

## **Lexicography, Law and the Transformation of New Zealand Jurisprudence**

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We construct the world with words, and indeed St John's Gospel underlines this in its opening sentence "In the beginning was the word, and the word was with God, and the word was God". Polynesian cultures were acutely aware of the power of words; contrary to the somewhat foolish assertion of the English proverb about sticks and stones, the Māori knew better – *He tao huata e taea te karo, he tao ki e kore e taea* – "A spear thrust can be parried, but a word cannot"

The research programme "Laws and Institutions for Aotearoa New Zealand", based at the University of Waikato's Te Mātāhauariki Institute has as one of its goals the production of a "compendium of references to customs and institutions of Māori customary law". This compendium, named Te Mātāpunenga<sup>1</sup>, takes the form of an encyclopaedic dictionary in which the named concepts and institutions (selected in consultation with Māori and legal scholars) each constitute the head word of a "title". A title includes a group of entries, arranged in chronological order, of extracts from manuscripts, published materials and transcriptions of oral accounts illustrating the application of the idea in different times and contexts.

Each title begins with a preamble combining a lexicographic introduction followed by a brief "road map" noting the salient features of the entries dealing with the word under review and also pointing the way to associated titles and important appearances of the same ideas in entries under the headings elsewhere in the book. In this discussion I am going to concentrate on the lexicographic aspect of the preambles, their contribution to the history of ideas, and, along with the material that follows them, the construction of an inclusive pluralism in Antipodean jurisprudence.

Now, I noted a few moments ago that the subtitle of Te Mātāpunenga proclaims it to be a compendium of concepts of Māori *customary law*. Our compendium is already a highly informative grab bag of words denoting or expressing philosophical concepts, values, norms, and institutions through which the social order has been and is maintained and regulated, and which have actual or potential legal significance. What this legal significance means is a topic which is easy to raise, like the lid of Pandora's box, but much less easily disposed of. It was a matter which Dr Alex Frame and I discussed at some length when we collaborated on the introduction to the draft prototype Mātāpunenga which was circulated to the project's advisory group and to other colleagues for comment. The introduction takes as a working definition of legality a modified reading of E. Adamson Hoebel's contention that:

A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.<sup>2</sup>

We added to this the proviso that "collective social recognition and reinforcement of 'supernatural' consequences constitutes a degree of social pressure which is equivalent to more direct applications of physical force", and later, in the light of an extended discussion of views of the nature of law written by Dr Frame, produced a further modification of Hoebels proposition as our working definition:

A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of force or the imposition of serious social disadvantage by an individual, group, or agency possessing the socially recognised privilege of so acting.<sup>3</sup>

I personally have never been very happy about the physical (or “supernatural”) force part of the argument, although I have to concede that to be completely effective some sort of enforcement mechanism external to the individual or potentially errant group probably has to exist. I am sure that from a Māori perspective there was and is nothing particularly *super*-natural about the effects of violating tapu (which is what we had in mind with the original rider to Hoebel’s axiom), any more than there is to violations of the law of gravity. It seems to me, though, that there is a way of getting around the need to specify any kind of force at all, as far as the construction of a new jurisprudence for Aotearoa / New Zealand is concerned, using an escape hatch provided by the Privy Council, a body whose past pronouncements will continue, I am sure, to provide shadows in which we may shelter and shiver for some time to come, despite its replacement with our own Supreme Court. In the case of *Angu v Attah*, the rule was laid down that:

As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them.<sup>4</sup>

Legality within a state supported framework may thus be obtained by beating the system and the concept frequently enough to gain the required notoriety. The “beating” that I refer to is the creative and constructive process with which the Tongan intellectual ‘Okusitino Māhina finds encapsulated in the concept *tā*<sup>5</sup>, a Proto-Polynesian term reflected in Māori, Tongan, and many other Polynesian languages. I am not sure of the word’s full range in Tongan, but in Māori it is particularly suitable for this purpose. Its use in legal discourse is too new for it to be notorious enough for inclusion as a title in Te Mātāpunenga, but highly suitable to feature in a preamble to our consideration of this work. The modern word *tā* is derived from an earlier word which probably had the same form, and which was in turn derived from one used in a pre-Polynesian stage of the Austronesian language spoken in Eastern Oceania, with the form \**tara*<sup>6</sup>, but a similar core meaning of beating or pounding, especially with a stick. In Māori its range extends to a variety of practical, ceremonial, and communicative activities, including striking the sides of a new house with a branch of kawakawa (*tā i te kawa*) as part of the opening ceremonies, painting, carving, modelling, tattooing and bailing water from a canoe.

Te Mātāpunenga itself is a manifestation of *tā*. The assembly of dozens, in fact hundreds, of well-researched pieces of evidence provides material for all those with an interest in beating their ideas into shape for purposes of understanding, communication, attracting attention, and finding hitherto hidden possibilities for development and growth.

This too I believe is a way of getting around the fraught subject of just what constitutes customary law in general, and *Māori* customary law in particular. The case for and against customary law has been rehearsed in many quarters, including the

Introduction to *Te Mätāpunenga*, and also by the keynote speaker at this symposium<sup>7</sup>. I am inclined to agree with the Dutch anthropologist J.P.B. de Josselin de Jong, who, after reviewing the sophisticated arguments and sophistry surrounding this particular concept concluded that “As muddled terminology may be an impediment to clear thinking, we should begin by abolishing the term ‘customary law’<sup>8</sup>.”

