

**Pūrongo Rangahau | Study Paper 24**

**Appendix 3:  
Interlegality,  
interdependence and  
independence:  
Framing relations of  
tikanga and state law in  
Aotearoa New Zealand**

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# Summary

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1. Relations between tikanga and state legalities present a general challenge to the operation of law in Aotearoa New Zealand. The practical challenges that arise wherever the two streams of law meet also presents a jurisprudential emergency: how do interacting and intersecting claims to legal status affect the recognition and evaluation of that status? Can there be overlapping and interacting statuses of legality? Can law itself provide for contests and distributions among competing statuses of legality?
2. This paper argues that the forms and claims of legality present in tikanga, operating independently as well as interacting with the state legal order, interrupt the recognition of state law as law. The operation and recognition of tikanga precludes collective recognition of a single status of legality operating one law for all. Instead, we have two legal orders, and the question is whether there are or should be one law for some and one for others, one law for some and force for others or two laws for all.
3. The arguments that follow present a 'two laws for all' approach. To have the rule of law, people need to be able to recognise law's claim to justly administer public standards for a community. Law is not the mere imposition of force – instead, it claims authority as a kind of rightful power. In Aotearoa New Zealand, state law fails on this front when it makes independent and supreme claims to authority in the face of the prior and continuing recognition of tikanga as law. By itself, state law fails to operate the rule of law – its legality is defective. The defects are (at least) three-fold: (1) State law's imposition upon Māori, and upon the recognition of tikanga, have been and remain forceful, in ways that undermine the recognition of state law as law. This is a failure of the rule of law understood in contrast to mere force. (2) This defect is compounded because the failure is uneven, with law claiming (and being recognised as claiming) authority for some but force for others. This is a failure to meet the rule of law's ideal of formal equality and a failure of 'one law for all'. (3) Both defects are compounded by the persistence of state law's claims in the face of its own failures. Either ignorance (or wilful blindness) about problems of recognition undermines not only the claim to the rule of law but also the legitimacy of its claimant.
4. Why settle for less than legality, less than the rule of law, when there could be institutions to relate the legal orders and contest their claims to legality? The plurality and overlap of claims to legality – in our case, those of state law and tikanga – may be addressed through methods and institutions of 'interlegality' in which the very status of legality can be tested and contested, while concrete issues invoking both legal orders can be addressed. The operation of interlegality is supposed to make the meeting point of interaction and intersection between legal orders a matter of legality rather than force or politics. It seeks a way to rescue legality in the face of overlapping claims to that status, preserving what is valuable about the rule of law, without the resort to force. It also makes the relationship between the legal orders – rather than each legal order on its own – the key object of recognition and the key target of the rule of law.

5. Interlegality requires both institutionalising humility – to limit the state’s own claims to legality and its reach into tikanga – and institutionalising the ways in which tikanga can be represented and applied in its meeting points with state law. Unlike legal forms that allow one order to unilaterally determine its relationship with the other (for example, conflict of laws tools) or legal forms that subject both legal orders separately to a higher legal order (in the manner of public international law), interlegality requires that the interaction and intersection between legal orders operates institutions and rules of engagement – rules and institutions for managing the relationship between the legal orders – that are determined and recognised by both. In simplified form, interlegality requires genuinely common law and genuinely shared institutions to contest its development and deployment.
6. Justifications for interlegality may include but do not start or end with te Tiriti o Waitangi, which may be interpreted to constitute an interlegal domain between Crown and Māori authorities but leaves open the legal and political mechanisms for giving effect to those constitutional relations. It also leaves open the relation between legal and political forms of constitutionalism.
7. Instead of political contest between constitutional claims and authorities, an interlegal framework requires institutions of law as fora both for responding to the matters of common concern that entangle tikanga and state legalities together and for contending and doing justice between overlapping claims to legality. An interlegality model frames the key matter of common concern as the operation and non-forceful contestation of legal statuses. Interlegality requires legal forms for the justified interaction of tikanga and state legal claims to authority, coercion and administration of justice. Among those institutions of law, common law harbours potential to be genuinely common law, operating both a domain of interdependence between state law and tikanga and fora for contesting its boundaries around a core of independent operation of tikanga. That potential is not captured in statist common law but in a *genuinely* common law – one that is recognised as common – between the overlapping legal orders.
8. The interlegality account engages a broader political theory that seeks to explain both the interdependence and independence of political communities. Interdependence and independence bear some relation with one another; the wider challenge is to examine what that relationship is and what it means for the relation between state and tikanga legal orders in Aotearoa New Zealand. The arguments below draw out theories of recognition, legality and authority that are central to that wider challenge and are central to what I defend elsewhere as the structure of interdependence around independence.
9. Arguments for interlegality, however, also support a narrower claim about the relations of state law and tikanga – one tied to theories of legality rather than to the particular political theory of interdependence around independence. In this view, the activities of persons, in places, generates interaction and intersection between legal orders that disrupt the recognition of authority and legality in both legal orders. The entanglements of interacting peoples and intersecting places cannot be simply segregated and separated, yet forms of legal ordering can still be arranged, and statuses of legality recognised and distributed, in ways that people and places cannot. Colonial legal forms can be removed and Indigenous legal forms renewed. Supreme claims can be replaced with relative or relational ones, in which both legal orders recognise their relations to the other. Interlegality then manages their interactions and intersections, including (though not only) by providing for shared decision making, deference and referral between the legal orders.

10. Finally, the paper responds to key objections to interlegality, including objections that worry directly about whether tikanga is law or whether tikanga and state law can both be recognised as law, that defend a supreme liberal democratic state (and its exclusive legality) in a multicultural society, that reject any 'race-based' distinctions among persons, that argue for the supersession of the historical injustices arising from the imposition of settler law upon tikanga or that advocate stronger claims to mana motuhake or tino rangatiratanga, rejecting the interdependence that interlegality builds around independence.
  11. For now, far too briefly, the response defended here argues that our history and its institutional present has a continuing impact upon the way persons recognise (and are recognised by) law and legal authorities. The deliberate displacement, denial and destruction of Indigenous communities and world views, the impacts of settler claims to legality and authority upon prior and continuing Indigenous legalities and authorities and, perhaps most importantly, the resurgence of recognition of Indigenous law and Indigenous authorities shadows both the plausibility and the value of liberal legality (and its institutions) for communities where there are continuing Indigenous legal orders overlapping with state claims to legality. The full response to key objections grounds the justification for interlegality on the value and status of legality itself in ways that avoid insidious forms of distinctions between persons on the basis of race and enable legality to serve persons equally as subjects as law – rather than unevenly as objects of force. It argues that interlegality can operate to realise both the independent operation of tikanga and a domain of interdependence between state law and tikanga that are necessary for the rule of law and law's legitimate authority in Aotearoa New Zealand.
  12. The paper is structured in five parts. Part 1 sets out the terminology and foundational concepts deployed in the paper. Part 2 offers a theory of law to address the question 'what is law?' without presuming a theory of state/monistic law. Part 3 examines how overlapping and contesting statuses of legality disrupt the recognition of law and law's claim to authority. Part 4 presents three contending understandings of recognition between legal orders, arguing against both incorporation and conflict of laws techniques, through which one legal order recognises another, in favour of tools for recognising relations between legal orders. Part 5 defends an account of interlegality and its forms for implementing such recognition through provision for both interdependent and independent domains of legality.
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# Background and scope

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1. There is an expansive body of work on the relationship between tikanga and state law, including academic contributions, judicial decisions and extra-judicial writing, Waitangi Tribunal reports, independent reports (such as *Matike Mai* and *He Puapua*) and the previous work done by and for Te Aka Matua o te Ture | Law Commission (including the general work on Māori custom and values in New Zealand law and the specific studies on the law of succession).<sup>1</sup> The present contribution provides both points of departure and development from that earlier work to offer a theoretical framework for understanding and evaluating systemic issues surrounding the interaction of state law and tikanga through their relation to broader questions of legitimate authority and the rule of law.
2. The theoretical framework draws on the ideas and arguments of pluralist jurisprudence, which both disrupts state-centred answers to familiar jurisprudence questions and introduces new ones.<sup>2</sup> Pluralist jurisprudence explores how the claims, statuses and evaluations of interacting legal orders affect one another rather than taking each in isolation. It does not prioritise theories of state law nor theories of one monistic legal order. Instead, pluralist jurisprudence examines (i) how the interactions of legal orders contribute to understanding what law is and (therefore) how legal orders *can* interact and (ii) evaluating law's authority, coercion and justice in light of plural claims to organise communities through law, justifying how legal orders *should* interact.
3. Within that field, specific work on interactions of state and Indigenous legalities can be dissociated from broader work on 'legal pluralism', which fails to capture the full range and

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<sup>1</sup> The Law Commission's earlier work on succession expressly did not engage the challenge of multiculturalism, while the newer work raised that aspect of the Law Commission's complex mandate but set it aside for separate study. See Pat Hohepa and David V Williams, *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (Law Commission 1996) and the newer Te Aka Matua o te Ture | Law Commission, *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (Te Aka Matua o te Ture | Law Commission 2021).

<sup>2</sup> Exemplifying the recent expansion of interest in pluralist jurisprudence, see the collections of essays, including Nico Krisch (ed), *Entangled Legalities Beyond the State* (CUP 2021); Jorge Luis Fabra-Zamora (ed), *Jurisprudence in a Globalized World* (Edward Elgar Publishing 2020); Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (CUP 2017); Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (OUP 2020); Seán Patrick Donlan and Heckendorn Urscheler, *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Routledge 2014); Michael A Helfand (ed), *Negotiating State and Non-state Law: the Challenge of Global and Local Legal Pluralism* (CUP 2015). These were preceded by influential monographs, including Keith Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (OUP 2010); William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP 2009); Brian Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001).

impact of claims to Indigenous (and not merely pluralist) authority.<sup>3</sup> The specific and continuing impact of colonisation differentiates the justification of state/tikanga interlegality relations from the controversies that attach to general legal pluralist claims against theories of monistic state legality.<sup>4</sup>

4. The scope of the paper is also narrower than a full jurisprudence of interaction. It deploys and develops jurisprudence that abstracts away from the familiar object of state law, and the challenges it poses to statist and monistic jurisprudence are designed to meet expert accounts of Māori philosophies of law and understandings of tikanga drawn from mātauranga Māori.<sup>5</sup> I make no claim to expertise in those fields and so say more here about state legality in its relations to tikanga and less about how tikanga may be represented, evaluated, operated and recognised within a jurisprudence of interaction.<sup>6</sup>
5. The paper also avoids duplicating the substantial body of work on case law or other institutional forms through which interactions of state law and tikanga are being played out.<sup>7</sup> Aside from a brief account of the interlegal institutional possibilities raised by *Ellis*,<sup>8</sup> it does not track or project forwards current/recent developments in legal practice, nor is it a paper about constitutional obligations or transformation. This selective focus reflects a division of labour around different aspects of the challenges of interaction between state law and tikanga as well as the specialist nature of both constitutional scholarship and doctrinal expertise at the intersection of the legal orders.<sup>9</sup>
6. The arguments below therefore offer a justification for interlegality that does not rest upon (though may resonate with) particular readings of te Tiriti o Waitangi. Te Tiriti may be read to constitute relations between Crown and Māori authorities and to constitutionalise interlegality. In that sense, te Tiriti offers a constitutional form to constrain those relations so that they are not relations of force. However, te Tiriti does not set out the institutions

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<sup>3</sup> Jacinta Ruru, Metiria Turei, Carwyn Jones and Khylee Quince, *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree: Phase One* (Borrin Foundation 2020) 37. On relations of indigenous and pluralist legal theories, see Kirsten Anker, 'Postcolonial Jurisprudence and the Pluralist Turn: From Making Space to Being in Place' in Roughan and Halpin (n 2); Kirsty Gover, 'Legal Pluralism and Indigenous Legal Traditions' in Berman (n 2).

<sup>4</sup> Among the most important works on the local distinctive and continuing impact of colonisation and the challenges it raises for thinking about law, authority and justice, Ani Mikaere, *Colonising Myths: Māori Realities. He Rukuruku Whakaaro* (Huia Publishers 2011) and Moana Jackson, *The Maori and the Criminal Justice System: A New Perspective, He Whaipaanga Hou* (Department of Justice 1988) remain essential and perhaps timeless resources.

<sup>5</sup> As Māmari Stephens has argued, we should avoid "an easy and false dualism when analysing Māori jurisprudence" in light of its "porous" interactions with Western legal thought. Stephens, 'Fires still Burning? Māori Jurisprudence and Human Rights Protections in Aotearoa New Zealand' in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds), *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters 2017) 102.

<sup>6</sup> I have examined elsewhere how statist jurisprudential tools may be reworked to serve a jurisprudence of interaction in Nicole Roughan, 'Honing 'Our Jurisprudence' to Respond to Interacting Legalities in Aotearoa New Zealand' (2022) *NZ Law Review*.

<sup>7</sup> Linda Te Aho, 'Tikanga Māori, Historical Context and the Interface with Pākehā Law in Aotearoa/New Zealand' (2007) 10 *Yearbook of New Zealand Jurisprudence* 10; Carwyn Jones, 'Lost from Sight: Developing Recognition of Māori Law in Aotearoa New Zealand' (2021) 1 *Legalities* 162; Claire Charters, 'Recognition of Tikanga Māori and the Constitutional Myth of Monolegalism: Reinterpreting Case Law' in Robert Joseph and Richard Benton (eds), *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters 2021).

<sup>8</sup> *Peter Hugh McGregor Ellis v The King* [2022] NZSC 114.

<sup>9</sup> To the extent that the tools jurisprudence offers for thinking about law and relations between legal orders involve constitutional ideas (such as the ideal of the rule of law), they may resonate with thinking about constitutional ordering and its potential transformation.

of interlegality to give effect to its constitutional constraints. It leaves open how any tino rangatiratanga/kawanatanga interactions and intersections are to operate. Te Tiriti may call for interlegality rather than providing structures or mechanisms for its operation.

7. The justification for interlegality presented here starts from a more abstract account about legitimate authority, force and law's role in social life. It is grounded in the potential and value of legality itself in contrast to mere power. It concentrates on the role of law understood in its diversified and plural forms rather than political forms and institutions within and across dispersed Crown-Māori relationships. Setting out a jurisprudence (rather than a constitutional or political) framework here is not intended to suggest that lawyers should always look to these more abstract foundations rather than to more concrete constitutional requirements. However, the more abstract positions may be helpful, and indeed may be essential, when concrete constitutional requirements remain so contested that they generate continuous controversy and are so poorly realised that they seem unfit to constrain interlegal relations.
  8. Such controversies do not disappear in a jurisprudence of interaction. Key objections to the interlegality argument are examined below at 2a, 3c and 5d.
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## SECTION ONE

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# Law's authority, legality and recognition

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## A. ASKING THE QUESTION 'WHAT IS LAW?'

- 1.1 In contexts of overlapping and interacting claims to the status of legality – from state law and tikanga – the question 'what is law?' is far from academic. We need at least a working and defensible understanding of what law is before we can examine whether and how legal orders can or should interact. The question has profound implications for the lives of those who are to be governed by law (not non-law) and matters daily to those who make, apply or enforce law in the face of overlapping claims to the status of legality.
- 1.2 It may be thought unfashionable to insist upon a robust concept of law, offering a distinct (even though revisable and not definitive) answer to the question of 'what is law?' While debates in jurisprudence seek to explain law as an aspect of human social ordering, attention to actual social orders reveals diverse forms and practices and diverse understandings of law's roles in social life.<sup>10</sup> Critical legal theorists often invoke such diversity to reject philosophical efforts to determine 'what is law?', associating both the question and the answer with imperialist or universalist tendencies.<sup>11</sup> Important debates about jurisprudential methodology also support doubts about either the possibility or

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<sup>10</sup> While work in comparative law also reveals differences and similarities in law's forms and institutions in how law is made and applied, communicated and received, work sharing interests in legal plurality is chiefly concerned with situations "in which two or more legal systems coexist in the same social field". See Sally Engle Merry, 'Legal Pluralism' (1998) 22 *Law and Society Review* 870. Key surveys of the range of legal pluralist approaches include Baudouin Dupret, 'Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification' (2007) *European Journal of Legal Studies* 1, 296. For the present purpose, the most useful are those studies of Māori law or tikanga itself, including those referenced in the present work as well as work that draws upon specific Indigenous legal orders to offer more abstract theories. See, for example, Val Napoleon, 'What Is Indigenous Law? A Small Discussion' (Indigenous Law Research Unit, University of Victoria 2016). On methodologies of Indigenous legal theory, see Hadley Friedland and Val Napoleon, 'Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions' (2015) 1 *Lakehead LJ* 17; Linda Tuhiwai Smith, *Decolonizing Methodologies. Research and Indigenous Peoples* (2nd edn, Otago University Press 2012); John Borrows, 'Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education' (2016) 61:4 *McGill LJ* 795.

<sup>11</sup> Nicola Lacey, 'Analytical Jurisprudence Versus Descriptive Sociology Revisited' (2006) 84 *Texas Law Review* 945; Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017); Brian Tamanaha, 'What Is 'General' Jurisprudence? A Critique of Universalistic Claims by Philosophical Concepts of Law' (2011) 2 *Transnational Legal Theory* 287.

utility of a universal and singular concept of law in favour of plural concepts of law.<sup>12</sup> The most extreme scepticism rejects philosophical explanations altogether in favour of folk theories of law, where law is whatever people, in diverse social orders, regard it to be.<sup>13</sup>

- 1.3 Although some such accounts of legal plurality stretch conceptions of law in all directions, a more robust strand separates the idea of legal order from the idea of a state legal order without giving up the central connection between law and political community. This link preserves a conception of law as a normative social practice operating to administer a community’s standards of behaviour, constraining power over (and between) persons. Such attention to diversity of legal ordering may explain how posited state law claims authority over persons through a formally institutionalised system of valid rules, official institutions and authorised coercion, generating debates about how tightly or successfully these forms and institutions demarcate law from other types of social ordering and/or from morality. Other types of legal orders, in contrast, may claim authority through institutions that are less formal, featuring less sharp differentiations between the roles of officials and subjects and less effort to demarcate legal institutions from other social practices or from morality, beliefs and forms of knowledge.<sup>14</sup>
- 1.4 A focus upon law’s diversity, including diverse concepts of law, may unhelpfully find law everywhere and thus risk finding it nowhere.<sup>15</sup> Moreover, resort to treating folk practices to determine legality leaves theory unable to explain legal ordering in the face of either collective doubts or contestations over legal statuses. Rather than giving up on the role of abstract theory or overstating and thereby reinforcing divides between more philosophical and more sociological approaches to legal theory, a number of contemporary contributions seek to situate together both philosophical and sociological elements and methods in legal theory. These include concerted efforts to ‘elucidate’ both essential and contextual features of law (and their relation),<sup>16</sup> to isolate where key building blocks of legal theory (including law’s authority and its recognition) harbour both

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<sup>12</sup> Joseph Raz explains the relation between possession of ‘our’ concept of law and how that parochial concept is used when building a theory of law. Raz, ‘Can There be a Theory of Law?’ in Martin Golding and William Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2005). Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009). Compare Ronald Dworkin, ‘Hart and the Concepts of Law’ (2006) 119 *Harvard Law Review Forum* 95; Roger Cotterell, *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (Routledge 2018); Julie Dickson, *Elucidating Law* (OUP 2022). For a recent targeted critique of expanding juristic concepts in the name of pluralism, see Fernanda Pirie, ‘Beyond Pluralism: A Descriptive Approach to Non-state Law’ (2022) 14 *Jurisprudence* 1.

