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Whaimutu Dewes “Māori custom law: He kākano i ruia mai i Rangiātea, e kore e ngaro”
(unpublished draft paper prepared for the Law Commission, 1998)

Maori Custom Law : “ He Kakano i Ruia Mai i Rangiatea, e Kore e Ngaro”

[Title Page-what is it?]

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Preface (Denese Henare, Law Commissioner)

[We need some prefatory comments, explaining the origins of the project, the stakeholder inputs and the desired outcomes. I believe that this should bear the imprimatur of Denese. That will also put the Law Commission's mark on the document. The preface, or the introduction, should also have the comments of Uncle Manu on behalf of the Maori Committee.]

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[My best effort at an intro for Maori audience]

Hei Whakapuaki i te Korero

Ko te mea tuatahi he whakamoemiti ki te hunga koroua, kuia, kua haere ake ki tua o te arai. Na ratau i whakaoreore i a tatau kia pumautia nga tikanga mai i Tuawhakarere tae noa ki inaianei. Na ratau hoki i tuari i te matauranga, te whakapono me te aroha i whakaora tonu ai nga tikanga kei te whaitia nei tatau. Otira, ki a kotou, e koro e kui ma, nga poito whakarewa i te ao Maori, kua okioki kotou i te huihuinga o te Kahurangi. Engari ko nga take i hangaia e kotou, kei te ora, kei te mahia tonutia. Tena kotou.

Ko tatau nga kanohi ora, tena tatau i te kaupapa o te korero. Ahakoa te mamae e hahau ake kei te poho, e kore ratau e hoki mai. Ma te hapai i o ratau akoranga, ratau ka whakakororia.

Kia oti pai tenei mahi, ka koa rawa te ngakau. Kua mau te wehi, e ranga wairua ana nga kaimahi o te korero nei. Ahakoa he taumaha, he uaua, he maha hoki nga whakatupato. Ko te mea nui, kia maunu atu te korero nei ki waenaganui i a ratau e kuare ana hei whakaora tonu ake, whakatu i te turanga totika hoki, i nga tikanga e korerotia nei tatau.

Me whakatauki ake tatau i te korero tawhito

> "E kore e ngaro te kakano i ruia mai i Rangiatea"

> He tohi, he whakamihi hoki te korero na. Kei te ki mai te taonga na, nara, he tapu te taonga i pahure mai i te Atua, kare hoki e taea te whati, engari ka ora tonu ana. Inahoki, he matakite. Kei te rito o te harakeke te putake oranga, ana, e pera ano ko nga tikanga, nga kakano o te Atua nui. Ki te ngaro ake nga tikanga ka ngaro hoki te Maori. He rereke te tinana, engari na te wairua e whakakaupapahia ana e te tikanga i whakaMaori tatau. Na reira, e kore e taea te ngaro.

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Introduction (insert into "What is Maori Custom Law?" section)

There is a demand for the examination that follows by people whose professional duties involve applying or interpreting tikanga Maori. That segment of the work force is not exclusive or exhaustive of the people who have the need or desire to understand the issues that are identified in this document. Nevertheless, the impact that such an ostensibly narrow band of decision-makers have on the lives and aspirations of the Maori community through those decisions is both palpable and significant.

There are numerous examples of statutory requirements for the application of tikanga Maori. The list includes

[List to supplied by JVW/Law Comm research]

As can be seen from the provisions listed, there are express statutory provisions as well as those that import tikanga Maori by inference [e.g. tangata whenua]. The need to apply tikanga Maori may also arise in a general context such as the review of a Maori organisation or even such mundane situations as a request that karakia is given.

The existence of a list or a request to have karakia given does not create the demand this document addresses. It is the gap in the knowledge or training of the practitioners concerned that creates the demand. The practitioners referred to might include members of the judiciary, members of the legal profession as well as policy advisers and operatives at local or central government and in the private sector. This document is therefore ameliorative because it does not seek to address to the root of the demand, that is, it might bridge a gap that exists but it will not stop such gaps from appearing. That is a function for wider measures than current resources can address.

