MÄORI LAW AND HART: A BRIEF ANALYSIS

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This is an edited version of a seminar paper presented in the context of the LLB(Hons) programme. It provides a contemporary perspective of Mäori law from the standpoint of HLA Hart's theory of the union of primary and secondary rules.

I INTRODUCTION

2001 is the fortieth anniversary of the publication of H L A Hart's landmark jurisprudential text *The Concept of Law*.[1] This year also saw the release of the New Zealand Law Commission's long awaited report on Mäori custom and law.[2] Hart would probably have called Mäori customary law a primitive or "pre-legal" system according to the criteria in *The Concept of Law.* The warm reception of the Law Commission's report indicates that Hart's assumed perspective may be considered outdated. However, Hart remains a dominant figure on the New Zealand jurisprudential landscape, and in this paper his ideas are revisited with the benefits of a greater knowledge of the Mäori practice of law.

In *The Concept of Law* HLA Hart does not demonstrate what his notion of a primitive or pre-legal system actually looks like, or how it functions. Therefore his theory, as it stands, is inadequate for the examination of Mäori practice, and appears inadequate for the legal analysis of any community. Mäori law *is* adequately reflected by Hart's legal system. Therefore, Hart's theory of law as the union of primary and secondary rules can

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1 The Concept of Law (Clarendon Press, Oxford, 1961).

2 Maori Custom and Values in Law, SP9 (New Zealand Law Commission, Wellington, 2001).

be useful as a means of analysis, but his notion of the primitive system is perhaps fatally flawed and may be superfluous.

II HART'S PRIMITIVE SYSTEM

Hart characterises a legal system as one that possesses both primary rules of obligation and secondary rules that enable the recognition, change and adjudication of those primary rules.[3] He describes a system of rules as "pre-legal" or "primitive" if it merely contains primary rules without the all-important secondary rules.[4]

> In the first place, the rules by which the group lives will not form a system, but will simply be a set of separate standards, without any identifying or common mark…They will in this respect resemble our own rules of etiquette….[t]here will be no procedure for settling…doubt either by reference to an authoritative text or to an official whose declarations on this point are authoritative.

The closest Hart comes to describing what such a system would look like is when he notes that "only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by a regime of unofficial rules".[5] Only in Hart's endnotes does he acknowledge that few such societies have ever existed.[6] He refers the reader to *The Cheyenne Way* and the other anthropological works of AS Diamond and E Hoebel, because, in his view, their work provides "study of the nearest approximation to this state."[7] Yet none of his sources describe small, kin-bound communities existing in stable environments. Instead they describe complex communities at the mercy of hostile and unstable environments, which calls into question Hart's usually careful use of language, and the attention he paid to what his sources actually described. Another problem is that the anthropological writing on which he relies adheres to theories that become dated. Hoebel was later to describe the

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3 HLA Hart The Concept of Law (2 ed, Oxford University Press, New York, 1997) 79-99.

4 Above n 3, 92.

5 Above n 3, 92.

6 Above n 3, 291.

7 Hart, above n 3, 291. This comment is somewhat ironic, as The Cheyenne Way is a detailed study of Cheyenne legal practices, not the description of a society that fits Hart's notion of primitive law at all. Llewellyn, KN and EA Hoebel The Cheyenne Way – Conflict and Case Law in Primitive Jurisprudence (University of Oklahoma Press, Norman, 1941).

Inuit as "one of the most genuinely primitive peoples known to anthropologists";[8] a statement ripe for challenge in the light of contemporary scholarship. If Hart exhibits some carelessness in his demonstration of the primitive or pre-legal, perhaps he was less willing to see the presence of his legal system in non-Western cultures. Waldron is confident Hart's primitive system is not to be read in terms of "modernist triumphalism": "He makes no assumption that a given society is better off with this change plus this adaptation than it would have been without either of them".[9] However Hart does judge the primitive system - he defines it in terms of what it does not possess. He defines it by its defects. This is a modernist assumption.

Even on a brief reading there is little agreement between Hart and his sources on what may be a primitive, pre-legal system. Hart's theory of the union of primary and secondary rules is based on the emergence of such a union from the primitive system. But the pre-legal is a chimera; easy to picture in the mind's eye, less easy to find in actual practice. The primitive system remains a theoretical construct in *The Concept of Law*, a foil to the real star: Hart's legal system.