<sup>13</sup> In his newer work, Brian Tamanaha defends a “socio-historical folk legal pluralism”. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (OUP 2021) 12. Tamanaha’s ‘folk concept’ rests upon what persons collectively recognise as law. Unlike the recognition defended in my own work and summarised here, Tamanaha appears to rest law upon a descriptive, not normative, concept of recognition.

<sup>14</sup> William Twining, ‘Normative and Legal Pluralism: A Global Perspective’ (2010) 20 *Duke Journal of Comparative & International Law* 473; and see, for example, Culver and Giudice (n 2).

<sup>15</sup> As Sally Engle Merry put it, “when do we stop speaking of law and simply speak of social life?”. Merry (n 10). See also Twining (n 2) 373 on the loss of analytical purchase resulting from a more inclusive concept of law.

<sup>16</sup> Dickson (n 12). As Dickson argues, “The thrust of my views on this issue is that legal philosophy about the nature of law can only be successful when it characterizes law accurately and adequately as a social phenomenon and as a social practice, and when it helps us to understand law as it already exists in our societies, and in our societal self-understanding.”

normative/evaluative and social/descriptive elements<sup>17</sup> and to examine how conceptual explanations are matters of both social construction and revision.<sup>18</sup> Together, such approaches to general jurisprudence revive the question ‘what is law?’, defending it against charges of methodological or universalist myopia and tracking the development of concepts of law that both explain and respond to pluralist challenges to statist monopolies on statuses of legality.<sup>19</sup>

- 1.5 Quite aside from complaints and countermoves in jurisprudence, contexts of overlapping claims to the status of legality force the issue of ‘what is law?’, showing that it matters what counts as law, so we need (and must take great care with) a working concept of law. It is significant that work in pluralist jurisprudence does not simply analyse the fact of plurality – the co-existence of multiple diverse forms of legal ordering. Law’s diversity on its own is not particularly problematic. Difficulties arise when there is both multiplicity and interaction of diverse legal orders. Advocates of legal pluralism endorse such co-existence; proponents of legal monism (whether defences of state law or otherwise) reject it. The present work does not summarise nor synthesise their debates. Instead, it examines directly how, in context, multiplicity and interaction of claims to legal ordering pressure law’s collective dimension, disrupt practices of recognition of the status of legality and challenge the justification of both law’s authority and its coercive enforcement.

### **i. Monism, pluralism and ‘tikanga as law’**

- 1.6 There are reasons to pause on this point insofar as the ‘status of tikanga as law’ continues to divide jurists. Those whose training and expertise is only (or primarily) in the forms of state law (and its canonical jurisprudential toolkit) might rely on that training to either doubt the legal status of tikanga itself or its operation as law alongside and/or independent of state law. It should not be surprising that legal training that defends (or exclusively conceives of) the rule of law as ‘the rule of state law’ generates scepticism about the legal status of other forms of legal ordering. It should be equally unsurprising if jurists who recognise tikanga as law without recourse to Western jurisprudential devices to explain that recognition reject the need to do so (and/or reject the devices themselves). A pluralist jurisprudence toolkit might be deployed to bridge that gap in contexts where overlapping claims to legality mean it needs to be bridged.<sup>20</sup>

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<sup>17</sup> See, for example, Nicole Roughan, ‘From Authority to Authorities’ in Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory* (Edward Elgar Publishing 2016); Roughan, ‘The Recognition in Authority: Roles, Relations, and Reasons’ (2022) *Jurisprudence*.

<sup>18</sup> Michael Giudice, *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation* (Edward Elgar Publishing 2015).

<sup>19</sup> Roughan and Halpin, ‘The Promises and Pursuits of Pluralist Jurisprudence’ in Roughan and Halpin (n 2). Roger Cotterrell, ‘Why Jurisprudence is not Legal Philosophy’ (2014) 5 *Jurisprudence* 41. Martin Krygier suggests that the myopia goes both ways. See Krygier, ‘The Concept of Law and Social Theory’ (1982) 2 *Oxford Journal of Legal Studies* 155; Julie Dickson, ‘Ours is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry’ (2015) 6 *Jurisprudence* 207.

<sup>20</sup> This toolkit operates alongside work that directly explains tikanga by examining its institutions, its systematic and organising rules and principles, its values and content. See, for example, Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Huia Publishers 2003); Richard Benton, Alex Frame and Paul Meredith (eds), *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press 2013); Edward Durie, ‘Will the Settlers Settle? Cultural Conciliation and Law’ (1996) 8 *Otago Law Review* 44. This large body of

- 1.7 From the starting point of statist jurisprudential orthodoxies, there are two distinguishable forms of scepticism about whether tikanga is (or should be) regarded as law. A 'statist objection' challenges specific features of tikanga itself, while a 'monist objection' doubts the possibility or value of pluralistic rather than monistic legal ordering.
- 1.8 Simple versions of a statist objection look for a legal order to have institutions that resemble (or functionally duplicate) Western-style parliaments, courts and executive/law-enforcement offices as well as their separations from each other. Such objections can be quite straightforwardly countered by the sophisticated literature that shows the contingency of the state legal forms that have been the dominant objects of analytical jurisprudence.<sup>21</sup> Theories of law in non-state polities as well as theories of law existing in interaction with the state often elevate conceptions of customary law, law-making institutions that don't look like state legislatures, law-applying institutions that may not resemble courts and practices of redress, reconciliation and redistribution operating as practices of law enforcement alongside (or instead of) centralised coercion.<sup>22</sup> These can be invoked to address simple forms of the statist objection.
- 1.9 Some forms of a statist objection, however, insist upon some integrating/structuring or organising feature that turns rules of behaviour into a legal *system* (for example, by looking for Hartian secondary rules such as a 'rule of recognition' (as an official practice of treating certain norms as having characteristics that make them legally valid/'legally binding')<sup>23</sup> or some other way of institutionally separating out a system of law from other modes of social ordering and from morality. Alternatively, or additionally, an objection might look to replicate a more substantive ideal of 'legality' in which law is understood to require some version of the rule of law (including constraints on discretion, avoidance of arbitrary power and protection for persons against each other and against the power of the state).
- 1.10 It is important to treat those objections in their strongest forms and in their best light. Beyond the comfort of the familiar, why would jurists insist upon these particular kinds of institutions, systemic features or structures and/or why look for legal forms that protect these particular procedural or substantive constraints on power? What is their value, and how is that value challenged by plural overlapping claims to the status of legality? Those questions trigger orthodox jurisprudential divides around the question of 'what is law?', which are set out briefly here to demonstrate that they cannot be straightforwardly relied upon to defend statist or monistic legality.

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work does not require translation into statist jurisprudence terms, but jurisprudential tools can be honed to better engage that work with statist and monistic theories. Responding to Durie's provocation, see also Roughan (n 6).

<sup>21</sup> Twining (n 2, n 14); Joseph Raz, 'Why the State' in Roughan and Halpin (n 2).

<sup>22</sup> Some of these emphasise the customary foundations of all law upon which posited state legalities can be examined and explained. See, for example, Jeremy Webber, 'The Grammar of Customary Law' 54 *McGill L Rev* 580; Gerald J Postema, 'Custom, Normative Practice, and the Law' (2012) 62 *Duke LJ* 707; Lon Fuller, 'Human Interaction and the Law' (1969) 14 *The American Journal of Jurisprudence* 1.

<sup>23</sup> HLA Hart, *The Concept of Law* (3rd edn, OUP 1961). Although it is common to refer to a rule of recognition as picking out 'sources' of valid law, Hart's *Postscript* acknowledgement that moral considerations can be among the criteria for legal validity means that not all laws need have social sources. Rejecting that view, see Joseph Raz, 'Authority, Law and Morality' in *Ethics in the Public Domain* (Clarendon Press 1994).

## ii. Revisiting monistic and statist jurisprudence

- 1.11 Legal positivist work isolates law as a distinctive kind of normative social practice, either separate or separable from matters of morality, ethics and politics. In some instances, positivist theories can be fairly (and fairly easily) characterised as begging questions about law’s diversity and plurality in favour of the familiar forms of the monistic law-state.<sup>24</sup> In other accounts, the claim to separation between state law and other normative orders is defended on either analytical, sociological or normative grounds.
- 1.12 Many proponents of positivism, and not only those who expressly defend so-called ‘normative positivism’, celebrate the notion that law is separated or separable from custom, etiquette, politics, morality, games and so on, making it easier to both identify law and criticise law when it goes wrong.<sup>25</sup> However, it is a separate question whether state law (or state law alone) offers the best forms and institutions for making or maintaining those separations.
- 1.13 Among the leading legal positivist theorists of law, generations of lawyers in New Zealand are often less familiar with Kelsen than with Hart and his tradition. That is unfortunate, insofar as Kelsen’s positivism more directly addressed the connection between law and state and monist/pluralist counterpoints. Kelsen’s account is subtle and methodologically complex, but in summary form, Kelsen’s core position explains state law – through its institutionalised forms, rules and sanctions – to offer a monopolisation of coercive force in a community. This monopolisation has a point: state law marshals force in the name of the community to stop force being used by persons among themselves.<sup>26</sup> Kelsen then argued, on logical grounds, that, to understand law as such a system of rules, jurists must presuppose an ultimate/basic norm from which the validity of all legal norms derives.<sup>27</sup>
- 1.14 It is important, however, that Kelsen’s account of systemic validity and law’s particular normativity rests on the contingency of seeking to understand what lawyers, judges and other jurists do when they treat certain enactments or judgments as creating valid law within a legal system. Contexts of overlapping claims to legal ordering seem among the most obvious contexts in which we cannot simply make Kelsenian presumptions about a (single) basic norm or myopically choose to think of law as a system of rules, logically ordered into a monistic structure. Nor can we cabin off a particular strand of juristic practice and seek to understand what (only) *those* jurists are doing. In our present

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<sup>24</sup> Joseph Raz examined the ways in which general jurisprudence has been focused primarily or even exclusively upon state law (and argues such a focus can be defended but not assumed). Joseph Raz, ‘Why the State?’ in Roughan and Halpin (n 2).

<sup>25</sup> For example, see Jeremy Bentham, *A Fragment on Government* (CUP 1988); Gerald J Postema, *Bentham and the Common Law Tradition* (OUP 1986); HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593. On normative positivism, see Jeremy Waldron, ‘Normative (or Ethical) Positivism’ in Jules Coleman (ed), *Hart’s Postscript* (OUP 2001); Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (UCL 2004). A full examination of ‘normative positivism’ (and whether the label has utility at all) raises debates of jurisprudential methodology including those examined in Julie Dickson, *Evaluation and Legal Theory* (Bloomsbury Publishing 2001).

<sup>26</sup> Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange 1999) 20–21.

<sup>27</sup> Kelsen (n 26) and see English trans. *Pure Theory of Law* (Clarendon Press 1992) at 344–347. While Kelsen is also often invoked as a theorist of monist legal ordering, his defence of monism is an account of the connectedness of international and domestic legal ordering. The logical relation of international and state legal orders presents a structurally and politically distinct challenge to the one posed by overlapping state and Indigenous claims to legality. It is built upon his account of the unity of all legal ordering, which is defended on epistemological grounds. He then defends (on normative grounds) a monistic structure that subsumes state law under international law.

context, there are diverse juristic practices, including practices of tikanga jurists as well as jurists who recognise plural interacting legal orders. That diversity disrupts Kelsen's methodology by upsetting the possibility of presuming a single system resting upon a basic norm.

- 1.15 Turning to juristic practice and matters of social fact invokes the (likely) more familiar Hartian device of a 'rule of recognition'.<sup>28</sup> A rule of recognition might be thought to readily accommodate interactions of tikanga and state law within a single system. Contemporary practices of officials of state law recognising tikanga as law – as exemplified in case law and legislation – might simply reveal yet another shift in the undulating customary development of state legal officials' regard for tikanga and its relation to other legal forms.<sup>29</sup> However, these practices of recognition also reveal contestation, including contests about whether recognition of tikanga is a form of incorporation or recognition of independence, about hierarchies between tikanga and state law as sources or streams of law and about who are the relevant 'officials' whose practices count in generating rules of recognition at all.<sup>30</sup>
- 1.16 The overlap and interaction of claimed legal orders serves to highlight that Hart's account of legal ordering depends upon the existence of a settled and recognised role of the legal official, which Hart presumed as a matter of social fact. Contexts of overlapping claims to legality, however, are also contexts of overlapping agents of legalities – upsetting the presumed class of officials upon which the notion of a rule of recognition depends. Just as diverse juristic practice precludes presuming a basic norm for Kelsen, it renders unstable the Hartian assumption that there is a settled and recognised class of officials whose practices generate a rule or rules of recognition.
- 1.17 Beyond diversity in the practices of agents of interacting legal orders, disputes over who counts as an official and debates over the official role itself, interactions between state law and tikanga may also generate disagreements over what the content of a rule of recognition is and should be. This suggests that the key jurisprudential interlocutor is not Hart (whose theory offers little space for either divergence or critical normative reflection over the rule of recognition itself) but Dworkin, for whom interpretive and constructive reflection reaches all the way down into the grounds or foundations of legal practice.<sup>31</sup> Dworkin's own account argued that interpretive disagreements at the grounds of law preclude the convergent official behaviour that Hart thought generated a rule of recognition.<sup>32</sup> A more robust challenge would deploy an interpretive account to argue that such a rule could not be generated without moral reflection about the values the rule

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<sup>28</sup> See Hart (n 23) 91–110.

<sup>29</sup> On the customary character of a Hartian rule of recognition, see John Gardner, 'Some Types of Law' in Douglas Edlin (ed), *Common Law Theory* (CUP 2009); on local practices of recognition, compare Natalie Coates, 'The Recognition of Tikanga in the Common Law of New Zealand' [2015] *New Zealand Law Review* 1; John Dawson, 'The Resistance of the New Zealand Legal System to Recognition of Māori Customary Law' (2008) 12 *Journal of Pacific Law* 56; Charters (n 7); Jones (n 7); Nicole Roughan, 'Escaping Precedent: Inter-Legality and Change in Rules of Recognition' in Timothy Endicott, Hafsteinn Dan Kristjánsson and Sebastian Lewis (eds), *Philosophical Foundations of Precedent* (OUP 2023).

<sup>30</sup> Roughan (n 29).

<sup>31</sup> For example, Ronald Dworkin, *Law's Empire* (Belknap 1986) at 4–12 discussing theoretical disagreements about the grounds of law.

<sup>32</sup> Ronald Dworkin, 'The Model of Rules I' in *Taking Rights Seriously* (Harvard University Press 1977).

itself is to serve.<sup>33</sup> Then, recourse to a rule of recognition invites rather than precludes evaluative debates in response to overlapping claims to statuses of legality.

- 1.18 There is no statist or monist refuge to be found in Joseph Raz’s influential variation on Hart’s positivism. In Raz’s account, law necessarily claims (but does not necessarily have) supreme legitimate authority. For Raz, law claims to morally obligate subjects; there is no separate domain of law’s normativity (as there was for Hart). By this, Raz means that law claims be able to serve subjects by enabling them to better conform with reasons for action that apply to them.<sup>34</sup> In other work, I have argued that, within Raz’s own account, value pluralism can generate multiple legitimate authorities for the same subjects.<sup>35</sup> In contexts of overlapping claims to law’s legitimate authority, rather than collapsing authority altogether by rendering law’s authority too uncertain or unclear, such claims can be understood as claims to relative and not supreme or exclusive authority. Understanding law as making a claim to authority does not rule out overlapping claims to law’s authority. Instead, their priorities and relations to one another will need to be evaluated to see which (or which combinations), if any, can be justified. (See part 3 below.)
- 1.19 Shifting towards the evaluation of claims to legal authority and interpretations of law’s foundations also shifts the jurisprudential toolkit away from accounts that demarcate law from other social phenomena or from morality. Instead, it suggests the various strands of thinking that emphasise the capacity of legal institutions (and legal practice) to give effect to a range of procedural or substantive moral or political goals. Debates in jurisprudence make considerable fuss over whether such capacities are built into the very idea of law, as a condition of ‘legality’ itself (in some form of non-positivism), or whether (consistently with positivism) law is simply an instrument that can (but need not) be put towards particular political/moral ends.<sup>36</sup> Setting aside any disciplinary concern over internal debates in jurisprudence, the present significance of these arguments is that, from either position, statist objections may argue that tikanga falls short in one or more markers of what statist jurisprudence either values or conceives as law, while monist objections may doubt whether the prospect of plural legal orders is consistent with values that (they argue) law either carries or ought to pursue.
- 1.20 The strongest monist and statist challenges are therefore not tied to an interpretation of a legal system’s operative rules of recognition nor an austere invocation of ‘legal positivism’. They are tied to ideas about value.

### iii. Law and value

- 1.21 Debates over ‘what is law?’ then turn into debates about value, legitimacy and justification, including debates about the value of law for communities, the value of communities themselves, the value of communities for persons both inside and outside

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<sup>33</sup> That need not be Dworkin’s own version of an interpretive or reflective account. See Gerald Postema on the reflective character of custom in Postema (n 22). This might be applied to understand a rule of recognition as a customary (and thus reflective) rule. See Roughan (n 29).

<sup>34</sup> See Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 23–69; Raz, *The Authority of Law* (2nd ed, OUP 2009) 3–27; Raz, *Between Authority and Interpretation* (n 12) 126–165. Important revisions and restatements appear in Raz, ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 *Minn L Rev* 1003.

<sup>35</sup> Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (OUP 2013).

<sup>36</sup> This is the core of the well-known Fuller/Hart debate. See Lon L Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ (1958) 71 *Harv. L. Rev.* 63; Hart (n 25).

their boundaries, the value of communities within communities and other key concerns. Yet in the context of overlapping claims to the status of legality, debates over 'what is law?' also lead directly to questions of the values to be pursued through interaction between communities and between legal orders, asking whether law's plurality and interaction (of diverse forms of law's recognition in overlapping communities) are themselves valuable and justifiable.

- 1.22 The most recurrent controversies surround the ideals of 'liberal legality'.<sup>37</sup> This ideal (or some version of it) underwrites substantive concerns about the recognition of tikanga either within the common law or as a separate legal order. Defenders of liberal legality treat legality as a particular kind of social and political achievement in which law supports autonomous individual personhood and the pursuit of one's chosen ends (within a framework that protects others' abilities to do the same), free from unjustified coercion. Key liberal positions then defend different variants of liberal ideals and different understandings of legality's contributions. Among the most relevant here are those liberal egalitarian accounts that not only celebrate persons' freedom from one another and from overreaching public power but celebrate equal freedom. The ideal is for persons to be equally free of unjustified public or private interferences and not to be put to another's (individual or collective) ends. Legality, with its constraints on power coupled with commitments to a form of equality, is then supposed to serve (and be necessary to serving) that ideal, while legal institutions, including constitutionally constrained executives, democratic legislatures and independent judiciaries (often with different weightings), are reified in different accounts of how to achieve those ideals.<sup>38</sup>
- 1.23 So understood, the strongest monist and statist objections do not arise from a lack of knowledge about what tikanga is or does nor come from blind allegiance to training in state law or statist jurisprudence. They come instead from a place of genuine commitment to a view in which the state's legal institutions are thought to defend the values of equal freedom, to offer the most secure and fair (albeit imperfect) framework for social ordering in diverse communities. That view then argues that the state provides an overarching and supreme framework within which there can be recognition of difference (and the value of different community priorities, identities, and practices), only under the umbrella of state law's supremacy or exclusivity. On this view, the argument is that genuinely plural legal ordering is inconsistent with liberal ideals of protection for equal freedom from unjustified coercion.
- 1.24 However, such recourse to justifications for liberal legality are parasitic upon defences of liberalism itself, which are not only beyond the present project's concern but (more importantly) fail to explain or to address how the status of legality itself could be up for contestation. As overlapping claims to the status of legality, interactions of state law and tikanga are not simply subject to the familiar rounds of contest in political theory over 'group rights', forms of biculturalism, 'multicultural liberalism' or broader debates between

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<sup>37</sup> Some of the leading literature on interaction between state law and tikanga highlights points of tension between the values liberal legal orders are thought to serve and values pursued in tikanga. See, for example, Joseph Williams, 'Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law' (2013) 21 *Waikato Law Review* 1.