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In the case of specific provisions, the underlying reason that such provisions exist is a subtlety that escapes many practitioners. The obvious reason is that it is demanded by a group of activists in the area who are able to persuade policy makers and legislators to have such expressions included. The same reasoning can be applied to the less formal situations. The deeper question is, why are they sought?

The answer is a complex tapestry of political economy factors. Its threads include the manifest absence of such factors that has hitherto existed and the resultant inadequacy of the decision making structures to deal with issues affecting Maori people and their resources. The need for specific provisions as opposed to their essence being natural inferences as part of the existing common law is a further strand of the fabric. The fact that seminal statements are made, such as [include an express example from the list], and not complete expositions of what is intended is another strand which is as much due to the understanding of the drafters as their techniques. The form of the statements also owes a great deal to manner in which the concepts are seen and applied by the Maori or host community.

For an uninitiated observer the tapestry is merely a bewildering tangle of random threads. It is the motivations and perspectives of that host community, which provide the clues to identifying the design of the tapestry. The demand for inclusion of such concepts in decision making is not a new phenomenon and the relatively recent accession to the demand is not the subject of this document. What is critical for any insights to be gained from the examinations that follow is an understanding and acceptance that the inclusion of such concepts as whanaungatanga and tikanga was inevitable. Furthermore, that understanding and acceptance must be extended to the fact that the process is a continuum the end point of which only the foolhardy would presume to identify.

Understanding may be assisted by the realisation that the retention of tikanga Maori is a fundamental part of the underlying drive by Maori people for survival. It is so fundamental that Hence their reactions to threats to the survival are more visceral than

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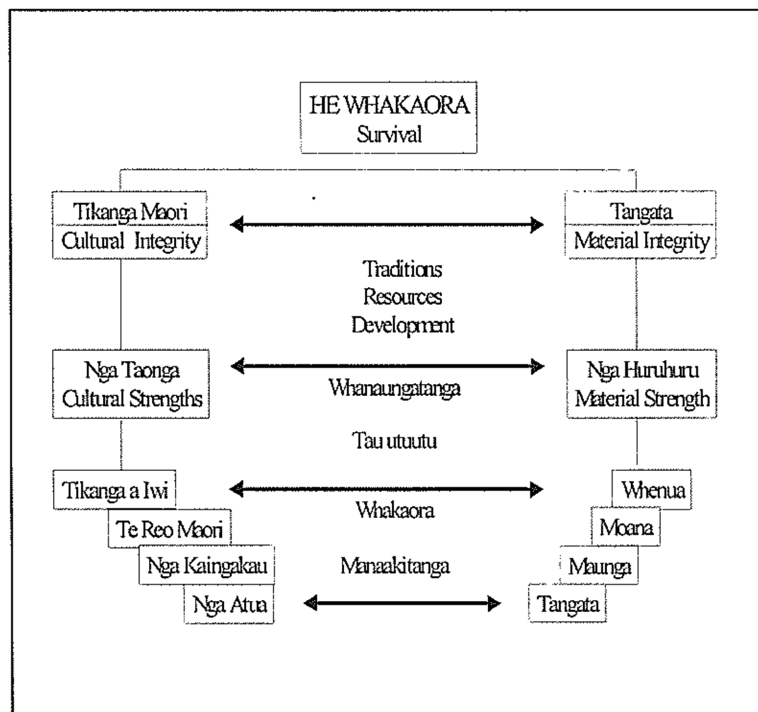
cerebral. The survival of Maori people as a people is absolutely dependent upon the retention of a cultural integrity that distinguishes them from other peoples. That cultural integrity is purveyed by the tikanga Maori. It is comprised of the various cultural components or taonga such as the tikanga a Iwi, language, and values.