I do not think that doing this would strike a mortal blow to our project (although it may require us to re-name our symposium in retrospect). Fractious as Māori society may have been under the pressures of increasing population and diminishing resources in the early part of the 18<sup>th</sup> Century, and the protoglobalization following the encounters with Cook, du Fresne and de Surville, it was never in a state of complete chaos or even anarchy; people lived by rules, and some how or other these rules were enforced, most of the time quite effectively. In fact, this effective legal order functioned independently of and in many ways parallel to the state-sanctioned one for more than a century after the signing of the Treaty of Waitangi and its revolutionary aftermath<sup>9</sup> ushered in and consolidated the New Zealand state system. It continues to function in some Māori communities, albeit in a somewhat subdued and much diluted way.<sup>10</sup>

The important question therefore is not how we define “Māori law” or how “legal” Māori custom might be, but me pēhea te ture e whakatāngia kia aranga tonu ngā miro Māori – how can the national system be beaten into shape so that Māori elements become a central focus. This is of course a “one law for all” agenda, but before the demonstrations begin, let me introduce another of Dr Māhina’s concepts which is highly relevant to the case and which I think underlies my argument. This is the idea of *heliaki*<sup>11</sup>, a form of expression in which one thing is stated in terms of another, and indeed reflects and incorporates in some way aspects or qualities of its counterpart. Sometimes the referent is easily discerned, sometimes the statement is quite cabalistic, but full comprehension is always dependent on knowledge of context and hidden referents. This mode of expression is found in many languages, of course, including English, but it is particularly well developed and pervasive in Polynesian oratory and formal discourse. *Taniwha* are thus not mythical creatures, at least most of the time (knowledge and judgement are required to separate or assess the relative significance of myth, legend and observable fact) – they may be clear and present dangers, potential sources of trouble on any of a large number of levels, powerful friends or foes, but never phenomena to be taken lightly, even by a court of law.

We will touch again on this way of communicating ideas, some of which may have important legal consequences. But in the mean time let me point out that in appearing to advocate a unitary system, I am also arguing for a much more multifaceted and polyphylletic one. This requires, however, a view of law which extends beyond the purely pragmatic. “Māori law”, like most ancient systems for regulating the social order, whether codified or not, was substantive or organic in nature. Dostoevsky’s *Crime and Punishment* provides an extended commentary on the clash of the organic view of law, in which crime, when it does occur, is against not just the immediate victim, but against everyone who shares in the life of the community.

This is contrasted with the positivist view of the central character, Rashkolnikov, for whom law is “merely a social convention, a taboo invented to control the ordinary being who cannot exercise real freedom”<sup>12</sup>. There were two elements of the old order in Russia that Dostoevsky abhorred and which violated his belief that the institutions

empowered to uphold the law, as the repository of the truth that constitutes the community, should not be polluted by hypocrisy and persecution. These were the collusion between Church and State in manipulating the conscience of an accused, and physical torture. But the inquisitor Porfiry, in his way of operating, actually practices the same kind of coercion. “The only difference is that he has cleaned them up and renamed them, in keeping with the enlightened intellectual posture of the times”<sup>13</sup>. It seems to me that Dostoevsky’s views are very much like the Māori traditional view, where substance is more important than mere form – *tikanga* is valid only if grounded in *tika*.

The dominant, official, state-sanctioned legal system in New Zealand is founded on a double-decker arrangement of (a) statute law and regulations made by a myriad of official entities deriving their authority from statutes; and (b) the common law, which consists of a complex compilation of lessons and principles drawn by learned judges from precedents based on each other’s interpretations of the legal import of customs which have become sufficiently notorious to have attracted sustained judicial attention. The statute, however, as representative of the will of the Sovereign, takes precedence over the common law in the case of direct and unmediated conflict. How can this essentially positivist, pragmatic arrangement be reconciled with a system which sees law as something more fundamental (and at the same time potentially much less precise) than the positivist mainstream? The tension is already manifest within this mainstream itself – references to the “principles of the Treaty of Waitangi” (let us avoid for the moment the question of *which* Treaty of Waitangi<sup>14</sup>) are intrusions of an organic normative order into a positivist one.

Hendrik Hartog, now a Professor of History at Princeton University, offers the possibility of a way forward in his seminal article “Pigs and Positivism”, first published in the *Wisconsin Law Review* in 1985. This is a meditation on the case of *People vs Harriet* – the “people” being primarily the Mayor of New York (who in his magisterial capacity actually tried the case) and some of his Council, and Mr Christian Harriet, a pig-owner resident in the City. Not surprisingly, the Mayor won the case (with the help of the jury he directed), but Mr Harriet nonetheless was no loser; he retained possession of these pigs, despite their being labelled public nuisances, and pig owners were able to assert their unrecognised but socially-supported customary right to let their pigs roam certain city streets for several decades more. It is the lessons from the contest between the City and the pig-keeping citizens which are relevant to us here.

In defining law as the command of the sovereign we ordinarily deny the legitimacy of interpretive stances other than those ... which have the benefit of formal authoritativeness. ....

That way of thinking allows us to maintain our valued vision of the law as a (single) text. But in doing so it represses the existence and the relative autonomy of competing and conflicting socially constituted visions of legal order.

....

.... If a legal historian has to define or assume a nature of law, and I am not at all certain that it is necessary to do so, he or she might as well start with a

definition of law as an area of conflict within which alternative social visions contended, bargained, and survived.

.... The [Harriet] case was one episode in an ongoing story of bargaining and conflict between contending normative orders.<sup>15</sup>

Professor Hartog notes that this perspective depends on recognition of an implicit pluralism in American law – “its implicit acceptance of customs founded on multiple sources of legal authority”. The same recognition would be equally necessary in Aotearoa. To the pig keepers, “the law was both an external force imposing itself on them, and also, at the same time, a structure within which they resisted and worked to control their traditional social practices”<sup>16</sup>. Legal authority may emerge from many governmental and quasi-governmental institutions and practices -- which are also influenced by multiple considerations, including such things as bureaucratic inertia, and “the realization that action against the custom might undermine the legitimacy or the effectiveness of the political order”. This is basically what happened when only nominal penalties were imposed on Mr Harriot in 1819 – “... in the end, the legality of the practice of keeping pigs in the streets rested on its actual possession by a group with some political significance, a group capable of imposing its practices, within limits, on the larger community, a group capable of resisting invasions of its relative autonomy. Until the late 1840s, the artisan pig keepers of New York evidently were such a group. An adequate account of our legal history should be capable of incorporating their values as well as those of the mayor of the City of New York.”