Despite the inadequacy of Hart's notion of the primitive system, his idea of the union of primary and secondary rules can be a useful tool of analysis of non-Western cultures. Mäori society offers possibilities for such legal analysis. Mäori practices may also serve to identify how difficult it is to define a system as "primitive" in the Hart sense.

III ISSUES IN ANALYSING MÄORI LAW.

Before analysing Mäori processes in the light of Hart's legal system, it is necessary to point out some of the complexities in analysing Mäori law. There is danger in using Western legal theory to analyse and judge a non-Western legal entity. Automatically, the Western idea becomes the frame of reference for discourse, undermining the worldview of the non-Western people.

The other danger in approaching the analysis of Mäori practices within Western discourse is in taking an extreme culturalist position. Culturalism itself is a useful means of criticism, as demonstrated by Moana Jackson, perhaps the most well-known culturalist

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8 Hoebel, EA The Law of Primitive Man (Harvard University Press, New York) 99.

9 J Waldron, "All we like sheep" (1999) 12 (1) Canadian Journal of Jurisprudence 169, 174.

commentator on New Zealand law.[10] According to this perspective Maori law must be recognised within the mainstream legal system. An extreme culturalist position would be that Mäori law and institutions should not be analysed using Western tools of analysis because the cultural derivation of those tools vitiates such analysis.[11] This position prevents the comparison of legal ideas between two worldviews.

Both culturalism and "Westernism" have probably contributed to some reluctance by modern legal scholars to analyse the form and function of Mäori law at all. As Chief Judge E T Durie observed in 1994 "[t]here is no text or study that casts our knowledge of Mäori custom in jurisprudential terms."[12] In response to Chief Judge Durie's observations, and with his further input, the Law Commission released the report entitled *Mäori Custom and Values in New Zealand Law* in March 2001.[13] Intended as a practical guide, it offers a valuable distillation of Mäori customary concepts. The report accepts their definition as law without delving very deeply into exactly how such concepts function as law, or indeed what "law" is supposed to achieve in Mäori or New Zealand society.[14] This report offers a useful starting point for further debate and exploration of Mäori law.

There have, of course, been many positivist assumptions about Mäori law, but this does not equate with analysis of the Mäori legal system using modern positivist legal theory. Perhaps Hart, or other modern theorists do have something to offer the study of Mäori practices. This

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10 See, for example, Moana Jackson "Criminality and the Exclusion of Mäori" (1990) 20 VUWLR 33.

11 Cultural relativism may also be a useful term. For further (albeit in itself culturally weighted) discussion of the potential problems of extreme culturalism or cultural relativism in the discourse between Western and non-Western modes of thought in comparative legal history, see Ann Mayer *Islam and Human Rights* (Pinter Publishers, London, 1995) 4-11.

12 ET Durie "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy" (1994) 24 VUWLR 325.

13 New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001)

14 The writers of the paper accept an anthropological definition of law, implicitly rejecting a positivist view. See Metge in New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 17-18.

essay will use Hart's theory to analyse Mäori processes to see if we may gain anything by doing so; either a better understanding of Hart's theory or of Mäori society.[15]

IV A MÄORI LEGAL SYSTEM

Hart replaces the Austinian system of a general habit of obedience to orders backed by threats with two conditions that make up the legal system.[16] The first condition consists of primary rules of behaviour that are considered valid according to an ultimate criterion of validity that must be generally obeyed. The second condition is made up of secondary rules of recognition (specifying the aforementioned ultimate criterion), change and adjudication that are effectively recognised as common public standards by the system's officials. In examining Mäori processes it is useful to identify how and if these conditions exist.

A A Mäori Rule of Recognition

Primitive "pre-legal" societies, according to Hart are characterised by uncertainty, stasis and inefficiency. In contrast legal systems are characterised by certainty, dynamism and efficiency. Uncertainty means that there is no mechanism for deciding the actual extent of a particular rule of obligation. There is no official or written text to refer to, leaving the actual edges of the law in doubt.[17] This is rectified in a legal system by the introduction of a *rule of recognition.* This rule will specify the characteristics needed by a particular rule to be generally obeyed.

The concept of tikanga may fulfil the idea of a rule of recognition by identifying the ultimate criterion of validity needed to underpin a legal system. The Williams Dictionary

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15 One final word of caution: earlier Western writers have already placed their own interpretations on the Mäori legal practices. Those Western perspectives and the customs have changed considerably over the past couple of centuries of contact. A discussion of Hart's theory and Mäori law in 2001 must also be interpreted within its own temporal context if it is to avoid a charge of essentialism on either topic. Please note the conscious use of the "historical present tense" in this essay. Most of the Mäori practices referred to here are spoken of in their pre-European or early colonial forms. The extent to which such institutions survive in contemporary New Zealand is worthy of much more discussion elsewhere.