<sup>38</sup> Those most familiar to local audiences may include the contrasting institutional emphases defended in Ronald Dworkin *Sovereign Virtue* (Harvard University Press 2002); Dworkin, *A Matter of Principle* (Harvard University Press 1985); Dworkin, *Law's Empire* (n 31); compared with Jeremy Waldron, *Law and Disagreement* (OUP 1999).

liberalism and communitarianism.<sup>39</sup> Addressing such interactions cannot simply turn directly to questions of value then reverse-engineer conceptions of law to fit either statist/monist or pluralist preferences. Instead, the question ‘what is law?’ needs to be answered with tools to examine contesting statuses of legality without begging the question in favour of either statist/monist, or pluralist positions.

- 1.25 That is the task to which a robust pluralist jurisprudence responds (and is addressed in Parts 3–5 below). The remainder of this section offers a working conception of law that takes seriously the prospect and impact of overlapping claims to the status of legality in order to examine and evaluate whether the claims (together or separately) can be realised.

## B. WHAT IS LAW?

- 1.26 This section explains three key building blocks of a working conception of law: authority, constrained coercion and recognition. These elements leave open the possibility of a great deal of diversity across different types of legal ordering (including different kinds of law-making, law-applying and law-enforcing institutions and different degrees of integration between posited law and matters of morality, spirituality and the physical/natural world) without treating law as an open-ended concept. This approach still draws a line around what law is (and what it is not) by conceiving that law claims legitimate authority over subjects, constrains the use of coercive power through a principle of legality and rests on recognition of both the roles and relations of officials (or agents) of law and law’s subjects.
- 1.27 Law can be understood as a particular mode of ordering societies through rules and principles that are applied and imposed collectively and institutionally in a community rather than through mere force and violence between persons in their private capacities.<sup>40</sup> Law is a particular mode for relating power and persons to one another.
- 1.28 Law’s collective dimension is important. Law operates on the back of collective practices of recognition as a normative social practice that orders a community in light of common concerns that people(s) must address in order to live together.<sup>41</sup> Those may include

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<sup>39</sup> These include the body of work through the 1990s that placed debates over Indigenous rights at the centre of these debates in political theory. Most prominently, in our local context, see Andrew Sharp, *Justice and the Māori* (OUP 1990). See also the essays collected in Duncan Ivison, Paul Patton and Will Sanders, *Political Theory and the Rights of Indigenous Peoples* (CUP 2000). The debates include division over the treatment of Indigenous peoples within a broader defence of multiculturalism or presenting a distinctive set of challenges for political theory. Compare Will Kymlicka, *Multicultural Citizenship* (OUP 1995) with James Tully, *Strange Multiplicity* (CUP 1995). For Kymlicka’s later acknowledgement that the “deep structure of settler colonialism” requires more than a broader theory of cultural accommodation, see Kymlicka, ‘Liberalism, Community and Culture Twenty-Five Years On: Philosophical Inquiries and Political Claims’ (2016) 44 *Dve domovini / Two Homelands* 67, 71.

<sup>40</sup> On ‘modal’ rather than functional understanding of law, in which law is distinguished by how it does its work and not what that work is, see Les Green, ‘The Concept of Law Revisited’ (1996) 94 *Michigan Law Review* 1687. Also see John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012); Gardner, ‘Fifteen themes from *Law as a Leap of Faith*’ (2015) 6 *Jurisprudence* 1, 29: “Even without legality, law is still to be distinguished modally: for example, by its use of rules (however obscure), its use of moral claims (however preposterous), its use of authority (however illegitimate), its use of custom (however concocted), its use of officials (however jumped-up), and its use of interpretation (however far-fetched).”

<sup>41</sup> As Jeremy Webber puts it, “the need to establish, at least provisionally, a single normative position to govern relations within a given social milieu, despite the continuing existence of normative disagreement”. Webber, ‘Legal Pluralism and Human Agency’ (2006) 44 *Osgoode Hall LJ* 167.

dealing with conflict, supporting wellbeing/flourishing/survival, administering just distributions and corrections, dealing with disagreement/diversity, constraining the use of public and private power, protecting the physical environment and managing relations between members and non-members of that community. However, law has diverse functions, and what amounts to a common concern will be deeply context-dependent, invoking both matters of value and disagreements about value.

### i. Law's authority

- 1.29 For all its diverse forms and functions, law orders communities in a distinctive way by replacing blunt force and domination with (a claim to) legitimate authority.<sup>42</sup> Law's claim to authority purports to tell people what they ought (or ought not) to do, purporting to generate, trigger, solidify or express obligations.<sup>43</sup> Law may fall short of having legitimate authority, but it at least claims to bind subjects rather than merely forcing them to act.
- 1.30 That claim succeeds only if the authority is legitimate, and there are pivotal debates in moral, political and legal philosophy about what legitimate authority requires.<sup>44</sup> A basic divide – between accounts that tie legitimacy to some kind of consent and those that tie legitimacy to authority's service of persons in light of reasons that apply to them – distracts from a key structural similarity in which the domain of legitimate authority operates around a domain of independence. Not all questions are appropriate matters to be determined by an authority.<sup>45</sup>
- 1.31 I have argued that, for authority to be legitimate, it must satisfy requirements of both standing and standards.<sup>46</sup> Public authority – the sort claimed by a legal order – must be claimed from a position of justified standing in collectively recognised *roles* of authority. The recognition of the role, and its value, carries the authority's standing and its responsibility to serve the subject.<sup>47</sup> We can then evaluate both the claim – is it offered from a position of standing in a role of authority as recognised by the collective? – and the standards – does the authority serve subjects?

### ii. Coercion and legality

- 1.32 While claiming authority, law is still coercive – it backs up its claims to authority with forceful sanctions. Theories of legality thus seek to explain why and how law's ways of governing persons are valuable, despite their forcefulness, and perhaps most importantly

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<sup>42</sup> Authority is understood as rightful power in contrast to the mere capacity to get one to act as one commands. This is a point in common between a number of otherwise divergent accounts, including Weber on legitimate domination and Raz on law's claims to legitimate authority.

<sup>43</sup> This formulation skims over debates over normativity itself – and authority's impact upon reasons – and a major debate in jurisprudence about the character of law's normativity, whether it is separate or integrated with social and/or moral normativity. I return to the latter below.

<sup>44</sup> Raz (n 34) and see discussion of key debates in Scott Shapiro, 'Authority' in Jules Coleman, Kenneth Einar Himma and Scott Shapiro (eds), *Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2012); Roughan (n 35).

<sup>45</sup> For example, in *The Morality of Freedom*, Raz defends his account in liberal terms, seeking to avoid the more paternalistic variants of this thesis. On Raz's 'independence thesis', see Scott Hershovitz, 'The Role of Authority' (2011) 11 *Philosopher's Imprint* 1.

<sup>46</sup> Roughan (n 35).

<sup>47</sup> Roughan, 'The Recognition in Authority' (n 17).

how justified coercion in accordance with law differs from the mere use of force.<sup>48</sup> This differentiation is supposed to include the protection of persons amidst the power that others (including both legal officials and other persons) wield over them.

- 1.33 Law’s protections of persons and its restraints on power are the key contributions of legality, whether these are administered through an order based on tikanga, on state posited law or on some combination. The question is how to ensure that a combination of legal orders does not result in either legal order instantiating mere violence or partial violence against the persons who recognise the other. Law’s answer to those questions depends on institutions and on how force itself is institutionalised in (and justified by) the law/laws.
- 1.34 The liberal tradition of legality typically celebrates the state’s monopolisation of the use of force in social and political life. Hobbes famously justified the unitary sovereign as a political form to provide security and assurance for people who are vulnerable to each other’s power.<sup>49</sup> In contemporary accounts, a state’s positive legal order both centralises and institutionalises force in the name of the community to protect persons against private uses of force. In doing so, law transforms force into sanction by rendering it within a central rule-governed and rule-governing system.<sup>50</sup>
- 1.35 However, to truly turn force into sanction (according to the liberal rule of law tradition), it is not enough that force is simply applied through a centralised system of rules. Legality, or the rule of law, is supposed to constrain the power of those who wield the rules and make decisions for the community by ensuring those powers are exercised in accordance with law and constrained by legal forms.<sup>51</sup> The rule of law treats persons with dignity and, when it is applied evenly, treats them with equal dignity. Krygier tells us that, in the ideal of legality, law ‘tempers’ power.<sup>52</sup> Fuller, famously, argues that law’s way of governing has moral and not merely instrumental value.<sup>53</sup> Different accounts then bear different requirements for what law must be like if it is to operate legality’s valuable temperance of power. Fuller’s own account demands that law’s rules be applied consistently, coherently, prospectively, generally, publicly and clearly and that power be used only in

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<sup>48</sup> Theorists present different models of this differentiation. See, for example, Dworkin, whose debate with Fuller is apparent but not always acknowledged. For Dworkin, coercion is justified when it is in accordance with law as ‘integrity’, carrying forward and constructively interpreting past political acts, in support of equal concern and respect for persons in associative communities, for example, *Law’s Empire* (n 31); Dworkin, *Justice for Hedgehogs* (Harvard University Press 2013). For Dworkin, this is the best interpretation of what ‘law’ is: this is not a separate ideal of ‘legality’.

<sup>49</sup> For an account of legality’s constraints even on the Hobbesian sovereign, see David Dyzenhaus, *Long Arc of Legality* (CUP 2022).

<sup>50</sup> Kelsen (n 26).

<sup>51</sup> For an examination and evaluation of contending rule of law accounts, see Kirsten Rundle, *Revisiting the Rule of Law* (CUP 2022).

<sup>52</sup> Michael Krygier, ‘Tempering power’ in Maurice Adams, Anne Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (CUP 2017).

<sup>53</sup> Fuller (n 36).

accordance ('congruently') with knowable standards.<sup>54</sup> This is taken to generate a reciprocal relation between official and subject.<sup>55</sup>

- 1.36 While Fuller's and related versions of the rule of law support a relation of reciprocity between subjects and officials, I have argued that these are grounded upon practices of recognition at the heart of legality.<sup>56</sup> That position becomes central to responding to interactions between legal orders in which both official and subject statuses, and the relations between officials and subjects, are affected by overlapping claims to the status of legality.

### iii. Recognition<sup>57</sup>

- 1.37 Both building blocks – authority and legality – invoke ideas of recognition. Recognition is a social practice that both generates the normative status of institutions and agents of the law and a normative connection between those who wield the law and those to whom it is applied. A 'recognition condition' for authority – including the authority claimed by law – requires that persons subject to authority and persons claiming authority recognise their standing in that relationship to each other.<sup>58</sup> This does not require full individualised recognition on the part of all persons within society, but for public institutions such as law, recognition must be practised widely within a collective. Recognition does not always translate to respect for law, and it is not sufficient for legitimate authority or full legality. It is, however, a necessary aspect of both law and authority, without which the substantive standards of legitimate authority and legality cannot get off the ground. Failures of recognition are in that sense fundamental.
- 1.38 As intimated above, for lawyers trained in Anglophone jurisprudence, talk of recognition quickly prompts Hart's idea of a 'rule of recognition' operating among officials to determine what is to be applied as valid law. Such a rule of recognition, however, is not the foundational element of recognition in a legal system and instead is built upon recognition of the role of the official and its relation to the role of the subject as well as a normative relation of recognition between officials and subjects.
- 1.39 Recognition then matters on both sides of that relation and is a key aspect of the roles of both official and subject. Claiming law's authority over persons entails recognising them as subjects of law, not recipients of force. In this way, recognition is built into the central relation between persons applying the law and those to whom it is applied. When the

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<sup>54</sup> Lon L Fuller, *The Morality of Law* (Yale University Press 1969) 33–44; and on congruence, see Nigel Simmonds, *Law as a Moral Idea* (OUP 2007). In thicker accounts, those markers of the rule of law are supplemented with further protections provided by the demands of natural justice, supervision by independent judicial institutions and substantive human rights protections. Some accounts also add democracy as an element of the rule of law itself. For the reasons elaborated by Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law* (n 34), the rule of law and democracy are separable, and the rule of law is neither the only political value nor the whole of political virtue.

<sup>55</sup> See Kirsten Rundle, *Forms Liberate: Reclaiming the Jurisprudence* (Bloomsbury Publishing 2013); Gerald J Postema, *Law's Rule: The Nature, Value, and Viability of the Rule of Law* (OUP 2022); Dyzenhaus (n 49).

<sup>56</sup> Roughan, 'The Official Point of View and the Official Claim to Authority' (2018) 2 *OJLS* 1; Roughan, 'Office-Holding and Officiality' (2020) 7 *University of Toronto LJ* 231.

<sup>57</sup> The positions summarised here are defended in Roughan, 'The Role of Recognition: Persons, Institutions, and Plurality' (2022) 47 *Journal of Legal Philosophy* 53; Roughan, 'The Recognition in Authority' (n 17); and Roughan, 'Recognition in the Concept of a Legal System' in *Jurisprudence in the Mirror* (forthcoming).

<sup>58</sup> On recognition of this relationship, see Hannah Arendt, 'What is Authority' in Hannah Arendt (ed), *Between Past And Future* (Penguin 1961).

agents of law claim authority and not mere force over persons, they recognise the dignity of those persons. Such recognition treats subjects not only as individual persons able to be guided by reasons rather than force but also as members of the community within which law is recognised.<sup>59</sup>

- 1.40 The key feature of a recognition model is that, together, law's claim to authority and the ideal of legality distinguish law from violence. For that distinction to hold, however, those subject to law must be able to recognise it as least plausibly claiming (if not always having) legitimate authority. If law looks like force, if the institutions of law-making, law-application and law-enforcement appear more like the gunman than bearers of legitimate authority and the rule of law, then law cannot genuinely claim to (let alone successfully) obligate persons.
- 1.41 Those operating the law, and thereby claiming the status of legality, must therefore do so in ways that are recognisably consistent with the rule of law in its respect for the dignity of law's subjects. Legality is interrupted most directly when law's authority is claimed by official institutions with obvious and general defects in their own compliance with the law or when law is imposed unevenly upon subjects. Moreover, law's legitimate authority is precluded when it is claimed by institutions – even official institutions – that are not collectively recognised as having the standing to claim such authority.
- 1.42 Many legal orders struggle on this front. This point provokes a reminder that the term 'law' used throughout this work extends to both state law and tikanga. There are always important arguments to be had about the extent to which any particular legal order – including both state law and tikanga – falls short of ideals, but that is not the focus of argument here. The argument instead is twofold: (i) that contexts of overlapping and interacting claims to legality disrupt the recognition of legality and law's authority; and (ii) that interaction makes the relationship itself the key target of the rule of law. Examining the operation of law's legitimate authority and evaluating the rule of law in our local context requires attending to the contesting statuses of legality presented by the interaction of tikanga and state law.
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<sup>59</sup> For a discussion of the significance of membership within a rule of law community, see Postema (n 55).

## SECTION TWO

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# Relations between legal orders: terminology and foundations

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2.1 Every exploration of relations between state law and tikanga works with an imperfect set of terminologies. This paper refers to (and regards) both state law and tikanga as law – but both are imperfect legal orders. Both fall short of ideals of legality. In this work, while ‘law’ as a concept extends to both tikanga and state law, as elaborated at 1.a above, the discrete terms of ‘state law’ and ‘tikanga’ are used to describe the interacting legal orders. The paper does not seek to explain either legal order on its own terms nor go into distinctions between different types of state law nor different sites or limits of tikanga Māori, tikanga ā-iwi or tikanga ā-hapū. Instead, it places weight on the idea, terminology and operation of ‘interaction’.

### A. INTERACTION

2.2 The fundamental interaction generating overlapping claims to legality is the interaction between persons, places and persons *in* places. The activities and physical presence of persons in communities together bring them into contact with one another. The key framing questions then ask: When interactions of persons in places operate with recognition of different and perhaps contesting legal orders, how does law itself (or the status of legality) provide for interaction? (How) can law govern and serve people in communities located together?

2.3 Interaction of legal orders derives from peoples’ activities together. An interaction implies deliberate action on both sides of a relation between legal orders. Interaction is not passive, not a situation of mere contact or a circumstantial overlap nor an accidental diffusion. Nor is it a unilateral action by one legal order. Instead, it is a practical relation in which there is agency on both sides and potential for reforming the relation itself. Focusing upon interaction highlights that the activities of agents, as concrete persons and as occupants of law’s institutions and roles of both officials and subjects of law, drives interaction between legal orders.

2.4 The terminology of ‘interaction’ used here is not intended to gloss over both the immense damage or destruction that can be (and has been) wrought by settler then state legal

ordering upon the institutions and practice of tikanga and the persons for whom (and places for which) tikanga operates. To the contrary, the idea of interaction highlights the deliberateness of such impacts.<sup>60</sup> Metaphorical representations of interaction include familiar images of ‘partnership’ and ‘marriage’<sup>61</sup> that can harbour practices of subordination and abuse of trust. Such deeply inter-personal metaphors of agency highlight the potential as well as the vulnerabilities involved in interaction.

## B. INTERSECTION

- 2.5 As well as interaction, the idea of ‘intersection’ is also crucial. It captures that there are places (both physical and metaphysical) where state law and tikanga meet. These meeting points feature legal content and institutions operating or claimed over the same places and persons. Attention to intersection reminds us to tend to the physical spaces that may be created and operated as meeting points. Metaphysically, there are also legal concepts, as well as understandings of value, that can be understood to be shared or practised in common between legal orders. Both the physical and metaphysical meeting points are often represented through metaphors, for example, as a physical and natural meeting of ‘streams’,<sup>62</sup> which is common ground reached from different starting points. Other metaphors feature artifacts that persons construct together, for example, a whare as a meeting house for peoples, a whāriki or woven mat,<sup>63</sup> a “two-stranded rope”<sup>64</sup> or a ‘bridge’.<sup>65</sup>
- 2.6 While the intersection of law’s places and interaction of law’s persons can operate together, difficulties arise when interaction occurs in physical places that are not places of intersection. The most prominent examples involve judges, lawyers and claimants operating interactions between tikanga and state law within the traditionally statist common law courts, for example, in civil claims between private persons, in criminal law and sentencing, in determinations of land use and title, in claims against the Crown or in judicial review proceedings. There, the absence of a physical institutional meeting point, a point of intersection, leads agents of interaction to seek metaphysical meeting points between rules, principles and values from the interacting legal orders. Present efforts to reform the court system, its structure, institutions, operations and physical locations, also point to the awareness of the need for places of genuine intersection,<sup>66</sup> while efforts to do away with unilaterally constructed tools and artifacts (for example, old common law

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<sup>60</sup> The contrast between deliberate interaction and diffusion is examined in Nicole Roughan, ‘The Association of State and Indigenous Law: A Case Study in ‘Legal Associations’’ (2009) 52 *University of Toronto LJ* 135. See also the conscious and unconscious impacts of interaction examined in Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press 2016).

<sup>61</sup> Jacinta Ruru, ‘First Laws: Tikanga Māori in/and the Law’ (2018) 49 *Māori Law Review* 279.

<sup>62</sup> Durie (n 20) 462.

<sup>63</sup> As in Coates’ submissions as Counsel in *Ellis v R* (n 8) drawing upon a whakataukī from the crowning of Kīngi Pōtatau Te Wherowhero in 1858.