Within the limits imposed by statute and noted above, the development of a distinctly New Zealand common law does open the way to incorporating other values more extensively than has been possible overtly in the past, particularly since the spectre of the Treaty has been allowed to manifest itself, but I am sure that the central lesson of the *Harriet* case, that the successful assertion of a right need have nothing directly to do with its “objective characteristics or functions”, but rather it’s the support it has from “a politically active and insistent community” who believe that they have this right, and the inability of those who oppose it to do what is necessary to stop it<sup>17</sup>. For an inclusive example of this, think only of the regulation of the sale and consumption of alcoholic beverages on the West Coast in the era of six-o’clock closing.

The current foreshore and seabed controversy provides an interesting illustration of the clash of normative systems, and also how the State has the ultimate power to intervene and, in conformity with Hoebel’s dictum and theories of John Hobbes, attempt to use its overwhelming force to determine the final outcome. In this case the *possibility* of an implicit legally-relevant right had been discerned by the Court, but before this could be tested, Government decided to intervene – so we now have a contest as to whose practices will be imposable in the future. Our research does tell us what was done in the past. The relevant entries from Te Mātāpunenga have been published and commented on in a paper by Dr Alex Frame and Paul Meredith<sup>18</sup>, and there are interesting case studies of the assertion of rights in relation to the foreshore within the contemporary data provided by our Pū Wānanga seminar leaders. For example, in this account by Dr Paki Harrison of his Grandfather’s assertion of rights in this regard:

Well, I remember ... grandfather's house was right next to the gate. Now, that's a controlled area. It's like going through customs. But it was an ordinary gate, and somebody used to come to the gate, and he would look from the kitchen and see him on his horse. And he knew he was going to get some crayfish or whatever it was. So the property was his, right? So he opened the gate to let him in. The guy would go out and get what he wanted, like a few paua, a few kina, and a few crayfish. But on his way back, it was interesting, because my great-grandfather used to be waiting there with his own kit, not an income tax form. And you pulled out a paua or a mussel or whatever, and put some of it in his kit; then you'd go on your way. That was an acknowledgement of his rights, that's his mana whenua, mana moana, which was being acknowledged.<sup>19</sup>

This narrative illustrates the operation of *kaitiakitanga* (trusteeship over resources), *mana* (recognized authority, including authority over the foreshore and seabed, not just the land over which you had to pass to get there) and *utu* (reciprocity, a return for a privilege received) in action. Such narratives have to be taken into account in sketching the semantic range of the terms associated with them. The lexicographer, practicing the "half art, half science, directed towards the most practical codification of a given corpus of words"<sup>20</sup>, thus becomes a kind of mediator between the legal system and the texts on which its conceptions of terminology relating to custom might be based.<sup>21</sup>

The words themselves have not sprung spontaneously from the earth or sky. Many have long histories, and are the product of centuries of refinement and transformation, much of which has taken place in far distant lands. Their etymology and the lexicographical framework in which it is embedded give us a guide to the intellectual history of Māori social and legal thought.

The starting point is the departure of the Austronesian people from the mainland of what is now China, somewhere in the vicinity of Taiwan. How they got there and where they were before that we have no way of knowing; the linguistic clues will take us back no further than this period, estimated with the help of supporting archaeological evidence to have been about 6,000 years ago. The language (or cluster of closely related languages – no one can know for sure) spoken by these people is conventionally termed "Proto-Austronesian". Some of these people stayed in Taiwan, but others eventually spread out south through the Philippines and on to what is now Indonesia. While some of the Austronesians continued a westward expansion, which would take their descendents eventually as far as Madagascar, others, by this time speaking a language that had diverged from the original Austronesian (like the languages spoken by their kin with whom they had lost touch as the generations passed), established a base in the Moluccas islands (north of Timor and east of Sulawesi), from which numbers of them, as speakers of what we now label Proto-Oceanic, moved along the island chains adjacent to the northern coast of New Guinea and into the Western Pacific. This area as far as the Solomon Islands had long been settled by other people – human occupation of this area had been extensive and continuous for many millennia before the arrival of the Austronesians, but when they got beyond the Solomons to Vanuatu, New Caledonia, and the island groups now known as Polynesia and Micronesia, they had a new world to themselves. In the course of this movement, from New Britain and the Bismarck Archipelago as far as

the hitherto unexplored lands of New Caledonia, Fiji, Tonga and Samoa, they not only carried their language, but also their culture and, among other technological innovations, a distinctive style of pottery-making, now known as Lapita.

This was more than just a series of remarkable feats of exploration and navigation. Andrew Pawley summarizes it thus:

The spread of the Neolithic through the Philippines and across Indonesia and into the Bismarck Archipelago now seems to have been quite swift, taking less than 1000 years .... Although certain archaeologists disagree ... it seems we are dealing here with a clear case of populations maintaining a high degree of cultural and linguistic continuity while migrating. Evidence from historical linguistics gives powerful support to this view. The support goes far beyond the matter of family trees and the directions of dispersal. It includes massive continuities in the terminologies for social organisation and material culture from Proto Malayo-Polynesian [the Austronesian language as transformed by the group that left Taiwan] through Proto Oceanic to contemporary Oceanic languages of both Near [Oceania, like the Solomons] and Remote Oceania [like Tongan, Samoan and Māori].<sup>22</sup>

These continuities are both physical and conceptual. By physical I mean that the same word, often with only very slight modification as the sound systems of daughter languages diverge from each other and their parent, can often be shown to have carried identical or at the least very similar meanings through several millennia. This is not because there is something magical about the sounds in which a meaning is encased – words do have lives, but these are given to them by the speakers of the language and those who transmit the culture of which it is part. They have therefore a kind of conditional immortality, and it is this quality that enables us to use the lexical heritage of a people to trace their intellectual history.

