

## **Custom Law Project- Think Tank Piece**

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### **SEEING LAW IN PRE-EUROPEAN MAORI SOCIETY.**

**DRAFT**

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Note: Metge makes a distinction between large –scale complex societies which tend to use formal measures to maintain order such as law making bodies and laws codified into a system, courts and judges, and small scale societies with simpler political systems which tend to use mainly informal, implicit measure that serve multiple social functions.

I will use this distinction in this paper.

## **Seeing law**

In many large-scale complex societies law is maintained and promulgated through specialised institutions, this law is solidified into a written form, however a clear and codified set of laws is rare and specialised in human societies. Legal principles are more often implicit, flexible, and constantly changing. Many small-scale stateless societies lacked specialised judicial institutions to pass and enforce judgements, and disputes were resolved mainly by the contending parties themselves.

The general underlying scheme regulating the application of sanctions to “wrongdoers” is not law in the Austinian sense [commands from a central sovereign source of power] but collective retaliation. Punishments, by necessity, vary with kinship backing and support musterable by the respective parties involved.<sup>1</sup>

While a universal definition of law is difficult to give because in small-scale stateless societies there is a continuity of law and everyday life, in these societies often law serves to preserve and rebuild networks of social relations, this enables us to understand why:

[p]rocesses which occur within the legal frame-work do not always concern the actual settlements of disputes. This may ... provide the context for the public enactment of established relations.<sup>2</sup>

Because legal action and social action are tightly intertwined within small-scale stateless societies, sometimes legal process as a social activity, is more important than the actual outcome. It is when customs are codified and frozen, that they lose their ability to adapt

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<sup>1</sup> Marshall Sahlins, *Social Stratification in Polynesia*, (1958). 150. For further discussion of Austinian Sovereignty see Roger Cotterrell, *The politics of Jurisprudence*, (1989).

Thomas Hobbes, *Leviathan*, (1914).

John Austin, *The Province of Jurisprudence Determined*, (1955).

<sup>2</sup> J Comaroff and S Roberts, *Long-Term Field Research in Social Anthropology*, (1977). 80.

flexibly to situations of change. Legal action becomes simplified and loses its complex extra-legal social functions.<sup>3</sup>

Adamson Hoebel sees law in terms of social control that is:

[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>4</sup>

On this basis Polynesian techniques of social control can be termed law, Ward notes that nineteenth-century Maori leaders, reflecting on their society in discussions with Europeans often referred to “our Law” rather than “our Custom.”<sup>5</sup> This reinforces that failure to recognise law in pre-European or contact Maori society by many observers was a defect in the way of observation rather than any actual absence of law.<sup>6</sup> In other words they could not see law because they could not see their own law reflected back at them.

A legal system will contain both formal and informal mechanisms of dispute resolution, in a society without formal courts or a state structure these can be varied and likely to be based on negotiation or confrontation. Legal system are not just about dealing with criminal offences, property and personal rights and dealing with disputes. A legal system

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<sup>3</sup> Roger Keesing and Andrew Strathern, *Cultural Anthropology: A Contemporary Perspective*, (3rd edition ed, 1998 (1981)).

<sup>4</sup> Adamson Hoebel, *The Law of Primitive Man*, (1967). 28.

<sup>5</sup> Alan Ward, *A Show of Justice*, (1995). 4.

<sup>6</sup> Of course this defect in seeing is in a great part due to the observers historical and social positioning, they were looking for recognisable social forms that were not present in the societies in which they encountered.

is also about creating and preserving an ordered system of mutual expectation and understandings that are intended to avoid conflict.<sup>7</sup>

In small-scale societies legal processes and legal principles can come to light by looking at cases, at specific instances where conflicts of rights or breaches of rules are socially resolved.<sup>8</sup> It is from these cases that the legal principles or norms of a society will emerge.

