THE TREATY OF WAITANGI SETTLEMENT PROCESS IN MĀORI LEGAL HISTORY

by

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BA/LLB, Victoria University of Wellington, 1999
MA, York University, 2003

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Supervisory Committee

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Abstract

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This dissertation is concerned with the ways in which Māori legal traditions have changed in response to the process of negotiated settlement of historical claims against the state. The settlements agreed between Māori groups and the state provide significant opportunities and challenges for Māori communities and, inevitably, force those communities to confront questions relating to the application of their own legal traditions to these changed, and still changing, circumstances. This dissertation focuses specifically on Māori legal traditions and post-settlement governance entities. However, the intention is not to simply record changes to Māori legal traditions, but to offer some assessment as to whether these changes and adaptations support, or alternatively detract from, the two key goals of the settlement process - reconciliation and Māori self-determination. I argue that where the settlement process is compelling Māori legal traditions to develop in a way that is contrary to reconciliation and Māori self-determination, then the settlement process itself ought to be adjusted.

This dissertation studies the nature of changes to Māori legal traditions in the context of the Treaty settlement process, using a framework that can be applied to Māori legal traditions in other contexts. There are many more stories of Māori legal traditions that remain to be told, including stories that drill into the detail of specific legal traditions and create pathways between an appropriate philosophical framework and the practical operation of vibrant Māori legal systems. Those stories will be vital if we in Aotearoa/New Zealand are to move towards reconciliation and Māori self-determination. The story that runs through this dissertation is one of a settlement process that undermines those objectives because of the pressures it places on Māori legal traditions. But it need not be this way. If parties to the Treaty settlement process take the objectives of self-determination and reconciliation seriously, and pay careful attention to changes to Māori legal traditions that take place in the context of that process, a different story can be told – a story in which Treaty settlements signify, not the end of a Treaty relationship, but a new beginning.

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Glossary of Māori Terms

ae	yes
Aotearoa	New Zealand
aria	form
aroha	love
atua	god
ea	state of equilibrium
e Tama	son/boy
hapū	Māori kin community
hara	wrongs
Hawaiki	traditional homeland of Māori
iwi	Māori nation/people
kai	food
kaitiaki	guardian/steward
kaitiakitanga	guardianship/stewardship
kanohi ki te kanohi	face to face
ka pai	good
karakia	prayer/incantation
kauhanga	passageway
kaumatua	elder
kaupapa	principle/foundation

kāwanatanga	government
kete	basket
kōrero	talk/stories
kōrero rangatira	chiefly discussion
kotahitanga	unity
kuia	grandmother/female elder
mana	spiritually sanctioned authority
mana whenua	authority in relation to land
manaakitanga	nurturing relationships
marae	central community space/complex
mauri	life force
moana	sea
motuhake	special, distinct
muru	ritualized confiscation of property
noa	profane/everyday/flipside of tapu
Pākehā	New Zealander of European descent
Pāpā	father/Dad
pāua	abalone
pōwhiri	welcome ceremony
pūrākau	story/traditional narrative form
rangatira	chief/leader
rangatiratanga	chiefly authority

taihoa	by and by, wait
take	cause of action
Tāne	one of the *atua* (Māori gods)
tangata whenua	Indigenous/'people of the land'
tāniko	traditional Māori form of weaving
taonga	treasured possession
tapu	spiritual character of all things
tātau	we – you (two or more) and I
tawhito	ancient (noun or adjective)
te maramatanga o ngā tikanga	philosophy of Māori law
te reo	language (often, the Māori language)
tikanga	system that encompasses Māori law
tino rangatiratanga	self-determination/chiefly authority
tipua	demon/supernatural being
tipuna, tupuna/tīpuna, tūpuna	ancestor/ancestors
tohunga	expert/priest
ture	law
utu	reciprocity
waiata	song
waka	canoe
Waka Umanga	'vehicle for community undertaking'
whakahaere	management

whakapapa	genealogy
whakatauki	proverb
whānau	extended family
whanaunga	relation
whanaungatanga	relationships
whare wānanga	traditional university/house of learning
whenua	land

Acknowledgments

I would like to thank my supervisory committee members: Hamar, John, Christine, and David, for all their comments and feedback on draft material. They each contributed enormously to my thinking, research and writing, bringing their own particular skills and knowledge to bear on this project. There are a number of others at the University of Victoria who were of great assistance as I worked on this dissertation. Hester Lessard and Jeremy Webber both provided support and guidance in the role of graduate programme director and also helped me to see new possibilities in legal pluralism. Jeff Corntassel, Val Napoleon, and John Borrows were always willing to talk through issues relating to Indigenous peoples and, along with Christine O'Bonsawin, provided fantastic role-models as Indigenous scholars. I am also grateful to the ever-calm Lorinda Fraser who, as Graduate Assistant at the Faculty of Law, helped me to manage all the administrative requirements with a minimum of stress.

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Dedication

To my grandmothers, Mabel Jones and Te Waara Te Uri

To Ruaariki, who arrived

And to Matt Hessell, who we miss every day

CHAPTER ONE: TAMATEA - INTRODUCTION

Tamatea

"What story are we going to have tonight, Pāpā?"

"What story would you like, e Tama?"

"Maybe the one about Rātā?"

"That's a good one, isn't it? Do you remember what happens in that story?"

"Rātā tries to cut down a tree, Pāpā. He wants to make a canoe. But the spirits of the forest keep putting the tree back together again every night when Rātā goes home."

"That's right, e Tama."

"Why don't they let him build his waka, Pāpā?"

"Because he didn't follow the proper process. He didn't say a karakia to Tāne before he chopped down the tree. He didn't follow tikanga."

"What is 'tikanga', Pāpā?"

"It is just the right way of doing things, e Tama. Like when we say karakia before we have our kai. Or when we have a pōwhiri to welcome visitors. In some ways, tikanga is a bit like the Pākehā idea of 'law'."

"But Rātā was able to build his waka in the end, wasn't he?"

"Yes, but only after he had acknowledged Tāne and the spirits of the forest appropriately. That was very important. Just like when our ancestor, Tamatea, was careful to acknowledge the great tree that Tāne provided to build the waka Takitimu. On the voyage to Aotearoa, Tamatea would chant:[1]

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[1] Tiaki Hikawera Mitira (J H Mitchell), *Takitimu*, facsimile of 1944 ed. (Wellington, N.Z.: A.H. & A.W. Reed, 1972) at 32.

Ko wai te waka e takoto nei,

Ko Takitimu, Ko Takitimu.

Pā atu ra taku hoe,

Ki te riu tapu nui o te waka e takoto nei

Rei kura, rei ora.

Rei ora te mauri-e.

Ka turuturua, ka poupoua,

Ki tawhito o te rangi-e.

Rurukutia,

Rurukutia te waka e takoto nei.

Rurukutia te kei Matapupuni,

Rurukutia te ihu matapupuni a Tāne.

Rurukutia i te kowhao tapu a Tāne,

Rurukutia i te mata tapu a Tāne.

Rurukutia i te rauawa tapu a Tāne,

O te waka e takoto nei.

"Did that keep the waka safe, Pāpā?"

"Ae, e Tama. Tamatea and the others on board Takitimu safely completed their journey to Aotearoa."

"What happened to Tamatea and the others after they got to Aotearoa?

"Tamatea made a home for himself at a place called Kawhai-nui. But some people say that he wasn't entirely happy in Aotearoa."

"Why not, Pāpā?"

"Well, Tamatea had been a great leader of his people back in Hawaiki. He had a deep knowledge and understanding of the tikanga in that place and so was able to fulfill the role of a chief. But things were different in Aotearoa. There was already a community at Kawhai-nui and they had their own leaders – people who knew about the local way of doing things and the way that tikanga had developed in response to this new land and new circumstances. Tamatea was still highly respected, but he found it difficult to find a role for himself in his new home. Nobody disputed Tamatea's knowledge and power, but the means of expressing knowledge and power had changed. The tikanga had changed."

"Has tikanga changed again since that time, Pāpā?

"Many times, e Tama. Tikanga must constantly adapt to new situations and different contexts, adjust to meet challenges that arise, and grow along with the hopes and dreams of our people."

"And what about the others who came with Tamatea, Pāpā? What did our other ancestors do? Did they know that tikanga had changed? Did they try and do anything about it? Did they try and change things themselves, like Māui did?"

"So many questions! And very good questions they are too. We'll get to their stories soon, e Tama."

1.1 Introduction

Change and adaptation are important aspects of any dynamic legal culture. Legal cultures, like other features of social life, adapt and develop in response to changes in matters such as community values, technology, and the environment. Flexibility and

dynamism are often identified as defining characteristics of common law systems. This dissertation is, however, concerned with another flexible and dynamic legal culture – the legal culture of the Māori peoples of Aotearoa/New Zealand. In particular, it examines the ways in which Māori legal traditions have changed in response to the process of negotiated settlement of historical claims against the state. The settlements agreed between Māori groups and the state provide significant opportunities and challenges for Māori communities and, inevitably, force those communities to confront questions relating to the application of their own legal traditions to these changed - and still changing - circumstances. These questions are especially stark in the context of establishing post-settlement governance entities, a process that unavoidably touches on issues of identity, authority, rights, and resource management. This dissertation focuses specifically on Māori legal traditions and post-settlement governance entities. However, the intention is not to simply record changes to Māori legal traditions, but to offer some assessment as to whether these changes and adaptations support, or alternatively detract from, two key goals of the settlement process: reconciliation; and Māori self-determination – tino rangatiratanga.

This chapter provides an overview of the central arguments of the dissertation. Following that overview, it sets out important background material, such as the dissertation's location within the context of Māori legal history and some basic information relating to the Treaty of Waitangi. This chapter also provides a brief survey of the existing literature relating to Treaty settlement negotiations as a process of reconciliation and tikanga and Māori legal traditions. The final part outlines the general content of each of the remaining chapters of the dissertation.

1.2 Overview

1.2(a) Māori Legal Traditions

The first part of this dissertation (Chapters One, Two and Three) examines the nature of Māori legal traditions. This part sets out the context of this research and explores several fundamental principles that guide Māori legal traditions, providing a brief overview of Māori social organisation as the superstructure on which Māori legal traditions are based. It also outlines some important aspects of the operation of the system of tikanga, which encompasses Māori customary law. Five concepts that are central to the operation of Māori legal traditions have been identified:[2]

1. Whanaungatanga – "the centrality of relationships to Māori life";[3]
2. Manaakitanga – "nurturing relationships, looking after people, and being very careful how others are treated";[4]
3. Mana – "the importance of spiritually sanctioned authority and the limits on Māori leadership";[5]
4. Tapu – "respect for the spiritual character of all things";[6]
5. Utu – "the principle of balance and reciprocity".[7]

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[2] Though there is some variation in the terminology used, there appears to be agreement as to the basic substantive content of these foundational concepts. See e.g. Hirini M. Mead, *Tikanga Māori: Living by Māori Values* (Wellington, N.Z.: Huia, 2003) at 28-32 [Mead]; Joe Williams, *He Aha te Tikanga Māori?*, (Paper presented to the Mai i Te Ata Häpara Hui, Te Wānanga o Raukawa, Otaki, New Zealand, 2000) [unpublished] at 8 [Joe Williams]; New Zealand Law Commission, *Māori Custom and Values in New Zealand Law*, (Wellington, New Zealand: New Zealand Law Commission, 2001) at 28-40 [New Zealand Law Commission, *Māori Custom and Values*].

[3] Joe Williams, *ibid.*

[4] Mead, *supra* note 2 at 29.

[5] Joe Williams, *supra* note 2.

[6] *Ibid.*

[7] *Ibid.*

The first part of the dissertation examines these five central 'conceptual regulators' as well as some key processes that derive from these concepts, which together form the foundation of Māori legal traditions.

1.2(a)(i) Terminology

There are several key terms that are used throughout this dissertation to describe aspects and levels of Māori law and legal practice. The following definitions are employed:

- 'tikanga' describes the right or correct way of doing things within Māori society. It is a system comprised of practice, principles, process and procedures, and traditional knowledge. It encompasses Māori law but also includes ritual, custom, and spiritual and socio-political dimensions that go well beyond the legal domain.
- 'Māori legal tradition' is an aspect of tikanga that has a legal quality. This term includes Māori legal practice, Māori legal principles, Māori legal process and procedures, and Māori legal knowledge.
- 'Māori legal systems' refer to the coherent systems that comprise Māori legal traditions. The plural form is used in order to reflect the existence of variations between different Māori communities.
- 'the Māori legal order' describes the fundamental values, institutions and philosophical perspectives that underlie all Māori legal systems.

This terminology is consistent with that deployed by Harold Berman in his study of the Western legal tradition.[8] Like this dissertation, Berman's study has a strong pluralist foundation. In the introduction to *Law and Revolution: The Formation of the Western Legal Tradition*, Berman argues that "[p]erhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems" and notes that "[t]he same person might be subject to the ecclesiastical courts in one type of case, the king's court in another, his lord's court in a third, the manorial court in a fourth, a town court in a fifth, a merchants' court in a sixth."[9] Berman's terminology is particularly helpful in examining legal traditions in this pluralistic context.

1.2(a)(ii) Tensions in Māori Legal History

The first part of the dissertation also discusses three key tensions in Māori legal history. That discussion provides important context and background to the more detailed analysis of the Treaty of Waitangi settlement process and its impact on Māori legal traditions contained in the second part of the dissertation (Chapters Four, Five and Six). The questions addressed relate to changes in the Māori law-making process, Māori dispute resolution, and the content of Māori laws.

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[8] Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Massachusetts: Harvard University Press, 1983), 49-51.

[9] *Ibid.* at 10.

1.2(b) Māori Legal Traditions and the Treaty Settlement Process

The second part of the dissertation focuses directly on the Treaty settlement process. Engagement in the settlement process has significant impacts on Māori communities. It may result in changes in leadership. Those in traditional leadership positions will not always be the people who are chosen to speak for the tribe in the settlement process. The Crown will conduct negotiations only with representatives of the claimant community who can demonstrate that they hold a mandate from the community to engage in such negotiations. However, the Crown requires that the mandate to negotiate be conferred through mechanisms such as a universal ballot of adult tribal members, which owe more to Western liberal democratic processes than Māori legal traditions. The way leaders are chosen and the means by which their authority is maintained is also likely, therefore, to differ from past practice. Collective tribal identity may also be affected. Tribal identity is often strengthened as tribal histories are researched, made more widely accessible, and validated through the settlement process. Choices about how to engage in the settlement process can sometimes change inter-tribal and intra-tribal relationships. Such matters are particularly significant in the New Zealand context where there has been no history of state-imposed tribal registers and tribal affiliation has largely been a matter of self-identification coupled with recognition by the tribe itself. All of that being said, experience to date indicates that tribes will try to give expression to their traditional ways of doing things, their customary law, both within the substance of settlement packages negotiated with the Crown and also within the constitutions of corporate governance entities that are established to manage settlement assets on behalf of the tribe. These

changes to tribal identity and relationships, and others where they have occurred, have had consequential effects on Māori legal traditions.

The very real danger for Māori and Māori legal traditions in interactions with New Zealand state processes, such as the Treaty settlement process, is that the effects on Māori legal traditions may represent an ongoing colonization of tikanga Māori rather than a healthy expression of tino rangatiratanga as part of a dynamic, living legal culture. This research, therefore, considers whether the effects on Māori legal traditions are consistent with the aims of the settlement process and the aspirations of the tribes involved.

1.3 Background

1.3(a) Māori Legal History

This research is located within the context of a broader Māori legal history project. While legal history is a field that has developed considerably in Aotearoa in recent years, very little consideration has been given to the study of Māori legal history, either by historians or lawyers/legal academics. Many people would consider Māori legal history to be the study of the historical development of laws that relate to Māori. But a study confined to legislation and case law that affects Māori is in fact just a small part of this field. This approach has tended to derive from the twin assumptions that there is no distinct Māori legal system that has either operated historically or operates now. As a consequence, the majority of New Zealand's legal-historical work does not take account of Māori law or Māori legal traditions. It might also be added that the majority of Māori histories do not engage in a legal-historical analysis. There are some notable exceptions.

Te Mātāhauariki has done some excellent work on Māori customary law concepts, including exploring the development of such concepts.[10] There has also been some very good legal-historical work published that relates to significant cases involving Māori or issues that particularly affect Māori.[11] Nevertheless, this work still only touches the edges of the potential field of Māori legal history.

In this dissertation I outline three 'tensions' that run through Māori legal history. I have used the concept of 'tension' to try to capture the complexity and diversity of the development of Māori legal traditions, and to provide an analytical framework that suggests the broad shape (if not the precise detail) of the nature of Māori legal traditions over the Treaty settlement period. These tensions are not bound by chronological periods and so avoid the more problematic aspects of periodization of histories of Indigenous peoples.

The concept of 'tension' also avoids the appearance of uniformity (or near uniformity) that might be suggested by a 'theme'. The very idea of a tension requires that there is more than one perspective, strategy, or approach that is vying for attention at any given time. The intention is to convey the fact that there will always be a diversity of the types of change to which legal traditions are subject. It is hoped that by using the concept of tensions to analyze Māori legal traditions that it will be clear that the development of these traditions has not been, and is not currently, linear or uniform. Tensions are nonetheless creative and produce dynamic change. By focusing on the

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[10] Te Mātāhauariki is a research centre based at the University of Waikato that was established to explore ways in which the legal system of Aotearoa/New Zealand can evolve so as to accommodate the aspects of both Māori and non-Māori legal traditions.

[11] See, e.g., Alex Frame "Te Heuheu's Case in London 1940-41: An Explosive Story" (2006) 22 New Zealand Universities L. Rev. 148.

tensions themselves it is hoped that some of the central concerns, strategies and modes of operation of Māori law will be revealed. Once we understand something of the pressures that have been brought to bear on Māori legal traditions and the way those legal systems have developed in response, we can begin to understand the Māori legal context within which the issues of post-settlement governance entities arise at the start of the 21st century.

The three tensions that I have identified as applicable to this dissertation are: adaptation (self-determined change vs reactive change); relationship to the Treaty partner (engagement vs disengagement with the state legal system); and, renewal (reinvigorating tikanga vs losing relevance). These tensions are not completely separate from one another, but co-exist and overlap. Later chapters consider these tensions in more detail and in the context of the Treaty settlement process, but a brief outline of each is set out here.

1.3(a)(i) Adaptation: Self-determined change vs Reactive change

It is difficult to draw a line between changes in Māori legal traditions that are self-determined and those that are forced upon the Māori legal order. All change is responding to pressures on the Māori legal order, and it may be difficult to discern precisely whether such pressures have been created by self-determining actions of Māori communities or because of external forces, or a mixture of both. It is also, perhaps, arguable that every change to Māori legal traditions is intended to maximize the self-determination of Māori communities. Nevertheless, I suggest that it is useful to consider the range of adaptive changes that can occur and the tension that exists between different

types of adaptive change because the ways in which Māori legal traditions adapt is determined by the nature of the pressures that are exerted upon them, including whether such pressures are internally or externally generated. Perhaps the clearest examples of internally generated pressures and externally generated pressures can be seen, respectively, in those changes in Māori legal traditions that resulted from Māori migration to Aotearoa and settlement there, and those changes to Māori legal traditions which are primarily responses to later colonization. However, this tension is not simply about pre-contact and post-contact developments. There are many examples of Māori legal traditions changing in response to changes to Māori society initiated by Māori communities themselves at the same time as more reactive changes are taking place. Conversely, pre-contact Māori society was forced to respond reactively to a range of factors (including environmental conditions) that were beyond their control and resulted in significant changes to Māori legal traditions. Part of the reason this tension is important for the analytical framework of this dissertation is that self-determination is a central concern of Māori involved in the Treaty settlement process. It will therefore be helpful to be able to identify the types of changes that indicate that communities are in control of the development of their legal traditions. In particular, this dissertation will consider whether the changes to Māori legal traditions that are resulting from the Treaty settlement process look more like self-determined changes or reactive changes and what that might tell us about the effectiveness of that process in reaching goals of tino rangatiratanga and reconciliation.

1.3(a)(ii) Relationship to the Treaty partner: engagement vs disengagement

The relationship between Māori legal traditions and the New Zealand state legal system has been reasonably well documented. A number of New Zealand legal and political histories have considered the strategies of engagement and disengagement employed by Māori communities in attempts to retain the authority to regulate themselves. Several recent publications have been directed specifically at these issues. Richard Hill provides, across two volumes, a comprehensive examination of Crown-Māori relations in the twentieth century.[12] The 2010 collection of essays, *Māori and Parliament: Diverse Strategies and Compromises*, addresses Māori engagement (and sometimes disengagement) with Parliament and government.[13] Judge Caren Fox's contribution to *Weeping Waters: The Treaty of Waitangi and Constitutional Change* outlines different models of engagement that Māori legal institutions have deployed at various points in time.[14] Māori engagement with the state is also a theme of the New Zealand-focused material in Paul McHugh's *Aboriginal Societies and the Common Law.*[15]

1.3(a)(iii) Renewal: reinvigorating tikanga vs losing relevance

The final tension that runs through Māori legal history that is to be explored in this dissertation is the tension between reinvigorating Māori legal traditions and setting aside

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[12] Richard S. Hill, *State Authority, Indigenous Autonomy: Crown-Māori Relations in New Zealand/Aotearoa, 1900-1950*, (Wellington, N.Z.: Victoria University Press, 2004) and *Māori and the State: Crown-Māori Relations in New Zealand/Aotearoa, 1950-2000*, (Wellington, N.Z.: Victoria University Press, 2009).

[13] Maria Bargh (ed.), *Māori and Parliament: Diverse Strategies and Compromises*, (Wellington, N.Z.: Huia, 2010).

[14] Judge Caren Fox, "Change, Past and Present" in Mulholland, M. and Veronica Tawhai (eds.), *Weeping Waters: The Treaty of Waitangi and Constitutional Change*, (Wellington, N.Z.: Huia, 2010), 41.

[15] P. G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination*, (Oxford: OUP, 2004) [McHugh, *Aboriginal Societies*].

Māori legal traditions as irrelevant to public life. This tension is perhaps most obvious in the deliberate choices made by Māori communities as they move through the Treaty settlement process and establish post-settlement governance entities. Designing constitutions for post-settlement governance entities requires the settling community to consider how and to what extent they wish to see their legal traditions reflected in that constitution. In some instances Māori legal traditions are reasserted and perhaps adapted to ensure their relevance for the challenges that will be faced by the governance entity in the 21st century. Sometimes a deliberate choice will be made to discard a particular legal tradition because it is seen to be no longer relevant, or perhaps that other options are perceived to be better in the current circumstances of the settling community.

The wider context of Māori legal history, and the tensions that run through that history, form the backdrop to the specific issues addressed in this dissertation, which is also situated against a backdrop of discourses relating to the Treaty of Waitangi (and especially Treaty claims and settlement) and tikanga Māori. This chapter now turns to address those areas.

1.3(b) The Treaty of Waitangi/Te Tiriti o Waitangi

The Treaty of Waitangi has been described as "simply the most important document in New Zealand's history".[16] At its heart it provides a framework for the relationship between Māori and the New Zealand government. Consequently, the Treaty of Waitangi informs discussions in New Zealand public life that relate to constitutional powers and limitations, race-relations, justice, identity, and reconciliation. It is a legal instrument, a

[16] Sir Robin Cooke, "Introduction" (1990) 14 New Zealand Universities L. Rev. 1.

political tool, and an historical document. The Treaty of Waitangi, therefore, has a considerable bearing on the matters addressed in this dissertation, and this section examines the Treaty of Waitangi as a central background. It considers the historical context in which the Treaty of Waitangi was signed, the on-going discussion over the meaning of its key terms and their appropriate application, and its re-invigorated status in law and policy from the 1970s onwards.

The Treaty was signed in 1840 between representatives of the British Crown and a grouping of Māori chiefs, initially, at Waitangi in the Bay of Islands. There is still debate as to the Treaty's precise legal status and its role in the acquisition of sovereignty by the British Crown.[17] There is an English language version and a Māori language version of the Treaty. The vast majority of the Māori signatories signed the Māori version. Although there are some significant differences between the two versions, the essential agreement, in both the English and Māori language texts of the Treaty, is that the Crown would have the authority to establish some form of government in New Zealand and that Māori property and other rights and the authority of the chiefs would be protected.[18] The concepts of self-determination and reconciliation underpin the Treaty and infuse the discussion (legal and otherwise) about the relationship between Māori and the state.[19] These two important concepts consequently flow through to the discussions that take place between Māori and the Crown in the context of Treaty of Waitangi claims

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[17] Matthew Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington, N.Z.: Victoria University Press, 2008) 359 [Palmer].

[18] *New Zealand Māori Council v Attorney-General* [1987] 1 N.Z.L.R. 641 at 663 (C.A.) [*Lands case*].

[19] See e.g. *ibid*.

and the settlement of those claims.[20] At the beginning of the formal interactions between Māori and the New Zealand state there is a point of mutual recognition and mutual agreement. As discussed in later chapters below, this must be an important reference point for the Treaty of Waitangi settlement process if that process is to contribute towards sustainable Māori self-determination and effective reconciliation.

The precise nature and scope of the governmental authority that was ceded and the Māori authority that was guaranteed by the Treaty of Waitangi has been the subject of considerable discussion. Building on Paul McHugh's *The Māori Magna Carta,*[21] Jock Brookfield and Matthew Palmer have provided two of the most comprehensive studies of the Treaty's constitutional significance in recent years. The orthodox view of the Treaty of Waitangi is that, while it may have been an important part of the establishment of the Crown's sovereignty in respect of New Zealand, it cannot have been the mechanism by which that sovereignty was practically effected. Brookfield has suggested that the Crown's acquisition of sovereignty was a revolutionary act in constitutional terms.[22] Brookfield uses Hans Kelsen's theory of a hierarchy of norms to argue that the assertion of Crown sovereignty and the replacement of the Māori legal order with a new governing constitution was, at least in part, revolutionary because it had no validity within the pre-existing legal order.[23] The Treaty of Waitangi may have provided partial legitimation for such a constitutional revolution, though only so far as the Crown's assumption of

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[20] See Chapter Six, below.

[21] Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, (Oxford: OUP, 1991).

[22] F. M. Brookfield, *Waitangi & Indigenous Rights: Revolution, Law and Legitimation*, 2nd ed. (Auckland, N.Z.: Auckland University Press, 2006), 85-107.

[23] *Ibid.* at 17-18.

authority was consistent with the Treaty guarantees.[24] According to that model, New Zealand has effectively been undergoing a constitutional revolution since 1840 with various factors contributing to the legitimation of the current constitutional arrangements.[25]

Matthew Palmer undertakes a thorough analysis of the constitutional and legal status of the Treaty of Waitangi within the settler legal system in his book, *The Treaty of Waitangi and New Zealand's Law and Constitution*.[26] Palmer sees the Treaty of Waitangi as part of the establishment of Crown sovereignty, rather than the instrument that technically transferred sovereignty from Māori to the British Crown. Palmer suggests that the Treaty of Waitangi was necessary as a political step more than a legal requirement and that the Treaty of Waitangi is not an international treaty of cession, but instead a treaty of protection. It provided protections and guarantees to the Māori chiefs so that the British Crown was able to assert sovereignty. While Palmer sees the Treaty's strict legal role as being rather limited, he goes on to consider the range of ways in which the Treaty of Waitangi can have some legal effect within the New Zealand legal system.

Palmer primarily addresses the Treaty's place within the colonial legal system. He acknowledges that the Treaty also has a place within the Māori legal system and suggests ways in which the Treaty of Waitangi might have been viewed within the Māori legal system. His analysis in this area is, however, somewhat limited. For a greater understanding of the meaning and effect of the Treaty according to the legal rules and

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[24] *Ibid*. at 181-184.

[25] Brookfield suggests that these legitimating factors include the passing of time and the benefits Māori have received from the constitutional arrangements of the New Zealand state. It should be noted that scholars such as Moana Jackson and Ani Mikaere have raised serious questions as to whether there is a sound constitutional or theoretical basis to assert that those matters can be seen as legitimating factors.

[26] Palmer, *supra* note 17.

constitutional principles of Māori legal traditions, we must turn to other Treaty scholars. Māori authors such as Ani Mikaere and Moana Jackson provide analyses of the Treaty of Waitangi which consider, not only Māori perspectives of the Treaty, but the constitutional impact of the Treaty according to Māori legal traditions.[27]

Mikaere argues that it is the Māori legal concepts in the Māori text that lead us to the clear intent of the Treaty agreement. She points to the consistency between the Māori text, the 1835 Declaration of Independence, and the political reality of the time, to suggest the only reasonable meaning that can be placed on the Treaty is that in signing, the Māori signatories declared and cemented their own authority, whilst acknowledging and defining the presence of the Crown and its citizens in their midst.[28] Mikaere compares this to a pōwhiri, a ceremony of welcome and encounter that acknowledges and recognizes a visiting group and provides space for them, but always takes place according to the traditions of the hosts, the tangata whenua.[29] Margaret Mutu makes a similar argument based on her analysis of the texts of the 1835 Declaration of Independence and the Treaty of Waitangi (in both Māori and English).[30] Jackson has also pointed to rules

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[27] See, for example, Ani Mikaere, "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu & David Williams, eds., *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Auckland: OUP, 2005), 330 [Mikaere, "The Treaty of Waitangi and Recognition of Tikanga Māori"]; and Moana Jackson, "The Treaty and the Word: The Colonization of Māori Philosophy" in Oddie, G. & R. Perrett, eds., *Justice, Ethics and New Zealand Society* (Auckland, N.Z.: OUP, 1992), 1 [Jackson, "The Treaty and the Word"].

[28] Mikaere, *ibid.* at 332-334.

[29] Ani Mikaere, *He Rukuruku Whakaaro – Colonising Myths, Māori Realities* (Wellington, N.Z.: Huia, 2011) at 111-115 [Mikaere, *He Rukuruku Whakaaro*].

[30] Margaret Mutu, "Constitutional Intentions: The Treaty of Waitangi Texts" in Malcolm Mulholland & Veronica Tawhai, eds., *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Wellington, N.Z.: Huia, 2010) 13 [Mutu, "Constitutional Intentions"].

of treaty interpretation that suggest greater reliance ought to be placed on the Māori text when seeking to ascertain the meaning of the Treaty.[31]

Mikaere also describes the Maori legal system as "the first law of Aotearoa" and suggests that it is the only legal system upon which New Zealand's constitution could have legitimately been based.[32] This perspective supports the view that the Treaty was signed within the context of the Māori legal system. Jackson further argues that the Treaty of Waitangi must be seen in the light of what was at 1840 already a long line of inter-iwi agreements that regulated political relations between iwi. Understood in this Indigenous context, the Treaty does not talk about a shift in absolute sovereignty, because, as Jackson has pointed out:[33]

> Under Māori law, it was impossible for any iwi to declare its authority over another except through absolute military conquest. It was equally impossible for any iwi to give away its sovereignty to another. The sovereign mana or rangatiratanga of an iwi was handed down from the ancestors to be nurtured by the living for the generations yet to be. It could not be granted to the descendants of a different ancestor, nor subordinated to the will of another.

In the latter part of the twentieth century, the courts, the parliament, and the executive branch itself recognized various obligations on the Crown. The Waitangi Tribunal was established in 1975 to inquire into and report on claims that the principles of the Treaty had been breached.[34] From the 1980s, new legislation likely to have a

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[31] Moana Jackson "Comment" (1995) 25 Victoria University of Wellington L. Rev. 245.

[32] Mikaere, "The Treaty of Waitangi and Recognition of Tikanga Māori" *supra* note 27.

[33] Jackson, "The Treaty and the Word", *supra* note 27 at 6-7.

[34] *Treaty of Waitangi Act* (N.Z.), 1975, s 4.

significant effect on Māori interests included reference to the principles of the Treaty.[35] This has led to enforcement of Treaty rights in the ordinary courts.[36] Aside from direct statutory incorporation, the Treaty of Waitangi influences New Zealand law in much the same way as a valid international law treaty would, despite some debate as to whether or not the Treaty of Waitangi is such an instrument. Palmer suggests that, were the issue put directly to the New Zealand Supreme Court, it is highly likely that the Treaty of Waitangi would be found to be a valid treaty at international law, and therefore binding on the Crown.[37] The New Zealand courts have yet to directly address that question but they have shown a willingness to recognize the Treaty of Waitangi as an extrinsic aid to statutory interpretation, and a factor to be considered in applications for judicial review of executive action.[38] Since the 1990s, the Crown has been engaged in a comprehensive process of negotiations with Māori groups over redress for the settlement of historical claims.[39]

This dissertation focuses on that claims settlement process and its effect on Māori legal traditions. One of the outcomes of Treaty of Waitangi settlements is the

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[35] See, e.g., *State Owned Enterprises Act* (N.Z.), 1986, s 9; *Conservation Act* (N.Z.), 1987, s 4; *Resource Management Act* (N.Z.), 1991, s 8; *New Zealand Public Health and Disability Act* (N.Z.), 2000, s 4; and *Local Government Act* (N.Z.), 2002, s 4.

[36] See, e.g., *Lands case*, *supra* note 18; *Attorney-General v New Zealand Māori Council* [1991] 2 N.Z.L.R. 129 (C.A.) [*Attorney-General v New Zealand Māori Council* (1991)]; *Ngai Tahu Māori Trust Board v Director General of Conservation* [1995] 3 N.Z.L.R. 533 (C.A.); and *Barton-Prescott v Director General of Social Welfare* [1997] 3 N.Z.L.R. 179 (H.C.).

[37] Palmer, *supra* note 17 at 231.

[38] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 N.Z.L.R. 188 (H.C.) [*Huakina Development Trust*].

[39] Philip Joseph, *Constitutional and Administrative Law in New Zealand*, 3rd ed. (Wellington, N.Z.: Brookers, 2007) 83-91.

establishment (or re-establishment) of tribal governance infrastructure.[40] The aim of the research is to analyse this particular aspect of the settlement process as a significant change in the history of Māori legal traditions and consider how this change will affect the Māori law-making process, the content of Māori laws, and the relationship between Māori legal traditions and the New Zealand state legal system. I now turn to consider the Treaty settlements discourse.

1.3(b)(i) Treaty Settlements

Although for over 35 years the Waitangi Tribunal has provided a forum in which claims under the Treaty of Waitangi can be heard, the systematic programme of comprehensive settlement of historical claims is a much younger process. In 1992 the New Zealand government agreed that officials should develop a set of principles to govern the settlement of historical claims based on the Treaty of Waitangi. These principles developed in the context of the pan-tribal settlement of all Māori claims to commercial fishing interests and, after being roundly rejected by Māori, were amended slightly and became official Crown policy in 1995. Settlements agreed to between the Crown and the major tribal groupings Ngai Tahu and Waikato-Tainui in the mid-1990s further established the framework for the modern settlement process. The Crown had commenced negotiations with both Ngai Tahu and Waikato-Tainui before the comprehensive settlement policy was formalised. Both settlements have provided key benchmarks for all subsequent settlement negotiations. In 1994 the government established the Office of Treaty Settlements ('OTS') within the Ministry of Justice. OTS

[40] See Kirsty Gover, *Constitutionalizing Tribalism: States, Tribes and Membership Governance in Australia, Canada, New Zealand and the United States.* (JSD dissertation, New York University, 2008) [unpublished].

grew out of the Ministry's Treaty of Waitangi Policy Unit and it is now officials from OTS who engage in settlement negotiations with claimant groups. While there is a significant body of literature that examines the Waitangi Tribunal claims process, there is surprisingly little that addresses the mechanics of the settlement process. The relative lack of literature on the settlement process may be explained by its relative youth. Perhaps too little time has elapsed to make any useful judgments on the settlement process. Perhaps the private and, essentially, confidential nature of settlement negotiations has not generated the same sort of raw materials that the highly public Waitangi Tribunal hearings and reports provide. Or perhaps the Waitangi Tribunal is perceived to be a more innovative mechanism than the internationally tried and true process of pragmatic and political government deal-making that characterises the settlement process. Whatever the case, the Waitangi Tribunal has been the subject of significantly greater comment and analysis than has the settlement process.

There have, however, been three important collections of essays that focus primarily on the process of Treaty settlements.

Treaty Settlements: The Unfinished Business provides a range of legal and political perspectives on the Treaty settlement framework.[41] This collection includes case studies of the settlement negotiations of the major tribal groups of Tainui and Ngai Tahu, and the negotiated settlement relating to Māori commercial fishing interests that came to be known as 'the Sealords deal'. These negotiations effectively set the parameters for the comprehensive settlement process that developed in the 1990s. There are also helpful discussions on the role of various state institutions (the courts, the legislature, the

[41] G. McLay (ed.), *Treaty Settlements: The Unfinished Business*, (Wellington, N.Z.: Victoria University Press, 1995).

Waitangi Tribunal) in the settlement and reconciliation process, and the use of negotiation to address Treaty of Waitangi claims. Caren Wickliffe, now Deputy Chief Judge of the Māori Land Court, contributes a chapter that places the issues of Māori claims and negotiated settlements within an international context. This is an area that has still not been widely addressed in the literature surrounding the Treaty of Waitangi settlement process.

Kōkiri Ngātahi: Living Relationships centres around two essays on the Treaty settlement process that were commissioned by the Ministry of Justice.[42] The first essay is authored by Canadian historian Ken Coates and sets the Treaty of Waitangi settlement process within the context of reconciliation between states and Indigenous peoples. The second essay is written by Paul McHugh and examines the New Zealand process in comparison with other, similar jurisdictions. Consistent with their relative areas of expertise, McHugh focuses more on the legal context and specific mechanisms by which Indigenous rights and claims are addressed.[43] This volume also contains a series of short commentaries by a range of Treaty of Waitangi scholars on the two central essays. Although each is relatively brief, these commentaries provide a useful elaboration of key issues relating to Treaty claims and settlements. Some of the commentaries are more specifically focused on the settlement process than others and they each illustrate social, legal, and political aspects of the Treaty of Waitangi discourse in different degrees. Key issues that are addressed throughout this collection relate to definitions of Māori identity

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[42] K. S. Coates and P. G. McHugh, *Kōkiri Ngātahi: Living Relationships*, (Wellington, N.Z.: Victoria University Press, 1998).

[43] McHugh has further elaborated on these matters as part of his comprehensive comparative examination of Indigenous peoples and the law in Australasia and North America. See McHugh, *Aboriginal Societies*, *supra* note 15.

and appropriate models of Māori social and corporate organisation,[44] the importance of perceiving that Treaty claims and settlement are merely part of a wider process of reconciliation and constitutional evolution (albeit an important part),[45] and the need to encourage mechanisms of law and policy that positively contribute to the relationships that underlie, and are articulated by, the Treaty of Waitangi.[46] Each of these has continued to be a significant issue in the development and implementation of the Treaty settlement process. Each of these issues also highlights some of the pressures exerted on Māori legal traditions by the settlement process.

Treaty of Waitangi Settlements is a more recent collection that includes contributions from a range of commentators and participants in the Treaty settlement process.[47] Many of the essays in this collection reflect on specific dimensions of the settlement process or settlement redress in the context of particular settlements that have been concluded.[48] A number of the contributions note challenges to Māori communities and to Māori legal traditions that are created by the settlement process.[49] One important theme that runs through this collection is the sense that Treaty settlements are only a

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[44] See Roger Maaka, "A Relationship, Not a Problem" in K. S. Coates and P. G. McHugh, *Kōkiri Ngātahi: Living Relationships*, (Wellington, N.Z.: Victoria University Press, 1998), 201.

[45] See Joe Williams, "Quality Relations: The Key to Māori Survival" in K. S. Coates and P. G. McHugh, *Kōkiri Ngātahi: Living Relationships*, (Wellington, N.Z.: Victoria University Press, 1998), 260.

[46] See Margaret Wilson, "A Path to Constitutional Change" in K. S. Coates and P. G. McHugh, *Kōkiri Ngātahi: Living Relationships*, (Wellington, N.Z.: Victoria University Press, 1998), 247.

[47] Nicola R. Wheen & Janine Hayward, eds., *Treaty of Waitangi Settlements* (Wellington, N.Z.: Bridget Williams Books, 2012).

[48] Paerau Warbrick, "'O ratou wenua': Land and Estate Settlements" in Wheen & Hayward, eds., *Treaty of Waitangi Settlements* (Wellington, N.Z.: Bridget Williams Books, 2012) 92; Michael J. Stevens, "Settlements and 'Taonga': A Ngai Tahu Commentary" Nicola R. Wheen & Janine Hayward, eds., *Treaty of Waitangi Settlements* (Wellington, N.Z.: Bridget Williams Books, 2012) 124.

[49] Robert Joseph, "Unsettling Treaty Settlements: Contemporary Māori Identity and Representation Challenges" in Nicola R. Wheen & Janine Hayward, eds., *Treaty of Waitangi Settlements* (Welington, N.Z.: Bridget Williams Books, 2012) 151 [Robert Joseph]; Maria Bargh, "The Post-settlement World (So Far): Impacts for Māori" in Nicola R. Wheen & Janine Hayward, eds., *Treaty of Waitangi Settlements* (Wellington, N.Z.: Bridget Williams Books, 2012) 166.

small part of a wider reconciliation process. Treaty settlements do not fundamentally restructure the relationship between Māori and the Crown, which may be disappointing to some participants in the settlement process. However, the settlement process can be seen as an important ingredient in shifting the broader conversation about reconciliation and self-determination.

The settlement process was the subject of considerable discussion in the media, and to a lesser extent in scholarly journals, at the time that its basic framework was first proposed and in the immediate aftermath of the establishment of OTS. Considered reflections on the way in which the process has played out remain relatively scarce, but the Crown Forestry Rental Trust (CFRT), which is a major funder of research for Treaty of Waitangi claims, has produced several publications which aim to explain the practicalities of settlement negotiations. These publications are intended for Māori groups who are involved, or are preparing to be involved, in the settlement process, and as one of the few sources of collected information about actual settlement negotiations and their outcomes, they are also an invaluable source for anyone researching this topic. Particularly helpful is the CFRT publication entitled *Māori Experiences of the Direct Negotiation Process* which is centred around interviews with Māori leaders and negotiators who have been through the settlement process.[50] The accounts recorded in that document make it clear that Māori groups experience many frustrations with the settlement process, including the lack of genuine negotiation in many areas, Crown policies relating to matters such as group identification and mandate that are perceived to be unnecessarily rigid, and the lack of attention to the actual grievances and the matters

[50] Crown Forestry Rental Trust, *Māori Experiences of the Direct Negotiation Process*, (Wellington, N.Z.: Crown Forestry Rental Trust, 2003) [Crown Forestry Rental Trust].

of justice, such as the particular circumstances of the community concerned and consideration of the nature of reparations that might be necessary in their specific case.

Two reports of the New Zealand Law Commission have also been directed at Treaty settlement issues. The first of these reports was an advisory report for Te Puni Kōkiri (the Ministry of Māori Development), OTS, and the Chief Judge of the Māori Land Court published in 2002 and entitled *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase.* This report followed a Law Commission study paper on Māori custom and values in New Zealand law and identified matters relating to governance of post-settlement corporate entities as being issues of concern and, indeed, some urgency. The Commission identified two central issues. First, despite the fact that many Māori groups had already progressed through the settlement process and that many more were attempting to agree to a settlement with the Crown at the time, there was no uniform governance model available to be used to receive and manage settlement assets which could discharge the core responsibilities required and also be able to be easily adapted to the particular needs of specific settling communities. Second, there was no model mechanism for the resolution of disputes that might arise within settling groups (either between members or between members of the community and those charged with managing settlement assets) that would give effect to the specific cultural practices and values of the settling community. The Law Commission considered the basic principles that ought to govern the development of such models of governance and dispute resolution, including an analysis of tikanga Māori and Māori legal traditions relevant to the management of collectively held assets. The Commission recommended that a new model of governance entity that better reflected Māori legal traditions and the particular

needs of post-settlement governance be established by legislation. This led to the publication of a second Law Commission report in 2006, *Waka Umanga: A Proposed Law for Māori Governance Entities*. This report addressed the practical details of implementing the principles set out in the 2002 report. *Waka Umanga* provides more detail and elaboration of the ideas discussed in *Addressing the Post-Settlement Phase*, but does not really develop any new principles. The framework of the discussion was essentially set in the earlier report. Despite the fact that the Waka Umanga Bill now seems unlikely to progress, these two reports provide an important component of the Treaty of Waitangi settlement literature.[51]

More recently, the government has convened several meetings of those involved in the Treaty settlement process in order to discuss ways in which the process might be improved. These meetings, in some senses, follow on from the *Kōkiri Ngātahi* publication and have adopted the same name for the meetings. They provide an important source of recent and practical information about the mechanics of the Treaty settlement process. There are some limitations to the material that has arisen from these meetings. First of all, these are meetings convened by the government for the purpose of refining government policy. The discussions are, therefore, focused on the matters that the government considers to be problematic or areas where the government perceives that improvements can be made. In any case, the identified Māori stakeholders are, virtually

[51] The *Waka Umanga (Māori Corporations) Bill* was introduced into the New Zealand House of Representatives on 21 November 2007 and received its first reading the following month. The Bill aimed to give effect to the recommendation of the New Zealand Law Commission that a new type of corporate entity be established that was tailored to meet the needs of Māori communities, and especially for use as Post-Settlement Governance Entities. The Māori Affairs Select Committee reported on the Bill on 8 Setember 2008 and recommended that the Bill, with some amendments, should be passed. However, the general election on 8 November 2008 resulted in a change of government, and although the Bill remained on the order paper for some time, the order of the day for its second reading was discharged on 21 December 2009. There has been no futher legislative activity on this subject since that time.

by definition, those who are already participating in the settlement process or those who want to engage in settlement negotiations with the Crown.

There are also a number of recent and noteworthy articles on the Treaty settlement process. These articles, including those published in a special issue of the University of Toronto Law Journal in 2002, tend to address similar issues relating to identity, reconciliation, and the settlement process that are identified in *Kōkiri Ngātahi* and by Māori negotiators in the CFRT publication.[52] The collection in the University of Toronto Law Journal includes several articles that are of particular relevance to the subject of this thesis. That collection contains an article by Paul McHugh that reflects his continued research and thinking on this topic and picks up on many of the themes he deals with in *Kōkiri Ngātahi* and, later, in *Aboriginal Societies and the Common Law*.[53] The collection also includes a thoughtful contribution from Andrew Sharp, a political philosopher and author of *Justice and the Māori*.[54] Perhaps the most significant paper in that collection in the particular context of this thesis is an essay by Kirsty Gover and Natalie Baird that considers post-settlement governance entities, the corporate bodies that are established to receive and manage Treaty settlement assets.[55] Gover has since published several other articles and a book on 'tribal constitutionalism'.[56] This is a central part of the backdrop to this thesis and provides a point of comparison with previous

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[52] *Liberal Democracy and Tribal Peoples: Group Rights in Aotearoa/New Zealand* (2002) 52 U. Toronto L.J.

[53] P. G. McHugh, "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" (2002) 52 U. Toronto L.J. 69.

[54] A. Sharp, "Three Kinds of Maori Groups and the Challenges They Present to Governments" (2002) 52 U. Toronto L.J. 9.

[55] K. Gover & N. Baird, "Identifying the Māori Treaty Partner" (2002) 52 U. Toronto L.J. 39.

[56] See K. Gover, "Tribal Constitutionalism and Membership Governance in Australia and New Zealand: Emerging Normative Frictions" (2009) 7 NZJPIL 191 and *Tribal Constitutionalism: States, Tribes, and Governance of Membership*, (Oxford: OUP, 2011) [Gover, *Tribal Constitutionalism: States, Tribes, and Governance of Membership*].

forms of Māori corporate governance models that have been documented in historical literature. Gover's work is also crucial for exploring the way in which Māori values are expressed in the constitutions of post-settlement governance entities and setting this area within an international context. There are some problematic aspects to the analysis of post-settlement governance entities presented in *Tribal Constitutionalism*, but it ultimately makes an important contribution to this field. Gover's analysis will be discussed more fully in Chapter Four. In part, it is the aim of this dissertation to build, on the sound foundation of research that Gover has constructed, an analysis that takes greater account of Māori legal traditions.

1.3(c) Tikanga and Māori Legal Traditions

There is very little literature that is exclusively, or even primarily, focused on Māori legal traditions, though there exist a small number of major works on this topic. There is also a significant body of work that addresses traditional Māori customs, values, and practices. This, inevitably, contains substantial information about Māori legal traditions, even if they are not characterized as legal texts. These works range from anthropological texts from the late 19th and early 20th centuries, largely written by non-Māori, to more recent philosophical works by both Māori and non-Māori scholars.

This dissertation does not engage directly with that older, anthropological work. As authors such as Ani Mikaere have pointed out, much of that work is extremely problematic.[57] Nevertheless, it does form an important background to the studies of

[57] Ani Mikaere, "Māori Critic and Conscience in a Colonising Context – Law and Leadership as a Case Study" (Paper presented at the 27th Annual Conference of the Law and Society Association of Australia and New Zealand, Victoria University of Wellington, 10 December 2010) [unpublished].

tikanga Māori that have followed. Those seeking to explore and understand tikanga Māori ought to be aware of this field and its continuing influence, if for no other reason than to be aware of the persistent myths it has created about tikanga Māori. Over the latter part of the 20th century, a more recent generation of anthropologists and historians began to address some of the more troublesome aspects of the 'classic' view of tikanga Māori and especially Māori social organization, which is central to the regulation of Māori society and the operation of Māori legal traditions. Work by Pākehā scholars such as Joan Metge, Judith Binney, Michael King, and, more recently, Angela Ballara alongside that done by Māori academics such as Hugh Kawharu, Maharaia Winiata, and Pat Hohepa from the 1950s and 60s onwards revised the 'classic' understandings of Māori society and articulated models of Māori social organization that better explain contemporary Māori culture. There is also a closely associated thread of scholarship that draws on the tools and concepts of philosophy: in particular, Metge's more recent publications and John Patterson's work on Māori values and ethics and the writings of major Māori scholars Hirini Moko Mead and the late Māori Marsden.[58] In this area, this dissertation engages most directly with these latter works. In particular the works of Marsden and Mead provide comprehensive conceptualizations of tikanga Māori that inform the analysis of Māori legal traditions within this dissertation.

There are also expositions of particular Māori legal traditions contained within various reports of the Waitangi Tribunal (and within the expert evidence upon which those reports are based). Although they do not attempt to articulate a comprehensive analysis of Māori legal traditions, many of these expositions are extremely helpful in

[58] Mead, *supra* note 2 and Maori Marsden (edited by Te Ahukaramū Charles Royal), *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Otaki, N.Z.: Estate of Rev. Māori Marsden, 2003) [Marsden].

understanding specific aspects of the Māori legal world. These parts of the Waitangi Tribunal reports are used in this dissertation to provide examples of the way in which tikanga has been interpreted by the Tribunal and applied in the context of Treaty of Waitangi claims from the last quarter of the 20th century onwards.

Of even more direct relevance to this dissertation are a small number of key publications that concentrate specifically on Māori legal traditions. Operating out of Waikato University between 2000-2005, Te Mātāhauariki Institute produced a series of important papers on Māori legal concepts as it worked towards developing a compendium of references to such concepts. The Institute aimed to "explore ways in which the legal system of Aotearoa/New Zealand can evolve so as to accommodate the best of the values and concepts of both major components of its society".[59] Part of the reason why Te Mātāhauariki's work is so important is that it approaches the study of Māori legal traditions from the discipline of law and seeks to analyze Māori legal traditions within a legal framework. Consequently, the scholarship associated with this institute has contributed to both methodological and substantive matters relating to the study of Māori legal traditions.

There are also a small number of reports published by government agencies that are important to the study of Māori legal traditions. The New Zealand Law Commission's study paper, *Māori Custom and Values in New Zealand Law*, is one such report.[60] As the title suggests, this paper is not a wide-ranging examination of Māori legal traditions, but rather is an exploration of those areas of New Zealand state law where Māori legal

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[59] Te Mātāhauariki, "Mission", online; Te Mātāhauariki Research Institute <http://lianz.waikato.ac.nz/mission.htm>

[60] New Zealand Law Commission, *Māori Custom and Values, supra* note 2.

traditions are recognised or are influential. It is ultimately a paper that is focused on the state legal system. However, it does provide an analysis of some key Māori values and concepts that shape Māori legal culture and traditions. The report considers the way that tikanga Māori operates in relation to social organisation, leadership, and rights to land.[61] The report also examines the role and recognition of Māori legal traditions within the Māori Land Court and the Waitangi Tribunal and this examination is also highly relevant to the specific subject matter of this thesis.[62] It identifies issues around post-settlement governance as one area around which further research is required. This led directly to the publication of two further Law Commission papers, which also provide important background to this dissertation.[63]

Two Ministry of Justice publications are also worthy of note. The first, authored by Moana Jackson, is focused on the criminal justice system.[64] *The Māori and the Criminal Justice System – A New Perspective: He Whaipaanga Hou* was published in 1988 and aimed to understand Māori offending in the context of social, economic, and cultural influences, and in particular, in the context of the pressures of colonization. The report is significant for many reasons, not least because of its analysis of Māori legal traditions. Over twenty years on, it remains one of the most important discussions of tikanga Māori as a system that includes laws and legal traditions, and reflects a distinctive Māori legal culture.

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[61] *Ibid.* at 41, 44, 47.

[62] *Ibid.* at 60, 69.

[63] See New Zealand Law Commission, *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase*, (Wellington, N.Z: New Zealand Law Commission, 2002) [New Zealand Law Commission, *Addressing the Post-Settlement Phase*] and *Waka Umanga: A Proposed Law for Māori Governance Entities,* (Wellington, N.Z: New Zealand Law Commission, 2006) [New Zealand Law Commission, *Waka Umanga*].

[64] Moana Jackson, *The Māori and the Criminal Justice System: A New Perspective – He Whaipaanga Hou*, (Wellington, New Zealand: Department of Justice, 1988) [Jackson, *He Whaipaanga Hou*].

The second Ministry of Justice publication is entitled *He Hinatore ki te Ao Māori – A Glimpse into the Māori World*.[65] This publication was the culmination of a Ministry of Justice project on Māori perspectives on justice. *He Hinatore* has three parts to it, each of which is highly relevant to the discussion of tikanga in the context of this dissertation. The report addresses "Traditional Maori concepts and customary law or tikanga", it includes eight case studies of Māori dispute resolution, and then sets out "A Collection of Behaviours, Philosophies, Emotions and Cultural Influences".

Although *Hinatore ki te Ao Māori* and *He Whaipaanga Hou* are governmental reports, they are both based upon significant consultation and numerous interviews with Māori. They provide relatively recent records of how Māori understand the application of tikanga, and specifically as it relates to law and legal traditions. *Hinatore* does not provide a very deep analysis of Māori legal traditions but it does gather together some helpful material. For instance, it records the experiences of interviewees and the examples they provide to illustrate the operation of Māori legal traditions. These are placed within the context of the Māori worldview, the philosophy described by Māori Marsden, and supported with Māori myths and legends. *He Whaipaanga Hou* undertakes a more analytical approach.