16 HLA Hart *The Concept of Law* (2 ed, Oxford University Press, New York, 1997) 116

17 Hart, above n 3, 92. Much ink has been spent discussing the uncertainty of statute and Common Law, which continually evades easy categorisation and definition. Somehow this uncertainty does not seem to raise questions about possible primitivism in Hart's legal system.

defines tikanga as "rule, plan or method." It is a noun derived from the adjective "tika" meaning straight, direct, just, or fair.[18] According to a recent paper presented by Professor Hirini Moko Mead "tikanga" embodies the following:[19]

> …a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures, as established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do….

Tikanga, according to Bishop Manuhuia Bennett, indicates the obligation to do things in the "tika" way.[20] Tikanga contains within itself central values such as whanaungatanga, mana, tapu, utu, kaitiakitanga, mana tupuna, wairua and aroha.[21] Such values were common to different hapü and iwi, but were practised and interpreted according to the contextual situations of those groups.[22]

Tikanga and its use and practice characterise an internal point of view. This internal point of view is reflected in phrases often used today and in the past; "it is tikanga that [such and such] occur", "[a particular action] is /is not tikanga." Rituals of encounter, for example, were (and are) adjudged valid according to whether such a ritual satisfied the criteria provided by tikanga. Actions and other *rules* are judged by their compatibility with tikanga. In rules of succession the right of adopted children to succeed to rights in property can be traditionally determined to be against tikanga if an öhäkï, oral will, exists

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18 HW Williams *A Dictionary of the Mäori Language* (Government Printer, Wellington, 1985) 216.

19 "The Nature of Tikanga" presented at Mai i te Ata Häpara Conference Wänanga o Raukawa, 11-13 August 2000 in New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001)16.

20 New Zealand Law Commission Mäori Custom and Values in New Zealand Law (NZLC SP9, Wellington, 2001) 16.

21 I roughly translate these terms as kinship, authority, ritual restrictions, equal return, guardianship, ancestral authority, spirituality, and love or yearning.

22 New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 4,28 Erueti in Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith *Mäori Land Law* (Butterworths Wellington 1999) 26.

that contradicts or disallows those rights.[23] The öhäkï itself must also satisfy criteria set by tikanga.[24] The concept of tikanga thus provides the necessary principle or set of principles against which all rules may be measured. At the same time tikanga contains the *content* of those laws.

Hart's rule of recognition provides the criteria to assess the validity of other rules.[25] Thus the Crimes Act 1961 provides the content of a criminal code, but the form of the Act is legislation as determined by the Queen in Parliament – mainstream New Zealand law's ultimate rule of recognition. The statutory order provides the criteria to assess the validity of the law. Mäori recognise marae protocols and öhäkï as law because they stem from tikanga; that which has been laid down by ancestors and ultimately by atua (gods).[26] Tikanga provides Mäori with the criteria to assess which actions and rules are tikanga.

It could be argued that in the Mäori case the defect of uncertainty remains, for the external observer at least, because there is fluidity in how commentators and those who live by tikanga express them. Erueti, for example, states: "Tikanga are considered to have their source in a set of core values held by Mäori generally."[27] Thus tikanga result *from* such values, whereas tikanga can be both the results of such values *and the values themselves*.[28] This fluidity would surely invalidate tikanga as a rule of recognition according to Hart, even though his ultimate rule of recognition also exists subjectively in the "beliefs" of officials that they are bound by it. For those who perceive the internal aspect of tikanga fluidity presents no fatal uncertainty. This fluidity is difficult to pin

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23 FOV Acheson "Adoption Amongs the Maoris of New Zealand" (1922) 4 (3rd series) Journal of Comparative Legislation and International Law 60, 66. See also New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 118-120.

24 See Appendix One.

25 HLA Hart *The Concept of Law* (2 ed, Oxford University Press, New York, 1997) 116.

26 Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith Mäori Land Law (Butterworths Wellington 1999) 25; New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 4, 15-17.

27 Erueti, aboven 26, 25.

28 See also New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 28 -40 for a fuller discussion of these values.

down. It may be evidence of uncertainty in Mäori law, or it can counter the next flaw in Hart's notion of primitive law - stasis.