Over the next thousand years or so the Oceanic Austronesians moved, with their pottery and other technological innovations, including their exceptionally efficient and seaworthy vessels, their language and their culture further into the Pacific. Those that were to be the forebears of the Polynesians settled first in some of the islands of the Fiji group, one of which is remembered in Tongan and Samoan traditions as Puluotu, and then on to Tonga and Samoa. The language spoken during the early occupation of Fiji became the ancestor of the modern Fijian and Polynesian languages, and Proto Polynesian, spoken during the early occupation and exploration of Tonga and Samoa (Samoa was settled around 1000 BC)<sup>23</sup>, became the mother language of Polynesia. As the Tongan and Samoan variants became more distinct, Proto Nuclear Polynesian developed in the Samoan area. By about 300 AD Polynesians had established themselves in the Marquesas (and probably reached some of the other Eastern Pacific island groups as well at this time), and a distinct Eastern Polynesian language developed, carried as far as Easter Island, which seems to have become isolated first, and then, as Proto Central Eastern Polynesian, to Hawaii. By the time New Zealand was discovered and settled (not necessarily simultaneous events), Marquesan and Tahitian had diverged sufficiently to be separate languages, and the predominant language spoken by the colonizers of Aotearoa seems to have been one they shared in common with the Polynesian inhabitants of Tahiti, the Tuamotus and Rarotonga. This is given the label Proto Tahitic. However it is probable

that speakers of the Marquesic language also settled in New Zealand and that Tahitic speakers visited Hawaii even after the linguistic differentiation of these two groups.<sup>24</sup>

The linguistic heritage contains an inventory of things as well as ideas. The ancestors of the Māori arrived here in waka, sailing vessels still called by a recognizable reflex (i.e. old form reflected in a newer one) of the Austronesian word *\*wangka*, which carried at least four plants and two animals still bearing their Austronesian (or Proto Malayo Polynesian) names: the yam (*uwahi*, from *\*hubi*), the ti (tropical cabbage tree, *\*siri*), the taro (*\*talo*), the memory of breadfruit (*kuru*, a word occurring in ancient karakia, from *\*kukur*), lice (*kutu*, unchanged) and nits (*riha*, from *\*lisa*). But even where the form of the word changes completely, and metaphorical association may persist. In Māori, the term waka refers also to the descendants of the ocean-going voyaging canoes which landed here in earliest days of settlement, and the territory over which they exercise control. Similarly the smallest unit of local government in the Philippines is the *barangay*, a name derived in the same way and with the same extended meaning as the Māori waka. The parallel does not end there. A decision of the Philippine Supreme Court noted that:

The word “barangay” is derived from the Malay “balangay,” a boat which transported them (the Malays) to these shores .... Historian Conrado Benitez wrote ... that the barangay was ruled by a dato who exercised absolute powers of government.

This kind of political power within Māori society was traditionally exercised by Ariki and Rangatira. *Rangatira* is a Central Eastern Polynesian word, *Ariki* is Proto-Polynesian. The closest language with a cognate form for Dato is Fijian. But although the word stopped in Fiji, the concept was carried to Aotearoa. The “Dato” was not just a mini-dictator.

The highest authority in the autochthonous hierarchical system of ancient Java was the *ratu*. ....

The word *ratu*, or its cognates, is found in many languages which belong to the Austronesian language family with a variety of meanings, such as Tagalog Däto (“high priest”). ‘Toba Batak datu (“sorcerer”), Malay datok (“head of a kin group”) and Fijian ratu (“title of rank before names of males who are chiefs”). Based on these various meanings, [Dr Robert] Blust ... suggests that the Proto-Austronesian *\*datu* had at least four components of meaning, namely: (1) political leader, chief; (2) priest, custodian and administrator of customary law, medical practitioner; (3) aristocrat, noble; and (4) ancestor, grandfather, elder.<sup>25</sup>

All these qualities are marks of the ariki and rangatira, including the grandfatherly role. As Sir Hugh Kawharu points out:

What is looked for ... in a rangatira is evidence of a working out of a high order of spiritually sanctioned power and authority. Primogeniture ... may thus be called the prescribed factor in rangatiratanga, and ability the achieved factor. Implicit in all this is the matter of reciprocity: between the individual and his god, and between the individual and his tribal community. Both sets of relationships are specific and closed to the community, both operate only

within the laws and checks and balances of its political system. A rangatira is a trustee for his people, an entrepreneur in all their enterprises.<sup>26</sup>

An adequate understanding therefore of the word rangatira, and its derivative rangatiratanga, requires insight not only into the ancestry of its form (which goes back only a thousand years or so), but also its content, which probably goes back the full six thousand years of known Austronesian history. This process of metaphorical extension and “heliaki”, which characterizes Polynesian languages in general, means that many individual words carry heavy loads; the key to meaning is the word-in-context, rather than an over-precise definition of the word itself. Particularly in nineteenth century Māori, as Bruce Biggs points out<sup>27</sup>, the context of the situation determines the meaning more than formal grammatical clues. Under the influence of English and globalization, the structure of Māori discourse had changed to be more explicit, more literal, more elaborated, but, some might say, also less colourful and distinctive.

Missionary Māori, found not only in scriptural translations but also in Te Tiriti, stretched meanings of many words well beyond their current boundaries, establishing new ranges of meaning which are, however, now “traditional”, and strictly speaking could be said to date from time immemorial, as no-one alive today would actually remember when the words were confined to the old limits (e.g. use of *tikanga* in Te Tiriti as an equivalent for “rights”<sup>28</sup>).

We are, as Dr Biggs points out,<sup>29</sup> up against the problem “traduttore, traditore”. The briefer the translation, the more treacherous it is likely to be.