<sup>64</sup> Elisabeth McDonald and others (eds), *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope* (Bloomsbury Publishing 2017).

<sup>65</sup> Joe Williams, ‘Build a Bridge and Get Over It: The Role of Colonial Dispossession in Contemporary Indigenous Offending and What We Should Do About It’ (2020) 18 *New Zealand Journal of Public and International Law* 3.

<sup>66</sup> See, for example, Heemi Taumaunu, Chief District Court Judge of New Zealand, *Norris Ward McKinnon Annual Lecture 2020* (Waikato University 2020).

doctrines of recognition of custom) point to the need for genuine metaphysical meeting points.

## C. INSTITUTIONS

- 2.7 The present paper refers often to ‘institutions’. Lawyers may be accustomed to thinking of law’s institutions as formal organisations, such as parliaments, courts or executive agencies. Yet the notion of institution is broader. An institution carries a normative status that is recognised by those who use it.<sup>67</sup> Law’s institutions therefore include law-making, law-applying and law-enforcing institutions (both under state law and tikanga) but also include institutions within the law that organise relations of persons, places and objects, including institutions of contract, Treaty and rāhui. Familiar institutions of state law include the forms through which law manages those relations – property, trusts, corporations, personhood, agency even ‘the reasonable person’ and ‘reasonable doubt’ are familiar institutions of state law. The institutions of tikanga similarly include institutions of both process and substance, including organising ideas of personhood, obligations and empowerments.<sup>68</sup>
- 2.8 Persons can also fill institutional roles through which they are empowered and burdened in ways beyond the powers and duties they bear as ordinary persons.<sup>69</sup> Yet persons typically fill a number of roles, and one of the complex challenges of interacting and intersecting legal orders is to account for the often diverse and potentially conflicting roles of both agents and subjects of multiple legal orders. In accounts of state legality, law’s agents are often more narrowly conceived as ‘officials’ of law. That idea of the legal ‘official’ as a type of institutional role typically features highly formalised distinctions between officials and ordinary persons subject to the law. Yet legal orders need not feature such sharply differentiated or hierarchically organised roles for law’s agents. Law making, application and enforcement may operate through processes involving a wider section of the community, not limited to persons in select roles, or law’s agents might be understood to have distinctive roles but without the layers of formality that are found in the state system of appointment to offices. The wider terminology of law’s agents is used here to diversify the forms and structures of law’s agents as those who make, apply and/or enforce the law.

## D. CLAIMS AND CLAIMING

- 2.9 The analysis here relies heavily on the language of *claims* – to legitimate authority, to the status of legality, to the justification for uses of coercion or the administration of justice. A claim is an assertion that something is the case and/or that something is owed to the claimant. For a legal order to claim authority is to assert that it has rightful/legitimate

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<sup>67</sup> There are different accounts of the idea of an institution, many derived from the influential work of John Searle. A summary appears in Searle, ‘What is an Institution?’ (2005) 1 *Journal of Institutional Economics* 1.

<sup>68</sup> See Benton et al (n 20); Māmari Stephens and Mary Boyce (eds), *He Papakupu Reo Ture: A Dictionary of Māori Legal Terms* (LexisNexis NZ 2013); Māmari Stephens, ‘Kei A Koe, Chair!’ – The Norms of Tikanga and the Role of Hui as a Māori Constitutional Tradition’ (2022) 52 *Victoria University of Wellington LR* 463.

<sup>69</sup> Quite how this operates is a matter of debate among theorists of role obligations. For example, compare Michael Hardimon, ‘Role Obligations’ (1994) 91 *Journal of Philosophy* 333 with the broader constructivist account of Christine Korsgaard, *Sources of Normativity* (Cambridge 1994) 101–107, 120–121.

authority to bind persons.<sup>70</sup> A claim to legitimate authority is not the same thing as having legitimate authority. Instead, the claim needs to be evaluated to see if it is (or can be) realised.

- 2.10 In jurisprudential debates, it often matters whether we focus upon law's claims or their realisation. It matters to the present paper because it highlights that a claim is made by an agent (or agents) and is heard or received by others. Making a claim to legal status is itself a part of the relationship between interacting legal orders. Rather than just an abstract question (for example, does state law have legitimate authority or does state law approximate the ideal rule of law?), we can look at the claims state law makes, what they communicate, what they require of the claimant and how they interact with the claims of tikanga. Attention to claiming means that a jurisprudence of interaction is not a blunt assessment of outcomes but instead looks directly at the interaction itself.
- 2.11 The language of claiming is sometimes thought to offer an odd 'personification' of law. That worry can be met with responses that treat 'law's claims' as those claims that are made by agents of law, those who make, apply and/or enforce law, wielding its coercive power, operating its institutions for administering justice and claiming its authority.<sup>71</sup>

## E. LEGALITY AND LEGALITIES

- 2.12 Finally, the term 'legality' refers to the status of law, which includes an understanding of law's constraints upon power. A familiar jurisprudential turf war disputes whether the concept of law includes an ideal of the 'rule of law' or 'legality' (understood to require satisfying a list of requirements such as certainty, coherence, generality, and non-retrospectivity. or whether a concept of law can be devised without that ideal (by offering a concept of law as a 'set' or 'system' of rules that may but need not pursue moral value).<sup>72</sup>
- 2.13 On both sides of that dispute, however, lies a concept of law in which law claims to obligate subjects, not merely to force them to act. Law's claim to authority is central to its distinction from mere power. For the reasons explained below, this paper adopts the version of that argument defended by Raz, in which law claims legitimate authority, and the ideal of legality defended by Krygier, in which legality captures a claimed normative status of tempering power rather than a specific list of procedural requirements about generality, consistency and the like. I have argued elsewhere that this claim to authority connects law's agents and persons subject to law in a relation of recognition that both constrains and supports the justification of the power of the former over the latter.<sup>73</sup> (I

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<sup>70</sup> See Raz (n 34) 16–20, treating authority as a kind of power (a normative power) that is contrasted (rather than continuous) with other capacities to get another to act as one intends. On this distinction and its defenders, see Shapiro (n 44).

<sup>71</sup> Those claims are made by officials of law in the course of claiming law's authority. See John Gardner, 'How Law Claims, What Law Claims' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012); cf Roughan (n 56).

<sup>72</sup> This is a simplification of the debate between Hart and Fuller, captured in Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 3.

<sup>73</sup> That is the central claim of my work on officials, which differs from accounts of reciprocity found in the work of Fuller, Dyzenhaus, Rundle and Postema. The claim and its receipt entails recognition, which is less demanding (of subjects) than reciprocity.

say more about this relation and its importance for interactions of state law and tikanga in part 3 below.)

- 2.14 For now, the point is that this basic notion of legality leaves open the possibility of plural overlapping legalities and/or claims to legality. The first substantive task is then to examine the conceptual work required to understand and evaluate plural claims to the status of legality.
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## SECTION THREE

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# Contesting statuses of legality

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- 3.1 Both the justification for law's coercive force and the legitimacy of law's authority are made more difficult when there are multiple interacting claims to the status of law. Indigenous claims to statuses of legality can be understood as claims to compete, to co-exist and/or to partner with the state in the same project of ordering communities through legality, both empowering and protecting persons. When statuses of legality are contested in this way, the question 'what is law?' invokes a matter of justice. It must address which claims to legality should be recognised, whether there can be plural interacting legalities and, if so, how do/should they relate to each other. Are denials of the status of legality a kind of injustice? Can denials of that status ever be justified? Can unjustified denials of legality statuses be corrected through new forms and practices of recognition? Can one legal order justifiably use force to override or exclude another, or can they interact as plural authorities?
- 3.2 It is important here that plurality of law and plurality of authority are neither valuable nor problematic in themselves. Whether or not plurality has value depends upon how/whether it serves persons as members of social and political communities. That evaluation takes place amidst the realities of political communities, including the ways in which past and present interactions of legal orders shape the recognition by persons of the law as well as law's recognition of persons. An evaluation of authority examines the continuing value of authorities for persons living together in communities, taking those circumstances as they are now but mindful of looking backwards to understand how history shapes and may constrain interactions and options for those relations.

### A. DISRUPTING THE RECOGNITION OF LAW AND AUTHORITY

- 3.3 A critical objection to the supposed rule of law in Aotearoa New Zealand challenges whether state law, imposed upon pre-existing and continuing models of Indigenous legality, successfully turns force into sanction in the name of a community or instead operates force against some persons who are subjected to standards they do not (and have good reasons not to) recognise as their own. Is state law consistent with the rule of law given (i) the unevenness and discrepancies in its achievement of legality's ideals for all persons over whom law is enforced and (ii) its forceful impositions upon tikanga and past denials of its status as law?

- 3.4 The first part of this objection demonstrates the ways in which law’s use of force impacts Māori individuals more (and more systematically) than other persons in the state’s jurisdiction.<sup>74</sup> Insofar as defects in law’s constraints on the use of force affect Māori more than others,<sup>75</sup> such unevenness is a black mark against the state’s claims to be justified in monopolising the use of law’s coercive force. Moreover, this is a defect across the board (i.e. not just for Māori) because it leaves us with a purported legal order whose uneven (and unevenly constrained) recourse to force threatens to undermine its very status of law at all.
- 3.5 The second part of the objection examines the impact of overlapping legal orders upon the recognition of law and its authority. When the dominant state legal order claims independent and exclusive legality, treating persons in Indigenous communities as subjects only of state law, it also claims supremacy over the Indigenous legal ordering those persons recognise and operate. Such force is felt directly and indirectly by the persons who recognise the legal order that is being excluded or overpowered. When tikanga is the recognised law, the state appears as the gunman. In this way, the state’s claim to administer its law over Māori communities, overruling or displacing tikanga, is markedly different from its claim to administer legality for all individuals within its jurisdiction. When state law’s claim to authority over persons is accompanied by a forceful exclusion of tikanga Māori, persons who recognise tikanga (as law) have good reasons not to recognise state law’s claim.
- 3.6 Part of the point here is structural: even if state law did (or does) not deliberately exclude tikanga as law, the plural overlapping claims to legality and law’s authority upset what officials claim and subjects collectively receive as law. The forms of legality present in tikanga –operating independently as well as publicly interacting with the state legal order – interrupt the recognition of state law’s independent claim to legality. The claims and operation of tikanga – replete with its distinctive forms and processes as well as its own practices of recognition of persons and statuses of legality – disrupt collective recognition of one law for all. Instead, we have two purported legal orders, and the question is whether there are/should be one law for some and force for others, one law for some and one for others or two laws for all.
- 3.7 This structural overlap of legal orders also casts doubt upon the extent to which claims to independent state legality are made in good faith and made in recognition of persons as subjects of law rather than mere force. At the very least, independent claims to state legality must assume that those who recognise tikanga will overlook its forceful exclusion by the very state legal order that claims to be something other than force. At worst, those

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<sup>74</sup> Evident most obviously in the administration of criminal justice. See Jackson (n 4); Khylee Quince, ‘The Bottom of the Heap? Why Māori Women are Over-Criminalised in New Zealand’ (2010) 3 *Te Tai Haruru Journal* 99. On the uneven use of force in the institutions of state ‘care’ of children, see Fleur Te Aho, ‘Violent ‘Care’ and the Law: The Overrepresentation and Harm of Tamariki Māori in State Care in Aotearoa’ (2022) 2 *Legalities* 32.

<sup>75</sup> Insofar as the inevitable discretion left to law’s agents has also led to unevenly forceful impositions on Māori, who “continue to bear the brunt of police violence and policies of over-surveillance and discrimination in decisions to stop, search, charge and convict”. Fleur Te Aho et al, ‘Introduction: Do the Lives of Tangata Whenua/First Peoples, Migrants and Refugees Matter in the Systems of the Settler-Colonial Nation State?’ (2022) 2 *Legalities* 1, 4. The authors cite a 2019 NZ Police annual report to show that “Māori are seven times more likely than non-Māori to be subject to police use of force”.

claims to independent state legality may be made knowing of (or being wilfully blind to) its defects.

- 3.8 In summary so far, the account of the role of recognition in both legality and law's authority reveals the failings of claims to independent state legality. The defect lies not in the state legal form *in* itself but in the state legal form *by* itself. In other words, the failure lies in the independence of the claims of state law. If state law is claimed and recognised as governing some persons through authority and rules (as subjects of the law) but others through force, it fails to uphold even a minimal concept of law as a system of rules and obligations and is merely coercive. By itself, state law fails to operate the rule of law – its legality is defective. Rescuing both legality and law's authority requires ways of relating the legal orders without resort to mere power. Can the rule of law apply to a relationship between legal orders? Can law's justified coercion and legitimate authority be shared?

## B. INDEPENDENCE AND INTERDEPENDENCE OF AUTHORITIES

- 3.9 Persons can be subject to more than one legitimate authority and more than one legal order. This can create practical conflicts for subjects wondering which order to obey and generate uncertainty in their recognition of authority. When both orders are also enforced, there are additional risks of multiple or inconsistent consequences arising from compliance with one obligation while breaching another. In earlier work, I have argued that plurality of authority also alters the operation and evaluation of the authorities so that, when there are plural claims to law's authority over the same persons, authority can be 'relative' or shared between overlapping and interacting legal orders. Legitimate relative authority depends on the interrelationship between the overlapping claimants.<sup>76</sup> Adding a recognition requirement into that account then reveals how plural overlaps and interactions affect the claims and receptions of authority.<sup>77</sup>
- 3.10 The theory of relative authority responds to the significance of overlap and interaction among and between communities and persons in communities. The presence of interactive and overlapping persons, activities and places produces interaction and overlapping claims: to authority, to justifiably use law's coercive force and to settle what justice requires. In our context, such overlap and interaction of subjects means that independent and comprehensive state or Indigenous authority claims cannot be justified as if the other's claims are irrelevant. Instead, the interaction of authorities – whether that involves one trying to exclude or compete with another, whether it involves spheres of deference or whether it involves some mode of cooperation or coordination – alters the ways in which either/both authorities can serve (or fail to serve) persons in their communities.

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<sup>76</sup> Roughan (n 35), see especially ch 7 on relative authority and ch 13 for a (somewhat dated) account of Crown-Māori relative authority relations. See also Nicole Roughan, 'Relative Political Authority: Overlapping Claims and Shared Subjects Beyond the State' (2020) 27 *Constellations* 702; Roughan, 'Politics and Relative Authorities' (2018) 16 *International Journal of Constitutional Law* 1215; Roughan, 'Relativity Under Review: A Response to Commentators on *Authorities*' (2015) 40 *Australian Journal of Legal Philosophy* 212.

<sup>77</sup> Roughan, 'The Recognition in Authority' (n 17). On the role of recognition in authority, see also Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (CUP 2018); and my commentary on his account of asymmetrical recognition in Roughan, 'Meet Me in the Middle?' (2019) 29 *Duke Journal of Comparative & International Law* 423.

- 3.11 Relative authority, however, does not always require relationships of cooperation or coordination. It can also justify relationships of independence as well as non-forceful contestation. The point is to examine the purported authorities in light of their interactions, not simply comparing one to the other and coming out with one on top. A justification for authority can therefore be sensitive to facts of plurality whilst still subjecting the activities of authorities to scrutiny. By focusing on relative authority, we continuously ask whether authorities are relating to each other in ways that help them serve their overlapping/interactive subjects. Ideally, this should operate as a kind of meta-check on the legitimacy of all authority in contexts of claims to plurality.
- 3.12 The possibility of an inter-authority relationship supporting the realisation of legitimate (relative) authority may reduce the need to impose coercive measures in the absence of authority – or the resort to justifications built on necessity.<sup>78</sup> Extraordinary as well as ordinary contexts demonstrate that the service of persons that cannot be provided by independent authorities may be provided by interdependent authorities and vice versa.
- 3.13 Our local context is made more complex by the presence of plurality among different types of Māori authorities, augmented by the operation of different political structures and legal forms across different hapū and iwi, and made even more diverse by the operation of non-whakapapa-based organisations and pan-iwi representative fora. Each of these interact with various tentacles of the state. Increased complexities, however, should not be alarming. Claimants and wielders of authority in our communities shift through time, as do their forms and processes, just as there are shifting and contesting understandings of the Crown/state and its branches or delegates and agents.<sup>79</sup>
- 3.14 The point, however, is still to evaluate these authorities together, evaluating what they can achieve either independently or interdependently. This works out, in practice, to a requirement that the authorities themselves must interact so as to realise shared authority arrangements that can address matters of common concern. As we see in both legal orders (most recently in the disputes in court and at Ōrākei Marae over whether matters invoking tikanga should be resolved by appealing to state law at all),<sup>80</sup> the practical working out of relative authority will itself be the subject of much contestation. Part 5 below argues that these contests should be constrained by legality, not left to politics or mere force, including the force of numbers and demographics.
- 3.15 In context, the relativity of interacting authorities generates a pivotal question for the interaction of state law and tikanga: what is the relation between interdependence and independence? While debates about the relationship between tikanga and state law sometimes polarise the options of independence and interdependence, they are not mutually exclusive and they have their own relation. As Moana Jackson put it, “there can

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<sup>78</sup> Justifications for coercion and authority can come apart, see Raz (n 34). See also Jean Hampton, *Political Philosophy* (Westview Press 1997); and Arthur Ripstein, ‘Authority and Coercion’ (2004) 32 *Philosophy and Public Affairs* 2. Positions in debates over whether coercion can be justifiably imposed in the absence of justified authority do not determine whether one monistic coercer (rather than plural coercers) would be justified in such imposition.

<sup>79</sup> For example, see Kristen Rundle, ‘Office and Contracting-out: An Analysis’ (2020) *University of Toronto LJ*; Janet McLean, “‘Crown Him with Many Crowns’”: The Crown and the Treaty of Waitangi’ (2008) 6 *Victoria University of Wellington LR* 35; McLean, ‘The Crown in Contract and Administrative Law’ (2004) 24 *Oxford Journal of Legal Studies* 129.

<sup>80</sup> Taurapa, Katie Doyle and Maxine Jacobs, ‘[The battle of Tāmaki Makaurau plays out in the court of Tū](#)’ *Stuff* (Online, 23 Feb 2023).

be no interdependence without independence”<sup>81</sup> and “interdependence, [is] a fundamental corollary of our understanding of independence”.<sup>82</sup>

- 3.16 Precise examples of matters for independence and interdependence cannot be pre-determined but rather will be matters of contest and context. However, existing practices of interaction suggest guiding principles for such contest. In particular, for matters on which tikanga alone is recognised as having standing and establishing standards of behaviour for persons in places and between persons across different places, state legality has no standing to insert claims to operate its own independent standards nor insert itself in ways that disrupt the independent operation of tikanga authorities.
- 3.17 In contrast, for matters on which both state and tikanga authorities overlap in their service of persons, institutions of interdependence will need to be developed and engaged. Perhaps the most obviously controversial are principles surrounding rights protection. Where there are rights that state authorities protect, these could not justifiably be denied to Māori persons in the name of independence. Yet a unilateral rights-protective intervention by state authorities would fall short of legitimate relative authority. Instead, recognising that human rights protections also support rights to self-determination, a domain of interdependence will need institutions in which persons can seek the services of both tikanga and state authorities to claim, contest and protect their rights. Part 5 below examines how legality itself, reconceived to operate ‘interlegality’, may offer forms for realising justified interdependence and independence.
- 3.18 The logic of authority, and the justifications for relative authority, indicate the nature of the relationship between the interdependent and independent models of authority and legality. Analogously to the ways in which authority itself is justified around a core domain of independence, interdependent state and tikanga authorities can be justified around a core domain of independent tikanga authorities.<sup>83</sup> A robust domain of independence is necessary in order to both contest and maintain the boundaries of the domain of interdependent authority. Without a strong independent domain, which can both operate its own internal legality as well as represent outwards into the interdependent domain, the whole structure may not be recognisable as relative authority and instead may appear as a continuing domination by the more powerful party. Part of ensuring that the domain of interdependence involves a genuine interaction of authorities, not force and not ‘window-dressing’ or a ‘myth’, lies in ensuring that its institutions and its boundaries are regularly and fairly contestable.