In order to elaborate the legal principles of pre-European contact Maori society, we need to ask the following questions:

Who makes legal decisions? In what settings and by what processes? What guidelines, principles, or precedents are used to make them? How are they enforced?<sup>9</sup>

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<sup>7</sup> Roger Keesing and Andrew Strathern, *Cultural Anthropology: A Contemporary Perspective*, (3rd edition ed, 1998 (1981)). 297-98

Also see I Hammnett, (ed) *Anthropology and the Law* (1977). 5.  
In the western legal system

In civil matters, litigation occurs in only a very small proportion of disputes, and these in their turn are almost infinitesimally few in comparison with the huge number of interactions where law serves merely as a consensual and implicit context of transactional discourse. Indeed, what the law... principally offers is the crucial advantage of knowing more or less where they and their partners stand. (298)

<sup>8</sup>Roger Keesing and Andrew Strathern, *Cultural Anthropology: A Contemporary Perspective*, (3rd edition ed, 1998 (1981)). 293.

<sup>9</sup> Roger Keesing and Andrew Strathern, *Cultural Anthropology: A Contemporary Perspective*, (3rd edition ed, 1998 (1981)).

## ***What is Custom Law?***

Durie defines custom law as “ law generated by social precedent and acceptance as distinct from institutional law generated from organisation of a superordinate authority.”<sup>10</sup>

It is interesting to note that before the rise of legal positivism, common law was seen as customary law:

... the custom or practice of the English which the Judges discovered, or enunciated, or clarified, but which they did not create, ( it was already there, as it were).<sup>11</sup>

It is a mistake to see custom law in small-scale societies as a rigid system that is obeyed without question, which is fixed and unchanging. Every society works out its own balance of choice and constraint, where there is choice there is the potential for change.<sup>12</sup>

It is generally accepted (at least in anthropological circles) that all human societies have law consisting of legal principles and legal processes, whether or not they have codified laws and law courts.<sup>13</sup> Metge argues that all societies pursue that maintenance of order except in times of exceptional crisis. This maintenance of order includes the reinforcement of accepted values and the punishment of breaches. All societies, equally depend on the maintenance of social norms, which may be sanctioned explicitly or implicitly.

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<sup>10</sup> Eddie Durie, *Custom Law*, (1994). 4.

<sup>11</sup> Richard Boast et al., *Mari Land Law*, (1999). 8.

<sup>12</sup> Joan Metge, “Commentary on Judge Durie's Custom Law,” (1995) . 2.

<sup>13</sup> Roger Keesing and Andrew Strathern, *Cultural Anthropology: A Contemporary Perspective*, (3rd edition ed, 1998 (1981)). 288-301.

Early observers of small-scale societies held that the individual had no real freedom of choice, that their every action was circumscribed by the iron mould of custom, reinforced by fears of the supernatural.<sup>14</sup> However this says more about the observers than the societies that they were describing. Malinowski found in the societies which he described that this rigid circumscription was lacking, and that people acted with considerable freedom of choice, without the oppressive ever-present fear of supernatural sanction.<sup>15</sup>

While there were culturally patterned ways of breaking norms,<sup>16</sup> and in Maori society powerful people sometimes-broke rules to prove that they were *toa* – strong men, possessed of great mana.<sup>17</sup> Licence was restricted and community cohesiveness maintained by the principle of reciprocity. That there was a sense of the interdependence, for the basic needs of life, among its members, which acted as a constraint on anti-social behaviour. Customary norms regulated social and economic life. Many of these were secular, involving the actions of people, not gods and spirits, (at least not directly); and they were flexible and subject to reinterpretation according to circumstances.<sup>18</sup>

It is sometimes argued that Maori customary law is enforceable in the New Zealand courts only where it has been incorporated in statute.<sup>19</sup> However Boast makes a case that

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<sup>14</sup> Alan Ward, *A Show of Justice*, (1995). 3.