The drive for survival also depends upon material integrity. Material integrity, in an orthodox and universal manner, rests upon the economically exploitable resources available from time to time.

Within the Maori value system there is a reciprocal relationship of mutual support between the tikanga Maori and physical well being. The survival of the physical elements is necessary for the continued practice of the theological and metaphysical beliefs. The converse is also true. The relationship may be described in a number of ways but it can be summarised in the expressions whanaungatanga, manaakitanga and tau utuutu. It is captured in a pictorial sense in the diagram below.



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Maori tribal and sub tribal groups have survived as identifiable political moieties in the face of a massive onslaught of physical and cultural degradation. Both pre-contact and post contact periods presented many challenges in a hostile environment. The Maori communities have had to organise every level of their society for survival.

This is not a unique set of paradigms. It has been identified in other peoples around the world and elements of it are familiar to New Zealanders belief systems. James Zion, an ethnojurist from the United States of America, describes a very similar paradigm for the Plains Cree of Montana.

(Reference, James W. Zion, "Searching for Indian common law", unsourced article provided by the author)

[Leonie, can your search magicians track it down? I have a copy from a book or pub., the first page is 121-copy attached for your info.]

Zion describes the paradigms as "animism", that is, a societal assumption that a supreme deity created a universe in which everything has a soul. As with Maori people, the Cree believe that people, animals, rocks, trees and even an ashtray have a soul. Springing from the souls of each thing are interlocking obligations and sources of assistance with all things. The obligations are expressed in terms of respect for things. A common example is that one is required to have a good reason to cut down a tree and to ask the tree's permission before cutting it. As Zion explains, such paradigms make up a very logical and sensible way of ordering the world (he uses the word religion) because it recognises the interdependence of people and the environment, an interdependence which involves all parts of the environment.

The parallels between the two sets of beliefs are obvious. In tikanga Maori the interdependence between the various elements is added to by the belief that all people and

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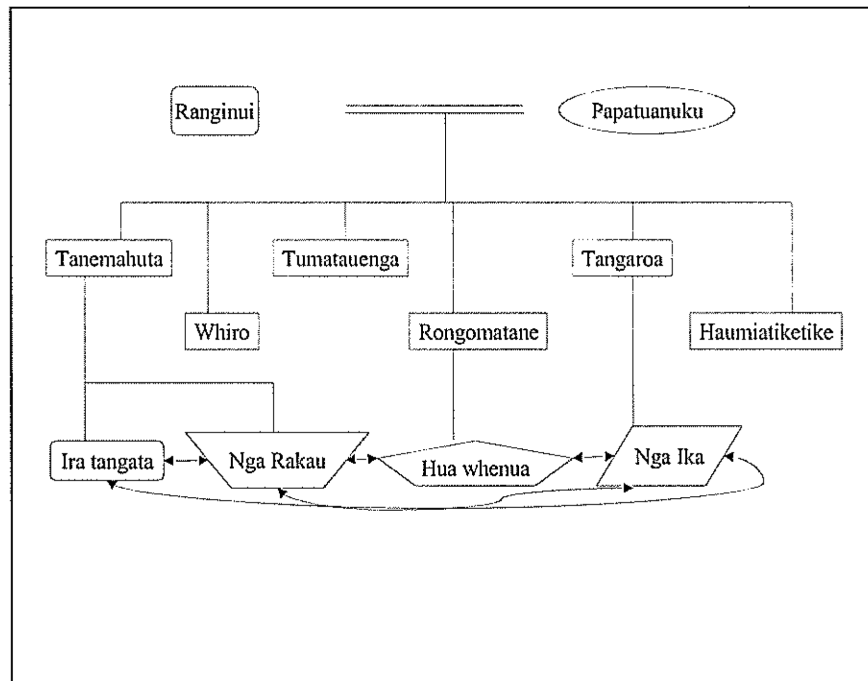
things are actually related by whakapapa. Such common descent ties represent and create the reciprocal obligations of respect and sustenance.