1.4 Chapter Outlines

The final part of this introductory chapter sets out the general content of the six remaining chapters of the dissertation.

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[65] Ministry of Justice, *He Hinatore ki te Ao Māori – A Glimpse into the Māori World*, (Wellington, N.Z.: Ministry of Justice, 2001) [Ministry of Justice, *He Hinatore ki te Ao Māori*].

1.4(a) Chapter Two – Methodology and Legal Theory

The second chapter of the dissertation provides two further strands of material that situate the proposed research: the methodological and theoretical foundations of the research project. First, the chapter explains the way in which Kaupapa Māori Research, a critical Indigenous research methodology, will be applied in the context of this project. The second part of the chapter explores concepts from within legal pluralism and Indigenous Legal Theory, in conjunction with a Māori philosophy of law, to construct a theoretical platform for this research.

1.4(b) Chapter Three – Māori Legal Traditions at the Turn of the 21st Century

Chapter Three, the first substantive chapter of the dissertation, provides a brief historical overview of the development of Māori legal traditions. This chapter has two distinct parts. First, it provides the reader with a sense of the way in which Māori law operates – how Māori law "channels behaviour by regulation, prevention and 'cleaning up social mess'".[66] The second part of this chapter aims to draw attention to the three key tensions in Māori legal history that have contributed to significant developments within Māori legal traditions. This will include a discussion of some of the effects on Māori legal traditions of Māori encounters with the New Zealand state. The intention is to provide a picture, albeit one painted with a relatively broad brush, of Māori legal traditions at the end of the 20th century, as the comprehensive Treaty settlement process takes shape.

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[66] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 61 [Borrows, *Canada's Indigenous Constitution*].

1.4(c) Chapter Four – The Treaty Settlement Process and Māori Governance

The implementation of a comprehensive Treaty settlement policy has provided a new set of challenges as Māori legal traditions move into the new millennium. This is the focus of the fourth chapter of this dissertation. The objective is to provide a detailed account of the Treaty settlement process, the types of settlement agreements that have been reached, and the models of Māori governance that are emerging out of this process. I have identified the governance aspect of settlement as a key issue because it reflects the process of re-grouping that is being undertaken by Māori communities as they strengthen themselves, build their capacity for self-determination, and develop modern Indigenous solutions and institutions.

1.4(d) Chapter Five - Treaty Settlements and Tensions in Māori Legal History

The fifth chapter of the dissertation considers the effects that the Treaty settlement process has had on Māori legal traditions. Engagement in the settlement process has a significant impact on Māori communities, particularly around issues related to tribal governance. The chapter focuses on the effects of the Treaty of Waitangi settlement process in three broad categories:

1. Effects on Māori law-making;
2. Effects on Māori dispute resolution processes;
3. Effects on the content of Māori law.

This chapter is built on the platform constructed by the preceding chapters. That is, it provides an analysis of Māori legal traditions and the Treaty settlement process by

considering the material relating to Treaty settlements and post-settlement governance entities (covered in Chapter Four) in light of the material relating to the development of Māori legal traditions (addressed in Chapter Three).

1.4(e) Chapter Six - Progress Towards Reconciliation and Tino Rangatiratanga?

The sixth chapter of the dissertation aims to evaluate the changes to Māori legal traditions that have resulted from the Treaty settlement process in terms of the contribution (or otherwise) of these changes towards reconciliation and tino rangatiratanga. Reconciliation and tino rangatiratanga are used to assess the changes in Māori law because they represent two broad objectives of the Treaty settlement process. They are also objectives that have deeper historical roots than the Treaty settlement process and which, I suggest, have driven many of the major changes within Māori legal traditions since their first encounters with common law traditions. This chapter places the conclusions as to the nature of the changes to Māori legal traditions (reached in Chapter Five) within the context of research relating to reconciliation and self-determination of Indigenous peoples.

1.4(f) Chapter Seven - Conclusion

The final chapter of the dissertation draws together the key conclusions of this dissertation, ultimately suggesting that the Treaty settlement process is undermining goals of self-determination/tino rangatiratanga and reconciliation, at least with respect to Māori legal traditions. This chapter also considers the implications of this research

beyond the Treaty settlement process to the developing field of Māori legal history and points to other areas of further inquiry that this research suggests.

CHAPTER TWO: RUAWHARO – METHODOLOGY AND LEGAL THEORY

Ruawharo

"Pāpā, have our ancestors always lived here?"

"Since the time of Tamatea, when our people came to Aotearoa on the great canoe called 'Takitimu'."

"How did they find their way here, Pāpā? Did Tamatea show them the way?"

"Tamatea was their leader, yes, but Ruawharo was the tohunga of Takitimu, the expert with the knowledge of the gods of the earth and the oceans."

"He must have been a very wise man, Pāpā."

"Ae, Ruawharo was a man of great learning."

"But how did he know to come to this place, Pāpā? How did he know this would be the home of our people?"

"Well, e Tama, let me tell you the story of Ruawharo."

"Like Tamatea, Ruawharo came to Aotearoa from Hawaiki aboard the waka Takitimu. And like Tamatea, Ruawharo was one of the leaders on that voyage. Back in Hawaiki, he had studied at the whare wānanga, the house of learning. There he had gained knowledge about the natural world and the spiritual world. He gained particular expertise in those matters relating to the earth and the oceans. Ruawharo's story is closely bound to the story of the waka Takitimu. Some say that it was Ruawharo's axe that was used to fell the tree from which the great canoe was made. And it was his knowledge of ritual, ceremony, and karakia that enabled the canoe to be brought to its launching place. So you see, even before he could chart a course for Aotearoa, Ruawharo had to understand

the wider landscape. He learned about the journeys that others had taken before him. He studied their techniques for reading the land, sky, and seas. He followed the protocols and pathways laid down by his ancestors. Only then was he able to set off on his journey with Tamatea and the others who travelled aboard Takitimu. And as the mighty canoe crossed the oceans from Hawaiki, Ruawharo was able to use the skills and knowledge that had been passed down to him to help guide Takitimu to Aotearoa. When our ancestors arrived at this place, Ruawharo, with his knowledge of the natural world, was able to recognize features of the land that were similar to Hawaiki and after they made landfall, Ruawharo spread on this new land, earth and sand brought from Hawaiki. The way of life and the knowledge that came out of the lands of our ancestors thus became the foundation of a new home here. It is said that Ruawharo then placed his three sons at different points along the coast to be the mauri, the life force, of this new home. And so, e Tama, that is how this came to be the home of our people – through the understanding that Ruawharo and others had of the landscape that surrounded them and the way they built on the knowledge of their ancestors to create a new path and a new home."

2.1 Introduction

This chapter provides two strands of material that situate my research: the methodological framework and theoretical framework for my dissertation. The other strand of 'locating' material, which situates this research amongst existing scholarship, is addressed in Chapter One.

The methodology that I have adopted follows the key principles of Kaupapa Māori Research and draws on other critical and Indigenous approaches. Part One of the

chapter explains those key principles and how the methodology will be applied to my research. This part of the chapter is divided into four main sections. The first section considers the background and development of Kaupapa Māori Research. The following three sections each address one of the key principles of this methodology. The key principles considered in this part of the chapter are tino rangatiratanga/self-determination; te reo and pūrākau/language and stories; and, whakapapa and whanaungatanga/genealogy and relationships. These sections provide a description of each principle in the context of Kaupapa Māori Research and explain how it has informed the conceptualization of my research.

The second strand of the locating material addressed in this chapter is the theoretical framework. This framework is closely connected to the methodological issues addressed in Part One of this chapter. In particular, the first section in Part Two discusses the development of Indigenous Legal Theory, which draws upon many of the key concepts of Indigenous methodologies, such as Kaupapa Māori Research. At a basic level, while Indigenous research methodologies aim to develop approaches to research and knowledge production that are based upon Indigenous worldviews, Indigenous Legal Theory seeks to construct theories of law that can be drawn from Indigenous philosophies and experiences.

The first section of Part Two addresses the need to develop Indigenous Legal Theory as a foundation for research into Indigenous legal issues. This section uses the model of Indigenous Legal Theory that has been articulated by Gordon Christie and draws on examples of Indigenous legal research that illustrate the application of this model. I then turn to consider how an Indigenous Legal Theory framework might be

applied to the subject of this dissertation by using Māori values and the Treaty of Waitangi as theoretical guideposts.

The second area of legal theory that is addressed in Part Two of this chapter is legal pluralism. Legal pluralism has been seen as problematic by a number of Indigenous scholars, especially those who are involved in what might broadly be understood as self-determination projects, because many pluralist theories still have state law at the centre of their framework and tend to situate Indigenous law in a subordinate position. I contend, however, that pluralist legal theories can be of assistance in advancing Indigenous self-determination projects and strengthening Indigenous legal systems. Legal pluralism can form a part of Indigenous Legal Theory, so long as it is authentically connected to Indigenous philosophies and Indigenous communities. In the final section of this chapter, I argue that the approach taken by pluralist legal scholars such as Jeremy Webber and Brian Tamanaha suggest theoretical spaces in which those connections might develop.

2.2 Part One: Methodology

2.2(a) Kaupapa Māori Research

My approach to researching Māori legal history is consistent with the principles of Kaupapa Māori Research methodology. My research has not involved fieldwork, interviews, focus groups, or other types of empirical data generation. As a consequence, the application of Kaupapa Māori Research methodology in this instance relates less to the design of appropriate methods of engaging with research participants and rather more to the epistemological framework and the conceptualization of the research project.

Kaupapa Māori Research is a Māori-centred research methodology. A general description of Kaupapa Māori Research has been articulated by Graham Smith, a leader in the field of Māori education and research, who has suggested that Kaupapa Māori Research:

1. is related to 'being Māori';
2. is connected to Māori philosophy and principles;
3. takes for granted the validity and legitimacy of Māori, the importance of Māori language and culture; and
4. is concerned with 'the struggle for autonomy over our own cultural well being'. [67]

To fully understand the basic premises of this methodology, it is helpful briefly to consider its connection to critical theory and other forms of critical methodologies. Linda Tuhiwai Smith considers the roots of Kaupapa Māori Research in her important 1999 book, *Decolonizing Methodologies*. [68] Smith suggests that the questions about the connections between research, knowledge and power, which form part of feminist and Marxist critiques, also resonate with Indigenous communities and their aspirations for self-determination. [69] Of particular relevance to Kaupapa Māori Research are the feminist critiques within the field of critical theory itself, which challenge critical theorists to recognize their own marginalizing practices. This requires researchers to

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[67] Graham Smith, "Research Issues Related to Māori Education" (Paper presented to NZARE Special Interest Conference, Massey University, reprinted in 1992, *The Issue of Research and Māori,* Research Unit for Māori Education, University of Auckland), cited in Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London; Dunedin: Zed Books; University of Otago Press, 1999) at 85 [G Smith].

[68] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London; Dunedin, N.Z.: Zed Books; University of Otago Press, 1999) at 163-182 [Linda Smith, *Decolonizing Methodologies*].

[69] *Ibid*. at 165.

adopt reflexive research practices[70] and engage in "a process of critical self awareness, reflexivity and openness to challenge."[71]

While Kaupapa Māori Research methodology has theoretical roots in major influential critiques of positivist research, it is also grounded in the experiences of Māori communities. Linda Smith draws attention to the engagement of Māori communities in claims processes (a subject which is of particular relevance to my own research) and argues that, aside from the resolution of specific grievances, underlying this engagement was "a much broader desire by Māori communities to regain or hold on to Māori language and cultural knowledge."[72] From the 1980s, the establishment of grassroots language revitalization programs in the form of community-initiated early childhood education centers (known as Te Kōhanga Reo) further encouraged Māori communities to develop processes relating to education and information gathering that reflected each community's own concerns and values. [73]

Kaupapa Māori Research can, therefore, be understood as a critical theory that is situated within a Māori-specific context. This methodology has been described by Linda Smith as a "local theoretical position that is the modality through which the emancipatory goal of critical theory, in a specific historical, political and social context, is practised."[74] It draws on critiques of positivism and liberalism but is oriented by a Māori worldview

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[70] 'Reflexive research practices' require the researcher to reflect on his or her own presence and interpretive work in the research.

[71] Linda Smith, *Decolonizing Methodologies, supra* note 68 at 166.

[72] *Ibid.* at 169.

[73] *Ibid.*

[74] Linda Tuhiwai Smith, "Kaupapa Māori Research" in M. Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 225 at 229 [Linda Smith, "Kaupapa Māori Research"].

and the issues faced by Māori communities. This methodological approach is, as indicated by Graham Smith, connected directly to Māori philosophy and principles.

The following sections address the three key concepts from Kaupapa Māori that are of particular relevance to my research.

2.2(b) Tino Rangatiratanga/Self-Determination

Tino rangatiratanga is the Māori concept of self-determination and autonomy and has been described as comparable to the Western concept of sovereignty.[75] The idea of tino rangatiratanga sits at the heart of Kaupapa Māori Research. Although tino rangatiratanga is a distinctively Māori concept, self-determination is recognized as an important political objective by many Indigenous scholars who have articulated Indigenous approaches to research. Taiaiake Alfred, for example, has described an ethic of 'Warrior Scholarship' that aims to contend with instances of colonial power expressed in academic or scholarly sites.[76] Indigenous self-determination underlies this ethic of Warrior Scholarship, which, according to Alfred, requires Indigenous scholars to honour Indigenous knowledge, confront false claims of legitimacy, and "fight for political independences in the face of state sovereignty".[77] Similarly, Dale Turner draws a philosophical connection between research/scholarship and "the legal and political discourses of the state".[78] Turner goes on

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[75] For a detailed discussion of the concept of tino rangatiratanga, see Mason Durie, "Tino Rangatiratanga" in Michael Belgrave, Merata Kawharu & David Williams, eds., *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Auckland: OUP, 2005) 3 [M Durie, "Tino Rangatiratanga"].

[76] Taiaiake Alfred, "Warrior Scholarship: Seeing the University as a Ground of Contention" in Devon A. Mihesuah & Angela Cavender Wilson, eds., *Indigenizing the Academy: Transforming Scholarship and Empowering Communities* (Lincoln ; London: University of Nebraska Press, 2004) 88.

[77] *Ibid.* at 95-96.

[78] Dale A. Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto; Buffalo; London: University of Toronto Press, 2006) at 95 [Turner].

to suggest that a "critical Indigenous philosophy must unpack the colonial framework of these discourses, assert and defend our 'indigeneity' within the dominant culture, and defend the legal and political integrity of Indigenous communities."[79]

The political objective of self-determination that scholars such as Alfred and Turner perceive to be an inherent part of Indigenous-centred research is expressed in the Māori worldview, and within Kaupapa Māori Research, as tino rangatiratanga. Tino rangatiratanga is the concept used in the 1840 Treaty of Waitangi to reflect the authority of the Māori signatories, which the British Crown guaranteed would be recognized notwithstanding the establishment of colonial government. It is a concept that has a long history of use as a principle that structures the political relationship between Māori and the Crown.

My research is directly associated with the concept of tino rangatiratanga. The Treaty of Waitangi settlement process and the Treaty itself frame the subject of the research. The political objectives of tino rangatiratanga are, therefore, central to my research topic. One of the express objectives of the research is to consider whether or not the changes to Māori legal traditions that have been brought about by the settlement process have contributed to or compromised tino rangatiratanga.

As well as being the subject of the research, tino rangatiratanga is also embedded in my methodology. This principle of tino rangatiratanga can be seen within Kaupapa Māori Research projects across a range of disciplines. Preeminent Māori health researcher Mason Durie has used a 'Rangatiratanga framework' that incorporates an explicit acknowledgement that "issues of autonomy and self-determination according to

[79] *Ibid.* at 95-96.

the Treaty of Waitangi" are relevant to Māori health research and matters relating to the delivery of health services to Māori.[80] In the field of criminal justice, Māori researchers such as Moana Jackson and Caren Wickliffe underpin their work with the assumption that one of the primary objectives of research in this area is to achieve some form of Māori self-determination or autonomy 'in the realm of justice'.[81] My approach to the research project is consistent with the emancipatory goals of Kaupapa Māori Research in general and the principle of tino rangatiratanga in particular. In part, situating the research within a Māori worldview will help to achieve this. Also, the underlying aim of the research is to prompt changes in the political and legal discourse to open up space for the expression of tino rangatiratanga through the recognition of Māori legal systems in a way that is meaningful to, and beneficial for, Māori communities.

2.2(c) Whakapapa And Whanaungatanga/Genealogy And Relationships

Critical theory might have objectives of resistance and struggle which are similar to the goals of self-determination and tino rangatiratanga that are inherent in Indigenous and Kaupapa Māori methodologies, but critical theory has failed to address the particular concerns of Indigenous communities - the type of localized emancipatory goals that derive from specific historical and social situations referred to by Linda Smith.[82] One of the aims of Kaupapa Māori Research is, therefore, to orient emancipatory goals within a Māori worldview. The fundamental organizing principle of Māori philosophy is

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[80] Mason Durie, *Whaiora: Māori Health Development*, 2d ed. (Auckland, N.Z.: OUP, 1998).

[81] See Jackson, *He Whaipaanga Hou*, *supra* note 64; Caren Wickliffe, "A Māori Criminal Justice System in the Context of Rethinking Criminal Justice" in F. McElrea, ed., *Re-thinking Criminal Justice Vol. I: Justice in the Community* (Auckland, N.Z.: Legal Research Foundation, 1995).

[82] Linda Smith, "Kaupapa Māori Research", *supra* note 74.

whakapapa (genealogy) supported by the associated concepts of whānau (families) and whanaungatanga (relationships).

The Māori theologian and philosopher, Māori Marsden, described the importance of whakapapa to Māori philosophy and knowledge systems as follows:

> The human mind creates maps/model/formulae as a means of grasping/understanding/representing/reconciling both the worlds of the senses and the real world…The Māori developed his sets of symbols in the form of a genealogical tree to portray the process by which the world of sense perception came into being. [83]

Te Ahukaramū Charles Royal, the current director of Ngā Pae o te Māramatanga (the National Institute of Research Excellence for Māori Development and Advancement), has described whakapapa as "an analytical tool employed by Māori" to understand such fundamental philosophical matters such as the origins of phenomena and the relations between phenomena.[84] Within this worldview, whakapapa is clearly of central importance to research, scholarship and knowledge production. It is, therefore, understandable that Māori writers such as Taina Pohatu see Kaupapa Māori Research as being grounded in whakapapa.[85]

Whakapapa is also important to Māori researchers because it provides the connection between the researcher and the research.[86] "Whakapapa turns the universe into a moral space where all things great and small are interconnected, including science

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[83] Marsden, *supra* note 58 at 110-111.

[84] Te Ahukaramū Charles Royal, "Mātauranga Māori: Paradigms and Politics" (Paper presented at Ministry for Research, Science and Technology Hui, Wellington, 13 January 1998) [unpublished].

[85] Taina Pohatu, *I Tīpu ai Tātou i ngā Turi o o Tātau Mātua Tīpuna: Transmission and Acquisition Processes within Kāwai Whakapapa.* (Master of Education Thesis, University of Auckland, 1996) [unpublished].

[86] 'Self-location' is an important part of many critical methodologies, including other Indigenous approaches and many feminist methodologies. See Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009) at 110-111 [Kovach].

and research."[87] Whakapapa, ultimately, establishes the relationships between each person and the world around him or her.[88] Māori businesswoman and former politician Donna Awatere has articulated this view:

> Who am I [sic] and my relationship to everyone else depends on my whakapapa, on my lineage, on those from whom I am descended. One needs one's ancestors therefore to define one's present. Relationships with one's tīpuna [ancestors] are thus intimate and causal. [89]

Within Kaupapa Māori Research, it is whakapapa that is primarily responsible for situating the researcher in relation to the research. It is through whakapapa that the position and authority of the researcher is affirmed.[90]

As a consequence of the centrality of whakapapa within Māori philosophy, the associated concepts of whānau (family) and whanaungatanga (relationships) also require careful consideration by those undertaking Kaupapa Māori Research. Prominent Māori educationalists such as Russell Bishop[91] and Kathy Irwin[92] view the whānau as the point where "research meets Māori, or Māori meets research, on equalizing terms."[93] Building and maintaining collaborative and mutually beneficial relationships with research communities is therefore an important aspect of Kaupapa Māori Research. The whānau might refer to a literal family or kinship group, a community comprised of research

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[87] Norman K. Denzin & Yvonna S. Lincoln, "Introduction: Critical Methodologies and Indigenous Inquiry" in Norman K. Denzin, Yvonna S. Lincoln & Linda Tuhiwai Smith, eds., *Handbook of Critical and Indigenous Methodologies* (Los Angeles: Sage, 2008) 1, at 9.

[88] Te Maire Tau, "Matauranga Māori as an Epistemology" in Paul G. McHugh, & Andrew Sharp, *Histories, Power and Loss: Uses of the Past--a New Zealand Commentary* (Wellington, N.Z.: Bridget Williams Books, 2001) 61 at 66.

[89] Donna Awatere, *Māori Sovereignty* (Auckland, N.Z.: Broadsheet, 1984) at 54.

[90] Leonie Pihama, *Tihei Mauri Ora - Honouring Our Voices:* Mana *Wahine as Kaupapa Māori Theoretical Framework* (PhD Thesis, University of Auckland, 2001) [unpublished] at 130 [Pihama].

[91] Russell Bishop, "Initiating Empowering Research?" (1994) 29 NZ Journal of Education Studies 175 at 176.

[92] Kathy Irwin, "Māori Research Methods and Processes: An Exploration" (1994) 28 SITES 24 at 27.

[93] Linda Smith, *Decolonizing Methodologies*, *supra* note 68 at 184-185.

participants, or a network of people with interests in the research topic (for example, academics or professionals who work in the research field). Whatever 'whānau' is appropriate to the research, the researcher should consider the relationships between whānau, research, and researcher in the research design by asking the following questions:

1. What research do we want done?
2. Whom is it for?
3. What difference will it make?
4. Who will carry it out?
5. How do we want the research done?
6. How will we know it is worthwhile?
7. Who will own the research?
8. Who will benefit?[94]

The concepts of whakapapa, whānau, and whanaungatanga guide the design of Kaupapa Māori Research projects by emphasizing the role of relationships and communities when addressing these questions. Russell Bishop has provided perhaps the most thorough examination of these kinship networks within a research context.[95] Bishop, writing with Ted Glynn, notes that, whether the relevant whānau is an actual kin group or whether it is a 'whānau of interest', within Kaupapa Māori Research, the constitution of the group and the relationships within and between groups will be

[94] Linda Smith, "Kaupapa Māori Research", *supra* note 74.

[95] Russell Bishop, *Whakawhanaungatanga: Collaborative Research Stories* (Palmerston North, N.Z.: Dunmore Press, 1996).

determined by Māori cultural practices.[96] For example, the leader of a research 'whānau of interest' will not necessarily be the lead researcher, but instead might be a kaumatua (elder) who can provide appropriate cultural guidance.[97] Bishop and Glynn suggest that by referring to a Māori cultural framework to determine roles and responsibilities within a Kaupapa Māori Research project ensures that issues of accountability and control are appropriately addressed within the research.[98]

This is consistent with other Indigenous methodologies. Cree scholar and teacher Shawn Wilson has noted that Indigenous systems of ethics and values are based on ideas of relational accountability, which has significant consequences for the way that the value of Indigenous research is measured:[99]

> Right or wrong; validity; statistically significant; worthy or unworthy; value judgements lose their meaning. What is more important and meaningful is fulfilling a role and obligations in the research relationship – that is, being accountable to your relations.

The priority of many critical Indigenous methodologies is, therefore, to deliver research that accords with Indigenous ethics by addressing the various relationships that are central to that research. The value of the research is then determined by reference to Indigenous understandings of knowledge and research. In that case, issues such as statistical significance, which may be crucial to many empirical methodologies, become secondary concerns, at best. In short, the standards and values of other methodologies do not set the points of reference for Indigenous research methodologies. Rather, the

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[96] Russell Bishop & Ted Glynn, "Researching in Māori Contexts: An Interpretation of Participatory Consciousness" (1999) 20 Jnl. Intercultural Studies 167 at 172-173.

[97] *Ibid.* at 173.

[98] *Ibid.* at 172-173.

[99] Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Black Point, N.S.: Fernwood Pub., 2008), at 77 [Wilson].

obligations in the research relationships set those reference points. I agree with this analysis and I would also add that inherent in the principle of 'being accountable to your relations' is the necessity to produce robust, high-quality research, as it is only in this way that one can fulfill one's obligations to the research community and to one's own community. Under this model, both the researcher and his or her community have a vested interest in the integrity of the methodology and the application of the results of the research.[100] The obligation is to ensure that values of respect, reciprocity, and responsibility underpin the research, notwithstanding that the research may provide challenges to one's relations.

The importance of relationships and of whakapapa as an organizing principle of Māori knowledge systems is reflected in the structure of my research. The project is conceptualized in the structure of a whakapapa (genealogy), with careful consideration being given to the relationships between various components of the research and also to the connections that link components of my research to other scholarship. It should be noted that, although this is not based on the Foucauldian genealogical approach, it is consistent with that approach in that knowledge and ideas are understood to be generated, not through a linear progression, but depend instead on contingent circumstances (in a whakapapa, a descendant exists only because of the meeting of two distinct genealogical lines). That conceptual organization will be reinforced by different parts of the research being explicitly linked to specific ancestors from my own whakapapa.

The explicit references to my own ancestors in the stories that begin each chapter also address another important aspect of whakapapa within Kaupapa Māori Research.

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[100] *Ibid.*

This incorporation of my own whakapapa situates myself in relation to the research. It establishes the space from which I can connect and interact with the subject of my research. This form of 'self-location' is identified by many Indigenous researchers as being of central importance to Indigenous research practices. Absolon and Willett view self-location as "one of the most fundamental principles of Aboriginal research methodology".[101] Kovach notes that self-locating is also common in many critical methodologies, including much feminist, anti-oppressive, social constructivist and post-modern research.[102]

Self-location can perform a number of functions within the research process. Absolon and Willett have explored a number of these functions, specifically within the context of Indigenous research.[103] One reason that self-locating is important for Indigenous researchers is because it is part of the recovery process of Indigenous communities. Absolon and Willett describe this function as follows:[104]

> As we recover from colonization, racism, residential schooling, and genocidal policies, we are retrieving and locating bits and pieces of who we are. Essentially, we are in the process of pulling ourselves together. Location means that we begin by stating who we are and we revise this statement over and over again. We each locate ourselves differently at various points in our lives. Revision through location is essential and integral to our recovery process.

Absolon and Willett also connect the process of self-locating to the concept of memory and 're-membering'.[105] That is, through locating ourselves, researchers engage

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[101] Kathy Absolon and Cam Willett, "Putting Ourselves Forward: Location In Aboriginal Research" in Leslie Brown & Susan Strega, eds., *Research As Resistance: Critical, Indigenous, and Anti-oppressive Approaches* (Toronto: Canadian Scholars Press, 2005) at 97 [Absolon and Willett].

[102] Kovach, *supra* note 86.

[103] Absolon and Willett, *supra* note 101.

[104] *Ibid.* at 112.

[105] *Ibid.* at 115.

in a process of remembering who we are and from where we come. In the case of Indigenous researchers, such remembering leads us to identify our place within our family and kinship networks and our connections with our ancestors. In this way, the researcher's membership of his or her community is re-affirmed.

Chickasaw educationalist Eber Hampton has also noted the important connection between memory and research.[106] Hampton argues that researchers who wish to undertake research related to Indigenous peoples must carefully consider how memory shapes personal truth in order to reflexively unpack their personal motivation for engaging in such research. Kovach further explains the importance of this aspect of self-location:[107]

> Indigenous research frameworks ask for clarity of both the academic and personal purpose, and it is the purpose statement within Indigenous research that asks: What is your purpose for this research? How is your motivation found in your story? Why and how does this research give back to community?

Location is, therefore, more than simply identifying an ethnic or geographic community, though, of course, those may both be important aspects of location. Location, at least within Indigenous research methodologies, is about "relationships to land, language, spiritual, cosmological, political, economical, environmental, and social elements in one's life".[108] Researchers have used a variety of different techniques in order to locate themselves in relation to their research. Many feminist researchers use their

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[106] Eber Hampton, "Memory Comes before Knowledge: Research May Improve if Researchers Remember Their Motives" (Paper presented at the First Biannual Indigenous Scholars' Conference, University of Alberta, Edmonton, Alberta, Canada, 1995) [unpublished].

[107] Kovach, *supra* note 86 at 115.

[108] Absolon and Willett, *supra* note 101 at 98.

own experiences quite directly as the basis of their research.[109] Graham Smith prefaces his research with a prologue that identifies his approach and perspective as a Māori researcher.[110] Kovach sees great value in that approach:[111]

> Through prologue, personal story offers authenticity, and is recognized as integral to knowledge construction. The prologue is where the writing can shape-shift from an 'objective accounting' to holistic narrative, revealing how the self influences research choices and interpretations.

The stories of my ancestors, which introduce the key topics of this dissertation, are set out in a similar form to Smith's prologue. I intend that they will contribute to the creation of the same type of 'holistic narrative' that Kovach recognizes in Smith's work.

Researchers also employ a variety of techniques to recognize and respect the relationships within the research. Often qualitative methods, such as appropriately structured interviews or focus groups, are employed in Indigenous research to maintain relational accountability and keep the research grounded in the concerns of Indigenous communities, though there is no particular method that must be used.[112] Because of the nature of my research project, I address informally important concepts associated with whakapapa, such as whānau (family) and whanaungatanga (relationships). That is, I did not undertake formal interviews or other qualitative data gathering, though I informally sought advice, support, and guidance.

Guidance from elders from within my own whānau was particularly important in relation to the use of our whakapapa and the stories of our ancestors because they hold

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[109] Sally A. Kimpson, "Stepping Off the Road: A Narrative (of) Inquiry" in Leslie Brown & Susan Strega, eds., *Research As Resistance: Critical, Indigenous, and Anti-oppressive Approaches* (Toronto: Canadian Scholars Press, 2005) at 92.

[110] See e.g. Graham Smith, "Transforming Leadership: A Discussion Paper" (Paper presented to the Simon Fraser University Summer Institute, Burnaby, British Columbia, Canada, 2009) [unpublished].

[111] Kovach *supra* note 86 at 112.

[112] *Ibid*. at 122; Wilson, *supra* note 99 at 111.

primary responsibility for the maintenance of those stories, histories, and whakapapa. Informal discussion amongst the wider whānau group also helped to keep the research grounded in the concerns and experiences of my community.

My identity as a member of the iwi Ngāti Kahungunu is reflected in these stories. Ngāti Kahungunu is the third largest iwi by population. The 2006 census figures show that nearly 60,000 people identify as members of Ngāti Kahungunu, which is close to 12 per cent of the total Māori population. Ngāti Kahungunu also has a relatively large traditional territory, covering the lower half of the east coast of the North Island. My family is from the northern part of this territory and our marae, named Takitimu after the great canoe, is in the small town of Wairoa, which lies between the cities of Napier and Gisborne. My hapū is Ngai Te Apatu and we identify ourselves in connection with the river Te Wairoa Hōpūpū Hōnengenenge Matangirau and the mountain Whakapūnake.

2.2(d) Te Reo And Pūrākau/Language And Stories

There is an inextricable link between whakapapa and te reo and pūrākau, (the Māori language and Māori stories). Linda Smith has noted: [113]

> To understand our whakapapa is also to understand the kōrero, the stories, the knowledge that comes with events, people, relationships. These are passed through whakapapa and whakapapa is passed through the telling of those histories.

The survival and revival of Māori language and culture is a key theme of Kaupapa Māori Research. Kaupapa Māori Research, therefore, includes a presumption that the use of Māori language and cultural concepts within the research is valid and legitimate. It is, however, important that the language and cultural concepts are used in a way that

[113] Pihama, *supra* note 90 at 131.

maintains their integrity. This requires the researcher to carefully consider ways of giving meaningful expression to Māori terms and concepts within their own cultural context. Pūrākau (traditional Māori story-telling forms) can be employed to achieve this.[114]

Māori educationalist Jenny Lee suggests that using pūrākau "creates the opportunity to write about culture as well as write culture into the text."[115] An example of the way in which storytelling forms can assist Indigenous researchers to 'write culture into the text' can be seen in Jo-ann Archibald's book, *Indigenous Storywork*.[116] In that book, Archibald records her experiences of researching the role of Indigenous storytelling in educational settings. Archibald uses Indigenous storytelling forms throughout the book to explore and develop her ideas. Her Sto:lo traditions and culture inflect these stories and her research as a whole. Her research stories provide an opportunity to perform many Indigenous cultural forms, to demonstrate practices and illustrate cultural values. Readers can see, for example, the importance of dreams within Sto:lo culture and the way in which dreams can be approached and analyzed to assist with our understanding of the world around us. The practical application of dreams in this way is a characteristic of many Indigenous cultures, which is also evident in John Borrows' exploration of Indigenous legal traditions through storytelling forms that is set out in *Drawing Out Law.*[117]

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[114] Jenny Lee "Māori Cultural Regeneration: Pūrākau as Pedagogy"(Paper presented to Centre for Research in Lifelong Learning International Conference, 24 June, 2005) [unpublished] at 8 [Lee].

[115] *Ibid.* at 12.

[116] Jo-ann Archibald, *Indigenous Storywork*: *Educating the Heart, Mind, Body, and Spirit* (Vancouver; Toronto: UBC Press, 2008).

[117] John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) [Borrows, *Drawing Out Law*].

In the context of this dissertation, I use the opportunity provided by the use of pūrākau to weave waiata/songs, karakia/prayers, whakatauki/proverbs, and other Māori forms within the research. These provide performative instances to help communicate Māori concepts across cultures. As well as providing an appropriate cultural context within which to explore Māori concepts, pūrākau can help Māori researchers communicate with Māori communities and the research whānau discussed above. For this reason I use short narratives, in the pūrākau form, to illustrate the analysis and arguments within my research. These are stories about my own ancestors, for the reasons outlined above. Aside from situating myself in relation to the research through whakapapa, these pūrākau provide examples of Māori law and explain Māori concepts, principles, and values within a culturally appropriate context.

Lee also suggests that adopting a pūrākau approach "guides us to speak in a language that is not exclusive, but draws on our own ways of seeing, speaking and expressing ourselves in order to bring 'to life' the issues and complexities of our experiences that may be culture specific and local and/or more universal in nature."[118] This approach assists to situate the researcher in relation to the research but leaves space for others to approach the research from their own situation. The conscious use of 'voice' can also help to make transparent the researcher's own "ideologies, knowledge, subjectivities and politics".[119] I deliberately employ a 'story telling voice' to make it clear that the representations of these stories and histories of my whānau and our ancestors are retold within the context of my dissertation and for the purpose of communicating aspects

[118] Lee, *supra* note 114 at 10.

[119] *Ibid.* at 11.

of this research. This is also intended to reflect a traditional way of preserving ancestral knowledge and transmitting knowledge from one generation to the next.

The use of storytelling as a means of cultural re-production and communication is, of course, not unique to Māori communities. Cherokee scholar Thomas King argues for the fundamental role of stories in our lives by quoting the Nigerian storyteller Ben Okri:

> In a fractured age, when cynicism is god, here is a possible heresy: we live by stories, we also live in them. One way or another we are living the stories planted in us early or along the way, or we are also living the stories we planted – either knowingly or unknowingly – in ourselves. We live stories that either give our lives meaning or negate it with meaninglessness. If we change the stories we live by, quite possibly we change our lives.[120]

Or, as King himself simply and elegantly suggests, "The truth about stories is that's all we are."[121]

Stories play an important role in the construction and maintenance of legal systems. As Robert Cover, in his influential '*Nomos* and Narrative' article, explained:[122]

> No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

The use of Māori storytelling forms reflects this understanding of law. By using pūrākau throughout my dissertation, I am seeking to reinforce the social, cultural, and political contexts of law. This is consistent with recent legal history scholarship of

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[120] Thomas King, *The Truth About Stories: A Native Narrative* (Toronto: House of Anansi Press, 2003) at 153.

[121] *Ibid.* at 2.

[122] Robert Cover, "Foreword: *Nomos* and Narrative" (1983) 97 *Harv. L. Rev.* 4 [Cover].

colonial societies, which views law as both a product and source of the cultures of those societies.[123]

As a means of transmitting embedded norms and cultural values, storytelling has particular relevance to research relating to Indigenous law.[124] Anishinabe legal scholar John Borrows has noted that "[s]tories express the law in Aboriginal communities, since they represent the accumulated wisdom and experience of First Nations conflict resolution."[125] Borrows uses storytelling techniques throughout his own work to explain, explore, and discuss Indigenous law and legal issues.[126] Borrows has even used storytelling forms to explain the importance of stories, as in the following passage:[127]

> 'I want you to remember only this one thing,' said the Badger. 'The stories people tell have a way of taking care of them. If stories come to you, care for them. And learn to give them anywhere they are needed. Sometimes a person needs a story more than food to stay alive. That is why we put these stories in each other's memories. This is how people care for themselves.'

Stories not only play an important role in the production and maintenance of legal culture within communities, but are also employed to communicate legal rules and principles between different cultural communities. For example, Lumbee scholar Robert Williams Jr. has illustrated the vital role that stories had in establishing common

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[123] See John McLaren and Hamar Foster "Hard Choices and Sharp Edges: The Legal History of British Columbia and the Yukon" in John McLaren and Hamar Foster, eds., *Essays in the History of Canadian Law, Vol. 6: British Columbia and the Yukon* (Toronto: Osgoode Society for Canadian Legal History, 1995) at 4-5. See e.g. Hamar Foster, Benjamin Berger and A. R. Buck, eds., *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: Osgoode Society for Canadian Legal History, UBC Press, 2008).

[124] See Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York and Oxford: OUP, 1997) at 83-97 [R. Williams]; Borrows, *Canada's Indigenous Constitution*, *supra* note 66 at 59-106.

[125] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 13 [Borrows, *Recovering Canada*].

[126] See e.g. Borrows, *Drawing Out Law*, *supra* note 117.

[127] Borrows, *Recovering Canada*, *supra* note 125 at 13.

understandings of legal rights and obligations across cultures within American Indian models of diplomacy.[128] Williams suggests that, within many American Indian societies, stories have long been understood as an essential ingredient of successful diplomatic and treaty relationships.[129] Stories might have many functions within this context. They may be told to establish and facilitate communicative processes. They may also be told to educate treaty partners about expected standards of behaviour and accepted legal norms. Some stories might also function as jurisgenerative devices.[130] One of the most significant aspects of the role of stories within American Indian diplomacy is their integrative power as mechanisms that can transcend cultural and social borders. Williams sees the creative potential of stories as crucial in this regard because it enables communities to imagine new connections and relationships: "In American Indian treaty visions of law and peace, a treaty itself was a special kind of story: a way of imagining a world of human solidarity where we regard others as our relatives."[131]

Williams also notes that many critical race and feminist legal scholars have employed storytelling techniques to assist their analysis of legal issues and "to make connections with strange others in a world of human diversity and conflict".[132] Critical race theorist Derrick Bell has explained different types of discrimination by constructing a series of separate narratives.[133] In the field of feminist legal scholarship, Patricia A. Cain has recounted the stories of lesbian women in order to ground her theoretical

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[128] R. Williams, *supra* note 124 at 83-97.

[129] *Ibid.* at 85.

[130] *Ibid.*

[131] *Ibid.* at 84.

[132] *Ibid.*

[133] Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987).

approach in the lived-experiences of women.[134] While Richard Delgado has argued that storytelling can be employed as an academic technique that can provide an appropriate and effective voice for those who might otherwise be marginalized within legal systems.[135]

Stories and narratives reflect traditional Indigenous forms of preserving and transmitting knowledge. Their re-telling at different times and by different people helps to construct and maintain a shared sense of cultural values.[136] Pūrākau, therefore, provide a means of expressing the values, norms, rules, and processes that comprise the body of Māori legal traditions within a cultural context that maintains the integrity of the subject matter.

2.3(e) Summary Of Methodology

Kaupapa Māori Research provides a methodological approach that is oriented by Māori philosophy and values. The basic premise of this methodology is that Māori cultural forms and values and ways of knowing construct a valid framework from which to approach research relating to Māori.

This approach is consistent with other critical and Indigenous methodologies and provides an appropriate conceptual scheme for my research, which seeks to articulate a perspective on the Treaty of Waitangi settlement process from within Māori legal traditions. This methodological approach is, therefore, also closely linked to the

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[134] Patricia A. Cain, "Feminist Jurisprudence: Grounding the Theories" (1990) 4 Berkeley Women's L. J. 191.

[135] Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87 Mich. L. Rev. 2411.

[136] Turner, *supra* note 78 at 50-51.

theoretical framework I have applied to the role and operation of law in New Zealand's Indigenous and common law legal traditions. This part of the chapter has already alluded to some important connections between the methodology and the legal theory that underpins this research, particularly in relation to the production and communication of legal cultures as interdependent aspects of broader Indigenous philosophies. The next part of the chapter turns to consider more directly Indigenous Legal Theory and to set out in more detail the theoretical foundations of this research.

2.3 Part Two: Legal Theory

2.3(a) Indigenous Legal Theory

The theoretical framework that underpins this dissertation is located within, and contributes to, the developing field of Indigenous Legal Theory.

Legal theories that are rooted in Indigenous philosophies are essential for a robust and healthy theoretical discourse around Indigenous legal issues.[137] All theorists bring a particular set of conceptual apparatus to the task of theorizing and, further, this apparatus sustains implicit ideological and political positions.[138] These positions become especially significant when applied to a socially constructed and contested subject matter such as law. Theoretical perspectives that reflect Indigenous communities' understandings and experiences of law, therefore, provide a distinctive contribution to legal theory.[139] Gordon Christie, whose work has directly addressed the concept of Indigenous Legal

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[137] Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds., *Indigenous Peoples and the Law : Comparative and Critical Perspectives* (Oxford ; Portland, OR: Hart, 2009) 195 at 197 [Christie, "Indigenous Legal Theory"].

[138] *Ibid.* at 201; See also Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous L.J. 67.

[139] See James Anaya, "Indigenous Law and its Contribution to Global Pluralism" (2007) 6 Indigenous L.J. 3.

Theory, suggests that such theoretical perspectives might provide insights into the operation of particular legal systems (whether they be Indigenous or non-Indigenous systems) as well as assisting our understanding of law at a more conceptual, abstract level.[140] Christie's concept of Indigenous Legal Theory does not, therefore, represent a single, uniform, pan-Indigenous view of law, but rather comprises a diverse range of legal theories. The one characteristic that all these theories have in common is that they are in some way connected to an Indigenous worldview. Christie describes this as cultural and experiential grounding. This kind of conceptualization of legal culture is also recognized in much non-Indigenous legal theory.[141] These groundings in Indigenous culture and experience have direct consequences for the way that Indigenous theorists conceptualize law and "how the world of legal phenomena comes to be perceived and studied" within Indigenous legal theories.[142]

The writings of Indigenous legal scholars such as Patricia Monture-Angus, Sakej Henderson, and John Borrows provide some helpful examples of the way these cultural and experiential groundings affect analyses of law and legal systems.

Monture-Angus explicitly frames her examination of Indigenous legal issues within the culture and experience of her own community. In *Journeying Forward: Dreaming First Nations Independence*, Monture-Angus notes: "In order to understand the way I have processed the recognition and affirmation of existing Aboriginal (and treaty)

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[140] Christie, "Indigenous Legal Theory", *supra* note 137 at 203. This also appears to be consistent with the literature relating to the study, and theorizing, of legal traditions more generally, see e.g. Patrick Glenn, *Legal Traditions of the World*, 3rd ed. (Oxford: Oxford University Press, 2007).

[141] See e.g. David Nelken, "Towards a Sociology of Legal Adaption" in David Nelken & Johannes Feest, eds., *Adapting Legal Cultures* (Oxford ; Portland, OR: Hart, 2001) 7; and, in the New Zealand context, Alex Frame, *Grey & Iwikau: A Journey Into Custom/Kerei raua ko Iwikau: Te Haerenga me nga Tikanga* (Wellington, N.Z.: Victoria University Press, 2002) at 25-33.

[142] Christie, "Indigenous Legal Theory", *supra* note 137 at 206.

rights in Canada's constitution, the basics of Haudenosaunee political thought must be briefly established." [143]

Journeying Forward is primarily focused on the conceptualization of Aboriginal rights and it aims to describe a vision of Aboriginal rights that reflects an Indigenous worldview. Monture-Angus' objective is to begin to articulate "what a theory of Aboriginal rights looks like from one Aboriginal location".[144] In doing so, she provides a forceful critique of Canadian rights discourse as exemplified by decisions of the Supreme Court of Canada and associated scholarly writing.[145] She notes that the categorization of rights as either 'individual rights' or 'collective rights' not only tends to diminish the value of rights characterized as 'collective', but is also a misrepresentation of concepts of rights and obligations within Indigenous communities.[146] In *Journeying Forward* she examines Aboriginal rights cases from the perspective of the communities involved. In relation to the Supreme Court of Canada's decision in *R v Sparrow,*[147] a case that addressed Aboriginal fishing rights, Monture-Angus explores the personal and community background of Ronald Sparrow and the cultural understandings and practices that led him to exercise his traditional fishing rights.[148] She explains how this analysis leads to a different view of rights, obligations, and relationships than the narrower and *narrowing* examination evident in the Supreme Court's judgments.[149] Her approach is,

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[143] Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax, N.S.: Fernwood Publishing, 1999) at 40 [Monture-Angus].

[144] *Ibid.* at 56.

[145] *Ibid.* at 135-157.

[146] *Ibid.* at 135-147.

[147] *R v Sparrow,* [1990] 1 S.C.R. 1075.

[148] Monture-Angus, *supra* note 143 at 88-115.

[149] *Ibid.* at 92 and 106.

therefore, to infuse the concept of human rights with Indigenous values and understandings. To give one basic, general, example, she suggests that First Nations' relationships with the land form an important component of any Indigenous conceptualization of human rights.[150] Christie contends that this type of conceptualization in Monture-Angus' work represents "a lived experience passing through the lens of her cultural grounding as a Mohawk woman".[151]

Sakej Henderson's work also illustrates the way in which cultural and experiential grounding affects Indigenous understandings of law and legal theory. Henderson sees Indigenous legal traditions and philosophies as inextricably connected to other aspects of the lives of Indigenous communities:

> First Nations jurisprudences are conceptually self-sustaining and dynamically self-generating. They are legal systems with a life of their own derived from relationships and experiences with families and the ecology…More consciousness and performance than text of decisions…Law cannot be any of its manifestations or reflections, but is a normative vision, a product of shared thoughts and consciousness, of a community's beliefs and imagination. [152]

Henderson uses Indigenous legal and philosophical concepts to build a theoretical framework with which to examine Indigenous legal issues. He suggests that "…First Nations knowledge and jurisprudence are organized around four insights: the insights of covenants of creation, embodied spirits, implicate order,[153] and dynamic

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[150] *Ibid.* at 60.

[151] Christie, "Indigenous Legal Theory", *supra* note 137 at 228.

[152] James (Sakej) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 122 [Henderson].

[153] In referring to an 'implicate order', Henderson is here drawing on the terminology used by physicist David Bohm in *Wholeness and the Implicate Order* (London: Routledge, 1980) at 149: "There is the germ of a new notion of order here. This order is not to be understood solely in terms of a regular arrangement of objects (e.g. in rows) or as a regular arrangement of events (e.g. in a series). Rather, a total order is contained, in some implicit sense, in each region of space and time. Now, the word 'implicit' is based on the

transformation".[154] These insights form the basis of Henderson's conceptualization of law.[155] He applies this theoretical framework to his analysis of Indigenous legal issues, not only as they are addressed within Indigenous legal systems, but also within the Canadian state legal system.[156] To illustrate this point, it may be helpful to consider the way in which Henderson's articulation of legal communication and reasoning within Indigenous traditions has implications for understanding the substance of *sui generis* Aboriginal rights within the Canadian legal system. Henderson explains that "First Nations jurisprudence and law are very much embedded in the heritage of societies of sound and ceremonies."[157] Consequently, much Indigenous legal procedure is based in performance or has a performative aspect to it.[158] Forms of legal reasoning that have developed from common law traditions, centred around precedent and legislation, have, therefore, limited application to the substance of Indigenous law. Henderson describes this type of performative jurisprudence as "open-textured",[159] "dynamic",[160] "transformational",[161] and notes that this type of jurisprudence tends to define wrongs in "relational rather than in purely physical or economic terms".[162] Approaches to legal

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verb 'to implicate'. This means 'to fold inward' ... so we may be led to explore the notion that in some sense each region contains a total structure 'enfolded' within it."

[154] Henderson, *supra* note 152 at 128-129.

[155] *Ibid.* at 129-163.

[156] *Ibid.* at 178-227.

[157] *Ibid.* at 163.

[158] The procedures and functions of the potlatch ceremony, common among Indigenous peoples of the Pacific Northwest region, is an example of the type of performative jurisprudence Henderson describes. See Borrows, *Canada's Indigenous Constitution*, *supra* note 66 at 40-41.

[159] Henderson, *supra* note 152 at 168.

[160] *Ibid.* at 169.

[161] *Ibid.*

[162] *Ibid.* at 168.

reasoning such as those that derive from legal conceptualism or legal positivism, which are prevalent within common law systems, are based on assumptions about the use of language and the operation of legal processes that do not take account of a more performative jurisprudence. Ultimately, Henderson argues, this renders such approaches "incapable of doing justice to *sui generis* Aboriginal rights".[163]

John Borrows also acknowledges the cultural and experiential groundings of Indigenous legal traditions, noting that the "underpinnings of Indigenous law are entwined with the social, historical, political, biological, economic, and spiritual circumstances of each group".[164] The theoretical framework applied by Borrows reflects these cultural and experiential groundings. This can be seen in the way that Borrows constructs his analysis of Indigenous law in his recent book, *Canada's Indigenous Constitution*. In that book, Borrows first explores the sources of Indigenous law in order to communicate the complexity of these systems and the choices Indigenous peoples may turn to in developing law.[165] The different sources of Indigenous law, identified by Borrows as including "sacred teachings, naturalistic observations, positivistic proclamations, deliberative practices, and local and national customs",[166] become key organizing principles for the analysis of Indigenous legal traditions.

Borrows then turns quite directly to the experiences of Indigenous communities to elaborate his theoretical framework. He considers specific examples of Indigenous legal traditions, paying careful attention to the specific social, historical, and cultural

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[163] *Ibid.* at 192.

[164] Borrows, *Canada's Indigenous Constitution*, *supra* note 66 at 24.

[165] *Ibid.* at 23-58.

[166] *Ibid.* at 24.

experiences of particular communities.[167] Borrows uses these specific examples in order to "develop an understanding of Indigenous law in a more applied context and attempt to show how Indigenous law channels behaviour by regulation, prevention and 'cleaning up social mess'".[168] This allows Borrows to advance the argument for the recognition of Indigenous legal traditions as part of a multi-juridical constitution. Features of Indigenous Legal Theory, as described by Christie, enable Borrows to address "questions related to the intelligibility, accessibility, equality, applicability, and legitimacy of Indigenous laws."[169] It would be impossible to adequately address such questions without reference to the cultural and experiential groundings of Indigenous legal traditions.

Patricia Monture-Angus, Sakej Henderson, and John Borrows each, therefore, illustrate ways in which theoretical and conceptual models, which are grounded in the culture and experiences of Indigenous communities, can be applied. Such models can make a distinctive contribution to the theoretical discourse and assist our analyses of law and legal systems, perhaps especially in relation to those legal issues that affect Indigenous peoples.

Being grounded in the culture and experience of Indigenous communities is a defining characteristic of theories that fall within the rubric of Indigenous Legal Theory. There is also scope for the application of non-Indigenous theoretical tools within Indigenous Legal Theory, but Christie cautions that Indigenous legal theorists should

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[167] *Ibid.* at 59-106.

[168] *Ibid.* at 61.

[169] *Ibid.* at 138, 137-176.

engage with non-Indigenous theoretical tools carefully and deliberately.[170] They are, after all, theoretical tools that have been developed with conceptual apparatus grounded in other cultures and experiences and will sometimes be built on ideological or political foundations that are antithetical to Indigenous aspirations.[171]

But Christie acknowledges the utility of deploying non-Indigenous theoretical tools in some circumstances and notes that this need not undermine Indigenous theorizing. For example, Indigenous legal theorists may find it helpful to draw on various strands of critical legal theory in order to interrogate assumptions relating to objectivity and neutrality of laws and legal processes, but may at the same time, quite legitimately, rely on Indigenous understandings of what objectivity and neutrality mean and require in the context of law and social relations, in order to support the revitalization of Indigenous legal traditions.[172] As Christie points out, the two positions are not mutually exclusive, and both approaches may sometimes be required:[173]

> Indigenous scholars can work from platforms that afford unique and insightful windows into legal phenomena. They also have the need to defend their nations from the continuing encounter with the West, a task that may press them into the sort of ideologically driven arguments and assumptions that historically marked much legal 'theorising' in the West. Waging the second sort of struggle – which may necessitate employing tools that come with their own histories in the West – does not preclude struggles of the first sort – which may include projects built around Indigenous notions of truth, wisdom, meaning and understanding.

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[170] Christie, "Indigenous Legal Theory", *supra* note 137 at 213.

[171] *Ibid.* at 215-218.

[172] *Ibid.* at 217.

[173] *Ibid.* at 221.

Indigenous legal scholars such as John Borrows, Val Napoleon, and Robert Williams Jr., demonstrate ways in which non-Indigenous theoretical tools may be put to use safely and fruitfully.

In *Canada's Indigenous Constitution*, Borrows explicitly draws on non-Indigenous theoretical tools, in particular, building on strands of legal pluralism.[174] In an extended example that illustrates the broad themes of the book, Borrows considers the possibility for an approach to constitutional law that draws on both Canadian state law and Indigenous law.[175] It should be noted that Borrows does not seek to step outside the Canadian legal system but instead forcefully argues that system, as it stands, is incomplete. Therefore, the central argument of *Canada's Indigenous Constitution* is not that law ought to be rejected as a mechanism for governing relationships within Canadian society, rather that the rule of law can, in fact, be strengthened in Canada if Indigenous legal traditions are recognized as a source of Canadian law.[176] Borrows incorporates ideas from law and anthropology literature to construct a pluralist framework for his analysis.[177] This allows Borrows to situate Indigenous legal traditions "within interpretive communities in which those who are affected by them are able to participate in their continued construction".[178] This is an important theoretical turn because one of Borrows' key arguments in *Canada's Indigenous Constitution* is that Indigenous and non-Indigenous legal traditions in Canada may be strengthened if interpretive legal

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[174] Borrows, *Canada's Indigenous Constitution*, *supra* note 66 at 8.