<sup>15</sup> Alan Ward, *A Show of Justice*, (1995). 3-4 Bronislaw Malinowski, *Crime and custom in savage society*, (1926) and Bronislaw Malinowski, *Magic, science, and religion, and other essays*, (1974).

<sup>16</sup> Roger Keesing and Andrew Strathern, *Cultural Anthropology: A Contemporary Perspective*, (3rd edition ed, 1998 (1981)). 301.

<sup>17</sup> Alan Ward, *A Show of Justice*, (1995). 7.

<sup>18</sup> Alan Ward, *A Show of Justice*, (1995). 4.

<sup>19</sup> Paul McHugh, *Maori Magna Carta*, (1991). 95.

Maori customary law does form part of the corpus of New Zealand common law and may be taken into account in the ordinary courts. He cites a line of cases<sup>20</sup> that culminate with the ruling of Chilwell J, that:

[Maori] customs and practices which include spiritual elements are cognisable in a Court of law provided they are properly established, usually by evidence.<sup>21</sup>

He cites the Coopers J's three-part test for the establishment of a rule of customary law,

- a) whether the custom existed as a general custom for the class of people; [Maori perhaps this could be narrowed to iwi or hapu?? There would be perhaps policy reasons for resistance to any narrowing of the criteria]
- b) whether the custom was contrary to statute; [statute always overrides custom in an Austinian type legal system]
- c) whether the custom was reasonable taking in all the circumstances.<sup>22</sup>

Although Boast admits that the recognition of Maori custom law is very limited and constricting, it nevertheless shows that Maori customary law is cognisable and enforceable in the New Zealand courts. Much of Maori customary law is supplanted by statute and even in areas such as the RMA or the TTWMA, there is little scope of applying Maori Customary law except as it is formally recognised. Any more substantial recognition of Maori Customary law could (at present) only be brought about by parliament. However this does show that even in the present system Maori customary law

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<sup>20</sup> See Richard Boast et al., *Mari Land Law*, (1999). 15-19

These cases include:

*Rira Peti v Ngaraihi Te Paku* (1888) 7 NZ Jur (NS) 72, 77

*Nireaha Tamaki v Baker* [1901] AC 5671 (PC), (1901) NZPCC 371, 382.

*Hineiti Rirerire Arani v Public Trust* (1919) [1840-1932] NZPCC 1 (PC)

<sup>21</sup> *Huakina Development trust v Waikato Valley Authority*[1987] 2NZLR 188 at 215

is a live issue and without too drastic an overhaul of present laws and institutions Maori customary law could play a more significant part.

### **What is Maori Custom Law**

Maori custom law evolved in a particular socio-political order where the largest and the most important socio-political groupings were relatively limited in size, were based on kinship, preserved and transmitted knowledge orally, and were relatively mobile both in space and time. This meant that the application of legal principles and processes was able to be contextualised tailoring them to particular circumstances.

The main functioning political and economic unit was a hapu or cluster of hapu recognising the mana of a senior chief. Hapu and the larger aggregation called iwi, were named from founding ancestors, possibly mythical and themselves descended from those who created and still acted in the world order.<sup>23</sup>

Pre-contact Maori society offered a large degree of choice to its members. The high value placed on oratory is evidence of the important of debate in decision making and the need for the rangatira to constantly mobilise support for their leadership.

Although it is tempting to look for a direct relationship between Maori and western legal concepts, Metge points out that Maori concepts hardly ever correspond exactly to those of the West which they may appear to resemble on the surface. While there is a degree of

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<sup>22</sup> *Public Trustee v Loasby* (1908) 27 NZLR 801.