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<sup>81</sup> Moana Jackson, ‘Where to Next? Decolonisation and the Stories in the Land’ in Bianca Elkington et al, *Imagining Decolonisation* (Bridget Williams Books 2020).

<sup>82</sup> This is the framing presented and recorded in Jackson’s contribution to *He Tohu*, the permanent public exhibition at the National Library, which is published in full on the [National Library website](#) (accessed 17 Dec 2023).

<sup>83</sup> This is an inexact analogy. It remains important that, in this model, persons are not simply subsumed into communities nor communities treated as singular persons. Instead, the boundaries of individual and communal interests remain contestable within both the independent and the interdependent domains of authority. That structure provides protection for persons amidst the power of all forms of communal legal ordering as well as in relations between legal orders.

- 3.19 This model of the relationship of interdependence around independence differs from the models emerging from *Matike Mai* and *He Puapua*. It is not an image of two governance spheres: one of tino rangatiratanga and one of kawanatanga, with overlap in the middle. Nor is it a whare with two sides and a structural connection. As models for a relationship between authorities, one difficulty with those models lies in doubt about what could justifiably be an independent domain of state authority that excluded the operation of Māori authorities. Wherever non-state authorities are better able to serve persons in overlapping and interacting communities – whether through independent or interdependent relations with state authority – relative authority rules out an exclusive state authority ‘zone’. Furthermore, as models for interacting *legal* orders claiming authority, the importance of both the claim and recognition of legality rather than mere force amplifies the doubts over independent claims to state legal authority.<sup>84</sup>
- 3.20 Contexts of relative authority, therefore, require that we not presume that common concerns can be addressed (only or at all) by monistic ordering. The question is not only what are the matters of common concern on which communities need common solutions, common mechanisms for resolving disputes and genuinely common institutions? It is what are the matters of common concern requiring independence, and what are those requiring interdependence, with authorities working in some combination (coordination, cooperation or contestation) to be recognised as addressing them together?
- 3.21 The visual representation of the model of interdependence around independence therefore looks quite distinct from the Venn diagram models of overlapping spheres of authority. Instead, the model may be represented diagrammatically by two concentric circles – a central core of tikanga independence surrounded by a ring of interdependent state law and tikanga. In a three-dimensional representation, the relative significance of the domains of independence and interdependence likely depend upon the perspective of the agent, much like looking through either end of a cylinder. From the perspective of persons whose activities primarily operate in the independent domain of tikanga, that domain will appear larger while the interdependent domain will look smaller. For persons primarily engaging in activities in the interdependent sphere, the domain of independent tikanga will appear smaller than the domain of interdependence.
- 3.22 Both legal orders in such a relative authority relation give up something, and this they give up mutually rather than in parallel. They both give up, crucially, the claim to independent legitimate authority in respect of matters of common concern. In addition, state law has to give up its current dominant powerful position, and tikanga has to give up its claim to restore its former dominant powerful position. On both sides, this means prioritising the realisation of legitimate authority over the operation of mere power.
- 3.23 The core concept of law set out earlier gives clues about what are the common concerns that tikanga and state law need to address together, interdependently, as well as clues

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<sup>84</sup> My earliest work on relative authority suggested that extreme contexts such as those requiring coordinated action in a national security emergency might justifiably be managed by one overarching exclusive authority. I now think that was a mistake. The absence of recognition of full exclusive authority undermines its claimant’s capacity to serve subjects, on its own, even in emergency contexts. This was arguably demonstrated in the responses to the early days of the COVID-19 emergency and the eventual vaccine roll-out, where the implementation of authority depended in very evident ways upon both the independent and interdependent role of Māori authorities (including hapū, iwi and non-kinship-based organisations) as well as state authorities. See Luke Fitzmaurice and Maria Bargh, *Stepping Up: COVID-19 Checkpoints and Rangatiratanga* (Huia Publishers 2021).

about what a domain of independence requires. These will ultimately be matters of continuing contestation, revision and development, just as all boundaries of law's authority shift and are perpetually open to challenge. Yet there is a foundational common concern that derives from the understanding of legality itself: how to ensure that law operates in such a way as to be law, not violence, equally and for all. A common aim is to avoid the mere power that operates when persons are subjected to domination rather than authority, in either direction. That search for the joint realisation of legality (or legalities) prioritises the common work that needs to be done where persons, places and communities are entangled together.

- 3.24 Before turning from relative authority to legality, it may be helpful to consider how this model (of interdependence around independence) can respond to key objections.

### C. RESPONDING TO OBJECTIONS

- 3.25 The first objection is something of a jurisprudence claim – that all the above attention to legitimate authority could be avoided by simply following Hart or Kelsen, arguing that law has a distinctive kind of 'legal authority', which is only a matter of legal validity determined by rules of recognition (Hart) or a grundnorm (Kelsen), separate from matters of moral justification for such authority. However, as suggested at 1.a.ii. above, a bare invocation of 'legal positivism' does not resolve questions of law's authority. Not only are there leading positivists (most obviously Joseph Raz) who deny that there is a separate domain of legal authority – instead law claims moral authority – but more importantly, an appeal to distinctive 'legal' authority cannot resolve questions of how to relate or evaluate multiple claims to such authority.
- 3.26 The more robust value-based objections require more care. Theories favouring independence of authorities, and singular legal ordering, may argue that having a monistic legal order is itself a matter of common concern because, without it, you cannot have a monopoly on public coercion, protection of persons against one another, a commitment to equality and human dignity and their protection through rights and general institutions of justice. More specifically, theories of independent *state* authority present the state as the best institutionalised form of such monistic legal ordering. The statist objection also argues that some use of force is necessary, and justified, in order for persons to live together in social and political communities. That justification is deeply embedded with principles of generality and evenness – so that force represents all against all, not some against some – and the objection is that enforcement could not be carved up or indeed pluralised without undermining the limited justification on which it rests.
- 3.27 Responding to this statist objection turns a principle of equality upon the very mantra of formal 'one law for all', which disguises that the imposition of *this* one law is a choice against a different law (for all). That choice unequally respects those for whom the chosen law is legitimately authoritative. If there are persons who can be better served by authorities other than the state, especially a state that has consistently proven itself a poor servant (or worse) of those persons, then to deny or even exclude the operation of other authorities for those persons is to deny that service of those 'subjects' matters as much as the service of others. For this reason, persons in Indigenous communities with continuing practices of authority are not straightforwardly understood as subjects of the state's authority, absent some way of relating the authority claimed by the state legal order to that of the relevant Indigenous legal orders.

- 3.28 This argument justifying the relativity of authorities (in which state and Indigenous authorities share an interdependent domain around a domain of independence) does not need to rely on the most controversial claims about identity nor resort to denials of difference. It needs instead to show that there is value in realising the legitimate authority of tikanga, not only for persons who live as members of communities in which that authority is directly practised but for all persons in settler state political communities that are irreducibly contoured by plural and (at times) contesting claims to authority over overlapping subjects. There is no value for anyone in an independent and exclusive state authority that serves only some of those within its territory, while an interactive or shared authority relationship in which the state operates with other authorities enhances its legitimacy by helping persons achieve what is of value for them. For the state, this will sometimes mean getting out of the way or (when it is required to serve subjects who are also served by overlapping Māori authorities) to ensure that its own involvement supports rather than interrupts the valuable services those others provide.
- 3.29 One way to present this argument is through the idea that it is valuable to persons to stand in justified relations with others that they cannot realise on their own. As a participant in a political community, embedded in a particular place, a person cannot, by themselves, bring about just relations with others. Nor can one person resolve or simply suspend reasonable disagreements about values. An individual cannot coordinate others' behaviour nor resource the provision of public goods and the protection of a shared environment. To realise those goals, or even just to pursue them, a person needs public institutions, authorities and enforcement. However, if the others to whom a person owes duties in a political community include persons for whom various legal and political authorities are (also or alternatively) valuable and claim to provide those services to them (or to all), then all those persons need all their potentially legitimate authorities to have ways of relating to one another. This is especially important if there have been relations of force and exclusion operating in the space of interaction, because this inevitably means that some persons have been subjected to force while others have had the luxury of recognising law's authority. Persons need the authorities that they recognise, and that are valuable for them, to engage with other authorities serving (and recognised by) persons other than themselves, all while realising that there are matters on which persons (and 'their' institutions) cannot be so tidily distinguished from one another and recognising that common concerns mean authorities are needed to serve all persons.
- 3.30 The reference to common concerns might generate the objection that, if the justification of authority is grounded upon the ways that persons must be served by authorities they collectively recognise, why is the solution not a single authority to serve (and be recognised by) all in common? This objection may encompass arguments from democracy, namely the claim that democratic institutions could be used to determine which, of competing claims to law's authority, should prevail. The objection treats a democratic institution as being sufficiently contestable to cut across deficits in the recognition of law's authority and to support recognition of a monistic status of legality.
- 3.31 A full response to arguments from democracy, and their significance for contexts of overlapping claims to authority, engages in matters of political theory beyond the present

paper's scope.<sup>85</sup> Yet there is a specific response that turns on the significance of recognition and its role in both legitimate authority and legality. In summary form, the key response is that, unlike majoritarian justifications for deciding what the content of law should be,<sup>86</sup> the status of legality itself is not and cannot justifiably be a matter for majoritarian determination. There is a normative difference between claiming a democratic mandate to make a law, change a law or repeal a law and claiming a democratic mandate to determine what law itself is. A majoritarian resolution to conflicting claims to legality is no remedy for the recognition problem; it is a denial that it matters. In contexts of competing claims to the status of legality, subjecting the question 'what is law?' to a democratic institution would be to subject recognition itself to the force of numbers and demographics. This is a different type of forceful override of legality but an override nonetheless.

- 3.32 The response also argues that there are collective practices and institutions shaping valuable recognition of the standing of authority and of the statuses of legality, which may include but are not limited to democratic practices and institutions. Recognition is not the same thing as consent or acceptance and is not reducible to democratic or other participatory measures. The presence of plural claims to authority increases the likelihood that there will be diverse and incommensurably valuable processes in which the standing of authorities may be both recognised and held to account, while their overlap and interaction means the substantive work of the authorities is more likely to require their collaboration or coordination. While recognitive practices in communities can and do shift over time, partly (though not only) in response to interactions between recognised authorities, they cannot be imposed upon nor required of persons. Both conceptually and as a matter of normative argument, 'enforced recognition' of authority or legality is no recognition at all.
- 3.33 As suggested above, to subject the question 'what is law?' to a democratic resolution denies the equal dignity of those who recognise other valuable authorities that overlap and/or interact with democratic authorities and whose service of their subjects is a key part of realising legitimate authority itself. The core response to democracy-based objections to relative authority then need not invoke distrust of the democratic process nor doubt persons' basic commitments to fair-mindedness nor worry about manipulation of public opinion by extremist views and misinformation nor cite any of the other contemporary threats to democratic integrity. It is (quite appropriately) founded on an argument for equality.
- 3.34 A related objection to the model of interdependence around independence might suggest that only interdependence is justified in the form of some sort of hybrid legal order. Part of the response to that concern is a denial that interdependence could be realised through hybridity. In practice, hybridisation may keep most of one beast and only a little of the other. A hybrid approach defines away any relationship between plural claims to authority, meaning that, by itself, it is unlikely to solve a deep-seated recognition problem in contexts of overlapping claims to authority. In our context, a hybrid

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<sup>85</sup> Democracy itself does not preclude nor answer the demands of relative authority. I have defended the potential for relativity of political authorities, including those that carry valuable democratic standing. See Roughan, 'Relative Political Authority' (n 76).

<sup>86</sup> In constitutional democracies, this is in any case a limited mandate subject to constitutional constraints.

state/tikanga authority or hybrid state/tikanga legality may still look and act very much like the dominant state/law. A hybrid may also be internally incoherent and therefore still more defective against measures of legality. For instance, it may struggle to square values and practices within both state and Indigenous authority forms.

- 3.35 Aside from practical difficulties, the point of principle at stake is that interdependence alone, even in its ideal form, could not resolve the recognition problem undermining law's legitimate authority. A strong independence domain is also needed in order to resolve the recognition deficit, because it is this domain of independent tikanga ordering from which the recognition of tikanga's relation to state law can be negotiated, represented and operated.<sup>87</sup> The core domain of independent tikanga, as a representation of authority for a collective (or many different collectives and their relations), is as important to the justification of interdependent authority as a core domain of personal independence is to the justification of public authority itself. Without a strong independent core, there may not be sufficient constraints upon the interdependent domain to avoid it turning into a form of continuing colonisation of tikanga in that domain nor sufficient bases from which to challenge whether the institutions operating the interdependent relations of state law and tikanga might overreach into the core.<sup>88</sup> That core domain is therefore central to protecting both independence and interdependence.
- 3.36 A final response might argue that, even if there is a justified independent domain of tikanga, it should be left to the dominant state order alone (through its legal and political institutions) to manage its boundaries. This view would trust state forms and processes to prevent their own overreach into the independent domain of tikanga. That would effectively surround a domain of independent tikanga with a domain of independent state authority rather than an interdependent domain of state and tikanga authorities.
- 3.37 Even an optimistic view, which has faith in the state form and its capacity for self-constraint, must concede the difficulty of establishing legitimate relative authority relations within a constitutional regime that has proven itself too flexible to impose its own constraints. A more realistic view is that, for a range of reasons, the state will likely continue to fail to pursue (let alone realise) legitimate relative authority. Again, however, the point of principle turns on the recognition problem. State claims to authority will continue to fail – which will continue the illegitimacy of its own authority in this regard – unless it can realise its relativity with Māori authorities. As so many others argue, therefore, new institutional forms and practices are needed to give effect to a relative authority relationship. That meeting point needs to be negotiated with sufficient practices of Māori determination of how Māori authorities are to be represented, manifested and applied within that relationship, not by state legal orders deciding those matters from its dominant vantage point.

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<sup>87</sup> Jackson (n 81). See also Annette Sykes, 'The Myth of Tikanga in the Pākehā Law' Nin Thomas Memorial Lecture, 5 December 2020 [2021] 8 *Te Tai Haruru Journal of Māori and Indigenous Issues* 7.

<sup>88</sup> See Moana Jackson, 'Justice and Political Power: Reasserting Māori Legal Processes' in Kayleen M Hazelhurst (ed), *Legal Pluralism and the Colonial Legacy* (Ashbury Publishing 1995); Ani Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Māori' in Michael Belgrave, Merata Kawharu and David Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (OUP 2005); Ani Mikaere, 'Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Māori' (2005) 8 *Yearbook of New Zealand Jurisprudence Special Issue – Te Purenga* 134.

- 3.38 The pursuit of legitimate relative authority between state law and tikanga therefore requires processes to manage relations between overlapping authorities and to configure interdependence while protecting and projecting independence. In the case of overlapping claims to the authority of law, these processes need also to be processes of legality, processes that subject the relations between authorities to the constraints of the rule of law. Otherwise, legality itself will be lost to politics or mere force.
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## SECTION FOUR

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# Resolving recognition

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- 4.1 As the responses to objections reveal, the first step towards realising relative authority and rescuing legality is to deal with the problem of recognition. In the discussion in part 2, both the recognition of authority and recognition of statuses of legality were disrupted by overlaps and interactions of state law and tikanga. There, recognition was a practice operating between persons wielding and receiving the law. Yet recognition is also often invoked as a practice between legal orders.
- 4.2 In contexts of interactions between state and Indigenous legal orders, the term ‘recognition’ is often used to characterise the recognition offered by a state order to and Indigenous order, for example, through common law or statute, it features in doctrines such as those associated with the recognition of custom or customary law, the recognition of aboriginal title, recognition of customary rights, ‘recognition orders’ or ‘recognition agreements’.<sup>89</sup> It is also deployed in the language of conflict of laws around the recognition of foreign law and foreign judgments. For Indigenous legal orders, such recognition has double-edged implications. It can be pragmatically crucial for making use of available protections or entitlements provided by state law, but it simultaneously seems to subjugate the Indigenous order to the state order doing the recognising.<sup>90</sup> The concern is that claimants of Indigenous legalities do not want nor seek recognition of their legality (which is already recognised by persons living with and using Indigenous law) from a state legal order.
- 4.3 Different approaches to recognition raise different versions of these concerns. Some approaches treat recognition as a unilateral practice – where one system uses its own valid rules, institutions and agents to recognise another. Others offer accounts of bilateral or mutual recognition – in which systems recognise each other. The following sections address the limitations of both unilateral and mutual recognition between legal orders before arguing that a key response to overlapping claims to legal statuses is to shift the object of recognition on to the relation between the legal orders rather than seeking ways for one legal order to recognise another.

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<sup>89</sup> Several models of recognition are helpfully analysed and evaluated in Coates (n 29).

<sup>90</sup> For an extended critique of recognition approaches, see Glen Coulthard, *Red Skin, White Masks: Rejecting Colonial Politics of Recognition* (University of Minnesota Press 2014).

4.4 Before turning to that concern, it is important to reiterate that the present account does not examine forms of ‘constitutional recognition’ of Indigenous legalities. Such forms are central to work on constitutional practice, reform and transformation. Constitutional layers of interaction seek to order plural claims to authority and legal ordering by using constitutional norms to put them in different places. Norms then constitutionalise the pluralism of legal ordering. They may establish federal separations of jurisdictions or looser arrangements of ‘quasi-federalism’ that depart from formal rule-based divisions and jurisdictional allocations and that may be closer to the interactions of legal ordering without the overlay of constitutional forms elaborated in the present work. Those constitutional arrangements are best examined by constitutional scholars. The present account, in contrast, does not subject interaction of legalities to a singular constitutional framework. It takes the position that, in our context, constitutions, like legal orders, can be understood in the plural and not the singular.<sup>91</sup> Such constitutional pluralism takes us back to the direct questions of the relationship between orders and the problems of recognition in that relationship.

## A. UNILATERAL RECOGNITION

4.5 Under a unilateral model of recognition, one system determines for itself how it recognises the other. This is the standard form of recognition operated through statist legal tools of both incorporation and conflict of laws.

4.6 Until recently, the standard model of interaction has seen state legality apply norms from tikanga through either common law doctrines of recognition (treating tikanga as akin to general custom) or statutory references. Despite their differences, these are both forms of unilateral recognition in which one system determines for itself how it engages with the other (i.e. state legality uses state legal forms to recognise tikanga). In earlier work, I have argued that practices of legislative reference to tikanga should be regarded as associations not between words, concepts and rules of different systems but between the systems themselves so that the words, concepts and rules invoked by statutory reference carry with them the authority structures of the system from which they come.<sup>92</sup> That kind of association between legal orders cannot be achieved by a unilateral model that treats such references as forms of incorporation of tikanga.