[175] *Ibid.* at 239-270,

[176] *Ibid.* at 6-7.

[177] *Ibid.* at 9-11.

[178] *Ibid.* at 10.

communities are widened through more people engaging with Indigenous norms.[179] An excellent example of the way that Borrows uses aspects of non-Indigenous legal theory is his exploration of the ways in which Anishinabek legal traditions could "stand beside the Canadian Constitution to organize and structure society's relationships", which relies heavily on legal pluralist theories at the same time as, clearly, being rooted in the culture and experiences of the Anishinabek community.[180]

Indigenous legal scholar Val Napoleon also makes use of the 'resources', as she describes them, which are provided by non-Indigenous legal theories as she begins to articulate a Gitksan theory of law in her PhD dissertation.[181] In particular, she finds some helpful conceptual tools within the positivist legal theory of H.L.A. Hart and the work of Lon Fuller.[182] Napoleon draws comparisons between Hart's model of primary and secondary rules and identifiable categories of Gitksan law.[183] She suggests that Gitksan legal processes also "fulfill Hart's characterization of the rules of obligation because people were acting on a belief that the rules are necessary to the maintenance of social life, and may require sacrifice or renunciation".[184] Though Napoleon uses aspects of Hart's theoretical framework, she is careful to identify the "cultural-boundedness" of Hart's theories and the distinctive features of the cultural context of Gitksan law, which render inappropriate an uncritical application of those theories.[185] In that vein, Napoleon

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[179] *Ibid.*

[180] *Ibid.* at 270.

[181] Valerie Napoleon, *Ayook: Gitksan Legal Order, Law and Legal Theory* (PhD Thesis, University of Victoria, 2009) [unpublished].

[182] *Ibid*. at 245-263.

[183] *Ibid*. at 254.

[184] *Ibid*. at 255.

[185] *Ibid*. at 258-260.

is also careful to disconnect Hart's framework from the concept of a centralized state legal system.[186] In order to explore the Gitksan legal order, a decentralized, non-state legal system, Napoleon turns to Lon Fuller's theory of law as social interaction.[187] She analyses Gitksan law using Fuller's idea of law deriving from human interaction over time to conceptualize 'implicit Gitksan law' and explain how informal law becomes formalized within the Gitksan legal order and the role of human agency in this process,[188] As with her use of Hart's theories, Napoleon is careful to disconnect aspects of Fuller's theories from some of its culture-specific assumptions.[189] This enables her to extract the tools from these theories that are helpful to her analysis without taking on board features that are not applicable to Gitksan law. That is consistent with the cautious and critical approach to the use of non-Indigenous legal theories that is urged by Christie.[190]

The prominent Lumbee academic Robert Williams Jr. also makes use of both Indigenous and non-Indigenous theoretical frameworks. Williams uses the conceptual tools of Critical Race Theory (CRT) throughout his work. In particular, Williams assumes that meaning ascribed to words or terms is not stable, but rather socially constructed.[191] This non-essentialist stance in relation to language is a characteristic feature of CRT (along with a number of other critical theories). CRT, and the work of non-Indigenous theorists, has provided Williams with theoretical tools that he has used to

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[186] *Ibid.* at 244.

[187] *Ibid.* at 261-281.

[188] *Ibid.*

[189] *Ibid.* at 244.

[190] Christie, "Indigenous Legal Theory", *supra* note 137 at 215-218.

[191] See, e.g., Robert Williams Jr., "Vampires Anonymous and Critical Race Practice" (1997) 95 Michigan L. Rev. 741 and "Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law" (1989) 31 Arizona L. Rev. 237.

critique United States law and its legal discourse, which has operated to subjugate Indigenous peoples in that country.[192] Williams, however, also brings aspects of Lumbee philosophy to his CRT framework. From his Lumbee background he brings the cultural imperative to "Think independently and act for others" to his implementation of CRT. Throughout his legal research, practice, and scholarship he tries to give effect to his responsibilities to family and community.[193] So, as Christie notes, Williams' adoption of non-Indigenous theory neither removes the need for Indigenous Legal Theory, nor precludes its use:[194]

> CRT stands then as a way for Williams to intellectually deconstruct the nature of American law and policy, while living as a Lumbee requires that this be supplemented with truths that emanate from his Indian roots.

2.3(b) Theorizing Māori Law In The Context Of The Treaty Of Waitangi

I now turn to consider how Indigenous Legal Theory applies to the subject of this dissertation. The aim of this section is to sketch some parameters of a Māori legal theory that validates the legal cultures of Māori communities and the experiences that those communities have had with law in the context of the Treaty of Waitangi claims settlement process. It is not my intention to develop here a theory of Māori law that can comprehensively explain the operation of Māori legal traditions, so this section is not focused on the substantive content of Māori law. The primary concern of this section is to examine philosophical underpinnings, to suggest ways of theorizing law that are culturally and experientially grounded in the Māori community.

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[192] *Ibid.*

[193] *Ibid.*

[194] Christie, "Indigenous Legal Theory", *supra* note 137 at 222.

2.3(b)(i) Māori Philosophy of Law

A basic comprehension of the key features of the philosophy that underlies Māori legal traditions is central, however, to constructing a theoretical framework for the analysis of the development of those traditions.[195] Māori legal traditions are based around a system of tikanga ('the right/correct/just way of doing things').[196] The system of tikanga is in turn based upon a set of underlying values. These values are introduced in Chapter One and examined in more detail in Chapter Three in the context of a discussion of the operation of Māori legal traditions. The key values are identified here as guideposts for the construction of a theoretical framework that is centrally connected to Māori legal culture. There is some debate around the precise set of values that can be said to form the underlying basis of the system of tikanga and Māori legal traditions. As noted above, the following five values appear to be considered foundational by the leading scholars in this field:[197]

1. Whanaungatanga – "the centrality of relationships to Māori life";[198]
2. Manaakitanga – "nurturing relationships, looking after people, and being very careful how others are treated";[199]

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[195] See Ani Mikaere, "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato L. Rev. 125. Though in a slightly different context, see also Marsden, *supra* note 58 at 22-23.

[196] It should be noted that tikanga is not equivalent to customary law, though the two concepts share many characteristics. It is not a definite set of rules that apply to discrete areas of social life, rather tikanga operates in all aspects of Māori life and incorporates spiritual, cultural, and practical aspects which are beyond a strictly legal domain. See Jackson, *He Whaipaanga Hou*, *supra* note 64 at 43.

[197] See *supra* note 2.

[198] J. Williams, *supra* note 2.

[199] Mead, *supra* note 2 at 29.

3. Mana – "the importance of spiritually sanctioned authority and the limits on Māori leadership";[200]
4. Tapu – "respect for the spiritual character of all things";[201]
5. Utu – "the principle of balance and reciprocity".[202]

As a whole, these values reflect the importance of recognizing and reinforcing the interconnectedness of all living things and maintaining balance within communities.[203] This also recalls the importance of whakapapa as an organizing principle within Māori society.[204]

In developing theoretical models for the study of law, which are appropriately grounded in Māori community life, we can draw some guidance from Māori scholars from the wider social sciences. Ngāti Awa leader, and scholar of Māori language and culture, Hirini Moko Mead has suggested a tikanga framework, which can be applied to any given set of circumstances to ascertain a viewpoint or a position that is grounded in Māori philosophy and reflects the core values of the system of tikanga.[205] Mead may be thinking of tikanga as a broader cultural system, rather than strictly a legal system, but the framework he suggests provides clear direction for the development of theories that seek to address Māori legal traditions. In part, this reflects the fact that tikanga Māori includes social as well as legal norms. Tikanga includes community-backed sanctions for actions that cause serious imbalance, but also "includes approaches or ways of doing

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[200] J. Williams, *supra* note 2.

[201] *Ibid.*

[202] *Ibid.*

[203] Mikaere, "The Treaty of Waitangi and Recognition of Tikanga Māori", *supra* note 27 at 332.

[204] See 'Part One: Methodology', above.

[205] Mead, *supra* note 2 at 336.

things which would be considered to be morally appropriate, courteous or advisable, but which are not rules that entail punitive sanctions when broken."[206] For example, as the New Zealand Law Commission noted in its 2001 study paper, *Māori Custom and Values in New Zealand Law,* tikanga dictates that one should purify oneself with water following proximity to death, but there is no legal sanction for failure to do so.[207] Neither are there the same divisions within law that are a part of common law traditions. There is, for example, no distinction between criminal and civil law within tikanga Māori, because all "offences" are understood to upset the balance of the same basic social/religious/legal order.[208] In any case, Mead's framework, in effect, outlines general concepts and normative principles within Māori law, points to a coherent total picture of law as understood within a Māori worldview and indicates, at least aspects of, the general workings of law, which are recognizable as some of the areas that one might expect a legal theory to address.[209]

According to Mead's framework, the basic purpose of the system of tikanga is to maintain balance, particularly where tapu may have been affected.[210] An illustration of the way in which the overall objective of maintaining balance in these crucial areas of life drives the development of Māori legal processes can be seen in the ritualized confiscation (and sometimes destruction) of property as compensation for an offence, known as

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[206] David Williams "He Aha Te Tikanga Māori", revised draft as at 10 November 1998 of Joe Williams, [unpublished] cited in New Zealand Law Commission, *Māori Custom and Values, supra* note 2 at 16.

[207] New Zealand Law Commission, *Māori Custom and Values, supra* note 2 at 17.

[208] Jackson, *He Whaipaanga Hou*, *supra* note 64.

[209] William L. Twining, *Globalisation and Legal Theory*, (Evanston, Ill.: Northwestern University Press, 2001) at 242.

[210] Mead, *supra* note 2 at 337-338. See also, John Patterson, *Exploring Māori Values*, (Palmerston North, N.Z.: Dunmore Press, 1992) at 17-45 [Patterson, *Exploring Māori Values*].

'muru'. An eyewitness account of a relatively large-scale muru, which took place in the late nineteenth century, serves as an example of this process.[211] In that case, the offence occurred when a young couple eloped, despite the relationship being adulterous according to the practices of their communities. Both the young man and the young woman who eloped were of high rank, which elevated the seriousness of the situation. Under tikanga Māori, those affected by the couple's actions were not simply the wronged partners and immediate families, but included the communities of all involved. Likewise, it was not only the young man who was seen to be responsible for the offence, but his entire community. The process for restoring balance among the parties, therefore, must offer some form of restitution to the communities that were wronged. In this instance, the appropriate course of action was a ritualized confiscation and destruction of the property of the young man's community. All the affected communities were entitled to take property as compensation. Once the appropriate compensation had been made, balance was deemed to have been restored, the previously existing marriage and betrothal were annulled, and the young couple's marriage, originally in breach of tikanga, was deemed to have been confirmed in accordance with the community's law.

Mead's framework suggests that Māori legal traditions develop by Māori communities determining the most appropriate mechanisms for maintaining balance and redressing imbalance when it occurs. Such determinations may be made by reference to various sources of law including models previously developed, and the key underlying values referred to above. The example of the ritualized confiscation, or the muru, referred to above may be an extreme case, but it does demonstrate the way in which the

[211] A Taranaki Veteran, "The Great Muru" (1919) 28 Jnl. Polynesian Soc. 97.

process addresses the central values of tikanga Māori. The sense of reciprocity and restoring balance that is integral to the concept of utu is perhaps most obvious. But one can see too the importance of assessing the seriousness of the breach of tapu and/or the offence to mana. Whanaungatanga also plays a role in regulating this process, because muru is primarily a process for dealing with disputes amongst close kin. Avoiding full-scale conflict is most important when all parties are related. Without those kinship connections, a serious offence would almost certainly lead to some form of physical conflict.

The use of precedent as a source of tikanga indicates that Mead's framework, though based in cultural values, also uses community experience as a point of reference. This is consistent with the view of Māori legal traditions that has been expressed by Moana Jackson.[212] Jackson sees the philosophy of Māori law being sourced, not only within the basic values of Māori culture, but also within the histories and the lived experiences of Māori communities:

> The Māori philosophy of law, te māramatanga o ngā tikanga, was sourced in the beginning. From the kete of Tāne[213] it was handed down through the precedent and practice of ancestors. Like an intricate tāniko pattern,[214] it was interwoven with the reality of kinship relations and the ideal of balance for those within such relationships. It provided sanctions against the commission of hara or wrongs which upset that balance, and it established rules for negotiation and agreement between whānau, hapū, and iwi.[215] It formulated a clear set of rights which individuals could

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[212] Moana Jackson, "Criminality and the Exclusion of Māori" (1990) 20 Victoria U. Wellington L. Rev. 23. See also, John Patterson, *People of the Land: A Pacific Philosophy*, (Palmerston North, N.Z.: Dunmore Press, 2000) at 13-24 [Patterson, *People of the Land*].

[213] The 'kete of Tāne' refers to the baskets of knowledge said to have been brought to the world of humankind by the god Tāne. These baskets form the basis of Māori systems of knowledge.

[214] 'Tāniko' is a traditional Māori weaving technique.

[215] 'Whānau', 'hapū', and 'iwi' are the basic units of Māori social organization, often translated as 'family', 'sub-tribe', and 'tribe' respectively. See further discussion of these concepts and their implications for the operation of Māori legal traditions in Chapter 3, below.

> exercise in the context of their responsibility to the collective. It also laid down clear procedures for the mediation of disputes and for adaptation to new and different circumstances. [216]

The work of Jackson, and other Māori legal scholars,[217] suggests that it is vitally important to look to conceptual frameworks from within Māori society in general, and Māori legal traditions in particular, when seeking to explore, understand, and explain those traditions. That is, it is necessary to deploy Māori philosophical and conceptual tools to examine and explain Māori law.

Jackson's recent discussion of a Māori form of title, the rights and obligations in relation to the land that stem from Māori legal traditions, provides a useful illustration of this point. For the purposes of this chapter, what is significant about the description that follows is not the particular substance of this 'tipuna title'. Rather, of greater interest at this juncture are the conceptual tools that Jackson calls upon to articulate this form of title. As articulated by Jackson below, 'tipuna title' really only makes sense when it is understood in the context of the Māori world. The basis of the title stems from forms of social organization such as the whānau/family, hapū/sub-tribe, and iwi/tribe. Whakapapa is determinative of rights and responsibilities as it structures the networks of relationships between people and the natural world. Jackson reinforces the importance of these kin-based relationships by using the word/concept 'tipuna', or 'ancestor' to describe this form of title. Māori forms of personal, collective, and political authority, expressed in the

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[216] Jackson, "The Treaty and the Word", *supra* note 27.

[217] See e.g. Ani Mikaere, "Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Māori" (2005) 8 Y.B.N.Z. Juris 134.

concepts of mana and rangatiratanga, are also central to the nature of this title.[218] Jackson also draws on Māori approaches to conceptualizing the natural environment in this explanation when he explicitly sets the term whenua/land within the context of a relationship with people and the identity of Indigenous communities/tangata whenua (literally 'people of the land').

Jackson's explanation of 'tipuna title' is as follows:

> Tipuna title may be described as the physical and spiritual interests that collectively vested in Iwi or Hapū as part of their mana or rangatiratanga in regard to the whenua. It is a title that exists within what may be termed "relational interests", that is the interests that inhered in the relationships of a particular whakapapa and the willingness of our people to develop existing or potential relationships with others. [219]

It is an absolute title in the sense that rangatiratanga and whakapapa create inalienable ties to the land. Being tangata whenua implies having whenua to be tangata upon, and "tipuna title" presupposes a continuing authority in relation to it.

This explanation highlights the importance of using concepts from within Māori legal traditions as points of reference. Jackson is careful to explain that while this title may have similar features to property rights that arise out of common law traditions,[220] tīpuna title derives from a quite different "cultural and legal paradigm".[221] Tipuna title is sourced in whakapapa, that is, a network of kinship connections. The rights and

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[218] For further discussion on Māori concepts of leadership and authority, see Api Mahuika, "Leadership: Inherited and Achieved" in Michael King, ed., *Te Ao Hurihuri: Aspects of Māoritanga*, (Auckland, N.Z.: Reed Books, 1992), 42.

[219] Moana Jackson, "Tipuna Title as a Tikanga Construct re: the Foreshore and Seabed" (March 2010), online: Peace Movement Aotearoa < http://www.converge.org.nz/pma/mjtipuna.htm> [Jackson, "Tipuna Title"].

[220] For example, the common law concept of 'fee tail' or 'entail' has some similar characteristics to Jackson's 'tipuna title' in that it is inalienable and maintains the kin group's land holding, but it is based on the values and imperatives of English feudal society, and must be understood in that context.

[221] Jackson, "Tipuna Title", *supra* note 218.

entitlements associated with tipuna title are, therefore, also defined by whakapapa. Individual rights to land exist within this framework, though they are ultimately relational, constrained by collective interests and obligations to the land itself. This framework also allows for various use rights to be allocated to others outside of the kin group. For example, Jackson notes that within the Ngāti Kahungunu community "a notion of kauhanga or "passageways" developed as the means to facilitate access by others on approved and negotiated terms".[222] However, because the tipuna title depends on whakapapa, it can never be permanently alienated. The exercise of rights that derive from tipuna title may be affected by factors such as defeat in battle or by a group member moving away from the area, but the notional title is based on the genealogical connection to the land and would not, therefore, be extinguished.[223]

The basic conceptual framework of Māori legal traditions, as outlined by Mead, Jackson, Mikaere, and others, is used as the theoretical foundation of the discussions that are engaged in this dissertation. Within this framework, Māori legal traditions must be understood as part of Māori culture, reflecting Māori systems of social organization and political authority, aimed at reinforcing values that stem from a Māori worldview. I take the view that concepts from within Māori philosophies ought to underlie any discussion of Māori legal issues. Mana, utu, tapu/noa, whanaungatanga, and manaakitanga, are used as theoretical guideposts within this research. These concepts drive the development of Māori legal traditions and they frame, therefore, the analysis of the changes to Māori legal traditions that are explored in this dissertation.

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[222] *Ibid.*

[223] *Ibid.*

2.3(b)(ii) Theoretical Implications of the Treaty of Waitangi

The Treaty of Waitangi establishes another important guidepost for the construction of a theoretical framework for my research.

As noted in Chapter One, the relationship between Māori and the New Zealand government is framed by the Treaty of Waitangi, which was signed in 1840 between Māori chiefs and representatives of the British Crown.[224] This instrument essentially paved the way for the introduction of a colonial government in return for British guarantees that Māori interests would be protected.[225] In the English text, the Māori chiefs cede sovereignty to the British Crown in exchange for a broad-ranging guarantee of property rights. In the Māori text, the chiefs cede a form of governmental authority (expressed as 'kāwanatanga') and retain their tino rangatiratanga (usually translated in this context as "unqualified exercise of their chieftainship").[226] While there continues to be debate about the scope of the Crown's kāwanatanga in relation to Māori tino rangatiratanga, it is clear that the Treaty envisaged a framework within which the two forms of political and legal authority would co-exist.

Issues that relate to the Treaty of Waitangi will obviously be substantively embedded within this research, which directly focuses on the Treaty of Waitangi claims

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[224] See Chapter One, above. For historical background relating to the signing of the Treaty of Waitangi, see Claudia Orange, *The Treaty of Waitangi*, 2nd ed. (Wellington, N.Z.: Bridget Williams Books, 2011).

[225] For a flavor of the scholarly discourse relating to the Treaty of Waitangi, see Michael Belgrave, Merata Kawharu and David Williams, eds., *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Melbourne: Oxford University Press, 2005) [Belgrave et al, *Waitangi Revisited*]. The Waitangi Tribunal and the ordinary courts have also given judgments on the appropriate interpretation of the Treaty and its 'principles', see e.g. *Lands case, supra* note 18; and Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, (Wellington, N.Z.: Government Printer, 1985).

[226] *Ibid.* at 391-392.

settlement process. But the Treaty also has theoretical implications for this research, primarily because the Treaty has a significant role in the way that Māori legal traditions are understood today. In the context of this research, I see the Treaty as providing an important theoretical link between Māori legal traditions and a legal pluralist framework.

The Treaty of Waitangi discourse affects the ways in which Māori law is received and applied. Ani Mikaere, a Māori legal scholar who has sought to promote a discussion of Māori law that is "free from the constraints of colonised and colonising attitudes" and "acknowledges tikanga as the first law of Aotearoa", has commented on the relevance of the Treaty to the discussion of Māori law.[227] Mikaere notes that: "Central to the discussion is the way in which the Treaty of Waitangi has been interpreted and applied since its signing in 1840. Attitudes towards tikanga Māori over time have, to a considerable extent, been mirrored by perceptions of the Treaty." [228]

The Treaty also provides an important theoretical guidepost through its expression of Māori legal norms. It reflects the cultural and experiential groundings that are critical for the development of Indigenous Legal Theory. Moana Jackson has argued that the Treaty, at least in its Māori language version, should be understood within the context of the Māori legal system:

> The Māori version of the Treaty is a reflection of the ancestral precedents and rights which were defined by Māori law. It fulfilled the form of Māori law since it was discussed by the representatives of iwi, and it both recognized and preserved the authority which they had as rangatira to sign on behalf of their people. [229]

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[227] Mikaere, "Recognition of Tikanga Māori", *supra* note 27 at 330. Though I would contend that it is specifically the legal dimensions of tikanga which comprise 'the first law of Aotearoa', this does not detract from Mikaere's basic argument.

[228] *Ibid.*

[229] Jackson, "The Treaty and the Word", *supra* note 27 at 7.

This view is similar to that expressed by John Borrows when he suggests that treaties between First Nations and the Crown in Canada were entered into within an Indigenous legal framework.[230] The Treaty can, therefore, be seen as a Māori legal mechanism, which protected Māori rights that were sourced in Māori legal traditions. It is inextricably connected to Māori communities' experiences of law in Aotearoa.

The Treaty also establishes a pluralist framework within Aotearoa. For this reason I consider that the theoretical framework of my own research ought to draw on pluralist legal theories. However, I am mindful of both the rejection of legal pluralism by advocates of Indigenous self-determination and Christie's caution to critically examine the content and application of non-Indigenous legal theories. The next section of this chapter, therefore, undertakes such a critical examination of legal pluralism.

2.3(c) Legal Pluralism

Theories of legal pluralism have played an important role in developing understanding about the different forms of law and the existence of multiple legal orders within a single political entity. Such theories have been central to the identification of Indigenous legal systems and the recognition of Indigenous law, as law, by scholars, lawyers, and, sometimes, state legal systems. Pluralist theories, by challenging legal centralism, have also contributed to the advancement of the broader project of Indigenous self-determination. Nevertheless, there are still questions about whether the framework of legal pluralism can accommodate the particular claims of Indigenous legal systems. This section considers whether legal pluralism can provide a theory of de-centralized legal

[230] John Borrows, "Ground-Rules: Indigenous Treaties in Canada and New Zealand" (2006) N.Z. Universities L. Rev. 188.

ordering which is consistent with Indigenous Legal Theory and can advance Indigenous communities' aspirations for self-determination.

In recent years, some legal pluralist theories have incorporated aspects of the conceptual framework of Critical Legal Studies, which has seen the establishment of critical legal pluralist theories. The development of critical legal pluralism, although not directly aimed at recognizing the self-determining character of Indigenous legal orders, may be able to move the legal pluralist discourse closer to being able to address the concerns of the Indigenous self-determination project. There are, however, some conceptual difficulties with the critical legal pluralist model that need to be considered in light of the objectives of the Indigenous self-determination project. At the same time it is important to retain the focus on the complex interactions between legal systems and legal subjects that the critical legal pluralists draw to our attention. If that theoretical balance can be achieved, the potential would exist to create, within the legal pluralist framework, a space for Indigenous law that is grounded in the culture and experiences of Indigenous communities and is consistent with Indigenous self-determination.

2.3(c)(i) Legal pluralism and the challenge to centralism

One of the most significant aspects of legal pluralism for Indigenous peoples has been the move away from legal centralism. This has been a key driver in the development of the legal pluralist discourse and creates a theoretical space in which Indigenous law can be recognized. However, there is considerable variation amongst the different theories of legal pluralism as to the degree to which state law is de-centered and the degree to which non-official law is recognized. In order to provide some background to the discussion of

Indigenous peoples' self-determination in the context of legal pluralism, this section briefly considers some of the general themes of the legal pluralist discourse that relate to the de-centering state law.

One relevant theme was explored by John Griffiths in an influential article published in 1986. [231] That article addresses the variations between different legal pluralist theories and identifies a distinction between 'strong' and 'weak' legal pluralism.[232] The former is concerned with the interaction between two, or more, distinct legal systems and the latter is focused on pluralism within the state legal system. Griffiths argues that there cannot be pluralism within a state legal order because, even when state law makes provision for different rules to apply to different people, this is only because the system itself has determined that those categories should be treated differently. This is really only legal diversity, not legal pluralism.[233] One cannot say that different legal mechanisms are applied to the same situation, because the 'sameness' of the situation is determined, not by any empirical measure, but instead by consideration of the legal order's own rules.[234]

Griffith's analysis, therefore, suggests that de-centering of state law must be part of any genuinely pluralist legal theory (that is, 'strong' as opposed to 'weak' legal pluralism). As discussed further below, this conceptualization is quite consistent with the self-determination objectives of Indigenous communities. Woodman agrees with Griffith that to progress the project of de-centering state law, it is necessary to address pluralism

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[231] John Griffiths, "What Is Legal Pluralism" (1986) 24 J. Legal Pluralism & Unofficial L. 1

[232] *Ibid.*

[233] *Ibid.*

[234] *Ibid.*

across, and not just within, legal orders.[235] But it does not follow that legal pluralism must always address pluralism across legal orders or that legal pluralism must necessarily advance the project of de-centering state law. Many legal pluralist theories recognize the existence of law that sits outside of the state legal system, but still maintain that state law has qualities that are distinct from other legal and normative orders. Sally Engle Merry has argued that "it is essential to see state law as fundamentally different in that it exercises the coercive power of the state and monopolizes the symbolic power associated with state authority".[236] Similarly, Boaventura de Sousa Santos recognizes that the state is not the sole source of law and that supra-state law and infra-state law operate upon and within national legal systems, but, nevertheless, these other legal orders all exist in the orbit of a central state legal order. [237] These conceptualizations of legal pluralism then, even while challenging legal centralism, do not completely de-centre state law. They certainly do not provide for the kind of de-centering of state law that would be consistent with Indigenous self-determination, as explained in the following section.

2.3(c)(ii) Indigenous self-determination and the limits of legal pluralism

While the development of legal pluralism and its challenge to legal centralism has led to wide acknowledgement that Indigenous law can be understood and recognized *as law*, this acknowledgement only goes part of the way to addressing many Indigenous peoples' concerns about the relationship between Indigenous law and state law. These concerns

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[235] Gordon R. Woodman, "Ideological Combat and Social Observation - Recent Debate about Legal Pluralism Part II: Urban Normative Fields: Concepts, Theories and Critiques" (1998) 42 J. Legal Pluralism & Unofficial Law 21 at 34.

[236] Sally Engle Merry, "Legal Pluralism" (1988) 22 Law & Society Rev. 869 at 879.

[237] Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science, and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 95.

are not limited to the recognition of Indigenous law, but can also include matters relating to Indigenous self-determination, such as the sources of legitimacy, authority, and political power within official legal systems. Reflecting on these matters in the New Zealand context, Paul Havemann has argued that legal pluralism cannot accommodate the aspirations of Indigenous self-determination simply by incorporating aspects of Indigenous law in the procedural and substantive law of the state or by adapting state institutions. [238] For those who aspire to Indigenous self-determination, Havemann argues, such adaptations are purely cosmetic, and only serve to disguise the central and oppressive role of state law.[239] Moana Jackson, someone who does aspire to Indigenous self-determination, argues that forms of legal pluralism which do not take account of the 'dialectic of colonization' cannot deliver justice for Indigenous peoples.[240] For Jackson, legal pluralist theories are not capable of addressing the aspirations of Indigenous peoples if these theories do not link "cultural and philosophical perceptions of justice and political power".[241] The legal pluralist discourse has not, historically, concentrated on such issues. However, the arguments advanced by Havemann and Jackson should not be understood as requiring scholars who are concerned with Indigenous self-determination to reject legal pluralist theories outright. Rather, these arguments suggest that not all legal pluralist theories will provide a satisfactory framework with which to address the

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[238] Paul Havemann, "Perspectives on Māori Rights and Pākehā Duties'" (1993) 1 Waikato L. Rev. 53 at 61.

[239] *Ibid.*

[240] Moana Jackson, "Justice and political power: reasserting Māori legal processes" in Kayleen M. Hazlehurst, ed., *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand* (Aldershot, Hants, England; Brookfield, VT: Avebury, 1995) 243.

[241] *Ibid.*

appropriate recognition of Indigenous law, even though some form of legal pluralism may be necessary for the appropriate recognition of non-state law.

Recent legal pluralist scholarship has moved in the direction that scholars such as Jackson suggest is necessary to address Indigenous peoples' aspirations. As discussed in the following section, the development of critical legal pluralist theories has shifted the discourse some way towards a further, and arguably more effective, de-centering of the state.

2.3(c)(iii) Critical legal pluralism's contribution to Indigenous self-determination

Critical legal pluralism re-conceptualizes the legal pluralist approach to place greater focus on the individualized construction of legal orders. Critical legal pluralist theories, therefore, look to legal subjects to consider the ways in which legal orders regulate the behaviour of individuals within societies. This emphasis on legal subjects means that there is scope to explore the types of cultural and philosophical perceptions of justice that Jackson argues are necessary to further Indigenous self-determination, although, as Jeremy Webber has pointed out, this framework does not fully account for the fundamentally social nature of the establishment of norms.[242] Nevertheless, critical legal pluralism's attention to the legal subject (and to the intersection of multiple legal orders in which that subject participates) expands the legal pluralist discourse to allow space for a project of Indigenous peoples' self-determination. This section considers critical legal pluralism's contribution to creating that theoretical space.

[242] Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall L.J. 167 [Webber].

As noted in the preceding section, although one of the basic drivers of much legal pluralist scholarship has been to challenge legal centralism and to de-centre the state legal order, some legal pluralists, such as Merry and Santos, still see state law as being distinct from other legal orders. One of the aims of the critical legal pluralists is to challenge the privileged position that state law has effectively maintained in the legal pluralist discourse.[243] Melissaris suggests that to concede that "legal pluralism exists in the shadow of an ultimate law of laws" is to undermine the whole project of legal pluralism.[244] This insistence on a genuinely non-hierarchical theory of interacting legal orders is, in itself, of assistance to the Indigenous self-determination project. It is a fundamental requirement of that project, as described by Havemann and Jackson, that Indigenous legal orders are not dependent upon, or in any way subordinate to, the state legal order.

The complete de-centering of state law is not the only aspect of critical legal pluralism that may be attractive to the advocates of Indigenous self-determination. To construct a theory of normative ordering that is truly non-hierarchical, critical legal pluralists focus on legal subjects and their ability to create legal orders.[245] Within this theoretical framework, emphasis is given to the transformative capacity of legal subjects, which "enables them to produce legal knowledge and to fashion the very structures of law that contribute to constituting their legal subjectivity."[246] Melissaris explains this

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[243] Martha-Marie Kleinhans & Roderick A. Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12 Can. J.L. & Soc. 25 at 34 [Kleinhans & Macdonald].

[244] Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13:1 Social Legal Studies 57 at 71 [Melissaris].

[245] Kleinhans & Macdonald, *supra* note 243 at 38.

[246] *Ibid.*

focus on the legal subject by reference to the role that personal narratives play in the construction of law.[247] Melissaris's explanation builds on Robert Cover's assertion that for a law to exist, those who are affected by it must have some level of commitment to it. According to Cover, 'commitment' is established by legal subjects participating in instances of legal discourse.[248] Melissaris supports Cover's assertion that such discourse must be part of the legal subject's "world- or jurisgenerative narrative".[249] However, Melissaris provides a critical legal pluralist gloss to argue that these narratives need not be shared by whole communities, but may be personal to the legal subject.[250] The recognition of the complex way in which legal subjects construct subjective legal spaces by reference to multiple normative orders suggests that critical legal pluralism may be able to take account of Indigenous perceptions of justice that underlie Indigenous legal orders in a way that other forms of legal pluralism cannot.

However, while the emphasis on the legal subject appears to provide space to address the self-determination objectives of Indigenous communities, this emphasis has been criticized for failing to adequately take account of the inherently social nature of legal orders. The next section considers some of those criticisms.

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[247] Melissaris, *supra* note 244 at 74.

[248] Cover, *supra* note 122.

[249] Melissaris, *supra* note 244 at 74.

[250] *Ibid.*

2.3(c)(iv) Webber's critique: re-centering institutions in the social construction of normative orders

Jeremy Webber has criticized the critical legal pluralists for their emphasis on the legal subject. Webber argues that critical legal pluralism goes too far because its fundamental framework places too great an emphasis on each individual's assessment of the particular norms that regulate their behaviour.[251] Institutions (state or otherwise) are therefore pushed to the margins under such a conceptualization. Webber argues that this "leaves out the hard truth that norms always involve a kind of imposition, where parties submit...to norms that would not be the ones they would choose if left to their own devices".[252] According to Webber, what critical legal pluralists are really focused on are asserted or proposed norms and the social interactions that construct those. But the establishment of norms really only takes place once these assertions of norms are settled by "some emphatically social, non-individual process".[253] In essence, Webber argues, this is the 'legal' quality of 'legal pluralism'. Law is concerned with the emergence of norms and the ways in which disagreement is managed.

Webber also argues that critical legal pluralists take the de-centering of the state too far by "treating every one of individuals' manifold normative relationships as presumptively equal, thereby definitively shifting the focus from the relationships to the individual's decision among them as the determinant of normative obligation".[254]

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[251] Webber, *supra* note 242 at 181-182.

[252] *Ibid.*

[253] *Ibid.* at 182.

[254] *Ibid.* at 189.

Webber suggests a model in which contending normative orders encounter each other and engage in a negotiation. Importantly, to understand the appropriate relationship between normative orders, one must consider the perspective from each side (for example, what type of relationship between state and Indigenous systems do each of the state and Indigenous peoples see as appropriate and/or legitimate?).[255] In the end, whether the normative order of the state or another normative order should be determinative in a particular situation should be subject to inquiry about which is best to manage the specific disagreements at issue, and as such, the legitimacy of any normative order must not be assumed but rather must always be justified.[256] It is possible that this negotiated, perspectival approach to the construction of normative ordering could be compatible with the Indigenous self-determination framework.

Webber's approach has not been universally accepted by legal pluralists. In a direct critique of Webber's argument, David Schneiderman disputes the need for a common normative order to manage disagreement.[257] Echoing Melissaris and the critical legal pluralists, Schneiderman contends that Webber's position is more akin to legal positivism than legal pluralism.[258] It may be, however, that Schneiderman is more concerned about Webber's confidence in the institutions of state law. Schneiderman acknowledges that the need for some form of common normative order is consistent with

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[255] *Ibid.* at 190. See also, James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) 99-139.

[256] Webber, *ibid.* at 189-190.

[257] David Schneiderman, "Pluralism, Disagreement, and Globalization: A Comment of Webber's Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall L.J. 199 [Schneiderman].

[258] *Ibid.* at 203.

pluralist concepts such as Moore's 'symbolic consensus'.[259] If, as Schneiderman argues, Webber's conceptualization returns state law to a central and privileged position,[260] then that conceptualization would certainly be inconsistent with the requirements of Indigenous self-determination.

However, I suggest that Webber's 'friendly critique' of critical legal pluralism is actually of assistance to the Indigenous self-determination project. Like the critical legal pluralists, Webber recognizes the complex and fluid way in which individuals, groups, and normative orders interact within the social milieu.[261] Furthermore, the Indigenous self-determination project requires not only a de-centering of state law, but also a re-centering of Indigenous legal orders. The former is certainly consistent with critical legal pluralism. The latter is more difficult to address within that framework because critical legal pluralism tends to de-center *all* legal institutions in deference to the legal subject. Webber's re-centering of the social aspect of the construction of normative orders to manage disagreement is, therefore, entirely consistent with Indigenous self-determination. Such an approach need not necessarily privilege state law. Webber explicitly recognizes that the legitimacy of any normative order (which presumably includes state law) cannot be assumed and must always be justified. So, although Webber appears to see considerable merit in the democratic institutions of state law, it does not follow that this preference translates to a re-centering of state law. New Zealand

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[259] Sally Falk Moore, *Law as Process: An Anthropological Approach* (Hamburg: LIT Verlag & James Curry, 2000) 210.

[260] Schneiderman, *supra* note 257 at 203-204.

[261] Webber, *supra* note 242 at 189-190.

legal scholar Nicole Roughan suggests a similar, deliberate approach in her model of 'legal association' that she suggests could develop in Aotearoa.[262]

Further support for this type of legal pluralism can be found in the writings of Brian Tamanaha. Tamanaha's version of legal pluralism is also helpful to the Indigenous self-determination project in that it is consistent with the type of individual agency that is evident in both Webber's conceptualization and amongst the critical legal pluralists. Tamanaha, like Webber and the critical legal pluralists, recognizes the hybridity and fluidity of groups and individuals in heterogeneous societies.[263]

Within Tamanaha's model of legal pluralism, it is clear that normative orders are not completely independent of each other. In any situation of conflict between normative orders, Tamanaha suggests that strategic actors will make strategic decisions about which legal system to invoke and how to invoke that system.[264] Critical legal pluralists might argue that it is the availability of these choices, and the inherently 'biographical' nature of the factors that lead to particular decisions, which mean that, in effect, individuals construct their own normative system reflecting their personal understanding of which norms they are obliged to follow in any given situation.[265] But Tamanaha's argument does not necessarily lead to that type of individualized construction of legal orders. On

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[262] Nicole Roughan, "The Association of State and Indigenous Law: A Case Study in 'Legal Association'", (2009) 59 U. Toronto L. J. 135.

[263] Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 Sydney L. Rev. 375 at 402-403 [Tamanaha].

[264] *Ibid.* at 406-407.

[265] Kleinhans & MacDonald, *supra* note 243 at 46.

the contrary, Tamanaha argues that the strategic choices he refers to are determined by structural factors rather than by individual characteristics or preferences.[266]

Tamanaha's conceptualization is, therefore, closer to Webber's view of legal pluralism and the role of official law in resolving conflict between clashing normative orders. In some ways, Tamanaha might be said to go further than Webber in privileging state law. The strategic choices made by strategic actors in Tamanaha's conceptualization are always made "to enlist the endorsement or support of existing *official legal systems*, to, if possible, lend legitimacy, resources and coercion to their cause".[267] This might well be construed as an unexpected re-centering of state law, which would run counter to the aims of the Indigenous self-determination project.

However, the terminology Tamanaha uses becomes highly significant in this context. Tamanaha uses the term 'official legal systems' in a way that is not equivalent to 'state law'. Certainly, state law forms part of official law and the state legal system can be considered as *one of many* official legal systems, but they are by no means the same thing. The very recognition that there are multiple official legal systems shows that Tamanaha does not equate state law with official law. There are other forms of official law that strategic actors might invoke. These official legal orders might conflict with each other as well as with non-official law. Tamanaha also warns that "one must not assume that strategic actors pursuing their aims in situations of legal pluralism will consistently invoke or support the same official legal system or normative system over

[266] Tamanaha, *supra* note 263 at 406-407.

[267] *Ibid.* at 406.

time".[268] So, while Tamanaha's conceptualization clearly privileges *official* law, it does not necessarily privilege *state* law.

2.3(c)(v) Legal Pluralism and Indigenous Legal Theory

Challenging legal centralism and the state's perceived monopoly on the creation of law has always been a key strand of the legal pluralist discourse. Nevertheless, many legal pluralist theories maintain a privileged position for the state legal order. This continued deference to state law has been one of the reasons why those scholars who seek to advance an Indigenous self-determination project have not seen legal pluralism as helpful to, or even compatible with, their aims. By shifting the focus of legal pluralist inquiry to the legal subject, critical legal pluralism provides a conceptual framework that is genuinely non-hierarchical. Such a framework has considerable potential to reconcile the Indigenous self-determination project with legal pluralist discourse. However, as Webber and Tamanaha argue, the inherent legal subjectivity of critical legal pluralism does not take sufficient account of the social process by which normative orders are constructed. This is problematic for the Indigenous self-determination project because, although it provides for the de-centering of state law, it does not provide a theoretical or analytical framework that re-centers Indigenous legal orders. Therefore, the approaches of scholars such as Webber and Tamanaha which recognize and address the role of legal subjects, as well as the role of legal institutions, in the creation of normative orders may be more consistent with the aims of Indigenous self-determination and the cultures and experiences of Indigenous communities.

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[268] *Ibid.* at 407.

2.3(d) Summary Of Legal Theory

The theoretical framework of this dissertation draws on both Indigenous Legal Theory and Legal Pluralism. Consistent with Kaupapa Māori Research methodology described earlier in this chapter, the legal theory that underlies this research recognizes the validity of concepts and ways of thinking that derive from a Māori worldview. Māori legal concepts, therefore, inform the theoretical framework. The key conceptual regulators of mana, tapu/noa, whanaungatanga, manaakitanga, and utu act as important theoretical guideposts.

The Treaty of Waitangi represents another such guidepost. The Treaty reflects a pluralist vision that provides a crucial connection between Māori legal traditions and the tools of legal pluralism. Legal pluralism has often been viewed as particularly problematic for Indigenous aspirations of self-determination. However, the kind of theoretical space that pluralists such as Webber and Tamanaha are opening may provide a sound foundation for legal pluralist tools to be used to progress Indigenous self-determination. Furthermore, Indigenous scholars such as John Borrows, Robert Williams Jr., and Val Napoleon provide instructive examples of how such tools can be used to advance particular theoretical objectives in a way that ensures the process of theorizing remains grounded in Indigenous communities.

2.4 Methodological And Theoretical Location

This chapter has set out the conceptual foundations of this dissertation by establishing the location of my research within relevant methodological and theoretical discourses. As

discussed in this chapter, Indigenous philosophical perspectives underlie both my methodological approach, based on Kaupapa Māori Research, and the theoretical framework of my research, which draws, primarily, on Indigenous Legal Theory.

The application of a Kaupapa Māori Research framework to this research suggests ways in which the Māori concepts of tino rangatiratanga, whakapapa, and pūrākau can inform the methodology. These principles of Kaupapa Māori Research frame the way in which the research is conceptualized, carried out, and communicated.

My research is also conceptually framed by the broad themes of Indigenous Legal Theory, as articulated by Gordon Christie and other Indigenous scholars, a discourse that is closely connected to critical Indigenous methodologies such as Kaupapa Māori Research. In particular, Indigenous Legal Theory, like Kaupapa Māori Research, places great importance on using conceptual tools that derive from Indigenous worldviews. Though, as explained above, the use of non-Indigenous conceptual tools is not necessarily inconsistent with Indigenous Legal Theory. Throughout this research, I employ conceptual and theoretical tools from within both Māori legal philosophy and legal pluralism.

Locating this research within a methodological framework that is based on the principles of Kaupapa Māori Research, and within a theoretical framework that engages with the Indigenous Legal Theory discourse, grounds this research in the lived experiences of Māori communities. This location provides the foundation for the analysis of the effects of the Treaty of Waitangi claims settlement process on Māori legal traditions that follows in the remaining chapters of this dissertation.

CHAPTER THREE: KAHUNGUNU & RONGOMAIWAHINE – MĀORI LEGAL TRADITIONS AT THE TURN OF THE 21ST CENTURY

Kahungunu and Rongomaiwahine

"Pāpā, lots of our stories are about rangatira - people who are chiefs or leaders, aren't they?"

"Ae, I suppose they are, e Tama."

"Tamatea was a rangatira, wasn't he?"

"Yes, he was a very great rangatira."

"And Kahungunu? Our iwi is named after him, so he must have been a great rangatira too, eh?"

"Yes, that's right."

"Pāpā, how does someone get to be a rangatira? Do they have to fight someone else to show how strong they are?"

"There are many ways you can show you have the qualities of a rangatira. Sometimes our leaders were great warriors, that is true, but that is not the only way to show strength and leadership. Our tipuna Kahungunu, for example, was well-known for being able to provide food for our people. That was partly how he convinced Rongomaiwahine's people that he was worthy of marrying her."

"Was Rongomaiwahine a rangatira too?"

"Yes. She was directly descended from Ruawharo of the waka Takitimu and also Popoto, the commander of the waka Kurahaupo. So she had whakapapa connections to

the important rangatira of both those waka. Her beauty, strength of character, and nobility were known throughout the island."

"Why do we call ourselves Ngāti Kahungunu then and not Ngāti Rongomaiwahine?"

"The people of Mahia keep the name of Ngāti Rongomaiwahine. They are descendants of Rongomaiwahine's daughters, Rapuaiterangi and Hinerauiri. These two daughters were not the children of Kahungunu. Their father was Rongomaiwahine's first husband, Tamatekutai. But, even though we use the name Ngāti Kahungunu for our iwi, we still remember the rangatiratanga of Rongomaiwahine. It is her mana that was so important in establishing the authority of our people in this part of the country. Because while Kahungungu was born and raised up north, only settling here as an adult, Rongomaiwahine lived here all her life."

"But what was so great about Kahungunu? Why did Rongomaiwahine want to marry him? How did he get to be a rangatira?"

"Well, he was from a very famous family too. And he was said to be very handsome, though Rongomaiwahine was not impressed by all the talk of what a fine man he was. He really had to show Rongomaiwahine and her people how skilled he was at gathering food. In those days, being able to provide for your people was a prized skill for a rangatira."

"So, what did he do?"

"Well, to begin with he gathered up huge quantities of fern root. It is said that he gathered so much that when he tied it together in bundles and rolled the bundles down the hill to the village, they piled up and blocked the doors to the houses."

"Whoah!"

"But that wasn't all. He also gathered huge quantities of the shellfish we call paua. More than anyone else could."

"How did he do that?"

"He closely watched the shags diving for shellfish and counted to see how long they were under the water. Then he dived for the shellfish, holding his breath as long as the seabirds had done. He filled baskets of shellfish – enough for the whole village. And when he came up from his last dive he had covered his whole body with shellfish! Rongomaiwahine's people were again greatly impressed with his talent and his generosity."

"Is that why carvings of Kahungunu often have paua shells on them?"

"Yes, that's right, e Tama. Although there is another story about Kahungunu and paua, but I'll tell you that one another time."

3.1 Introduction

This chapter provides a more detailed analysis of the underpinning concepts that provide a foundation for Māori legal traditions within the context of the wider system of tikanga. The aim of this chapter is to identify and explain the legal framework that produces and maintains Māori law. It applies the theoretical tools discussed in the previous chapter to analyze the legal dimensions of tikanga Māori.[269] This chapter will provide the foundation for the study of the changes within Māori legal systems in the specific context of the Treaty settlement process that follows in Chapters Five and Six. Accordingly, it is

[269] See Chapter Two, above.

primarily concerned with understanding tikanga as incorporating a system of law and identifying and analysing its legal dimensions.

This chapter comprises two parts. The first part provides a more detailed explanation of some of the key concepts that underlie tikanga Māori and Māori legal traditions. This part considers each of the five key concepts identified in Chapter Two as well as the closely connected concepts of rangatiratanga and kaitiakitanga that are of particular significance in the context of the Treaty of Waitangi and the claims settlement process. Examples are provided that illustrate the way in which these key conceptual regulators are applied in various social and environmental circumstances; of particular significance are the examples of the operation of these principles that have been distilled and appear in the well-known stories of Māui, a central figure in Māori mythology.

The second part focuses specifically on the operation of Māori legal traditions at the turn of the 21st century.[270] This begins with a general consideration of the ways in which Māori legal traditions regulate New Zealand public life before turning to examine two particular examples of such regulation in greater detail. The two examples are the constitution of the political party called 'The Māori Party', which aims to reflect Māori legal traditions, and the 'tikanga-based dispute resolution process' that was utilized in a 2008 treaty settlement involving significant forestry assets. Together they provide a basic overview of the operation of Māori legal traditions at the turn of the 21st century and the basis for a more detailed exploration in Chapter Five of the application of Māori legal traditions in the context of the Treaty settlement process. Building on the basic

[270] The material in the second part of this chapter is also the basis of a chapter in a recently published collection of essays. See C Jones, "Whakaeke i ngā ngaru – riding the waves: Māori legal traditions in New Zealand public life" in Lisa Ford and Tim Rowse, eds., *Between Indigenous and Settler Governance* (Oxford; New York: Routledge, 2013) 174.

outline of the system of tikanga set out in the first part of this chapter and considering the identified tensions in Māori legal history (adaptation, the relationship to the Treaty partner, and renewal), we can begin to observe in these examples the ways in which Māori legal traditions are influencing the legislative and Treaty settlement processes, and how those legal traditions are in turn being influenced by tribes' engagement with the legal and constitutional machinery of the state.

3.2 Key Concepts Underlying Māori Legal Traditions

Five central concepts were identified in Chapters One and Two that underpin Māori philosophy and can be used as thoretical guideposts in an analysis of Māori legal traditions. These are:

- whanaungatanga – the centrality of relationships to Māori life
- mana – the importance of spiritually sanctioned authority and the limits on Māori leadership
- tapu/noa – respect for the spiritual character of all things
- utu – the principle of balance and reciprocity
- manaakitanga – nurturing relationships, looking after people, and being very careful how others are treated

It is crucial to note that these values are not completely discrete and they operate within tikanga Māori to reinforce each other. In this section I consider each of these fundamental values in some detail to reveal fundamental aspects of the operation of Māori legal traditions.

3.2(a) Whanaungatanga – Relationships

Relationships are absolutely central to Māori society. They define rights and obligations between:

- individuals;
- communities;
- the individual and the collective;
- past, present, and future generations;
- people and atua (gods); and,
- people and the natural world.

Relationships are, therefore, absolutely central to Māori legal traditions and Māori legal traditions need to be understood, in part, through this relational lens.[271] Matters such as how relationships are formed, maintained, changed, and dissolved are key concerns of Māori legal traditions.

Some observations may be made about the way Māori legal traditions operate in general which illustrate the priority given to the maintenance of relationships. For example, there is significant flexibility in the application of Māori legal traditions. Although precedents and past actions are important sources of Māori law, it does not apply legal rules in the same way as the common law's principle of stare decisis requires. Precedent within Māori law is used to identify values that are important, rather than rules

[271] See Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wellington, N.Z.: Legislation Direct, 2011). Relying on evidence presented by Māori in the course of this inquiry and other research, the Tribunal identifies whanaungatanga as the defining principle that frames Māori knowledge systems and the rights and obligations that were relevant to the inquiry, see, for example, *Ko Aotearoa Tēnei* at 16-17, 35-38, 81-84, 115-118, 237 [Waitangi Tribunal, *Ko Aotearoa Tēnei*].

that ought to be followed when a particular set of facts arises. Patterson suggests that narratives of past behaviour, proverbs, and other sources of Māori law come together as an ethical system, which "provides a wide and rich range of traditional focal points, and leaves it to the good sense and mana of those involved to arrive at reasonable solutions to their problems".[272] This produces a quite different type of flexibility than that which can be identified within the common law. The common law can adapt to changing socio-cultural values, as it did, for example, in the ground-breaking Australian native title case of *Mabo v Queensland (No 2)*.[273] Nonetheless, interpreting and applying established legal rules in light of current legal principles and models of justice (perhaps informed by human rights considerations)[274] is quite different to identifying values demonstrated by ancestors and determining the best way to give expression to those values. Mead explains the role in which precedent plays in determining the appropriate tikanga for a tangihanga (funeral) ceremony.[275] Mead notes that one must recognise that the practice of tikanga may not always be a perfect expression of the values that underlie that tikanga.[276] Precedent, while an important reference point, is therefore only part of the framework for interpreting and applying tikanga. In the case of the tangihanga ceremony, the tikanga that is applied and practiced is derived from background knowledge of the community (including past practice, but also knowledge of the broader history of the community and their environment), concepts of death and relationships with the spirit world, and wider

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[272] Patterson, *Exploring Māori Values*, *supra* note 210 at 75.

[273] *Mabo v Queensland (No 2)* (1992) 175 C.L.R. 1.

[274] Kellinde Turcotte, "Why Legal Flexibility is not a Threat to either the Common Law System of England and Australia or the Civil Law System of France in the Twenty-first Century" (2005) 1 Hanse L. Rev. 190 at 191-192.

[275] Mead, *supra* note 2 at 18-19.

[276] *Ibid.* at 18-19.

principles and values that govern Māori life.[277] This approach allows for significant variation and flexibility in the tikanga of this ceremony. The flexibility of Māori law is significant for a number of reasons, one that is of particular significance is that it allows different weight to be given to various factors in deciding what the correct course of action ought to be in any given situation. Relationships can be, and often are, prioritised.[278]

Processes for making legal decisions also reflect an emphasis on relationships. The relatively low-level of executive authority that is granted to leaders within Māori society requires that relationships amongst members of the community are constantly maintained and nurtured. Law-making and dispute resolution always take place with a careful consideration of how relationships will be affected by both the process and the substantive outcome.[279] In analysing Māori legal traditions, it is always important to consider how those traditions structure relationships and what outcomes those legal traditions prescribe for the apportionment of rights and obligations within the relationships in question.

As discussed in Chapter Two above, the concept of 'whanaungatanga' encapsulates the centrality of relationships within Māori legal traditions. Marageret Mutu, Professor of Māori Studies at Auckland University, has described whanaungtanga as "[o]ne of the most fundamental values that holds any Māori community together".[280]

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[277] *Ibid.*

[278] See Nin Tomas and Khylee Quince, "Māori Disputes and their Resolution" in P. Spiller, ed., *Dispute Resolution in New Zealand* (Oxford: OUP, 1999) 205 at 207-208 [Tomas and Quince, "Māori Disputes and Their Resolution"].

[279] *Ibid.* at 212-215.

[280] McCully Matiu and Margaret Mutu, *Te* Whānau *Moana: Ngā* Kaupapa *me ngā Tikanga – Customs and Protocols* (Auckland: Reed Publishing, 2003) at 162 [Matiu and Mutu].

Grounded in genealogical connections, whanaungatanga is central to individual and community identity and the rights and obligations that are associated with that identity:[281]

> Knowledge of how one is related to everyone else within a particular community and to neighbouring hapū is fundamental to the understanding of an individual's identity within Māori society. It also determines how an individual relates to and behaves towards other individuals of that community.