As we saw in relation to waka and rangatira, extensions of the range of meanings of nouns and statives are characteristic of Māori discourse. This is particularly important in the communication of abstract ideas:

For reasons that relate to New Zealand’s cultural and linguistic isolation during the millennium prior to 1769, Māori nouns with concrete referents are commonly, even usually, used for abstractions that can be seen as metaphorical extensions of the basic meaning.<sup>30</sup>

This happens in all languages, but less so in languages like English that have others (in the case of English, especially Latin and Greek) to provide abstract terms. Thus English-speakers get *interest* on their money, while Māori gather its fruits (*hua*). So with the word *taonga*, which appears in the Māori text of the Treaty (hereinafter *Te Tiriti*), but is glossed as “lands, fisheries and forests” in the various English texts. The core meaning of *taonga*, as with its Proto Polynesian source, is “valuable material possession”, but Professor Biggs found a very wide-range of “valuable possessions and attributes, material and non-material” to be covered by the word when he looked at how it was used in early nineteenth century non-scriptural texts. These included “in addition to greenstone and woven articles, such other material assets as weapons and pieces of land; social and cultural features such as carving, dance, and (interestingly) warfare; personal attributes such as attractive eyebrows”.<sup>31</sup> The question is, of course, why was such a vague and wide-ranging idea included in a Treaty whose proponents seemed to have much more specific “treasures” in mind?

Some years before Professor Biggs published his critique of the language used in Te Tiriti, the Wellington Māori Language Board, Nga Kaiwhakapūmau i te Reo, had brought before the Waitangi Tribunal a claim that the Government had failed in its duty to protect and foster the Māori language. The arguments establishing that the Government had such a duty were constructed around an assertion I had made (also on the basis of the way the word was used in nineteenth century manuscripts) that the Māori language was in 1840 and remained a *taonga*, and therefore to the extent that government policies had impacted adversely on its survival, or failed to support its maintenance, the Crown had acted in breach of the Treaty. The Tribunal, after a prolonged series of hearings, accepted this and supporting evidence, and made several recommendations for remedial action by the Crown.

However, although my lexicographical argument was accepted by the Tribunal, its relevance, and the weight given to it in the Tribunal's finding, has been seriously questioned by Professor Andrew Sharp. His argument centres not on the possible and plausible meanings of the words employed, but whether the particular application given to them in retrospect would have been in the minds of either party when the agreement was made. He notes that, in connection with phrases like *ō ratou taonga katoa*, "all their taonga":

In fact, no single interpretation of what the Treaty / te Tiriti meant then or means now can be given. It has multivalent locutionary force because it is in two languages ..., and although it is in only one version in te reo Māori, Māori is a language which plays on multivalence. Its illocutionary force – what people intended and intend in referring to its words – had and has no less a range, the more so since it is so potent a symbol.<sup>32</sup>

So, although (as Professor Biggs had also pointed out) it is difficult to discern on logical and "strict constructionist" legal grounds just what *rights*, if any, were created or guaranteed by the Crown after the instrument of whatever it happened to be (cession or protection) was signed, the Tribunal, "in accordance with the idea of justice in contract and its statutory duty to discover the 'principles' of the Treaty ... did pronounce on what rights the Treaty / te Tiriti contained". It did this in a number of early cases, including, under the concept of *taonga*, "the right to guaranteed protection of Te Reo Māori – the Māori language".

Professor Sharp questions the persuasiveness of these findings, however, in that the rules of Treaty interpretation and historical reconstruction require that such documents "are to be understood not only in terms of linguistic usage at the time the treaty (or document) was made, but also in terms of what meaning it would in fact then have had in the minds of those who signed (or authored) it."<sup>33</sup> So the legal and rational test is "not only in regard to conventions of meaning but to intentions in signing". Perhaps this is where lexicography meets its match – we have a systematic mismatch with no principle of *tupu* (organic development) to bridge the continuum of *wā* (time and space) between then and now, surface appearances and potentiality. The Tribunal noted that it was unlikely that Māori would have signed the Treaty had they been told that "the Royal guarantee of protection would not include the right to use Māori in any possible proceedings involving Māori". Professor Sharp argues, however, that:

It is as hard to imagine Hobson thinking of disallowing the language ... as it is to imagine the Māori signatories perceiving such a threat. It is surely truer to the facts to imagine that the question of language never crossed anyone's mind, and that 1840 (when the language was not under threat) is not 1985 (when it was).

He goes on to say,

The Tribunal was not alone in arguing this way [that the validity of the Treaty was in some way conditional on the protection of the language as a taonga]. Dr Richard Benton had produced exactly the same counter-factual argument in 1983 and repeated it at the hearing.<sup>34</sup>

His thesis basically is that it was stretching an argument that could be advanced on other grounds "to bring injustices to the Māori under the aegis of a breach of contract". This at least gives us grounds for hope. The etymology and linguistic, semantic and social geography of *taonga* and other concepts may not always be strictly relevant for Treaty claims (an avenue of legal recourse that may in any case fade from the scene rather more quickly than some might wish), but it may well support or bring into question matters quite appropriately raised in other fora.

A rather similar question arises with the Lake Taupo air rights claim which recent newspaper reports suggest is being advanced by Ngati Tuwharetoa. A clearly established common law right to air space (whether it is also a "Māori customary right" doesn't matter in this case) was known at the time that the Lake Taupo accord was agreed on by the Crown and the iwi, but according to Dr Brash, leader of the NZ National Party, its existence in relation to the air over the lake never entered anyone's mind (just as Professor Sharp assumed no-one was thinking about the fate of the Māori language when Captain Hobson and the Chiefs of the United Tribes signed Te Titiri). I suspect however that the air rights issue may have entered the mind of at least one party, if not both, in the Lake Taupo case, but they decided to let sleeping dogs lie until the time seemed right to wake them up. The operation of tupu and the spectre of Harriet's pigs may perhaps be seen in the background here.