4.7 As practices of state legality alone, such practices of incorporation of tikanga by state law amount to a ‘co-option’, an unjust taking or a recolonisation of tikanga.<sup>93</sup>

4.8 Technical accounts in jurisprudence helpfully distinguish the incorporation of custom (or morality) from recognition of a foreign legal order. Norms drawn from custom and

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<sup>91</sup> See Carwyn Jones, ‘A Māori Constitutional Tradition’ (2014) 12 *New Zealand Journal of Public and International Law* 187. On plural constitutions in historical terms, see Robert Joseph, *The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852* (Te Mātāhauariki Institute 2002); David V Williams, ‘Constitutional Traditions in Māori Interactions with the Crown’ (2012) 12 *New Zealand Journal of Public and International Law* 231. Andrew Sharp has examined the continuity and interaction of plural constitutional traditions without truncating interactions by formally resolving, recognising and reifying their content. See Andrew Sharp, “‘This is My Body’”: Constitutional Traditions in New Zealand’ (2014) 12 *New Zealand Journal of Public and International Law* 41; and Robert Joseph, *Comparatively Speaking: A Summary Paper of Preliminary Principles and Aims* (Te Mātāhauariki Institute 2001).

<sup>92</sup> Roughan (n 60).

<sup>93</sup> Sykes (n 87).

morality are thought ripe for incorporation by a posited and systemic legal order, while the rules of foreign legal systems are typically treated as being applied, but not incorporated, by norms of the host system.<sup>94</sup> A range of reasons are given for this different treatment. Raz argues that the non-incorporation of another legal order's norms is part of understanding law as the political institution that it is, i.e. an institution that orders a polity, and in which the ability to recognise 'my' law (and treat it as authoritative), and not the law of some other polity, is important.<sup>95</sup> Even without taking a deeper dive into the jurisprudence of persons, affiliations, membership or obligations within communities, the point is that, given the important roles of law in societies, legal ordering needs to be identifiable and recognisable as making claims of authority over persons in those societies. In context, if tikanga is to be recognised as carrying its own claims to authority rather than just a claim to provide guidance about customary practices of value that could be subsumed within a monistic legal order, it requires a model of recognition that does not monistically incorporate or subject one legal order to another.

- 4.9 The field of conflict of laws offers a different model of recognition, which still features unilateral determinations of relations between legal orders but applies the norms of another system without incorporation. Orthodox conflict of laws techniques entail a state legal order using its own norms (unilaterally) to determine when it has jurisdiction and when to apply foreign law rather than its own.<sup>96</sup> These techniques offer a way of dealing with private claims between persons on either side of borders, both inside and outside the state.<sup>97</sup> They operate to support an inter-public or inter-sovereign relation based on practices of comity, deference and reciprocity between state legal orders.
- 4.10 On its face, treating a state/tikanga legal association as a genuinely 'inter-public' (or even inter-sovereign) model of interaction may be attractive to advocates of Indigenous legalities as well as presenting lawyers with a broadly familiar and workable toolkit.<sup>98</sup> Yet there are problems with a conflict of laws-type approach, which can be summarised in three related concerns: (i) the unilateral recognition model found in orthodox conflict of laws gives too much power to one legal order to determine the terms of its interaction with the other(s); (ii) a conflicts model inadequately captures overlaps of plural authorities and subjects or responds to matters of common concern that they share; and (iii) in state-

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<sup>94</sup> Joseph Raz, 'Incorporation by Law' (2004) 10 *Legal Theory* 1; Cormac Mac Amhlaigh, 'Taking Identity Seriously: On the Politics of the Individuation of Legal Systems' (2022) 42 *OJLS* 521.

<sup>95</sup> Raz (n 94).

<sup>96</sup> That unilaterality is softened in the inter-state context by efforts to coordinate states' conflict of laws doctrines by subjecting them to international conventions.

<sup>97</sup> Karen Knop, 'The Private Side of Citizenship' (2007) 101 *Proceedings of the Annual Meeting (American Society of International Law)* 94. Newer forms of 'relational' conflict of laws approaches argue that the field's grounding upon a relational foundation of comity between nations may be reconceived as a kind of ethic of 'hospitality' towards persons. Horatia Muir Watt, 'Conflicts of Laws Unbounded: The Case for a Legal-Pluralist Revival' in Berman (n 2). I have argued against appeals to such models in contexts of state and Indigenous interactions because of the models' emphases upon insider and outsider distinctions and the notions of 'host' and 'foreign', each of which are normatively and descriptively problematic in this context. See Nicole Roughan, 'Plurality of Laws and Conflict of Laws: Reconciling Through Recognition?' in Ralf Michaels, Roxana Banu and Michael Green (eds), *Philosophical Foundations of Private international Law* (OUP, forthcoming 2023). A draft version is available [here](#).

<sup>98</sup> The conflict of laws toolkit extends into approaches to recognition and enforcement of foreign arbitral awards. On the potential of arbitration and models of recognition of foreign arbitral awards, see Amokura Kawharu, 'Arbitration of Treaty of Waitangi Settlement Cross-Claim Disputes' (2018) 29 *Public Law Review* 295; and Kawharu, 2022 Nin Tomas Memorial Lecture.

Indigenous contexts, the supposedly private claims between persons that are the object of conflict of laws (as ‘private’ international law) implicate but cannot resolve the very claims – to public authority, coercive enforcement and the administration of justice – that the interacting legal orders make against each other.<sup>99</sup>

- 4.11 The use of conflict of laws tools – which are designed to determine one forum’s applications of separate (host or foreign) laws to separate (host or foreign) persons and their activities – pre-empts more interactive responses to overlapping claims to legal ordering. The ‘singular forum’ approach of conflict of laws presents a mismatch with efforts to recognise and respond to the interactions of legal orders’ norms, authorities, subjects, officials and institutions.

## B. MUTUAL RECOGNITION

- 4.12 Within both conflict of laws and pluralist theory, there are prominent efforts to shift away from unilateral models of recognition towards mutual models. In a model of mutual recognition, the legality status of the interacting legal orders depends upon both internal and ‘external’ rules of recognition.<sup>100</sup> Roughly put, each legal order needs to recognise the other. Although a mutual recognition model may appear more attractive than a unilateral model, it still enshrines the structural dependence of each legal ordering upon recognition by another.<sup>101</sup> Making that dependence reciprocal (so that the legality status of state law would depend upon recognition by Indigenous law and vice versa) inadequately responds to the power imbalances that typically disrupt and may prevent practices of genuine mutuality. Mutual recognition risks subjugating the less-powerful legal order to the recognitional power of the dominant order, pressuring any perception of reciprocity.
- 4.13 Mutual recognition also fails to resolve both the sociological and normative problems of recognition itself. Why should (and how could) a legal order that is internally recognised by those who are its subjects and agents also be subjected to the artificial or doctrinal recognition of another legal order? Furthermore, if a rule of recognition is primarily a device of recognition among officials, why should (and how could) the recognitive practices of one legal order’s officials have any impact upon the legal status of another? Recourse to mutual recognition models seems to further inflame rather than address the concern that ‘external’ recognition itself is neither wanted nor needed for a legal order to operate as law.
- 4.14 Moreover, the mutual recognition models of conflict of laws appear as a kind of mutual unilateral or mutual yet parallel approach. Each legal order recognises the other, in its own terms, and so the model lacks a meeting point between the recognition that each side offers the other.<sup>102</sup> One legal order’s recognition of the other may be coherent according to its own rules but fail to offer any fora for responding to overlaps or interactions with the other legal order (and its own practices of recognition). Each legal order is thought to have its own ways of recognising the other legal order and determining whether to apply

<sup>99</sup> Roughan (n 97).

<sup>100</sup> Ralf Michaels, ‘Law and Recognition – Towards a Relational Concept of Law’ in Roughan and Halpin (n 2); and Michaels, ‘Tertiary Rules’ in Krisch (n 2).

<sup>101</sup> Roughan (n 97).

<sup>102</sup> Elaborated in Roughan, ‘Meet Me in the Middle?’ (n 77).

its own or the other order's norms without engaging in the further layer of contestation and engagement between those practices of recognition. If the relation between overlapping legal orders is not simply to be subjected to de facto power discrepancies, it will require some forms or fora for testing out those practices of recognition and the impacts each order has on the other's claims to legal status.

- 4.15 Even in its mutual recognition variant, a conflict of laws model therefore falls short on both the independence and the interdependence models of state law-tikanga interactions. An alternative approach shifts the object of recognition away from the legal orders themselves and on to their relationship.

### C. RECOGNITION OF RELATIONS

- 4.16 Contexts of overlapping legal orders do not require each order to recognise the other in order for them to operate as law. Instead, a model of 'recognition of relations' requires both legal orders to recognise their relativity to one another. There must be recognition – by both subjects and officials – of the claim to legality presented by 'their' law, but there must *also* be recognition that their law is related to other legal orders.
- 4.17 Recognition of relations turns upon practices of recognition among both agents and subjects of different legal orders. Arguably, whenever arguments invoking tikanga are brought before the courts, there is recognition of some kind of relationship between the legal orders. Such recognition is put to the test whenever persons make claims invoking both legal orders, for example, contesting their interaction on opposite sides of disputes. These claims invoke broader practices of recognition among and between persons in interacting normative communities as participants in interacting legal orders.<sup>103</sup>
- 4.18 While there are important practices of recognition of relations on the part of subjects of interacting legalities, the model places a great burden on the 'officials' or agents of the law(s), who need to operate as both agents of legal orders *and* agents of their interaction.<sup>104</sup> The most obvious need for recognition of relations arises in the processes and practices of reasoning, interpretation, judgment and discretion among the institutions and agents claiming law's authority and wielding law's coercive force (on both sides of the interaction).
- 4.19 This recognition model does not make one system dependent on the other's recognition. Nor does it enshrine the content of that relationship. Recognition of relations between legal orders leaves open possibilities of cooperative, coordinative and contesting relations, and in some cases, it may support independence rather than jointness.<sup>105</sup> The point is that recognition of the relationship requires institutions, processes and tools for managing the relationship, whatever its content.

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<sup>103</sup> See Jeremy Webber on normative communities, in Webber (n 41) 192; James Tully, 'A Fair and Just Relationship: The Vision of the Canadian Royal Commission on Aboriginal Peoples (1998) 57 *Meanjin* 146; John Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press 2016).

<sup>104</sup> Scholars and judges alike have returned to examples of the increasing recognition for tikanga among non-Māori persons and within non-Māori. On the burden on officials, see Nicole Roughan and Andrew Halpin, 'Promises and Pursuits' in Roughan and Halpin (n 2).

<sup>105</sup> See James Tully, 'Recognition and Dialogue: The Emergence of a New Field' (2004) 7 *Critical Review of International Social and Political Philosophy* 84; Roughan (n 35). James Tully, 'The Negotiation of Reconciliation' in *Public Philosophy in a New Key, Volume 1: Democracy and Civic Freedom* (CUP 2008).

- 4.20 Recognition of the relation enables each legal order to practise its own forms of recognition and represent these outwards into a meeting point with the other. That outreach can only operate on the back of self-recognition within each legal order. For state law, this includes recognition of a more restrained claim and more inclusive forms than the orthodox claims to supremacy and exclusivity. For tikanga, Nin Tomas has argued, it includes self-recognising more systematically and universally, for example, by recognising central and common principles and processes for resolving differences between different hapū. Those can then be represented into the inevitable and justified meeting points with state law.<sup>106</sup>
- 4.21 This point raises a critical constraint upon recognition of relations between legal orders. For those relations to be relations of legality, the forms of recognition cannot leave recognition itself up to individual arbitrary discretion, nor chance, nor politics, nor force (including the force of numbers or demographics). Recognition of relations requires institutions, procedures, principles and rules operating normative constraints upon the relation. This might appear as an overly legalistic (or perhaps an overly statist) way of thinking about relations and perhaps out of synch with forms of recognition of relations that operate within tikanga. However, the point is not to overrule or subvert more relational ways of managing interactions between communities with different ways of doing legal ordering. Reiterating the broad notion of institutions set out earlier in this work, such relational and relationship-building practices are among the kinds of institutions that may be applied outwards to the relation between legal orders.
- 4.22 Unlike both the unilateral models of recognition and the ‘mutual but parallel’ models of recognition (which are both governed by one system’s norms and institutions), the recognition of relations therefore opens up (and likely requires) the possibility of new combinations of the interacting orders’ institutions, forms and authorities to manage the relation between tikanga and state law. Shifting the object of recognition on to the inter-relationship between legal orders creates a demand for the operation of legality between them in which the relationship itself is subjected to the rule of law. This entails both systems recognising the relationship in which they operate together as a relationship to be administered through legality rather than a relation of mere power determined by imposing one legal order upon the other.

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<sup>106</sup> Nin Tomas, ‘Key Concepts of Tikanga Maori (Maori Custom Law) and Their Use as Regulators of Human Relationships to Natural Resources in Tai Tokerau, Past and Present’ (PhD Thesis, University of Auckland 2006) 3. See also Tomas, ‘Coming Ready or Not! The Emergence of Maori Hapu and Iwi as a Unique Order of Governance in Aotearoa New Zealand’ (2010) 3 *Te Tai Haruru: Journal of Māori and Indigenous Studies* 14.

## SECTION FIVE

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# Interlegality

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- 5.1 How could legality itself apply to a relation between legal orders? What are the options for institutionalising interactions between state law and tikanga in order to realise both their claims to authority and legality?
- 5.2 To rescue legality from defective claims to independent or supreme legality, there need to be constraints upon state law's reach into Indigenous legalities, institutionalising humility in those claims. Political limits upon wielders of state power do not provide the necessary legality forms to constrain state legal orders from forcefully intervening upon Indigenous ones or for protecting against the power imbalance that frequently renders Indigenous legalities vulnerable to state legalities. Rather than hybridisation between legal orders (which lends itself to practices of state override) or conflict of laws approaches (that empower state legality while distorting 'foreignness'), a model of 'interlegality' offers forms and institutions for contest, correction and a kind of distribution of statuses of legality.
- 5.3 Interlegality operates in the domain of interdependence that surrounds the core independent domain of tikanga, but it must also offer fora for testing and managing that boundary. The boundary, from either direction, cannot be sharp or fixed, as people and their activities move between the domains of interdependence and independence and as identities, needs, preferences and capacities change. Interlegality forms include tools for the continuous process of testing whether and how conduct is to be governed by interdependent or independent authorities. These include forms and institutions through which tikanga is engaged in patrolling the internal boundaries between those aspects of tikanga engaged in interdependence and its independent operation.
- 5.4 Returning to the suggested diagram of concentric circles, interlegality operates the outer domain of interdependence as a domain of law and provides that the boundaries protecting the space for a core of tikanga independence are themselves contestable, subject to continuous interlegal reflection and review. In its strongest form, interlegality requires institutions through which statuses of legality can be both contested and administered.<sup>107</sup> These make the meeting point of interaction between legal orders itself

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<sup>107</sup> This reflects the models that defend practices of recognition as ongoing dialogues between legal orders, not end points to be achieved. See Tully, 'Recognition and Dialogue' (n 105); and James Tully, 'The Struggles of Indigenous Peoples for and of Freedom' in Ivison, Patton and Sanders (n 39). It is important, however, that interlegality requires institutional forms for deliberate interaction and does not leave dialogue only to more political relational models.

a space for legality rather than force or politics.<sup>108</sup> In metaphorical terms, subjecting the interdependent domain of tikanga and state authorities to interlegality offers a life-ring for legality itself.

- 5.5 Unlike legal forms that allow one order to unilaterally determine its relationship with the other, the forms of interlegality need to be recognised by both legal orders. Their content will be deeply context-dependent, arising from the practices of interaction and critical reflection on those practices. (Some possibilities are discussed below.) In simplified form, however, interlegality will require both genuinely common law and genuinely shared institutions for contesting the statuses of legality. Interlegality must draw upon legal forms from both orders to govern the relationship itself, such as arrangements for either separating or sharing jurisdictions between the interdependent and independent domains, special institutions or institutional combinations for hearing disputes that invoke both legal orders and for making rules to be applied in common across both orders.
- 5.6 Aside from the brief comments below, I leave it to expert jurists in each/both legal orders to explore what in practice is possible together. The theoretical point is that adaptations of existing institutions and creation of new institutions must be mutual and negotiated, designed to get to meeting points (even if these are points of contestation), if they are not to fall back into merely parallel practices of unilateral recognition. Yet for that to happen, we would need sufficiently robust institutional practices for representation of legal orders in some kind of dialogical process with one another.
- 5.7 Under a dialogical recognition model, tikanga and state law processes (making, applying and interpreting rules, principles and values) need to be engaged together to work out (i) what are the matters of common concern and (ii) on those matters of common concern, what are appropriate cases for shared decisions, deference or referral. That will not be easy nor a once and for all process. Working out and then continually revising what are the matters of common concern and what matters can be dealt with exclusively through tikanga will itself have to be a dialogical, continuously renegotiated process and will at least initially require a fair amount of creativity.
- 5.8 The orders may need to adapt in order for each to recognise their meeting point with one another. These might include, on the part of state law, adopting forms through which to recognise local expertise about tikanga that is not ‘neutral’ and deferring to tikanga processes and content to determine how the expertise of contending parties is tested and resolved. Wherever tikanga content is invoked before state legal institutions, an interlegal response would treat that content to invoke not simply concepts, rules, principles and values but also the institutions, authorities and decision-making processes of tikanga.<sup>109</sup> Interlegality requires that state courts do not simply decide, alone, on matters that invoke both tikanga and state law but instead need institutional arrangements for deciding together with tikanga authorities, for deference to tikanga authorities and/or referral to tikanga institutions. Meanwhile, tikanga content and processes may need to be more transparent or systematically represented if they are to be applied more generally or indeed deferred to more regularly when they meet with state legality claims. This of course triggers the concern that Indigenous legal orders have

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<sup>108</sup> Jan Klabbbers and Gianluigi Palombella present ‘inter-legality’ as a distinctively legal rather than political response in *The Challenge of Inter-Legality* (CUP 2019).

<sup>109</sup> Roughan (n 60); Jones (n 7).

already done or been required to do most of the ‘adapting’ in forced meetings with state law, and more should not be expected.<sup>110</sup> The claim here would limit such reform only to that required for representation into the meeting points with state legality in the domain of interdependence, leaving open what happens in the independent core. In both cases, adaptations may require the creation of new institutions, new procedural innovations, new rules or principles of substantive law and revised practices of legal method, reasoning and interpretation.

- 5.9 Both state law and tikanga may be primed to operate such dialogical and adaptive processes that both feature respect for existing rules, values and traditions alongside the flexibility to develop both substance and processes to meet changing needs. The most optimistic reading sees both legal orders able to harness together their creative and their customary characteristics, as well as their own elements of openness and decisiveness, into forms of interlegality.
- 5.10 For legal practice, the key question is then to ask what interlegality entails. Here, it is important to reiterate that the scope of the present paper does not examine constitutional tools nor inter-constitutional tools for relations. While a treaty might guide interlegality<sup>111</sup> – and in our own context, te Tiriti o Waitangi and its protections for the continuity of tikanga are an important constitutional constraint upon interlegality forms – the treaty form itself is attuned to more general rather than particular legal arrangements. Legal institutions on both sides of interactions still have to grapple directly with the practice of interlegality between tikanga and state law.
- 5.11 The context-dependence of legal forms means that forecasting what interlegality might require, in our own context, starts with asking whether existing tools of interaction might be recognised as forms of interlegality and where new tools are required.

## A. FORMS AND TOOLS OF INTERLEGALITY

- 5.12 Although the present paper is not an effort to interpret past or current trajectories of legal practice, there are lessons for an interlegality model in several key recent developments. Recent case law and legislative enactments, as well as recent work of the Law Commission, suggest ways in which agents and subjects of both state law and tikanga have been grappling to find ways to operate and generate forms of interlegality. Several emergent forms for institutionalising humility suggest pathways to interlegality through forms of recognition of relations between state law and tikanga.
- 5.13 Legislative forms searching for interlegality are most prominent in the work to develop frameworks for legal personhood within the settlements effected through Te Urewera Act 2014 and Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. These have

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<sup>110</sup> In addition to the concerns raised in Mikaere (n 4) and Coates (n 29), see, for example, Hendry and Tatum on the US context, acknowledging the artificiality and controversies involved in encouraging US tribal legal orders to adopt some liberal legal forms. Jen Hendry and Melissa L Tatum, ‘Justice for Native Nations: Insights from Legal Pluralism’ (2018) 60 *Arizona Law Review* 91.