The importance of relationships in terms of identity and rights and obligations is also evident in the story of how Māui was re-united with his family. Māui had been abandoned at birth and raised by one of his ancestors. When he returns to his mother and brothers many years later he asserts his identity, but his mother does not believe him until he recites the genealogical connections (whakapapa) that he heard when in the womb. The story illustrates that those kinship connections are important in establishing relationships, rights and duties.[282]

The term 'whanaungatanga' may be grounded in genealogical connections, but it is today applied to other types of relationships where reciprocal obligations apply. Eminent anthropologist Dame Joan Metge has described the way in which the root concept of 'whānau' has itself developed and acquired new meaning over the course of the twentieth century so that it is now widely applied to various types of communities and groups and no longer only those with actual blood ties. [283]

The changing nature of the concept of whānau and whanaungatanga provides a useful example of the way in which the expressions of these fundamental elements of

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[281] *Ibid.* at 163.

[282] Ministry of Justice, *He Hinatore ki te Ao Māori supra* note 65 at 22.

[283] Joan Metge, *New Growth from Old: The* Whānau *in the Modern World* (Wellington, N.Z.: Victoria University Press, 1995) at 291.

tikanga Māori change and adapt to new environmental challenges.[284] Metge has suggested that a discussion of the concept of whānau at the end of the twentieth century ought to reflect five key points:[285]

- The word whānau has not one but many meanings.
- These include some meanings which have been handed down from pre-European ancestors and many of recent development.
- One meaning – 'the whānau that comes first to mind' for most Māori – has primacy for others.
- This whānau of primary reference is a corporate group defined in the first place by descent.
- The non-traditional meanings of whānau are extensions and metaphorical applications of this primary meaning; the whānau thus identified resemble and differ from the whānau of primary reference in significant ways.

Evidence given in the Waitangi Tribunal supports this understanding of whānau and whanaungatanga. Heitia Hiha emphasized the importance of kinship, marriage, and other relationships in describing the whanaungatanga of various hapū of Ngāti Kahungunu:[286]

> We are all connected through whakapapa. Some hapu even have links to other iwi. These linkages are often made and remembered. For instance there are marriage ties between Ngāti Hinepare, Ngāti Hineuru and Tuwharetoa. However, we are all linked to Ngāti Kahungunu. Many of these interchanges resulted through whanaungatanga, relationships and close connections with other hapu.

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[284] Note that the effective application of tikanga and key conceptual regulators, such as whanaungatanga, to issues of concern to contemporary Māori communities is challenged by the ongoing effects of colonisation that have eroded Māori social structures and actively suprressed tikanga over a long period of time. However, there is an increasing recognition of the value of cultural reconnection and the recovery of Māori knowledge and tikanga and the resources that this heritage provides to construct a platform from whcih Māori can confidently face the future. See Mead, *supra* note 2 at 21-23, 233-235.

[285] *Ibid.*

[286] Waitangi Tribunal, *Te Whanganui-a-Orotu Report (Wai 55)* (Wellington, N.Z.: Department of Justice, 1995) at para 2.5.6.

A separate Waitangi Tribunal inquiry related to the operation of an urban Māori organisation. The members of this organisation were not all linked by actual genealogical connections. However, the organisation had adopted the name 'Te Whānau o Waipareira Trust'. During the course of the Waitangi Tribunal inquiry, one member of Te Whānau o Waipareira explained why the organisation had chosen to use the term and concept of whanau within their name:[287]

> We acted like a whanau. It was our actions and feelings, our wairua, which knitted us together as a whanau. We made a conscious, unified effort to protect Māori values, and nurture them in the urban environment.

3.2(b) Mana - Authority

Mana is the central concept that underlies Māori leadership and accountability. It embodies spritiually as well as democractically sanctioned authority. The Māori scholar and theologian, Māori Marsden, described this spiritual aspect as follows:[288]

> Mana in its double aspect of authority and power may be defined as 'lawful permission delegated by the gods to their human agents and accompanied by the endowment of spiritual power to act on their behalf and in accordance with their revealed will'. This delegation of authority is shown in dynamic signs or works of power.

The concept also includes notions of influence, prestige, power, force and vitality. The term dervies from an ancient Oceanic concept of mana which was used to describe supernatural power.[289] A description of the concept of mana in the context of rights and

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[287] Waitangi Tribunal, *Te Whānau o Waipareira Report (Wai 414)* (Wellington, N.Z.: GP Publications, 1998) at 42 [Waitangi Tribunal, *Te Whānau o Waipareira Report*].

[288] Marsden, *supra* note 58 at 4.

[289] Te Mātāhauariki Research Institute, *Te Mātāpunenga: A compendium of references to the concepts and institutions of Māori customary law,* draft, (June 2007) [unpublished] [*Te Mātāpunenga*].

obligations in relation to the Mohaka River is set out in evidence given by members of the tribal group Ngāti Pahauwera in their Waitangi Tribunal claim:[290]

> The control of the river has been our mana from way back. It came from our ancestors and down through the generations. Even though these things have been taken, we stand firm (in our belief). Tawhirirangi is the mountain, Mohaka is the river, etc, etc. Our ancestors discovered the mana. They found the mana in the hills, in the rivers, and that is why we battle for their return . . . Tino Rangatiratanga can be understood as meaning 'full authority, status, and prestige with regard to their possessions and interests'. Mana is the personalisation of that authority. [Mana] is the psychic force within us. What is the essential element of mana? To us, it is not us. We say that it is the culmination of the story of the river. To me our mana is derived from the river. Without that heritage of the river we are nobody. To us the river is spiritual in all things. People go and talk to the river.

There are many different types of mana. Māori linguist Margaret Mutu has categorised the different types of mana that she has identified as relevant to her people, Te Whanau Moana:[291]

> Mana atua – is the very sacred power of the gods which is given to those persons who conform to sacred ritual and principles.
>
> Mana tupuna – is authority and power handed down through chiefly lineage.
>
> Mana whenua – is the mana that the gods planted with Pāpā-tua-nuku (Mother Earth) to give her the power to produce the bounties of nature. A person or tribe who 'possesses' land is said to hold or be the mana whenua of the area and hence has the power and authority to produce a livelihood for the family and the tribe from this land and its natural resources.
>
> Mana tangata – is the power acquired by an individual according to his or her ability and effort to develop skills and to gain knowledge in particular areas.
>
> Mana moana – is the equivalent of mana whenua as it applies to the sea and its reources. The two forms of mana overlap considerably since the

[290] Waitangi Tribunal, *Report on the Mohaka* River (Wellington, N.Z.: Department of Justice, 1992) 18-19.

[291] Matiu and Mutu, *supra* note 280 at 156-157.

> land is considered to extend well into the sea, while the sea's effects impinge some distance inland.

The different types of mana are extremely important for maintaining a relatively low level of executive authority in Māori leaders and a relatively high level of accountability of leaders to the community. In particular, the concept of mana tangata requires that leaders must continually demonstrate the qualities of leadership and their position as a leader can never be taken for granted. Māori leaders traditionally did not command obedience but rather needed to persuade. Many of the Indigenous peoples of North America also have similarly decentralized structures of leadership and authority.[292] This not only affected the substance of decisions made but meant that the decision-making process needed to be one which had legitimacy and one in which people felt that their voice had been heard.[293] Eddie Taihakurei Durie has pointed out that mana is therefore both ascribed and achieved:[294]

> Mana tupuna expressed the basic ideology that all things came from ancestors, land rights, status, authority, kinship, knowledge, ability, etc. Mana was usually presented as ascribed but ascription was usually retrospective to validate achievement ('he is brave, caring, etc for he is the descendant of so and so') so that in practice, mana was both ascribed and achieved.

Anthropologist Elsdon Best described what this meant for the practical operation of Māori leadership:[295]

> He [the Māori individual] ever held his high-born cheiftains in esteem, so long as they conducted themselves in an able, unselfish, and conscientious manner. Should they fail, however, to uphold the standard demanded by

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[292] Borrows, *Canada's Indigenous Constitution, supra* note 66 at 46-51.

[293] Tomas and Quince, "Māori Disputes and Their Resolution" *supra* note 278 at 212-215.

[294] E.T. Durie, *Custom Law,* (1994) [unpublished, paper prepared for Waitangi Tribunal members and later referred to the Law Commission] at 8.

[295] Elsdon Best, *Social Usages of the Māori* (Wellington, N.Z.: Maoriland Worker Printing and Publishing, 1918) at 9.

> the people, then their influence waned, and others were elevated to such positions. At the same time, the Māori, in many ways was a democrat. Every freeman, and woman, had a right to public speech in the arrangement of any matters connected with the family group, the clan, or the tribe. Chiefs would lay proposals before the tribe or clan, and the latter would accept or reject them. The chief would not, indeed, could not, command the people to act on his own initiative.

The demi-god Māui was the archetype of a Māori leader that established his position through ability, irrespective of his place in the family. Māui was the youngest of five brothers and, all other things being equal, the expectation would have been that his elder brothers would take up positions of leadership ahead of him. However, Māui showed resourcefulness, imagination, and creativity demonstrating that he was a much more capable leader than his brothers. Consequently, the elders who held special knowledge and expertise identified him as someone worthy to pass such knowledge to and by his actions Māui takes on important leadership roles. The Māui story cycle reminds us that, no matter what one's family position, mana and the authority to lead can be determined by one's own actions and abilities.[296]

3.2(b)(i) Rangatiratanga

Closely connected to mana, the concept of 'rangatiratanga' is also of central importance in Māori understandings of leadership and authority. The word literally means 'chieftainship', with the root word being 'rangatira', which is usually translated as 'chief'. The suffix '-tanga' indicates that the concept is referring to those matters associated with the chief – 'chieftainship' or 'chiefly authority'.

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[296] Ministry of Justice, *Hinatore ki te Ao Māori*, *supra* note 65 at 22.

The term has particular resonance in the context of the Treaty of Waitangi because of the Article II guarantee of tino rangatiratanga, as noted above.[297] Hugh Kawharu provided a modern English translation of the Māori text of the Treaty of Waitangi, which has subsequently become the orthodox translation. He translates the Article II guarantee of tino rangatiratanga as "unqualified exercise of [Māori] chieftainship".[298] Kawharu also provided some suggestion of the way in which rangatiratanga would have been understood by Māori in 1840 at the signing of the Treaty of Waitangi: [299]

> At its most general, rangatiratanga (being derived from 'rangatira': chief) means evidence of breeding and greatness'. Here, 'breeding and greatness' allude to the two main criteria for leadership: primogeniture (generally male) and proven ability. 'Evidence', for its part, turns on the concept of 'mana'. Mana is the power and authority that is endowed by the gods to human beings to enable them to achieve their potential, indeed to excel, and, where appropriate, to lead. It is in the nature of a spiritual contract mediated by the priest, chiefs, and elders of a tribal group between an individual member of the group and their deities. What is looked for, then, in a rangatira is evidence of a working out of a high order of spiritually sanctioned power and authority.

The different strands of mana described above provide inherent limitations to the authority of rangatira or leaders. Māori politician Shane Jones has noted:[300]

> Inherent in the Māori conception of power is the notion that the agent who uses it in an unprincipled manner will lose it. Authority which is exercised beyond the value framework is not rangatiratanga.

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[297] The addition of 'tino' operates as an intensifier of the base concept of 'rangatiratanga'.

[298] I.H. Kawharu, ed., *Waitangi: Māori And Pakeha Perspectives Of The Treaty Of Waitangi* (Auckland: OUP, 1989) 319-321.

[299] I. H. Kawharu, *Introduction,* in I.H. Kawharu, ed., *Waitangi: Māori And Pakeha Perspectives Of The Treaty Of Waitangi* (Auckland: OUP, 1989) x-xxii, xix.

[300] S Jones, "Consultation with Tangata Whenua" (1992) [unpublished] at 6, cited in Nin Tomas, *Key Concepts of Tikanga Māori (Māori Custom Law) in Tai Tokerau past and present* (PhD Thesis, University of Auckland, 2006) [unpublished] at 95.

'Rangatiratanga' then can be seen to reflect the autonomy and self-determination of the community itself, rather than the absolute authority of an individual leader.[301]

3.2(c) Manaakitanga and Kaitiakitanga - Nurturing and Stewardship

Manaakitanga and kaitiakitanga reflect the importance of nurturing and the responsibility of looking after those in your care. They are distinct concepts – kaitiakitanga embodies the ethic of stewardship and guardianship (particularly in relation to the natural environment), whereas manaakitanga encompasses selflessness and generosity and is often used to express the type of responsibilities that a host has to his or her guest. When identifying the fundamental conceptual regulators that underpin tikanga Māori, some scholars have chosen manaakitanga as the overarching value while others have opted to use kaitiakitanga instead. Though closely connected, the terms are not synonyms. The distinctive elements of each have particular relevance to the consideration in this chapter of tikanga at the turn of the 21st century and so I address these two concepts together in this section.

3.2(c)(i) Manaakitanga

Manaakitanga is based around the root word 'manaaki'. 'Manaaki' itself is formed from the words 'mana' and 'aki'. A detailed explanation of the concept of 'mana' (authority and prestige) is explained above while 'aki' is a Proto-Polynesian word which, although

[301] See, for example, the comments of missionary Octavius Hadfield in *Native Tenure: Opinions of Various Authorities* (1861) AJHR, E No. 1, Appendix A. at 9: 'The Chief of the tribe, since he has no absolute right over the territory of the various *hapu*, nor over the lands of individual freeman of his own *hapu*, cannot sell any lands but his own. . . nor can he do so in opposition to the opinion of the Chiefs of the *hapu* of the tribe, if they consider the territory, and thus the independence of the tribe impaired by doing so.'

no longer used this way in modern Māori, conveyed the sense of reciprocal action. This suggests that "the giving and acceptance of kindness and hospitality bestows mana on both host and guest".[302]

Hirini Mead explains the way in which key principles such as manaakitanga have retained their relevance in contemporary Māori life:[303]

> All tikanga are underpinned by the high value placed upon manaakitanga – nurturing relationships, looking after people, and being very careful about how others are treated. Thus in the tikanga of muru . . . for the groups of people who come to take away the heirlooms, goods, products of the land, sea and forest, the animals and, in fact, anything moveable, the value of manaakitanga still holds: that is, the principle or standard of behaviour must remain in place. These people are given a meal and are allowed to leave in peace . . . Aroha is an esential part of manaakitanga and is an expected dimension of whanaungatanga. It cannot be stressed enough that manaakitanga is always important no matter what the circumstances might be.

The importance of manaakitanga can also be seen in the Māui story cycle. In a number of the stories about him, Māui builds close relationships with various of his ancestors. Although sometimes ultimately exhibiting deceitfulness and a trickster's nature,[304] Māui, at least initially, builds these relationships on the basis of trust, respect, and manaakitanga. Reciprocal relationships are established in which Māui provides care and support for his elders and, importantly, demonstrates his intelligence and ability. His ancestors also provide support to Māui and, in seeing his ability, identify him as someone to whom they can pass on sacred knowledge and/or powerful and magical objects and

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[302] *Te Mātāpunenga*, *supra* note 289.

[303] Mead, *supra* note 2 at 29.

[304] For example, in one well-known story Māui tricks his ancestress, Mahuika, the keeper of fire, into giving him nearly all her magical and treasured supply of fire.

tools. Māui is then able to achieve fantastic feats because of what he has gained from the reciprocal relationships built upon manaakitanga. [305]

3.2(c)(ii) Kaitiakitanga

The way in which kaitiakitanga is currently used has quite recent origins even though the root word, kaitiaki (guardian), is clearly a traditional concept with a long history. Kaitiakitanga has become a central concept in environmental law to express the Māori interest in resource management decisions.

Early documented uses of the term suggest that a kaitiaki commonly took the form, not of a living individual, but perhaps in the form of an ancestor, an animal, or even a supernatural being.

A letter to the editor in a Māori newspaper from the turn of the twentieth century referred to the kaitiaki of the headland at Te Uruti. In this context, kaitiaki referred to the guardians of the headland, who took the form of tipua [supernatural beings]: "I still live on that headland now . . . The *tipua* which live on the outskirts of Uruti are *kaitiaki* [guardians] that descend from crayfish, they are called Turuawahine, they are female and are ancestors of Ngai-Teao [the local people], I am their descedant."[306]

The writer and historian James Cowan in 1903 recounted an earlier interview with the prominent Māori leader Te Heuheu in which Te Heuheu desribes an atua or god as his kaitiaki: [307]

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[305] Ministry of Justice, *Hinatore ki te Ao Māori*, *supra* note 65 at 24.

[306] A. Harawira, (letter to the editor) *Te Puke Ki Hikurangi* Vol. 5, No. 15, 3 (30 January 1903).

[307] James Cowan, "The Gods of the Māori: Some Curious Beliefs" *Otago Witness* (23 December 1903).

> The saying of my family is, 'Ko Rongomai te atua, ko Te heuheu te tangata' (Rongomai is the god, Te heuheu is the man). He is a good god, a guardian atua. His aria (form) is a star; in the olden days it was a shooting star. Rongomai still appears on occasions of great importance. He has accompanied me on my travels at night. . . He is my kai-tiaki (guardian).

Māori Marsden, who later provided scholarship on the application of the concept of kaitiakitanga to resource management law, described the concept of a kaitiaki as follows: [308]

> The ancient ones (*tawhito*), the spiritual sons and daughters of Rangi and papa were the '*Kaitiaki*' or guardians. Tāne was the Kaitiaki of the forest; Tangaroa of the sea; Rongo of herbs and root crops; Hine Nui Te Pō of the portals of death and so on. Different *tawhito* had oversight of the various departments of nature. And whilst man could harvest those resources they were duty bound to thank and propitiate the guardians of those resources. Thus Māori made ritual acts of propitiation before embarking upon hunting, fishing, digging root crops, cutting down trees and other pursuits of a similar nature.

More recently 'kaitiakitanga' has taken on a specific statutory meaning through its use in the Resource Management Act 1991. The details of this legislation are not relevant to the present discussion, but it should be noted that the Resource Management Act was a major consolidation and, to some extent, a restructuing of environmental and planning law in New Zealand. The Act requires that all those exercising powers and functions under the legislation must have particular regard to a number of matters, one of which is 'kaitiakitanga'. The current statutory formulation of 'kaitiakitanga' is "the exercise of guardianship by the tangata whenua [local people, literally 'people of the land'] of an area in accordance with tikanga Māori [Māori law and practice] in relation to natural and physical resources; and includes the ethic of stewardship."[309]

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[308] Marsden, *supra* note 58 at 67.

[309] Resource Management Act of 1991 (New Zealand) s 2.

The Waitangi Tribunal's recent report, *Ko Aotearoa Tenei* ['This is Aotearoa/New Zealand'], uses the concept of kaitiakitanga to underpin its analysis of the range of law and policy affecting Māori culture and identity. The Tribunal suggests that kaitiakitanga is "an intergenerational obligation that arises by virtue of kin relationship".[310] This kin relationship may be between people or between people and natural resources and it supplements the idea of 'guardianship' with "a core spiritual dimension that animates the concept".[311] The close connection between kaitiakitanga and concepts such as mana and rangatiratanga is illustrated by the following statement in the Waitangi Tribunal's report:[312]

> In the human realm, those who have *mana* (or, to use Treaty terminology, *rangatiratanga*) must exercise it in accordance with the values of kaitiakitanga – to act unselfishly, with right mind and heart, and with proper procedure. Mana and kaitiakitanga go together as right and responsibility, and that kaitiakitanga responsibility can be understood not only as a cultural principle, but as a system of law.

Margaret Mutu also sees a strong connection between mana and kaitiakitanga. Her description of kaitiakitanga also reflects the way in which this ethic of guardianship has its roots in the natural and spiritual world but, in a contemporary context at least, imposes obligations on current generations:[313]

> Kaitiakitanga is the role played by kaitiaki. Traditionally, kaitiaki are the many spiritual assistants of the gods, including the spirits of deceased ancestors, who were the spiritual minders of the elements of the natural world. . . In Māori cultural terms, all the natural, physical elements of the world are related to one another, and each is controlled and directed by the numerous spiritual assitants of the gods. . . These spiritual assistants often

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[310] See Waitangi Tribunal, *Ko Aotearoa Tēnei*, *supra* note 271.

[311] *Ibid.*

[312] *Ibid.* at 23.

[313] Matiu and Mutu, *supra* note 280 at 166-168.

> manifest themselves in physical forms such as fish, animals, trees or reptiles. . . Each kaitiaki is imbued with mana. . . There are many forms and aspects of mana, of which one is the power to sustain life.

In specific terms, each whānau or hapū is kaitiaki for the area over which they hold mana whenua, that is, their ancestral lands and seas. Should they fail to carry out their kaitiakitanga duties adequately, not only will mana be removed, but harm will come to the members of the whānau and hapū.

3.2(d) Tapu and Noa – Recognition of the Spiritual Dimension

Tapu and noa are complementary opposites and are both central to the operation of Māori legal traditions. The concept of tapu recognises the spiritual quality of all things and the the associated restrictions and regulation which necessarily relates to the spiritual dimension. Noa, on the other hand, suggests a freedom from such restriction and is often used in the context of processes which normalise or make safe interaction with things which would otherwise be restricted. Settlers and anthropologists have often identified tapu as the key mechanism of Māori law, though tapu has religious and socio-political aspects as well as strictly legal dimensions. The theologian Māori Marsden has described the concept as follows:[314]

> The Māori idea of tapu is close to the Jewish idea translated in the words 'sacred' and 'holy', although it does not have the later ethical connotations of the New Testament of moral righteousness. . . It has both religious and legal connotations. A person, place or thing is dedicated to a deity and by that act it is set aside or reserved for the sole use of that deity. The person or object is thus removed from the sphere of the profane and put into the sphere of the sacred. it is untouchable, no longer to be put in common use. It is this untouchable quality that is the main element in the concept of tapu. In other words, the object is sacred and any profane use is sacrilege, breaking the law of tapu. . . From a purely legal aspect, it suggests a

[314] Marsden, *supra* note 58 at 5.

> contractual relationship has been made between the individual and his deity whereby a person dedicates himself or an object to the service of a deity in return for protection against malevolent forces and the power to manipulate his environment to meet needs and demands.

The importance of the concept of noa in relation to tapu is explained by Professor Hirini Moko Mead:[315]

> Noa is often paired with tapu indicating that often noa refers to restoring a balance. A high level of tapu is regarded as dangerous. Here the role of tikanga and tohunga [skilled spiritual leaders or experts] is to reduce the level of dangerous tapu until it is noa or safe. It is not useful to think of noa as being the opposite of tapu or as the absence of tapu. This is plainly not the case. For example a person can be very tapu if one is very ill or there is bleeding and shedding of blood. Once these tapu-increasing symptoms have passed the person returns to a safe state, but still has personal tapu. The state of noa indicates that a balance has been reached, a crisis is over, health is restored and life is normal again.

Similarly, Ani Mikaere has emphasised the role of noa:[316]

> Absolutely pivotal to the effectiveness of tapu as a means of social control, was the complementary institution of noa. Just as vital as the ability to impose restrictions through the use of tapu was the ability to remove such restrictions. For the majority of people the roles and tasks of daily life led them backwards and forwards across the boundaries of tapu and noa. It was imperative that this be so, that spiritual balance be preserved.

Raymond Firth, in his book, *Economics of the New Zealand Māori*, also addresses the multi-dimensional nature of tapu:[317]

> . . . the best evaluation of it [the term tapu] is to be obtained by considering the attitude of the native towards tapu objects, as expressed in his behaviour. Any person or thing which was regarded as tapu was only to be approached or handled with caution, and under certain rigidly delimited conditions. Otherwise harm was believed to occur. For the ordinary villager, things tapu were to be avoided. Hence one can readily

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[315] Mead, *supra* note 2 at 31-32.

[316] Mikaere, *He Rukuruku Whakaaro*, *supra* note 29 at 212.

[317] Raymond Firth, *Economics of the New Zealand Māori* (Wellington, N.Z.: Government Printer, 1959) at 245-279.

> see the justification for the meaning of "prohibited" which is usually applied to the term. Moreover, a tapu object was believed to impart to any person or thing which came into contact with it the same mysterious quality, which could only be removed by ritual performances of a magical kind. So, in some circumstances, it might be regarded as having the significance of "unclean". And, on the other hand, since the tapu is thought to receive its virtue from the gods, it has come to be accepted in many cases as a synonym for "sacred". There is no need, as is sometimes done, to oppose these different meanings of the concept of tapu; they may be regarded as various aspects of the same state, now one quality and now the other receiving emphasis according to the nature and degree of the tapu under consideration. All tapu was not of the same intensity; some objects had to be treated with much greater respect than others, and the penalty for infringement was correspondingly severe.

Both the spiritual and more instrumental aspects of tapu are illustrated by the way in which tapu is addressed in the story of how Māui met his father. According to this story, Māui found his father by secretly following his mother, turning himself into a bird to disguise himself. When Māui identifies himself to his father, his father performs a blessing for Māui, but makes a mistake in the ceremony, which eventually has profound consequences for Māui.

There are two points of engagement with tapu and the spiritual dimension in this story. The first is when Māui uses a karakia (prayer or incantation) to turn himself into a bird. Although Māui is here clearly calling upon supernatural forces, he does so for quite a functional purpose. This reflects the fact that the existence and management of tapu is an ordinary and instrumental part of dealing with the spiritual dimension of all things in the natural world.

The second point of engagement with tapu in this story illustrates the consequences of a breach of tapu. When engaging with spiritual matters, it is important to ensure that the proper rituals and processes are completed. In this instance, Māui's

father does not complete the relevant ceremony correctly. This mistake has severe ramifications, costing Māui his immortality. As noted in *Hinatore ki te Ao Māori*:[318]

> This highlights that ceremonial processes have to be conducted correctly in Māori society. If they are not accurately recited then the burden is cast upon the people involved. The inevitable consequence of a mistake is misfortune and death. Projects are doomed by neglecting to use the correct forms of words without hesitation or error.

Tapu and noa therefore still play a central role in relation to the maintenance of Māori legal traditions. These concepts provide a key motivation for obediance to laws and the perceived consequences of breaching tapu act as an enforcement mechanism.[319]

3.2(e) Utu - Reciprocity

As noted in Chapter Two above, utu embodies the basic principle of reciprocity that underpins the operation of all Māori legal traditions. It is perhaps most readily evident in cases of warfare, which has no doubt led to an emphasis on ideas of 'revenge' when translated into English. Yet the principle is also clearly evident in economic transactions and the processes of gift-exchange indicating that a focus on 'revenge' is both "reductive and misleading".[320] The concept of utu relates more broadly to maintaining balance and,

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[318] Ministry of Justice, *Hinatore ki te Ao Māori*, *supra* note 65 at 23. This is not completely foreign to the common law e.g. use of oaths as a means of certifying the veracity of statements.

[319] Matiu and Mutu, *supra* note 280 at 159.

[320] Joan Metge, *Tuamaka: The Challenge of Difference in Aotearoa/New Zealand* (Auckland: Auckland University Press, 2010) at 19 [Metge, *Tuamaka*]. Note that in the general context of legal-athropological studies of tribal societies, John McLaren has pointed out that it is unhelpful to focus on the idea of 'vengeance' to explain the legal responses to torts or personal injury within those societies (though it may be an appropriate consideration in the context of what might be categorised as 'criminal matters'). See John McLaren "The Origins of Tortious Liability: Insights from Contemporary Tribal Societies" 25 U. Toronto L.J. (1975), 42.

as Hirini Mead has pointed out, reflects the emphasis on whanaungatanga and the centrality of relationships within Māori legal traditions:[321]

> utu is a response to a take [cause of action] and that once the take is admitted the aim is to reach a state of ea, which might be translated as restoring balance and thereby maintaining whanaungatanga.

Other scholars have also noted the central importance of the concept of utu in the operation of Māori legal traditions. Joan Metge describes it as "one of the most important ordering principles in traditional Māori society".[322] Pākehā philosopher John Patterson has pointed to parallels between the concept of utu and Western concepts of punishment and suggested that, while there are some similarities, the differences between the two concepts are significant:[323]

> Apart from the law of tapu, which can operate without the need of human intervention, Māori parallels to a European system of legal punishment are found in the practice of utu and in particular in the version of utu known as muru. But the parallels are approximate only. Although both punishment and utu involve a deliberate response to an offence or injury and aim to achieve retribution or repayment, they differ in important respects. Ethically speaking, punishment can be forgone, but utu cannot; punishment should be unpleasant enough to deter, but utu may be entirely friendly and welcome; punishment should be confined to offenders who have been proven guilty of intentional offences, but utu may be exacted from individuals who have done no wrong. The aims of punishment are complex and contentious, but the aim of utu can be seen as being more straightforward – utu is essentially a mechanism for restoring lost mana.

Utu is about restoring balance, not only reciprocating good gifts (food stuffs, items of clothing, tools, luxury items) but also responding to 'bad gifts' (insults, thefts, other offences.[324] Hirini Mead notes that there is not necessarily a single way of

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[321] Mead, *supra* note 2 at 31.

[322] Metge, *Tuamaka*, *supra* note 320.

[323] Patterson, *People of the Land*, *supra* note 212 at 134-135.

[324] Metge, *Tuamaka*, *supra* note 320.

responding to a gift (good or bad) but that an assessment made according to Māori legal traditions will dictate the response in any given situation. The process of muru (ritualized confiscation), which is described in more detail below, was one model for restoring balance by taking physical property in response to being wronged. Historically, gifts of land were made by communities to their allies to acknowledge their services in war.[325] Mead suggests a number of questions that may be relevant to ask in order to determine an appropriate form of utu where some breach has occurred, including:[326]

- Who is implicated in the breach?
- What was the reason for the breach? Was harm intended? Or was the intention to benefit people?
- Did those responsible for the breach assess the likely effects on others before taking action?

The goal is to reach a state of resolution where relationships are restored. Determining the course of action necessary to restore relationships will also include reference to the nature of the particular relationships at stake, the mana of those involved, the seriousness of any breach of tapu, and any precedent or past practice.[327] The appropriate response for a breach involving close kin will likely differ than the response for the same offence committed by a distant relative. One's own mana is affected by the mana of one's kin and, therefore, to impose severe penalties on close kin may also be of further detriment to the mana of the injured party, and consequently do little to restore balance. Historian Angela Ballara recounts an incident from the mid-19th century involving several close relatives from the hapū of Ngāti Uru. In this incident, Te Puhi of

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[325] Mead, *supra* note 2 at 186.

[326] *Ibid.* at 342.

[327] *Ibid.* at 343-347.

Whangaroa shot and killed a relative named Mahue. The nephew of both Te Puhi and Mahue, Young Te Puhi, took up a musket intending to kill Te Puhi [senior] for the murder, but was persuaded not to do so. Three days later, a party of 200-300 men came from a nearby settlement to punish Te Puhi [senior]. They stripped the crops of Te Puhi's settlement, took two of Te Puhi's slaves, and killed another slave. Ballara notes that the killing of Mahue by a close kinsman was an aberration and that if Mahue had not been a close relative of Te Puhi [senior] "matters would have been much more serious; war would have been inevitable".[328]

3.3 Māori Legal Traditions at the Turn of the 21st Century

Shaped by the tensions identified in Chapter One above, tikanga Māori has remained a dynamic mechanism of social regulation that has had a transformative impact on the regulation of New Zealand public life. It has done so in a number of important ways: chiefly through law, ritual, and though dynamic Māori engagement with state processes.

This chapter is concerned with the role of Māori law in New Zealand public life at the turn of the 21st century. Māori legal traditions can be seen as part of the legal framework that regulates New Zealand society but this role is complex and has ebbed and flowed with changing social, environmental, and political circumstances. However, the Māori legal system is not simply a passive recipient of changing circumstances, merely floating with the tide of social change. Like all legal cultures, Māori law influences, and is influenced by, the society within which it operates. To understand the role of Māori legal traditions in New Zealand public life in the 21st century requires one to first

[328] Angela Ballara, *Taua: 'Musket Wars', 'Land Wars' or Tikanga?* (Auckland: Penguin Books, 2003). at 101-102.

comprehend the general nature of the pressures exerted on the Māori legal system and the way in which that system responds. This chapter uses the three tensions in Māori legal history identified in Chapter One to draw attention to those matters and to begin to explore the role of Māori legal traditions in contemporary New Zealand society. Competing pressures on the Māori legal order produce creative tensions, which in turn lead to change within that legal order. Such change is rarely straightforward. By considering these three broad tensions we may be able to achieve a more complete understanding of the state of Māori legal traditions today and the role that they play in New Zealand public life than might otherwise be yielded by focusing on the myriad of particular changes to which Māori legal traditions have been subject.

3.3(a) Māori Law and Social Regulation Today

Tikanga Māori is still a dynamic mechanism of social regulation. Its application today is shaped by the tensions of adaptation, the relationship to the Treaty partner, and renewal. This part of the chapter provides three brief examples to illustrate the range of situations in contemporary New Zealand society in which tikanga serves as an effective regulatory force. First, it may have effective force in circumstances where the state legal system will recognise and enforce customary law. Second, tikanga is the key mechanism of social regulation in Māori settings. For example, the traditional welcome ceremony, the pōwhiri, is a distinctly Māori process, usually carried out in a distinctly Māori space, which is governed by tikanga. Third, tikanga can be seen to guide Māori behaviour in some non-Māori settings as well.

It is this last aspect of the operation of tikanga at the turn of the 21st century that will be examined in most detail in this chapter. It will consider two case studies of the operation of Māori legal traditions at the interface with state processes: The constitution of the political party called 'The Māori Party' and the dispute resolution process used in the Central North Island Forestry settlement. Both serve as examples of practices that are based on tikanga being formally articulated in order to regulate interactions amongst Māori parties but also regulate those parties' interactions with non-Māori groups and individuals and state institutions. These two case studies also each illustrate the way in which Māori legal traditions respond to the identified tensions in Māori legal history and, therefore, foreshadow the types of issues that are addressed in more detail in later chapters.

3.3(a)(i) Customary law and state law

Māori legal traditions do have limited recognition in the New Zealand state legal system. There is some statutory incorporation of aspects of Māori customary law as well and customary law also has relevance to the modern application of the doctrine of Aboriginal or Native Title.[329] There is a body of authority that indicates that the rules of Māori customary law form a part of the New Zealand common law.[330] Richard Boast has explained the process by which Māori customary law can be recognised as similar to that

[329] See, for example, *Te Weehi v Regional Fisheries Officer* [1986] 1 N.Z.L.R. 682 (H.C.); *Attorney-General v Ngati Apa* [2003] 3 N.Z.L.R. 643 (C.A.).

[330] See *Public Trustee v Loasby* (1908) 27 N.Z.L.R. 801 and *Huakina Development Trust, supra* note 38. See also *Arani v Public Trustee* [1920] AC 198 (P.C.) in which the Privy Council assumed that Māori society had mechanisms to permit the evolution of Māori custom so that Pākeha as well as Māori children could be the subjects of customary adoptions and entitled to succeed to the property of the adoptive parents. Though this decision may be seen as recognition that self-determined changes to Māori legal traditions may take place, it should be noted that there may also be a question as to whether the Privy Council correctly applied tikanga in this instance.

which enables foreign law to be recognised. That is, the existence of the custom must be proved as a matter of fact (usually based on the evidence of appropriately qualified experts).[331] The New Zealand Law Commission has also produced a study paper that addresses the role of Māori customary law and values within the state legal system.[332] That report considers a range of ways in which Māori legal traditions contribute to the regulation of New Zealand public life. In particular, the Law Commission study paper points to examples where Māori customary concepts and legal traditions are relevant to family law and matters relating to land and resource management.[333] Although Māori customary adoption is not legally recognised for the purpose of adoption law, it is a practice that is still relatively common amongst Māori and can be recognised by the Māori Land Court for the purposes of determining a person's entitlement to succeed to Māori land interests.[334] Māori customary values have also been taken into account in custody disputes and family protection cases.[335] Māori customary values are explicitly referred to in the Resource Management Act 1991. Anyone exercising powers or functions under that Act is required to "have particular regard to", among other things, 'kaitiakitanga'.[336] Nevertheless, Māori legal traditions have quite a limited and constrained role within the state legal system, largely because the colonial relationship that has been established does not require they be provided any more substantial recognition. These traditions provide, however, a more significant contribution to the

[331] Richard Boast "Māori Customary Law and Land Tenure" in Boast R, Andrew Erueti, Doug McPhail and Norman Smith, eds., *Māori Land Law*, 2nd ed., (Wellington, N.Z.: LexisNexis, 2004) 21 at 32-37.

[332] New Zealand Law Commission, *Māori Custom and Values, supra* note 2.

[333] *Ibid.* at 52-59.

[334] *Te Ture Whenua Māori Act* (New Zealand) 1993, s 115.

[335] See New Zealand Law Commission, *Māori Custom and Values, supra* note 2 at 56-58.

[336] *Resource Management Act* (New Zealand) 1991, s 7.

regulation of New Zealand society through other mechanisms and in other contexts, such as the rituals of encounter and the two case studies explored below. The recent New Zealand Court of Appeal decision, *Takamore v Clarke*, illustrates both the willingness of the New Zealand courts to take account of Māori customary law, and also the limitations of the recognition of tikanga in the courts.[337]

3.3(a)(ii) Pōwhiri – Rituals of encounter

As discussed above, the system of tikanga, which comprises Māori legal traditions, is based around the application of principles, values, or 'conceptual regulators'. The expression of these principles, that is, the practice of Māori legal traditions, is, in some cases, recognised by the New Zealand state legal system in the types of ways that the law commission has described. But, of perhaps greater importance, is the way in which these principles and practices regulate Māori society independent of the state legal system.

The pōwhiri, or welcome ceremony, provides a useful example of the way in which the 'conceptual regulators' govern interactions within the Māori legal system. The pōwhiri is a common ceremony, primarily, for welcoming guests.[338] Although important occasions may require the ceremony take place on a grander scale, the key elements of the pōwhiri can be seen in a range of essentially everyday situations. A pōwhiri may be

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[337] *Takamore v Clarke* [2011] NZCA 587. In this case, James Takamore, a man of Māori descent, had died and a number of his Māori relatives removed his body to be buried on his ancestral land, against the wishes of the executor. Two of the three judges in the Court of Appeal found that, although the taking of the body without the permission of the executor could not be recognised by the common law, the common law in New Zealand has developed to a point that Māori customs relating to burial, where relevant, must be taken into account by the executor. Note that the New Zealand Supreme Court subsequently heard an appeal from the Court of Appeal decision, *Takamore v Clarke* [2012] NZSC 116. The Supreme Court adopted slightly different reasoning to the Court of Appeal, but did not directly overrule the lower court's reasoning and upheld the result.

[338] This is a somewhat crude simplification of the functions of the pōwhiri, though it is sufficient for the purposes of this dissertation.

used to welcome delegates to a conference or a new staff member to the workplace. A pōwhiri may also be used to welcome groups to public events such as graduation ceremonies, or to community events such as celebrations or funerals. In short, whenever a Māori community is required to greet and host visitors, a pōwhiri ceremony is likely to set the framework for the management of the relationships between hosts and guests. The ubiquitous nature of the pōwhiri is relevant to this discussion for two reasons. First, it indicates the relatively wide scope of the continuing influence of Māori legal traditions on the regulation of New Zealand society. Second, it reinforces the centrality of relationships within the Māori legal order. The widespread practice of the pōwhiri ceremony suggests that establishing an appropriate framework for interaction is of fundamental importance to Māori individuals and communities.[339]

The pōwhiri process reflects other important principles of the Māori legal order. The dual concepts of tapu and noa underlie many of the practices of the pōwhiri. The primary objective of the pōwhiri is to transition gradually from a state that is highly sacred and formal to one in which the interactions between hosts and visitors have been normalised.[340] Once the transition is complete, it can be said that a state of ea has been reached, where balance has been achieved because the correct protocols have been followed and all obligations fulfilled. This brings to mind the two key values of utu (relating to the imperative to seek balance and redress imbalance) and manaakitanga (relating to the obligations to care for others).

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[339] Mead, *supra* note 2, at 117.

[340] *Ibid.* at 118.

3.4 Two Case Studies

The final sections of this chapter focuses on two examples that illustrate the application of Māori legal traditions in non-Māori settings - the constitution of a political party and a 'tikanga-based dispute resolution' process designed to facilitate the settlement of a significant group of Māori claims against the Crown.

3.4(a) Māori Party Constitution

The Māori Party is a political party that was established in 2004 and its establishment reflects the three tensions in Māori legal history identified above. The catalyst for the formation of the party was the then Government's determination to enact the Foreshore and Seabed Act, which many Māori saw as discriminatory and a confiscation of property rights in the foreshore area. This led to a Cabinet Minister resigning from both the Government and the Labour Party and eventually leading the Māori Party in Parliament. The impetus for the party's formation can, therefore, be seen as being directly connected to an assertion of self-determination. From its establishment, the party aimed to provide an independent and authentic Māori voice within the national Parliament, highlighting the carefully balanced relationship with the state legal system. And the party founders have deliberately constructed a constitution that uses those aspects of tikanga that they determined to be relevant to the operation of a political party in the twenty-first century.

The Māori Party constitution recognizes that a distinctive Māori world-view is expressed through Māori songs, legends, prayers, proverbs and other art forms that reproduce, transmit, and develop Māori culture. This world-view leads to a particular set

of kaupapa, described as 'principles, values, philosophies'. These reflect the core values, the conceptual regulators discussed above, which underlie the system of tikanga. In the context of the Māori Party's constitution, tikanga comprises the 'processes and policies aligned to the kaupapa'. The first kaupapa and associated set of tikanga in the constitution is manaakitanga:[341]

> **1. Manaakitanga**
>
> Manaakitanga is behaviour that acknowledges the mana of others as having equal or greater importance than one's own, through the expression of aroha, hospitality, generosity and mutual respect. In doing so, all parties are elevated and our status is enhanced, building unity through humility and the act of giving. The Party must endeavour to express manaakitanga towards others, be they political allies or opponents, Māori and non-Māori organisations, taking care not to trample Mana, while clearly defining our own.
>
> **Tikanga of the Māori Party derived from Manaakitanga**
>
> i. to be recognized by Māori as a political organisation that does manaaki the aspirations of Māori;
>
> ii. to ensure that relationships between the Party and whānau, hapū, iwi and other Māori organisations are elevating and enhancing;
>
> iii. to promote a fair and just society, to work for the elimination of poverty and injustice, and to create an environment where the care and welfare of one's neighbour is still important.
>
> iv. to ensure that members agree to work together, treat each other with respect and act with integrity in their party work.
>
> v. to involve all peoples in the process of rebuilding our nation based on mutual respect and harmonious relationships.

The constitution goes on to list other core values and to describe the practices that derive from those values and which govern the actions of party members elected to the New Zealand House of Representatives. The tikanga derived from manaakitanga led to a

[341] Māori Party Constitution (2010), online: The Māori Party http://Māoriparty.net [Māori Party Constitution].

the party's MPs demonstrably avoiding personal attacks in Parliament. The constitution also includes tikanga based on the importance of the Māori language to Māori culture and identity. The Māori Party MPs make a deliberate effort to use the Māori language in the House. This has led to the development of much improved processes for simultaneous translation of Parliamentary proceedings. The rules in the constitution apply only to the party's members, and yet they have an impact on the way the party engages with others. These values are evident in the way Māori Party MPs conduct themselves in the House, in the policies of the party and in the content of legislation.[342] The position the party took in 2007 on the Human Tissue and Organ Donation legislation was determined by the tikanga relating to the integrity of the human body. At that time, the party was of the view that there had not been sufficient time for Māori to discuss the implications of the bill for tapu and noa as it relates to the human body. Furthermore, the party was concerned that the legislation privileged the choices of individuals in matters that are, in the Māori world, the concern of the collective. In relation to legislation regulating electoral campaign spending, the Māori Party's points of reference were the tikanga relating to the accountability of traditional leadership and the responsible and sustainable management of resources.[343]

Aspects of this tikanga-based constitution were tested and subjected to significant scrutiny when the party suspended one of its MPs from the Parliamentary caucus in 2011. The constitution includes a mechanism for the 'Resolution of differences'. All members of the party must 'treat each other with respect and are expected to act ethically and with

[342] Tariana Turia, "Operating Māori Values Within the System" (Paper presented to Māori Customary Law class, Victoria University of Wellington, 8 December 2007) [unpublished].

[343] *Ibid.*

integrity in their party work'.[344] Another rule sets out a procedure for disciplinary action against a member who refuses to comply with the constitution, improperly deals with party funds, or 'in any other way wilfully brings the party or its members into public disrepute'.[345] A Disciplinary and Disputes Committee of the party's governing body, the National Council can address serious complaints against a member.[346] The National Council aims to ensure that any such dispute 'is resolved on the basis of the kaupapa of the Party',[347] reinforcing those principles that derive from a Māori world-view.

In 2011, members of the Party's five person caucus made a complaint against one of the party's Members of Parliament, Hone Harawira.[348] Following a series of controversial incidents involving Harawira,[349] an opinion piece written by Harawira and published in a national newspaper[350] provoked the complaint. Harawira's article criticised the Māori Party's cosy relationship with the governing National Party and reiterated his concerns about the Marine and Coastal Area Bill (now enacted), which the other Māori Party MPs supported and continue to promote as a major achievement. Harawira was suspended from the party's parliamentary caucus prior to the formal dispute resolution process being completed.[351] According to the party's co-leaders, Harawira had breached

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[344] Māori Party Constitution, *supra* note 341 at Rule 11.1.

[345] *Ibid.* at Rule 11.2.

[346] *Ibid.* at Rule 11.3.

[347] *Ibid.*

[348] Patrick Gower, "Leaked complaint shows extent of Māori Party split" *3 News* (4 February 2011), online: 3 News < http://www.3news.co.nz> [Gower].

[349] "Faith in Harawira lost – caucus" *New Zealand Herald* (7 February 2011) [*New Zealand Herald*].

[350] Hone Harawira, "Crunch time for Māori grumbles" *Sunday Star Times* (16 January 2011).

[351] *New Zealand Herald*, *supra* note 349.

the kaupapa and founding principles of the Māori Party.[352] 'Having no regard for the constitution is one thing. It is quite another to have no regard for the kaupapa and tikanga of the party, and that is what has really brought us to this point'.[353] Evidently, to the Māori Party leadership the kaupapa and tikanga are not only reflected in the constitution but are also independent of the constitution; their independent status is seen by the Māori Party leaders to be more important, at least in terms of political justification and legitimacy.

The formal complaint reportedly stated that the other Māori Party MPs had 'lost trust and confidence' in Harawira because he 'acts unethically and without integrity' and 'deliberately undermines' the party and the leaders.[354] Harawira criticised the complaint process in an interview with Radio New Zealand: 'The process is not consistent with kaupapa Māori [Māori style of governance] . . . I also think that it's very, very Pakeha the way that it's being run'.[355] Harawira repeatedly stated that the issue ought to be resolved on the marae in accordance with Māori protocols and processes.[356] The party president, however, was adament that the process was consistent with kaupapa Māori and emphasized that 'Meeting face to face in a safe environment is Māori'.[357] Again, the political legitimacy of the process seems to rest on whether it is consistent with kaupapa Māori rather than with the constitution of the party, which must of course be complied with as a legal requirement.

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[352] *Ibid.*

[353] *Ibid.*

[354] Gower, *supra* note 348.

[355] New Zealand Press Association, "Māori Party plays down Harawira tensions" *National Business Review* (25 January 2011) [New Zealand Press Association].

[356] Derek Cheng, "Harawira wants to stay with party" *New Zealand Herald* (8 February 2011).

[357] New Zealand Press Association, *supra* note 355.

The Disputes and Disciplinary Committee found that the differences between Harawira and his parliamentary colleagues could not be resolved and referred the matter back to the party's National Council, recommending that Harawira be expelled from the party. Before this recommendation was considered by the National Council, Harawira resigned his membership of the party and announced he would seek re-election as an independent candidate. Re-elected in a by-election in June 2011, he formed a new party, the Mana Party. As the party's name suggests, it is intended to have a significant Māori focus. Interestingly, the Mana Party's interim constitution, approved in May 2011, makes no mention of kaupapa or tikanga.

Throughout this episode the three tensions in Māori legal history are evident. The emphasis on the need for the process to be one that is authentically Māori illustrates the desire to assert self-determination, even though the enforcement of the obligations in the constitution would ultimately have rested with the state legal system. The relationship between tikanga and the state legal system sits at the very foundation of this episode. That is, this case highlights different views as to how Māori voices might be most effectively heard within the state system and the catalyst for the dispute was the way in which tikanga was expressed within state law (the Marine and Coastal Area Act 2011). The application of the Māori Party constitution and the lack of explicit reference to tikanga in the Mana Party's interim constitution illustrates distinct and deliberate choices about the relevance of particular tikanga to the governance of Māori political parties within the New Zealand parliamentary system.

3.4(b) The Central North Island Forestry Settlement

The second example of contemporary application of Māori legal traditions relates to the settlement of Māori claims against the Crown. The Central North Island Forest Lands Collective Settlement is the result of negotiations between the Crown and various tribal groups as part of the systematic programme aimed at settling historic claims based on the 1840 Treaty of Waitangi.[358] Involving eight different tribal groups representing over 100,000 people, the settlement comprises 176,000 hectares of forestry land and is worth approximately $220 million.

In a Treaty settlement dealing with forest land, the settling group receives not only land but also accumulated rental fees received by the Crown from third parties for forestry licenses over those lands. The proportion of the accumulated rentals that each tribal group within the Central North Island ('CNI') collective will receive from the settlement was determined at the time as the settlement package was agreed. However, the allocation of the land itself is to be determined by the tribes involved, in what is described as a 'Tikanga based resolution process' that is set out in a schedule to the legislation which implements aspects of this settlement. Core values that underpin Māori legal traditions are reflected in the principles of the resolution process:[359]

> The iwi acknowledge their commitment to a resolution process that—
>
> a) enhances and promotes the mana and integrity of all iwi; and
>
> b) is open and transparent; and

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[358] Linda Te Aho, "The Tangled Web of Treaty Settlements: Emissions Trading, Central North Island Forests, and the Waikato River" (2008) 16 Waikato L. Rev. 229.

[359] *Central North Island Forests Land Collective Settlement Act* (New Zealand) 2008, Schedule 2, s 2 [*CNI Forests Land Collective Settlement Act*].

c) promotes whanaungatanga, manaakitanga, and kotahitanga amongst the iwi; and

d) recognizes the desirability of post-settlement collaboration between them in the collective management of assets.

The maintenance of relationships is clearly a central concern of the groups participating in this process. The principle of whanaungatanga is explicitly referred to in the CNI allocation/resolution process and this is reinforced by the recognition of the desirability of future collaboration and other features of the resolution process, such as the references to mana-enhancement, transparency, and the value of manaakitanga. As recorded in the legislation:[360] 'The CNI Iwi Collective is committed to the iwi deciding upon the allocation of CNI forests land for themselves, on their own terms, answerable to one another.'

This statement also reflects an assertion of authority and responsibility on behalf of the participating iwi and thus links the concepts of mana and whanaungatanga.

The first stage of the process is the identification of the relative interests of the CNI iwi in CNI forests land, by reference to tikanga Māori.[361] The relevant interests are described as 'mana whenua interests' (traditional authority and responsibility in relation to the land) and evidence for the existence of such interests may be found in traditional Māori oral records such as songs, tribal histories and genealogies as well as in written sources.

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[360] *Ibid.*

[361] *Ibid.* at Schedule 2, s 4.

The second stage of the process addresses overlapping interests, where two or more iwi have identified a mana whenua interest in a particular area of forest land.[362] Again, the key principles and practices of tikanga govern the procedure. In this stage, negotiations are 'kanohi ki te kanohi' ('face to face'). The iwi involved in negotiation over particular interests will determine the tikanga that applies to those negotiations. These negotiations are intended to take place between representatives who have the authority to commit their iwi to agreements and who are themselves committed to engage in an open, principled, and trustworthy dialogue. The legislation refers to this as kōrero rangatira (chiefly discussion) and draws again on the basic principles that underlie Māori legal traditions. While iwi representatives may take expert advice, those advisers are not permitted to participate directly in the negotiations themselves.

If negotiations do not produce agreement about recognition of mana whenua interests and the allocation of CNI forest land, the unreconciled iwi may refer the matter to either mediation or adjudication.[363] The appointment of mediators or an adjudication panel also reflects Māori legal traditions. The legislation requires that mediators and adjudicators be fluent in te reo (the Māori language) and have knowledge of tikanga Māori, in particular tikanga-based dispute resolution and how mana whenua is held and exercised by iwi.

The final allocation of the settlement lands was supposed to have taken place by 1 July 2011, but, at the time of writing, no allocation has been agreed. Each iwi has identified the areas where it held the mana whenua interest, and face-to-face negotiations

[362] *Ibid.* at Schedule 2, s 5.

[363] *Ibid.* at Schedule 2, s 6.

have taken place, but there remains significant disagreement. The appointed adjudication panel advised that it needed more time and resources to make robust allocation decisions. Some iwi also argued that an extension of the timeframe was not possible, even if unanimous agreement to do so was achieved. CNI Iwi Holdings obtained a declaration from the High Court that it would be lawful to take more time to negotiate the allocation of land, but the iwi were not able to agree on a new termination date for the negotiations, and some iwi refused extra time. The adjudication panel has resigned without deciding allocations. One of the CNI iwi, Ngāti Manawa, has now filed proceedings with the High Court to have the time limit for adjudication extended absent unanimous agreement so that the allocation process can be completed. When the application of tikanga cannot bring about consensus among Māori interests, the High Court is available as a neutral arbiter, though the Court is not obliged to reason its decision in terms of tikanga.

3.5 Conclusion

Māori legal traditions are underpinned by a set of core principles or conceptual regulators. The interlocking concepts of whanaungatanga (the centrality of relationships to Māori life), mana (the importance of spiritually sanctioned authority and the limits on Māori leadership), tapu/noa (respect for the spiritual character of all things), utu (the principle of balance and reciprocity), and manaakitanga (nurturing relationships, looking after people, and being very careful how others are treated) provide the basis of tikanga and the Māori legal order. The associated concepts of rangatiratanga (chieftainship) and kaitiakitanga (the Māori ethic of stewardship) are also particularly relevant to the Treaty settlement context.

The three tensions in Māori legal history provide interpretive tools that help to analyse the dynamic application of tikanga in the 21st century. The adaptation of Māori legal traditions is a creative force in the Māori Party's explicit use of kaupapa and tikanga as the foundation of the constitution. The constitution asserts that the party's members want Māori values and principles to regulate the organisation. Yet, this is also a reaction to the operation of state processes. The Māori Party was formed to engage Māori in New Zealand's law-making processes and, in particular, to represent the Māori partner in the Treaty of Waitangi relationship.

The expression of Māori legal traditions within the Māori Party constitution was subjected to legal and political scrutiny when the party expelled Hone Harawira. The way in which tikanga and kaupapa were interpreted and applied in that situation can be understood by reference to tensions in the adaptation and response Māori legal systems. While all the protagonists emphasized the need for 'a Māori process', the process was also determined by the Party's need to remain as disciplined as a Westminster-style parliament demands.

