A NATION CAST ADRIFT? A LEGAL AND HISTORICAL ANALYSIS OF TIKANGA MĀORI FOR THE PURPOSES OF GENERAL COMMON LAW APPLICATION

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Abstract

Tikanga as a basis for Aotearoa/New Zealand's legal framework and governance is not an entirely new concept. Tikanga received recognition in colonial New Zealand's early days and its subsequent disregard was an unfortunate consequence of an increasingly aggressive settler colonialism. Though great caution and thought will be required in its application and despite objection from Māori and Pākeha alike, tikanga may yet provide surer foundations for a bicultural Aotearoa/New Zealand.

Ko Takitimu tōku waka,
Ko Maungatere tōku maunga,
Ko Rakahuri tōku awa,
Ko Ngāi Tahu te iwi,
No Tuahiwi au,
Ko Te Rakitaunuku Tau ahau.

Takitimu is my waka,
My mountain is Mt. Grey,
The Ashley is my river,
My iwi is Ngāi Tahu,
I am from Tuahiwi,
I am Te Rakitaunuku Tau

I whakapapa to Ngāi Tūāhuriri, a hapū of Ngāi Tahu, and this article is written from that perspective. Though other iwi and their tikanga are noted and discussed

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here, my better sources and insights are formed and drawn from my Ngāi Tahu whakapapa.

Tikanga Māori and the more informal 'kawa' have surrounded me all my life, growing up in the village of my hapū, Tuahiwi. I know my whānau and all tūpuna before them have attempted to live by it, despite the ever-changing nature of their worlds. I grew up with stories from my poua (grandfather) of how our whānau used to camp along the Rakahuri (Ashley) river and catch whitebait along its banks, how we used to return home with staggering numbers of eels from Te Waihora (Lake Ellesmere) and how nearly all whānau were within walking distance from one's home. These times are gone, but not forever. I presented my reasoning for the rural Māori dispersal in my last Honours Report cited below. Like that Report, this one has a tangibly historical flavour. Here, I wanted to examine the degradation of tikanga, some of which is within living memory. Following this discussion, I wish to present an argument and path for the modern integration of tikanga Māori within the contemporary New Zealand legal system.

We live in stirring times for Māori and the legal system. With this excitement and hope comes insecurity and even fear. In current discussions around tikanga Māori, there is already plenty of both. This article aims to give a measured argument for the integration and wider acceptance of tikanga in the law of Aotearoa New Zealand.

I. Introduction

> They are not mere wanderers over an extended surface, in search of a precarious subsistence; nor tribes of hunters, or of herdsmen; but a people among whom the arts of government have made some progress; who have established by their own customs a division and appropriation of the soil; who are not without some measure of agricultural skill, and a certain subordination of ranks; with usages having the character and authority of law.
>
> – Lord Russell to William Hobson, 9 December 1840[1]

Within living memory, tikanga has largely been confined to private dealings between whānau and procedure on the marae.[2] However, recent developments in the

1 A Mackay *A Compendium of Official Documents Relative to Native Affairs in the South Island: Volume II* (Luckie & Collins, Nelson, 1872) at 42.

2 ET Durie, Chief Judge of the Māori Land Court "FW Guest Memorial Lecture: Will the Settlers Settle? Cultural Conciliation and the Law" (1996) 8(4) OLR 449 at 453.

law such as the *Takamore* case,[3] and the Supreme Court's pending decision in *Ellis*,[4] have forced the courts to confront tikanga at state level. What this precisely means for New Zealand's current "legal monoculture" remains to be seen.[5] The recognition of New Zealand's first customary law presents a wide range of opportunities and challenges that the author endeavours to explore. Initially, the reader will be furnished with a general description of what tikanga Māori is. Then, a history and examples of its application will be analysed. Both the pre, during and post contact periods will be discussed; critical in acquiring an understanding of tikanga and how it has adapted over time. I will then settle on developing case law, including *Ellis.* Though unreleased, *Ellis* already generates large volumes of speculation on what it means for New Zealand's legal future.[6]

Traditionally, common law courts have allowed indigenous and customary legal systems to continue, so long as they met a variety of pre-requisites.[7] The *Ellis* case presents an opportunity for New Zealand's courts to integrate tikanga Māori into our law in this manner. I will critically examine this integration. The concept has its critics, with some Māori academics viewing court attempts to recognise tikanga as "patronizing intolerance".[8] Others doubt the ability of the justice system to engage with and understand tikanga Māori to the appropriate level.[9] Commentators such as Don Brash and the Hobson's Pledge group have expressed concerns with the very basis of tikanga as an authentic legal system. I will explore these views before proposing arguments to discourage the reader from their adoption.

In the final paragraphs of this article, I aim to show how the common law courts can work to recognise tikanga Māori, alongside the legislature, to fully realise the bi-cultural aspirations of New Zealand's founding parties. My objective is to show that Māori have always lived according to tikanga and should be enabled to do so further, through a sympathetic and willing legal system. I will argue that fears of an overly indulgent or ignorant application of tikanga from the bench are largely unjustified. With increasing efforts towards education and engagement, the nation's courts are carefully and consciously engaging with tikanga, with no sign of this

3 *Takamore v Clarke* [2012] NZSC 116.

4 *Ellis v R* [2020] NZSC 89. This Paper was written before the Supreme Court's decision in Ellis was delivered.

5 Paul McHugh *The Māori Magna Carta* (Oxford University Press, Auckland, 1991) at 86.

6 See Martin Van Beynen "The Peter Ellis case and Māori customary law" (9 July 2020) Stuff <www.stuff.co.nz>; and Taha Brown "A further fusion of tikanga Māori and common law? High Court decision upholds plaintiff's mana" (6 April 2021) Simpson Grierson <www.simpsongrierson.com>.

7 See *Case of Tanistry* (1608) Dav 28: 80 ER 516 as cited in McHugh, above n 5, at 87.

8 Philip Joseph *Joseph on Constitutional and Administrative Law* (5th Ed, Thomson Reuters, Wellington, 2021) at 111.

9 Meriana Johnsen "Concern at High Court use of tikanga to overrule Waitangi Tribunal" RNZ (31 March 2021) <www.rnz.co.nz>.

practice discontinuing. Tikanga was intended for recognition in this nation's beginnings and there is no reason we cannot return to that foundation.

A. Tikanga Māori Defined

Literally translated, "tikanga Māori" is the correct and Māori way of doing things.[10] Williams J states that it encompasses "the very mundane to the most sacred or important fields of human behaviour".[11] It is not a rule-based system. Māori academic and Judge ET Durie asserts that tikanga may be likened to the New Testament as opposed to the Old, in that it relies on broad values rather than strict and rigid rules.[12] Tikanga is a spectrum, with rules at one end and values at the other, with values informing the range.[13]

There is some debate as to what the fundamental values of tikanga Māori are. Whilst certain values are added and excluded from opinion to opinion, there are often more similarities than differences. This result is not unlike what one would expect if several judges were asked to explain the fundamental values of the English common law. The primary values listed by Williams J are reproduced here as follows:[14]

> (a) Whanaungatanga, or the source of the rights and obligations of kinship;
> (b) Mana, or the source of rights and obligations of leadership;
> (c) Tapu, as both a social control on behaviour and evidence of the indivisibility of the divine and profane;
> (d) Utu, or the obligation to give and the right (and sometimes obligation) to receive constant reciprocity; and
> (e) Kaitiakitanga; or the obligation to care for one's own.

10 Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZLR 1 at 4.
11 Joseph, above n 8, at 106.
12 ET Durie "Custom Law" (online ed, Discussion paper presented to the Waitangi Tribunal, January 1994) at 8.
13 Timoti Gallagher "Tikanga Māori Pre-1840" *Te Kahui Kura Māori* 0(1) (online ed, Wellington, 2008) at 7.
14 Justice Joseph Williams "Lex Aotearoa: A Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 3.

Williams J labels whanaungatanga as the "glue that held, and still holds, the system together".[15] Timoti Gallagher asserts that the individual's identity is defined through their relationship with the collective and their whenua.[16] Whakapapa, or genealogy, is the basis of these relationships and the collective is expected to support the individual.[17] Whanaungatanga is the idea that rights (from natural resources to support from the collective) stem from relationships.[18] When the fires in the metaphorical whare, or house, of these relationships are not maintained (ahikaa), there are no rights.[19] Understanding the interconnectedness of the Māori world view helps one understand whanaungatanga. This concept covers emotional, social, spiritual, environmental, and economic relationships.

The term mana has become common in everyday New Zealand dialect,[20] seeing use in everything from alcoholic beverage branding to political party names.[21] Durie states that mana "described the personal and political dimensions of Māori authority".[22] Mana may be gained through divine means, through whakapapa and through personal endeavour.[23] Honesty, integrity, bravery, generosity, respect and oratory skills are a number of the many qualities an individual may possess that work to enhance their mana and the mana of their collective when displayed.[24] Breaches of tapu, dishonesty or losing a battle may decrease one's mana.[25] The Western concepts of authority, prestige and reputation help those unfamiliar with the term mana better understand it. It relates to whanaungatanga as the status of one's relationships with their collective and wider world.