However even when matters seem a little more clear cut problems can arise, as courts may not have available to them the full range of background information needed to resolve questions of what is and is not a reasonable or even plausible assertion regarding a customary practice, treaties and tiriti notwithstanding. A case in point could well be the proper interpretation of the concept of *rāhui*, the placing of a ban or restriction on the harvesting of resources or recreational or other use or right of access to defined areas of territory (over land, sea, or freshwater). This is a practice which has attracted the notice of the courts as well as the wider community, and thus has some common law standing. The current version of the preamble for the title under which references to this practice are assembled reads thus:

**Rāhui.** This word refers both to a mark (often a pole topped with a bunch or twigs, fern fronds, grass, hair or garment) signifying that an area had been temporarily set aside for some reason, and should not be entered, and the act or process of establishing a rāhui. This proscription might be total, directed at the taking of a particular resource, e.g. birds or eels, or limiting access to

certain people. The strictest form of rāhui involved special karakia designed to ensure very severe consequences (including death) for violation of the restriction (consequences which would be enforced by human agency when supernatural sanctions were ineffective – the term **kairāmua** was used to denote such a breach, and its perpetrator would be killed if caught). However rāhui could also be proclaimed by chiefs with sufficient mana, without karakia, and usually were on an occasional basis (e.g. in consequence of a drowning or other incident affecting the area concerned). Important related terms are **maro** (or **puhi**), the bunch of herbage attached to the pole; **turuki**, a karakia to enforce a rāhui; and **kapu** (or **whatu**), the symbol containing the power of the rāhui – this may be located in the maro, but might also be hidden somewhere else in the area affected, so that counter-incantations directed at the maro would be rendered ineffective. The term **pou rāhui** was sometimes used to indicate a boundary post, presumably intended to represent a more permanent arrangement than a typical rāhui. In modern usage, especially officialese, the meaning of rāhui is often extended to form a counterpart to English words like “ban”, “reserve” and “prohibit”. The term rāhui is ultimately derived from Nuclear Polynesian \**lafu* “prohibit”, but its immediate ancestor (shared with Easter Island, Tahitian, and related languages) is Eastern Polynesian \**rāfui* (note the long vowel); its meanings in Marquesan and Rarotongan are very similar to that in New Zealand Māori.

I was therefore somewhat taken aback when I read a report in the Māori Law Review of the case *Proprietors of Paranihi ki Waitotara Bloch vs Horimakuterangi Manuirirangi et al.*, tried in the High Court in New Plymouth in October 2003. In his judgement, the learned Judge commented that he “had a great deal of evidence about the meaning, purpose and effect of a rāhui”. The judgement went on to note that:

The court also accepted evidence of a senior kaumātua that “in Māori mythology the gods, Papatuanuka [sic] and Tangaroa, are the kaitiaki or caretakers or enforcers of a rāhui. They are the protectors of the land and waterways. They retaliate spiritually to anybody who contravenes a rāhui through a process known as mauri”. According to the senior kaumātua, compliance with a rāhui required “humility, compassion and non threatening behaviour”. He had never known retaliation by human physical force and “once a rāhui has been placed, even those people associated with the land cannot enter without a karakia or blessing from the tohunga”.<sup>35</sup>

After reviewing the issues involved, the Judge concluded that purporting to have placed a rāhui on the disputed land in his claimed capacity as a rangatira did not justify the defendant’s actions in attempting to enforce it. He went on to say:

In any event Mr Manuirirangi cannot use the existence of a rāhui to justify his actions for two other independent reasons. First, I am satisfied that he never acted in accordance with a moral duty. I accept Mr Ngatai’s evidence that, consistent with its spiritual nature, a rāhui is enforceable only by the gods .... Those who break it do so at their own peril. They face a risk of spiritual recrimination”.

Mr Manuirangi agreed that enforcing a rāhui did not involve retaliation by human physical force, but thought that “the economic reality of modern Māori society justified some adaptation”. The court was however satisfied “that Māori customary law does not recognise and has never recognised a duty or obligation on a human being to enforce a rāhui”.<sup>36</sup>

I checked the sources on which I had based my definition – and to my relief found that I had not misrepresented them. In fact, Raymond Firth in his *Economics of the New Zealand Māori* states quite explicitly that violation of a rāhui could be a *casus belli*, and that chiefs could impose rāhui by decree, for specific purposes, without any accompanying karakia<sup>37</sup>. Perhaps there is a regional customary law operating in Waitotara that has escaped our notice. Whether there is or not, it might perhaps be worth our while annotating the entries for Te Mātāhauariki to indicate the regions to which they refer most directly. Certainly, there was no support for the position taken by the Court’s Māori advisor in the data we have assembled, but his evidence on this issue will need to be noted! However, from my observations, I would say that Māori spirituality in general is considerably less ethereal than the Court’s advisors seem to think!

This case does however teach us that notoriety could become a problem.

Folk etymologies also can get in the way. Like the opinions of local experts, their objective historical basis, even when this can be shown to have strong external evidential support, has to compete with new current social realities (even when these are constructed on shaky foundations). It is a bit close to home to give New Zealand examples right now, but one from the near Pacific will suffice. There is a very interesting discussion by Serge Tscherkézoff in the March 2003 issue of the *Journal of the Polynesian Society* of the term *papālangi*. He notes that although there are solid grounds for believing that the origin of the word was probably a Malay term, *barang*, for the cloth that was extensively traded in the early days of contact with Europeans, the derivation from a combination with *langi* “sky” may have been a folk etymology arising in Polynesia itself, and not inspired by Missionary mythology (as some other people have asserted). This etymology would be as “real” to its Polynesian inventors as the assumed initial origin is to the scholars.

Lastly, as we have seen on several occasions, the “shape-shifting” nature of Polynesian discourse has to be taken into account in finding and interpreting Māori legal notions. For example, in the North there are legends about a being known as Miru controlling the entrance to the Underworld (there are other versions of this story told elsewhere, locating Miru in various appropriate places). Like the taniwha, Miru exists on many levels. The practical significance of this narrative, in Taitokerau at least, seems to be that whoever controlled the entrance to a river, also had primary resource rights from the estuary to its source. I say “seems to be”, because this assertion needs to be checked and corroborative evidence found. Nevertheless, this kind of leap from story to law is very much a part of how statutes are framed in the minds and speech of some Māori lawmakers.