While the CNI forestry settlement process is 'tikanga-based', it is also an adaptation to the social and political circumstances of New Zealand today. It both expresses self-determination and recognizes the regulatory powers of the state. It reflects a desire to both engage with, and maintain distance from, the Crown. While emphasizing and reinvigorating relevant tikanga, the process does not mobilise traditions that many iwi deem to be unhelpful. Among the CNI iwi there remain differences of opinion as to how best to give effect to the tikanga described in the allocation mechanism.

By analysing the role of Māori legal traditions in contemporary Māori institutions through three long standing, historical tensions: adaptation (self-determined change vs. reactive change); relationship to the Crown (engagement vs. disengagement with the state legal system); and, renewal (reinvigorating tikanga vs. losing relevance), I have also suggested that Māori law has survived and remains a vibrant force within New Zealand society, not by passively receiving change, but by actively engaging with other legal traditions that regulate contemporary New Zealand society. It is within this context that the analysis in the following chapters of the Treaty of Waitangi settlement process and its effects on Māori legal traditions is situated.

CHAPTER FOUR: TAPUWAE & TE RAUHINA – THE TREATY SETTLEMENT PROCESS AND MĀORI GOVERNANCE

Tapuwae and Te Rauhina

"Pāpā, I heard someone today talking about Te ari a Te Maaha and Te ari a Tapuwae - what does that mean?"

"They will have been talking about the two sides of our river. Te Maaha and Tapuwae, two of your ancestors, were brothers, but they had a falling out when they were children and even when they grew up they did not get along. They were from a family of rangatira and would have been expected to take on leadership roles within the community. But their father became concerned that the hostility between them would create tensions in the community and even put the community in danger if they were to be attacked from outside forces."

"What does that have to do with the river?"

"Well, e Tama, when they were adults, their father decided that Te Maaha and Tapuwae ought to be separated. He sent Te Maaha to set up a community and to live on the eastern side of the river and Tapuwae to live on the western side. The different sides of the river thereafter became known as 'Te ari a Te Maaha' and 'Te ari a Tapuwae' and you sometimes hear the old people still use those names when talking about the banks of the river, like you heard today."

"That is sad that the two brothers didn't get along. Did they never have anything to do with each other after that? What about their families? They must have all been related, so did they talk to each other?"

"Ae, it is sad. For some time the two families remained quite separate, but eventually the two families did grow back together. The descendants of each of the brothers mixed and mingled and began to live together as a united community once again."

"Did the brothers forgive each other then?"

"It wasn't quite as simple as that. There was a lot of trust that needed to be rebuilt amongst the two families and the community as a whole. Fortunately, Tapuwae in particular was known for his great qualities as a leader and the courtesy with which he treated others won him respect from far and wide."

"What did Tapuwae do?"

"Well, it was not all down to Tapuwae of course. But he did a number of things which made it easier for the community to unite. One important aspect was his marriage to Te Rauhina. Te Rauhina was herself a woman of great mana. This marriage was important not only for the links this gave Tapuwae to other parts of the community, but the special leadership qualities that Te Rauhina herself embodied were vital."

"Why? What was Te Rauhina like?"

"Te Rauhina was a very compassionate and forgiving woman. She was sometimes called 'Te Wahine Korero Aio a Tapuwae', which means 'the Peace-Talking Wife of Tapuwae'. She always spoke up in the interests of peace and unity. Her village became widely known as a place where people could always find sanctuary. People responded to the humanity of Te Rauhina and Tapuwae and we remember them now as two of the great leaders of the people of our region."

"So, is leadership as easy as that?"

"It is not always easy to forgive, to speak up for peace, or to show restraint and tact, but certainly a big part of their success comes back to those key values and principles. But also remember the story of Te Maaha and Tapuwae, because leaders can also damage relationships within a community if they are not careful. And sometimes the way in which the community is set up has a big effect – whether the community is built on the kind of linkages that were forged when Tapuwae and Te Rauhina came together, or whether it is defined by boundaries such as the river that separated the two brothers."

"I wouldn't want to live on a different side of the river from my brother."

"No, e Tama, I wouldn't want that for you either."

4.1 Introduction

This dissertation is concerned with the development of Māori legal traditions in the context of and in response to the Treaty of Waitangi claims settlement process. Chapter Three provided a basic outline of some key concepts within Māori law and a brief example of the operation of Māori legal traditions at the turn of the 21st century. This chapter provides a basic outline of the Treaty of Waitangi claims settlement process and identifies key issues within the settlement process that have put pressure on Māori legal traditions and reflect the key tensions within Māori legal history. The chapter finishes by focusing specifically on the establishment of post-settlement governance entities. This chapter aims to provide a brief account of the Treaty settlement process and identify some of the issues created for Māori governance through this process.

4.2 Overview of the Settlement Process

The Treaty settlement process is now primarily focused on negotiations between Māori and the Crown. Court and Waitangi Tribunal hearings may have set the stage for the settlement process, [364] but they are no longer its centre. For example, the Waitangi Tribunal has an important, though in some ways slightly peripheral role in the settlement of Treaty of Waitangi claims.[365] The Tribunal is responsible for inquiring into and reporting on claims brought by Māori against the Crown. It is charged with assessing these claims against the principles of the Treaty of Waitangi and making findings and recommendations to the Crown for the practical application of Treaty principles. Once the Tribunal's work was underway and its recommendations for remedy and redress began to be put regularly before the government, it perhaps became inevitable that a systematic programme for the settlement of these claims would develop.

The Office of Treaty Settlements ('OTS'), a unit within the Ministry of Justice, now engages with Māori groups and negotiates redress packages to settle their historical Treaty of Waitangi claims. The Tribunal is not directly involved in the settlement of claims, but often a Tribunal report will provide a starting point for settlement negotiations. However, the Tribunal continues to provide some oversight of the

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[364] See e.g. *Lands case*, *supra* note 18; *Attorney-General v New Zealand Māori Council* (1991), *supra* note 36; *New Zealand Māori Council v Attorney-General* [1994] 1 N.Z.L.R. 513 (P.C.); Waitangi Tribunal, *Muriwhenua Land Report* (Wellington, N.Z.: GP Publications, 1997); Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington, N.Z.: GP Publications, 1996) [Waitangi Tribunal, *The Taranaki Report*]; Waitangi Tribunal, *The Ngai Tahu Report 1991* (Wellington, N.Z.: Brooker & Friend, 1991); Waitangi Tribunal, *The Te Roroa Report* (Wellington, N.Z.: Brooker & Friend, 1992).

[365] Eddie Durie, "Background Paper" in Geoff McLay, ed., *Treaty Settlements: The Unfinished Business* (Wellington, N.Z.: Institute of Policy Studies and Victoria University of Wellington Law Review, 1995) 7 at 12.

settlement process when called to make specific recommendations as to remedy or to assess issues of mandate and overlapping claims.[366]

In 1992 the New Zealand government agreed that officials should develop a set of principles to govern the settlement of historical claims based on the Treaty of Waitangi.[367] These principles were part of a set of proposals that were rejected by Māori, but which became official Crown policy, in slightly amended form, in 1995.[368] These principles were largely developed in the wake of the pan-tribal settlement of all Māori claims to commercial fishing interests, which marks the beginning of the modern systematic settlement process. In 1994 the government established OTS within the Ministry of Justice. OTS grew out of the Ministry's Treaty of Waitangi Policy Unit and it is now officials from OTS who engage in settlement negotiations with claimant groups. Settlements agreed between the Crown and the major tribal groupings Ngai Tahu and Waikato-Tainui in the mid-1990s further established the framework for the current settlement process. The Crown had commenced negotiations with both Ngai Tahu and Waikato-Tainui before the comprehensive settlement policy was formalised, though both settlements were concluded after the establishment of OTS. The *Waikato Raupatu Claims Settlement Act*[369] was the first implementation of the new policy and both the Waikato and Ngai Tahu settlements have provided key benchmarks for all subsequent settlement negotiations.

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[366] See e.g. Waitangi Tribunal, *Turangi Township Remedies Report* (Wellington, N.Z.: GP Publications, 1998); Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report (Wai 1362)* (Wellington, N.Z.: Legislation Direct, 2007) [Waitangi Tribunal, *Tāmaki Makaurau Report*]; Waitangi Tribunal, *East Coast Settlement Report (Wai 2190)* (Wellington, N.Z.: Legislation Direct, 2010) [Waitangi Tribunal, *East Coast Settlement Report*].

[367] Palmer, *supra* note 17 at 264.

[368] *Ibid.* at 264-267.

[369] *Waikato Raupatu Claims Settlement Act* (New Zealand) 1995 [*Waikato Raupatu Settlement Act*].

4.2(a) Phases of the Settlement Process

The Crown's settlement process is described in the OTS guide for claimants as having four phases:[370] preparing claims for negotiation; pre-negotiations; negotiations; and ratification and implementation. There are various important steps within each phase.

The first step in preparing claims for negotiation is for the claimant to register a claim with the Waitangi Tribunal. This may be lodged on behalf of a wider community or simply on behalf of the individual claimant themselves. No new historical claims (those are, claims relating to Crown action pre-1992) may now be registered with the Tribunal, though registered claims may be amended. It is not necessary for the Waitangi Tribunal to report on the claim before negotiations with the Crown commence. There may well be significant research undertaken into the claim prior to registration and, whether the claim is the subject of a Tribunal inquiry and report or not, further research will be undertaken subsequent to registration if the claim is to progress through the claims settlement process.

The next step in this first phase of the process is for the claimant community to give a mandate to representatives to advance the settlement of all historical claims of that community. Those representatives must be able to demonstrate to the Crown that they have been given such a mandate before the Crown will formally acknowledge that mandate.[371] There is no formal requirement to establish a mandate on behalf of a community in order to pursue claims through the Waitangi Tribunal and so this may be

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[370] Office of Treaty Settlements, *Ka tika ā muri, ka tika ā mua - Healing the Past, Building a Future: a guide to Treaty of Waitangi claims and negotiations with the Crown*, 2nd ed. (Wellington, N.Z.: New Zealand Ministry of Justice: Office of Treaty Settlements, 2002) at 35-40.

[371] *Ibid*. at 44-51.

the first point at which questions of mandate are really tested. This may lead to significant tensions and conflict within the claimant community, as discussed in more detail below.[372] The Crown will not enter into negotiations with groups that do not have a recognised mandate, nor will the Crown enter into negotiations with groups that do not have any well-founded claims or do not constitute a 'large natural group'.[373] The previous policy document referred to 'large natural (customary) groupings'.[374] The change is probably of only minor practical significance but it does suggest a slight and further shift away from tikanga-based definitions of membership. There is no set number of members that a group must have for the Crown to deem it as a large natural group for the purposes of settlement negotiations, rather the policy serves to protect the Crown's objective of organising settlement negotiations in the most administratively efficient way possible.

Once the Minister for Treaty of Waitangi Negotiations has recognised the mandate of a group to negotiate a settlement of their claims, the group can move into the next phase of the process: pre-negotiations. The pre-negotiations phase comprises three key steps. This phase of the process begins to construct the framework of the negotiations in more detail.[375] In this phase the Crown and the claimant community move towards agreeing to the Terms of Negotiation. The Terms of Negotiation effectively set the ground rules for the negotiation. The Crown will seek to ensure that

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[372] See pp 182-186, below.

[373] Office of Treaty Settlements, *supra* note 370 at 44.

[374] Office of Treaty Settlements, *Ka tika ā muri, ka tika ā mua - Healing the Past, Building a Future: a guide to Treaty of Waitangi claims and negotiations with the Crown*, 1st ed. (Wellington, N.Z.: New Zealand Ministry of Justice: Office of Treaty Settlements, 1999) at 52.

[375] Office of Treaty Settlements, *supra* note 370 at 54-60.

the Terms of Negotiation clearly define the claimant group who will benefit from the settlement and also record that the settlement will be 'full and final'. Although the language of the *Healing the Past* booklet has moved away from 'full and final' to 'fair and durable', much of the rhetoric of finality and extinguishment remains in the settlement discourse and Terms of Negotiations record that the objective of the settlement is to finally settle all the historical claims of the settling community and to remove the jurisdiction of the courts and the Waitangi Tribunal in relation to those claims.[376] The Terms of Negotiation will also preclude parties from pursuing their claims through the Waitangi Tribunal or the courts while in negotiations with the Crown. The Terms will provide for conduct of the negotiations themselves, stating that they will be undertaken in good faith, that they are private and confidential and without prejudice and that any Deed of Settlement that results will remain conditional until the claimant group ratifies it and Parliament passes any necessary settlement legislation. Terms of Negotiation also usually include reference to any Treaty breaches that the Crown has already conceded and the claimant group's aspirations for the settlement.[377]

Two other steps within the pre-negotiations phase have an important effect on the negotiations process. Alongside the Terms of Negotiation, both the Crown and the mandated claimant body must establish their own parameters. The mandated claimant body ought to identify at this stage the specific breaches of the Treaty, identify particular areas of land that have been affected by the claims and/or are culturally important sites, and also identify Crown assets within the area covered by the claims that they wish to be

[376] See, e.g. Ngāti Ruahine Terms of Negotiation, para 13.1.

[377] Office of Treaty Settlements, *supra* note 370 at 57.

considered as potential commercial redress. The Crown, on the other hand, already has a number of established policy parameters that it is working within, including fiscal constraints and the parameters effectively set by the precedents of previous settlement agreements. However, the Crown also has a responsibility to identify Crown properties that could be considered for potential redress in the particular negotiations in question, and also to consider any issues relating to overlapping claims. The Crown's management of overlapping claims has been the subject of several Waitangi Tribunal reports, as further discussed below.[378]

The Crown will also make decisions about claimant funding in the pre-negotiations phase. The Crown will usually make a contribution towards the claimant community's costs incurred in obtaining a mandate and agreeing Terms of Negotiation, as well as costs of the negotiation and ratification of a Deed of Settlement.[379] Claimant funding is over and above the money or other assets that comprise the redress for historical claims. However, many groups will also receive advances of portions of their settlement redress in order to assist with costs in the later stages of the settlement process.

The third phase of the settlement process is the negotiation phase.[380] The negotiations take place between a Crown negotiating team and a claimant negotiating team. The Crown team is primarily comprised of officials from OTS though may include officials from other government departments (such as Treasury or the Department of Conservation) as well as specialist advisors. The current Crown policy is to also deploy Chief Crown Negotiators in most negotiations. These individuals report directly to the

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[378] See pp 182-186, below.

[379] Office of Treaty Settlements, *supra* note 370 at 54-56.

[380] *Ibid.* at 61-68.

Minister. The mandated body will appoint the claimant negotiation team. In many instances, the claimant negotiators will be appointed from amongst the mandated representatives, but that need not be so. In any case, the claimant negotiators are accountable to the mandated representatives who are in turn accountable to the claimant community. As with the Crown negotiating team, the claimant negotiating team may also include specialist advisors.[381] During the negotiation phase, working groups might be set up to advance specific issues or areas of redress.[382]

The objective of the negotiation phase is to reach an Agreement in Principle and then agree upon a Deed of Settlement.[383] An Agreement in Principle records the basic outline of the proposed settlement and is often given effect by an exchange of letters between the Minister and the mandated representatives. This basic outline may now also take the form of a 'Letter of Agreement'[384] or simply a 'Crown Offer'.[385] Sometimes this outline is formally signed as the Heads of Agreement. The agreed and recorded outline of the settlement then forms the basis for working towards the more detailed Deed of Settlement. Once the Deed of Settlement is in a form that can be approved in principle, the mandated representatives and the Minister will initial a draft Deed of Settlement.

The claimant community must then ratify the initialled draft Deed of Settlement before the finalised Deed of Settlement is signed and settlement legislation is introduced in the final phase of ratification and implementation. Ratification is a crucial step in the

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[381] Following the successful example of the CNI Forestry negotiations, it is now common for lawyers not to participate in the actual face-to-face negotiations.

[382] Office of Treaty Settlements, *supra* note 370 at 62-63.

[383] *Ibid.* at 64-65.

[384] See Ngati Toa Rangatira Letter of Agreement, 11 February 2009.

[385] See Crown Offer to Ngai Tūhoe, September 2012.

settlement process because it can provide a fairly rigorous check on whether the broader claimant community approves of the settlement package that has been negotiated.[386] Often, if communication between the mandated representatives and the wider community has been effective over the course of the negotiations, there will be clear support for the final agreement. However, ratification is by no means a formality and there have been settlements in which significant sections of the claimant community have been opposed to accepting the settlement package.[387] The Crown may then be faced with the difficult decision as to whether a sufficient level of support has been reached. This is not always a clear-cut decision and simply looking for a bare majority is unlikely to be appropriate in these circumstances, though the Crown has not set a specific threshold that must be met. This problem may be further exacerbated if there is a low voter turnout, which, in itself, undermines the robustness of any settlement.

Once the settlement package has been agreed and the Deed of Settlement finally approved, various actions must then be taken to implement the settlement agreement. First, the claimant community, who can now be referred to as the 'settling group', must establish a Post-Settlement Governance Entity ('PSGE') to receive and administer settlement assets on behalf of the community.

The constitution of a settling community's PSGE must be ratified by the wider community, as well as being approved by the Crown. The establishment of a PSGE paves the way for settlement legislation to be introduced. Settlement legislation will be required to give effect to a number of aspects of the Deed of Settlement. Such legislation

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[386] Office of Treaty Settlements, *supra* note 370 at 69-80.

[387] See e.g. Waitangi Tribunal, *The Te Arawa Mandate Report – Wahanga Tuarua (Wai 1150)* (Wellington, N.Z.: Legislation Direct, 2005) [*The Te Arawa Mandate Report*].

goes through the normal Parliamentary process, including scrutiny by a Select Committee and an associated call for public submissions. Settlement legislation is not quite the conclusion of the process as there may still be a number of actions that need to be carried out in order to complete the implementation of the settlement agreement. For example, the Crown may have to raise title for property to be transferred, encumbrances affecting settlement properties may have to be executed, and affected third parties will need to be notified. For its part, the settling community's PSGE may need to choose representatives to be a statutory advisor or a member of statutory board if those mechanisms are part of the settlement redress.[388]

4.2(b) Settlement packages

There are three main components of a Treaty settlement package: an historical account; cultural redress; and commercial redress.

The historical account is a statement agreed between the Government and the settling group that summarizes the past relationship between those two parties. This provides the basis for the Government to acknowledge breaches of the Treaty of Waitangi and apologize for injustices suffered by the settling group as a result of those breaches. It is usual for the historical account, acknowledgements and apology to be set out in the Deed of Settlement in both English and Māori.

Commercial redress is provided in recognition of prejudice suffered by the settling group as a result of breaches of the Treaty of Waitangi. The commercial redress may include cash, the acquisition of government properties within the claimant group's

[388] Office of Treaty Settlements, *supra* note 370 at 80.

area of interest, rights of first refusal to purchase government properties in the future, or the acquisition of Crown forestry land and the accumulated rentals from forestry licenses.

Cultural redress is "intended to meet the cultural rather than the economic interests of the claimant group".[389] There is a range of mechanisms commonly used in settlements to provide cultural redress. This includes the vesting of lands that are of cultural significance to the settling group or instruments such as 'statutory acknowledgements' and 'deeds of recognition' that set out formal statements of the claimant group's association with a specific site. These instruments create rights to be consulted in relation to the management of such sites. Cultural redress may also include arrangements for joint management of public land, place-name changes, or protocols setting out ways in which specific government departments ought to provide for input from the settling group into decisions which affect their recognised cultural interests.

4.3 The Settlement Process and Māori Governance Principles

This part of the chapter analyses the settlement process in light of recognised principles of Māori governance in order to identify pressures on Māori legal traditions that may be created by that process.

The New Zealand Law Commission[390] has produced several important publications that address Māori legal traditions and Treaty settlement issues and provides

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[389] *Ibid.* at 96.

[390] The New Zealand Law Commission was established by the *Law Commission Act 1985*. It has a membership of between 3-6 commissioners, appointed by the Governor-General on the advice of the responsible Minister. The functions of the Commission are "to take and keep under review in a systematic way the law of New Zealand; to make recommendations for the reform and development of the law of New Zealand; to advise on the review of any aspect of the law of New Zealand conducted by any government department or organisation and on proposals made as a result of the review; and, to advise the Minister of Justice and the responsible Minister on ways in which the law of New Zealand can be made as

useful guidance on principles of Māori governance. The Commission's *Waka Umanga: A Proposed Law for Māori Governance Entities*[391] followed its 2001 study paper *Māori Custom and Values in New Zealand Law*[392] and its 2002 advisory report to Te Puni Kōkiri (the Ministry of Māori Development) entitled *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase.*[393] The *Māori Customs and Values* paper was the conclusion of a project that began in 1994 at the suggestion of then Māori Land Court Chief Judge, Eddie Taihakurei Durie.[394] The Law Commission acknowledged that their study paper drew extensively on the writings of then Chief Judge Durie, and in particular, a draft paper on custom law written by him in 1994. In 2004, Eddie Durie, by then a Justice of the High Court of New Zealand, was appointed to the Law Commission and was one of the two commissioners responsible for the *Waka Umanga* report. The key role of Eddie Durie in the production of these reports lends significant weight to their authority.

In its *Waka Umanga* report, the Law Commission set out the key principles that it considered important in the development of an appropriate governance entity for Māori tribal (and other) organisations. These principles are as follows.[395]

- The principle of autonomy.
- The principles of cultural match and mandated vision.

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understandable and accessible as is practicable". In making its recommendations the Commission is required to take into account "te ao Maori (the Maori dimension)" and "give consideration to the multicultural character of New Zealand society"; and must "have regard to the desirability of simplifying the expression and content of the law, as far as that is practicable".

[391] New Zealand Law Commission, *Waka Umanga, supra* note 63.

[392] New Zealand Law Commission, *Māori Custom and Values, supra* note 2.

[393] New Zealand Law Commission, *Addressing the Post-Settlement Phase, supra* note 63.

[394] New Zealand Law Commission, *Māori Custom and Values, supra* note 2 at vii.

[395] New Zealand Law Commission, *Waka Umanga, supra* note 63 at 67.

- The principles of community empowerment and participatory democracy.
- The principles of consensus and assisted dispute resolution.
- The principles of fair process, protection of minorities and access to law.
- The principle of choice.
- The principle of diversity.
- The principle of maintaining economies of scale.
- The principle of rationalization.
- The principle of early entity development.
- The principle of recognition.
- The principle of ensuring good governance.

4.3(a) The principle of autonomy

The Law Commission notes that the principle of autonomy has been recognised in some of the leading projects relating to the governance of Indigenous peoples in North America.[396] To those listed by the Law Commission we can now also add the provisions in the United Nations Declaration on the Rights of Indigenous Peoples. The Law Commission also notes that in the New Zealand context this principle is supported by the Treaty of Waitangi with its guarantee of tino rangatiratanga.[397] The Law Commission suggests that the key points of this principle are:[398]

- The communities must own and control the constitution-building process. They must design their own institutions.

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[396] *Ibid.* at 68.

[397] *Ibid.*

[398] *Ibid.*

- They must have the freedom, time, encouragement and resources to do so.
- They must be engaged in the process of entity formation from the outset and fully participate in developing and deciding the form of the entity's structure and the terms of the charter.
- To the most practical extent, the process must be developed by traditional consensus procedures.
- The process itself should be approved by the people and should be open and transparent.

An important dimension of this principle is to give effect to Indigenous peoples' rights to self-determination. In the New Zealand context we can also see this principle as the Crown fulfilling its obligations under the Treaty of Waitangi. But this is not simply about meeting human rights standards and maintaining the honour of the Crown, important as those two strands of the principle are. There is also a very practical aspect of this principle. That is, the international literature suggests that governance entities are likely to be more successful, more effective representative institutions, and more responsive to the needs of the community if the community drives the development of the governance entity. An important part of this and other principles is the idea that community involvement, control, and ownership encourages the community to 'buy-into' the operation of the governance entity, to support that entity, and enhance its ability to fulfil its role effectively.[399]

4.3(b) Cultural match and mandated vision

'Cultural match' is a term that was coined by the Harvard Project on Indian Economic Development and the Law Commission draws heavily on the approach advocated by that

[399] *Ibid.* at 67.

project. The basic idea underlying this principle is that the governance entity, its structure and processes, ought to closely fit with the community's cultural worldview, particularly with respect to matters such as the way in which authority operates, how decisions are made, and other similar aspects of the exercise of leadership.

The Law Commission notes that the principle of cultural match has particular importance in three contexts:[400]

- in capturing the people's concept of what constitutes the wider descent group when developing a tribal confederation;
- in capturing the people's vision of themselves as a community, of their place in the Māori world and their future role; and
- in incorporating the group's preferences and traditions when developing the organization's charter.

The Law Commission suggests that this principle of cultural match must reflect the past, present, and future of the community.[401] That is, this principle should not be seen to limit the community to historical social structures or concepts, yet the history of the community will be an important element to consider. Also important when considering appropriate governance structures ought to be the way in which the people conceptualise themselves as a people today and a vision of where they aspire to be in the future.

The concept of cultural match is now widely used in the Indigenous governance discourse. However, some commentators have suggested that the way in which the concept is used by the Harvard Project researchers is more limiting than many Indigenous communities might wish. Patrick Sullivan, a prominent Australian critic of the Harvard

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[400] *Ibid.* at 69.

[401] *Ibid.*

Project's conclusions, has argued that cultural match is less about developing governance models that are consistent with Indigenous values and is instead aimed at legitimising Western ideas of good governance.[402] Indigenous communities ought to take care when deploying the principle of cultural match in the development of governance entities.

4.3(c) Community empowerment and participatory democracy

This principle is about recognizing and engaging the constituent groups that comprise the wider community. In the case of PSGEs, this would be the individuals, hapū, or whānau that comprise the settling community. The Law Commission notes that in the case of Treaty settlements, engagement with particular sections of the community will be crucial to the success and durability of settlements:[403]

> Many claims are specific to hapū or particular families. Measures may be needed to protect their interests in any large settlement that includes them, while at the same time balancing the needs of the tribe as a whole. Individual hapū may be concerned to know if distribution policies are proposed that will enhance their ability to maintain their own development programmes.

Again, it is interesting to note that the Law Commission draws on Māori and non-Māori sources of this principle.[404] The Commission found that concepts such as community empowerment and participatory democracy can be seen in traditional Māori leadership structures and values. The Commission also notes that the New Zealand Bill of Rights Act 1990 recognises similar values. The Commission does not explicitly draw on the Treaty itself in this regard, though it is arguable that the form of the Treaty also

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[402] Patrick Sullivan "Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity" (2007) Desert Knowledge CRC Working Paper Series at 10-12.

[403] New Zealand Law Commission, *Waka Umanga, supra* note 63 at 69-70.

[404] *Ibid.* at 69.

supports this principle. The Treaty was not signed on behalf of all Māori but rather by the rangatira of individual hapū, which suggests that this was the primary level of leadership responsibility and accountability, though this did not preclude entering jointly into an agreement such as the Treaty of Waitangi.

4.3(d) Consensus and assisted dispute resolution

This principle also has direct antecedents within Māori culture and traditional forms of decision-making. Consensus decision-making is consistent with the way in which leadership and authority operate in accordance with the values and principles associated with the concept of mana. However, the Law Commission notes that there are a number of factors that have "undermined the traditional value of consensus in modern Māori society".[405] The governance entities that many Māori have contact with and are familiar with often operate according to majority votes. For example, the rules and regulations that govern entities such as Māori trust boards, Māori incorporations, and trusts that manage Māori land under Te Ture Whenua Māori/The Māori Land Act 1993 all require decisions be made by way of voting. Government policy and action has also played a role in both undermining traditional leadership structures and often contributing to tensions within a community by encouraging dissension.

Many of these factors are at play in the Treaty settlement dynamic. For example, the overlapping claims policy employed by the Crown has been found by the Tribunal to foster exactly the kind of dissension and "patch disputes" that the Law Commission

[405] *Ibid.* at 70.

refers to.[406] The Tribunal has expressed concern on a number of occasions that the Crown's approach, which has tended to shut out communities with overlapping interests until too late in the settlement process, undermines the objective of achieving stable and durable settlements.[407] This is merely one of the more recent examples in a long history of colonial interaction that has encouraged Māori communities to exaggerate their own claims at the expense of other Māori communities.[408]

4.3(e) Fair process, protection of minorities and access to law

The basis of this principle is that in order to maintain its legitimacy the governance entity must be demonstrably established in a way that is fair and transparent. According to the Law Commission, a central feature of the establishment process must be to ensure that there exists "a faithful record of proceedings that provides conclusive evidence that the entity structure and charter has the free and informed approval of most members in each constituency".[409]

Furthermore, the constitution of the governance entity ought to also embody the concept of fair process by ensuring that appropriate dispute resolution procedures are available to its members, including the ability for members to access the protections provided by state law as a last resort. The constitution should also protect the rights of minorities or particular constituencies amongst the general membership.[410] These

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[406] See, e.g. Waitangi Tribunal, *Tāmaki Makaurau Report, supra* note 366.

[407] *Ibid.* at 7-13.

[408] See Richard Boast, *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865-1921* (Wellington, N.Z.: Victoria University Press, 2008) at 111-117.

[409] New Zealand Law Commission, *Waka Umanga, supra* note 63 at 71.

[410] *Ibid.*

measures not only provide for fairness (at least procedural fairness) to all members of the community but, by doing so, also legitimizes the governance entity's claims to represent the interests of its members.

4.3(f) Choice

The Law Commission also contends that decisions relating to community governance should, as far as possible, be left to the community itself to determine:[411]

> Māori should have maximum scope and autonomy in designing their institutions limited only by that which is necessary to maintain fair process. For example, in relation to tribal bodies, the group must have maximum scope for defining the constituencies that make up "the tribe" and the relationship that the tribe may have to any larger tribal grouping.

The Waitangi Tribunal has similarly found that the principles of the Treaty of Waitangi includes the principle of options.[412] There is of course a balance to be struck between choice and ensuring fair process. This balance involves careful and, inevitably, value-laden judgments as to what constitutes fair process. If 'fair process' is simply an imposition of Western liberal democratic values, then the worth of the nod towards autonomy and choice might well be questioned. In any case, it is instructive to consider the Treaty settlement process and the 'fair process'-based limitations that the Crown imposes on PSGEs to assess how this principle of choice is given effect (or not) in practice in that context.

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[411] *Ibid.* at 72.

[412] See, e.g. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy (Wai 1071)* (Wellington, N.Z.: Legislation Direct, 2004).

4.3(g) Diversity

The principle of diversity aims to reflect the diversity of Māori communities. The Law Commission is clear that a 'one size fits all' approach is not appropriate in the context of Māori governance entity design and implementation.[413] Different iwi and hapū will have been affected differently by the experience of colonization. They will have distinctive social, cultural, and economic histories that result in distinctive governance needs today. Different groups may also hold very different views about the optimum way to structure their relationships internally and with others externally:[414]

> The social structures of tribes may be located at several levels ranging from individual marae, to a hapū which may be comprised of several marae, to an iwi or other confederation of hapū, to the tribes of a geographic district, to the wide ranging tribes of a waka and, ultimately, to pan-tribal organisations that embrace the tribes of Aotearoa. These various combinations may be seen to reflect not a hierarchy of control, but a spectrum of purpose-built combinations.

The principle of diversity is also a necessary corollary of the principle of choice described above.

The requirements imposed by the Crown on the structures of PSGEs create some difficulties for the application of the principle of diversity in the settlement context. As Māori legal academic Robert Joseph has noted, nineteen of the '20 Questions' OTS considers when determining whether proposed governance structures are acceptable for use as a PSGE refer to "Western standards of corporate governance and do not seek to

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[413] New Zealand Law Commission, *Waka Umanga, supra* note 63 at 72.

[414] *Ibid.*

reflect practices and traditions of the Māori community involved".[415] As a consequence, there is little diversity amongst the PSGEs that have been approved by the Crown.

4.3(h) Economies of scale

One of the key motivations for the Law Commission to produce the *Waka Umanga* report was the concern that the ad hoc development of Māori governance entities in response to immediate and specific needs (as opposed to being based on wider strategic objectives) was leading to a proliferation of governance bodies creating duplication and inefficiencies. The Law Commission, therefore, recognizes the importance of developing a system of Māori governance that encourages efficient use of limited tribal resources and takes advantage of economies of scale. As noted in Chapter One above, the pattern of ramification and aggregation can be seen as aspects of Māori political and constitutional history. That is to say that there is no tikanga-based objection to this principle. Māori groups have historically come together for large-scale projects and continue to do so today. It is important to note that the Law Commission is not advocating the aggregation of Māori communities without regard to other factors. The Commission suggests that for such aggregation to be successful, the resulting governance entity ought to have the following characteristics: [416]

- that it represents the largest group that is consistent with the people's perception of their history and identity and is acceptable to them for the purpose given; and
- that it expressly supports the traditional autonomy of each constituency.

[415] Robert Joseph, *supra* note 49 at 155.

[416] *Ibid.* at 73.

These factors are particularly important to consider in the context of the settlement of historical Treaty claims. OTS policy is to negotiate with 'large, natural groups'. This policy certainly reflects the objective of achieving economies of scale, and so long as proper regard is given to the 'natural' criterion, then it will be consistent with the approach advanced by the Law Commission.

4.3(i) Rationalisation

The Law Commission refers to the problem of multiple entities being established and particularly notes the different requirements of the Māori Fisheries Act and the requirements imposed by the Crown through their confirmation of PSGEs: "To achieve a reasonable alignment in forming new entities, Māori must have time to debate the option of combining with others already existing. Where the constituencies are not the same, provision may be considered for a common administration that manages separate accounts."[417]

As the Law Commission identified, Crown settlement policies have worked against rationalisation of governance entities. This is not only a result of the different sets of requirements that must be met for the settlement of commercial fishing claims and other historical Treaty claims. The structure of the negotiations process leaves little space for the consideration of joint-governance arrangements where there have not been joint-negotiations or a joint-settlement.

[417] *Ibid.* at 74.

4.3(j) Early entity development

As noted above, a central concern of the Law Commission is been that the development of Māori governance entities has been ad hoc and reactive rather than strategic and proactive. The principle of early entity development is intended to address this particular issue: [418]

> The principle is to enable and support groups to form entities at an early stage. Logically, entity formation should precede the Treaty claims process. Claim negotiators should be appointed by established, democratic entities and should be accountable to them. If later, Government requires a larger group with which to settle a claim, then entities may negotiate the terms on which they will combine with others.

This is a sensible principle, but the difficulty is that, in practice, few communities have the necessary infrastructure and resources to be able to work through a principled and participatory process for the establishment of a representative entity without the funding and incentives created by participation in the settlement process. There are few recent examples of tribes that have been able to develop, outside of the settlement process in a carefully managed and deliberate fashion, the establishment of representative entities that are designed to be used for PSGEs in Treaty settlements, amongst other things.

4.3(k) Recognition

The principle of recognition is that an entity with a proven mandate to represent a tribe should be recognised as the legitimate representative of that tribe. It should be recognised as legally and exclusively entitled to represent the tribe to third parties and in

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[418] *Ibid.*

legal proceedings on all matters relating to the tribe's affairs, save to the extent that it is constrained in doing so by its charter.[419]

If this principle of recognition is to be effective and legitimate then it must be put to the community expressly at the point of formation. This is not the case at present with PSGEs. That is, PSGEs are expressly established for the management and implementation of the settlement. They are not required to seek a mandate for any wider purposes or general representation. This principle also further conflates the tribe/community with the governance entity. Admittedly, many of the cultural redress mechanisms also have the effect of putting the PSGE in the place of the tribe and/or traditional tribal leaders. This issue is further explored below in Chapter Five.

4.3(l) Good Governance

This principle is aimed at ensuring that the governance entity operates according to recognized standards of good governance and management. It is hard to argue against such a principle. It should, after all, be the overriding objective of the governance entity to deliver good governance for the community. A PSGE should aim to operate in a way that demonstrates good governance practices and in doing so maintains the mandate of the community and the confidence of third parties with whom the governance entity may have contractual or other relationships.[420] However, the general principle does raise a number of specific questions, such as whose standards are being recognized and deployed as standards of good governance? Does the community itself determine the standards that

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[419] *Ibid.*

[420] *Ibid.* at 75-76.

it considers reflect 'good governance'? Or are these standards externally imposed? Depending on the answers to the foregoing questions, one might also ask whether this principle is about securing the interests of Indigenous peoples, or is it simply about ensuring that Indigenous peoples are tied into the systems of global capital?

4.3(m) Summary of Māori Governance Principles

The Law Commission's *Waka Umanga Report* identifies a number of issues relating to Māori governance that arise in the context of the Treaty settlement process. The governance principles that are proposed by the Commission suggest ways of approaching those issues that might avoid exerting undue external pressure on Māori legal traditions. There are, however, a number of fundamental aspects of the current settlement process that create difficulties for the application of the governance principles proposed by the Commission. The remainder of this chapter considers those problematic aspects of the settlement process.

4.4 Crown Sovereignty Framework

Andrew Sharp, the political philosopher and author of the pre-eminent text on justice and Māori claims,[421] has noted that the sovereignty claims made in relation to the Treaty have affected the discussion of just settlements and reconciliation in that context.[422] Claims that the Treaty provided for absolute Māori sovereignty, as well as claims that the Treaty created 'one people' with one official language, one culture, and 'one law for all' under

[421] A. Sharp, *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand since the 1970s*, 2nd ed. (Oxford: OUP, 1997) [Sharp, *Justice and the Māori*].

[422] *Ibid.* at 249-318.

British sovereignty, are incompatible with the concept of justice and reconciliation between competing ethnic groups with different cultures. Such claims can only be a basis for justice in a homogenous society, because, in effect, these claims argue for two separate and contradictory sovereignties.[423] Sharp does not argue that two distinct sovereignties cannot exist in New Zealand, rather his point is that they cannot be the basis for justice and reconciliation between Māori and other New Zealanders because they are based on separateness, and mechanisms which address justice between different ethnic or cultural groups can only have authority if that authority is commonly accepted by those groups. The justice discourse within the Treaty of Waitangi settlement process is, therefore, coloured by the need to develop a framework for managing disagreement between Māori and the Crown that is rooted in the Treaty's language of sovereignty and, the Māori equivalent, tino rangatiratanga.

Scholars such as Jeremy Webber argue that the institutions of the liberal-democratic state can provide effective mechanisms for fairly managing disagreement between ethnic groups.[424] That is to say, that in any social order there must be mechanisms for resolving disputes, and the authority of state institutions can be justified if they can be shown to manage disagreement fairly amongst members of society.[425] Sharp suggests that this has generally been the approach of the institutions of the New Zealand state in relation to managing justice between Māori and other New Zealanders.

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[423] *Ibid.* at 264.

[424] Webber, *supra* note 242, at 180-181.

[425] *Ibid.* at 179-182.

That is, Crown sovereignty is seen to transcend and regulate "the differing conceptions of justice held by all its subjects".[426]

Sharp suggests that such an approach can be seen in the landmark decision in *New Zealand Māori Council v Attorney-General [the Lands case],*[427] which, arguably, aims to reconcile competing claims for sovereignty in the context of the Treaty of Waitangi. In that case, the New Zealand Court of Appeal was for the first time faced with the task of giving direct effect to 'the principles of the Treaty of Waitangi'. The case arose out of the massive re-structuring of the state sector that took place in New Zealand through the mid to late 1980s. One of the key components of that re-structuring was the corporatization and privatization of many government departments. In order to begin this process, legislation was passed that would enable government departments to be transformed into 'state-owned enterprises'. This raised the possibility of significant land and other assets, which may have been the subject of Waitangi Tribunal claims, passing out of Crown control and ownership and, therefore, made effectively unavailable for use as redress of those claims should those claims prove to be well-founded. The enabling legislation includes a provision that states: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".[428] The New Zealand Māori Council argued that the Crown's proposal to transfer land and assets out of Crown ownership before claims to that land could be heard was in breach of the principles of the Treaty of Waitangi and therefore outside of the powers conferred by the state owned enterprises legislation. In the *Lands case*, the Court of Appeal spoke of

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[426] Sharp, *Justice and the Māori, supra* note 421 at 265.

[427] *Lands case, supra* note 18.

[428] *State Owned Enterprises Act* (New Zealand) 1986, s 9.

Māori and the Crown as 'partners' who should engage in constructive dialogue. The Court required the partners to negotiate an agreed protection mechanism for potential Māori Treaty interests before the Crown could proceed with the establishment of the state owned enterprises. By focusing the Treaty relationship on partnership the Court moved the discussion away from shared legal sovereignty. As McHugh notes, "the courts were not prepared to see Māori as a distinct legal sovereign sharing sovereignty with the Crown or legally limiting its power in Parliament, [but] they did recognize their political sovereignty as a tribal people".[429] This outcome sets the Treaty partnership within a sovereignty frame by confirming "an asymmetrical relationship where the Crown's *legal* sovereignty could out-trump Māori's *political* version".[430] Although the *Māori Council* decision reflects a vision of justice in relation to the Treaty of Waitangi that is influenced by a sovereignty discourse, Sharp also notes that this case occurs in the context of both the Waitangi Tribunal's developing jurisprudence and Pākehā understandings of justice as formal equality.[431] This gives rise to a particular vision of justice in relation to the Treaty of Waitangi, which is framed by sovereignty claims, but which is also historically focused and circumscribed by socioeconomic models of justice. That vision of justice is based on the requirement that Māori recognize the Crown's right to govern and that the Crown in turn make reparations for violation of Māori rights.[432]

This Crown sovereignty framework is in tension with a number of the Law Commission's principles for Māori governance. In particular, this framework would

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[429] McHugh, *Aboriginal Societies*, *supra* note 15 at 416.

[430] *Ibid.*

[431] Sharp, *Justice and the Māori, supra* note 421 at 278.

[432] *Ibid.* at 278.

appear to create some difficulties for the principles of autonomy, cultural match, choice, and diversity. Māori communities who design governance entities in the context of the Treaty settlement process are constrained by the Crown sovereignty framework in ways which limit their ability to control the constitutional-building process, limit their time to engage in a process of entity formation, and generally limit their choices, including choices about the role of Māori legal traditions within the new entity.

4.5 Symbolic Reparation

The broad framework of the process established by the Crown for the settlement of claims carefully circumscribes the parameters of those claims and potential redress. As described below, the financial limits on redress effectively constructs a Treaty settlement discourse that is centred on symbolic reparation, which also affects principles of Māori governance.

It is evident that both Māori and Crown views of the just settlement of claims and what might be required to enable reconciliation are framed by the Treaty relationship. After all, Māori and the Crown have a relationship that is based on an agreement entered into which set out some agreed standards of justice. The Treaty settlement process is based on the premise that these standards of justice have not been met, that is, the terms of the agreement have been breached, and, therefore, a just settlement must specifically address the particular breaches of the agreement. Although this provides a helpful focus on injustices of the past, it also, perhaps, leads to a narrow view of the requirements of justice and reconciliation.

Sharp suggests that the Treaty-based framework in New Zealand infuses the settlement discourse with a focus on past injustices and, therefore, ideas of reparative justice.[433] Sharp suggests that the following definition of reparative justice applies to the New Zealand situation:[434]

> Reparative justice is a reciprocal exchange between two equal parties, recognizing the same standards of right, whereby one party having done wrong to the other, repairs that wrong by restoring the wronged party to his, her, their or its original position before the wrong. I wrongly take your land; I return it. I arrogate your authority; I restore it to you. I do not benefit from the transaction: your suffering is relieved; balance is restored and justice in transactions done. A debt - generated by the wrong action - is discharged in reparation: what is owed is paid, what is taken is restored.

While this might clearly point to the actions necessary to achieve justice in simple situations, there are, as Sharp points out, a number of subjective matters contained within this definition.[435] For instance, there may not be agreement between the parties as to what constitutes a wrong action, what benefit has accrued to one party and what prejudice has been visited on the other. Without agreement on those matters it is difficult to find agreement as to what would constitute a just outcome. Furthermore, the situation becomes more complicated when the bona fide rights of third parties are involved or in circumstances where it is no longer possible to return exactly what was taken or to restore the situation to precisely what it would have been had no wrong occurred. Therefore, Sharp notes that two different types of reparations can be identified. That is, reparations

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[433] *Ibid.* at 27-40.

[434] *Ibid.* at 34.

[435] *Ibid.* at 34-36.

can be conceptualized as either restitution or compensation.[436] Sharp explains this distinction as follows:[437]

> 'Restitution' is the process by which things are restored to what they were. 'Compensation', so distinguished, admits to failure to restore the parties precisely to their original position and comes as close as it can by returning not the good in question, but another as much alike as possible.

Interestingly, the New Zealand Treaty settlement process aims at neither restitution nor compensation in a strict sense. Because of the complex and often countervailing interests of third-parties that exist in New Zealand today, restitution of Māori groups to the position they would have enjoyed had the Treaty not been breached, in all but perhaps a few rare and highly circumscribed instances, is acknowledged as unrealistic. However, the Crown also makes it clear that it will not provide compensation for the full value of the prejudice suffered by Māori. It will only offer Crown-defined "redress".

The Crown's approach to the total value of each settlement is described in official publications as follows:[438]

> The task for the Crown in developing the current settlement policy was to devise an approach to financial and commercial redress that, within a negotiated settlement as a whole:
>
> - enables the claimant group's sense of grievance to be resolved
> - contributes to the economic and social development of the claimant group
> - is fair between claimant groups, and

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[436] *Ibid.* at 35.

[437] *Ibid.*

[438] Office of Treaty Settlements, *supra* note 370 at 87.

- takes account of New Zealand's ability to pay, considering all the other demands on public spending such as health, education, social welfare, transport and defence.

Crown policy in this area was modified in 2000, so now also includes the following matters:[439]

- redress should relate fundamentally to the nature of the breaches suffered
- different claimant groups should be treated consistently, so similar claims receive similar redress, and
- while maintaining a fiscally prudent approach, each claim is treated on its merits and does not have to be fitted under a pre-determined fiscal cap.

There is no longer a formal fiscal cap in place, so there is now at least theoretical flexibility in relation to the value of settlement assets that may be available.[440] However, it should be noted that the original cap continues to cast a shadow over settlement negotiations. Both Ngai Tahu and Waikato-Tainui, two large groupings whose negotiations and settlements essentially set the framework for the new-style settlement process, each included a relativity clause within their settlement agreements.[441] These provisions acknowledge that these groups settled their claims on the assumption that the total value of assets available for the settlement of historical claims was $1 billion. The agreements, therefore, allow for their settlements to be 'topped-up' if necessary to maintain relativity with other settling groups. Even without these clauses, the Crown sees it as a matter of fairness to maintain relativity between the different settling

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[439] *Ibid.* at 88.

[440] *Ibid.* at 87.

[441] Waikato Deed of Settlement, 22 May 1995, Attachment 9; Ngai Tahu Deed of Settlement, 21 November 1997, Section 18.

groups.[442] This also has implications for the kind of justice the Crown perceives should be delivered through this process. That is, it places a premium on relativity between groups as opposed to the provision of just redress dependent on the injustice suffered by a particular group.[443] The subject of Treaty settlement negotiations becomes, therefore, the nature of appropriate symbolic reparation.

Governance entities that are constituted for the narrow purpose of receiving reparations are unlikely to meet the identified principles of community empowerment, recognition, or early entity development. The limits on settlement redress, both financial and conceptual, also limit the roles and functions of PSGEs, and this ultimately effects the role of Māori legal traditions within PSGEs.

4.6 Crown Requirements

Specific Crown requirements also pose challenges for principles of Māori governance. The choice of entity to act as a PSGE represents a significant decision for the settling community. It is also a potentially fraught area for the Crown because decisions about governance and representation of an iwi or hapū unavoidably address key aspects of self-determination and tino rangatiratanga. Somewhat counter-intuitively then, it is ultimately the Crown that determines whether or not it will accept an entity as a PSGE. The Crown's position is that it is a matter for the settling community to determine what type

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[442] Office of Treaty Settlements, *supra* note 370 at 28-30, 88.

[443] Margaret Mutu, a prominent Māori leader who has acted as chief negotiator for her tribe, has noted the problems this creates for doing justice in each claim, and, consequently, for reaching durable settlements. See Margaret Mutu, "Recovering Fagin's Ill-Gotten Gains: settling Ngāti Kahu's Treaty of Waitangi claims against the Crown" in Michael Belgrave, Merata Kawharu, and David Williams eds., *Waitangi Revisited: perspectives on the Treaty of Waitangi*, 2nd ed. (South Melbourne, Vic.: New York: Oxford University Press, 2005) 187, 204-205.

of legal entity will best serve that community's needs, but that the Crown also has obligations to members of the settling community as well as the tax-payer to ensure that certain fundamental governance standards are met.[444] The Crown describes these standards as reflected in principles of representation, accountability, and transparency.

4.6(a) Representation

The Crown must be satisfied that the PSGE is genuinely representative of the settling community and that all adult members of the community have an opportunity to participate in the affairs of the PSGE. When assessing the suitability of a proposed PSGE, the Crown will want to be confident that all beneficiaries of the settlement, that is, all those people whose claims are to be settled, will be entitled to register as members of the PSGE. The PSGE must therefore have provisions in their constituting instrument (which may be a constitution, charter, trust deed, or other instrument depending on the form the entity takes) setting out the process for registration, the criteria for registration, who makes decisions about registration, and whether those decisions can be appealed or disputed.[445]

All adult registered members ought to have a say in who the representatives on the governance entity will be. The Crown will consider matters such as how many representatives there will be on the PSGE and who is eligible to be appointed or elected as a representative. Though there are various ways in which elections can be structured, the Crown will take note of whether representatives are chosen from an 'at large' vote or

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[444] Office of Treaty Settlements, *supra* note 370 at 72.

[445] *Ibid.* at 75.

whether there are specific selections of representatives on the basis of iwi, marae, hapū, or other group. There ought to be clear rules around the voting process itself (for example, will there be provision for postal ballots?) and the Crown will also seek to ensure that the term of office of the representatives is reasonable and allows for stable governance and that if there are circumstances in which a representative can be removed from office that these be clearly set out. [446]

The Crown requirements in relation to representation may create some difficulties in relation to the principle of cultural match, especially when it comes to questions of membership. Kirsty Gover undertook a comprehensive examination of the membership rules used by different Indigenous governance entities in New Zealand, Australia, Canada and the United States of America. Membership is a very important aspect of the way these governance entities operate and the way Indigenous communities define themselves.[447] Gover's work on membership provides a platform for one strand of the analysis of the effects of the establishment of PSGEs on Māori law that are discussed in further detail in Chapter Five.

All the iwi within Gover's study based their membership on whakapapa or kinship connections and descent. Gover identifies four basic conceptions of descent that are used by iwi in the context of their governance entities:

- descent from a person named in a historic document or base roll,[448]
- descent from a named ancestor,[449]

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[446] *Ibid.*

[447] Gover, *Tribal Constitutionalism: States, Tribes, and Governance of Membership, supra* note 56.

[448] Te Atiawa Manawhenua ki te Tau Ihu Trust: Replacement Deed of Trust, cl 6 (2000); Ngati Tama Manawhenua ki te Tau Ihu Deed of Trust, cl 9.2 (1993); Te Rūnanga o Ngai Tahu Charter (2000).

- descent from a named (eponymous) ancestor,[450] and
- descent from a collective (usually an Iwi).[451]

Iwi who have been through the Treaty settlement process tend to use the claimant definition that is used in the Deed of Settlement when defining membership in the constitution of their PSGE.[452] The Crown insists upon direct incorporation of the Deed of Settlement definition because it is anxious to ensure that the beneficiaries of the PSGE are exactly the same group of people whose claims are being settled. The claimant definition used in the Deed of Settlement must be negotiated and agreed between the Crown and the claimant community. The usual form of the claimant definition is to define membership of the claimant community by descent from one or more ancestors,[453] consistent with the conceptions of descent identified by Gover.

Gover also notes that often there is very little guidance from the constitution of a PSGE as to what kind of evidence would prove membership, though membership application forms indicate the type of information required:[454]

> These usually require the applicant to name his or her immediate ancestors (only two invite the applicant to identify ancestors beyond his or her great-

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[449] See, e.g. Deed of Trust of the Patiki Trust, cl. 1.1 (2006).

[450] See, e.g. Deed of Restatement and Amendment of Trust: Te Kotahitanga o Te Arawa Waka Fisheries Trust Board, cl. 1.1 (2005).

[451] See, e.g. Rules of Muaupoko Tribal Authority Inc, cl 6.1(b) (2005): see also Constitution and Rules of Ngati Ranginui Iwi Soc Inc, cl 1.1 (2005): '[a]ll persons who whakapapa to any of the seven hapu of Muaupoko Iwi'.

[452] See, e.g. the Constitution of Te Rūnanga o Ngati Awa: '(a) "Ngati Awa" is ngā uri o ngā Hapū o Ngati Awa and: (b) means the collective group composed of individuals referred to in paragraph (b) of this definition; and means: (i) every individual who is descended from a Ngati Awa Tipuna; (ii) every individual who is a member of a hapū, group, family or whanau referred to in paragraph (c) of this definition; and (c) includes the Hapū; and any hapū, group, family or whanau composed of individuals referred to in paragraph (b) of this definition.' Charter of Te Rūnanga o Ngati Awa, cl 1.1 (2005).

[453] See, e.g. Ngāti Toa Rangatira initialled Deed of Settlement, 30 August 2012.

[454] Gover, *Tribal Constitutionalism: States, Tribes, and Governance of Membership, supra* note 56 at 89.

> grandparents),[455] to identify a primary hapū or marae,[456] and sometimes also to provide an affidavit from a kaumatua (elder), or other tribal member who knows the applicant's family.[457]

Two further issues relating to both representation within the settlement process and a number of the identified principles of Māori governance have been repeatedly brought before the Waitangi Tribunal: challenges to the mandate of settling groups; and issues relating to the way in which overlapping interests are managed within the settlement process. Although these can be characterised as two distinct sets of issues, there are important connections between the two. Both speak to the way in which Māori groups interact and relate to each other, addressing significant matters of tikanga and the application of concepts such as mana and rangatiratanga, whanaungatanga, and manaakitanga.

The Crown's policy and practice in relation to the management of overlapping claims has been found wanting by the Waitangi Tribunal on a number of occasions.[458] In the *Ngāti Tuwharetoa ki Kawerau Settlement Cross-Claim report*, the Waitangi Tribunal summarised the expectations on the Crown in relation to managing overlapping claims issues: [459]

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[455] See, e.g. Waikato Raupatu Lands Trust Registration Form (undated), required registrants to identify their great-great-grandparents, and the Te Rūnanga o Ngai Tahu Application for Registration (undated) requires registrants to identify their great-great-great-grandparents.

[456] See, e.g. Te Atiawa Iwi Authority and Te Atiawa (Taranaki) Settlements Trust Registration Form (undated).