The diagramatic representation summarises those relationships many of which are contained in the examples and discussion set out in the later chapters of this document. The main point to be gained for immediate purposes is to recognise the interlocking, overlapping and continuous nature of the various relationships.

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[Insert in section 2-see work plan outline]

The Effects of Colonial and Post Colonial Contact

Definition [NB this may already have been attended to by the Preface or JVW's section]

"Maori Custom Law" may be defined as

> "...[the] values, standards, principles or norms to which the Maori community generally subscribed for the determination of appropriate conduct...."(Durie 1996,8)

Although the definition coined by Chief Judge Durie speaks for itself it also has support from the field of economic development. To the extent that culture and custom law are equivalents, a definition of culture is

> "...a set of interpretations, understandings and models that provide individuals with strategic guidance and repertoires of acceptable behaviour."(Cornell 1988,8)

Custom Law is sometimes used interchangeably with the expression "aboriginal rights". That is the bundle of rights and relationships that, following contact with settlers pertain to the aboriginal inhabitants. The term "aboriginal rights" also denotes the origin of those rights. This concept is represented in the tikanga Maori relating to the rights and obligations of tangata whenua. Maori people were in occupation in Aotearoa prior to Abel Tasman and James Cook and the settlers that followed, therefore they are tangata whenua. The fact that the aboriginal people were here first is at the core of the notion of aboriginal rights or aboriginal title. (Elliot 1985,48)

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General Comment

With the arrival of European sailors and colonial settlers Maori Custom Law an eclipse of Maori Custom Law was begun. A process of denial, suppression, assimilation and co-option blocked the operation of Maori Custom Law. This process of forced change is not only much faster it is substantively different to the natural, endogenous change that all societies undergo. However, notwithstanding the withering process of attrition that it has suffered, the tikanga that make up Maori Custom Law still survive and there is a discernible push for Maori Custom Law to be employed in a number of different areas.

The strong assertion by Maori communities of arguments for the retention of their tikanga as they seek greater control over their own resources in turn requires those community members to seek guidance from their own tikanga. External agencies are forced to apply those tikanga if they are to maintain jurisdiction within the decision-making arena.

The push for greater control by Maori communities is occurring within an overall strategic and policy shift in the private and public sectors toward greater control at the community level. The economic and policy changes of the last thirteen years in New Zealand and elsewhere in the world have created an environment more conducive, in general, to the assumption of decision making powers by the communities. Thus there is a continuing need to maintain and adapt tikanga in a dynamic process.

Political, economic and cultural factors continue to play an integral part in the nature and extent of the recognition given to Maori Custom Law. The current strategic and policy settings are an example of that interaction. History has countless examples of how the political economy of the time has shaped how the colonists and their descendants have regarded Maori Custom Law. The conversion of customary land tenure to an individualised, beneficial, Torrens registrable interest is perhaps the best known. Section 9 of the State Owned Enterprises Act 1986 is a contemporary example. A comparison of

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the drafts of the Bill of Rights provision covering aboriginal rights and the Treaty of Waitangi with the final form is also instructive.

It is increasingly recognised that Tikanga reflect the unique worldview that Maori have. There is also an increasing acceptance that Maori Custom Law should be recognised in order to ensure its survival and to provide Maori determined alternatives to a mono-cultural government legal system. This requires a shift from the attitude that Maori Custom Law represents a failure by the Maori community to adopt non-Maori systems of belief.

To render the Maori Custom Law and its cultural foundations understandable, non-Maori continually strive to find analogues within their own cultural parameters. This process is natural, automatic and continuous for all inter cultural contact. Recognition of the natural biases cultural overlay is vital in dealing properly with new concepts. To come to grips with Maori Custom Law, it is necessary to recognise that Maori concepts hardly ever correspond exactly with those Western concepts that they appear, on the surface, to resemble. (Metge 1996,2)

The Effects of Colonial Settlement

> "The ability of Maori to exercise customary law was restricted by loss of resources, by lack of recognition by the courts and by Parliament and by persistent and prolonged promotion of individualism and assimilation. (Belgrave 1996,11)

Prior to contact with non-Maori the customs and practices of the different hapu and Iwi were conducted within their respective areas of jurisdictions. There was a system of law and order, that is, Maori Custom Law. The operation of such a system is recognised, for example, in the decision by Greig J. on the issue of whether the quota management system represented an incursion into rights confirmed and guaranteed by the Treaty of Waitangi.