Tapu is the primary social control authority in tikanga Māori and has been described as "the major cohesive force in Māori life".[26] There is intrinsic tapu, possessed by all individuals through whakapapa, linked to those before us and those to come after.[27] Tapu gives all inherent worth. There is also tapu that acts as a restrictive or prohibitive force for the purposes of social control, discipline, the protection of people and the protection of property.[28] Violent warfare was a

15 At 4.
16 Gallagher, above n 13, at 10.
17 At 10.
18 Williams, above n 14, at 4.
19 At 4.
20 See "Mana Shuzou New Zealand Limited (CR No. 1917224)" NZ Business Directory <http://www.nzwao.com>.
21 David Fisher "Mana Party's Hone Harawira back in the fold of Māori Party for unity call to voters" *The New Zealand Herald* (online ed, Auckland, 31 August 2017).
22 Durie, above n 12, at 5–6.
23 Gallagher, above n 13, at 11.
24 Durie, above n 12, at 5–6.
25 Gallagher, above n 13, at 15–21.
26 Ani Mikaere "Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Māori" (2005) 18 YBNZ Juris 134 at 137.
27 At 136.
28 At 137.

last resort in Māori culture but was a tactic used often in response to desecration of waahi tapu or sacred locations.[29] Prior to colonisation, the reproductive organs and procedures of women were considered highly tapu. Women had the ability to make objects tapu or remove tapu to make these same objects noa (base), if correct procedures were followed.[30] Tapu is often linked to the Western concept of sacrality and was thus blended with Christian doctrine on the arrival of settlers.[31]

Utu, like tapu, is another conceptual regulator of tikanga Māori and is concerned with balance.[32] Williams J defines utu as a responsive value that creates equivalence. When tapu is breached, the individual or hapū of the individual who enacted the breach may expect repercussions in the name of utu.[33] Te Rauparaha's gruesome attack on Ngāi Tahu elder Tamaiharanui at Bank's Peninsula was utu for the killing of Te Rauparaha's relatives by Ngāi Tahu chiefs.[34] Alternately, a Māori politician once called on the support of Waikato Māori by reminding them of a mercy his ancestor had granted their ancestor, Pōtatau, in calling off a planned attack.[35] The politician went on to "narrowly win" the Western Māori parliamentary seat, showing a situation where utu created a lasting positive relationship.[36] Utu is primarily concerned with restoring harmony and has been partially likened to western concepts of payment and revenge.[37]

Williams J describes kaitiakitanga as a "natural shoot-off" of whanaungatanga.[38] Any right deriving from a person or resource carries an obligation to care for the physical and spiritual wellbeing of that person or thing.[39] Whilst whanaungatanga revolves around the interconnectedness of the Māori worldview, kaitiakitanga focuses on the legal obligation that arises from these relationships. The traditional institution of rāhui arises from the concept of kaitiakitanga, where prohibitions would be placed over resources. This was often tied to efforts of resource conservation or because a death in the locality meant tapu may be breached if normal usage immediately continued.[40] Kaitiakitanga is arguably one of the more readily accepted tikanga Māori values from a Western standpoint, laying claim

29 Gallagher, above n 13, at 25.
30 Mikaere, above n 26, at 138. See the full paper for further discussion relating to the malforming of tikanga due to the influence of Western missionaries that spurred a decline in the recognition of feminine power, once strongly recognised in tikanga Māori.
31 Durie, above n 12, at 8.
32 At 4–6.
33 Gallagher, above n 13, at 20.
34 Arini Loader "Kei Wareware: Remembering Te Rauparaha" (2016) 39 Biography 339 at 339.
35 James Cowan *Tales of the Māori Bush* (AH & AW Reed, Dunedin, 1934) at 119–124.
36 Tai Ahu, Racheal Hoare and Māmari Stephens "Utu: Finding a Balance for the Legal Māori Dictionary" 16 NZACL Ybk 19 at 23–24.
37 At 25.
38 Williams, above n 14, at 4.
39 At 4.
40 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 40.

to statutory definition that is actively used in legislation.[41] It is often linked with European concepts of guardianship and stewardship.

One tikanga value Williams J mentions later in his piece is tino-rangatiratanga, best translating to self-determination. Māori self-determination was a simple fact of life pre-colonisation. However, tino-rangatiratanga adopts new meaning for Māori in the modern world. Williams J notes that the Treaty grants tino-rangatiratanga to the chiefs in the second article.[42] He goes on to assert that we must see "customary law as a necessary and inevitable expression of self-determination".[43] It is suggested that Williams J correctly points to why tino-rangatiratanga is now a fundamental aspect of contemporary tikanga Māori. Self-determination is a right guaranteed by the Treaty and is a goal Māori actively pursue. The recognition of our own laws and customs at the highest legal levels is a key checkpoint in its attainment.

This is not an exhaustive list of tikanga Māori values and concepts. Whakapapa, manaakitanga and aroha are others that were included in Durie's writing of fundamental values that are not adopted here.[44] The above tikanga form Williams J's list of primary tikanga Māori values. This list has been cited in high level cases as authoritative for legal purposes.[45] The purpose of this work is not to provide a detailed analysis as to what tikanga Māori is and where these values come from. Rather, the above definitions are provided to give the reader a basic comprehension of tikanga Māori.

B. Tikanga as Law

From the beginning, Māori separated Western law from their own. Tikanga referred to Māori law and custom, whilst "ture" (from the Hebrew word 'Torah', referring to the Judaic holy text) referred to religious and Western law.[46] Though there was some degree of variation by locality, the fundamental values noted above informed everything. Thus, Bishop Hadfield noted in 1864 that pre-contact custom had a degree of regularity so strong that one tribe could "predict accurately the conduct of another in any given circumstance."[47]

A lack of institutional law led to claims that Māori were a primitive society. In letters to William Hobson, Lord Normanby described New Zealand as being "dispersed with petty tribes, who possess few political relations to each other, and

41 Resource Management Act 1991, s 2(1).
42 Treaty of Waitangi Act 1975, sch 1.
43 Williams, above n 14, at 9.
44 Durie, above n 12, at 5–10.
45 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZRMA 248 at [173].
46 Durie, above n 12, at 3.
47 At 2.

are incompetent to act, or even deliberate in concert".[48] The lack of an institutional and centralised governing body in Māori society has long encouraged a view of acute deficiency being possessed by Māori in terms of legal structure. Hadfield's quote above demonstrates that Māori did have a form of law that found its origins in Māori social custom and practice. Durie argues that there were very clearly values, standards, principles and norms to which the Māori community generally subscribed to, then and now.[49]

This is highly analogous to the generally accepted origins of Western law. From an early 18th-century standpoint, Thomas Wood stated that English law was mostly "General Customs; these customs are properly called the *Common Law*".[50] Revered legal scholar William Blackstone divided the laws of England into lex scripta and lex non scripta, with the latter being laws that are not set down in writing as acts of Parliament.[51] These laws received their power, not from a centralised agency like Parliament, but from "long and immemorial usage".[52] In an American context, James Kent argued that the common law as he knew it was "founded in the common reason and acknowledged duty of mankind, sanctioned by immemorial usage".[53]

Whilst Māori did not have a legislative body such as Parliament or any form of centralised government, there was undoubtedly a generally recognised form of law in tikanga. Values such as whanaungatanga and utu informed tikanga, just as Western values informed the early phases of the common law.

In his essay on pre-colonial tikanga, Timoti Gallagher outlines several ideas key to understanding tikanga Māori. These will be noted here for clarity and due to differences that stem from modern perceptions of Māori society. Hapū, or "sub-tribes", were stronger and tighter political entities than they are today and dominated day to day life.[54] This is noted as iwi are the decision-making body most widely seen in the contemporary Māori context. Hapū were decisively steered by Rangatira or "chiefs". Rangatira were the strongest human authority in their collectives.[55] Ariki and rangatira views were often decisive on crucial matters and

48 *British Parliamentary Papers*, vol 3 1840 [238] No 16, 37–42.
49 Durie, above n 2, at 452.
50 Thomas Wood *An Institute of the Laws of England* (Richard Sare, London, 1720), at 1:6 as cited in Stuart Banner *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* (Oxford University Press, New York, 2021) at 46.
51 At 47.
52 William Blackstone *Commentaries on the Laws of England*: *Volume I* (JB Lippincott Co, Chicago, 1900) at 63–64 as cited in Banner, above n 50, at 47.
53 *Wightman v Wightman,* 4 Johns Ch 343, 350 (NY Ch 1820).
54 Gallagher, above n 13, at 19.
55 Durie, above n 2, at 455.

this is well illustrated in the lives of senior Ngāi Tahu chiefs such as Te Maiharanui and Taiaroa.[56]

Prominent early New Zealand ethnologist Edward Shortland recorded his experiences of tikanga Māori in action. Shortland noted that families of rank would devote one or more of their members to the study of tikanga and religion. Those educated would act as "their [Māori] books of reference and their lawyers".[57] When the rights to land or the boundaries of that right were disputed, these lawyers would be appealed to by those with grievances.[58] The case would be investigated between the two opposing parties, where all could witness, generally close to the spot of land in question.[59] The claim to the land would be proven by naming the original ancestor who staked the claim and then tracing lineage to the case claimant. Here, the importance of whanaungatanga and whakapapa is evident. If the lineage could not be disproven or faulted, the opposing party's case would be nullified, and the matter settled.[60] Shortland noted the analogous nature of the process to that of claims settled in a European context.

This article only grants a brief snapshot of tikanga Māori prior to colonisation. The above recollections from Shortland and Gallagher serve to illustrate the collective focus of tikanga Māori, so crucial to understanding its application. Whilst there were undoubtedly clear leaders and experts in the forms of tōhunga (spiritual leaders) and chiefs, community consent and consultation was important.

C. Tikanga, the Treaty and Early Colonial Attitudes

Initially, both parties to the Treaty of Waitangi affirmed the continuation of tikanga in New Zealand's law. Between 1835 and 1839, 52 chiefs signed a Declaration of Independence for New Zealand,[61] creating a Confederation of United Tribes at the encouragement of James Busby.[62] Ned Fletcher argues that the chiefs saw a difference between governmental power and tribal authority.[63] Thus, the chiefs ceded the powers of government necessary for "the dispensation of justice, the preservation

56 Stephen Oliver "Tama-i-hara-nui" *Dictionary of New Zealand Biography* (first published in 1990). Te Ara – the Encyclopedia of New Zealand <https://teara.govt.nz>.

57 Edward Shortland *The Southern Districts of New Zealand: A Journal with Passing Notices of the Customs of the Aborigines* (Longman, Brown, Green & Longmans, London, 1851) at 95.

58 At 96.

59 At 96.

60 At 96.

61 "The Declaration of the Independence of New Zealand" (17 June 2021) Archives New Zealand <https://archives.govt.nz/>.

62 Ned Fletcher "Foundation" in Mount, Simon & Harris (eds) *The Promise of Law: Essays Marking the Retirement of Dame Sian Elias as Chief Justice of New Zealand* (LexisNexis, Wellington, 2019) at 82.

63 At 82.

of peace and good order, and the regulation of trade".[64] Beyond these objects, the powers of the Confederation had no impact on the tribal authority wielded by each chief. When the chiefs signed the Treaty, they were ceding the powers of the Confederation to the Crown, no more and no less.