[457] See, e.g. Some tribes require registrants to provide an affidavit from a Kaumatua endorsing their descent form: Te Rūnanga o Ngati Whare Iwi Trust, Beneficiary Registration Form (undated), or a tribal representative: Te Rūnanga o Rangitane o Wairarapa Registration Form (undated).

[458] See, e.g. *The Te Arawa Mandate Report*, *supra* note 387; and Waitangi Tribunal, *Tāmaki Makaurau Report*, *supra* note 366.

[459] Waitangi Tribunal, *The Ngati Tuwharetoa ki Kawerau Settlement Cross Claim Report* (Wellington, N.Z.: Legislation Direct, 2003) at 61.

> It follows from the foregoing that we expect of OTS officials a sophisticated understanding of the many dimensions of the Māori world within which they are operating when they negotiate settlements. We think such a high standard is appropriate. It is not enough for the Crown to act in good faith, if it means half-informed good intentions. In order to act fairly, and protect the interests of all the groups with which they deal in the context of a settlement, the OTS officials must be highly skilled. They must have a sophisticated understanding of how Māori communities operate in general, and how the ones in question operate in particular. If they do not have these understandings, how will they appreciate how much there is to know, or develop an instinct for when they do not know enough? It is a hard job, and a demanding one, because the honour of the Crown is on the line, and the durability of these settlements, and the quality of the relationships that spring from them, will depend in large measure on how well these officials perform. It is, as they say, a big ask. But it is one underpinned by Treaty principles and the imperative of fairness. We should not hesitate to insist on high standards when lower ones can have such serious, and long-lasting, consequences.

The Tribunal here draws a clear connection to the quality of the settlements and the settlement process in terms of reconciliation, a measure applied in this dissertation to examine the effects of the settlement process on Māori law.[460]

The *East Coast Settlement Report* is one of a series of reports which address aspects of the Treaty settlement process itself. In fact, this report provides a helpful summary of previous Waitangi Tribunal comment on Crown settlement policy.

The *East Coast Settlement Report* relates to the settlement negotiations between the Crown and Te Rūnanga o Ngāti Porou. A number of claimants who submitted claims for the Waitangi Tribunal's East Coast district inquiry did not wish to enter direct negotiations with the Crown without first going through a full district inquiry. Some of these claimants, who claimed to represent the kin groups Ruawaipu, Uepohatu, and Te Aitanga-a-Hauiti, sought recommendations from the Tribunal that the settlement between the Crown and Te Rūnanga o Ngāti Porou should be delayed. They contended that the

[460] See Chapter Six, below.

Rūnanga had no mandate to negotiate the settlement of their claims and that the Crown's recognition of the Rūnanga's mandate was contrary to the principles of the Treaty. The Tribunal held an urgent hearing of these claims in December 2009 and reported its findings and recommendations in the *East Coast Settlement Report.*[461]

The report identifies a number of aspects of the mandating process that might have been improved upon, although the Tribunal determined that any flaws in the process were not substantial enough to warrant delaying the settlement. The Tribunal was mindful that such a delay would significantly prejudice those who support Te Rūnanga's mandate. Furthermore, the Tribunal noted that a full inquiry was unlikely to address many of the issues at the heart of the claimants' concerns, which were really issues between Māori groups, upon which the Waitangi Tribunal has historically been reluctant to comment.

However, the Tribunal did find a number of flaws in the Crown's Treaty settlement policy and recommended a number of changes to that policy to ensure that the settlement process is fair and that settlement agreements are durable. These recommended changes included the following:[462]

- The Office of Treaty Settlements should call for submissions at the point that a proposed mandating strategy is submitted, as well as after a deed of mandate is received in order to allow ample time for interested parties to voice their concerns and for the Crown to be made aware of potential issues at an early stage.
- The information provided as part of any mandating strategy must include:
    - the specific claims (Wai numbers) to be included in a proposed settlement;

[461] Waitangi Tribunal, *East Coast Settlement Report, supra* note 366.

[462] *Ibid.* at 67.

- a clear definition of the claimant community on an iwi, hapu, marae, and whakapapa basis;
- and the specific geographical area to be covered by a proposed settlement.

- The Office of Treaty Settlements should, at an early stage, write to all Wai number claimants whose claims might be extinguished if a proposed settlement goes ahead, and should also assist any body that is mandated to negotiate the settlement of claims to communicate settlement milestones and developments with affected claimants.
- The Crown should adopt a more proactive role in monitoring developments during the mandating strategy process in order to discharge its responsibilities towards claimants who may feel marginalised as a result of the process.
- In order to lessen the likelihood of claimants seeking assistance and protection through the Waitangi Tribunal's urgent inquiry process, the Crown must recognise that it "has a responsibility to ensure that all interested parties in a negotiated settlement have access to unhindered participation at every stage of the mandating process."
- The Office of Treaty Settlements should "update its policy guide, *Ka Tika a Muri, Ka Tika a Mua*, to reflect changes that have arisen out of the recommendations of Waitangi Tribunal reports on mandating issues and Crown settlement policy in general.

In August 2012, the Waitangi Tribunal again addressed issues relating to the Crown's Treaty settlement policy and practice in the *Port Nicholson Block Urgency Report.*[463] The Tribunal was critical of the 'silo approach' to negotiations within the Office of Treaty Settlement, which had contributed to a lack of awareness of the overlapping interests between two neighbouring Māori groups. The Tribunal noted that these same issues in relation to managing relationships in the settlement context were

[463] Many of these issues were subsequently addressed by the High Court of New Zealand. See *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181. It is worth noting Williams J's obiter dicta at para 95 in which he suggests that one of the difficulties with the cultural redress mechanisms that are used in modern settlement to recognise customary interests is that these mechanisms ". . . do not reflect the sophisticated hierarchy of interests provided for by Māori custom. They have the effect of flattening out interests as if all are equal, just as the Native Land Court did 150 years ago. In short, modern [Resource Management Act]-based acknowledgements dumb down tikanga Māori".

raised in the *Tāmaki Makaurau Settlement Process Report* in 2007 and expressed disappointment at the need to raise these matters once again.[464]

The issues relating to mandate and overlapping claims are extremely significant in the context of PSGEs because they speak directly to questions of identity, authority, and relationships.

4.6(b) Accountability and Transparency

The Crown sees accountability to the settling community as crucial to the ongoing legitimacy of the settlement. Consequently, bodies such as Māori Trust Boards that have been used as governance entities in the past, may not be appropriate for use as a PSGE:[465]

> Māori Trust Boards are, by law, ultimately accountable to the Minister of Māori Affairs and not to the members of a claimant community. The Crown does not consider accountability to the Minister rather than to members of a claimant group appropriate for the administration of a settlement. Beneficiaries of a Māori Trust Board also do not have a beneficial interest or rights to use the benefit from property in such Trust Boards. Because of these factors, claimant groups may find Trust Boards too restrictive and lacking in accountability.

For similar reasons, the Crown does not consider that a charitable trust is an appropriate vehicle for a PSGE (despite having accepted some exceptions to this policy). That is, the Attorney-General (who, coincidentally, has also historically been the Minister in Charge of Treaty of Waitangi Negotiations) maintains a supervisory role in relation to charitable trusts. There are also additional complications that would occur if the trust were to wind up. In that circumstance, it would not be possible for the trusts assets to simply be allocated amongst the settling community. It should be noted that, despite

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[464] Waitangi Tribunal, *Port Nicholson Block Urgency Report* (Wellington, N.Z.: Legislation Direct, 2012).

[465] Office of Treaty Settlements, *supra* note 370 at 72.

these concerns and the Crown's general preference that Māori Trust Boards are not used as PSGEs, the recent partial settlement with Ngāti Maniapoto used Te Maniapoto Māori Trust Board as the PSGE.

The Crown is concerned to ensure that the PSGE is accountable to the settling community, and to nobody else. The Crown therefore inquires into matters such as how decisions by the PSGE will be made, who will determine what benefits are available to beneficiaries and how that will be determined, and what kind of obligations the PSGE will have to report to its members.[466] The Crown will also take note of how the rules of the PSGE may be changed and whether there are processes for planning, monitoring or reviewing decisions of the PSGE and what members can do if they disagree with a decision made by the governance entity.[467]

The Crown must also be satisfied that the operations of an entity are transparent before it will be recognised as a PSGE. This essentially boils down to some quite basic requirements such as the preparation of audited accounts and financial reports, ensuring copies of the rules of the PSGE and financial and other reports are available to members, along with appropriate minuting of meetings and resolutions.[468]

In order to meet the Crown's requirements of accountability and transparency, the PSGE must include some form of dispute resolution process. This speaks directly to the Law Commission's principle of consensus and assisted dispute resolution in Māori governance. Usually, the PSGE will include aspects of Māori legal traditions as part of its dispute resolution process, at least in relation to some types of dispute.

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[466] *Ibid.* at 76.

[467] *Ibid.* at 76-77.

[468] *Ibid.* at 77.

The constitution of the Ngāti Kahungunu Iwi Incorporated ('NKII') illustrates the types of choices that many iwi are making in regards to dispute resolution.[469] Ngāti Kahungunu is an iwi with approximately 60,000 members. The iwi has adopted the incorporated society model for its tribal governance entity. NKII manages a range of commercial fishing operations, and is a social service provider. The NKII constitution establishes a committee to resolve any disputes that are referred to it by the Board of governors. The constitution requires that members appointed to this committee must have "proven expertise in mediation and alternative dispute resolution" and/or "expertise in te reo Māori [Māori language] and tikanga Māori". Although the committee's jurisdiction is not limited to particular types of disputes, the constitution specifies three areas that it envisages the committee will be called upon to address: disputes about membership; disputes about tribal boundaries; and disputes arising in relation to the Māori Fisheries Act which deals with the recognition of customary fishing rights.

The dispute resolution committee is required to convene and facilitate a meeting involving parties who have an interest in the dispute but, aside from ensuring all parties are entitled to be heard, the exact process is left to the committee to determine. It should also be noted that even though members of the dispute resolution committee are expected to have expertise in tikanga Māori, there is also provision for the committee to seek advice, on any particular matter, from a committee of elders. In the provisions of the constitution relating to membership, it is clearly anticipated that advice from the committee of elders will be sought in relation to any membership dispute. In fact, the constitution provides that, "unless there are compelling reasons to the contrary", advice

[469] Constitution of Ngäti Kahungunu Iwi Incorporated, (July 2006).

provided by the committee of elders should be the principal factor to be taken into account by the Board when it considers applications for membership. NKII is a relatively typical example of a Māori governance entity adopting an orthodox Western structure but also ensuring that aspects of traditional dispute resolution processes are incorporated with it.

The example of the CNI dispute resolution process examined in the previous chapter provides an even more sophisticated example of this application of tikanga in a non-traditional governance context. I will return to the CNI forestry settlement example in more detail in the next chapter in order to examine the way in which Māori legal traditions are being affected by the tensions created by the settlement process, its flaws, and the current pressures on Māori governance that have been set out in this chapter.

4.7 Conclusion

The various stages of the Treaty settlement process that are outlined in this chapter are not simply neutral procedural steps. They are designed to give effect to particular Crown objectives and consequently the Treaty settlement discourse becomes coloured by both a framework of Crown sovereignty and the lens of symbolic reparation. Both these characteristics create friction, if not actual conflict, with principles for Māori governance that have been identified by the New Zealand Law Commission. These principles for Māori governance are perhaps even more directly engaged by the Crown's specific requirements of representation, accountability and transparency for PSGEs. This gives rise to issues of mandate, membership, and dispute resolution. These are matters that will

be further explored in the next chapter in the context of changes to Māori legal traditions relating to law-making, dispute resolution, and the substance of membership laws.

CHAPTER FIVE: MOEWHARE – TREATY SETTLEMENTS AND TENSIONS IN MĀORI LEGAL HISTORY

Moewhare

"Pāpā, tonight, let's have a story about a great battle."

"Do you like to hear about your warrior ancestors, e Tama?"

"Ae. Well, sometimes – so long as the ending isn't too sad."

"Well, there is usually sadness present whenever our people are divided by warfare."

"I know, but so long as it isn't *too* sad. That will be alright."

"OK then. How about the story of Tāne-te-Kohurangi?"

"Who?"

"You might have heard of him by another name – Moewhare."

"Who?"

"Well, let me tell you a story about a battle that he was involved in. This was a battle in which loyalties amongst the community were divided and Moewhare had to make some principled decisions about whether or not to get involved and, if he did, how to proceed."

"What happened, Pāpā?"

"First of all, you should know some of the key people who were caught up in this conflict. Moewhare was a rangatira from Wairoa and all the other important people in this story were in some way connected to him. His two sisters were involved – Patupuku and Te Whewhera – as well as his younger brother, Te Huki. Patupuku was married to a man called Te-O-Tāne, with whom Moewhare had quarrelled in the past."

"Was the battle between Moewhare and Te-O-Tāne then?"

"No, interestingly, Moewhare sided with Te-O-Tāne in this instance. It seems there were more important things at stake than their past arguments."

"Like what?"

"People's lives! Moewhare was drawn into this battle, on the side of Te-O-Tāne, because he was concerned to protect his sister Patupuku. The community within which Te-O-Tāne and Patupuku lived was under attack and Moewhare went to their aid."

"But of course he would. That would have been an easy decision."

"Not exactly. You see, the leaders of the raiding party were also closely related to Moewhare – they were the children of his other sister, Te Whewhera. So Moewhare had to make a difficult decision about what he should do."

"How did he make that decision?"

"Well, he looked to our tikanga and the principles that underlie it. He considered the responsibilities that came from his whakapapa and his relationships with the other people involved. He considered the history of the peoples in the Wairoa area and past disputes over resources. He thought about what was right and fair and just according to our tikanga and what the consequences would be of following one path or another."

"But he chose to help Patupuku and Te-O-Tāne and everything turned out OK, right?

"He certainly helped to ensure that Patupuku was safe, but his nephews never forgave him."

"Why not?"

"He had taken sides against them. And perhaps they did not see that tikanga justified Moewhare's actions."

"That seems a bit unfair to me"

"Maybe. But relationships can be fragile things, especially if everyone has different views about what is fair."

5.1 Introduction

This chapter considers the broad changes in Māori legal traditions that are taking place as Māori communities work through the Treaty of Waitangi settlement process. This chapter builds on the material set out in the previous two chapters. Chapter Three described some of the key aspects of the Māori legal system and examined the ways in which Māori legal traditions are operating at the beginning of the 21st century. Chapter Four set out the basic structure of the Treaty of Waitangi settlement process that is implemented through OTS. This chapter considers the ways in which the Māori legal traditions outlined in Chapter Three are subject to pressures created by the settlement process that are identified in Chapter Four.

Three broad areas of the Māori legal system are considered in this chapter: law-making processes, dispute resolution processes, and developments in the substance of Māori legal traditions.

The first part of this chapter addresses law-making and considers the effect on Māori law-making traditions of the structure of the settlement process, geared as it is around the Crown's vision of certainty. This part then moves to examine the application within the settlement process of key Māori principles relating to law-making.

The next part of the chapter then turns to dispute resolution processes. Two particular examples are studied in this part: a Waitangi Tribunal directed mediation between neighbouring iwi, Ngāti Tama and Ngāti Maniapoto; and the 'tikanga-based

dispute resolution process' deployed in the Central North Island forestry settlement. Again, the wider context of the structure of the settlement process and the Crown's objectives provide an important backdrop to these two brief case studies.

The specific issue of membership will be discussed in the third part of this chapter to illustrate the pressures that are brought to bear on aspects of substantive Māori legal traditions. Membership rules of PSGEs raise fundamental questions relating to agency and autonomy and are also quite directly connected to the Crown's vision of 'certainty'.

These three broad areas are examined within the framework of the three key tensions in Māori legal history that are identified in Chapter One: 'Adaptation', 'Relationship to the Treaty Partner', and 'Renewal'. The analysis in this chapter suggests that the Treaty of Waitangi settlement process is tending to skew the Māori legal system towards a very constrained form of autonomy within a state-centric model that encourages a very selective incorporation of substantive Māori law.

5.2 Changes to the Māori Legal System

5.2(a) Law-Making

The structure of the Treaty settlement process creates significant pressures on Māori legal traditions relating to law-making. Many of these pressures arise from the tendency of the process to prioritize objectives of certainty over justice objectives, an issue that sociologist Andrew Woolford has identified within the British Columbia Treaty Process. Clear parallels can be drawn with the New Zealand Treaty settlement process in this respect.

The settlement of claims that are based on the Treaty of Waitangi take place within a process that is structured around delivering certainty.[470] Primarily, this is certainty for the Crown and the wider New Zealand community that the Crown represents, although there are also some important aspects of certainty for settling in the case of Māori groups. Achieving certainty in relation to legal rights and obligations is a legitimate objective of the Treaty of Waitangi settlement process, and one that can have benefits for Māori and the Crown.[471] However, certainty can become problematic if it is conceptualized as being primarily based on comprehensiveness, finality, and the extinguishment of Indigenous rights. Visions of certainty that are more consistent with justice in this context might aim for predictability in the Treaty relationship between Māori and the Crown, rather than a termination of that relationship.[472] Such an approach would create more space for Māori law-making processes. Concentrating on achieving certainty without sufficient consideration of justice issues is likely to limit the scope of Māori legal systems to maintain and develop law-making processes sourced in Māori autonomy and legal traditions and undermines the settlement process itself.[473]

The broad framework of the process established by the Crown for the settlement of claims carefully circumscribes the parameters of those claims and potential redress. The first point to note is that the Treaty settlement process deals only with 'historical'

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[470] Douglas Graham, *Trick or Treaty?* (Wellington, N.Z.: Institute of Policy Studies, Victoria University of Wellington, 1997) 55-64 [Graham].

[471] See Office of Treaty Settlements, *supra* note 370 at 44-51; and Crown Forestry Rental Trust, *supra* note 50 at16-21.

[472] See Andrew Woolford, *Between Justice & Certainty: Treaty Making in British Columbia* (Vancouver: UBC Press, 2005) at 161-165 [Woolford]. Note that although Treaty settlements usually include mechanisms designed to establish new, healthier relationships between Māori and the Crown these settlements are fundamentally premised on the extinguishment of Māori rights under the Treaty of Waitangi.

[473] See *ibid.* at 172-179.

claims.[474] These claims are defined as those that relate to alleged breaches of the principles of the Treaty that took place prior to 21 September 1992. Although in many respects somewhat arbitrary, this date is used as the boundary between historical and contemporary claims because it is the date on which the Cabinet approved the development of general principles for the settlement of Treaty claims.[475] The Crown continues to have obligations under the Treaty of Waitangi and contemporary claims relating to Crown actions or omissions post-1992 may be brought before the Waitangi Tribunal. However, OTS is not responsible for the settlement of contemporary claims. The government department responsible for the relevant policy area will also be responsible for any Crown response to contemporary claims. For example, the Crown's response to contemporary claims relating to Crown minerals would be managed by the Ministry of Economic Development. This limitation is one of a number of indicators that suggest that the Crown is primarily concerned with delivering a quite narrow vision of justice in relation to the Treaty. More recently, the Waitangi Tribunal's governing legislation has been amended to prohibit that body from accepting any new claims based on historical Treaty breaches.[476] Māori were given notice that the jurisdiction would be limited in this way and the imposition of a deadline for lodging historical claims led to thousands of claims being filed with the Tribunal. These, mostly pro forma, claims are intended to be broad enough to cover any potential specific issues that might be

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[474] Office of Treaty Settlements, *supra* note 370 at 27-29.

[475] It is also significant to note the context in which this decision was taken. In the period leading up to the development of these principles, the Crown was engaged in negotiations with Māori which led to the national settlement of all claims in relation to commercial fisheries. 'The Sealords Deal', as this agreement became known (because it involved the purchase of a stake in the commercial fishing company, Sealords), was a pre-cursor to these new-style, negotiated settlements.

[476] *Treaty of Waitangi Amendment Act* (New Zealand) 2008. The limitation on historical claims is now set out in *Treaty of Waitangi Act* (New Zealand) 1975 s. 6AA.

identified, the detail of which can be inserted by later amending the original statement of claim. This is also a measure that is clearly aimed at the type of certainty desired by the Crown. It is aimed at finality, not delivering mechanisms for an ongoing articulation of Māori rights based on Māori legal traditions or even based on an interaction between Māori and state legal systems.

The Crown has also sought certainty by placing limits on the total amount of money that will be made available for the settlement of historical claims. Initially, the Crown's policy was that no more than a total of $1 billion (NZ) would be available for the settlement of all historical claims.[477] The original Crown proposals for the settlement of historical claims were centered around the idea of a 'settlement envelope'.[478] This conceptual envelope was, in part, intended to speak to the scope of the claims that would be settled, that is, as outlined above, only historical claims would fit within the settlement envelope. However, most of the discussion related to the concept of the settlement envelope has centered around the fiscal cap that this envelope set for the settlement of all historical claims. The conceptually broader 'settlement envelope' quickly became the 'fiscal envelope'. Circumscribing the scope of claims and setting a fiscal cap for settlements are not entirely unconnected measures. Primarily, they are connected by the Crown's vision of certainty, which is, perhaps unsurprisingly, a very state-centric vision. The original fiscal cap and other parameters set by the Crown are symptomatic of this state-centric vision, which heavily constrains Māori law-making authority in the context of the settlement process and post-settlement governance. This model provides a process

[477] Office of Treaty Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims* (Wellington, N.Z.: Department of Justice: Office of Treaty Settlements, 1994) 9-12 [*Crown Proposals for the Settlement of Treaty of Waitangi Claims*].

[478] *Ibid.*

of identifying and defining discrete rights, but not for recognizing and managing overlapping powers of government and law-making authority in an ongoing relationship.[479]

In addition to the fiscal constraints, the Crown has also set other limits on the redress that might be available to settle historical claims. For example, the Crown has made it clear that title to land in national parks or other designated conservation areas is generally not available to be transferred as part of the settlement of claims.[480] Conservation land may be used in settlements where specific sites of particular cultural significance are identified, though it is rare for title to be transferred as part of a Treaty settlement. The Crown's settlement offer to Ngai Tūhoe adds a significant gloss to this particular policy, though ultimately stops short of transferring title of national park land to the settling community. Te Urewera National Park was the subject of intense negotiation between Ngai Tūhoe and the Crown. The resulting offer, subsequently accepted by Ngai Tūhoe, proposed that title to Te Urewera National Park be vested in a new legal entity that would be represented by a governance board with equal numbers of Crown and Ngai Tūhoe appointees.[481]

The Crown proposals for the settlement of Treaty of Waitangi claims make it clear that the Crown does not accept that Māori can claim any rights to regulate the management of natural resources.[482] Though contemporary claims have been brought to

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[479] See, in the Canadian context, James Tully, "Reconsidering the B.C. Treaty Process" in *Speaking Truth to Power* (Vancouver: British Columbia Treaty Commission and Law Commission of Canada, 2001) 3 at 8-9 [Tully, "Reconsidering the B.C. Treaty Process"].

[480] Office of Treaty Settlements, *supra* note 370 at 58,127.

[481] Note that a similar arrangement has been proposed in relation to the Whanganui River.

[482] *Crown Proposals for the Settlement of Treaty of Waitangi Claims*, *supra* note 477 at 22.

the Waitangi Tribunal that aim to address some of these issues, this serves to underscore the point that these issues are not being dealt with effectively through the OTS process. This severely limits the recognition of many elements of the injustices suffered by Māori groups and speaks to the Crown's view of both justice and certainty.[483] In one sense, this can be seen as another constraint upon the types of redress that might be available within these settlements. But it also shows the Crown's view of the type of justice that is at stake in these negotiations. As in the British Columbia Treaty Process, the non-Indigenous state parties tend to be unwilling to take seriously any claims to difference (that is, cultural-symbolic, as opposed to socioeconomic, justice).[484] Without a genuine effort to recognize claims to difference and address cultural-symbolic justice issues, Treaty settlements will continue to encourage Māori legal systems to adopt law-making processes that are consistent with the Crown's vision of state authority and move away from tikanga-based law-making.

The move away from tikanga-based law-making is arguably evident in the way Māori commercial assets are managed in the settlement context. Linda Te Aho has suggested that directors responsible for Māori corporate governance entities, such as PSGEs, often appear to act in a manner that is contrary to tikanga. Given the central position that PSGEs tend to have within the community infrastructure of the iwi, the normalisation of that type of behaviour has a very real impact on the legal traditions of

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[483] Alan Ward, *An Unsettled History: treaty claims in New Zealand today* (Wellington, N.Z.: Bridget Williams Books, 1999) 52-54.

[484] The Ngai Tūhoe and Whanganui Settlement Offers provide for some novel and innovative forms of redress, yet they only address cultural-symbolic issues to a very limited extent and in a way which does not deviate from the basic Crown framework or challenge the colonial relationship. See *Crown Offer to Ngai Tūhoe* (2012) and *Tōtohu Whakatupua – Whanganui River Agreement* (2012).

the community and the reference points by which behaviour is judged and regulated. PSGEs have assumed a de facto law-making role in many communities and any shift away from a tikanga base in the rules and operation of the PSGE is likely to be reflected more generally in a shift away from tikanga-based law-making.

Te Aho raises concerns about the environmental consequences of decisions that Māori 'corporate warriors seem willing to take, notwithstanding tikanga to the contrary:[485]

> Despite the negative effects on the environment, when faced with some of these situations, some directors take the view that the real issue is that the wealth gets to the right people at the end of the day, and not so much how money is made. Very often, financial considerations or the best commercial interests of the company take precedence over aspects of tikanga.

Te Aho calls on the liberationist theories of Paulo Freire to explain why this might be the case.[486] Friere theorised that if there is no critical recognition of the causes of oppression, the oppressed will adapt to the structures of the oppressor and internalise the oppressor's vision of the world.[487] I would not dispute that one factor likely to be at play in these instances is the internalisation of 'exploitative colonial values'. However, I would argue that such internalisation need not take place for directors of PSGEs to behave in a way that is at odds with tikanga. As discussed in the previous chapter, PSGEs are not tikanga-based structures. They are entities that are based on models of corporate governance that are primarily concerned with financial propriety, commercial accountability, and economic sustainability. These are all valuable aspects of corporate

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[485] Linda Te Aho, "Corporate Governance: Balancing Tikanga Māori with Commercial Objectives" (2005) 8 Yearbook of New Zealand Jurisprudence 300 at 308.

[486] *Ibid.* at 308-309.

[487] Paulo Freire, *Pedagogy of the Oppressed*, 30th anniversary ed. (New York: Continuim, 2000) at 45-48.

governance, but they are not specifically derived from, nor based in, tikanga Māori. They need not be inconsistent with tikanga Māori, but giving commercial imperatives a greater weight than other considerations, could be quite contrary to tikanga. Quite simply, PSGEs can be constituted in a way which leads decision-makers to act in a way which is at odds with the principles that underlie tikanga. But that does not require such an approach to be internalised. It is perhaps quite likely to contribute to the type of internalisation, but it is not a necessary condition for law-making within Māori legal systems to shift away from a tikanga base. Neither is it necessary for PSGEs to shift away from tikanga-based law-making, if greater attention is given to the effect of the Treaty settlement process on Māori legal traditions.

5.2(a)(i) Law-making, tikanga, and Post-Settlement Governance Entities

PSGEs are obviously established in the specific context of the settlement process and specific settlement agreements. The settlement documents (deeds of settlement and settlement legislation) address issues of decision-making, jurisdiction and governance and set the framework for the operation of Māori legal traditions within the settling community, at least in relation to all matters connected with the PSGE and the settlement. It is therefore helpful to consider the use of key Māori legal concepts relating to law-making (mana, rangatiratanga, and kaitiakitanga) that are deployed in settlement documents.

5.2(a)(ii) 'Mana' and Treaty Settlements

'Mana' is used in the settlement documents to denote the following notions of autonomy:

- sovereignty
- autonomy
- authority
- power
- guardianship/custodianship
- control
- rights
- mandate

Most of the Māori text in Treaty settlement documents does not appear in the effective provisions of the Deed of Settlement but rather in preambular sections and agreed historical accounts which include acknowledgements and apologies from the Crown as well as significant background to the settlement. There are many examples of the Crown acknowledging the detrimental effect that state law and policies have had on Māori authority and autonomy and 'mana' is frequently used in the Māori text to convey those concepts. In this context, 'mana' is variously used to mean 'power', 'authority', 'autonomy' and 'self-government'.[488] The term is also often used in conjunction with other words. To give some examples, mana is used with '*whenua*' [land] '*moana*' [sea], '*tangata*' [person/people], '*ture*' [law] and '*whakahaere*' [management] to respectively convey the ideas of 'protection and use of lands', 'protection of the sea', 'rights', 'legal authority', and 'control' [over lands and resources].

[488] See e.g. Ngati Ruanui Claims Settlement Act of 2003 (New Zealand), Preamble; Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act of 2005 (New Zealand), Background; Ngati Mutunga Claims Settlement Act of 2006 (New Zealand), Preamble.

'Mana' is also used a small number of times in the substantive provisions of settlement instruments. These provisions generally relate to the cultural redress aspects of the settlement package. For example, the Ngāti Awa Claims Settlement Act refers to 'mana' in the statutory acknowledgements relating to the Ohope Reserve and the Whakatane River. In the case of Ohope Reserve, the relevant part of the schedule states:[489]

> The traditional values of mana, mauri, whakapapa, and tapu are central to the relationship of Ngāti Awa with the Ohope Scenic Reserve. The mana of Ohope describes the power and importance of the reserve to Ngāti Awa. Mana also implies the responsibility of Ngāti Awa as tangata whenua and guardians of the area. The mauri of Ohope is the life force of Ohope. All forms of life have a mauri and all forms of life are related. One of the roles of Ngāti Awa as tangata whenua is to protect the mauri of the Ohope Scenic Reserve area. Whakapapa defines the genealogical relationship of Ngāti Awa to the Reserve. Tapu describes the sacred nature of the Reserve to Ngāti Awa. Mana, mauri, whakapapa, and tapu are all important spiritual elements of the relationship of Ngāti Awa with the Ohope Scenic Reserve area. All of these values remain important to the people of Ngāti Awa today.

The statutory acknowledgement in relation to the Whakatane River is similar, providing, amongst other things, "Mana also defines the custodian responsibility of Ngāti Awa as guardians of the river."[490]

The Ngai Tamanuhiri Deed of Settlement also contains reference to the concept of 'mana' in relation to the cultural redress provided under that agreement:[491]

> 5.1 There are three main components of the cultural redress –
>
> 5.1.1 mana tangata (identity and heritage) redress, the objective of which is to assist Ngai Tamanuhiri to reclaim and promote their identity, tikanga and history; and

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[489] Ngati Awa Claims Settlement Act of 2005 (New Zealand), Schedule 6.

[490] *Ibid.* Schedule 10.

[491] Ngai Tamanuhiri Deed of Settlement cl 5.1 (2011).

> 5.1.2 mana whenua/mana moana (protection and use of land and sea) redress; and
>
> 5.1.3 mana rangatira (enhancement of relationship) redress which contributes towards the protection and recognition of the right of Ngai Tamanuhiri to exercise mana rangatira, mana tangata, mana tipuna, mana atua, mana whenua and mana moana.

The Rongowhakaata Deed of Settlement uses the term 'mana whenua' to make reference to the specific interests that a particular segment of the Rongowhakaata community have in an area of land to be returned under the settlement:[492]

> 6.15 Rongowhakaata –
>
> 6.15.1 wish to record their intention that, after the settlement date, the governance entity will transfer the fee simple estate in the London Street site to an entity approved by, and for the benefit of, Ngāti Oneone; and
>
> 6.15.2 acknowledge that –
>
> (a) the transfer of the London Street site referred to in clause 6.15.1 is in recognition of Ngāti Oneone holding mana whenua in Kaiti; and
>
> (b) after the transfer of the London Street site referred to in clause 6.15.1 has been completed, the property will be administered jointly by Ngāti Oneone, Ngai Tawhiri and Whanau a Iwi in recognition of the interests that the latter two hapu also have in the Kaiti area.

Perhaps mana is rarely used in the operational provisions because the operational provisions are mostly governed by English concepts, traditions and laws and mana is not needed to express such ideas. If that is the view taken by the drafters of these instruments, that seems to suggest that whilst Treaty documents are supposed to be a reflection of partnership between the New Zealand government and Māori communities, in effect, it is the laws, ideas, and philosophy of the New Zealand state that ultimately determine how Treaty settlements are structured.

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[492] Rongowhakaata Deed of Settlement cl 6.15 (2011). [Rongowhakaata DOS]

It is notable that when the concept of sovereignty is used to describe the status and powers of the British monarch, mana is the term that is used to translate that concept into Māori.[493] 'Mana' is not translated anywhere in the settlement documents as ' Māori sovereignty'.[494] It is interesting to note that although mana is a Māori concept it is used in this example to express British notions of sovereignty for non-Māori people rather than sovereignty for Māori themselves. The phrase 'mana motuhake' is used as a key concept in the Crown's offer to Ngai Tūhoe. Although this is significant, it is used to convey the idea of increased Tūhoe autonomy in relation to the delivery of social services. Whilst this is an important aspect of the redress package, it is a more limited form of authority than would ordinarily be reflected in that concept.[495]

Mana, then, is used to express various forms of autonomy, though it is rarely used in settlement instruments to express high levels of sovereignty and is instead used mostly to convey the concept of 'authority'. Therefore, whilst mana is used to express varying forms of authority/autonomy, it is mostly used in settlement instruments to express concepts at the lower levels of this spectrum.

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[493] *Waikato Raupatu Settlement Act*, *supra* note 369, Preamble.

[494] This might be seen as a parallel to issues relating to the language and concepts used in the Treaty of Waitangi. 'Kāwanatanga' [government] is used in the Māori text of the Treaty as the translation for 'sovereignty' and 'tino rangatiratanga' is used to express the authority of the chiefs. 'Mana' is conspicuously absent from the text of the Treaty, despite being used five years earlier in the 1835 Declaration of Independence in the phrase "Ko te Kingitanga ko te mana" as a translation of "All soverign power and authority".

[495] See Te Rangimarie Williams, *Te Mana Motuhake o Tūhoe* (LLM thesis, Victoria University of Wellington, 2011) [unpublished].

5.2(a)(iii) 'Rangatiratanga' and Treaty Settlements

Rangatiratanga is another Māori term that appears frequently throughout Treaty settlement documents. Rangatiratanga is used to denote the following concepts:

- power
- authority
- autonomy
- sovereignty
- governance
- leadership
- control
- ownership

Rangatiratanga has only infrequently been translated into English in these settlement documents. Rather rangatiratanga has generally been left for the reader to ascertain the precise meaning.

Where it does have an English translation, rangatiratanga has been used as a translation for 'authority', 'leadership', 'control' and 'ownership'. These concepts are reflections of lower levels of autonomy. However when used in conjunction with other Māori words rangatiratanga is sometimes used to translate higher levels of autonomy. For example, 'rangatira motuhake' is used to translate 'Māori autonomy'.[496]

In one instance rangatiratanga is used within an English sentence and when this is translated into Māori the phrase 'mana rangatira' is used as a translation for

[496] Rongowhakaata DOS, *supra* note 492, cl. 2.18.

rangatiratanga.[497] This represents a slightly unusual choice made by the drafters because it renders a Māori concept differently in the Māori text to the meaning the same word is given in the English text. It is also a slightly unusual use of the phrase 'mana rangatira' in any case. The other occasion on which mana rangatira is used in these settlement instruments is within the Ngai Tamanuhiri Deed of Settlement, in the Cultural Redress section. Here it is used to describe a component of the cultural redress and translated as 'enhancement of relationships'.

5.3(a)(iv) 'Kaitiakitanga' and Treaty Settlements

'Kaitiakitanga' appears throughout the Treaty settlement documents (albeit less frequently). Kaitiakitanga is used to convey the concepts of 'custodianship', 'guardianship' and 'stewardship'. Kaitiakitanga is used consistently in the Treaty settlement documents to express these concepts. On two occasions kaitiakitanga is directly translated to mean custodianship and on two occasions kaitiakitanga is left untranslated. The very consistent, precise, and specific use of this term stands out from the wide range of meanings ascribed to mana and rangatiratanga in these settlement instruments. This is likely due to the fact that kaitiakitanga is a term used in the Resource Management Act 1991 and its meaning through this Act is becoming more entrenched for government authorities.

Custodianship is a lower level of authority/autonomy, indicating a reciprocal relationship between the custodian and the whenua to which the kaitiakitanga is linked rather than government over the land and the people within.

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[497] *Waikato Raupatu Settlement Act, supra* note 369.

Kaitiakitanga is found solely within the more symbolic provisions of the settlement instruments, that is, within the preamble, background, or historical account. This again highlights the general lack of Māori language within the operational provisions of these instruments. Given the centrality of the concept of kaitiakitanga to Māori rights and obligations, to Māori environmental law and policy, and even to New Zealand resource management law, it is perhaps surprising that kaitiakitanga does not appear more frequently in settlement instruments, particularly in provisions giving effect to forms of cultural redress that deal directly with these precise matters.

5.3(a)(v) Limited use of Māori concepts relating to law-making

The examination of the use of mana, rangatiratanga, and kaitiakitanga in settlement instruments draws attention to four significant issues with the use of Māori language and concepts in those instruments.

First, the limited use of Māori language in these instruments is of some concern. While it is acknowledged that all settlement instruments contain some Māori language, it is instructive to note that Māori language and concepts only rarely appear in the operative provisions of settlement instruments. So, although the use of Māori language to record the background to these settlements and the history of the relationship between particular Māori communities and the New Zealand government ought to be applauded, there is clearly a division between these more symbolic provisions and the operative sections of the settlement instruments. If one of the intended effects of these settlements is to transfer or devolve authority to the settling communities, one might expect to see terms which express aspects of Māori authority regularly deployed in the delivery of settlement

redress. As the examination of the use of mana, rangatiratanga and kaitiakitanga demonstrates, the use of such terms in that context is the exception rather than the norm.

Second, there appears to be a troubling co-option of Māori concepts within these settlement instruments. Perhaps the starkest example of this is the use of the term mana to express sovereignty of the colonial government but never translated as 'sovereignty' when it is applied to the authority exercised by Māori.

Third, and connected to the co-option of Māori concepts, is the difficulty that is created when Māori concepts are used as part of New Zealand English within these documents. The term 'rangatiratanga', for example, is frequently not translated from Māori to English. This may be argued to allow the Māori concept to stand on its own terms, without being overly constrained by the problems of translation and the definitions of English words. Yet, there are also some difficulties with this approach. In the case of 'rangatiratanga' this approach tends to cloud the meaning and intent of the settlement agreement by allowing a Māori reader to ascribe a very high level of autonomy and self-determination to the term, while the government party might argue for a reading down of the concept based on some of the lower-levels of autonomy which this term is used to express in several of the settlement instruments. So long as there remains an asymmetrical and colonial relationship between Māori and the Crown, this creates some difficulties for Māori. Despite initial appearances, the problems of interpretation and definition remain.[498]

[498] Note that the debate about the appropriate interpretation of the Treaty of Waitangi itself has illustrated similar difficulties in relation to the application of the Māori text and meaning ascribed to Māori concepts that are used in the Treaty.

Finally, it is surprising that a term such as kaitiakitanga, which has such a central role in expressing Māori interests in the management of the natural environment, is not used in the operative provisions of settlement instruments that directly address the role of Māori communities in environmental decision-making.

It is clear that the concept of kaitiakitanga, like mana and rangatiratanga, express fundamental aspects of the exercise of Māori jurisdiction and law-making. The fact that these terms, are used rarely, if at all, in the practical and effective mechanisms within settlement instruments raises serious questions about the ability of such instruments to give appropriate expression to Māori understandings of autonomy and self-determination.

5.3(b) Dispute Resolution

There are three important points that can be made about Māori legal traditions relating to dispute resolution and how the Treaty settlement process is affecting these traditions. First, the maintenance of relationships can be characterised as an exercise of authority and tino rangatiratanga. This is significant because dispute resolution can be viewed, essentially, as a process of structuring relationships at points of conflict or disagreement. There is, therefore, particular significance to choices about models of dispute resolution in the Treaty settlement context, overlaid as this process is with the tino rangatiratanga discourse.[499] Second, the claims and settlement process inevitably places the Crown at the centre of the dispute. Dispute resolution models in this context then tend to be models that are either favoured by the Crown and/or have the greatest likelihood of engaging the Crown. Third, even in situations where Māori are able to construct dispute

[499] Waitangi Tribunal, *Tāmaki Makaurau Report*, *supra* note 366.

resolution processes within the settlement context which aim to give effect to Māori legal traditions, those processes nevertheless play out in the shadow of the state legal system and the threat of judicial review and inevitably only implement Māori legal traditions to a point.[500]

5.3(b)(i) Disputes and Relationships

The Waitangi Tribunal's *Tamaki Makaurau Settlement Process Report* describes the importance of relationships within Māori society and frames the maintenance of relationships and the resolution of disputes as functions of tino rangatiratanga: [501]

> But article II of the Treaty establishes a different connection with the Crown from that enjoyed by non-Māori in New Zealand. Article II guarantees te tino rangatiratanga, which is the absolute authority of chiefs to be chiefs, and to hold sway in their territories. By that guarantee, the Crown recognized and confirmed Māori relationships and property that were in existence when the Treaty was signed. Confirmation of te tino rangatiratanga is about the maintenance of relationships. In traditional Māori society, chiefs were only rarely autocrats. They sprang out of and were maintained in their positions of authority by their whanaunga; their kin. Whanaungatanga was therefore a value deeply embedded in the maintenance of rangatiratanga. It encompassed the myriad connections, obligations and privileges that were expressed in and through blood ties, from the rangatira to the people, and back again.

In that report, the Waitangi Tribunal strongly criticized the Crown's approach to managing intersecting Māori interests in the context of settlement negotiations. This was neither the first nor the last time the Tribunal leveled such criticisms at the Crown. At the heart of the Tribunal's analysis was the adverse effect the Crown's policy had on whanaungatanga and the relationships between Māori groups. As noted in Chapter

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[500] Gina Hefferan, "Post-Settlement Dispute Resolution: Time to Tread Lightly" (2004) 10 Auckland U. L. Rev. 212.

[501] Waitangi Tribunal, *Tāmaki Makaurau Report, supra* note 366 at 6-7.

Three, whanaungatanga is a key principle that underlies Māori legal systems. It is crucial for determining rights and obligations and is fundamental to Māori dispute resolution processes. If the settlement process damages relationships between and amongst Māori communities it also damages the ability of those communities to apply Māori legal traditions relating to dispute resolution. This leads to a reliance on the Crown as illustrated by the two examples that follow: the Ngāti Tama/Ngāti Maniapoto mediation and the CNI forestry settlement.

5.3(b)(ii) State-centric models of Dispute Resolution

There can be no real argument that the Treaty claims and settlement process focuses dispute resolution processes on the Crown. Perhaps the most clear-cut example of this is the nature of the Waitangi Tribunal process and the nature of claims that may be registered with the Tribunal. All claims must be made by Māori against the Crown. This is often exactly as it should be, although from time to time, the Tribunal is asked to intervene in disputes that are really Māori-Māori disputes. For the Tribunal to inquire into such disputes, they must be framed as being directed at Crown action.

A dispute that arose in 2000 was effectively a boundary dispute between two neighbouring iwi – Ngāti Tama and Ngāti Maniapoto. However, the urgent need to resolve this dispute was created by the then imminent settlement of Ngāti Tama's historical claims against the Crown. The dispute, therefore, arose in the context of the Treaty settlement process and in order to engage the Waitangi Tribunal, it was framed, not as a dispute between Ngāti Tama and Ngāti Maniapoto, but as a claim against the Crown and its processes.

The Tribunal directed the parties to undertake a process of mediation. Two co-mediators were appointed – one with skills and knowledge relating to tikanga, Māori law and dispute resolution; and one mediator trained in Western forms of alternative dispute resolution. I have written elsewhere of this process as a good example of the ways in which traditional Māori processes can be deployed in the context of Treaty of Waitangi claims and settlement.[502] Here, I would like to consider a different aspect of using such an approach. That is, the way in which the settlement process affected the nature of the engagement between the two iwi concerned.

An important factor in determining the structure and mechanisms of dispute resolution processes is the particular vision of justice that a community collectively pursues. Dispute resolution processes that are formed in the context of, or, in the case of PSGEs, as an outcome of, the settlement process, are, in part, shaped by the vision of justice that underlies the settlement process itself. This is evident in the Ngāti Tama/Ngāti Maniapoto mediation: [503]

> Despite the obvious efforts of the Tribunal to incorporate tikanga, the reflections of the mediators suggest that there was "insufficient exploration of Māori processes of dispute resolution". It appears that one party may have been approaching this mediation as a Māori dispute resolution process, concentrating on tikanga and rights and practices according to fundamental conceptual regulators while the other was engaging on a narrower basis. This may have been because of the terms of reference that the Tribunal had set for the mediation, or the reasonably formalized way that the mediators had been entered into the process.

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[502] Carwyn Jones, "Māori Dispute Resolution: Traditional Conceptual Regulators And Contemporary Indigenous Processes" in Morgan Brigg and Roland Bleiker, eds., *Mediating Across Difference: Indigenous, Oceanic and Asian Approaches to Conflict Resolution* (University of Hawaii Press, Honolulu, 2010) 115.

[503] *Ibid.* at 127.

While it appears that Ngāti Maniapoto approached the mediation as a Māori dispute resolution process, concentrating on tikanga rights and obligations, Ngāti Tama, understandably, were focused on concluding their settlement. This led Ngāti Tama to pursue the type of justice that the settlement process itself gives priority. As the following discussion illustrates, this can be quite different to tikanga-based visions of justice, which has implications not only for the settlement process, but also, more specifically, for dispute resolution processes that develop from the settlement process. Very similar issues have arisen amongst First Nations in Canada[504] and analysis of the British Columbia Treaty Process again provides a useful platform for a consideration of these issues in the New Zealand context.

Woolford has pointed to the strong focus within the British Columbia Treaty Process on procedural justice that is consistent with non-Indigenous conceptualizations, rather than visions of substantive justice that might align with Indigenous expectations of the process.[505] Within the British Columbia Treaty Process, Woolford notes that "one can observe the reliance on the dialogical rationality of opposing parties to forge just arguments through fair and equal negotiations".[506] But, as Tully has argued, such reliance is premised on the parties entering the process as equals and developing a process which incorporates the different cultural understandings of justice and proper procedure which each might hold.[507] Unfortunately, that has not been the experience of

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[504] See *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722.

[505] Woolford, *supra* note 472 at 122-123.

[506] *Ibid*. at 123.

[507] Tully, "Reconsidering the B.C. Treaty Process", *supra* note 479.

First Nations groups who have engaged in the Treaty Process,[508] nor the experience of Māori claimant groups who have negotiated Treaty of Waitangi settlements.[509]

However, the theoretical ability of a fair process to deliver just outcomes is "confronted by the obstacles standing in the way of what Habermas refers to as the 'ideal speech situations'."[510] In order for an ideal speech situation to be achieved, the parties must be genuinely engaged in a communicative interaction aimed at developing mutual understanding. The parties must not be guided by instrumental objectives in this scenario. Woolford points out that these conditions are not present in the British Columbia Treaty Process, largely because the constraints on the non-Indigenous government parties "prevent them from participating in the open, interest-based negotiations necessary for communicative interaction".[511] Woolford also notes that, although the non-Indigenous governments see themselves as participating in interest-based negotiation, this does not match up with the reality.[512] The non-Indigenous governments, in fact, enter the negotiations with a whole range of issues on which they will not compromise. It is difficult to describe issues around which there will be no compromise as interests and not positions.

In Treaty of Waitangi settlement negotiations, the New Zealand Crown adopts a similar approach. The Crown comes to the negotiating table with a range of set positions from which it will not shift. There is, in reality, very little to negotiate in these 'negotiations'. The discussions become focused on relatively peripheral matters - which

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[508] Woolford, *supra* note 472 at 122-126.

[509] Crown Forestry Rental Trust, *supra* note 50.

[510] Woolford, *supra* note 472 at 123.

[511] *Ibid.* at 124.

[512] *Ibid.*

properties will be transferred as part of the commercial redress, rather than how the value of the commercial assets required to redress the Treaty breaches ought to be calculated; how many statutory acknowledgements (or other cultural redress instruments) will be appropriate, rather than what is the most appropriate way to reflect the Treaty relationship between the settling group and the Crown and its agents; what matters should be included in the historical account, rather than thinking about the interests that are being met (and those being overlooked) in constructing a negotiated history. One of the central concerns that claimant representatives have expressed about the Treaty Settlement process is that, although the process is labeled as negotiation, it really does not resemble negotiation in any accurate sense of the word.[513]

Furthermore, as noted above, Indigenous peoples make justice claims that are based both on difference as well as sameness (that is, they are claims to both cultural-symbolic justice and socioeconomic justice).[514] In the New Zealand context, political philosopher Andrew Sharp has also identified the tension between distinctiveness and equality within the justice claims made by Māori in relation to the Treaty of Waitangi. While the very concept of justice between parties requires two (or more) identifiably distinct groups (or individuals), Sharp argues that a condition of justice is that there must exist a sense of unity to some degree, otherwise the space between disputing parties is simply conflict based on force and power and cannot be properly called justice.[515] Much the same point is made by Jeremy Webber, though from a legal pluralist perspective,

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[513] Crown Forestry Rental Trust, *supra* note 50 at 44.

[514] Woolford, *supra* note 472 at 54.

[515] Sharp, *Justice and the Māori*, *supra* note 421 at 42.

rather than from within the framework of political philosophy.[516] Sharp suggests that this tension between sameness and distinctiveness can be seen in Māori social organization, which could be characterized as traditionally structured around 'opposition within unity'.[517]

The Crown's vision of justice does not yet appear to capture the need to address issues of distinctiveness and equality.[518] The Crown proposals for the settlement of Treaty of Waitangi claims give some indication of the Crown's perception of justice within these settlements. The detailed proposals that the Crown circulated for consultation note the following points in relation to the Crown's general approach to redress:[519]

> In redressing claims the Crown will take into account:
>
> - the requirements of justice and equity;
> - the best interests of all New Zealanders;
> - what is affordable;
> - relativities between claims (i.e., the relative severity of the grievance in relation to other claims).

It appears that only the first bullet point actually refers to the justice required to redress a particular Treaty breach. Again, this demonstrates the narrow role that the Crown sees for the concept of justice in the settlement of historical Treaty breaches.

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[516] Webber, *supra* note 242.

[517] Sharp, *Justice and the Māori, supra* note 421 at 64.

[518] Andrew Sharp "The Trajectory of the Waitangi Tribunal" in Janine Hayward and Nicola R. Wheen, *The Waitangi Tribunal - Te Roopu Whakamana i te Tiriti o Waitangi* (Wellington, N.Z.: Bridget Williams Books, 2004) 195, 204-205.

[519] *Crown Proposals for the Settlement of Treaty of Waitangi Claims, supra* note 477 at 23. This general approach to settlement redress is now reflected in the Office of Treaty Settlements' guidance to claimants (see Office of Treaty Settlements, *supra* note 370 at 28-29) which also sets out the Crown's specific approach to financial and commercial redress referred to above.

The result is that the justice that can be delivered by the Treaty settlement process is constrained by both the concentration on certainty and the imposition of non-Indigenous governments' visions of justice.

To return to the Ngāti Tama/Ngāti Maniapoto mediation, we can see how the narrow role of 'justice' within the settlement process consequently narrowed the role of substantive justice in a dispute resolution process between two iwi that had the potential to be based more on tikanga principles and Māori visions of justice.

5.3(b)(iv) Māori legal traditions in the shadow of State dispute resolution processes: the Central North Island Forestry Settlement

The Ngāti Tama/Ngāti Maniapoto mediation was constrained by the parameters set by the Waitangi Tribunal process, but even in cases where iwi have more freedom to set their own dispute resolution processes, the ultimate supervision of the state courts ensures that these processes always take place within the shadow of the state legal system. Although there is greater potential in such situations for the incorporation of tikanga-based processes, there is also greater potential for Māori legal traditions to be transformed through engagement with the state system if the dispute resolution process is perceived to reflect and implement tikanga when, in reality, it is regulated by the state court system.

The Central North Island forestry settlement referred to in Chapter Three as an illustration of the application of tikanga at the turn of the 21st century is a case in point. As previously noted, the process for resolving any disagreements in relation to the allocation of lands included in that settlement was designed by the iwi who made up the collective and explicitly intended to be a tikanga-based dispute resolution process.

However, the operation of that tikanga-based process is affected by the participants in the process having the ability to remove the dispute to the state court system. [520]

The CNI allocation of land has been the subject of litigation. The judge that heard the case, former Waitangi Tribunal Chairperson Justice Joe Williams, counseled the parties on this very issue, cautioning them about the effect on their own self-determination of seeking adjudication from the state legal system on a tikanga-based process such as this:[521]

> I understand that there is a great deal at stake for each iwi in this case. By agreeing to the allocation process, iwi have placed great trust in their leaders. There will be enormous fear of failure and its consequences. Resort to litigation can sometimes be seen by kaitiaki as the "tough" thing to do when the stakes are so high. But litigation has its own negative consequences. The people on the other side of the table resent being sued, making the necessary compromises even more difficult to achieve. In litigation, the process takes over. This reduces the level of control in the hands of the chiefs who should have it. It transfers power to lawyers and Judges.

Whilst the experience in both New Zealand and British Columbia suggests that it is difficult to remove settlements and associated disputes from the supervision of the state courts,[522] I contend that it is important for the durability of those settlements to revitalize the autonomy of Māori legal traditions.[523]

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[520] See also *Leef v Bidois* [2012] NZHC 2631, a recent decision of the New Zealand High Court. In that case, the Court was asked to set aside an arbitral award that had been made as part of a process that was very similar to the tikanga-based dispute resolution process developed in the CNI forestry settlement. In this case, the process in question had been agreed in order to establish, for the purposes of the alloation of settlement assests, the relative customary interests of the constituent groups of Ngāti Ranginui (an iwi from the Tauranga region that entered into a Deed of Settlement with the Crown on 21 June 2012).

[521] *Te Rūnanga o Ngati Manawa v Attorney-General*, High Court Wellington CIV-2011-485-1233, 2 November 2011 at para 59.

[522] Note that whilst it is difficult to remove settlement disputes from the supervision of the state courts in one sense, the courts in both New Zealand and British Columbia have also been reluctant to intervene in settlements, which are viewed as political compacts and consequently non-justiciable in most respects. See, e.g. *Te Rūnanga o Wharekauri Rekohu v Attorney-General* [1993] 2 N.Z.L.R. 301 (C.A.) [*Te Rūnanga o Wharekauri Rekohu*].This presents a double challenge for Māori legal traditions: a state legal system which

5.3(c) Developments in the Substance of Māori Law: Membership Rules

There have also been changes to the substance of Māori laws and legal principles that are identfiable within the context of the Treaty settlement process. In particular, this section considers the specific issue of membership and membership rules. As Kirsty Gover's work has demonstrated, the ways in which Māori communities identify and confirm membership, and the rights and obligations that go along with membership, are subject to significant pressures in the context of the settlement process and the establishment of PSGEs.[524] In this part of the chapter, I suggest that the tensions in Māori legal history are reflected in the constitutions of these purpose-built PSGEs and the rules which they adopt in relation to membership.