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> "I am satisfied that there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole coast of New Zealand at least where they were living. This was divided into zones under the control and authority of the hapu and the tribes of the district. Each of these hapu and tribes had dominion over, perhaps rangatiratanga, over these fisheries. Those fisheries had a commercial element and were not purely recreational or ceremonial or merely for the sustenance of the local dwellers." (Ngai Tahu 1987,???)

The case for fisheries management can be extrapolated to all resource use. The existence of laws in relation to personal relationships is also well documented. Adoption and marriage according to Maori custom were specifically provided for in legislation.

As control over the resource base has been transferred into non-Maori hands the extent (in quantum terms) of the Maori Custom Law has reduced. Greig J. noted that process

> "...What is clear is that over time since 1840 there has been a diminution and restriction in Maori fishing through circumstances, to use a neutral word, which have in the end limited the exercise of those rights." (Ngai Tahu 1987, p???)

Michael Belgrave argues persuasively that the transfer of control has been effected through a sustained attack on Maori Custom Law by the monocultural colonial and postcolonial systems. In addition he observes that recognition of Maori Custom Law is quickly followed by extinguishment and that Maori people have every right to be cautious about attempts to recognise customary law.

> ...To achieve a modern Maori consensus on the nature of customary law that is workable in the present, it is necessary to appreciate the extent that colonisation was more than simply a catalyst for the modification of customary law. That at different times Maori customary law was denied, acknowledged, defined,

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> modified and extinguished according to a non-Maori agenda casts a long shadow that cannot be ignored" (Belgrave 1996,4)

"Extinguishment"

Some people will find the term "extinguishment" too strong. If "putting out" or "obliteration" was not the result of colonial contact with custom there can be little doubt that such was the intent. Moreover, there is a consistent pattern to be seen in other jurisdictions of the world. In the Canadian context, the expression "extinguishment" has attracted a specific definition, that is, governmental action that terminates aboriginal rights. It is distinguished from "abridgement", a seemingly less intrusive term, which describes government action that diminishes or otherwise restricts aboriginal rights but falls short of terminating the aboriginal title. (Elliot 1985,48)

In present times sensitivities to the use of the word "extinguish" in Canada are such that the modern treaties such as the Nunavut Settlement refer only to the "surrender" of the aboriginal rights. (Nunavut 1993) By contrast Clause 5.1 of New Zealand's Deed of Settlement of the fisheries settlement expressly records that

> "…this Settlement Deed…shall satisfy all claims,… and shall discharge and extinguish, all commercial fishing rights and interests…. whether arising by statute, common law(including customary law and aboriginal title), the Treaty of Waitangi, or otherwise,…"

The Colonists Attempt to Extinguish

A comprehensive analysis of the historical effects of colonisation provides examples of Maori Custom Law being dealt with by

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- express denial that it exists
- overt suppression
- assimilation into the imported institutional law followed by express extinguishment
- assimilation by recognition followed by extinguishment through re-interpretation
- removal of the resources to which the Maori Custom Law is applied
- alteration to the social structures within which the social controls of Maori Custom Law are exercised.

Such an analysis is provided by Belgrave (Belgrave 1996, supra) and is summarised below.

Express Denial of Existence

The pressure settlement brought to bear by the New Zealand Company created the problems of how to recognise Maori customary ownership in order to purchase land, the consequential problems of dealing with those with rights who refuse to sell and the difficulties of buying off all those with claims.