B Rules of change in Mäori law

The defect of stasis in primitive law is the lack of an acknowledged process for changing any of the primary rules of obligation beyond simple change over time. Stasis is resolved in Hart's legal system by *rules of change* to introduce new primary rules and adapt those already in existence. For Hart, the simplest form of this rule empowers an individual or body to introduce new primary rules for the conduct of the life of the group and to eliminate old rules.[29]

Recent commentators have observed that Mäori custom is not rigid, able instead to adapt to the changing requirements of the community, giving effect to a "practical jurisprudence."[30] The exact mechanisms to incorporate such change into the life of the hapü or iwi are unclear. Clearly in pre-colonial times tribal hui were a vital institution whereby public opinion was delivered to the relevant chiefs.[31] The ability of Mäori communities to change customary practices was recognised by the courts early in the 20th century in the case of *Hineiti Rirerire v Public Trustee of New Zealand*[32] quoting the Native Appellate Court in 1906. That Court noted that Mäori custom did not follow the English notion that custom must, in order to be called custom, have been in place since "time immemorial".

> It may well be that this is a sound view of the law, and that [Mäori] as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the customs of such a race is not to be put on a level with the custom of an English borough…which must stand as it has always stood, seeing that there *is no quasi-legislative internal authority which can modify it.* (emphasis added)

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29 HLA Hart *The Concept of Law* (2 ed, Oxford University Press, New York, 1997) 95.

30 New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 5. See ET Durie (1994) 24 VUWLR 325, 327; Erueti above n 26, 26.

31 Elsdon Best *The Mäori* (Vol 1, The Polynesian Society, Wellington, 1925) 353-355, 375 .

32 *Hineiti Rirerire v Public Trustee of New Zealand* [1920] AC 198; (1919) NZPCC 1 PC 6.

Evidence for pre-European processes of rule-making is sketchy, nevertheless such rule creation and adaptation was done in hui called according to need. Polack recorded the following *observation* in the 1830s after some Europeans had repeatedly breached a tapu placed on the Whanganui River:[33]

> The simple natives obeyed but the Europeans would not, and the chief discharged several muskets loaded with ball at the various boats as they passed…but at a conference that followed, it was carried unanimously and the motion seconded that, for the future, Europeans should not be shot at for such trifles.

Despite Polack's eurocentric interpretation, this piece does show that Mäori utilised group processes to alter the rules that they adhered to; they were not always bound irrevocably to their ancestral practices.[34]

> Tribal and sub-tribal policy was forged by consensus, with all the chiefs and elders having a say. Whenever the group gathered, matters of policy were discussed and the best orators commanded great influence…oratory became crucial to the exercise of leadership.

The decisions that arose from such hui may be termed law. If legislation is merely the collective enactment of laws, then the Mäori in hui enact legislation and change and adapt those laws as necessary, providing such laws are valid according to tikanga. Certainly Mäori did not consider themselves bound by a static set of customs; they were fully able to change the rules by which they were bound, with only the condition that tikanga be maintained.[35]

Hart identifies uncertainty and stasis as central flaws in the primitive system but how can a primitive system be criticised for leaving its legal edges in doubt, yet also be criticised for having processes that are too rigid and unable to change? This inconsistency may perhaps be another flaw in Hart's primitive system.

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33 J Polack *New Zealand – Being a Narrative of Travels and Adventures* (Vol 2, Whitcombe and Tombs, London, 1838) 255.

34 Anne Salmond *Hui: A Study of Mäori Ceremonial Gatherings*(2 ed, Reed Methuen, Auckland, 1976) 14.

35 See New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 35f regarding the role of rangatira in such communal decision making.

C A Rule of Adjudication

In Hart's primitive law, the lack of processes to make changes to or to define laws results in inefficiency. Resolution of any breaches of the rules will be left to the individuals and the groups that are able to pursue such resolution.[36] Inefficiency must be countered by *laws of adjudication*, whereby individuals are empowered to judge when breaches have taken place and which procedure should be used to remedy breaches.

Were there officials in Mäori society empowered to judge breaches of rules and determine the resolution of such breaches? [37]

The Maoris had no all-powerful prince willing and able to enforce due obedience to their customs, but the customs were enforced by such means as existed, chief of these being the general opinion of the tribe, as expressed in meetings of the elders or through the mouths of the chiefs.