Because of the understanding based on the Confederation, there was "no necessary inconsistency between the cession of sovereignty or kawanatanga in article one and the guarantee of tino rangatiratanga in article two".[65] Busby, who inspected Henry Williams's translation, approved of it, and told the Legislative Council of New South Wales that rangatiratanga was the closest Māori equivalent to "independence" mere months after the Treaty's signing.[66] Fletcher argues the most persuasive evidence of the Treaty's intention for "undisturbed intra-tribal government" lies in eyewitness accounts of what was explained to the Chiefs by senior officials.[67] First Governor William Hobson, Catholic missionary Father Louis-Catherin Servant, Major Thomas Bunbury, Colonial Surgeon John Johnson and New Zealand's first Surveyor General Felton Matthew had primary relationships with the Treaty's signing and all asserted the same thing in different words: whilst sovereignty was ceded to the Queen, chiefs retained full powers over their people.[68]

This can be understood to mean that the Treaty intended for Māori to retain their customs and tikanga. Subsequent communications were issued by Hobson, the Colonial Office and their underlings to confirm as much.[69] This approach was maintained by colonial powers for a period in practice. Māori were "not treated as objects of government in the same way as settlers", and Lord Russell's 1840 instructions to Governor Hobson affirmed this emphasis on the retention of Māori laws and institutions.[70] In 1843, Lord Stanley wrote to Acting-Governor Willoughby Shortland that:[71]

> … there is no apparent reason why the aborigines should not be exempted from any responsibility to English law or English courts of justice, as far as respects their relations and dealings with each other …

64 At 82.
65 At 83.
66 Editor "The Legislative Council" *The Sydney Morning Herald* (Sydney, 6 July 1840).
67 Fletcher, above n 62, at 84.
68 At 84–85.
69 At 85–87.
70 At 86.
71 Letter from Lord Stanley to Lord Shortland regarding New Zealand's governance (21 June 1843), GBPP 1844 (556) XIII.1 Appendix 19,475 as cited in Fletcher, above n 62, at 87.

except where "universal laws of morality" were concerned. This sentiment was later echoed by leading Canterbury settlers like James Fitzgerald and Premier Henry Sewell. Sewell tendered concerns that an "ultra-democratic" government would not be conducive to granting Māori their "fair share of power", whilst Fitzgerald made clear his support for some runanga-based form of governance.[72]

The recognition of tikanga at state level was not only the well-intentioned musings of officials and bureaucrats. These ideas were also frequently implemented with real legislative action. New Zealand's first constitution stated that: "in cases arising between the aboriginal inhabitants of New Zealand alone ... the courts and magistrates of the same province ... shall enforce such native laws, customs and usages aforesaid".[73] In the early colonial period, settler officials granted tikanga Māori "tentative legislative recognition".[74] There were several Acts passed recognising the need for some legal plurality. The Native Exemption Ordinance 1844 "incorporated a number of Māori perspectives, norms and values within the British justice system, with active involvement of Māori leadership".[75] British involvement in internal Māori disputes was dependent on request. Tikanga was integrated where appropriate: convicted Māori thieves were required to pay four times the amount of the good stolen, with some of the proceeds going to the victim.[76] This is a clear adaption of the tikanga Māori principle of 'muru' where ritual compensation was offered after a transgression. Muru was intended to return the offended party to their original position and is not unlike the same idea of compensation in tort.[77]

The New Zealand Constitution Act 1852 went as far as the creation of separate jurisdictions. The Act enabled the Queen by order of Council to set aside districts of New Zealand that observed the law and customs of Māori.[78] These laws and customs did not have to comply with English law and need only not be "repugnant to the general principles of humanity".[79] For reasons to be elaborated on later, this never eventuated in any form, despite numerous calls from Māori for the section's implementation.[80]

The implementation of native custom in the formation of fledgling settlements was not uncommon or unheard of in the British Empire. Ned Fletcher asserts that: "The general practice in the Empire was to accommodate native systems of

72 Alan Ward *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1973) at 22.
73 New Zealand Constitution Act 1846, ss 9–10 as cited in McHugh, above n 4, at 94.
74 Law Commission, above n 40, at 19.
75 At 19.
76 At 19.
77 Williams, above n 14, at 4–5.
78 New Zealand Constitution Act 1852, s LXXI.
79 Section LXXI.
80 Law Commission, above n 40, at 21.

government and law under British sovereignty."[81] This is arguably exactly what the Treaty of Waitangi set out to do, on a standard word-based assessment and contextual view. Treaties with West African natives ceding sovereignty often contained recognition of tribal custom. The Brekama Treaty acknowledged tribal signatories the continuing right to enact war upon other tribes.[82] The Credit River Reserve Constitution in Canada,[83] and British acceptance of some legal plurality in the East Indies are further examples of legal plurality being observed across the British Empire.[84]

The above examples of intended legal plurality do not reflect the New Zealand we live in today, yet the fault for this does not lie with Māori. A viewpoint popular in the 20th century was that Māori simply suffered from an ineptitude to cope with the onslaught of civilisation.[85] This was not true of commercial matters and is equally false when we examine the Māori approach to Western law.[86]

Durie describes tikanga as "pragmatic and open-ended".[87] The Law Commission noted that, since the early days of settlement, Māori were quick to adapt their societal structures and ideals to the new experiences they encountered, particularly in the legal system.[88] In these discussions, the Kīngitanga movement is often referred to.[89] Here, the author has access to a number of physical documents and manuscripts that contain early attempts at the adaption of formal Western legalism from a Māori perspective. The early laws passed by Ngāi Tahu chiefs relating to their claim will be analysed, alongside fledgling hapū courts.

On 10 June 1875, Ngāi Tahu chiefs gathered in Ōtakou to pass an agreement regarding the collection and administration of finances in relation to Kemp's Deed.[90] The Act is fashioned in a manner analogous to that of the current Parliamentary legislative system. It begins with a preamble that is loosely translated to: "The name of this law is the law to establish financial activities and to appoint officers and set the authority of the officers to organise this activity."[91] The text goes on to note procedure should the chief officer die, date as to when the law comes into effect and

81 Fletcher, above n 62, at 81.
82 At 81.
83 At 81.
84 McHugh, above n 5, at 86.
85 Harry C Evison *Te Waipounamu: The Greenstone Island* (Aoraki Press, Wellington, 1993) at 484.
86 At 484.
87 Durie, above n 11, at 4.
88 Law Commission, above n 40, at 4.
89 At 4.
90 Ngāi Tahu Rangatira "Te Ware Runanga e kiia ana ko Te Mahi Tamariki, Otakou, 10 Hune, 1875" (Mackay, Fenwick & Co, Dunedin, 1875) as cited in Waitangi Tribunal *The Ngāi Tahu Report* (Wai 27, 1991) Doc C1, 18(a).
91 Te Ware Runanga, above n 90, at 4.

stipulations as to where the money could be appropriately spent such as lawyers' fees, telegrams and travel costs.[92]

The 1875 Act was not a one-off. In 1907, the chiefs met again to pass two further Acts under "Te Ture whakahaere inga hui mote keereme o Ngāi-Tahu raua ko Ngati Mamoe, 1907".[93] The two pieces of tribal legislation in the publication both contain preambles and title sections.[94] The first Act related to executive management of the 1907 claim, with the final section declaring that the office of the claim was to be at Kaiapoi.[95] The second Act was a renewed financial contribution scheme.[96] In both cases, the chiefs were exercising their rangatiratanga, in accordance with tikanga Māori. Each chief is listed with his corresponding hapū. These decisions were made by rangatira representing their hapū and formed the basis of the early Ngāi Tahu claims proceedings. Ngāi Tahu have made claims to the government since 1849, and these have always operated on a tikanga Māori basis, with chiefs and tribal leaders leading tribal efforts with the support of the people.[97]

In the early 1900s, Ngāi Tūāhuriri had its own court system, presided over by elders and rangatira such as tribal historian Thomas E Green. These courts dealt with everyday tribal issues such as assaults, thefts and allegations of fatherhood in a tikanga-based context. In one case, the accused, George Huria, was made to pay five shillings per week for the upkeep of a child he fathered out of wedlock. Evidence was given by whānau at the marae, on both the accused and plaintiff's side to the bench. Presiding judge was local kaumatua, ūpoko and historian, Thomas Green.[98] Tikanga values are not explicitly mentioned often, yet the process is implicitly pro-tikanga. It is Māori determining their own outcomes, in accordance with their own customs, presided over by their own people. This was and is, rangatiratanga, mana and utu in practice.

These are examples specific to Ngāi Tahu, but similar acts of adaptation to new legal concepts by Māori can be seen throughout New Zealand's history. The Kingitanga movement, Māori Parliament and the Confederation of Chiefs further serve to illustrate this point. The switch to a monocultural legal system that has only very recently begun to truly recognise tikanga Māori was a gradual process.

92 At 4–5.
93 John Tikao et al (Ngāi Tahu chiefs) *Te Kereme o Ngai Tahu raua ko Ngati Mamoe* (New Zealand Times Office, Wellington, 1907).
94 At 7, 11.
95 At 10, s 11.
96 At 11–13.
97 Waitangi Tribunal, *The Ngāi Tahu Report: Volume I* (Wai 27, 1991) at 76.
98 Thomas E Green "Kaiapoi Native Court Minute Book" (1907) at 29–31. This is a hand-written manuscript, kept by the Tau family.

The Law Commission outlines four key factors in combination leading to the "eclipse of Māori customary law":[99]

> (a) the belief that English institutions and culture were innately superior, and it was in the best interests of Māori to assimilate;
>
> (b) the desire to create an ideal English society in New Zealand;
>
> (c) the introduction of English laws and internalising colonial values; and
>
> (d) the settlers' desire for land resulting in the alienation of land from Māori.