The Colonial Office response was to deny Maori customary rights to land beyond habitations and cultivations. Although the Treaty of Waitangi guaranteed rights to land, these did not extend to waste land. (Belgrave, 31)

The Native Rights Act of 1865, a companion measure to the Native Land Act 1865, made it clear that land was the only matter for which there would be recourse to Maori custom.

The opposition by the Crown and the New Zealand Fishing Industry Association to the assertion of Maori rights to fisheries through the last half the last decade is a modern equivalent and proof that the urge to extinguish is alive and well.

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Overt Suppression

The Tohunga Suppression Act 1907 (Belgrave 1996, 31) displayed the same ugly lack of subtlety as its short title. It was the instrument to suppress so called injurious Maori custom by criminalising traditional healing and counselling practises. It was extremely traumatic for communities of the time and drove tohunga under ground. It was effective but did not wipe out the knowledge or the desire to utilise the remedies. Tohunga still practise today and are sought to offer a wide range of medical and psychological assistance. Modern mainstream medical practitioners do not regard the value of such remedies with such disdain.

Alteration to Social Structures in which Social Controls of Maori Custom Law Exercised

The individualisation of the property rights in land and other tribally owned assets has had a profound effect on Maori social structures. There had been in existence a power of veto by the rangatira of an Iwi, such as that attempted by Wiremu Kingi at Waitara. (Belgrave 1996, 37). **[Also referred in JVW's section].** That veto was merely the form of expression of the Iwi collective agreement and it was not allowed to persist. One of the deliberate aims of the land title investigation process was to undermine collective interests. Individuals would have the power to have their own interests determined and extracted from the Iwi estate.

Assimilation followed by Re-interpretation : Extinguishment

A efficient ethnocentric process arrived at individualisation. The Native Land Court was supposed to investigate titles to land according to Maori custom. However, it only awarded titles to individuals and at one stage title for land areas less than 5,000 acres could only be awarded to 10 owners or less. Many Iwi resisted the individualisation of the interests but there were very few successes. (Belgrave, 35)

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The Native Land Court established its own rules for excluding groups of claimants in favour of others. In its attempt to codify custom emphasis was given to physical evidence rather than whakapapa because of a prejudice toward the oral nature of the latter in evidence. Furthermore, the elevation of pou whenua to the indefeasibility of a survey peg distorts some of the most significant aspects of Maori tenure. It is the relationship between people that defined relationships with land. The land title system forced Maori participants to adopt the fiction that ownership of land was unitary, that lines could be cut through survey that divided owners on one side from owners on the other. (Belgrave 1996, 41)

The creation of a title in a separate block of land not only turned tribal control of the block into individual, transferable interests, it also broke relationships between pieces of land, reducing a tribal estate into a series of unrelated economic commodities. In this fragmentation, broader spiritual, economic and cultural aspects of customary tenure were denied legal recognition and protection. (Belgrave 1996, 42)

Assimilation followed by Express Extinguishment

For European recognition of customary title, the ability to permanently extinguish rights was foremost. The Crown aimed to ensure that once it extended recognition of title to a group of owners, it could proceed to extinguish those rights once and for all. Thus, group recognition and customary group decision making gave way to individual property rights. (Belgrave 1996, 43)

The Crown's predisposition to have extinguishment follow axiomatically on recognition of custom is evidenced in the insistence on repeal of the preserving provision of the Fisheries Act 1986, s.88(2)

"...Nothing in this Act shall affect any Maori fishing right..."

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as part of the fisheries settlement. See page **00** above.

Maori Custom Law is Dynamic

Extinguishment, abridgement or surrender involves conscious and overt actions by an external party, for example, the Crown. That process is quite different in nature and effect to the adaptation and development that all systems of law undergo.