Exploring the full meaning of the terms which end up in Te Mātāpunenga, whether as titles or as related ideas revealed in various entries, thus requires more than a conventional etymology and a brief definition. Even taking into account the rich

explanatory potential of the entries illustrating the uses to which the various words have been put, additional light could be thrown on the ideas (and perhaps stimulate deeper consideration of their potential import) by retracing their journeys and looking at how they have fared in other places. The set of words we are primarily concerned with covers the whole range from Austronesian to local origins, with of course a few words acquired outside the Austronesian family, like *ture* (“law”, from Hebrew Torah), and *kawanatanga* (“governance”, from English). Quite a few of the words for social institutions are either home grown or acquired from outside (like the two examples just given), but overall what we might call the legal vocabulary is richest in words from Eastern Polynesia and Proto Polynesian. For example, of 55 words relating to kinship relations, kin groups, and social classes, relationships and groupings which I have encountered in recent research, there is only one which is “borrowed” (*whāmire*, “nuclear family”), two are Nuclear Polynesian in origin but have special additional meanings in Māori – *iwi*, “bone” (original meaning) and “a tribal confederation”, and *hapū*, “pregnant” (original meaning) and “a named, multi-generational kin-based socio-political grouping”. Neither of those shorthand definitions does justice to either concept, of course. Of the rest, 22 are shared with most other East Polynesian languages, 21 derive from Nuclear or Proto-Polynesian, and 9 are derived from earlier stages of Austronesian.

There are ties other than linguistic and cultural ones that bind us closely, in terms of heritage, to East Polynesia (that is, Tahiti, the Cooks, Marquesas, Mangareva, the Tuamotus, Hawaii, and, more remotely, Easter Island). Two very important plant species, the bottle gourd (*Lagenaria*), a source of food which in Aotearoa also replaced pottery as the means for manufacturing storage containers, and the *kumara*, the essential food crop on which the health and prosperity of the population to a considerable extent depended, were, until the arrival of American and European vessels in the eighteenth century, uniquely found in this part of the Pacific. It is certain that the *kumara*, and almost equally certain that the calabash gourd (despite the latter’s probable African origin) were carried to East Polynesia from Peru, probably by Polynesians (the Peruvians and other South American people did not have ocean-going vessels that could get across the Humboldt current – Polynesians did<sup>38</sup>). It would certainly be useful for us to talk at length and in depth with people knowledgeable about law and language in Tahiti, Samoa, Tonga and Hawaii, at least, at some later stage of our research. This symposium already marks a small step in that direction.

By asking the judiciary, the legal fraternity, policy makers and politicians to take serious account of Māori legal notions and their evolution and development, we may perhaps be contributing to what Andrew Sharp has called a “retrospective jurisprudence”<sup>39</sup>. Will this be fuelled further by either the lexicographic introductions or the sequential aggregation of entries in *Te Mātāpunenga*? Not in the hands of a strict constructionist, but not much differently either from any other aspect of common law if the potentiality of *tupu* and *te wā* are taken into account. That is something for courts, tribunals, advocates and also politicians to sort out for themselves. Perhaps in a way in assembling *Te Mātāpunenga* we are becoming arms dealers, supplying all sides with materiel that could either avert or inflame conflict! In our defence I can only say that at least we are trying to preserve our own neutrality, and to ensure that what we supply is of the highest quality.

It is important for the legal profession, the judiciary, Māori and other citizens to have access to accurate, well documented accounts and examples of customary practices with legal implications and their contemporary relevance. It is equally important to communicate that change does not ipso facto rule out validity. How the change came about may be relevant: criteria of reasonableness à la Wednesbury would apply here as elsewhere.

Norms will still be contested. The common law mechanism is a very important avenue for inclusiveness, but, like statutory definitions even of the well intentioned kind can of course be expected to be contentious. Any definition is problematic, and the more precise it is, the more problematic it is likely to be. The legitimacy of any legal order, monist or plural in nature, depends on wide acceptance by all involved, which in a modern society requires communication, education and, most fundamental of all, good will.

The kind of evolution which I have in mind probably could prosper best under the protection of a covenant-like constitution. That is, an agreement invested with a degree of sacredness or tapu that renders it immune to the whims of fashion, but flexible enough to allow for development and growth. It could be quite a vague document, perhaps not quite as vague as Te Tiriti, but couched in terms of truths which the nation can come to accept as self evident. ‘Okusitino Māhina thinks that Pacific cultures are characterized by a “cyclical organisation of time and space”, in contrast with the unidirectional linearity of the West.<sup>40</sup> There is an image from Aotearoa, the spiral as symbolized by the *taka* in carving and by the koru, which takes advantage of the circle’s capacity for retrospection and the line’s potential for advancement. Our present constitutional arrangements, with a unicameral legislature answerable in the final analysis only to itself, leave us without any impediment to tyranny should a bare majority of the elected politicians choose to follow the appropriate formal procedures. Neither lexicographical analysis nor compendia of Māori customary law will save us from that fate. They may however, by clarifying some important ideas from the past that live on in the present, help us to develop a new jurisprudence, not of retrospection, but of freedom, equity and justice.

If we do manage to get things right for ourselves, we still have a new world order to contend with. This, too, I think can be dealt with if we embrace a spiral model of development, allowing us to advance while continuing to remember who we are and where we wish to go, as a pluralistic nation but a nation nonetheless. The opening address to the symposium by Dr Griffiths has highlighted the possibilities for indigeneity to remain an influential normative force within a globalized legal and political order. By allowing Māori ideas and experience to play a full role within our local polity, we will give substance to our claims to uniqueness, and to belong to the space and the time which we occupy in Aotearoa.