In his PhD thesis, Ned Fletcher argues that whilst early colonial officials like Stephen wished for the civilisation of Māori, to equate this with a guiding policy of assimilation for British government in New Zealand "goes too far".[100] The Law Commission alternatively argues that there is "no mistake" that settler recognition of tikanga Māori was only ever a temporary measure.[101] The Law Commission points to the preamble of the Native Exemption Ordinance Act 1844 which states that it is desirable for Māori to "yield a ready obedience to the laws and customs of England".[102] The eventual full assimilation of Māori into a Western system likely was intended by even more liberal colonists such as Lord Normanby. However, this was caveated by Māori doing so through their own autonomous choice, rather than via settler compulsion. It is key to understand Māori intentions when they signed the Treaty – the retainment of their rights to self-determination.

What Fletcher and the Law Commission find common ground on is the fact that Māori aspirations of self-determination ultimately fell to the wayside of settler interests. The Law Commission states that the acquisition of New Zealand's resource base was achieved by a "sustained attack on Māori custom law by the monocultural colonial and post-colonial systems".[103] When George Grey assumed his role as Governor, there was a distinct change in attitude towards Māori, with settler

99 Law Commission, above n 40, at 22.
100 Ned Fletcher "A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi" (PhD Thesis, University of Auckland, 2014) at 1071.
101 Law Commission, above n 40, at 21.
102 Native Exemption Ordinance Act 1844, preamble as cited in Law Commission, above n 40, at 21–22.
103 Law Commission, above n 40, at 22.

interests gaining greater prominence in English government due to "inexorable pressure exerted by the [New Zealand] company".[104]

The New Zealand Company went to great lengths to counter and undermine the Colonial Office's initial liberal sentiments. The Company labelled the Treaty a "praiseworthy device for amusing and pacifying savages for the moment".[105] They played on the 22 settler deaths at the Wairau Affray, an incident that the colonial powers of the time regarded as a consequence of unjustified settler aggression. Regardless, the New Zealand Company published articles in contemporary media criticising government policy toward Māori as "unwise and too indulgent".[106] Manned by a number of politicians sympathetic to unbridled free market principles and the New Zealand Company, the 1844 House of Commons' Select Committee expressed the view that the Treaty was a mistake and that Māori rights to land should only stem from that land which was actually occupied.[107] Māori land ownership governed by tikanga was a major barrier to profitable settlement pursued by the New Zealand company. They employed a system of unrelenting negotiation criticised as "puffing and falsehood" to bend the colonial office to their desires.[108]

Though not successful straight away, the New Zealand Company's lobbying had a gradual effect. Lord Normanby held his line against the Company until he resigned in 1845. However, what followed his idealist policies was an approach more sensitive to "pragmatic political and commercial concerns".[109] Support for representative government lead to the Constitution Act 1846. Over time, London grew weary of the New Zealand Māori question, but the settlers had not. After continued pressure from the colonists, the Crown cleared the way for legislation that allowed the infamous Native Land Court to form.[110] In conjunction with this, Governor Grey cleared funding for the settlers that allowed aggressive land purchasing tactics under the Crown right of pre-emption policy.[111] By 1846, the Colonial Office consented to company and settler pressure by denying Māori claims to land without cultivation or habitation.[112] With the fast-paced dominance achieved by the settlers through rising immigration and land purchases, Māori viewpoints at odds with these progressions were swiftly disregarded.[113]

104 Fletcher, above n 100, at 972.
105 At 951.
106 At 954.
107 At 957.
108 At 936.
109 At 972.
110 Fletcher, above n 100, at 974.
111 At 973.
112 Law Commission, above n 40, at 24.
113 At 22.

The explicit rejection of tikanga at the New Zealand state level came in the form of a ruling by Prendergast CJ. In his ruling, tikanga was dismissed entirely:[114]

> Had any body of law or custom capable of being understood and administered by the Courts of a civilised country been known to exist, the British Government would surely have provided for its recognition.

With reference to s 4 of the Native Rights Act 1865, Prendergast CJ claimed:

> The Act speaks further on of the "Ancient Custom and Usage of the Māori people", as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being … no such body of law existed.

The Law Commission noted the "circular" reasoning of the judgment, where tikanga Māori could not exist as it was not recognised by statute and that statute could not anyway recognise something that did not exist.[115]

The *Wi Parata* finding relating to tikanga was rejected by the Privy Council, noting it was "rather late in the day" for New Zealand courts to adopt this view.[116] Prendergast CJ continued this line of reasoning by refusing to acknowledge any legal basis in New Zealand law for Māori customary marriage.[117] These attitudes toward tikanga Māori completely eclipsed the contemporarily progressive viewpoints of bodies such as the early Colonial Office to become the new rule.

The Law Commission calls the Native Land Court of the 1860s "the most obvious example of this category of effective extinguishment" of tikanga Māori.[118] The Court investigated Māori title to land and claimed to do so in accordance with tikanga Māori.[119] In reality, hapū ownership was ignored if not minimised. At one stage, the Court awarded titles to land of 5,000 acres or less to no more than 10 owners.[120] The Native Land Court forced notions of individual ownership "practically unknown to the ancient Māori" to hasten land sales, dealing another blow to the recognition

114 *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 77–79.
115 Law Commission, above n 40, at 22.
116 *Nireaha Tamaki v Baker* [1901] AC 561, (1901) NZPCC 371.
117 *Rira Peti v Ngaraihi Te Paku* (1888) 7 NZLR 235.
118 Law Commission, above n 40, at 25.
119 Michael Belgrave Māori Customary Law: from Extinguishment to Enduring Recognition (unpublished paper for the Law Commission, Massey University, Albany, 1996) at 35 as cited in Law Commission, above n 40, at 25.
120 At 25.

of tikanga Māori at state level.[121] This individualisation took power away from collectives like hapū and iwi. It had a "profound effect on Māori social structures and management systems".[122]

Further degradations of tikanga took place right into the 20th century. The Tōhunga Suppression Act 1907 criminalised Māori spirituality through measures that even at the time were controversial.[123] The suppression of indigenous faith through state powers is a story that many are familiar with. This article will instead look to the less well-known state aggressions against tikanga Māori that happened in the author's own backyard and within living memory.

Ngāi Tūāhuriri settled in a segregated reserve called MR873, or Tuahiwi, by the end of the 19th century. This followed a slew of questionable land purchases as a direct result of the aforementioned Native Land Court and colonial pressure to sell.[124] By the 20th century, Rangiora historian Donald Hawkins noted that: "many Māori, most of whom lived outside the towns, lived in poverty and abysmal housing conditions".[125] Despite this, a level of tikanga remained in everyday life. Ngāi Tūāhuriri Māori subdivided their lands for their children to build their own houses close to whānau. They continued to stake out spots on the Ashley River, catching whitebait for themselves and their whānau, as had always been done.[126]

The tikanga here is worth exploring. Kaitiakitanga and whanaungatanga are seen in clear practice. In the collection of whitebait, one generation would pass on the matauranga or knowledge required to care for the river's birdlife, to catch the marine life and to preserve the numerous different kinds of mahinga kai (traditional foods) caught.[127] As a child I was told to stay away from the breeding grounds of whitebait and put back any unusual catches like freshwater crayfish, in line with the tikanga passed on from my elders and their elders before them. This was done to care for the river. In contemporary Western culture, living within proximity to one's parents into adulthood is not a cultural norm and is even occasionally mocked.[128] For Māori in Tuahiwi, it was key for whānau to build on their land to retain close connections with their elders. Children were expected to chop the wood, mow the

121 MPK Sorrenson "The Lore of the Judges: Native Land Court Judges' Interpretation of Māori Custom law" (2015) 124(3) Journal of the Polynesian Society 223 at 224.

122 Law Commission, above n 40, at 26.

123 At 24.

124 For further detail on how Ngāi Tahu Māori lost their lands and were relegated to inadequate reserves, see Harry C Evison *The Ngāi Tahu Deeds: A Window on New Zealand History* (Canterbury University Press, Christchurch, 2006).

125 D Hawkins *Rangiora: The Passing Years and People in a Canterbury Country Town* (Rangiora, Rangiora Borough Council, 1978) at 14.

126 Te Maire Tau *Water Rights for Ngāi Tahu: A Discussion Paper* (Canterbury University Press, Christchurch, 2017) at 16–20.

127 At 19–20.

128 See the popular 1990s sitcom *Everybody Loves Raymond.*

lawns, bring food and conduct regular visits with older members of their whānau.[129] This is whanaungatanga, lived in practice.

These traditions were blown away at the stroke of a pen. In my previous Honours' report, I outlined how the government's successive Town and Country Planning Acts, alongside the Rangiora County Council's by-laws, stripped the ability of Tuahiwi Māori to build on their land to almost nothing.[130] The 1960s saw Tuahiwi land deprived of its protection through the implementation of new zoning and Māori land legislation.[131] Up until the 1960s, Tuahiwi Māori had subdivided their land off to whānau. The new legislation stipulated that only one house could be built for every 10 acres.[132] The land blocks owned by Tuahiwi whānau as a result of the creation of the Tuahiwi land reserve by the settler government were generally 14 acres.[133] Whānau were forced to ultimately sell their rural blocks of land to the same Pākehā farmers that had a hand in the drafting of these rules.[134] Often the "push-pull" factors of 'Rogernomics' are blamed for the urbanisation of Māori, but Professor Te Maire Tau describes this as "nonsense".[135] When one visits old Māori reserves like Tuahiwi, Rāpaki, Wairewa and Port Levy, many of the original whānau no longer reside there. What destroyed these communities in which tikanga Māori was once closely observed by all who lived within them was legislative interference conducted less than a century ago. Only in 2015, after continued pressure by Ngāi Tūāhuriri, was this wrong mended by the now Waimakariri District Council.[136]

This same disregard for tikanga Māori was exhibited again in 1987 regarding Ngāi Tūāhuriri mahinga kai practices. As noted above, Ngāi Tūāhuriri would camp along the Ashley River during the whitebaiting season and move up to Tūtaepatu lagoon for the summer months to continue eeling.[137] The catches would be kept for self-sufficiency, given to whānau and taken to the marae for events such as tangi or large hui. Living off the land in accordance with tikanga, alongside supporting oneself and one's whānau, has always been a source of pride for Ngāi Tūāhuriri Ngāi Tahu. The Rangiora County Council passed a bylaw prohibiting the erection of temporary structures along the riverside, which only really applied to Ngāi

129 Tau, above n 126, at 18.
130 Nuku Tau "Tuahiwi" (LLB(Hons) Report, University of Canterbury, 2020).
131 See the Town and Country Planning Act 1953 and the Māori Affairs Amendment Act 1967.
132 Te Maire Tau and Martin Fisher "Fulfilling Kemp's Deed: Tuahiwi and Land Title Reform" in *History Making a Difference: New Approaches from Aotearoa,* eds. Katie Pickles, Lyndon Fraser, Marguerite Hill, Sarah Murray and Greg Ryan (Cambridge Scholars Publishing, Newcastle Upon Tyne, 2017) at 33.
133 At 33.
134 Tau, above n 126, at 19.
135 At 18.
136 Waimakariri District Council, "Operative-Notice-Lurp-Action-21" (2015) <www.waimakariri.govt.nz>.
137 Tau, above n 126, at 19–20.