The misconception that custom law is rigidly constraining, obeyed without question or fixed and unchanging has been dispelled by anthropological fieldwork. Every society works out its own balance between choice and constraint, and wherever there is choice there is potential for change. Pre-contact Maori society was notable for the large degree of choice it offered its members. For example, individuals could trace their descent and attach themselves to descent groups through forbears of both sexes on each generation. (Metge 1996,2)

[If not already included in JVW's section we need to describe the nature of systems of law, values and norms and how they are in continuous state of change.]

From the earliest post-colonial times Maori communities set about adapting societal structures to deal with the new experiences they were encountering. Included in such examples are the Maori parliaments, the Kingitanga of the Waikato and the pan-Maori movements such as the Kotahitanga. (Belgrave 1996, 10)

The high value placed on oratory is evidence of the importance of debate in decision making and the need for rangatira to constantly mobilise support for their leadership. (Metge 1996, 2).

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Oral literature as the medium for transmission and application of Maori Custom Law adds a further dimension to the process of change and adaptation. Oral literature must be performed to be transmitted or applied. The performance will be affected by

- the subject matter,
- the context,
- the linguistic and oratorical skill of the performer,
- the extent to which the opportunity for original composition is taken, and
- the audience.

There is a popularly held view, among people inculcated with the idea of literacy and written traditions, that oral literature is shrouded in mystery and based on crude and artistically undeveloped formulations. (Finnegan 1970) This dogma has had direct impacts on Maori Custom Law as noted above. The importance of the performance is not only a distinguishing feature it is also an example of the depth and richness of the oral form of a culture's literature. Advocates in a courtroom will appreciate the distinction.

Nor does the oral form of transmission render the content any less valid than if delivered in the written form It is misleading as well as unfruitful to draw a strict line between the verbal art of literature and of non-literate cultural traditions. (Finnegan 1970,16)

In addition, non-Maori perceive Maori Custom Law as a failure. They see the prevalence of non-Maori law as a failure of Maori Custom Law to overcome the non-Maori influences partly caused by an incapacity to meet the requirements of the Maori community. Such perceptions are rooted deep in the psyche of many non-Maori New Zealanders having been spawned in the former eras where the conquest approach to colonisation and settlement was predominant. That they are founded on superficial observation and erroneous assumption belies the difficulty encountered in moving them. Their obdurate character springs from the politics of recognition of an alternative set of drivers and rights. Recognition of Maori Custom Law has been afforded only as the

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result of overwhelming legal leverage and conditional on subsequent surrender or extinguishment of the underlying rights.

In direct contradiction, the very persistence of Maori Custom Law is also seen by many as evidence of failure. As the terminology of Maori policy changed from amalgamation in the nineteenth century to assimilation and integration in the twentieth, Maori attempts to retain distinct cultural identities are regarded as evidence of Maori incapacity to live in the modern world. (Belgrave 1996,24) In fact the contrary is the case. By definition Maori Custom Law will change over time in response to endogenous and exogenous stimuli. The ability to grow and adapt to new circumstances is a sign of a living set of values. It does not represent an inadequacy. All cultures grow and adapt over time. The most persistent show the capacity to respond quickly to new phenomena.

Maori Custom Law in the Present Tense

There is also a tendency, discussed above, to relegate Maori Custom Law to the past denying the possibility for it to develop. For instance, in the "1840" rule applied to determination of land titles. The failure to recognise the dynamic nature of Maori law and its continual development in the face of changing circumstances has resulted in breaking the continuity between past and present, itself one of the main principles on which custom is founded. (Belgrave 1996,45)

Maori Custom Law shows a persistence that defies all attempts to stamp it out. The undeniable effects of post-colonial influences on Maori Custom Law continue to have a massive impact. However, Maori Custom Law is a living, dynamic body of law. Its growth and adaptability is the result of the inherent flexibility of all systems of law. Its future is secure in the political economy of Maori survival. After 150 years of assuming Maori assimilation or cultural disappearance, policy makers are accepting that reliance on complete and imminent Maori assimilation has been misplaced. (Belgrave 1996,50)

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