<sup>111</sup> Tully’s extended accounts of intercultural and intersystemic constitutionalism is built upon an account of historical treaty practices as evidence of principles (mutual recognition, consent and continuity) that distinct political traditions not only can accept but have accepted. See Tully (n 105). Treaties themselves may be understood to offer ‘interface norms’. See Nico Krisch, ‘Introduction’ in Krisch (n 2); and see the chapters from Mills and Anker in the same collection. On the Treaty form, see also Aaron Mills, ‘What Is a Treaty? On Contract and Mutual Aid’ in John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press 2017).

been extensively examined and evaluated by leading scholars in work not repeated here.<sup>112</sup> The present gloss on those accounts is the suggestion that the frameworks may be regarded as efforts (albeit imperfectly realised) at interlegality insofar as they generate interlegal constraints on interdependent authorities and decision-making processes. Tikanga forms recognising personhood were met with state legal forms for doing the same, coupled with the development of new institutional mechanisms designed to give effect to the shared and interdependent object of both state law and tikanga in that context: protection for those recognised persons.

- 5.14 The Law Commission’s independent examination of the reform of the law of succession also grappled directly with the interlegality challenge represented by the possibility of ‘succession’ to taonga. The scoping paper, submissions and final report are replete with accounts of how tikanga and state lawyers conceive of that challenge and its resolution.<sup>113</sup> Again, this can be presented as a question of interlegality, but unlike the specific legislative interventions around personhood, it expresses direct evidence of broader recognitive practices of the community of law’s agents and subjects. It also expresses the challenge of recognising the relation between legal orders and the need for systematic attention to that relation.
- 5.15 Through the common law and the cases through which it is generated, the courts are pressed to respond to the most immediate and frequent challenges of interlegality. It follows that the common law carries some of interlegality’s most powerful potential and pitfalls. The following analysis is focused upon the general courts and the structure of the court system as a whole. It is important to observe, however, that the specialist courts (including those dealing with particular types of criminal offending) feature practices and processes that are not always well captured in theoretical engagements with the common law. The alcohol and drug treatment courts, the Rangatahi courts, the Environment Court and of the course the Māori Land Court and Māori Appellate Court all present processes and substances that are designed better to recognise the relations of state law and tikanga.
- 5.16 There will be lessons in those specific institutions as well as inter-institutional pathways of delegation, referral and joint decisions that are likely to be crucial to the practical realisation of interlegality. When direct claims to tikanga legalities are brought before the general courts, however, there are opportunities for the courts to claim to make authoritative distributions or corrections of statuses of legality with wider systemic implications. To the extent these influence wider recognition practices, such institutions act as distributors of a sort as well as institutions for the correction of mistakes or injustices generated over denials of the statuses of legality.
- 5.17 The general courts have long grappled with interactions of state law and tikanga, intensifying over the last decade in response to a wave of cases that have tipped from

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<sup>112</sup> See, for example, Jacinta Ruru, ‘The Flow of Laws: The Trans-jurisdictional Laws of the Longest River in Aotearoa New Zealand’ in Janice Gray, Cameron Holley and Rosemary Rayfuse (eds), *Trans-jurisdictional Water Law and Governance* (Routledge 2016); Jacinta Ruru, ‘Listening to Papatūānuku: A Call to Reform Water Law’ (2018) 48 *Journal of the Royal Society of New Zealand* 215; Katherine Sanders, ‘Beyond Human Ownership?’ Property, Power and Legal Personality for Nature in Aotearoa New Zealand’ (2018) 30 *Journal of Environmental Law* 207.

<sup>113</sup> Te Aka Matua o te Ture | Law Commission, *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person’s property on death* (n 1); and submissions on that project.

specialist into generalist legal and judicial practice at all levels. A large body of literature examines the difficulties of reconciling different approaches – difficulties that are strung together by the impossible (and I have suggested illegitimate) task of calibrating an interaction between the legal orders within supreme and independent claims of state legality. The current wave of this interaction (in striking contrast from the dominant twentieth century approaches in which recognition was either denied or controlled by common law doctrine) features efforts, apparent in a growing number of judgments, to seek tools for deference or referral to authorities and institutions of tikanga.

- 5.18 Where courts in the past have readily pronounced on what particular tikanga concepts required (for example, where they have been incorporated into statute or recognised as ‘custom’ by common law doctrine), we now see instances of courts claiming or seeking to limit the impact of their own decisions upon the independence and integrity of tikanga as a system.<sup>114</sup> Some of the judicial approaches in *Ellis* suggest that the courts may be increasingly reluctant to make independent determinations of how to operate the relation of tikanga and state legality, instead invoking tikanga-consistent or tikanga-determined procedures in preference to solo court determinations.
- 5.19 In rejecting the *Loasby* approach to incorporation (under which norms of tikanga were customs to be incorporated (or not) by the application of common law rules), the court clarified the trajectory from *Takamore* and affirmed earlier arguments that the *Loasby* ‘test’ was inappropriate for the recognition of tikanga.<sup>115</sup> The separate judgments then appear to keep alive both a looser sense of the recognition of tikanga – offering up its principles, rules, values or other content into the common law in the mix with everything else – as well as the recognition of tikanga having independent authority as a system of law that is not affected by what the courts do through the common law, replete with its own institutions and authorities. The tensions between these models represent the systemic challenge that drives the present project.
- 5.20 Against the older models of common law recognition, aspects of *Ellis* point to a potential interlegality model that our dispute resolution systems are not yet institutionally equipped to realise in full. The interaction between authorities on display in *Ellis* ultimately fell short of realising interlegality because of the formal unilateral structure of the court’s decision and the split substantive findings about how to deal with the applicable tikanga content. The Statement of Tikanga was presented (only) as evidence, and the substantive outcome was formally and exclusively a matter for the court.
- 5.21 Looking through an interlegality lens, however, the most significant aspect of the case may be the practices of recognition on display in *Ellis* – among judges, the appointed tikanga experts, the Crown and appellant’s lawyers, the intervenors – that in different ways expressed the significance of tikanga operating as general law without giving up its independence or integrity as the first law of Aotearoa. The substance of both the majority’s position and the position of the tikanga experts was highly deferential in recognition of their relations. The minority judgments also placed considerable weight on

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<sup>114</sup> *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at [365]; *Ellis* (n 8), for example, see [111], [120] per Glazebrook J.

<sup>115</sup> Glazebrook J [112]–[116]; Winkelmann CJ [177]; Williams J [260].

the joint statement and its determinations of how a decision should be made.<sup>116</sup> Such recognition was also evident in the parties' presentation of the expert consensus as a joint (and not contested) statement and in the invocations of broader social practices of recognition of relations between tikanga and state legalities. Both the process and dialogical character of aspects of the *Ellis* reasoning arguably represents a practice of broader recognition of the relation between the legal orders.

- 5.22 In *Ellis*, a Statement of Tikanga, prepared by Sir Hirini Moko Mead and Professor Pou Temara, was presented jointly by the parties as evidence (and, significantly, appended to the judgment). The joint statement documented the consensus positions reached by a highly esteemed yet ad hoc group of tikanga experts convened in a wānanga process to address the question not only of the content of tikanga but also (and crucially) whether and how tikanga was relevant to the questions before the court.<sup>117</sup> Seeking expert evidence on that question rather than having the court assert its own independent expertise and authority to determine the very applicability of tikanga may be interpreted as an aspect of recognition of the relationship of state law and tikanga and the relativity of state law's claim to law's authority.
- 5.23 The majority judgments effectively relied upon that statement to answer the court's question about the relevance and applicability of tikanga rather than simply asserting common law doctrine and common law method to control the application of tikanga. According to the mātanga, tikanga was applicable and should be applied by the court notwithstanding the concerns over doing so – concerns that several of the judgments directly repeated. Had the tikanga experts come to the opposite conclusions or even disagreed on that point, it is difficult to imagine the judges relying on tikanga to the extent that they did.
- 5.24 Such recognition is significant, and the deference shown by the majority to the content of the Statement of Tikanga is striking because it corrects the more piecemeal ways in which tikanga had been recognised by older doctrinal approaches in the common law. It replaces the incorporation of particular and isolated tikanga concepts with a robust recognition of the relationship of state law and tikanga as legal orders. The court was not simply seeking evidence of either an 'external' legal order or a 'custom' to be recognised by the common law but about the applicability of tikanga as law. This invokes not only substantive tikanga content but also the forms and institutions of authority and decision making that accompany such content. Seeking evidence on the applicability of tikanga appears as a type of outreach (albeit one limited by the evidentiary form itself) to the operation of tikanga and an invitation to its interaction with state law. Although the outreach and the affirmative response about the applicability of tikanga still operated with the court acting as the determiner of the legal outcome, the case displays some recognition of a relationship through interlegality. Furthermore, although this was a case of substantial areas of consensus and coherence between legal content in both orders, the processes themselves did not remove the potential (and indeed the likelihood) of

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<sup>116</sup> O'Reagan and Arnold JJ at [279] thought this was not an appropriate case to make more general statements about tikanga, while thanking the experts and intervenors for their evidence. Yet at [316] they rely upon the joint statement, quoting it directly: "[it] is for the rangatira, in this situation the Court, to decide in accordance with its own principles and rules".

<sup>117</sup> *Ellis* (n 8) (Appendix).

disagreements within and among the different forms of authority being represented in that interaction.

- 5.25 In this way, the recognition operating in *Ellis* differs from the models in which a singular hybrid legal order engulfs tikanga and differs from the monistic effort to treat tikanga as part of the values of the common law but still subject to determination by the courts. One way of reading this recognitive practice is that it positions tikanga, like equity and customary international law, as types of law that can be applied by the courts but that are not (or not originally) sourced in the court's own rulings.<sup>118</sup> Their authority does not derive from court judgments. This reaffirms that the courts are not only agents of the English/settler common law as developed through a long trajectory of cases. They wield and apply other law too, in recognition of relations between legal orders. However, the authority of tikanga, unlike the other types of law applied by the courts, is not latent (as for equity) nor dispersed across a community (in the manner of different types of custom). The authority of tikanga lies elsewhere and is operated through agents and institutions of its own.<sup>119</sup>
- 5.26 Turning to those agents and institutions of tikanga, the second key element of recognitive practice in *Ellis* is that recognition of the relation, and the need for interlegality, was arguably also evident in the position of the tikanga experts. Their consensus position recognised tikanga as a legal order extending beyond the regulation of Māori communities and thus recognised its relation with state legality. Yet there is also recognition of the authority of the court and its role in applying general law, including applications of tikanga, notwithstanding the experts' concerns about the impact of the courts applying or misappropriating tikanga.<sup>120</sup>
- 5.27 This “ultimate group consensus” was of course reached by a select group of experts, and despite the undoubted mana of the participants, there can be differing positions regarding the desirability of (and the forms for) recognising relationships of tikanga with state legalities as well as divisions over representing tikanga content.<sup>121</sup> There is no exclusively authoritative tikanga institution upon which a relationship of interlegality could be constructed.<sup>122</sup> The authority of tikanga is most often represented locally, transmitted through institutions and persons that will not always cohere or reach consensus on its content nor its relations with state legality. This reinforces that a key challenge for an interlegality model will be to devise forms and institutions to contest the ways in which tikanga is represented and asserted in its relations with state legality.

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<sup>118</sup> The example of equity is probably now a stretch – the joining of common law and equity jurisdictions means that the courts develop equity through their rulings, yet it sometimes still matters that, strictly conceived, common law and equity have different sources, content and rationales. There is, however, no relative claim to authority made by a community recognising equity. The analogy here is designed only to show that the courts can work with different types of legal ordering, together.

<sup>119</sup> See, for example, Stephens (n 68).

<sup>120</sup> ‘Statement of Tikanga’ in *Ellis* (n 8) at [52].

<sup>121</sup> These may also differ across different combinations of what Glazebrook J described as the “matrix of iwi, hapū and whānau relationships”. *Ellis* (n 8) at [170]. See also Sykes (n 87).

<sup>122</sup> Relativity of authority and relations between authorities may be as much a feature internal to tikanga as it is a feature of the relationship between tikanga and state law.

- 5.28 In addition to institutional constraints on state legality claims, a key challenge therefore is to engage forms for representing tikanga in its outreach to state legalities. More might also be done to imagine and to resource new institutions. Praise for the wānanga process engaged by the parties in *Ellis* is shadowed by the observation that this process may not be widely accessible due to the resources it required.<sup>123</sup> If it were simply a matter of resources, the question arises why not rework resourcing, including time allocations and funding, in order to resource some form of standing body of tikanga jurists to represent tikanga in its interactions with state legality, both to contribute to the development of common law and to operate as a decision maker in its own right on questions that require deference to tikanga authorities? There are other initiatives surrounding the structure and operation of the court system from which to draw lessons and also to suggest that there may be resourcing for new forms and initiatives.<sup>124</sup>
- 5.29 It is not, of course, a mere question of resources. There are also matters of contestation, representation and division that any standing body would need to address and continually provide avenues for. However, for an interdependence domain to operate as a domain of interlegality, there may be few alternatives to a standing body (or bodies), which need not look anything like a state court, to hear and deliberate upon the questions that interlegality raises. There are, in existing practice as well as in past efforts, powerful models of institutional formation and operation – for example, models found in practices of the Māori Law Commission and Te Hunga Rōia Māori o Aotearoa as well as the current developments to moderate the content of tikanga education within the law schools – that may assist in developing forms for the representation of tikanga in recognition of relations and practices of interlegality.
- 5.30 At the same time, however, there may be a very real sense in which, according to tikanga, local rules and principles could only apply to particular places or persons and/or could only be administered in local tikanga-based institutions. In the domain of matters of common concern, however, which does not of course cover all matters of personal, interpersonal or community life, that argument may be met with the operation of those elements of tikanga that deal with relations to others outside of whakapapa relations and with the operation of disputes between groups with different tikanga. Perhaps more importantly, the ways in which tikanga itself appears to connect persons and places beyond kinship relations means that a genuinely common law embedded in (and applying to) Aotearoa New Zealand may continue to adapt and develop its own new tools as needed to address common concerns between tikanga orders as well as between tikanga and state legal orders.
- 5.31 Finally, on the recognition of relations, it is significant that both the tikanga experts and the majority judges in *Ellis* point to wider social practices in recognition of the authority of tikanga. This broader social recognition, along with both the court's and the experts' recognition of their relationship, points to shifting practices of recognition of law, authority and subjection to law. The approaches to recognition – not only that of the majority judges but also those of lawyers for both parties as well as the tikanga experts and those

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<sup>123</sup> Williams J in *Ellis* (n 8) at [273] notes that parties will not always be able to resource more elaborate processes among existing processes.

<sup>124</sup> For example, the funding in the 2022 Budget in support of the Te Ao Mārama reforms. Government of New Zealand, *Wellbeing Budget 2022: A Secure Future* (The Treasury 2022).

expert interveners assisting the wānanga – reflect broader recognitive practices in which tikanga is not incorporated by common law rules but has legal status in interaction with state legality.

## B. A GENUINELY COMMON LAW?

- 5.32 Lawyers typically (though perhaps too simplistically) describe the law that is applied (and thus gradually developed) by the courts as ‘common law’. This may be the most accurate way to capture the particular mix of case law, convention, customary law and other types of non-legislated law operated by the courts.<sup>125</sup>
- 5.33 For all the theoretical wrangling over what the common law is and does, it is most simply conceived as the law that is developed by judges.<sup>126</sup> It includes the rules, principles, processes and conventions that emerge from the courts’ determinations of issues that are brought before them. The court system has a fixed structure – hierarchical but also with branches and connections between layers of speciality and generality, seniority and distinctive roles in relation to questions of law and fact. Not all the courts look the same, but it is important that the work of all the judges in all the courts together contribute to making the common law.
- 5.34 The original notion of ‘commonality’ of the common law is no romanticised notion of common law being ‘the people’s law’ nor somehow emerging from ‘bottom-up’ practices. It captured, instead, that the law was to be common across the royal courts of justice, replacing localised and diverse laws. The settler common law has been proclaimed as just such a common law, formally applied to all without plurality or differentiation of subjects, sources, content, expertise, processes, institutions and agents.
- 5.35 Yet in Aotearoa New Zealand, the continuity of tikanga shows that the (English then settler) common law never did replace or render obsolete other forms of legal ordering nor other law-applying institutions. The law has never been genuinely common. As the discussion of part 2 argued, there have always been discrepancies and defects in the claimed commonality and legality of the settler common law. These belie its claim to legitimately administer law over matters of common concern in a community and render it ‘common’ in name only. Most importantly, it does not serve as law common for communities with interdependent authorities nor satisfy the need to relate legalities rather than rendering them into a hybrid form.
- 5.36 In the interdependence domain, the imperative of engaging persons and places together in institutions for addressing common concerns requires that there be some genuinely common law for a community. The persistent interactions of tikanga and state legalities both within and surrounding the courts that have in the past been exclusively recognised as developing the common law raises the question whether there is a different potential – in the notion of commonality – to serve practices of interlegality.
- 5.37 As explored above, practices of incorporation (and cognate terms such as hybridity, integration, and amalgamation ) are unjustified when they endorse and give effect to a

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<sup>125</sup> Gardner (n 29).

<sup>126</sup> Gardner (n 29). This is also how it is officially represented to the public. [The Ministry of Justice guide](#) to New Zealand’s constitutional system gives a simple description: “Common law has been developed by judges over the centuries, and may be altered by the courts to meet changing circumstances.”

unilateral approach to recognition. In contrast, through an interlegality frame involving recognition of the relation between state law and tikanga, there can be an effort to build a new and genuinely common law – one operating in common between interacting the legal orders. The interlegality model requires not the old settler and evidently statist and monist common law incorporating another legal order into itself but a model of institutions operating together to apply law in common between them.

- 5.38 Interlegality requires a genuinely common law that embraces plurality in its sources, agents, subjects, institutions, processes and content so that it might be justifiably applied to deal with concerns that are common to interacting communities. Within the interlegality framework for interaction, tikanga needs to operate not only in a core domain of independence but also in the interdependent domain as one of two strands of authority and institutions contributing to what is genuinely common law, together with the authorities and institutions that were imported on settlement and have since developed into the state legal order. This is part of what it means for tikanga to be in place as a legal order, governing and applying to persons and places beyond its independent core. Tikanga needs to be in place in the common law of Aotearoa New Zealand – or that law cannot be genuinely common.
- 5.39 The question posed in *Ellis* – what does tikanga have to say about this matter as part of the general law and not siloed into specialist areas of law or applied only to Māori interests, places or persons? – is precisely the question of the interlegality model searching for a genuinely common law. Somewhat ironically, it tangles up in knots the argument against tikanga applying as ‘special law’ for Māori because it recognises that the application of tikanga to all serves formal equality by securing law for all.<sup>127</sup> From the other side of interaction, however, the objection (founded on tino rangatiratanga) about having tikanga anywhere near the jurisdiction of the court – an objection that is about preserving the independence of tikanga as an aspect of mana motuhake – worries about making tikanga ‘common’ in the pejorative sense.
- 5.40 Writing in the Canadian context, Val Napoleon argues that, when it comes to the practice of Indigenous laws, communities should not get stalled by institutional imperfections or gaps in capacities. Provided there is caution and careful awareness of past failures and their lessons, that position may be as apt for an emerging genuine and general common law as it is for the regenerating Indigenous legal orders that Napoleon’s work supports. The institutions, tools and practices that already exist (and those yet to be developed) will be imperfect forms for realising the interlegal interactions of state law and tikanga. They will prove unwieldy and controversial, they will be contested and criticised and, at times, they may lead to outcomes that fall short on any number of measures of legitimacy or justness.
- 5.41 Reasonable worries about interlegality and about the institutional arrangements for a genuinely common law might then be drawn upon to steer ongoing reform and reworkings of law’s institutions (not only those of law making and law application but also

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<sup>127</sup> Acknowledging that this objection may be recast in other forms, namely liberal objections about the substantive content of tikanga, for example, whether it preserves enough space for individual decision making and preferences and, procedurally, whether it is developed or applied through processes that are consistent with participation, fair contestation and non-domination. Put together, the liberal objection worries whether the collectivism at the heart of tikanga is compatible with liberal values that are concerned with equal freedom (compatible with the freedom of others) rather than (formal) equality under law. Those objections are discussed below.

professional and educational institutions on both sides of the interaction). What changes would be required for the system of adjudication and dispute settlement – not only the courts and tribunals but also the institutions of tikanga – to administer genuinely common law?