Tūāhuriri campsites. This bylaw, passed with no real consultation, effectively meant a culture and tikanga passed down through generations was "deleted".[138]

It is my own submission that overt racism *may* have had some part to play in the above laws. However, especially with regard to the Town and Country Planning legislation, I would argue mere indifference and ignorance to Māori aspirations was more at play. By the 20th century, Māori were a people largely confined to their own rural settlements like Tuahiwi. Māori primarily existed outside formal New Zealand society.[139] The above legacy of disregard for tikanga arguably led to complete ignorance. New Zealand moved from due consideration of Māori aspirations and desires under the Treaty to a nationally sustained lethargy for Māori viewpoints that saw little to no consultation or partnership on issues as Māori-centric as the zoning of land within rural communities. This is the legacy that precedes the more positive developments of today.

D. Tikanga: Recent Legal Developments

Following continuous pressure from Māori in the form of public marches,[140] political lobbying and continued litigation,[141] a tangibly different approach to tikanga Māori gained momentum in New Zealand. It is worth noting that one argument claims this change is better attributed to relationships Māori had with communities such as the Lions Club and trade unions, progressive Waitangi Tribunal publications and hard-fought litigation like the 1987 *New Zealand Māori Council v Attorney General* case.[142] These institutional victories and alliances are credited by Tau as more conducive to the gains in Treaty/Māori legal thought that we see today than the protest movements of the 1970s. Full discussion of this matter is beyond the scope of this article. The author only seeks to note the power of institutional change over generations, that will also be argued for here.

The 1970s and 1980s brought on a raft of legislative change that pushed the Treaty and tikanga Māori into the limelight. A tribunal was established to hear Treaty related grievances from Māori in 1975[143] and, in 1985, was granted retrospective

138 At 20.

139 David Pearson "Ethnic Inequalities: Rural Māori" (21 May 2018) Te Ara – the Encyclopedia of New Zealand <https://teara.govt.nz/>.

140 Chris Maclean "Wellington region: new growth and attitudes: 1940–1975" (1 August 2015) Te Ara the Encyclopedia of New Zealand <https://teara.govt.nz>.

141 Te Maire Tau "Neo-Liberal Settlements: From Adam Smith to Treaty Settlements" (2015) 49(1) NZJH at 126. The author gives an example of how a decades-old relationship with the ANZ bank had allowed the then relatively poor Ngāi Tahu Trust Board to finance the claim with heavy borrowing that may otherwise have not been permitted.

142 At 128–129.

143 Treaty of Waitangi Act 1975.

jurisdiction to 1840.[144] The Treaty of Waitangi went from being a "simple nullity",[145] to "simply the most important document in New Zealand's history".[146] The "purist" view that, because the Treaty was not adopted into New Zealand's domestic law, it had no significance was deemed "unrealistic" by most academics in the 1990s.[147] With increased significance given to the Treaty by the state and courts, this same credence was soon to be directed at tikanga Māori.

II. Case Law: From the 20th Century to Today

Family law is a key example of tikanga and Treaty jurisprudence gaining increased prominence in the latter half of the 20th century. Family law statutes of the 1950s operated "largely by ignoring Māori social policies and objectives".[148] The Adoption Act today expressly refuses to acknowledge the ancient Māori custom of whāngai or adoption.[149] However, the courts began to overtake the outdated statute. In two cases,[150] Inglis J expressly recognised the importance of tikanga Māori in cases concerned with Māori children, stating:[151]

> A custody order excluding one parent altogether from the possession and care of a Māori child is seen as imposing European values on an ancient and strongly reviving culture … [The Family Court] must and does recognise that each case involving the welfare of a child must be considered according to its own individual circumstances, important traditions and cultural values affecting the child …

Though not always without complications, largely relating to judicial unawareness of tikanga,[152] a pattern began to evolve. By 1997, President of the Law Commission Baragwanath J stated that "counsel had not performed their task" when

144 Treaty of Waitangi Amendment Act 1985.
145 *Wi Parata v The Bishop of Wellington*, above n 114, at 72.
146 Robin Cooke "Introduction" (1990) 14 NZULR 1.
147 Law Commission, above n 40, at 70.
148 At 58.
149 Adoption Act 1955, s 19(1).
150 *Rikihana v Parson* (1986) 4 NZFLR 289; and *Makiri v Roxburgh* (1988) 5 NZFLR 673.
151 *Makiri,* above n 150, at 672.
152 See *Re Wakarua* (1988) 4 FRNZ 650. The presiding judge declared that whāngai essentially related to desertion because of a lack of evidence that allowed him to conclude otherwise when faced with the statute.

they failed to recognise Māori custom where relevant.[153] Even where not expressly recognised, tikanga Māori began to be deployed in the Family Court.

The Environment Court and resource management legislation also began to make steady progress. The dismissal of tikanga Māori in previous planning acts has been discussed. However, the Town and Country Planning Act 1977 contained a clause stating that planners had to give due consideration to "the relationship of the Māori people and their culture and traditions with their ancestral land".[154] Initially, the provision was given a very narrow interpretation by the Planning Tribunal.[155] Unless Māori held the land freehold, the provision would often be dismissed.

This view was eventually corrected and advanced. The Court of Appeal considered that it was the relationship Māori had to the land, rather than the strict ownership status of the land, that was key in adjudicating on the provision.[156] The Resource Management Act 1991 has several references to tikanga and in particular, kaitiakitanga. All persons exercising powers under the Act must have regard to the tikanga Māori value of kaitiakitanga.[157] The relationship between Māori and their ancestral lands is considered a matter of national importance that also must be taken into consideration under the Act.[158] Whilst there is a "settled line of authority" that the Act does not grant veto powers to kaitiaki and mana whenua over who may use resources or begin developments in their rohe,[159] this integration and acknowledgement is a far cry from the 1950s.

Tikanga as a source of the common law saw direct recognition in the 1980s. In 1986, Tom Te Weehi was granted a customary fishing right by my grandfather, Rakiihia Tau Sr. Tau was the ūpoko of the Ngāi Tūāhuriri hapū who held mana whenua over the area Te Weehi wished to gather from. Te Weehi's conviction for the possession of undersized paua was quashed by Williamson J who noted:[160]

> The treatment of [the Crown's] indigenous peoples under English common law … confirmed that the local laws and property rights of such peoples in ceded or settled colonies were not set aside by the establishment of British sovereignty.

153 Law Commission, above n 40, at 58.

154 Town and Country Planning Act 1977, s 3(1)(g).

155 See *Knuckley v Taranaki County Council* (1978) 6 NZPTA 609. Also see a critique from Principal Planning Judge Turner at the time in Rick Shera, "Section Three of the Town and Country Planning Act 1977: Adjudicating the Non-Justiciable" (1987) 5(4) Auck UL Rev 440 at 453.

156 *Environmental Defence Society and Tai Tokerau District Māori Council v Mangonui County Council* [1989] 3 NZLR 257 (CA).

157 Resource Management Act 1991, s 7(a).

158 Section 58M.

159 *Gock v Auckland Council* [2019] NZHC 276 at [177].

160 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, [1986] 6 NZAR 114, 121.

The court recognised the tikanga exercised by Tau in allowing Te Weehi to collect shellfish for personal and whānau consumption. This was an exercise of rangatiratanga and mana by Tau for Te Weehi to support himself and his family by traditional means.

It is worth noting that *Te Weehi* touched on the doctrine of Aboriginal rights that was later affirmed in the infamous foreshore and seabed case. The doctrine is based on the old common law doctrine of continuity. Essentially, the laws of Indigenous people in British colonies, whether settled, ceded or conquered, continue as a matter of law, even after declarations of sovereignty and the imposition of English law, unless expressly extinguished.[161] Nineteenth-century jurists like Prendergast CJ refuted the doctrine's application to what they perceived as savage races, such as Māori; these judgments are largely considered "detours" in today's jurisprudence and academia.[162] The doctrine was recently affirmed in New Zealand, despite being legislated over the top of by Helen Clark's Labour Government.[163]

In *Te Weehi,* the Act concerned contained specific provision for customary fishing rights.[164] In *Huakina*, one year later, Chilwell J imported considerations of tikanga Māori and Treaty principles where the Act did not expressly call for this to be done. Chilwell J's judgment stated that the Treaty was a part of New Zealand's "fabric" and went on to say: "customs and practices which include spiritual elements are cognisable in a Court of law provided they are properly established, usually by evidence".[165] Chilwell J ruled that even where not strictly referred to, tikanga and the Treaty may still be relevant.