5.3(c)(i) Membership and Certainty

Non-Indigenous governments' focus on certainty also imposes a range of particular constraints on justice in treaty negotiations. These constraints are often explained in terms of what is 'practical', 'reasonable', 'politically acceptable', or 'pragmatic'. For example, in Treaty of Waitangi settlements, parties explicitly confirm that the settlement package is 'fair in the circumstances'.[525] The British Columbia Treaty Process has also been motivated in large part by the non-Indigenous governments' desire to achieve

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asserts exclusive legal authority to deal with settlement disputes; and limited practical availablity of legal oversight mechanisms within the state system for settlement issues.

[523] See Chapter Six, below.

[524] Gover, *Tribal Constitutionalism: States, Tribes, and Governance of Membership, supra* note 56.

[525] For recent examples, see Ngāti Manawa Deed of Settlement (12 December 2009) cl 4.8.2; Ngāti Whare Deed of Settlement (8 December 2009) cl 4.7.4; and Deed of Settlement in Relation to the Waikato River (17 December 2009) cl 16.10.2.

certainty.[526] Woolford has outlined the importance, to non-Indigenous governments' visions of certainty, of finally and comprehensively settling land claims issues.[527] Māori legal academic, Ani Mikaere, has also described the type of thinking that appears to be central to non-Indigenous governments' visions of certainty in the context of treaty negotiations. In a 1997 article on the processes aimed at settling Indigenous claims, Mikaere points to comments made by one of the key architects of the Treaty of Waitangi settlement process, then New Zealand Minister of Justice, Doug Graham:[528]

> When questioned recently about the injustice of expecting claimants to settle for less than 2 percent of the present-day value of what they are entitled to, the Minister for Justice appealed to the need to find solutions that were "realistic". He rejected outright the notion that Māori could be properly compensated by a long-term payment scheme. When pressed, he admitted that the settlements could not be regarded as full, in the sense of meaning full compensation. They would, however, be final.

The language in official policy documents has since shifted from 'full and final' to 'fair and durable', though the Treaty settlement discourse remains firmly rooted in 'finality'.[529] The dominant discourse reflects a particular vision of certainty, but also the way in which this vision of certainty constrains visions of justice. In using the certainty language of 'realism' and 'finality', non-Indigenous governments assert their own social and economic logic, values, and norms in an attempt to create a 'universal' common-sense vision of justice.

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[526] Christopher McKee, *Treaty talks in British Columbia: negotiating a mutually beneficial future*, 2nd ed. (Vancouver: UBC Press, 2000) 92-96. Alongside state obsession with certainty it might also be noted that the state has a similar fixation with reaching agreements expeditiously, despite taking over 100 years to recognise that there existed issues to be resolved.

[527] Woolford, *supra* note 472 at 144-170.

[528] Annabel Mikaere, "Settlement of Treaty claims: full and final, or fatally flawed?" (1997) 17 New Zealand Universities L. Rev. 425 [Mikaere, "Settlement of Treaty claims: full and final, or fatally flawed?"]

[529] See, e.g. Ngāti Toa Initialled Deed of Settlement (30 August 2012), cl. 4.4.

There is an important link between the aims of comprehensiveness and finality that appear to be the key pillars of non-Indigenous parties' conceptualization of certainty in Treaty settlement negotiations and the pressures exerted on substantive Māori legal traditions, such as those relating to membership.

Ravi de Costa has addressed the issue of the comprehensiveness of the scope of the Indigenous rights that are dealt with in the context of the British Columbia Treaty Process.[530] De Costa notes that the non-Indigenous governments' aims of comprehensiveness and finality can be seen in the British Columbia Treaty Process.[531] Furthermore, he suggests that this process is, rather ambitiously, premised on the idea that Aboriginal and non-Indigenous leaders will be able, at this particular point in time, to "comprehensively and conclusively set out the needs and desires of their communities".[532]

However, De Costa also notes that it is not necessary for the British Columbia Treaty Process to proceed on that basis. *The Report of the British Columbia Claims Task Force* envisaged that the treaty-making process would take some time for each First Nation to complete and that demanding that agreements only be confirmed as comprehensive treaties could be problematic. Therefore, the Claims Task Force proposed that a range of interim measures could be employed to ensure that First Nations

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[530] Ravi de Costa, "Treaties in British Columbia: comprehensive agreement making in a democratic context" in Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain eds., *Honor Among Nations? Treaties and agreements with Indigenous people* (Carlton, Vic.: Melbourne University Press, 2004) 133, 141 [de Costa, "Treaties in British Columbia: comprehensive agreement making in a democratic context"].

[531] Ravi de Costa, "History, Democracy, and Treaty Making in British Columbia" in Alexandra Harmon ed., *The Power of Promises: rethinking Indian treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 297, 314.

[532] de Costa, "Treaties in British Columbia: comprehensive agreement making in a democratic context", *supra* note 530 at 146.

interests in lands and resources would be protected throughout the treaty negotiation process. These included:[533]

- notification of potential impacts on issues that may be discussed at treaty tables, particularly unilateral action on lands and resources
- consultation over that action
- consent for such initiatives
- joint management processes requiring consensus
- restrictions or moratoria on land and resource use.

However, de Costa points out that interim measures have not been used in the way that First Nations leaders had hoped.[534] It appears that the Province has generally been unwilling to implement interim measures before an Agreement in Principle is reached.[535] Essentially, this is applying the same sort of requirement of comprehensiveness that is central to the Treaty of Waitangi settlement process in New Zealand. As in the New Zealand case, the primary objective in the British Columbia Treaty Process appears to be to achieve certainty for the non-Indigenous government parties. This effectively shapes the requirements of membership rules imposed on PSGEs by the settlement process.

As noted above, non-Indigenous governments‘ objectives of certainty include finality as well as comprehensiveness. This conceptualization of certainty requires not only that all ‘outstanding‘ justice claims be addressed in one agreement, but also that agreement should deal with those claims finally. This finality is most often manifested as

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[533] The British Columbia Claims Task Force, *The Report of the British Columbia Claims Task* Force (Victoria, BC: The Government of British Columbia: Treaty Negotiations Office, 1991) 63-65.

[534] de Costa, “Treaties in British Columbia: comprehensive agreement making in a democratic context”, *supra* note 530 at 141.

[535] *Ibid.*

an extinguishment of rights. In her 1997 article on Indigenous claims processes, Ani Mikaere notes the problem of basing settlements on the extinguishment of Indigenous Peoples' rights. She concludes:[536]

> More than simply representing a cheap payout to silence Māori protest in the short-term, the current Treaty settlement policy sets in place powerful structural barriers to prevent Māori from pursuing their Treaty claims in the future.

Mikaere points to recommendations made by the Canadian Federal Government's 1985 Task Force to Review Comprehensive Claims Policy and the 1996 Royal Commission on Aboriginal Peoples that the objective of settlements ought not to be the extinguishment of Aboriginal peoples' rights.[537] She also notes examples of settlements which have invoked the claim of finality by aiming to extinguish the rights of Indigenous communities, which resulted in perpetuating disputes, and undermining not only the delivery of justice, but the non-Indigenous parties' objectives of certainty.[538]

A recent example from New Zealand of the development of settlement-related policy initiatives demonstrates the way certainty is often conceptualized by non-Indigenous governments. In July 2009, the New Zealand government produced a list of seven ideas to improve the settlement process. This list makes it clear that the Crown views the difficulties with the settlement process to be primarily - if not exclusively - about the efficiency of the process. The seven ideas that comprise the list are directed at streamlining the process and improving certainty, not justice. The list envisages

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[536] Mikaere, "Settlement of Treaty claims: full and final, or fatally flawed?", *supra* note 528 at 454.

[537] *Ibid.* at 443.

[538] *Ibid.* at 444.

improving the settlement process by implementing the following measures, each of which can be characterized as directed at improving certainty:[539]

- using more mediation to resolve mandating issues prior to settlement [certainty of claimant group];
- providing information to claimant groups early in the process about the type of redress that is available [certainty of forms of redress];
- encourage claimant groups joining together for settlement negotiations purposes [certainty of the number of negotiations that need to be completed];
- increased transparency from the Crown on who it intends to negotiate with and potential settlement quantum [certainty of claimant group and value of redress];
- greater use of senior Crown negotiators and facilitators [certainty of decision-making authority];
- less Crown involvement in settlement decisions [certainty of Crown responsibility]; and
- streamlining the legislative process [certainty of legislative content and timetable].

These measures are not necessarily contrary to Māori groups' objectives. Most settling groups would share the Crown's desire for a speedy and efficient settlement process. It should also be noted that these measures are not wholly in conflict with the concept of justice. For example, the proposals to support mediation around mandate

[539] '7 Ideas to Accelerate the Settlement Process' (draft produced by New Zealand Government for discussion at Kokiri Ngātahi - Treaty Settlements Hui, Auckland, N.Z., 22 April 2009).

issues as early as possible and to allow settling groups to work through some matters without the Crown's interference may lead to more just resolutions. However, the list, taken as a whole, indicates the characteristics that non-Indigenous governments often see as important in these processes and the way in which those governments tend to conceptualize and emphasize certainty. The objectives of finality, comprehensiveness, and rights-extinguishment that contribute to the Crown's vision of certainty are inter-connected and influence not only the Crown's conceptualization of the Treaty settlement process but also the way in which the settlement process contributes to the tensions in Māori legal history, particularly in areas of substantive law, such as membership rules.

5.3(c)(ii) Legal Traditions Relating to Membership

Kirsty Gover's comprehensive study of membership in tribal constitutions illustrates how the rules of a PSGE might affect the Indigenous legal traditions relating to membership. Issues of membership comprise a significant area of substantive change to Māori legal traditions that demonstrates the way in which the Māori legal system is responding to the settlement process.

Gover describes the way in which substantive rules or laws relating to membership in modern settlement processes have tended to focus primarily on descent, despite the fact that this may distort or misrepresent Indigenous legal traditions relating to membership. As Gover notes, this approach to membership serves to provide certainty for non-Indigenous governments but severely limits the autonomy of Indigenous communities. [540]

[540] Gover, *Tribal Constitutionalism: States, Tribes, and Governance of Membership, supra* note 56 at 160.

> . . .membership criteria must be clear enough to permit public officials to identify a person as a member, or non-member, at any given time. Tribal constitutionalism, then, requires that a formal member--non-member boundary be extracted from the cultural practices of tribal communities. Membership rules that appear to be indeterminate, inchoate, or otherwise inaccessible to outsiders are unlikely to survive the claims process. They include rules permitting a high degree of discretion in the selection of members, and those that allow the modification of a person's status over the course of their lifetime, due to changes in residency, marriage, or their observance of laws and customs. The exigencies of the claims process accordingly tend to favour descent rules over other forms of affiliation. The preference for descent rules in formal membership governance therefore seems to displace tribal custom and constrain tribal self-constitution.

Gover's work is important, in part, because it provides an analysis of corporate membership within Indigenous communities that places Indigenous agency at the centre of the discussion. The question of Māori agency is a central part of what animates the adaptation tension that I have deployed in this dissertation. The focus on Indigenous agency also moves Gover away from the assumptions that formality and institutionalization are incommensurable with custom; assumptions that have obscured other issues, such as those of agency, in some pluralist accounts.

Gover identifies two key concerns that are raised in the literature relating to the juridification of Indigenous nations. The first is a concern that formal rules cannot accurately reflect the customary law relating to membership – the customary system having an inherent flexibility that cannot be matched by a formalized constitution that inevitably fails to capture the nuances of cultural practice at play. The second concern is that juridification, furthermore, actually distorts the customary membership rules.[541]

[541] *Ibid.* at 161.

Gover rejects this strictly oppositional approach, arguing instead that formality per se need not be seen as necessarily inconsistent with Indigenous legal traditions.[542] Culture itself must be understood as a dynamic process rather than a "static attribute of a community".[543] Members of the community are actively engaged in a process of cultural production. In the field of legal pluralism, this might be described as legal subjects participating in the construction of the legal orders by which they are regulated.[544]

There is no reason that the type of formalization seen in membership rules of Māori communities as a result of the establishment of PSGEs cannot be a part of this dynamic process of Indigenous law-making as cultural production. John Borrows has described a number of different sources of Indigenous law, illustrating the fact that custom is only one source and that Indigenous legal systems can have space for formalization and institutionalization of laws.[545] That being the case, the real issue is not whether the Treaty settlement process results in the formalization of membership rules, but to what extent Māori have determined that membership rules ought to be formalized: Gover's key question of Indigenous agency.[546]

Gover notes that descent tends to be the key criteria for membership of an Indigenous community within the common law jurisdictions that her study encompasses and she views this as allowing plenty of scope for Indigenous agency: [547]

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[542] *Ibid.* at 165-166.

[543] *Ibid.* at 165.

[544] See Chapter Two, above.

[545] Borrows, *Canada's Indigenous Constitution, supra* note 66 at 23-58.

[546] Gover, *Tribal Constitutionalism: States, Tribes, and Governance of Membership, supra* note 56 at 165.

[547] *Ibid.* at 166.

> Descent rules, for example, can form the scaffolding of tribal membership regimes, because these rules are relatively stable and uncontested. This could provide the legibility and accountability considered necessary for the public transfer of resources and governance capacities to tribal institutions, while allowing space for adaptation of those rules in accordance with the evolving custom of the tribal community, for instance by enacting rules admitting non-descendants.

However, the emphasis on descent has proved quite limiting for Māori. Descent is a vitally important aspect of community membership according to Māori legal traditions, but it is not the only criterion that is relevant. For example, one's entitlement to the rights and privileges of membership will also be dependent on participation in community life and maintenance of a connection with ancestral lands. The recent application of descent rules to PSGEs is not dissimilar to the approach taken by the Native Land Court in regard to the identification of customary interests in land. In both instances, particular criteria appear to be given priority in order to facilitate administration by the state legal system. In the Native Land Court, rights that came through conquest and the forced taking of land became predominant, regardless of the Māori legal systems' concern with other matters such as ancestral connection to the land.[548]

This all reflects the Crown's particular vision of certainty in the settlement process and is reflected in a range of procedural requirements imposed on those groups wishing to enter settlement negotiations.[549] These requirements are primarily aimed at achieving the kind of certainty that is sought by the Crown and have been widely

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[548] See David V. Williams, *'Te Kooti Tango Whenua': The Native Land Court, 1864-1909* (Wellington, N.Z.: Huia, 1999) at 187-189.

[549] Office of Treaty Settlements, *supra* note 370 at 44-51.

criticized by Māori for overlooking requirements of substantive justice and thereby hindering the settlement process.[550]

In particular, the Crown seeks to achieve its vision of certainty by requiring that all negotiations be comprehensive and by entering into negotiations only with 'large, natural groups'. The negotiations, and the resulting settlement agreements, are intended to be comprehensive in the sense that they aim to settle all the historical claims of the settling group.[551] The scope of each settlement is usually defined by listing specific claims registered with the Waitangi Tribunal, identifying all members of the settling group by reference to tribal ancestors, and delineating the geographical boundaries of the settlement area.[552] There have been some notable exceptions to the Crown's policy of comprehensiveness, but these are anomalies.[553] The Crown has attempted to frame the requirement of comprehensiveness as being necessary to deliver justice.[554] But, it is difficult to read the primary objective of comprehensiveness as anything other than certainty.

On the other hand, the Crown is entirely open about the desire for certainty driving its preference to negotiate with large, natural groups.[555] However, the Crown's guide to claims and negotiations argues that, in addition to certainty, this policy also

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[550] Catherine J Iorns Magallanes, "Reparations for Māori Grievances in Aotearoa New Zealand" in Federico Lenzerini ed., *Reparations for Indigenous Peoples: international and comparative perspectives* (Oxford, UK; New York: Oxford University Press, 2008) 523, 563.

[551] Graham, *supra* note 470 at 90.

[552] Office of Treaty Settlements, *supra* note 370 at 47-48. For recent examples, see Ngāti Manawa Deed of Settlement (12 December 2009) cl 13.1 and cl 13.4; Ngāti Whare Deed of Settlement (8 December 2009) cl 12.1 and cl 12.3.

[553] For example, Waikato-Tainui signed one agreement in 1995, which settled their claims in relation to land confiscations, and in December 2009 concluded another settlement, this time in relation to the Waikato River.

[554] Office of Treaty Settlements, *supra* note 370 at 44.

[555] *Ibid.*

delivers just settlements by both enabling a wider range of redress instruments to be used and by effectively addressing all overlapping interests at the same time.

The Crown also sets the framework within which any group wishing to enter settlement negotiations must achieve and demonstrate a mandate to negotiate on behalf of the claimant group. It is, of course, important for the justice of the process that those who claim to represent a claimant group really do have the authority to speak for that group on these issues. This demonstrates again that there are important connections between the justice and certainty discourses. Yet the Crown's overriding concern in this area still appears to be the objective of certainty. This demand for certainty places clear pressures on Māori legal traditions relating to matters such as membership.

5.4 Conclusion: The Treaty Settlement Process And Tensions In Māori Legal History

In this chapter, I have contended that the Treaty settlement process places pressure on Māori legal traditions, affecting law-making, dispute resolution and substantive law. Without detailed case studies based on empirical research covering changes over time and across Māori communities it is not possible to assert that particular aspects of the settlement process have led directly to specific changes to Māori legal traditions. However, it is possible to make some comments about the nature of the pressures created by the settlement process and how those pressures might be contributing to tensions in Māori legal history. That analysis, in turn, allows some assessment to be made about whether, in relation to its interactions with Māori legal traditions, the Treaty settlement process is fulfilling its claims to provide self-determination and reconciliation. That is

essentially the final substantive question to be addressed in this dissertation and is the focus of Chapter Six.

Across the basic components of the Māori legal system - law-making, dispute resolution, and substantive law - examples have been identified in this chapter which provide an indication of the way in which the settlement process is interacting with Māori legal systems and contributing to the key tensions in Māori legal history.

In relation to the tension of 'Adaptation' it appears that the settlement process tends to limit and constrain the way in which Māori legal traditions can change and adapt. Key Māori principles that underpin law-making processes are constrained and the Crown's reluctance to address cultural-symbolic justice issues further limits the scope for tikanga-based law-making processes to flourish within PSGEs. The philosophical underpinnings of the settlement process can also shape the way in which Māori design and enter into dispute resolution processes. As illustrated by the Ngāti Tama/Ngāti Maniapoto mediation, the settlement process conditions participants to embrace a particular vision of justice, within which it is difficult for settling groups to be anything other than reactive. Central to the tension of 'Adaptation' is the question of Indigenous agency, which Kirsty Gover also draws attention to in her work on tribal membership. However, it is difficult to see a great deal of Indigenous agency in the parameters set by the Crown, in pursuing its objectives of 'certainty', around the identification and delineation of the settling community.

The examples addressed in this chapter also provide information about the contribution of the Treaty settlement process to the second key tension: 'Relationship to the Treaty Partner'. The settlement process also places pressure on Māori legal systems

to become more connected to and focused on the state and state legal institutions. In the context of the tensions that run through Māori legal history, this tends to direct the development of Māori legal traditions towards more engagement with the state and to become more state-centred in their operation. This feeds into a vision of only weak legal pluralism, and does not reflect the stronger concepts of legal pluralism that assist with de-centring the state and are more consistent with Indigenous self-determination projects.[556] The limited use and interpretation of Māori legal principles relating to law-making and the content of the settlements themselves frame Māori as very much a junior partner in the Treaty relationship. PSGEs that come out of the settlement process are, to some extent, predicated on that framework. The Ngāti Tama/Ngāti Maniapoto mediation is an example of the way in which the Crown is very much the focus of disputes relating to the Treaty, and the Central North Island forestry settlement shows how difficult it can be for groups coming through the settlement process to engage with each other without resort to the state legal system. In the case of membership rules of PSGEs, it seems clear that these rules are, first and foremost, established for the benefit of the Crown, to make engagement with PSGEs administratively simple for officials, and to secure the Crown's objectives of certainty.

The analysis in this chapter also indicates that, in terms of the third tension, 'Renewal', the settlement process encourages and, in many cases, requires that Māori communities move away from tikanga-based law making, dispute resolution, and substantive legal practices. The basic structures of PSGEs are based on Western law and values with only a limited recognition of Māori legal traditions in some instances. In the

[556] See Chapter Two, above.

area of law-making, the Treaty settlement process appears to be encouraging the discarding of Māori law rather than the re-invigoration of applicable tikanga. The Crown imposes a range of requirements on the rules and structures of PSGEs,[557] and yet, none of these rules address standards that derive from Māori legal traditions or conceptions of leadership and accountability. The result is that PSGEs are based on Western ideas of governance. Both the Ngāti Tama/Ngāti Maniapoto mediation and the Central North Island forestry settlement litigation reflect the way in which participants in the settlement process can end up moving away from tikanga-based processes, even in instances where the parties have gone to some effort to incorporate Māori legal traditions. Similarly, in the case of membership rules, many settling groups will go to considerable effort to ensure that the membership of the PSGE reflects the traditional membership of the community, and yet the requirements imposed by the Crown are effectively prioritised in order to enable the implementation of the settlement agreement.

The examples considered in this chapter suggest that the pressures created by the Treaty settlement process can have a significant role in animating the key tensions in Māori legal history. The next chapter considers how this is contributing to the stated aims of reconciliation and self-determination.

[557] See Chapter Four, above.

CHAPTER SIX: TIMI KARA – PROGRESS TOWARDS TINO RANGATIRATANGA AND RECONCILIATION?

Timi Kara

"Look at that cloak, e Tama. That belonged to one of your ancestors, Ta Timi Kara."

"Is that the same person that they call Sir James Carroll?"

"Ae, that's right. My great-grandmother – your great-great-grandmother – was a Carroll."

"Why is his cloak in this museum?"

"I suppose it is because it is very beautiful"

"But why isn't it back in Wairoa?"

"That's a very good question! There are many taonga that museums have now that they look after. There are long arguments about some of the rights and wrongs of that. But do you remember that we did take one cloak that belonged to Timi Kara back to Wairoa?"

"Oh, yeah. We brought it back from that museum in Canada."

"That's right."

"And Aunty and Uncle had organized a big celebration to welcome it home."

"Yes. Because Timi Kara was such an important person, it was an important event when his cloak came back to Wairoa."

"Why was Timi Kara important?"

"Well, he was another leader of our people."

"Like Tamatea and Kahungunu and Rongomaiwahine and Tapuwae and Te Rauhina and all that lot."

"In some ways, very much like those great leaders. But he lived in a different time and so he necessarily had to provide leadership in a different kind of way."

"What do you mean?"

"Well, Tamatea and Kahungunu and Rongomaiwahine didn't need to deal with Pākehā laws and government. There were no Pākehā in Aotearoa in their time. But that had all changed by the time that Timi Kara was born. So, Timi Kara sought ways of helping his people by engaging with Pākehā law and government."

"What do you mean by 'government'? Do you mean like the Prime Minister and stuff?"

"Yes, that's basically it. In fact, Timi Kara got to be Acting Prime Minister a couple of times."

"Really!?"

"Yes. He was widely respected in the Pākehā world as well as in the Māori world. He often helped to broker agreements between the Pākehā government and Māori – whether that was with the Māori Parliament, the Māori King, or iwi such as Tūhoe. Things didn't always lead to the outcome he envisaged, but he did his best to find mechanisms of Pākehā law that would protect our lands and also create space for the exercise of Māori authority."

"Was he a warrior then?"

"Maybe you could say that he was a word warrior. He was famous for his oratory, being an eloquent speaker in both Māori and English. Some people still talk about a time when he had defended his administration of native affairs with such skillful rhetoric, imagery and passion that even his main detractor walked across the floor of Parliament to congratulate him."

"No way?"

"That's what they say."

"And do people sometimes call him Jimmy Taihoa?"

"They do! You know how 'taihoa' means to slow down, right? Well, Timi Kara always counseled the need for patience, delay, and reflection when making decisions. Many of his ideas around the buying and selling of Māori land seem to have been based on this kind of idea."

"And doesn't he have something to do with the meeting house at our marae?"

"You seem to know a lot about him!"

"I remember Nanny saying something about that when we were driving up to Wairoa one day."

"Yes, you're right. Or at least your kuia is. She was probably telling you that the meeting house was dedicated as a memorial to Timi Kara. You see that beautifully carved house that stands on our marae now was not the original meeting house. In fact, at one point there were two meeting houses on this site, but both burnt down. Shortly before Timi Kara's death, people had started talking about re-building our meeting house. Ta Timi Kara was really taken with the idea and encouraged our people to take on the challenge of reviving the marae, upholding our traditions and customs, and moving into the future with a unity of purpose. Our people took this to heart, and that is why the dining hall is named as it is."

"'Tātau, tātau'?"

"That's right – 'all of us together'."

6.1 Introduction

Reconciliation and self-determination are two key objectives of the Treaty settlement process. In fact, these two concepts underlie much of the post-contact history of Māori legal traditions. The influence of the ideas of reconciliation and self-determination can be traced back through Māori legal history till at least the Treaty of Waitangi. The Treaty itself might be seen as having these two concepts at its very heart – Māori self-determination is arguably reflected in the guarantee of tino rangatiratanga in Article Two, while the recognition of kāwanatanga in Article One arguably reconciles the presence of the settler population and their institutions of government in Aotearoa with the continuing tino rangatiratanga of Māori. This chapter assesses how well the Treaty settlement process meets these objectives, specifically in relation to the ongoing changes to Māori legal traditions. The analysis in Chapter Five suggests that the Treaty of Waitangi settlement process is tending to skew the Māori legal system towards a very constrained form of autonomy within a state-centric model that encourages a very selective incorporation of substantive Māori law. This chapter builds on that analysis to examine whether that is consistent with the objectives of reconciliation and self-determination.

Some explanation of tino rangatiratanga is provided in earlier chapters, in the context of elaborating the concept of mana. The first part of this chapter links the concept of tino rangatiratanga to the wider discourse relating to the self-determination of Indigenous peoples.

The chapter then turns to explore ideas of reconciliation. Again, the specific issues of Aotearoa/New Zealand are placed in the context of a more general discourse. In particular, James Tully's articulation of the foundations of legitimate and effective reconciliation between Indigenous and settler communities is examined. This is overlaid

with Indigenous perspectives on reconciliation and particularly Māori reconciliation concepts and processes.

The final part of the chapter considers whether the Treaty settlement process is supporting reconciliation and tino rangatiratanga when it comes to Māori legal traditions. The three tensions in Māori legal history (adaptation, the relationship to the Treaty partner, and renewal) provide a framework to address this issue. When the dynamics of these tensions as they are currently playing out within the Treaty settlement process are measured against the objectives of reconciliation and tino rangatiratanga, it becomes apparent that the settlement process, at least in regard to Māori legal traditions, is failing to meet the objectives upon which the entire claims and settlement system is founded.

6.2 Self-Determination and Tino Rangatiratanga

Much has been written on the subject of self-determination and Indigenous peoples; often the discussion focuses on the institutions of international law[558] and liberal egalitarian conceptions of rights.[559] More recently, Cherokee scholar Jeff Corntassel has advocated a move away from a rights-based discourse of self-determination towards what he suggests is 'sustainable self-determination'.[560] Corntassel persuasively argues that there are many problems with a rights-based discussion of Indigenous self-determination. The benchmarks for sustainable self-determination that he outlines appear to be more

[558] See, for example, Erica-Irene A. Daes, "Some Considerations on the Right of Indigenous Peoples to Self-Determination" (1993) 3 Transnat'l L. & Contemp. Probs. 1.

[559] See, for example, Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, (Oxford: OUP, 1995).

[560] Jeff Corntassel, "Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse" (2008) 33 Alternatives 105 [Corntassel, "Toward Sustainable Self-Determination"].

consistent with Māori ideas of autonomy, independence, and self-determination that are bound up in the concept of tino rangatiratanga.

Corntassel's central thesis is succinctly captured in the following statement: [561]

> States and global/regional forums have framed self-determination rights that deemphasize the responsibilities and relationships that Indigenous peoples have with their families and the natural world (homelands, plant life, animal life, etc.) that are critical for the health and well-being of future generations. What is needed is a more holistic and dynamic approach to regenerating Indigenous nations, and I propose the concept of sustainable self-determination as a benchmark for future Indigenous political mobilization.

Corntassel suggests that framing of Indigenous self-determination within a state-centred rights discourse is problematic for the future development of Indigenous peoples in four distinct ways.[562] First, he argues, the rights discourse has "compartmentalized" Indigenous self-determination, so that issues such as the control and ownership of lands and natural resources are disconnected from forms of political/legal recognition that are compatible with the existing constitutional apparatus of the state.[563] Two examples illustrate Corntassel's first point within the New Zealand context. The Resource Management Act 1991 was drafted so as to deliberately disconnect issues of ownership from issues of management and environmental decision-making. However, throughout the drafting process, Māori argued that before the government enacted legislation such as the Resource Management Act, which comprehensively details the mechanisms of control over environmental planning, questions of Māori customary ownership interests ought to have been addressed. That did not happen, which is one of the reasons why

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[561] *Ibid.* at 105.

[562] *Ibid.* at 107.

[563] *Ibid.*

Māori have continued to argue that, despite several provisions directed at Māori values, this legislation does not take appropriate account of their interests, and especially their tino rangatiratanga or self-determination. The Treaty of Waitangi settlement process also demonstrates this split between economic self-determination and political self-determination. The New Zealand government is now reasonably comfortable with providing financial redress for historical breaches of the principles of the Treaty of Waitangi, but appears to be less at ease with an ongoing recognition of the distinctiveness of Indigenous communities.

The second way in which the rights discourse is problematic for Indigenous peoples, according to Corntassel, is that it has encouraged states to deny the existence of Indigenous peoples, or rather deny their status as Indigenous peoples. In particular, Corntassel points to the actions of the Botswana government in classifying their Indigenous populations as 'tribes', 'races' or 'communities' in order to avoid giving effect to international human rights standards for Indigenous peoples. The New Zealand state has perhaps not explicitly denied that Māori are Indigenous peoples; however, there remains a disturbingly strong strand of rhetoric in the political discourse in New Zealand that argues that Māori should not be considered as such. It is also worth noting the qualifications that the New Zealand government placed around its eventual acceptance of the United Nations Declaration on the Rights of Indigenous Peoples.[564] It is arguable that

[564] In a statement endorsing the Declaration, Minister of Māori Affairs Pita Sharples noted these qualifications, amongst others: "In moving to support the Declaration, New Zealand both affirms those rights and reaffirms the legal and constitutional frameworks that underpin New Zealand's legal system. Those existing frameworks, while they will continue to evolve in accordance with New Zealand's domestic circumstances, define the bounds of New Zealand's engagement with the aspirational elements of the Declaration...In particular, where the Declaration sets out aspirations for rights to and restitution of traditionally held land and resources, New Zealand has, through its well-established processes for resolving Treaty claims, developed its own distinct approach."

those qualifications reflect a government view that the full rights of Indigenous peoples that have been recognized by the international community do not apply to Māori, which perhaps comes close in substance to the more brazen denial by the Botswana government.

The third aspect of a concept of Indigenous self-determination that is framed by the rights-discourse is the focus on legal and political rights that is created at the expense of cultural responsibilities and the relationships that exist within Indigenous communities. This concern is directly relevant to Māori communities. Māori legal traditions, social structures, and the foundational ideas within Māori philosophy are all centred around relationships and kinship connections. Concepts such as whanaungatanga and whakapapa are basic organizing principles of the Māori world and, as with many other Indigenous peoples, Māori perceive real kinship relations between people and the natural world. The Treaty of Waitangi settlement process again provides an excellent illustration of the way in which self-determination as a concept is framed by the state can be dangerous for Māori communities. In 2007, the Waitangi Tribunal released its report on the operation of the government's Treaty settlement process in the Auckland area.[565] The *Tāmaki Makaurau Settlement Process Report* was a scathing indictment of the government's approach. This report addressed the central claim that the proposed settlement with one of the iwi of Tāmaki Makaurau (Auckland) would prejudice other iwi in the area. The Tribunal noted that there were approximately ten iwi that could claim that they exercised traditional authority and customary rights within the area.[566] The Tribunal found that the ability of these groups to exercise their rights and obligations as

[565] Waitangi Tribunal, *Tāmaki Makaurau Report*, *supra* note 366.

[566] *Ibid.* at 13-14.

kaitiaki (guardians/stewards) in Tāmaki Makaurau had been diminished by the Crown's approach to settlement negotiations in the area and that they would be further prejudiced if the settlement was to proceed unaltered.[567] The report was particularly critical of the fact that government action had damaged relationships between the various iwi of the Auckland area, with the Tribunal noting that "[i]nstead of supporting the whanaungatanga that underpins rangatiratanga, the Crown's actions have undermined it".[568] The Tribunal found that the principles of the Treaty of Waitangi required the Crown not to take actions which undermine relationships between iwi, in part, because whanaungatanga is of such central importance to Māori social interactions. The settlement of Māori claims to commercial fishing interests can also be seen to be damaging to relationships between Māori groups. That settlement led to significant litigation, which pitted coastal iwi against inland iwi and traditional iwi against more recent urban Māori groupings. The commercial fishing settlement was supposed to provide for a measure of Māori self-determination, but the characteristic of those rights as political and legal (and, in this instance, economic) entitlements actually undermined the relationships that are fundamentally important in the Māori world and to the operation of Māori self-determination, tino rangatiratanga.

Finally, Corntassel argues, Indigenous peoples' self-determination is limited when framed within the rights discourse because as part of that discourse it becomes subject to ad hoc restrictions imposed by states. Here, Corntassel is referring to matters such as UN General Assembly resolution 1514 (1960), which stipulated that only territories that were

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[567] *Ibid.* at 102.

[568] *Ibid.*

geographically separate from the colonizing power could invoke the right of self-determination. In the New Zealand context, the qualifications surrounding the United Nations Declaration on the Rights of Indigenous Peoples may be seen to constitute such a limitation. The settlement process is rife with examples of ad hoc limitations on the way in which self-determination can be exercised. For example, the Crown effectively has complete control over the selection of groups that it will enter negotiations with, thereby placing itself as the final arbiter of who is entitled to self-determination, in whatever form the Treaty settlement process recognizes. The Crown has also set a number of limits on the content of redress packages available in the Treaty settlement process.[569]

Building on the work of James Anaya, Taiaiake Alfred, James Tully and others, Corntassel suggests that the most effective approach for Indigenous peoples is to move away from the state-centred rights discourse of self-determination and move towards sustainable self-determination.[570] Corntassel argues that the limitations of conceptualizations of self-determination that are derived from a rights discourse inevitably constrain the practice of self-determination, and in particular the ability to maintain self-determining communities. This is why he advocates using sustainability as the key benchmark. Self-determination that is not sustainable is not effective self-determination because, by definition, it results in Indigenous communities sooner or later losing the means to govern themselves. Corntassel describes sustainable self-determination as a process that rejects "colonial strategies founded on economic dependency as the main avenues to meaningful self-determination" and also rejects "the

[569] See Chapter Four, above.

[570] Corntassel, "Toward Sustainable Self-Determination", *supra* note 560 at 116.

compartmentalization of standard political/legal definitions of self-determination by taking social, economic, cultural, and political factors of shared governance and relational accountability into consideration".[571] Corntassel also stresses the importance of addressing self-determination at a regional and local level. Ultimately, for practices of self-determination to be sustainable, Corntassel argues that they must operate at a community level "as a process to perpetuate Indigenous livelihoods locally via the regeneration of family, clan, and individual roles and responsibilities to their homelands".[572] According to Corntassel, sustainable self-determination for Indigenous peoples will not be fully realized until Indigenous peoples play a more influential role in shaping the global political economy. The most effective means of achieving this influence is for Indigenous peoples to focus on rebuilding and restrengthening local and regional Indigenous economies.[573] This enables Indigenous peoples to engage in the global political economy from a position of strength, with stable foundations established according to their own principles of social, political, and economic organization. That engagement in the global economy then becomes sustainable, not being dependent on the goodwill of state actors or the prevailing political or economic climate.

It is important to note that Corntassel is not suggesting that rights-based arguments and strategies for Indigenous self-determination be completely abandoned.[574] He explicitly recognizes that the rights discourse can provide useful tools for Indigenous communities. His point is that this framework can only take Indigenous self-

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[571] *Ibid.* at 119.

[572] *Ibid.*

[573] *Ibid.*

[574] See also Mikaere, *He Rukuruku Whakaaro*, *supra* note 29 at 179-186.

determination so far, and that in order to develop a durable and sustainable self-determination the discourse needs to be shaped by Indigenous communities and the state needs to be removed from the centre of discussions of Indigenous self-determination. Ultimately, Corntassel argues that authentic and long-lasting self-determination for Indigenous peoples will only be achieved if the benchmarks of self-determination are set by Indigenous communities themselves with reference to the network of relationships and responsibilities that organize those communities, rather than being grounded in a system of individualized rights consistent with the structures of colonial state parties and a colonizing global political economy.

6.2(a) Tino rangatiratanga

Corntassel's framework for sustainable self-determination provides a useful international context within which the particularities of the discourse around Māori self-determination, often referred to as tino rangatiratanga, can be addressed. Tino rangatiratanga is an important concept in the Treaty of Waitangi and, consequently, central to any discussion of the Treaty of Waitangi settlement process.

There are a number of ways in which the concept of tino rangatiratanga has been approached. As Mason Durie has pointed out, various people ascribe various levels of Māori authority to the concept of tino rangatiratanga.[575] For some it means a level of self-government. To others it is full authority, closely connected to the concept of mana. At times it has been equated with the English concept of "sovereignty" or "sovereign rights". In any case, it implies a high degree of Māori autonomy and speaks to the

[575] M Durie, "Tino Rangatiratanga", *supra* note 75 at 4-6.

distribution of political authority both within Māori society and between Māori and the state.[576] A national debate about tino rangatiratanga that was led by the National Māori Congress in the mid-1990s (incidentally, as part of a response to the government's proposals for the settlement of Treaty of Waitangi claims),[577] generated three key principles that underlie tino rangatiratanga: Ngā Matatini Māori – Māori diversity; Whakakotahi Māori – Māori unity, and; Mana Motuhake Māori – Māori autonomy and control.[578] In the context of the Treaty of Waitangi, Ngāpuhi leader and scholar Margaret Mutu has described tino rangatiratanga as:[579]

> …the exercise of paramount and spiritually sanctioned power and authority. It includes aspects of the English notions of ownership, status, influence, dignity, respect and sovereignty, and has strong spiritual connotations.

Various aspects of the concept of tino rangatiratanga have been touched upon throughout this dissertation and this chapter builds on those aspects by examining the particular way in which tino rangatiratanga has been applied in the Treaty settlement process.

In Chapter Three, 'rangatiratanga' is explained in connection with the concept 'mana'.[580] As described in that chapter, rangatiratanga, like mana, is a central concept of Māori leadership, coming from the root word 'rangatira' meaning 'chief' or 'leader'. When, as in the Treaty of Waitangi, the prefix 'tino' and the suffix '-tanga' are added, the

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[576] *Ibid.* at 6.

[577] During this period, the Crown Congress Joint Working Party ('CCJWP') was set up by an agreement between National Maori Congress and the Crown. Its purpose was to establish whether a prima facie case of Treaty breach could be demonstrated for iwi with an interest in particular Railcorp properties, and to negotiate settlements clearing those properties for sale to the public. The work of the CCJWP was also an important part of the background of the modern Treaty settlement process.

[578] M Durie, "Tino Rangatiratanga", *supra* note 75 at 6-8.

[579] Mutu, "Constitutional Intentions", *supra* note 30 at 26.

[580] See Chapter Three, above.

resulting concept captures the very special authority exercised by Māori leaders, that is, 'unqualified chieftainship'. In Chapter Three it is also noted that this authority is really more about the self-determination of a community than the power of an individual. The different strands of mana that support the concept of rangatiratanga and tino rangatiratanga both ensures that this authority is, in part, spiritually sanctioned, and also has inherent a high level of executive accountability. This account of mana and rangatiratanga is further developed in Chapter Five, which looks at the way in which these concepts have been used within Treaty settlement instruments.[581] Tino rangatiratanga and self-determination are also embedded in the methodological framework applied throughout this dissertation.[582]

6.2(a)(i) State legal system definitions of tino rangatiratanga

The Waitangi Tribunal and the ordinary courts have had cause to address the concept when considering the application of the principles of the Treaty of Waitangi. It should be noted that the Waitangi Tribunal and the courts are constrained in defining tino rangatiratanga. As part of the state legal system, their definitions must be consistent with Crown sovereignty. Nevertheless, it is helpful to examine the way in which this important concept is being applied with the state legal system, and especially in the particular context of Treaty claims and settlement.

In *Taiaroa v Attorney-General*, Justice McGechan made some general comments about the content of tino rangatiratanga, accepting that "it encompassed a claim to an

[581] See Chapter Five, above.

[582] See Chapter Two, above.

ongoing distinctive existence as a people, albeit adapting as time passed and the combined society developed".[583] Addressing the same subject matter in the *Māori Electoral Option Report*, the Waitangi Tribunal elaborated the meaning of 'tino rangatiratanga' in relation to 'kāwanatanga', granted to the Crown in the Treaty of Waitangi:[584]

> The precise meaning of tino rangatiratanga in the Treaty and its relationship to the kāwanatanga which was ceded in Article I has been much debated. Some have argued that tino rangatiratanga was a guarantee of Māori sovereignty; others a right to self-determination; others again a right of self-management. The difficulty is that no one of these English constitutional terms properly captures the Māori meaning, or meanings, of tino rangatiratanga, a term which is eminently adaptable to time and circumstance. But if we look beyond the strict literal meaning of the Treaty to its broader principles, it is clear that the exercise of tino rangatiratanga, like kāwanatanga, cannot be unfettered; the one must be reconciled with the other ... In constitutional terms this could be seen as entitling Māori to a measure of autonomy, but not full independence outside the nation State they helped to create in signing the Treaty.

Within this statement one can observe some of the key aspects of the way in which the courts and the Tribunal have described tino rangatiratanga. First, it is important to note that the courts and Tribunal, when defining this concept, have been required to do so in a very specific context, that is, in interpreting and applying the principles of the Treaty of Waitangi within the parameters of their respective jurisdictions. The concept has consequently become a term of legal art, given a legal meaning that is not necessarily precisely the same as its ordinary usage. This approach also immediately defines tino rangatiratanga with reference to kāwanatanga. Moana Jackson has forcefully argued that the application of the legal construct of Treaty

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[583] *Taiaroa and Others v Attorney-General* (H.C.) [1994] 4 October, unreported, CP No 99/94 at 69.

[584] Waitangi Tribunal, *Māori Electoral Option Report (Wai 413)*, (Wellington, N.Z.: Brooker's Ltd, 1994) 3-4.

principles has led to a distortion of the Māori concepts involved, especially tino rangatiratanga.[585] This disjuncture is a further illustration of why it is important to set the tino rangatiratanga discourse within a broader conversation about Indigenous self-determination, and especially to build in some of the ideas of sustainable self-determination addressed by Corntassel.

Although in the context of the principles of the Treaty of Waitangi tino rangatiratanga is defined as being qualified by the Crown's kāwanatanga, this body of law also qualifies the Crown's authority by reference to the guarantee of tino rangatiratanga:[586]

> It is clear that cession of sovereignty to the Crown by Māori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Māori land but of much more, including fisheries ... The Crown in obtaining the cession of sovereignty under the Treaty, therefore obtained it subject to important qualifications upon its exercise. In short, the right to govern which it acquired was a qualified right.

However, as explained below in the discussion relating to reconciliation, the co-existence of two independent polities within the same territory is not impossible.

While the Tribunal does not view the protection of tino rangatiratanga, guaranteed in the Treaty of Waitangi, as requiring Māori independence outside of the New Zealand state, the Tribunal explains tino rangatiratanga as comprising quite substantial authority and autonomy. In the *Ngāwhā Geothermal Resources Report,* the Tribunal states that "[t]he tribal right of self-regulation or self-management is an inherent element of tino

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[585] Jackson, "The Treaty and the Word", *supra* note 27.

[586] Waitangi Tribunal, *Ngāi Tahu Sea Fisheries Report* (Wellington, N.Z.: Brooker & Friend Ltd, 1992) at 269.

rangatiratanga".[587] The Tribunal has further found that tino rangatiratanga includes not only a right to manage resources, but also an authority to regulate the behavior of people across a range of areas of public life. In the *Te Arawa Representatives Geothermal Resources Report*, the Tribunal found that the guarantee of tino rangatiratanga included "tribal control of Māori matters, including the right to regulate access to tribal members and others to tribal resources",[588] and in the *Te Whānau o Waipareira Report*, the Tribunal explained that tino rangatiratanga "applies to much more than the customary ownership of lands, estates, forests, fisheries and other taonga. It describes a value that is basic to the Māori way of life, that permeates the essence of being Māori".[589] Similar conceptual underpinnings can be seen in the key elements of tino rangatiratanga identified by the Waitangi Tribunal in the *Muriwhenua Fishing Claim Report*:[590]

> There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically, and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga [treasured possessions] (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly the exercise of authority was not only over property but of persons within the kinship group and their access to tribal resources.

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[587] Waitangi Tribunal, *Ngāwhā Geothermal Resources Report (Wai 304)* (Wellington, Brooker and Friend Ltd, 1993*)* at 101.

[588] Waitangi Tribunal, *Te Arawa Representatives Geothermal Resources Report* (Wellington, N.Z: Brooker and Friend, 1993) at 32.

[589] Waitangi Tribunal, *Te Whānau o Waipareira Report*, *supra* note 287 at 26.

[590] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22)*, (Wellington, Department of Justice, 1988) at 181.

The Tribunal has also noted the close connection between the concept of mana and tino rangatiratanga.[591] The Tribunal explicitly makes this link in the context of understanding the principles of the Treaty of Waitangi:[592]

> In Māori thinking "rangatiratanga" and "mana" are inseparable. One cannot have one without the other. The Māori text of the Treaty conveyed to the Māori people that, amongst other things, they were to be protected not only in the possession of their lands but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences.

The Tribunal has, at times, also sought to locate tino rangatiratanga within the broader discourse of Indigenous self-determination or, 'aboriginal autonomy'. The Tribunal has described aboriginal autonomy as an inherent right of all Indigenous peoples and has linked the guarantee of tino rangatiratanga to that right:[593]

> Broadly ... we consider 'aboriginal autonomy' to describe the rights of indigenes to constitutional status as first peoples, and their right to manage their own policies, resources, and affairs (within rules necessary for the operation of the State) and to enjoy cooperation and dialogue with the Government….The international term of 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as first peoples and their rights to manage their own policy, resources and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Māori words are "tino rangatiratanga", as used in the Treaty, and "mana motuhake" as used since the 1860s.

6.3 Reconciliation

Reconciliation is a complex concept and cross-cultural reconciliation has additional layers of complexity. In order to assess the contribution or otherwise of the Treaty of

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[591] See Chapter Three, above.

[592] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim (Wai 9),* (Wellington, GP Publications, 1987) at 149.

[593] Waitangi Tribunal, *The Taranaki Report, supra* note 364 at 5, 20.

Waitangi settlement process to reconciliation between Māori and the New Zealand state, it is necessary to tease out some of this complexity.

Reconciliation can be a problematic concept for Indigenous peoples. The concept seems often deployed to encourage Indigenous peoples to 'forgive and forget'. Even some of the more recent and sophisticated work on reconciliation still has undertones of that idea.

For example, Susan Dwyer has suggested that human reconciliation is most usefully understood in terms of tensions – "tensions between two or more beliefs, tensions between two or more differing interpretations of events; or tensions between two or more apparently incommensurable sets of values"- and how those tensions are responded to and otherwise managed.[594] These types of tensions, suggests Dwyer, can cause 'disruptions', which might affect an individual personally, or, in the case of larger-scale 'disruptions', can have a significant impact on public life in a community. Dwyer contends that reconciliation is not about undoing the disruption, but is about finding ways of making sense of the disruption so that it does not threaten a person's or peoples' self-understanding and identity. Notably, this does not require forgiveness:[595]

> Coherent incorporation of an unpleasant fact, or a new belief about an enemy, into the story of one's life might involve the issuance of an apology and an offer of forgiveness. But it need not. Reconciliation, as I have presented it, is conceptually independent of forgiveness. This is a good thing, for it means that reconciliation might be psychologically possible where forgiveness is not.

Dwyer also notes that reconciliation is not the same as justice and that, even when pursued in good faith, it is not inevitable that reconciliation processes will lead to justice,

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[594] S. Dwyer, "Reconciliation for Realists" in C. A. L. Prager and T. Govier, eds., *Dilemmas of Reconciliation: Cases and Concepts*, (Ontario: Wilfrid Laurier UP, 2003) 91, at 96.

[595] *Ibid.* at 106.

and, in any case, justice may well be only one of a number of social and political objectives.[596]

While Dwyer importantly distances reconciliation from forgiveness, the disjuncture with justice is of some concern. Dwyer's point is that coming to terms with social disruption is a process that is distinct from the range of measures that might be necessary to deliver justice. However, my concern is that this suggests that effective reconciliation can occur while injustices continue. I argue that a different vision of reconciliation is possible, and indeed preferable for reconciliation between Indigenous peoples and settler polities.

Some Indigenous scholars have suggested that reconciliation is a Western concept, steeped in Christianity, and therefore should not be a primary objective of Indigenous peoples.[597] The concept, in this sense, certainly has problematic connotations, but as discussed more fully below, James Tully provides an account of reconciliation that creates space for both Indigenous and Western understandings. In Tully's account, reconciliation processes need not be about restoring "an asymmetrical relationship with the state" but instead can be used, as Corntassel suggests, to "restory our communities toward justice" through truth-telling and other Indigenous approaches to reconciliation.[598] I contend that reconciliation can be conceptualized in a way that is consistent with Indigenous perspectives of justice.

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[596] *Ibid.* at 108.

[597] Jeff Corntassel, Chaw-win-is, T'lakwadzi 'Indigenous Storytelling, Truth-telling, and Community Approaches to Reconciliation' (2009) 35 (1) English Studies in Canada 137, 145.

[598] *Ibid.*

In her book *What Does Justice Look Like?: The Struggle for Liberation in Dakota Homeland*, Waziyatawin provides a Dakota perspective on the steps that would be necessary for her people to achieve justice.[599] Waziyatawin describes these four steps as 'Initiating an Era of Truth Telling', 'Taking Down the Fort', 'Making Reparations', and 'Creating an Oppression-Free Society'. Truth-telling is often suggested by Indigenous scholars as a first and important step towards achieving justice vis-à-vis the settler state.[600] Similarly, Paulette Regan views truth-telling and the re-storying of public history as an important component of the process of decolonization which is ultimately necessary for native and non-native peoples to move toward reconciliation.[601] 'Taking Down the Fort' is used by Waziyatawin as a metaphor for dismantling the imperial and/or colonial apparatus of the state.[602] That is, once truth-telling has taken place, the state ought to stop perpetuating the practices which have injured Indigenous peoples in the past and continue to cause Indigenous peoples harm today. The next step is to make reparations and to provide redress for past wrongs.[603] The final stage is to negotiate and agree arrangements for peaceful coexistence.[604] This entire process can be understood as one of reconciliation, and is consistent with James Tully's account, described below.

Reconciliation within the system of tikanga Māori would be described in terms of Hirini Moko Mead's framework described in Chapter Two, based on the key principles of

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[599] Waziyatawin, *What Does Justice Look Like? The Struggle for Liberation in Dakota Homeland*, (St Paul: Living Justice Press, 2008) [Waziyatawin].

[600] *Ibid.* at 71-96.

[601] Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth-Telling, and Reconciliation in Canada*, (Vancouver: University of British Columbia Press, 2010) at 62-82 [Regan].

[602] Waziyatawin, *supra* note 599 at 97-118.

[603] *Ibid.* at 119-166.

[604] *Ibid.* at 167-176.

tikanga, especially the principles of tapu and utu, which are explained in further detail in Chapter Three. The restoration of balance is a key driver of Māori legal systems and the philosophical underpinnings of tikanga - the principles of mana, tapu/noa, utu, manaakitanga, and whanaungatanga – have many parallels with Tully's articulation of reconciliation, to which I now turn.

6.3(a) Reconciliation based on a treaty relationship

The influential Canadian political philosopher James Tully has carefully articulated a vision of reconciliation between Indigenous peoples and states such as Canada and New Zealand that is founded on liberal democratic theory and that can also take account of Indigenous understandings of self-determination and reconciliation. This is an extremely important account of this particular form of reconciliation and it is useful to consider the key strands here in some detail.

Though Tully is primarily concerned with the situation in Canada, the philosophical basis of his work is equally applicable to the New Zealand context. Tully describes two types of relationships that exist between Indigenous peoples and the state.[605] The first is a treaty relationship in which the Indigenous nation is recognized as being self-determining and engages with the state in a 'nation-to-nation' relationship. The Treaty of Waitangi is an expression of this type of relationship. The second type of relationship Tully characterizes as being a colonial relationship. When this colonial relationship becomes the dominant narrative, it overlays the treaty relationships that exist

[605] James Tully, *Public Philosophy in a New Key: Vol. 1. – Democracy and Civic Freedom*, (Cambridge: Cambridge University Press, 2008). 225-228 [Tully, *Public Philosophy in a New Key*].

and even transforms the interpretation of those treaty relationships.[606] Tully's concept of reconciliation requires the rejection of the colonial relationship and the strengthening of treaty relationships.

Tully identifies five essential principles that underlie this type of treaty relationship: mutual recognition, intercultural negotiation, mutual respect, sharing, and mutual responsibility.[607]

The basic components of mutual recognition are 'equality, coexistence and self-government'.[608] Tully contends that coexistence signifies a relationship in which Indigenous peoples and settler populations retain distinctive and independent identities in a relationship that values political diversity.[609] It is important to note that such a relationship does not denote separation. Tully points to the interactions that have taken place between Indigenous communities and *arrivistes* for centuries, developing shared histories and a network of intercultural relations.[610] There are two important aspects to equality in the context of mutual recognition. First, Indigenous and non-Indigenous peoples ought to recognize each other as equal peoples who operate according to their own legal traditions. Secondly, and crucially, Indigenous and non-Indigenous peoples, as equal peoples, ought to "govern their common relations in accordance with the five principles [of the treaty relationship] on equal footing".[611] The final component of

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[606] See also, Nadasdy, P. "The Antithesis of Restitution? A note on the dynamics of land negotiations in the Yukon, Canada." in D. Fay and D. James, eds., *The Rights and Wrongs of Land Restitution,* (Kentucky: Routledge- Cavendish, 2009) 85 [Nadasdy].