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## NOTES

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- <sup>1</sup> A word coined by the Māori Language Commission as an equivalent for “encyclopaedia”, from the elements *mätä* “filled, packed with” and *punenga* “useful knowledge”.
- <sup>2</sup> E Adamson Hoebel, *The Law of Primitive Man: A Study of Comparative Legal Dynamics*. Cambridge, Mass.: Harvard University Press, 1954, p.28
- <sup>3</sup> [Alex Frame], “Te Mätäpunenga: Defining Customary Law” (2003), p.5.
- <sup>4</sup> [1874-1928] Privy Council Judg. 43 (Ghana 1916), quoted in Woodman (1969), p. 85.
- <sup>5</sup> *Reed Book of Tongan Proverbs* (2004), pp. 20-21.
- <sup>6</sup> More will be said about the evolution of the Māori and other Polynesian languages from their Austronesian roots later in this discussion. Since there are no written records of the earliest stages of Austronesian and its successors, words from these stages reconstructed by careful comparison of their more recent counterparts are preceded by an asterisk, to indicate that they are hypothetical rather than directly attested forms. A good, concise explanation of the methods used by historical and comparative linguists to reconstruct previous stages of a language and determine the relationships among languages is given in the Introduction to Malcolm Ross et al., *The Lexicon of Proto Oceanic: 2 The Physical Environment* (pp. 1-16).
- <sup>7</sup> See Anne Griffiths, “Customary Law in a Transnational World: Legal Pluralism Revisited” (2004).
- <sup>8</sup> “Customary Law: A Confusing Fiction” (1948), p.111.
- <sup>9</sup> For an analysis of the revolutions and their legitimation, see F.M. Brookfield, *Waitangi and Indigenous Rights* (1999).
- <sup>10</sup> The Mātāhauariki Institute’s research programme includes a complementary project to Te Mätäpunenga, *Te Pū Wānanga*, which is studying contemporary conceptions of Māori law and legal concepts in collaboration with Māori community leaders and experts on traditional knowledge and customs. These conversations have underlined the contemporary relevance of some key Māori legal institutions.
- <sup>11</sup> In her paper “A Different Story” (1999), the Tongan educator and poet Konai Thaman explains *heliaki* thus: “In the poetry of the lakalaka, a relatively modern Tongan dance form, a series of concepts and references is composed to commemorate a particular event rather than tell a story. Specific words are alluded to with hand movement, and allusions are often to mythology and genealogy often in quite a round-about or indirect way, illustrating the Tongan poetic ideal of *heliaki* (not going straight). Some allusions are understood by everyone but most are understood only by other poets. In order to understand the poetic transformation one must work from her own knowledge gained through the study of genealogy, mythology and history. In Tonga, the performance of a lakalaka is the highest possible honour that can be accorded a chief or a special guest.”
- <sup>12</sup> L.A. Johnson, *The Experience of Time in Crime and Punishment* (1984), p.78.
- <sup>13</sup> *Ibid.*, p.88.
- <sup>14</sup> See Richard Benton “Truth and the Treaty of Waitangi” (2003); Brian Easton “Was there a Treaty of Waitangi” (1997); Dame Joan Metge “Ropeworks – He Taura Whiri” (2004).
- <sup>15</sup> “Pigs and Positivism”, pp.736-737.
- <sup>16</sup> *Ibid.*, p. 734.
- <sup>17</sup> Cf. *Ibid.*, p. 735
- <sup>18</sup> Alex Frame and Paul Meredith, “The Hard Yards” (2003).
- <sup>19</sup> Transcript, 5 April 2003.
- <sup>20</sup> Yakov Malkiel “The Lexicographer as Mediator ...” (1980), p. 44.
- <sup>21</sup> For some insights into the role of lexicography in illuminating the history of ideas, and assisting the reader to understand the current scope and potential of a particular word, see Yakov Malkiel, *op.cit.*; the contributions to the “Forum on the Theory and Practice of Lexicography” organized by William Frawley (1993), especially the articles by B.T.S. Atkins, Patrick Hanks, and Sidney Landau; Jürgen Schäfer “The History of Ideas and Cross-Referencing in the Future EMED” (1984); and William Frawley’s “Lexicography and the Philosophy of Science” (1981).

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- <sup>22</sup> “Locating Proto Oceanic” (2003), pp. 24-5.
- <sup>23</sup> M. Spriggs, in Bellwood et al., *The Austronesians* (1995), p.121
- <sup>24</sup> Recent research on the settlement and exploration of Eastern Polynesia and the subsequent Polynesian colonization of New Zealand is reported and discussed in Geoffrey Irwin, *The Prehistoric Exploration and Colonisation of the Pacific* (1992), K.R. Howe, *The Quest for Origins* (2003) and Douglas G. Sutton (ed.), *The Origins of the First New Zealanders* (1994).
- <sup>25</sup> S. Supomo, “Indic Transformation”, in Bellwood et al. *The Austronesians*, p.296.
- <sup>26</sup> Introduction to *Waitangi* (1989), p. xix
- <sup>27</sup> “Humpty Dumpty and the Treaty of Waitangi”, in I.H. Kawharu (ed.), *Waitangi*, p. 301
- <sup>28</sup> See *Ibid.*, pp. 308-9.
- <sup>29</sup> *Ibid.*, p. 303
- <sup>30</sup> *Ibid.*, p.307
- <sup>31</sup> *Ibid.*, p. 308.
- <sup>32</sup> Andrew Sharp, *Justice and the Māori* (1997), p.133
- <sup>33</sup> *Ibid.*, p.134 (emphasis in original).
- <sup>34</sup> *Ibid.*, pp. 135-6.
- <sup>35</sup> *Proprietors of Paraninihi ki Waitotara Block v Horimakiterangi Manuirirangi et al.*, Māori LR Feb 04, p. 2.
- <sup>36</sup> *Ibid.*, p. 4.
- <sup>37</sup> *Economics ...* (1959), pp. 258-262.
- <sup>38</sup> I am indebted to Dr Peter Adds for pointing this out in a recent (2004) radio broadcast.
- <sup>39</sup> Cf. *Justice and the Māori*, pp. 131-155.
- <sup>40</sup> ‘O. Mähina and U. Nabobo-Bamba, “The Issue of Pacific Past and Future”, in T. Baba et al. (eds), *Researching the Pacific ...* (2004), pp. 203-4.