In criminal jurisdiction, the Supreme Court and Court of Appeal have found that in sentencing Māori offenders, the tikanga concept of whakamā may be relevant as a "unique mitigating factor".[166] Whakamā being closely associated with shame, but also the harm to the defendants and whānau's mana.[167] The Court of Appeal took judicial notice of the concept of whanaungatanga as a "fundamental precept of tikanga Māori".[168] Tukaki sought an order from the Court stating that extradition for previous crimes would be oppressive in his circumstances due to a lack of

161 Law Commission, above n 40, at 11.
162 MD Walters "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill LJ 711, 721.
163 See *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) and the fallout resulting in the Foreshore & Seabed Act 2004.
164 Fisheries Act 1983, s 88(2).
165 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 215.
166 *Henare v R* [2020] NZSC 96 at [9]; and *Henare v R* [2020] NZCA 188 at [26].
167 *Henare v R* [2020] NZCA 188 at [27].
168 *Tukaki v Commonwealth of Australia* [2018] NZCA 324 at [38].

whanaungatanga and tikanga-based living in Australia. Though the appeal was dismissed, Winkelmann J accepted the grounds as arguable, noting they were not strong enough in the case before the court.[169]

Tikanga is now prevalent throughout New Zealand's law. This year, in response to the Waitangi Tribunal awarding land on one tribe's rohe to another tribe, Cooke J asserted that it was not open for the Waitangi Tribunal to ignore tikanga when considering claims.[170] In *Tauranga Environmental Society,* Palmer J ruled that it was not open to the Environment Court to find against cultural adversity when presented with genuine and credible evidence of it from Ngāti Hē. The lower court was required to act consistently with Ngāti Hē's "rangatiratanga, guaranteed to them by art 2 of the Treaty, which the Court was bound to take into account by s 8 of the RMA".[171] The *Tauranga* case is not even the first time this year tikanga was explored by Palmer J. The High Court found that a decision to unjustly revoke the plaintiff's visitation pass was an unlawful revocation on their mana. Palmer J stated that:[172]

> … upholding a successful plaintiff's mana, to vindicate their rights as is fundamental to the rule of law, can be a good reason for New Zealand courts to make a declaration in a judicial review case.

Palmer J referred to quotes from the *Trans-Tasman* case in his judgment. Relating to opposition from the respondents to a proposed iron sands' mining consent, the court judgment gave strong pronouncements of the strength of tikanga. The Court of Appeal stated:[173]

> … it is (or should be) axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand.

169 At [51].
170 *Mercury NZ Ltd v The Waitangi Tribunal* [2021] NZHC 654.
171 *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [66].
172 *Sweeney v Spring Hill Corrections Facility* [2021] NZHC 181 at [76].
173 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZRMA 248 at [177].

The court held that the continued common law existence of Māori property rights naturally leads to the continued existence of tikanga Māori,[174] which "defines their nature and extent".[175]

This leads to what the author originally intended to analyse. The *Ellis* case concerns the appeal of Peter Ellis against convictions in 1993 for sex offences against children.[176] The case took a surprise turn when Glazebrook and Williams JJ suggested that tikanga Māori could establish an entirely new rule regarding posthumous defences based on the concept of mana.[177] The English common law default suggests the appeal should have been abated because of Ellis' death. In 2020, submissions were made on tikanga Māori informing the development of New Zealand's common law legal system. Natalie Coates argued that tikanga Māori is a "thread" that can and should be used to create the whāriki/mat of a uniquely New Zealand common law system.[178] Submissions were given by the Crown and appellants regarding the above. It perhaps goes to show how much progress has been made when the Solicitor-General remarked that at this point, acceptance of tikanga as part of New Zealand law was "pretty unexceptional".[179]

The judgment remains unreleased, and so we do not yet know what the Supreme Court will rule on the proposition, and how far it may go in creating a new facet of law based on tikanga Māori in relation to posthumous defences. However, having laid out what tikanga is and New Zealand's journey to this point with Māori customary law, arguments against the further integration of tikanga Māori will be scrutinised.

A. Views Against the Integration of Tikanga Māori

The author will discuss two key arguments against the integration of tikanga Māori. One is an argument used by Pākehā academics that decries tikanga Māori as any kind of legitimate basis to construct laws upon, whilst also attacking any concept of Māori self-determination. The other is a Māori view that any amalgamation with a colonial legal system will taint ancient Māori customs and law, opening them to abuse and degradation.

John Robinson is a member of activist group Hobson's Pledge. Robinson has authored books on the invalidity of tikanga Māori and the corrosive effects its

174 As affirmed in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).
175 At [177].
176 *Ellis v R* [2020] NZSC 89.
177 Joel McManus "Peter Ellis appeal derailed by legal curveball on possible tikanga Māori approach" (15 November 2019) Stuff <www.stuff.co.nz>.
178 *Peter Hugh McGregor Ellis v The Queen* [2020] NZSC Trans 19, at 6.
179 At 33.

integration has on national unity.[180] Robinson first critiques the very notion of any kind of Māori law, arguing: "There was no system of law in pre-contact Māori society, no codification of laws (indeed Māori were illiterate) [and] no central authority to apply any such system."[181] Robinson also questions whether older Māori practices of inter-tribal warfare, cannibalism and "other primitive customs" are part of the tikanga referenced by the Courts.[182]

As discussed earlier, tikanga Māori is as valid as any other English common law customs. Tikanga Māori "draws upon rituals, precedents and customs that have been handed down through the generations",[183] just as common law rulings gain their validation from the "long and immemorial usage" waxed upon by Blackstone.[184] One may make the argument that time-tested use of a custom, by those who live under it, is arguably greater validation for the legitimacy of a law than a pen-stroke from a centralised Parliament.

Robinson is correct that pre-colonisation Māori practiced customs such as cannibalism and slavery under tikanga. Yet the implied argument that a customary law system allowing these customs in a minority of cases means the system in its entirety should be scrapped is dubious. The British legal system has a tradition of slavery, both at home and in its colonies. One case saw a slavers' company claim insurance for the casting of 130 slaves overboard.[185] The insurance claim was disallowed because of the captains' errors, but Lord Mansfield emphasised the massacre was justified and insurance claimable had this not been the case.[186] The English common law system has always been hostile to victims of rape and traditional rape laws made it "easy to commit rape and get away with it."[187] Homosexuality was punishable by death, with the last executions taking place in 1835.[188] The English legal system has moved away from these laws, and it is notable that the Zong slave ship massacre had a hand in moving the Empire to outlaw slavery. The Buggery Act was also a statutory measure, rather than strict common law. However, few would

180 See John Robinson *Dividing a Nation: The Return of Tikanga* (Winter Publications, New Zealand, 2018).

181 John Robinson "Tikanga in law: what does it mean?" (3 June 2021) Hobson's Pledge <www.hobsonspledge.nz>.

182 Robinson, above n 181.

183 Annette Sykes "The Myth of Tikanga in the Pākeha Law" (Nin Thomas Memorial Lecture 2020, University of Auckland, Auckland, 5 December 2020) at 4.

184 Blackstone, above n 52, at 47.

185 *Gregson v Gilbert* (1738) 3 Doug. KB 232.

186 Jeremy Krikler "The Zong and the Lord Chief Justice" (2007) 64 (1) History Workshop Journal 29 at 38.

187 Cassia C Spohn "The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms" (1999) 39(2) Jurimetrics 119 at 120.

188 See the Buggery Act 1533 (25 Hen 8 c 6) and the Offences against the Person Act 1828 (9 Geo 4 c 31).

suggest the English common law system lacks value simply because the above existed within it.

Regarding feminist and LGBT+ issues,[189] Māori were traditionally more progressive than their European counterparts. Same-sex relationships were largely accepted within pre-colonial Māori society, and there was no punishment for such conduct.[190] Tikanga Māori saw sexual assault as a breach of a woman's tapu, affecting the mana of herself and her family. It required utu in the form of minor assaults, the acquisition of the offender's property and, in some cases, murder.[191] Māori mythology and lore placed women in positions of authority and the female reproductive system was seen as sacred and powerful.[192] European translators who had different perceptions of sexual power and the place of women in society altered these stories in transcriptions, to fit their own worldviews.[193] The above points are not intended to rank and compare the two legal systems. Neither is it contended that tikanga Māori is a perfect system. They serve as an attempt to rebut Robinson's assertion that "only a fool" would accept the prescriptions of tikanga Māori.[194]

It is suggested that the principle of the custom should at times be divorced from the action used to enforce it. The Zong slavery debacle above is a clear example. Lord Mansfield did not want to discourage commercial activity in the United Kingdom with his ruling. He aimed to preserve the custom of "general average".[195] This principle holds that a Captain can claim from his insurers when parts of their cargo are jettisoned to save the rest of the ship.[196] Few would argue that any of these ideas are inherently unjust or wrong. However, English legal and institutional thought has moved beyond the practice of using human beings as chattels.

Robinson attacks the notion that should a rape occur, "the formation of a posse of extended family members to do something about it" is an acceptable way to deal with the crime in a modern context.[197] This suggestion is arguably not drawing too long a bow if one considers how such an offence would have been dealt with pre-colonisation. However, there may be room today to look at how we adjust penalties for such offences to be more in line with tikanga Māori. The Crimes Act carries a

189 LGBT+ refers to the lesbian, gay, bisexual and transgender communities, with the '+' at the end encompassing other forms of gender and sexual expression outside traditional norms.

190 Stevan Eldred-Grigg *Pleasures of the Flesh: Sex and Drugs in Colonial New Zealand* (AH & AW Reed, Wellington, 1984) at 47.

191 Camille Wrightson "Customary Law and Violence Against Women: Where to from here?" (2016) 3 PILJNZ 5 at 8.

192 Ani Mikaere, above n 26, at 136.

193 At 147.

194 Robinson, above n 181.

195 Jane Webster "The Zong in the Context of the Eighteenth-Century Slave Trade" (2007) 28 JLH 285 at 291

196 Robert Weisbord "The case of the slave ship Zong, 1783" (1969) 19(8) History Today 561 at 562.

197 Robinson, above n 181.

maximum penalty of 20 years' imprisonment for sexual violation.[198] It is submitted that this does very little for the victim personally, bar keeping the perpetrator confined. Tikanga and the concept of utu could see, if possible, in the circumstances, monetary compensation awarded to the victim for things such as counselling or any other life adversity suffered because of the original 'hara' that was the sexual assault. Though not an expert on these matters, the above serves to communicate how tikanga principles can serve to develop the common and statutory law as we know it, to better fit New Zealand.