[607] Tully, *Public Philosophy in a New Key*, *supra* note 605 at 229.

[608] *Ibid.* at 229-232.

[609] *Ibid.* at 231.

[610] *Ibid.* at 231-232.

[611] *Ibid.* at 232.

mutual recognition, self-government, is firmly rooted in liberal political theory. As Tully notes:[612]

> When Europeans arrived [in Canada], the Aboriginal peoples they encountered were independent, self-governing nations equal in status to European nations. Their status as self-governing nations rested on exactly the same criteria in international law, then and now, as the status of European nations: the proven ability to govern themselves on a territory over time and to enter into international relations with other nations. These are the universal criteria of the inherent right to self-government on which nationhood rests in the modern world.

Exactly the same principle applies to the Māori iwi of Aotearoa. In fact Tully's characterization of the process by which settler polities legitimized their presence in North America is startlingly reminiscent of the arrangements entered into in Waitangi in 1840:[613]

> The Aboriginal peoples agreed to recognize the settlers as coexisting, self-governing nations, equal in status to themselves, with the right to acquire land from them, over which the settler governments could then exercise jurisdiction and sovereignty, by means of nation-to-nation treaties based on mutual agreement. This is the basis of the treaty relationship.

The first interactions between Indigenous peoples in Canada and in Aotearoa/New Zealand were framed by this type of treaty relationship, with its inherent mutual recognition. But since those first interactions, the growth of state power has enabled the state to re-frame the relationship, to overlay the treaty relationship with what Tully describes as a colonial relationship. This type of relationship, based not on mutual recognition and equality, but upon the subordination and dependency of Indigenous peoples and Indigenous systems of governance, now affects the way in which those first

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[612] *Ibid.* at 233.

[613] *Ibid.* at 234.

interactions are understood.[614] One central aspect of reconciliation then is to re-establish the treaty relationship, to recognize that the legitimacy of the state depends on the consent of Indigenous peoples, such consent being conditional on the acknowledgement of Indigenous peoples' "equal yet prior status as nations".[615]

Relationships, through the process of reconciliation, must therefore be negotiated. Within the framework of a treaty relationship, those negotiations must be understood to be intercultural. As Tully notes, in negotiating reconciliation between Indigenous peoples and the state, there is "no place for the injustice of non-Aboriginal people speaking for Aboriginal people, either in the imperial monologue of command and obedience or in the more subtle injustice of permitting Aboriginal people to speak, but only in the languages, traditions and institutions of the dominant society."[616]

Paul Nadasdy has also pointed to the difficulties that arise in reconciliation processes if such processes are not an intercultural negotiation but rather framed in the language of state law and the political institutions of the state government.[617] Nadasdy's account of land negotiations between Kluane First Nation ('KFN') and government parties in the Yukon from 1994-1998 illustrates the way in which the colonial relationship can skew the process away from the underlying theory of reconciliation:[618]

> Thus, political inequalities between KFN and government transformed what was in theory a process of land cession, in which KFN granted lands to the federal and territorial governments, into one of restitution, in which government gave lands to the First Nation. Reframing the process in this way gave the federal and territorial governments a degree of control over

[614] *Ibid.* at 226-228.

[615] *Ibid.* at 234.

[616] *Ibid.* at 239-240.

[617] Nadasdy, *supra* note 606.

[618] *Ibid.* at 95.

> the land claim process that was unwarranted by the theory that gave rise to the negotiations in the first place."

If the relationship between Indigenous peoples and the state is to be a treaty relationship rather than a colonial one, negotiations between the parties must be genuinely intercultural.

In this way, a dialogue is made possible which takes place in an intercultural middle ground. Tully warns that we must remember that this middle ground is not perfect, that it still contains inequalities, power imbalances, distrust, and other things which make dialogue and negotiation difficult. Nevertheless, despite its flaws and distortions, there is, Tully argues, "a starting ground for a new dialogue of equality".[619] It is a space that has been constructed and tested by the many sites of positive interactions between Indigenous and non-Indigenous peoples over centuries. It may not be perfect, but there is no perfect space that exists for the negotiation of reconciliation between Indigenous peoples and settler states.[620]

Tully also suggests that the process of reconciliation requires a form of mutual cultural respect.[621] It is only with this respect of peoples and cultures that mutual recognition of distinctive and equal legal orders and systems of governance can occur. Tully points out that there is a fundamental ethic of respect that underlies Western political philosophy as well as the political philosophy of North America's Aboriginal peoples. The parallel with Māori philosophical perspectives is relatively straightforward as the concept of mana incorporates a similar basic ethic of respect for the inherent

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[619] Tully, *Public Philosophy in a New Key*, *supra* note 605 at 241.

[620] *Ibid.* at 241.

[621] *Ibid.* at 243.

dignity of all people. Not only is this culture of respect deeply rooted in both Western and Indigenous philosophies, but, argues Tully, there are significant advantages to fostering a public attitude of mutual cultural respect:[622]

> In addition to the way mutual cultural respect beneficially empowers both partners to live free and responsible lives, rather than the mutual detriment of a climate of disrespect, it furnishes another benefit. The experience of living in a society where a variety of languages, forms of government, economic organisations and religions thrive and intermingle enriches each person's life, enabling them to see their own culture as one among many, and so gaining a self-critical and tolerant attitude, rather than the haughty intolerance and stultifying dogmatism of the colonial vision.

The fourth principle that Tully sees as undergirding a treaty relationship is a principle of sharing.[623] Again, Tully notes that this principle is quite consistent with both Indigenous and Western philosophical foundations.[624] And again, similar ideas can be identified within tikanga Māori, especially in relation to the concept of manaakitanga (nurturing relationships, looking after people, and being very careful how others are treated).[625] A necessary part of the reconciliation process will be the return of lands and resources that were unjustly taken from Indigenous peoples and 'as an act of reciprocal justice' mutually agreeable policies need to be implemented in order to address social and economic inequalities of Indigenous peoples.[626] Indigenous peoples may be willing to accept alternative remedies so long as there is recognition that lands were unjustly taken and the option of the return of land is not taken off the table. In Aotearoa/New Zealand, the ongoing presence of a settler population was clearly anticipated by those who signed

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[622] *Ibid.* at 244.

[623] *Ibid.* at 244-250.

[624] *Ibid.* at 244-246.

[625] See Chapter Three, above.

[626] Tully, *Public Philosophy in a New Key*, *supra* note 605 at 247.

the Treaty of Waitangi. Another important dimension of sharing in the context of reconciliation, Tully suggests, is 'a just means of sharing legal and political powers'.[627] Tully notes that for sharing of legal and political power to be just, the arrangements for the exercise of legal and political power must be based on the principles that underlie the treaty relationship – "intercultural dialogue negotiation between equals, based on mutual consent, recorded in treaty-like agreements, and open to review and amendment in the future".[628]

The final principle of the treaty relationship is mutual responsibility, the basis of which Tully succinctly states is that "the partners act responsibly towards one another and towards the habitat they share".[629] Mutual responsibility is also embedded within the fundamental tikanga principles of whanaungatanga and manaakitanga.[630]

Significant similarities can be seen between the principles that Tully identifies as necessary for a treaty relationship and the principles of the Treaty of Waitangi as articulated by the Waitangi Tribunal and the courts. There is no definitive or exhaustive list of the principles of the Treaty of Waitangi, but the principle of partnership is well-established and can perhaps be seen as a central concept from which other key principles flow. The New Zealand Court of Appeal has found that the Treaty of Waitangi established a relationship between Māori and the Crown that is akin to a partnership, the characteristic obligation of which was that each party must act towards the other with

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[627] *Ibid.*

[628] *Ibid.* at 248.

[629] *Ibid.* at 250.

[630] See Chapter Three, above.

utmost good faith.[631] In a subsequent decision, the President of the Court of Appeal described this principle of partnership as "each party accepting a positive duty to act in good faith, fairly, reasonably, and honourably towards the other".[632] The Waitangi Tribunal has also identified principles of reciprocity and mutual benefit as part of the principle of partnership. Building on these principles, the Tribunal stated in its *Te Whānau o Waipareira Report*:[633] "Partnership thus serves to describe a relationship where one party is not subordinate to the other but where each must respect the other's status and authority in all walks of life."

The principles of the Treaty of Waitangi that have been identified and constructed through legal processes in Aotearoa/New Zealand incorporate key strands of Tully's principles of mutual recognition, intercultural negotiation, mutual respect, sharing, and mutual responsibility. It therefore seems entirely appropriate to bring those philosophical principles of renconciliation to bear on the Treaty of Waitangi settlement process and its implications for Māori legal traditions.

6.3(b) Reconciliation in the Treaty settlement process

The Treaty of Waitangi settlement process is often described as being about reconciliation. That is, one of the key objectives, if not the primary objective of the process is reconciliation. There is little precise or explicit definition about the nature of

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[631] *Lands case, supra* note 18 at 664

[632] *Te Rūnanga o Wharekauri Rekohu, supra* note 522 at 304.

[633] Waitangi Tribunal, *Te Whānau o Waipareira Report, supra* note 287 at xxvi.

the reconciliation that is envisaged, but one is able to discern some sense of this by examining the way in which the key players engage in and describe the process.

The OTS publication, *Healing the Past, Building a Future*, reflects something of reconciliation in its title but contains surprisingly little clear guidance as to the objective of settling claims. In describing the settlement process, however, this publication does provide some clues to the way in which the state party understands and frames reconciliation in this context. For example, for settlements to be fair and durable, they must remove a sense of grievance held by Māori against the Crown and its past action.[634] *Healing the Past* also emphasizes the restoration of the relationship between Māori and the Crown:[635] "The strengthening of the relationship between the Crown and Māori is an integral part of the settlement process and will be reflected in any settlement. The settlement of historical grievances also needs to be understood within the context of wider government policies that are aimed at restoring and developing the Treaty relationship."

According to *Healing the Past,* an important part of the restoration of the relationship between the Treaty partners will be an acknowledgment by the Crown of historical wrongs it has committed in breach of the principles of the Treaty of Waitangi:[636]

> The Crown's acknowledgement of and apology for well-founded breaches of the Treaty and its principles is vital to rebuilding the relationship between the Crown and claimant groups. It is also important for the claimant groups to record their agreement that their historical grievances

[634] Office of Treaty Settlements, *supra* note 370 at 28.

[635] *Ibid.* at 30.

[636] *Ibid.* at 28.

> have been finally settled, so that both parties can move on to a more positive future.

There is significant literature on the politics of apologies, some of which relates specifically to apologies made by states to Indigenous peoples.[637] Apologies have important symbolic value and the potential to contribute to transformative healing. However, if apologies appear to distance the apologizer from responsibility or are otherwise seen as being tokenistic, then they are likely to hinder rather than assist reconciliation. Regan notes that "ethical reconciliation requires more than words of regret. Such words must be spoken in conjunction with monetary and cultural reparations".[638] The Crown acknowledgment and apology are formally recorded in the Deeds of Settlement agreed with settling groups. A brief survey of some of the forms this apology has taken in early 21st century settlements suggests the role that the apology is seen to play in reconciliation.

In the Ngāti Raukawa Deed of Settlement the apology is linked, not only to reconciliation, but also to self-determination through its reference to mana and rangatiratanga:[639]

> The Crown apologises for its past failures to acknowledge the mana and rangatiratanga of Raukawa and looks forward to building an enduring relationship of mutual trust and cooperation with Raukawa that is based on respect for the Treaty of Waitangi and its principles.

This short statement also incorporates some of the important aspects of negotiating reconciliation through the type of treaty relationship advocated by Tully.

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[637] See, e.g. Regan, *supra* note 601.

[638] *Ibid.* at 58.

[639] Ngāti Raukawa Deed of Settlement (2 June 2012), para 3.17.

Mutual trust, cooperation, and respect are identified as central factors in building a new relationship between Ngāti Raukawa and the Crown.

The apology in the Te Rarawa Deed of Settlement also refers to a new relationship between the Crown and the settling group being enabled by the settlement, and the apology contained within it, but also adds the concept of atonement:[640]

> Through this apology the Crown seeks to atone for these wrongs and relieve the burden of historical grievance so the process of healing can begin. The Crown looks forward to building a new relationship with Te Rarawa based on Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

The ideas of apology, atonement, and the removal of a sense of grievance are thereby built into the reconciliation framework in this settlement. The use of the concept of atonement suggests that the Crown is not trying to back away from the responsibility it has for the wrongs referred to.

These themes are also clearly evident in the Taranaki Whānui Deed of Settlement, which adds the dimension of forgiveness, on behalf of the settling community, to the other aspects of reconciliation seen in the settlement apologies already discussed:[641]

> Through this settlement the Crown is seeking to atone for its past wrongs towards you, restore its honour which has been tarnished by its actions, and to begin the process of healing. It is the Crown's hope that this apology will mark a pivotal point in the rebuilding and enhancement of our relationship with you. We look forward to building a relationship of mutual trust and co-operation that can flourish in the future. . .
>
> . . . E kite nei mātou i te kaha hiahia o te Karauna kia ea ai tērā i hē i a ia, kia tika ai tōna tū, otirā kia ara ake i tēnei mate nui. Ka pono mātou ki te kupu a te Karauna, kia tutuki marire tēnei hiahia nui ōna, ā, ko tō mātou,

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[640] Te Rarawa Deed of Settlement (3 November 2011), para 3.44.

[641] Taranaki Whānui o te Upoko o te Ika Deed of Settlement (19 August 2008), para 3.2, para 3.3.

> kia rite tētehi huarahi kia mahi tahi, kia aronui ki te tika i ngā tau kei te heke mai.
>
> We acknowledge that the Crown seeks to atone for its past wrongs and to restore its honour and begin the process of healing. We accept the Crown's commitment to act in good faith and we look to building a relationship of mutual trust and cooperation in the future.

The Waitangi Tribunal has also articulated its own view of the Treaty claims and settlement process in general, and its own role in particular. The Tribunal has referred to the need to resolve grievances, restore the wellbeing of Māori communities, and "reconcile Māori communities with the state and other parts of society".[642] Here one can see how the objectives of resolving grievances are explicitly linked by the Tribunal to the language of both restoration and reconciliation. The Tribunal sees its role in this process is to:[643]

- investigate to find the truth of the past;
- listen to claimant communities, and to the Crown;
- affirm claims where they are proven; and
- explain where they fall short.

These functions might be seen as part of the truth-telling, and potentially even re-storying, that many Indigenous scholars see as a vital aspect of reconciliation processes.

Government ministers who have responsibility for Treaty settlement negotiations have also spoken of the particular characteristics of reconciliation in the contexts of the settlement of claims based on the Treaty of Waitangi.

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[642] Waitangi Tribunal, *The New Approach Revisited: A Discussion Paper on the Waitangi Tribunal's Current and Developing Practices*, (Wellington, N.Z.: Waitangi Tribunal, December 2005) at 1.

[643] *Ibid.*

At a forum called to discuss the progress of the Treaty settlement process, the current Minister of Treaty of Waitangi Negotiations stated:[644]

> ...achieving settlements is about a number of very very positive things. First it is about our shared history, trying to achieve a measure of justice for the negative impact elements of that history have had on iwi and hapū. Secondly, achieving settlements can generate relationships with the Crown that are much more productive than in even the relatively recent past. We all acknowledge that they retain frustrating elements, but post-settlement relationships are largely positive rather than negative, and finally effective cultural and economic redress gives settling groups a platform for further development based on their own choices about what they want to do and where they want to go and too few have had this autonomy in the past.

Within that statement are the ideas of resolving grievance and building new relationships between Māori and the Crown that have been features of official policy in this area since the establishment of the modern Treaty settlement process. The minister's statement also includes an important reference to building a platform for the autonomy of Māori communities, bringing in an element of the self-determination discourse.

In an address at the same forum, the Associate Minister of Treaty Negotiations placed even greater emphasis on the practical aspects of restoring the capacity of Māori communities and also suggests a re-storying of the history and future of Māori-Crown relations:[645]

> …we talk of addressing longstanding relationship mamai of greater economic capacity and the restoration of tribal estates. We talk about redirecting, redirection of our energy on both sides of the relationship from negotiations to developmental modes. Of parallel importance is that completing settlements will be a significant milestone for the Crown – it will indicate the restoration of Crown relationships with iwi, and

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[644] C. Finlayson, "Address by the Minister for Treaty of Waitangi Negotiations" speech at Te Kōkiri Ngātahi: Treaty Settlements Hui, October 2010.

[645] P. Sharples, "Post-Settlement Crown-Iwi Relationships", speech at Te Kōkiri Ngātahi: Treaty Settlements Hui, October 2010. Note that Pita Sharples, the Minister for Māori Affairs at the time of this meeting, is also a member of Ngāti Kahungunu and, like Timi Kara (Sir James Carroll), has attained high office in the New Zealand Government.

> progressing into the future. The Crown will have more confidence that these relationships are no longer based on negative equity.

At an earlier forum, also convened by the Government to discuss issues in the Treaty settlement process, the Prime Minister touched on each of the key themes of acknowledging the wrongs of the past, contributing to the restoration of Māori communities, resolving grievances, building a new relationship between the Crown and more independent Māori communities:[646]

> Breaches of the Treaty by actions of the Crown have caused great harm to Maori. It is time those breaches were dealt with and the wounds they have caused were healed.
>
> Both Maori and the Crown benefit from settlements. Maori gain a settlement package that provides redress for those breaches. While the Crown, in negotiating that settlement and providing redress, has its honour restored. And all New Zealanders benefit from the resulting improvement in the Crown-Maori relationship.
>
> In short, settlements address our past and they invest in our shared future.
>
> I am impatient to see all Maori standing strong, economically independent and fulfilling their true potential. I see the completion of historical Treaty Settlements as an essential part of achieving that. Because only when the wrongs of the past have been addressed, will we all truly move our sights to the promise of the future.

6.4 Summary: Self-Determination and Reconciliation in the Treaty Settlement Process

The Treaty settlement process is underpinned by the objectives of reconciliation and delivering greater self-determination to Māori communities. As noted above, the type of tino rangatiratanga that is reflected in the Treaty settlement process may be a legal construct that is distinct from the fuller self-determination that the concept implies within

[646] J. Key, "Towards 2014: Speech at Te Kōkiri Ngātahi National Hui to Progress Treaty Settlements", speech at Te Kōkiri Ngātahi: Treaty Settlements Hui, 22 April 2009.

Māori legal traditions. Although there may not be agreement as to the precise level of self-determination that the settlement process is intended to deliver to Māori, it is clear, from statements made by key actors within the process, that, as in the relationship described in the Treaty itself, some degree of sharing of public power is intended, even if the terms of that power-sharing are not precisely defined. In any case, the philosophical foundations of reconciliation require the mutual recognition of the authority of both state and Indigenous forms of law and government. Self-determination and reconciliation are therefore interdependent concepts in the context of the relationships between Indigenous peoples and states.

6.5 Māori Legal Traditions and the Settlement Process

In Chapter Five, I argue that the Treaty settlement process creates particular pressures on Māori legal systems, which animate the three major tensions in Māori legal history in particular ways. I now turn to consider whether that is consistent with the objectives of self-determination/tino rangatiratanga and reconciliation as described in this chapter. I have suggested above that the Treaty settlement process makes claims about delivering, or at least contributing to, reconciliation and self-determination. In this part of the chapter, I use the three major tensions in Māori legal history to assess whether such claims are credible when applied to Māori legal traditions.

6.5(a) Adaptation

The tension of 'Adaptation' directs Māori legal traditions to either more self-determined change or towards more reactive change. In Chapter Five, I suggested that the settlement

process pulls Māori legal traditions towards more reactive change, largely as a result of the Crown's visions of justice and certainty that are imposed on the settlement process.

6.5(a)(i) Adaptation and Tino Rangatiratanga

As discussed in Chapter Five, the virtual absence from the substantive provisions of settlement instruments of concepts such as kaitiakitanga, mana, and rangatiratanga raises serious questions about the ability of those instruments to give appropriate expression to Māori understandings of self-determination. This in turn suggests that the settlement process is placing considerable constraints on the deployment of tikanga-based law-making within that process.

Corntassel's approach to sustainable self-determination is based on the idea of moving beyond rights-based discourses to an articulation of self-determination that is constructed on an Indigenous framework. The Treaty settlement process appears to be pushing Māori legal traditions in the opposite direction. Treaty settlement agreements are couched in the language of rights and purport to regulate not only rights as between the settling community and the state, but also to apportion rights as between the collective and the individual community member. The mediation involving Ngāti Maniapoto and Ngāti Tama that is described in Chapter Five illustrates the way in which engagement in the settlement process encourages Māori communities to articulate their issues within a rights discourse and to move away from tikanga-based approaches to understanding and expressing the relationships between and within Māori communities, not to mention relationships between Māori communities and the state. Many of the Waitangi Tribunal reports that have dealt with the Crown's policy and practice relating to

the settlement process have pointed to the deleterious effects of the settlement process on relationships and whanaungatanga.[647]

When one considers the Treaty settlement process in terms of the major tension of 'Adaptation' it becomes clear that self-determination/tino rangatiratanga in relation to Māori legal traditions is not being advanced through the settlement process. In fact, it is probable that self-determined changes to Māori legal traditions will become less likely as settling communities are required to adopt governance structures and law-making processes that are based on the rights discourse that currently permeates the settlement process.

6.5(a)(ii) Adaptation and Reconciliation

According to Tully, genuine reconciliation between Indigenous peoples and states requires a treaty relationship that is, in part, based upon mutual recognition. Mutual recognition implies a recognition of different forms of self-government and legal-political institutions, co-existing on equal terms. The tension of 'Adaptation' illustrates that the Crown has some difficulty with some aspects of Tully's mutual recognition, notwithstanding the fact that the settlement process makes claims of reconciliation.

The Crown's visions of justice and certainty are underpinned by the concept of Crown sovereignty, which frames the entire settlement process. The Crown sovereignty framework poses particular problems for reconciliation in relation to the tension of 'Adaptation'. In Chapter Four, I noted that the Crown sovereignty framework appears to be in conflict with some of the principles of Māori governance that are identified in that

[647] See, e.g. Waitangi Tribunal, *Tāmaki Makaurau Report, supra* note 366.

chapter. Māori governance entities that are constructed upon constitutions designed in the context of the settlement process are constrained by the parameters of this Crown sovereignty framework, which entrenches systems of law-making that are reactive, as opposed to self-determining.[648]

As Tully's articulation of reconciliation demonstrates, it need not be this way. It is quite possible to develop a treaty relationship that respects Indigenous and state forms of political authority and, furthermore, genuine reconciliation cannot take place if the new relationship is not established on the basis of mutual recognition and the coexistence of the political authority of both the state and Indigenous peoples. A settlement process that advanced reconciliation would create space for more tikanga-based law making, more self-determining change in respect of Māori legal traditions. The present process closes down that space by reinforcing a vision of exclusive Crown sovereignty.

6.5(b) Relationship to the Treaty Partner

The previous chapter illustrates the ways in which the Treaty settlement process feeds into the second key tension in Māori legal history and pushes Māori legal traditions towards reinforcing a particular relationship with the Crown. When this is considered in the context of reconciliation and tino rangatiratanga as described in this chapter, it appears that the Treaty settlement process is not supporting those objectives, and may even be undermining them, at least in so far as Māori legal traditions are concerned.

[648] See Chapter Five, above.

6.5(b)(i) Relationship to the Treaty Partner and Tino Rangatiratanga

As discussed above, the relationship to the Treaty partner is central to the discussion of tino rangatiratanga in the context of the Treaty of Waitangi. When the courts and the Waitangi Tribunal have applied the principles of the Treaty, they have tended to describe tino rangatiratanga in relation to the Crown's exercise of kāwanatanga, with each form of political authority being qualified by the other. When tino rangatiratanga is moved away from the strict legal definitions elaborated in the application of Treaty principles, the nature of the relationship with the Treaty partner takes on a slightly different shape, with even greater scope for the coexistence of independent polities.

That type of relationship would support quite strong forms of legal pluralism, which would assist with the de-centering of state law. However, the current settlement process encourages Māori legal systems to not only engage with state law, but to focus on the state legal system. The examples of the Ngāti Tama/Ngāti Maniapoto mediation (in which questions about the relative authority and the relationships between the two groups became a simple boundary dispute that was an obstacle to an imminent settlement, with a resolution to the issue sought via a claim to the Waitangi Tribunal) and the disputes relating to the Central North Island forestry settlement that are discussed in Chapter Five both illustrate the tendency of settling groups to turn their attention towards the state legal system and to develop their own legal traditions in ways which also engage state law.[649] This type of relationship between Māori legal traditions and state legal traditions tends to be one of subordination, rather than one that enhances tino rangatiratanga/self-determination.

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[649] See Chapter Five, above.

6.5(b)(ii) Relationship to the Treaty Partner and Reconciliation

The relationship between Māori and the Crown is clearly at the very heart of the Treaty of Waitangi and the claims and settlement process. In particular, the ideas of reconciliation that are described by key actors within the Treaty settlement process are based on restoring a healthy relationship between the Treaty partners, or even establishing a new and better relationship.

However, as noted in Chapter Five, the very limited use within settlement instruments of Māori legal principles relating to law-making casts the settling Māori community as a junior partner in the Treaty relationship. This is quite inconsistent with the approach to reconciliation that James Tully describes. Tully's concept of reconciliation is based on an equality of cultures and legal-political institutions. Tully is very clear that effective reconciliation cannot take place if the state party requires the Indigenous community to engage purely on the state's terms, by reference only to state legal traditions. Instead, there ought to be a process of intercultural negotiation. This type of intercultural dialogue would create space for the operation of distinct legal systems – those of both Indigenous peoples and the state. The relationship between legal systems would be based on interaction and not subordination or assimilation.

6.5(c) Renewal

Issues relating to the design of post-settlement governance entities and the constitutionalisation of iwi bring the tension of 'Renewal' to the fore. This third and final major tension in Māori legal history operates along an axis between models of legal

change which encourage the reinvigoration of tikanga and models which facilitate the perception that specific Māori legal traditions are losing relevance to the public life of the community.

6.5(c)(i) Renewal and Tino Rangatiratanga

The examples discussed in Chapter Five also suggest that there is very little self-determination/tino rangatiratanga that is being cultivated by the Treaty settlement process in relation to the major tension of 'Renewal'. In Chapter Five, I contend that the Ngāti Tama/Ngāti Maniapoto mediation and the Central North Island forestry settlement litigation show that the settlement process can encourage participants to see the state legal system as more relevant than Māori legal systems, even in those cases where the settling communities have gone to significant lengths to try to incorporate and/or reflect Māori legal traditions.

The central strand of Corntassel's concept of sustainable self-determination is that the standards and benchmarks for that self-determination must be constructed by Indigenous communities themselves.[650] By encouraging Māori communities to see the legal traditions of the state as more relevant to their own law-making, dispute resolution, or substantive laws about matters such as membership, the Treaty settlement process is effectively undermining self-determination/tino rangatiratanga in relation to Māori legal traditions.

[650] See 'Self-Determination and Tino Rangatiratanga', above.

6.5(c)(ii) Renewal and Reconciliation

By considering the tension of 'Renewal' one can also identify shortcomings in the Treaty settlement process when assessed against the objective of reconciliation. There are a number of aspects of Tully's reconciliation that are overlooked in the Treaty settlement process. Tully asserts that reconciliation between Indigenous peoples and states must be based on intercultural dialogue and negotiation that takes place in a philosophical and cultural middle ground. Yet the Treaty settlement process has basic structural characteristics which prevent that type of dialogue and, consequently, that type of reconciliation. As described in Chapter Four, the Crown sets the parameters of the settlement process unilaterally and dictates both financial and conceptual limits on settlement redress, which ultimately constrains the role of Māori legal traditions within the settlement process.[651] The settlement process cannot then be described as a process of intercultural dialogue that is based on mutual respect and the equality of Indigenous and state forms of legal-political institutions.

In particular, I have argued in the preceding chapters that the post-settlement governance phase is conceived upon a foundation of Western ideas of governance, virtually without reference to Māori legal traditions relating to leadership and accountability. The basic structures of PSGEs are based on Western law and values with only a very limited recognition of Māori legal traditions. Far from being an intercultural dialogue, there is a structural bias within the settlement process that encourages the discarding of Māori legal traditions rather than their re-invigoration. The requirements

[651] See Chapter Four, above.

imposed by the Crown on PSGEs relating to representation, accountability, and transparency ensure that the Crown's concerns are prioritized and as a consequence the settlement process tends to encourage Māori communities to move away from their own legal traditions.

6.6 Māori Legal Traditions: Tino Rangatiratanga And Reconciliation

Self-determination/tino rangatiratanga and reconciliation are two extremely important objectives of the Treaty settlement process. Both Māori and the Crown recognize reconciliation and some degree of self-determination/tino rangatiratanga as objectives of the settlement process. They are ideas that can be seen within the Treaty of Waitangi itself and inherent in the relationship given expression in the Treaty. In this sense, they can be understood as objectives that have a history in Aotearoa/New Zealand that stretches back much further than the modern Treaty settlement process. However, I argue in this chapter that, as far as Māori legal traditions are concerned, these objectives are being undermined, rather than advanced, by the operation of the Treaty settlement process and the nature of PSGEs that are established through this process.

The three major tensions in Māori legal history help to illustrate this disconnect between rhetoric and reality in the settlement process, albeit in relatively broad terms. In Chapter Five I explain how the Treaty settlement process animates the tensions in Māori legal history. I argue that the Treaty of Waitangi settlement process is tending to skew the Māori legal system towards a very constrained form of autonomy within a state-centric model that encourages a very selective incorporation of substantive Māori law.

This chapter illustrates the effect that this has on the objectives of self-determination and reconciliation.

In respect of each of the three major tensions – 'Adaptation', 'Relationship with the Treaty partner', and 'Renewal' – the structure of the current Treaty settlement process creates significant challenges for the realization of self-determination/tino rangatiratanga and reconciliation. If the settlement process is undermining these objectives, at least in so far as they are affecting Māori legal traditions, as I contend they are, then this suggests that there exist internal contradictions within the settlement process that are potentially highly problematic.

CHAPTER SEVEN: TAMA – CONCLUSION

Tama

"Pāpā"

"Yes, e Tama"

"Are all these stories about my tīpuna true? Did these things really happen?"

"That's what the stories say."

"Yes, but are they the truth?"

"They tell us truths."

"What kind of truths?"

"All kinds – qualities we ought to value, ways we ought to behave, principles that are important, consequences of our actions, who we are, how to live together and fulfill our aspirations."

"All of that?!"

"Yes, e Tama, all of that and more. As a Cherokee man once said, the truth about stories is that's all we are."

"So, am I just the stories of my tīpuna?"

"Not only those stories – you have your own stories too."

"What kind of stories? Ones with pirates and dinosaurs?"

"Probably not. But there might be warriors and a leviathan."

"Levia-what?"

"Never mind - that's not important. The important thing is that we keep telling the stories of our tīpuna."

"Why?"

"Because that's who we are as Māori, as Ngāti Kahungunu, as Ngai Te Apatu. If we stop telling those stories, we start to lose control of our own stories."

"If I get to control my own story, I'm definitely having pirates and dinosaurs in it."

7.1 The Treaty Of Waitangi Settlement Process In Māori Legal History

The story of Tamatea that begins this dissertation reflects ideas of change within Māori legal traditions. The focus of the dissertation is the way in which Māori legal traditions have changed over time and in particular the pressures exerted by the Treaty of Waitangi claims settlement process and the ways in which Māori legal traditions have responded to those pressures. This chapter brings together the key conclusions of the preceding chapters and reflects on what those conclusions mean for a number of important stories: the story of the Treaty settlement process; the story of Māori legal history; and new stories that are yet to be told.

The first two chapters provide the framework for the dissertation. Chapter One sets out the background to the discussion that follows. It locates the dissertation in a political and historical context and also in relation to the existing literature that addresses tikanga Māori or issues in the Treaty settlement process. Scholarship by Hirini Moko Mead,[652] Māori Marsden,[653] Andrew Sharp,[654] Kirsty Gover,[655] and the New Zealand

[652] Mead, *supra* note 2.

[653] Marsden *supra* note 58.

[654] Sharp, *Justice and the Māori, supra* note 421.

[655] Gover, *Tribal Constitutionalism: States, Tribes, and Governance of Membership, supra* note 56.

Law Commission[656] serve as key threads for the analysis throughout the dissertation. Chapter One also introduces the three major tensions in Māori legal history (adaptation, the relationship to the Treaty partner, and renewal) that provide important points of reference for the analysis that follows.

Chapter Two provides two further strands of locating material, constructing the methodological and theoretical frames for the dissertation. The principles of Kaupapa Māori Research – a Māori-centred research methodology – underpin this dissertation.[657] In particular, the principles of tino rangatiratanga/self-determination, te reo and pūrākau/language and stories, and whakapapa and whanaungatanga/genealogy and relationships have guided my research. These principles are embedded in the dissertation and the stories of my ancestors that begin each chapter are both expressions of these principles and also draw attention to their presence and importance. The theoretical framework also builds on these principles to suggest the basis of a Māori legal theory, that is, to articulate conceptual and theoretical tools drawn from Māori values and experiences. I also suggest that recent scholarship in the field of legal pluralism can be deployed to support Māori Legal Theory and this is consistent with the theoretical implications of the Treaty of Waitangi, which is, of course, central to this dissertation. The discussion of Māori legal traditions throughout this thesis is therefore grounded in

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[656] New Zealand Law Commission, *Māori Custom and Values, supra* note 2; *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase,* and *Waka Umanga supra* note 63.

[657] See Linda Smith, *Decolonizing Methodologies, supra* note 68.

Indigenous Legal Theory[658] (specifically Māori Legal Theory) and modified critical legal pluralism.[659]

Chapters Three and Four then provide analyses of the two basic institutions at the heart of this dissertation: Māori legal traditions as they are operating at the turn of the 21st century; and the system of law and policy that directs Māori governance in the context of the Treaty settlement process. Chapter Three explains the fundamental principles of tikanga Māori, which is the superstructure that creates and supports Māori legal traditions. A number of examples illustrate the way in which Māori legal traditions continue to regulate social activity and interaction within the Māori world today. Of particular interest are the ways in which Māori legal traditions are applied in what might be described as non-traditional contexts, for example in the constitution of a parliamentary political party.[660] The examples illustrate the tensions in Māori legal history and possible responses of Māori legal traditions. The Central North Island Forestry Settlement illustrates this in the specific context of the Treaty settlement process and provides the basis for further discussion in later chapters.[661] In Chapter Four, the dissertation turns to consider the Treaty settlement process itself and its relationship to Māori governance. In that chapter, I contend that the Treaty settlement process sets philosophical and practical parameters that impact upon principles of Māori governance. This creates issues relating to mandate, membership, and dispute resolution that require Māori legal traditions to respond.

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[658] See Christie, *supra* note 137.

[659] See Kleinhans & Macdonald, *supra* note 243; Webber, *supra* note 242; and Tamanaha, *supra* note 263.

[660] See Māori Party Constitution *supra* note 341.

[661] See *CNI Forests Land Collective Settlement Act, supra* note 359.

Chapters Five and Six use the three major tensions in Māori legal history to analyze the ways in which Māori legal traditions have responded to the pressures created by the Treaty settlement process. Chapter Five examines three broad areas of Māori legal systems – law-making, dispute resolution, and substantive law – in light of the three major tensions and concludes that the Treaty of Waitangi settlement process is tending to skew Māori legal systems towards very constrained forms of authority within a state-centric model that encourages a very selective incorporation of substantive Māori legal traditions. Chapter Six builds further on that analysis to assess the effects on Māori legal traditions against the goals of self-determination/tino rangatiratanga and reconciliation. Ultimately, I contend that the Treaty settlement process is undermining those goals, at least in so far as Māori legal traditions are concerned.

7.2 Re-Storying The Settlement Process

If the Treaty settlement process is to achieve its objectives of increased Māori self-determination and reconciliation between Māori and the New Zealand state, the analysis in this dissertation suggests that there needs to be significant changes to the way in which the settlement process is executed. Fundamental conceptual changes to the settlement framework are required. The settlement process needs to tell a different story.

The story of Treaty settlements cannot be one that is written only by the Crown. It must instead be co-authored by the Treaty partners - iwi Māori and the Crown. This is the only approach that can remove the colonial relationship and move towards the type of treaty relationship described by Tully.[662] Such an approach would imply a shift away

[662] Tully, *Public Philosophy in a New Key, supra* note 605 at 225-228.

from narrow conceptions of justice and certainty that currently constrain the settlement process.[663] Self-determination and reconciliation in this context require that Māori legal traditions be recognized as part of a legitimate social and political culture that existed in Aotearoa prior to the establishment of the New Zealand state.[664]

If Māori legal traditions are recognized as the first law of Aotearoa,[665] Treaty settlements would proceed on a very different basis. Processes and structures that subordinate Māori legal traditions to those of the state in a colonial relationship would not be acceptable.[666] The Treaty settlement process would not be based on asserting Crown sovereignty. Crown visions of justice and certainty would need to be considered alongside Māori visions of justice and certainty.[667] These settlements would not be understood as a process of the Crown acknowledging Māori claims, but one in which iwi Māori acknowledge the presence of the institutions of the New Zealand state. That is, it is the state that is actually making a claim on the pre-existing authority of iwi Māori.[668] The processes, structures, and objectives of the settlement process would be set through intercultural negotiation and the outcomes of the settlement process, the settlement agreements themselves and the new relationships for which they establish a platform, would reflect both Māori and state legal traditions. Principles of whanaungatanga, mana, utu, manaakitanga, and tapu and noa would contribute to the shape of both the negotiation process and any settlement agreements that came out of that process.

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[663] See Woolford, *supra* note 472.

[664] Tully, *Public Philosophy in a New Key*, *supra* note 605 at 234.

[665] Mikaere, "The Treaty of Waitangi and Recognition of Tikanga Māori", *supra* note 27.

[666] Tully, *Public Philosophy in a New Key*, *supra* note 605 at 226-228.

[667] Woolford, *supra* note 472 at 172-179.

[668] See Tully, *Public Philosophy in a New Key*, *supra* note 605 at 234.

If the Treaty settlement process is to achieve self-determination and reconciliation, greater attention will need to be given to the effects on Māori legal traditions. That is not to say that the settlement process ought to have no effect on Māori legal traditions; indeed, it seems unlikely that any effective settlement process could avoid doing so. A process that delivers on the goals of self-determination and reconciliation is almost certain to demand Māori legal systems respond in some way. This is where the major tensions in Māori legal history can provide a useful framework. By examining the settlement process in light of these tensions one is able to ascertain whether or not the process is animating those tensions in a way that supports the mutual recognition of Māori and state legal traditions and institutions of law and government.[669] These tensions help us to identify when the process is skewing Māori legal traditions towards more reactive, more state-centric, less tikanga-based forms of law-making, dispute resolution and substantive law.

It is not as though we do not possess the conceptual tools to construct a settlement process that tells this different story. The theoretical framework set out in this dissertation illustrates that creating an intercultural, pluralistic legal space is possible.[670] What is more, the Treaty of Waitangi itself gives expression to a vision of two distinct polities co-existing in Aotearoa. The Treaty tells its own story of reconciliation and self-determination. It is the product of intercultural negotiation and its terms speak of a mutual recognition of legal and political traditions. The language and form of the Treaty also reflect mutual respect and sharing. It suggests all the qualities of a genuine treaty

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[669] *Ibid.* at 229.

[670] See Webber, *supra* note 242.

relationship necessary for reconciliation.[671] It guarantees the tino rangatiratanga of Māori, confirming the self-determination of iwi Māori. The beginning of the story is, therefore, already in place. Better understanding the changes to Māori legal traditions over time and the tensions in Māori legal history that drive those changes enables us to re-write the current Treaty settlement story in a way that removes the colonial relationship and honours the Treaty partnership.

7.3 Re-Storying Māori Legal History

Rejecting the colonial relationship will also require telling a different story about Māori legal traditions and the changes to those traditions over time. This dissertation has focused specifically on changes to Māori legal traditions in the context of the Treaty settlement process but it has illustrated some issues that are relevant to the study of Māori legal history more generally.

First, it is vital that appropriate conceptual tools are developed for the study of Māori legal history. In this dissertation, I have drawn on Kaupapa Māori Research, Indigenous Legal Theory, and Legal Pluralism in order to construct a theoretical framework for the analysis of Māori legal traditions. Kaupapa Māori Research places Māori concepts, principles and processes at the centre of Māori legal history.[672] This approach expands the scope of Māori legal history beyond the confines of state law that affects Māori to include Māori legal systems and the interaction between state law and Māori legal traditions. Indigenous Legal Theory reinforces the ideas of Kaupapa Māori

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[671] Tully, *Public Philosophy in a New Key*, *supra* note 605.

[672] G Smith, *supra* note 67.

Research by using the cultural and experiential groundings of Indigenous communities, in this case, Māori communities, to develop the conceptual tools necessary to examine Māori legal traditions and changes to those traditions over time.[673] Re-storying Māori legal history is also assisted by recent scholarship in the field of legal pluralism. Understanding the Māori legal order on its own terms is an important part of re-storying Māori legal history and this requires a de-centring of state law. The modified form of critical legal pluralism suggested by the work of Webber[674] and Tamanaha[675] provides a theoretical model for de-centring state law by recognizing the role of legal subjects in the operation of law, and also assists in re-centring Indigenous legal orders by acknowledging the role of legal institutions and the fundamentally social nature of processes by which legal orders are created.

Deploying these conceptual tools also helps to reveal the legal dimensions of tikanga without requiring that they be decoupled from other aspects of tikanga. Attempting to make such a separation would not be a simple task and neither would it contribute much to our understanding of Māori legal traditions. In order to provide an analytical framework that suggests the broad shape of changes to Māori legal traditions but also captures the complexity and diversity of those changes, I have used three major tensions in Māori legal history. These tensions assist in identifying pressures on Māori legal systems and the general nature of the responses of those legal systems. The concept of tensions in Māori legal history can be a useful aspect of the re-storying of that history

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[673] Christie, "Indigenous Legal Theory", *supra* note 137 at 206.

[674] Webber, *supra* note 242.

[675] Tamanaha, *supra* note 263.

because it reflects creativity and dynamic change but also avoids problems of periodization and allows multiple perspectives, strategies, and approaches to co-exist.

7.4 New Stories

Re-storying the Treaty settlement process and re-storying Māori legal history would be supported by further research in a number of areas.

This dissertation has attempted to provide a general conceptual framework for the analysis of changes to Māori legal traditions, but further empirical research is required in order to reveal finer detail. Kirsty Gover's research in relation to membership and 'tribal constitutionalism' is a useful example of the kind of empirical work that assists to flesh out those details.[676] There are a number of other discrete areas that could be studied in this way. The constitutions of PSGEs (and similar entities) that formed the basis of Gover's study also contain dispute resolution mechanisms, provisions for the election or appointment of a governing body, and set the powers of the governing or executive body. Empirical research that examined available PSGE constitutions, specifically focusing on provisions that relate to a particular one of those topics, would provide a valuable foundation for examining the operation of PSGEs within the framework of Māori legal traditions.

The objectives of reconciliation and self-determination, insofar as they apply to Māori legal traditions, would also be supported by further research that is aimed at identifying specific Māori legal principles and developing scholarship that supports the practical application of these principles to the issues that Māori communities are

[676] Gover, *Tribal Constitutionalism: States, Tribes, and Governance of Membership, supra* note 56.

confronting today. The New Zealand state legal system has always had the ability to recognize Māori customary law, but recent years have seen an increasing recognition that, no matter what the state legal system will enforce as customary law, Māori legal traditions exist as part of a distinct Māori legal system. Note that this is an important part of mutual recognition and reconciliation. That suggests the need to explore ways of moving between the philosophical and conceptual framework to the practical operation of a dynamic and healthy Māori legal system.[677]

This work would contribute to shifting the discussion about Māori legal traditions from the broad and general to specific legal principles and examples of legal practice. Prominent Māori jurists such as Sir Edward Taihakurei Durie[678] and Justice Joe Williams[679] have done much to articulate the structures and principles that underlie the Māori legal system, as have researchers at the Te Mātāhauariki Research Institute.[680] The New Zealand Law Commission built on some of this scholarship in its 2001 study paper, *Māori Custom and Values in New Zealand Law,*[681] and the Ministry of Justice has sought to explore the philosophical underpinnings of Māori perspectives of justice in *He Hinatore ki te Ao Māori – A Glimpse into the Māori World*.[682] The next step would be to

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[677] See Val Napoleon and Hadley Friedland "An Inside Job: Developing Scholarship From An Internal Perspective of Indigenous Legal Traditions." (Paper prepared for 'An Exploratory Workshop: Thinking About and Practicing with Indigenous Legal Traditions, Fort St John, 2011) [unpublished] [Napoleon and Friedland, "An Inside Job"].

[678] See E.T. Durie, "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 Otago L.Rev. 449.

[679] See Joe Williams, *supra* note 2.

[680] See *supra* note 10.

[681] New Zealand Law Commission, *Māori Custom and Values, supra* note 2.

[682] Ministry of Justice, *He Hinatore ki te Ao Māori, supra* note 65.

provide an internal perspective of the Māori legal system,[683] seeking to understand Māori legal traditions on their own terms, rather than through the lens of the state legal system.

This builds not only on the theoretical and methodological basis of this dissertation but also the important work undertaken by Val Napoleon, Hadley Friedland, and others involved in the major collaborative research project relating to Indigenous Peoples and Governance. Napoleon and Friedland contend that Indigenous legal traditions ought to be treated "substantively as law – to be debated, applied, interpreted, argued, analyzed, criticized, and changed".[684] To do this in Aotearoa, in a way that is both robust and respectful of Māori legal traditions, will require significant engagement between legal scholars and Māori communities. If undertaken carefully and thoughtfully, such engagement ought to give rise to many new stories of Māori legal traditions and Māori legal history that can assist Māori communities to fulfill their aspirations.

7.5 Conclusion

This dissertation has studied the nature of changes to Māori legal traditions in the context of the Treaty settlement process. It has aimed to analyze broad changes using a framework that can be applied to Māori legal traditions in other contexts. There are many more stories of Māori legal traditions that remain to be told. There are also different types of stories to be told about Māori legal traditions even in the context of the Treaty settlement process - stories that drill into the detail of specific legal traditions and create pathways between an appropriate philosophical framework and the practical

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[683] See H.L.A. Hart, *The Concept of Law* (London: OUP, Ely House, 1961) at 87-88.

[684] Napoleon and Friedland, "An Inside Job", *supra* note 677 at 8.

operation of vibrant Māori legal systems. Those stories will be vital if we are to move towards reconciliation and Māori self-determination. The story that runs through this dissertation is one of a settlement process that undermines those objectives because of the pressures it places on Māori legal traditions. But it need not be this way. If parties to the Treaty settlement process take the objectives of self-determination and reconciliation seriously, and pay careful attention to changes to Māori legal traditions that take place in the context of that process, a different story can be told – a story in which Treaty settlements signify, not the end of a Treaty relationship, but a new beginning.

Epilogue: Māui And The People Of The North[685]

"Pāpā, can we have a story about Māui tonight?"

"Of course. There are lots of stories about Māui. Which one do you want to hear? The one about him fishing up this island we live on?"

"Nah, I know how that one goes."

"How about the one where he slows down the sun?"

"I know that one too."

"What about the one where he gets the secret of fire from his great ancestress, Māhuika?"

"You tell me that one all the time! Aren't there any new stories about Māui?"

"You want a new story about Māui?"

"Yeah."

"A new story…let's see now…OK, how about this. This is a new story about Māui, one where we find Māui many, many years after his most famous adventures. But at a time when Māui was becoming restless again. Māui always craved excitement, adventure, and change. Not for him a quiet life, whiling away the hours, fishing, weaving or playing golf. In his day he had tamed the mighty sun itself! Even challenged the very mortality of human beings! Admittedly, that hadn't worked out as well as he had hoped, but it had been worth a try. Anyway, that was all a long time ago. He knew it was not his day anymore. Though surely he still had a few tricks up his sleeve, a few more adventures yet to be had. And there was still plenty that needed to be done. He saw many

[685] This epilogue was inspired by my participation in a workshop on Indigenous Legal Traditions held in Fort St John, BC, in 2011. I would like to acknowledge the generosity of the peoples of the Treaty Eight territory for sharing their stories with all of us who were privileged to participate in that workshop.

communities suffering great hardships. But where would he be of most use? Where could he use his powers to make real change in people's lives?"

"Then he remembered a place he'd heard people speak of - 'The Law' it was called. Some people said that The Law was the only place you could find justice. Others said that it was a site of oppression. Māui had heard many different things about The Law – that it was the location of a proud and ancient civilization, that it was an empty, crumbling ruin, that it was a vibrant, dynamic and cosmopolitan place. So many different and contrasting views! But all the stories suggested that, for good or ill, The Law had a huge effect on the lives of people who had been there. Māui was intrigued. He decided he wanted to see The Law for himself."

"So, Māui set off for The Law. But it was not an easy journey. For a start, Māui wasn't exactly sure where The Law was. It wasn't clearly marked on any maps, though if he looked hard he could make out some smudged markings which gave him a general sense of where to look for The Law, but no more than that. Travellers he met along the way weren't much help either. Their directions were not especially precise and often Māui felt as though they were talking about completely different places."

"Just when he was on the verge of abandoning his journey, Māui caught a glimpse of a settlement off in the distance. Could this be The Law? As he came closer he began to appreciate the elaborate construction of this settlement. Some of the structures mirrored the natural environment – the contours of the land, the progress of the waterways, the life-cycles of plant and animal life, the balance and inter-dependence of the natural world. Some buildings had a spiritual quality to them that he could not quite put his finger on. They were not like churches exactly, but he could sense they were imbued

with the powers of the gods and the spirit world like awe-inspiring cathedrals or the intricacy of the carvings on the meeting-house in his own village. Other buildings had obviously been carefully and deliberately built by people for particular purposes – fortress-like structures to protect what was kept within, bridges that reached out to forge new relationships, high walls to set boundaries and prevent encroachment. And the wide streets and tree-lined avenues had obviously been designed to facilitate and encourage movement in some directions and to discourage or prevent movement in other directions. Māui marveled at the complexity of it all. Sure, there were some parts of town that looked as though they had developed in a slightly haphazard and chaotic fashion, but Māui felt that all added to the charm of the place."

"As Māui rounded a corner in what seemed to be a slightly neglected area of town, he came across a large group of people huddled around a map and deep in conversation. He exchanged greetings and discovered the group had come from the north. Like him, they were interested in finding out as much as they could about The Law. They told him they had been here before. In fact, they were once very familiar with this place, but things had changed. Others had built over the top of the landmarks they used to navigate. When Māui looked at their map, he saw that it did not show the roads and streets of the settlement they were within, but there were clearly other paths, tracks, alleyways, promenades laid out which one could use to travel through The Law. Māui could see that following these pathways would show you very different aspects of The Law than you would see from the streets."

"Yet the group still seemed uncertain about how best to proceed. The issue seemed to be that not all the members of the group wanted to use the map. It wasn't as though anyone

wanted to use the official roads and streets, but there was some concern that their map provided a very incomplete picture of the vast network of paths and tracks that crisscrossed The Law. Some of the guides amongst the group said that their methods of navigation cannot be represented by lines or icons on a map. Others felt that it was unwise to follow a path on the map when the map could not show all of the connecting paths that link to places outside the boundaries of the map. Then, an elder rose to speak. The elder acknowledged the expertise of the guides and the importance of taking account of their concerns. But, the elder noted, the guides are not the only ones who ought to have a say in this matter. The map contains some useful information. And using the map might in fact help the community to re-connect with some of those matters the guides spoke of. Travelling the pathways on the map might encourage people to re-discover the connecting paths that are not represented on the map. Getting used to travelling through The Law once again might build the confidence of the group to more widely use the other navigational tools that are available to them."

"The group seemed persuaded by these arguments put forward by the elder and readied themselves to set off again. Māui farewelled the people from the north and continued on his own journey. After a short while, he reached the top of a rise from where he overlooked the entire settlement. He could see the people from the north making their progress through The Law and, as they did so, Māui noticed something quite unexpected. As the group travelled through the settlement, they actually appeared to be changing the very landscape of the city itself. The shapes of the buildings were modified. The layout of the streets began to bend before his eyes to align more closely with the group's

journey. Or was that just his eyes playing tricks on him? If it was, it was a good trick. He blinked, shook his head and started the long journey home."

"Is that the end?"

"Well, it is the end of one story, but also the beginning of others."

"Like the story of Māui's journey home?"

"Yes"

"And the story of the people of the North?"

"Yes"

"And the story of The Law?"

"Maybe, yes."

"Will you tell me those stories one day?"

"I can tell you some of them, but you might have to help me figure out more endings and beginnings."

"I'll help you Pāpā."

"Ka pai, e Tama. Then they really will become your own stories."

"Our own stories, Pāpā."

"Ae, e Tama, our own stories."

Pinepine te Kura[686]

Pinepine te kura, hau te kura

Whanake te kura i raro i Awa-rua

[686] In Māori traditions, songs or waiata are usually performed at the end of speeches to support what has been said. 'Pinepine Te Kura' is a famous song from Ngāti Kahungunu. It is an oriori, a chant composed for young children.

Ko te kura nui, ko te kura roa

Ko te kura o tawhiti nā Tu-hae-po

Tenei te tira hou, tēnei haramai nei

Ko te umu-rangi, nā te Whatu-i-apiti

Nau mai e tama, ki te taiao nei

Ki' whakangungua koe ki te kahikatoa

Ki te tūmatakuru, ki te tara ongaonga

Ngā tairo rā e nāhau, e Kupe

I waiho i te ao nei.

Pike ake, kake ake I te toi huarewa

Te ara o Tawhaki i piki ai ki runga

I rokohina atu rā Maikuku-Mākākā

Hāpai o Māui, he waha i pā mai

"Taku wahine purotu, Taku tāne purotu"

Kōrua ko te tau e.

Little tiny treasure, treasure of renown,

The treasure who came from below Awarua;

The noble treasure, the famous treasure,

The treasure from afar off, the treasure of Tuhaepo!

A strange visitor is he, lately arrived here:

He is Te Umurangi, descended from Te Whatuiapiti.

Welcome, O son, welcome to this world of life.

You are to be ritually strengthened with the kahikatoa [tea tree],

With the tūmatakuru [thorny shrub native to Aotearoa] and the taraongaonga [tree nettle];

These were the thorny obstructions that you, O Kupe,

Bequeathed unto this world.

Climb up, ascend by the suspended way,

The pathway of Tawhaki when he ascended on high,

And there found Maikuku-Mākākā,

Attended by Hāpai [advance guard] of Māui,

and greetings were uttered:

‘My beautiful lady!’ ‘My handsome man!’

A tribute for you two, O loved ones.

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