### C. SHARED DECISION MAKING, DEFERENCE AND REFERRAL

- 5.42 Genuinely common law rejects the ways in which the judicial system is seen as an instrument or aspect of exclusive and supreme state legality. A genuinely common law not only draws upon (and provides contestation for) plural streams of law but also finds ways for state law to share with, defer to and refer to tikanga authorities (and vice versa) when relative authority so requires. As Carwyn Jones suggests, in context, part of the response to interaction falls on the courts themselves to “engage with Māori legal processes, Māori forms of decision-making, and work with Māori sources of law, such as stories and traditional sayings”.<sup>128</sup> When there are concepts and norms of tikanga brought before the courts, they carry those processes, institutions and authorities with them.
- 5.43 Interlegality therefore demands forms for administering shared decisions as well as deference and referral to tikanga experts and authorities. With the aim of institutionalising humility in that relationship, some existing forms could be made mandatory rather than discretionary. For instance, wherever there are claims invoking tikanga, the assistance of pūkenga could be required, not a matter of judicial discretion. This would respond to the worry that a judge operating without pūkenga assistance on a matter of tikanga falls afoul of the recognition required for legality, as explained in part 3. Even where a judge has personal expertise that might allow them to assess tikanga evidence better than a judge without personal expertise in tikanga, the point is to represent and manifest decision making that carries forms of Māori authority and legality into the interlegality relation.
- 5.44 Mandatory pūkenga roles, however, seem insufficient to fix the recognition and legality deficits. Instead of (or in addition to) the assistance of pūkenga, interlegality may require shared decision making, perhaps through specialist appointments or co-judging within the current court structure, by developing a new composite court combining the expertise of the High Court and Māori Appellate Court or, more ambitiously, working towards or a new line of both hearings and appeal in a standing tikanga-based institution that could both provide a forum for hearing disputes between claims to particular tikanga in the independence sphere and to represent and manifest tikanga in the interdependence sphere through shared decisions at all levels.
- 5.45 In contrast to shared decision making, processes of deference to tikanga would accord decisive weight to experts’ evidence of what tikanga requires or what decisions have been made under tikanga processes. Referral, in further contrast, means to refer a decision itself to tikanga processes. As a structure, referral goes beyond deference to the authority of expert evidence of tikanga and instead refers matters to both processes and substance of tikanga as law for decision by relevant authorities under tikanga (which themselves, of course, might be plural and conflicting).
- 5.46 One way to understand the difference between deference and referral is that to defer implies that, while one institution decides the matter (i.e. there is jurisdiction), it does so

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<sup>128</sup> Jones (n 7).

by giving effect to another's judgment. A referral, on the other hand, sends a matter to a different institution in recognition that it is the appropriate forum for decision with the legitimate authority to decide that matter. Jurisdiction, which is so often an exclusionary instrument of the law, then becomes a useful device for managing interdependence, not by declining jurisdiction outright but by referring matters on for decision. The interlegal potential of referral mechanisms also avoids treating tikanga as a matter to be proven/agreed to the satisfaction of a statist court and rather allows for contestation of tikanga content in its appropriate fora.

- 5.47 Working out which cases (or parts of cases) raise matters for shared decision making, referral to tikanga institutions or deference to the evidence and/or decisions of tikanga experts is among the key tasks in the working out and mapping of common concerns. That cannot be done without negotiation and requires sensitivity to context beyond the more general/theoretical approach of this outline. As a matter of theory, however, a key consideration is the potential of any mechanisms to operate plural legal orders and manage overlapping statuses of legality so as to make them fairly contestable while maintaining appropriate procedures for protecting persons from mere power. This includes keeping open the pathways of access to justice by acknowledging that statist courts on their own, without any engagement with tikanga authorities through either shared decisions, deference or referral, can provide access to only a partial justice and not justice according to law.
- 5.48 The capacity to generate processes and rules for shared decisions, deference and referral, suggest that (among the institutions of interlegality), there is potential for the old 'common law' to be developed into a genuinely common law operating in the domain of interdependence around the core of both tikanga and personal independence. It would need to be both genuinely common between the legal orders and recognised as supporting their relation. This potential makes the common law a powerful institution with promise of actually being a just institution of justice. In this form, genuinely common law can support the justified interaction of tikanga and state law's authority, coercion and administration of justice in relations of interlegality. It then supports the interlegality model's ultimate matter of common concern: the operation and peaceful contestation of overlapping legal statuses without resort to one's domination of the other.
- 5.49 From the current state of practice, however, any moves towards shared decision making, deference and referral likely entail elements of trial and error, which is alarming for those whose concrete situations, duties and interests are at stake before a centralised justice system. It may also appear alarming on 'rule of law' grounds that favour certainty and predictability as well as raising the argument that concrete persons with stakes in particular claims and interactions ought not be treated as instruments towards working out a new kind of interlegal administration of justice. The negotiated development of principles of interlegality, and mechanisms for its realisation, is an important counter to those concerns.
- 5.50 On the other hand, as intimated above, there are already 'rule of law' defects in the existing common law, which also in some sense already instrumentalises persons and their claims in the course of creating new common law rules. Any efforts to develop genuinely common law methods to operate shared decisions, deference and referral will have to aim at meeting those and other objections about interlegality, which are considered in the final section below.

## D. OBJECTIONS TO INTERLEGALITY

- 5.51 This paper concludes by engaging with some of the most important objections that might be raised against an interlegality framework.<sup>129</sup> The first objects to any identity-based, ethnicity-based or race-based forms of distinctions between persons and their entitlements in communities. The second argues that, while historical injustices have occurred, they have been ‘superseded’ by changes in circumstances. Both objections defend the view that, for all the injustice wrought upon Māori, the role of the contemporary state is to provide justice among present persons (and perhaps those generations to come), whatever their provenance, identities, ethnicities, cultures or beliefs.
- 5.52 A third objection, which often runs alongside the first two, is a worry about the rule of law – that interlegality bears too much uncertainty or inconsistency to bear the name of legality at all or that it offends against some formal equality principle of ‘one law for all’. The fourth argument addressed here is a pluralist objection – namely, that tikanga does not seek nor want forms of interaction with state law and that a strong form of legal pluralism rather than interlegality better recognises tikanga. Despite appearing on opposite ends of ideological debates that surround relations of tikanga and state legalities, objections three and four are addressed in similar ways by the interlegality argument – namely, that interlegality shifts attention onto the relationship between orders as a location for the rule of law and recognition between legal orders rather than upon each of the interacting legal orders independently.

### i. ‘Identity politics’ and ‘ethno-nationalism’

- 5.53 Worries about identity politics and ethno-nationalism have long appeared at the heart of debates surrounding liberal political theory’s responses to claims to Indigenous rights and self-determination.<sup>130</sup> Those positions and their full responses cannot be examined here, but it is important to represent the core worry that it is not only unjust but also harmful for a political community to delineate and divide people into ethnic or race-based categories. As well as risking serious division and morally problematic categories of ‘insiders and outsiders’, the objection argues that race-based divides also reify one among many aspects of persons’ practical identities and risk subjugating one to another in ways that can endanger vulnerable persons or ‘minorities within minorities’. In a context of multicultural communities, a more specific objection is then raised against Indigenous political claims to the extent they are based upon a distinctive practical identity. The argument shifts to a claim that, even if liberal multiculturalism can be supportive of cultural differences and can defend distinctive identities, Indigenous cultures and Indigenous identities should be treated by the liberal state no differently to any others. Separately and/or together, such concerns about the politics of recognition ground arguments that deny forms of Indigenous rights or practices of self-determination.

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<sup>129</sup> These are elaborated in more detail in Nicole Roughan, ‘States of Injustice and Statuses of Legality’ to appear in Walton et al (eds), *Responding to Injustice* (forthcoming). A draft version is available [here](#).

<sup>130</sup> For a relatively recent summary of concerns and responses drawing contemporary developments from the canonical debates of the 1990s–2000s see Paul Patton, ‘Philosophical Foundations for Indigenous Economic and Political Rights’ 46 (2019) *International Journal of Social Economics* 1264.

- 5.54 Those concerns are met with an equally expansive literature from both defenders and critics of liberalism, which either deny that the self-determination claims of Indigenous peoples clash with multicultural and/or liberal political values or deny that those values trump or outweigh others.<sup>131</sup> Responses often point out that statist framings of political value are defences of what the state itself should accommodate, support or protect; a framework that is ill-suited to meet Indigenous philosophies with their own understanding and justifications for the relations between persons, power and values.
- 5.55 For the present project, it is important that the key objections and responses in political theory tend to offer their justifications without attention to the status of legality. Law is typically treated as an instrument for doing justice (whatever that is) and for protecting rights (whatever they are). The contestation is over those substantive objects and law's aims, not the status of legality. An interlegality theory, however, offers a different sort of response. Interlegality offers the same response to both full-fledged nationalist demands and to denials of difference. It offers the tools of legality, which self-proclaims to be able to abstract away from concrete identities to recognise the forms and institutions of Indigenous legalities rather than the identities of persons. Legality's abstraction houses its capacity to address the claims that are made from competing legalities. It can construct institutions for recognising statuses of legality rather than the identities or statuses of persons.
- 5.56 Importantly, interlegality can also avoid essentialising or over-determining the complex choices, preferences and indeed preferred identities of persons who may (but need not) recognise Indigenous laws and reject state legality. It also avoids over-determining the significance of identity itself or indeed membership of a single rather than multiple overlapping communities. For instance, it does not recognise a Māori individual as having some special entitlements, let alone identities, vis-à-vis other persons in the community. It recognises instead the distinctive as well as the interactive forms of Māori legal ordering and their implications for those persons who recognise and are recognised within that order. The abstraction of interlegality helps, just as the abstraction of legality serves to abstract away from race/ethnicity/cultural/identity-based claims. It may thus ward off insidious forms of ethno-nationalism better than defective liberal claims to legality.

## ii. Superseding historical injustices

- 5.57 The supersession thesis, advanced powerfully and consistently by Jeremy Waldron, argues that injustices wrought upon Indigenous persons, including forceful and deceitful appropriations of property, sovereignty and political authority as well as breaches of Treaty-based rights and obligations, can be superseded by changes in circumstances.<sup>132</sup> The supersession thesis argues against reversion and restoration of Indigenous property,

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<sup>131</sup> See, for example, Coulthard (n 90); Gordon Christie, 'Law, Legal Theory and Aboriginal Peoples?' (2003) 2 *Indigenous Law Journal* 70; Moana Jackson, 'The Colonisation of Māori Philosophy' in Graham Oddie and Roger Perrett (eds), *Justice, Ethics and New Zealand Society* (Massey University Press 1992).

<sup>132</sup> See, for example, Jeremy Waldron, 'Settlement, Return, and the Supersession Thesis' (2004) 5 *Theoretical Enquiries in Law* 237: "certain things that were unjust when they occurred may be overtaken by events in a way that means their injustice has been superseded" (240). For Waldron's most recent account, see Waldron, 'Supersession: A Reply' (2022) 25 *Critical Review of International Social and Political Philosophy* 443. That piece offers a helpful explanation of the development of the thesis since its earliest iteration in Jeremy Waldron, 'Historic Injustice: Its Remembrance and Supersession' in Oddie and Perrett (n 131).

sovereignty, authority and, in a sense, independence (though does not deny that compensatory responses may be appropriate).

- 5.58 A number of responses to Waldron have challenged the supersession thesis in general as well as Waldron's application of that thesis to the Treaty of Waitangi.<sup>133</sup> In earlier work, Mark Bennett and I argued, in response to Waldron, that te Tiriti is not superseded by circumstances. Instead, its existence is supposed to contour the content of the very rules designed to protect and enable persons to live together amidst the challenges and changes of interaction. In addition, Waldron has more recently argued that Indigenous sovereignty and its forms of political authority could not be operable systems for governing a contemporary, modern, multicultural society.<sup>134</sup> The relative authority account defended above suggests that Waldron's argument cuts both ways. If an independent and supreme Indigenous authority could not be expected to justifiably govern and to have legitimate authority and solo legality, so too does the contemporary state order fail to justifiably govern, to have legitimate authority and to operate solo legality, in light of the contemporary continuity of Indigenous legal ordering. The interdependence of these orders calls out for a form of interlegality.
- 5.59 The interlegality approach directly responds to Waldron's recurring claim that people and their projects are now so deeply interwoven that no return to Indigenous sovereignty, no return of generations of settlers to their ancestors' homes and no return of Indigenous property can be justified on the grounds of redressing historical injustices. The response from interlegality is that the concrete interaction of persons and the entanglement of their activities and entitlements do not set the limits of the abstract responses that legality makes possible. An interlegality framework envisages institutions to contest which legal orders can justly be applied within an interaction. If law and legal forms are to have a role in responding to injustices in this context, the question is which legal ordering(s), in what combinations or relations and through which forms?
- 5.60 The deep interactions of concrete persons do not resolve the question of what legal forms can serve those interactions or how statuses of legality may interact in order to serve persons better. Even if we concede to Waldron (and others) the argument that interacting peoples cannot and should not be segregated, the abstract forms of legal ordering can still be rearranged and abstract statuses of legality recognised, attributed and distributed in ways that people and places cannot. The generations of persons who have arrived since settlement cannot be removed, but supremacist legal forms can be removed and Indigenous legal forms renewed. Interlegality then provides forms for their interactions and intersections.

### iii. The rule of law

- 5.61 The response to both the ethno-nationalism concern and the supersession thesis is the same: that forms of interlegality and law's abstractions offer ways of responding to injustice that do not turn upon the identities or ethnicities of the persons engaged in claims of injustice. The response then falls within a fairly orthodox lawyerly commitment to the rule of law, with several important modifications to the way that ideal is typically

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<sup>133</sup> Mark Bennett and Nicole Roughan, 'Rebus Sic Stantibus and the Treaty of Waitangi?' [2006] 37 *Victoria University of Wellington Law Review* 24.

<sup>134</sup> Waldron, 'Supersession' (n 132); and Waldron, *Supersession and Sovereignty* (NYU School of Law 2013).

presented in common law settler states. First, the ideal of the rule of law, in the realm of interlegality, applies to the rules for the relationship between legal orders. While it does not give up its concern that either legal order should be sufficiently clear, consistent, public, general and coherent – in order to be claimed and received as law – it is equally concerned with evaluating the forms for interaction and interdependence that affect law's claims and their reception. Those forms may not look like forms familiar from state legal ordering. They may be more or less formal, more or less rule-governed or principle-based, and more or less dependent on persons or institutions. . Those are the matters for a rule of law account to examine, armed with the key concern that interlegality, like legality itself, offers the relationship something other than politics and power.

- 5.62 The second modification is that the rule of law in an interlegality context provides not one law for all, in the familiar manner of the formal equality principle, but two laws for all, along with law for the interaction and intersection that can temper power and render the relation sufficiently clear, coherent, consistent, public and general. For the reasons explained in part 3, seeking to force one law for all upon communities with interacting legalities undermines legality's claim to be something other than force. Where the continuing operation of Indigenous legalities precludes the operation of state legality as one law for all, the options are one law for some and one law for others, one law for some and force for others or two laws for all plus interlegality for the interaction and intersection. The ideal of legality, I argue, is best met by the third.
- 5.63 A third modification examines Raz's suggestion that the operation of an independent judiciary is a key aspect of the rule of law.<sup>135</sup> To operate interlegality in the common law settler states, the independence of law-applying institutions, their role as interpreters and their role in incrementally developing the law is no less important. Some form of independent judiciary system has a justifiably distinctive role amidst other tools of interlegality, including deliberative and Treaty institutions. Yet for interlegality to be realised, the institutions of adjudication and dispute settlement require diversification and modification to be sufficiently independent from state legality, with procedures, expertise, membership and mandates to develop a genuinely common law.

#### **iv. Plurality and recognition**

- 5.64 I have suggested that, in the example of Aotearoa New Zealand, there is deep interdependence in the claims to legality and authority captured in the ideas of (i) relative rather than plural independent authority and (ii) interlegality rather than plurality of laws. Both positions raise the normative concern that, from the perspective of an advocate who wishes to restore or otherwise support the operation of tikanga as a response to the injustice of its prior exclusion, interlegality may seem less attractive than the robust operation of an independent tikanga that does not need nor seek recognition beyond Māori communities. It is important that interlegality and plurality share some common concerns but are not the same thing. Interlegality emphasises interdependence, whereas plurality emphasises independence. Interlegality, however, still presumes some form of independence of laws that feeds into the relationship and is in that sense deeply pluralist – it is about the interaction of plural claimants of legality and authority; interlegality then provides means for realising those claims.

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<sup>135</sup> Raz, 'The Rule of Law and its Virtue' (n 54).

- 5.65 A broadly pluralist objection against interlegality may argue that it does not go far enough to give effect to the independent claims of Indigenous legal ordering and that any effort to relate legal orders through legality will end up either incorporating by assimilating tikanga into the dominant state legal order or will be subject to political dynamics that have that effect.
- 5.66 The response offered by interlegality is to shift the object of recognition in order to provide for both interdependence and independence. Those who recognise tikanga as law recognise that it does not need nor seek the state's recognition in order to have an independent status of legality. Many of the persons, places and activities organised through tikanga need never be tested nor confronted by state claims to legality. Moreover, when there are entanglements between tikanga and state law – whether generated through persons making tikanga-based claims before state courts or through state interventions into practices governed by tikanga – any effort to use state law, institutions and authorities alone to 'recognise' tikanga, folding tikanga within the constraints of state legality, will amount to a form of recolonisation.
- 5.67 Abstraction away from both state legality and Indigenous legality, instead, shifts the object of recognition to avoid both the subordination implicit in asking for recognition and the failures implicit in giving it. Just as the rule of law focus shifted onto the interlegality relation, the object of recognition in interlegality is neither tikanga nor state law but their relationship. That does not preclude – indeed it supports – the operation of an independent core of tikanga by ensuring that tikanga also operates its status as legality in the domain of interdependence.
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# Conclusion

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The arguments presented here have framed the interactions of state law and tikanga within an account that seeks to rescue both legality and law's legitimate authority from the recognition deficit that arises from the imposition of state law upon tikanga. It argues that, to have the rule of law, people need to be able to recognise law's claim to justly administer public standards for a community. Instead of settling for less than legality and denying law's legitimate authority, the methods and institutions of 'interlegality' would provide for the status of legality to be tested and contested while addressing concrete issues invoking both legal orders. Rather than submitting one legal order to another's recognition, interlegality makes the relationship between the legal orders – rather than each legal order on its own – the key object of recognition and the key target of the rule of law.

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# Author acknowledgment

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