The other contention often put forward against any kind of specific recognition of Māori custom or the Treaty is the 'one law for all' argument. In 2004, National Party Leader Donald Brash gave a speech at the Orewa Rotary Club that lifted National from 28 per cent to 45 per cent in election polls.[199] As noted above, New Zealand since the 1980s had made progressions in its recognition of Māori rights, customs and law. Brash was sensitive to the mounting public suspicion these measures aroused. The underlying message of his 'Nationhood' speech and following campaign was that "Māori had positioned themselves as competitors whose claims conflicted with national unity, equal citizenship and democracy."[200] Brash believed that any deviation from the standard one law for all position "threatened the integrity of the nation state".[201]

Despite the National Party moving from Brash's position under Sir John Key's government,[202] to this day Brash campaigns on similar points. The aforementioned Hobson's Pledge organisation was founded in 2016 by Brash and others.[203] The group takes its name from the phrase "He iwi tahi tātou" (we are one people), a quote William Hobson was alleged to have uttered during the Treaty signing as each signatory chief shook his hand.[204] Hobson saying this is recorded by no other contemporary source, including Hobson himself, and was only noted by a book published in 1890.[205] Regardless of whether Hobson made the statement or not, it has become the tagline of a group campaigning to end perceived Māori separatism.[206]

198 Crimes Act 1961, s 128B.

199 Editor "Don Brash to spread race message buoyed by poll results" *The New Zealand Herald* (online ed, Auckland, 16 February 2004).

200 Dominic O'Sullivan "Needs, Rights and "One Law for All": Contemporary Debates in New Zealand Māori Politics" 41(4) Canadian Journal of Political Science 973 at 974.

201 At 973.

202 Lana Greaves & Ella Morgan "National won't find its brighter future through divisive Ōrewa-style rhetoric" (3 May 2021) The Spinoff <https://thespinoff.co.nz>.

203 Danny Keenan "Opinion: a pledge that never was?" *The New Zealand Herald* (online ed, New Zealand, 4 January 2019).

204 Keenan, above n 203.

205 Keenan, above n 203.

206 Keenan, above n 203.

This argument will be countered with two points. First, it is, or should be, clear that mono-legalism was not what the chiefs had in mind, or even what the British government initially had in mind, upon the signing of the Treaty. Appeals to a quote Governor Hobson likely never said are arguably ineffective when faced with the evidence. The second is that recognition of Māori rights to self-determination are not attacks on state integrity and actually aid social cohesion.

McHugh asserts that "the legal monoculture of today – one law for everyone – is a relatively recent attitude".[207] He goes on to state that "there is every reason to suppose that some form of legal pluralism was, in 1840, an expected outcome of British sovereignty over New Zealand".[208] Captain Hobson was familiar with East Indian territories where the colonial powers there had implemented similar processes. At Treaty signings and in following communications, Hobson assured chiefs that their standing amongst their people would be maintained and that the government would "ever strive" to protect Māori custom.[209] The common law presumption that indigenous laws continued after sovereignty is seen as "simply a response to an inevitable fact of human life".[210] The fact that today we operate in a largely mono-cultural legal system is due to the steady erosion of Māori autonomy and institutions by state authority. The loss of tikanga can primarily be attributed to the inability of Māori to remain a separate indigenous community when faced with these factors.[211] The idea that tikanga Māori was intended for destruction in place of cultural assimilation at the signing of the Treaty arguably carries little evidential weight.

The proposition that 'one law for all' is completely in tune with liberal democracy and Māori interests is also flawed. As Durie argues:[212]

> ... indigenous peoples do not always see their destinies locked into the wisdom of the state, especially if their sovereignty has been appropriated by colonising powers and their experiences of state control have been marred by dispossession and deculturation.

Indigenous peoples want the opportunity to exist in a modern world whilst retaining their culture and heritage. True liberal democracy provides minority groups with protections from external domination. Brash's view of liberal

207 McHugh, above n 5, at 86.
208 At 86.
209 Fletcher, above n 62, at 85.
210 McHugh, above n 5, at 85.
211 Joseph, above n 8, at 118.
212 O'Sullivan, above n 200, at 976.

democracy fails to admit the legitimacy of culturally framed Māori participation, thus obstructing equality.[213] It is tainted by the assimilationist tendencies of multicultural polities. Furthermore, a genuine 'one law for all' policy would accept the ancestral inheritance owed to Māori through the Treaty and common law customs such as the doctrine of continuity. As O'Sullivan argues: "It is the attempt to impose homogeneity rather than accept diversity that is socially divisive."[214] Brash ultimately argues for monocultural dominance of the settler majority over the Māori minority. That is what raw-number democracy has continually provided.[215] Bentham himself argued that democracy's core function is to protect citizens from "oppression and depredation" by the state.[216] The recognition of Māori autonomy does not undermine the New Zealand state and actually enhances it. Brash's proposition of a fully assimilated society is not something Māori have ever wanted or agreed to.

Many Māori legal activists have critiqued the very concept of tikanga being applied to bodies and structures that are not indigenous by nature. The argument from academics such as Moana Jackson and Ani Mikaere is that this simply reinforces Pākehā legal and structural dominance and marginalises Māori aspirations to self-determination.[217] Annette Sykes contends that Māori should never "expect the Crown to become a revolutionary and hand over or even share real power".[218] Sykes goes as far as saying "this is a system that really hates us".[219] Whilst considering historical Crown actions with tikanga such as the Native Land Court, the Law Commission states that Māori "have every right" to be suspicious of Crown-driven attempts to recognise tikanga Māori.[220] There is real concern that any recognition of tikanga Māori will distort and mangle what is considered to be taonga to Māori. There is also suspicion of following action by a Crown that still bluntly refuses to recognise tino-rangatiratanga.[221]

Sykes further argues that she herself and other Māori academics were misguided in believing that real constitutional change could be achieved through the state legal system. Sykes states that the jurisprudence resulting from the *Lands* case signified

213 At 978–979.
214 O'Sullivan, above n 200, at 982.
215 As noted previously, the Foreshore and Seabed Act 2004 was a capitulation by the Dame Helen Clark Labour government to public fears of the foreshore and seabed coming under exclusively Māori control. This was never a likely outcome or legitimate fear of the *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) case that ruled Māori *may* have a claim to non-exclusive customary use of the foreshore and seabed, should high evidential requirements be met.
216 Jeremy Bentham *The Works of Jeremy Bentham* (William Tait, Edinburgh, 1843) at 47.
217 Joseph, above n 8, at 122.
218 Sykes, above, n 183, at 1.
219 At 3.
220 Law Commission, above n 40, at 22.
221 Claire Charters "Recognition of Tikanga Māori and the Constitutional Myth of Monolegalism: Reinterpreting Case Law" in Robert Joseph & Richard Benton (eds) *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, New Zealand, 2021) at 617.

"seriously downhill" progression, observing the Court going on a "frolic" with its Treaty principles concept rather than recognising tino-rangatiratanga as they had been fighting for.[222] Sykes' essential argument is that Māori cannot expect a system responsible for so much of our oppression to mend anything for us, or aid us in our efforts for self-determination.

It is not the place of the author to condemn the work of older people with experience in Māori struggles for self-determination and true state recognition. However, it is contended that, with gradual incremental change through structural systems, the eventual recognition of tino-rangatiratanga in tangible form can be achieved. It is submitted that this can at least partially be achieved through the common law. As noted earlier, Ngāi Tahu achieved its current status through the building of relationships and steady pressure on the state.[223] Suggestions of "rising up and taking back power by revolutionary means" have been contended by the tino-rangatiratanga movement, but how feasible is this really?[224]

Māori make up 16.7 per cent of the population in what has become a multicultural New Zealand.[225] If tikanga Māori and Māori tino-rangatiratanga are to be reasserted, it needs to be recognised that this is the context Māori now live within. Tino-rangatiratanga and the recognition of tikanga Māori at state level can only be achieved through state bodies, if it is to have any legitimacy in today's New Zealand. There may be other methods of doing so, yet the author would argue this seems the most practical and plausible. Forms of indigenous self-government have been recognised all over the world in some form or another. The tribal nations of the United States and Canada have status as domestic dependant sovereign nations, subject only to federal oversight and jurisdiction.[226] This may not be the form of self-determination Māori wish to take but it is certainly a possibility. Recognition of indigenous custom and sovereignty has been done by colonial powers before – with the current power and resourcing of Māori entities in 2021, there is no reason why we cannot seize these concepts and expand on them to suit Māori circumstances.

B. How the Courts May Recognise Tikanga

Elliott Harris argues that the *Ellis* case and court adaption of tikanga Māori implicitly subdue tikanga Māori, creating a "pervading assumption of Crown

222 Sykes, above n 183, at 12.
223 Tau, above n 141, at 126.
224 Caren Fox & Matiu Dickson "Māori and Constitutional Change" in Robert Joseph & Richard Benton (eds) *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, New Zealand, 2021) at 526.
225 Stats NZ "Māori Population Estimates: as at 30 June 2020" (30 June 2020) <www.stats.govt.nz>.
226 Fox & Dickson, above n 224, at 527.

authority."[227] Harris submits that whilst *Ellis* is a step in the right direction, the fact that tikanga Māori remains "subordinate" sits "uneasily with the promises and principles of Te Tiriti".[228] It is submitted that Harris' argument is correct, in that *Ellis* and any future common law cases will not have the power to place tikanga on equal footing with Parliament's law. Currently the formal power of tikanga is limited to the extent the common law courts will recognise it. However, this does not mean the courts and case law cannot be used as a powerful vehicle for the recognition of tikanga, as they already are.

New Zealand's common law courts possess an early history of recognising tikanga as law and were doing so substantively as late as 1919.[229] However, the issue of whether tikanga could be directly enforced as New Zealand law, unconnected to native title or the Treaty, did not truly arise until *Takamore v Clarke.*[230] At issue was whether Māori custom or the executrix under Takamore's will controlled where his body would be buried.[231] His Tūhoe whānau pursued court action based on tikanga, arguing they had the right to bury him in their rohe, rather than his home in Christchurch. Though there is a common law rule of the will executor having the final say as to burial, the issue has never been drafted for specifically by New Zealand legislation.