One group of people that may have been empowered to make such decisions were tohunga. Tohunga, translated as "skilled people" in Williams' *Dictionary of the Mäori Language*, were extremely important, usually religious, figures in the maintenance of Mäori society.[38] When also possessing the rank of the first born of a leading family (ariki) the tohunga held considerable authority as noted by Sir Apirana Ngata:[39]

> He as not only chief of the clan, but he supplied its law and government. The law that governed the tribe practically emanated from the priest, from the tohunga.... The law which meant life and death which dealt with everything pertaining to their cultivations, everything pertaining to their industries, everything

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36 HLA Hart *The Concept of Law* (2 ed, Oxford University Press, New York, 1997) 93.

37 FOV Acheson *The Ancient Mäori System of Land Tenure* (Thesis for the Jacob Joseph Scholarship, Victoria University College, 1913) 3; see also Best (1925) 351; Wharepouri AULR (1994) 605.

38 According to Shortland, every hapü contains at least one matakite (person with second sight) and several tohunga. E Shortland Tradit*ions and Superstitions of the New Zealanders* (Longman, Brown, Green, Longmans and Roberts, London, 1856) 106.

39 (July 19 1907) 139 NZPD 518.

> pertaining to their moral life, and everything pertaining to their religious life emanated from tohunga. His word was law.[40]

Writers such as the Reverend GT Hammond disagreed that the tohunga was always in such command and observed that other ranks in the Mäori hierarchy could have had input in the

40 It could be that Ngata here contradicts Acheson's theory negating "Strong Arm" rule in Mäori society discussed earlier in this paper. This quotation is included to illustrate that tohunga are seen by at least some commentators as individuals or officials responsible for ascertaining the laws of a given community.

adjudication of laws.[41] The fact that Mäori practices were not easily agreed upon by external observers indicates some complexity in Mäori processes that defies categorisation as "primitive".

Laws of adjudication must also outline the procedure by which breaches are identified and remedied.[42] One such procedure might be the institution of tapu, at its broadest meaning: ritual restrictions placed on people, things and acts.[43] One function of tohunga and other notables in hapü was to identify when to apply appropriate restrictions to people, things and activities or to identify that which had been rendered tapu. Breaches of tapu needed to be resolved in the interests of community welfare.[44] Such resolution might be mediated through a tohunga, by placating the gods, or might be achieved through supernatural means beyond the control of any human agency.[45]

V CONCLUSION

Mäori legal processes operate at a level over and above mere "etiquette" or primary obligations lacking an accompanying system. Tikanga Mäori decides what is and is not valid practice. Mäori also have processes by which laws may be altered and adapted to circumstances as required. Mäori social hierarchy includes figures with the authority to

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41 CMG Gudgeon, "The Tohunga Maori" (1895) 2, 16 JPS 63-91; T G Hammond, "The Tohunga Maori" (1908) 17, 67 JPS 163-165. Hammond includes other ranks such as Tumu Whakarae (supreme leader), Pou-Matua (third in rank) as well as the rangatira. That there has been ongoing disagreement as to the exact identity and position of such officials represents a continuing scholarly anxiety to tie down and define the institutions of Mäori society.

42 HLA Hart *The Concept of Law* (2 ed, Oxford University Press, New York, 1997) 96-97.

43 The definition of tapu needs far more space than I can give it here. It has many different meanings according to context. I concentrate on the ritual restriction because this "corrective and coherent power" of tapu comes closest to offering a process by which to determine breaches of tikanga. See HW Williams A Dictionary of the Mäori Language (Government Printer, Wellington, 1985) 385; New Zealand Law Commission Mäori Custom and Values in New Zealand Law (NZLC SP9, 36-38; S Mead, (ed) Customary concepts of the Maori: a source book for Maori Studies (Victoria University of Wellington, 1984) 68-106.

44 Durie, M in David Williams "He Aha te Tikanga Mäori?" (unpublished revised draft of Joseph Williams" paper of the same name prepared for the New Zealand Law Commission Mäori Custom and Values in New Zealand Law (NZLC SP9, Wellington, 2001) 37.

45 Best in S Mead, (ed) Customary concepts of the Maori: a source book for Maori Studies (Victoria University of Wellington, 1984) 91. Please note that tapu must always be considered in relationship to the concept of noa; that which is ritually unrestricted

identify when breaches of primary obligations occur, and to decide what earthly action must take place to rectify such a breach. The Mäori system of tapu or imposing ritual restrictions on objects, people and places ensures that tikanga is observed.