In the High Court, Fogarty J applied the test used in *Public Trust v Loasby*.[232] In *Loasby,* for tikanga to be recognised, it had to be a custom of the Māori people, not extinguished by statute that is reasonable under the prevailing circumstances.[233] Fogarty J found that the Tūhoe burial custom was unreasonable, with reference to the fundamental common law principle of individual autonomy.[234]

On appeal, the Court of Appeal in *Takamore* drew on *Halsbury's Laws of England* to propose the following prescriptions for the recognition of tikanga Māori at common law:[235]

> (a) That the custom be reasonable;
> (b) That the custom has existed and continued since time immemorial;

227 Elliott Harris "Interrogating *Ellis vs The Queen*: Tikanga Māori in the Common Law of New Zealand" (December 2020) Māori Law Review <https://maorilawreview.co.nz>.
228 Harris, above n 227.
229 *Hineiti Rirerire Arani v Public Trustee* [1920] AC 198 (PC).
230 Williams, above n 14, at 16.
231 At 16.
232 *Public Trust v Loasby* (1908) 27 NZLR 801 (SC): a case concerning the burial of a Māori chief.
233 At 806.
234 *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at [83]–[89].
235 *Takamore v Clarke* [2011] NZCA 587 at [109]; [2012] 1 NZLR 573.

(c) That the custom be certain in its terms of locality and application;
(d) That the custom has not been extinguished by statute.

This approach was approved by Tipping, McGrath and Blanchard JJ in the Supreme Court and it is entirely possible that it will again be used in judgments for the *Ellis* case.[236] Natalie Coates argues that tikanga could be viewed by the courts as existing law, subject to amended versions of the Court of Appeal's prescriptions.[237]

Coates refers to legislative extinguishment as the "most prohibitive barrier" to the recognition of tikanga Māori.[238] Much of New Zealand's laws are extensively and thoroughly codified, such as the Crimes Act 1961 that was argued against in *R v Mason*.[239] Here, whilst the Court did not deny the existence of tikanga Māori as a source of law, the relevant question was encompassed by the Crimes Act as the "current and only" source of law for dealing with criminal activity.[240] Even where tikanga seeped through legislative cracks, Parliament has the power to legislate over the top of any ruling it does not like.[241] As a remedy to this, Coates recommends that the courts give a "strict reading" to any legislation that may stand to extinguish tikanga Māori, noting that nothing less than direct reference or codification should suffice.[242]

In Australian courts, complications have been faced by native applicants in the common law's continuity doctrine.[243] Customs must remain demonstrably identical and must not have lost their traditional character.[244] Coates argues that such a strict interpretation of the rule risks "freez[ing] Māori at the point of contact".[245] For this test to substantially engage with tikanga Māori, it must recognise that tikanga has adapted to the introduction of Western laws and culture. For example, many Tītī/Muttonbird Island hunters helicopter to the islands from Bluff. Sky TV is on the island and numerous contemporary tools are used in the birds' capture. However, rights to land on the island and the conduct of those there remains heavily governed by tikanga Māori.[246] A custom may evolve with passing time in practice, but the underlying values and motivators must stay the same. In applying the continuity

236 *Takamore v Clarke* [2012] NZSC 116; [2013] 2 NZLR 733.
237 Coates, above n 10.
238 At 17.
239 *R v Mason* [2013] NZCA 310.
240 Charters, above n 221, at 619.
241 See the Foreshore & Seabed Act 2004.
242 Coates, above n 10, at 19.
243 *Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, 214 CLR 422.
244 At [42]–[43].
245 Coates, above n 10, at 21.
246 *Reihana v Rakiura Titi Committee* [2018] NZCA 325.

doctrine, the court should consider whether the overall nature and practice of the custom remains whilst allowing for inevitable changes promoted by modernity.

The reasonable requirement is what lost the *Takamore* case for the whānau at the High Court and Court of Appeal.[247] In the Court of Appeal, the whānau were found to be in conflict with a fundamental ideal of the common law – the "right not might" principle.[248] Coates identifies further adversity with this requirement in that the Takamore whānau did think they had the right to move Takamore's body – in a Māori context.[249] In considering tikanga under this requirement, courts should weigh the custom against the absolute principles of the common law and view its practice through a Western and Māori lens.[250] Where differences are irreconcilable, the reasoning for prioritising one or the other must be transparent, and only the unreasonable part if not all of the custom should be barred.[251]

Halsbury's Laws of England requires that for the certainty element to be met, there must be defined limits on the customs nature, locality and who it applies to.[252] In *Takamore,* the Court of Appeal noted that due to the lack of precise rules and focus on mediated outcomes, this test could not apply with the same rigour to tikanga Māori as it might to English custom.[253] Coates argues that customs may be constrained in tikanga Māori by certainty of relevant values and certainty of process.[254] Certainty of values may be seen in the Māori customary process of gathering food for large events (tangi). There is no defined limit to this custom outlined in tikanga Māori. However, values such as kaitiakitanga, manaaki and the mana of the deceased will impose limits on what one may take.[255] Tikanga Māori provides certainty of process with burial issues as seen in *Takamore.* Following initial debate and discussion, if a consensus is not reached, whoever takes the body has a right to it. Coates argues this is not so different from the common law position of handing over to the executor who then after due consideration makes a choice on what to do with the body.[256] Neither explicitly provides for the final outcome, but both have sufficient certainty involved in process to satisfy some form of legal procedure.

Anguish has been expressed over whether allowing tikanga Māori into the common law courts will open these broad values to abuse, particularly at the expense

247 *Clarke,* above n 235.
248 At [163]–[166].
249 Coates, above n 10, at 23.
250 At 23.
251 At 23.
252 Halsbury's Laws of England (5th ed, reissue, 2008) vol 32: Custom and Usage at [15].
253 *Clarke,* above n 235, at [132].
254 Coates, above n 10, at 25.
255 At 25.
256 At 25

of less culturally aware judges.[257] Coates notes the fear that applicants may "invent custom" to reach favourable outcomes by abusing a lack of judicial knowledge.[258]

This fear may be set aside upon examination of the judicial history in dealing with tikanga. The courts have considered applications relating to tikanga in a respectful yet cautious manner. Claims that argued for supreme ownership of land through tikanga,[259] or a rejection of the Crimes Act in favour of tikanga were both dismissed.[260] In *Takamore,* the NZSC found that, although the executrix was not unfettered in her decision, final adjudication as to the body's resting place ultimately lay with her.[261] This was at odds with the tikanga of Takamore being buried at home. These outcomes point away from any notion that tikanga is being used as a tool to dupe the nation's judiciary. The facts and evidence presented with each case receive careful consideration.

What we are seeing, especially in recent times, is careful engagement with tikanga by the bench. In the recent *Re Edwards (No2)* case, Churchman J heavily referenced the submissions and evidence of pūkenga/tikanga experts in his examination of a MACA (Marine and Coastal Area Act 2014) claim before the court.[262] Section 99 of the Act expressly provides for a judge to account for such evidence, showing how the judiciary and legislature can work in tandem.[263] Tikanga is being used to protect the interests of Māori in everything from freshwater,[264] to the unreasonable incursion of mana whenua rights through Department of Conservation commercial consents.[265] Every decision goes through rounds of litigation and in the case of the *Ngāi Tai ki Tāmaki* and *Takamore* cases, all the way to the NZSC.

The change may be slow, but it is consistent and legitimate. Tikanga is slowly gaining a foothold in the courts and in legislation. The above amendments to typical common law tests for the recognition of tikanga provide avenues for the courts to better engage with tikanga Māori, arriving at culturally considerate outcomes. The common law courts will never be able to place tikanga on equal footing with statutory law, but they can interpret statutory law to give tikanga meaningful power and application.

257 Eddie Durie "Ethics and Values in Māori Research" (paper presented at the Te Oru Rangahau Māori Research and Development Conference, Massey University, 7–9 June 1998) in *Te Pūmanawa Haurora (ed) Proceedings of Te Oru Rangahau Māori Research and Development Conference* (Massey University, Palmerston North, 1998).
258 Coates, above n 10, at 26.
259 *Gregory v Thames Coromandel District Council* [2017] NZHC 3002.
260 *R v Mason* [2013] NZCA 310.
261 *Takamore,* above n 236, at [164].
262 *Re Edwards (No 2)* [2021] NZHC 1025.
263 Marine and Coastal Area (Takutai Moana) Act 2014, s 99.
264 *Tau v A-G* [2020] NZHC 3063.
265 *Ngāi Tai ki Tāmaki Tribal Trust v Director of DOC* [2018] NZSC 122.

III. Conclusion

Claire Charters has stated that the nation's courts should recognise tikanga Māori "as an authoritative source of law, independent of state law, albeit on the basis that state courts are constitutionally required to uphold state law as superior".[266] By doing this, Charters argues that courts would "debunk the mythical and colonial narrative that New Zealand is monolegal, yet retain their constitutionally required deference to Parliament's supremacy", whilst also providing a "more solid legal basis" to develop tikanga in the law.[267] The author agrees with Charters' statement, though contends that the original colonial narrative was, at least partially, one of recognition of tikanga and legal plurality.

In the words of Sir Robin Cooke, "a nation cannot cast adrift from its own foundations".[268] Until its full repeal in 1982, the New Zealand Constitution Act 1852 allowed for the creation of districts where "law, customs or usages" of the "Aboriginal or Native Inhabitants of New Zealand" should be observed, so long as not "repugnant to the general principles of humanity".[269] Fletcher's overall argument is that though the Treaty's original understanding became eclipsed by politics from 1846, the true intentions "may yet provide a sure foundation for this nation".[270] Despite judicial and state disregard, as shown above, Māori have continued to live by tikanga Māori to some extent. If one takes the legal naturalist stance, tikanga may be recognised by the courts as an independent source of law within their capacity to do so.

Measures such as the removal of Crown title to iwi land or true shared governance, rather than 'consultation' are all possible and even under current examination. However, such change must come from Parliament for legitimacy. These concepts would be powerful compliments to tino-rangatiratanga and Māori aspirations of self-determination through tikanga. However, the common law courts can and are playing their part. The *Trans-Tasman* case and recent judgments from Palmer J show that the recognition of tikanga by the common law courts, even if at their discretion, can provide Māori with avenues to self-determination. Through the integration and recognition of tikanga, New Zealand courts can create the bi-cultural nation New Zealand was founded to be. We may still return to our original bicultural shores.

266 Charters, above n 221, at 626.
267 At 627.
268 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 at 308–309.
269 New Zealand Constitution Act 1852, s LXXI.
270 Fletcher, above n 62, at 88.