Hart's theoretical construct of the primitive system does not reflect actual Mäori processes and it is difficult to imagine a culture that would reflect that construct. Therefore, its usefulness as an explanation of Mäori processes is questionable. If the label of "primitive" could be dropped and its application widened, the construct may retain some usefulness as a theoretical model with which to identify theoretical deficiencies in the legal practices of any society. Hart's notion of the legal system, on the other hand, throws new light on how Mäori ordered social and cultural life, and that investigation deserves more space than I can give it here. The idea of the primitive, pre-legal system lacks definition, and is a redundant mirage that vanishes on closer inspection.

This year isthe fortieth anniversary of *The Concept of Law* and belatedly time to acknowledge, with the release of the Law Commission's report and other similar works, the complexity of traditional Mäori legal practices. If Hart's primitive, pre-legal system is to survive as a theoretical construct it must be altered to make it more accurate, relevant and useful. If that alteration is not possible, the idea it should perhaps be dispensed with altogether.

APPENDIX

SOME ASPECTS OF MÄORI LAW

A Öhäkï

He öhäki is the public, oral will, made by the deceased on their deathbed. As noted by Acheson, this feature was acknowledged by the Native Appellate Court in 1895.[46] At that time the following characteristics were summarised:

(1) It was the oral expression of the wishes and intentions of a Mäori, shortly before their death, regarding the disposal of their property.

(2) It had to be made in the presence of, to made known to near relatives

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46 Acheson, FOV *The Ancient Mäori System of Land Tenure* (Thesis for the Jacob Joseph Scholarship, Victoria University College, 1913) 28.

(3) It would seldom or never make provision in favour of a stranger.

(4) The öhäkï was binding and would be acted on without question by the relatives of the dead person after death.

(5) Traditionally öhäkï were required to be made at the point of death, but the court considered that this was not necessary for contemporary öhäkï.

As noted by the Law Commission report on Mäori custom, no sooner was the öhäkï recognised in the courts than it was abrogated by the Native Laws Amendment Act 1895, s 33.[47] Thus there is no customary law of wills now recognised by the Courts. The practice still continues.

B Rähui

This, according to S Mead is a means of prohibiting a specific human activity either from continuing or from occurring. It might be directed at a group of people, or it might be focussed on a single individual. There might be a visible signal, such as a post, to let people know that a rähui had been "set up".[48]

> The most common types of rähui are those associated with pollution and hence tapu and those related to the conservation of resources. These two are closely interlinked and, in fact, one implies the other.
>
> [often a rahui would be placed in an area where a drowning had occurred]
>
> …anyone out of bounds was likely to find himself the target of…the muru (ritual plunder).

C Whängai

This is the Mäori practice of adoption.[49] Acheson summarised the rules surrounding this practice as follows:[50]

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47 New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 119.

48 S M Mead (ed) *Customary concepts of the Maori : a source book for Maori Studies* (Victoria University of Wellington, Wellington 1984) 127-128.

49 See also New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 127-130, for a fuller discussion on Mäori customary adoption.

50 FOV Acheson "Adoption Among the Mäoris of New Zealand" (1922) 4 Journal of Comparative Legislation and International Law (3rd series) 60-63.

(1) Complete adoption would be where the child was taken in early infancy, and lived with its adoptive parents up to marriage or adulthood.

(2) Where adoption was not of the complete character…the surrounding circumstances would have to be taken into account in determining the rights, if any, of the adopted child.

(3) It does not appear the special ceremonies were observed. It was sufficient that the adopted child be recognised as such.

(4) The adopted child would almost invariably be a relative by blood of the adopting parent.

(5) If the adoption were made with the consent of the hapü and the adopted child remained with the hapü it would be entitled to share the hapü lands,

(6) Under the conditions in (5) the adopted child would be entitled to succeed to the whole of the interest of the adopting parent.

Similarly to öhäkï, the practice of whängai was recognised in the courts then legislated against.[51] Section 19(1) of the Adoption Act 1955 provides that no person shall be capable of adopting a child in accordance with Mäori custom. The custom continues today, and there are some attempts to respect the practice, even if not acknowledging it as a legal practice.[52]

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51 *Hineiti Rirerire Arani v Public Trustee* (1919) NZPCC 1.

52 New Zealand Law Commission *Mäori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001)55-59.