<sup>23</sup> Alan Ward, *A Show of Justice*, (1995). 5

overlap there are usually divergences as well. Even if the denotation -- the direct reference is substantially the same, the connotations are significantly different.<sup>24</sup>

The belief that the spiritual order constantly interacted with the material order extended to the view that sickness and death were caused by the withdrawal of protection or the malignancy, of spirit beings. This could be due some failure in action or ritual of the afflicted person or his kin, but was frequently held to be the result of sorcery by some adversary, and this too was a cause of conflict.<sup>25</sup>

Ward explains that this results in there being a number of actions that were seen as offences to Maori which were not recognised as such in the English law of the nineteenth century. However given this caveat Ward does identify areas of correspondence between Maori concepts of wrong and those recognised in English law. Such as negligence leading to damage of the person or property was punishable, so were nuisance, trespass, defamation, liability for animal trespass, seduction and other offences that are categorised as torts in England.

## **Tikanga**

Both Durie and Metge identify tikanga as central importance in the context of custom law. Tikanga is said to describe the norms that maintained law and order in Maori customary society.<sup>26</sup>

Metge describes tikanga as having a range of meanings in Maoridom, she believes that the primary emphasis is on rightness.<sup>27</sup> When used in the phrase *nga tikanga Maori* it

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<sup>24</sup> Joan Metge, "Commentary on Judge Durie's Custom Law," (1995) . Part1, 2.

<sup>25</sup> Alan Ward, *A Show of Justice*, (1995). 8.

means 'the right Maori ways' and refers to rules and guidelines for living generally accepted as tika. This includes ways of thinking (whakaaro nui) and ways of doing (mahinga), principles and practice.

Nga tikanga Maori were handed down from tupuna, but this did not mean that they were static or entrenched.<sup>28</sup> Nga tikanga are believed to originate in the spiritual realm with the gods/god and are endorsed and sanctioned in this world by the community as a whole. (cf this with the idea that the common law always existed<sup>29</sup>)

Tangata whenua of a particular locality had the right to formulate their own tikanga, thus while the principles were the same throughout Maoridom the detailed content may vary between iwi, hapu and even whanau.<sup>30</sup>

Nga tikanga Maori fulfil other functions besides maintaining rule of law, and covers the whole range of human behaviours, including moral and spiritual aspects, and are enforced by other means.<sup>31</sup>

Tikanga arises out of an on-going community debate and practice and are communicated orally; as a result they are adapted to changing circumstances easily, quickly and without most people being consciously aware of the shift.<sup>32</sup>

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<sup>26</sup> Eddie Durie, *Custom Law*, (1994).

<sup>27</sup> Joan Metge, "Commentary on Judge Durie's Custom Law," (1995) . 4.

<sup>28</sup> Joan Metge, *New Growth from Old*, (1995). 21.

<sup>29</sup> Richard Boast et al., *Mari Land Law*, (1999). 12.

<sup>30</sup> Joan Metge, *New Growth from Old*, (1995). 21.

<sup>31</sup> Joan Metge, *New Growth from Old*, (1995). 21.

While tikanga are not formally promulgated or published in a codified form, Maori do express them in words from time to time. This is usually done in a context in which the tikanga is to be used. They may be phrased as prescriptions or descriptions, these can be in the form proverbs, stories or other narratives. Tikanga have varying levels of generality from the highly general to the specific, Metge identifies three levels but admits that this classification is artificial and not particularly Maori. The higher the level of generality the easier it is to observe the value behind the tikanga however the more specialised or specific the harder it is to see that they are value based , or which value is being served.<sup>33</sup> It would seem that in order to seek the underlying values of Maori customary law one should look for the general tikanga of an area of focus, however localised example will help illustrate those principles.

She suggests that the most knowledgeable kaumatua would draw on a store of tikanga and draw on them when deciding how to act in a particular situation. In each situation they review past precedents and present needs, and on that basis they decide which tikanga are most relevant and should take precedent in that context.<sup>34</sup>

### **Who had the Authority?**

Law and political power are part of the same continuum, when looking at small-scale societies it is not useful to try and separate the two. However in general the class that holds power in a society has the means to define laws that legitimise its own rights and

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<sup>32</sup> Joan Metge, *New Growth from Old*, (1995). 5.

<sup>33</sup> Joan Metge, *New Growth from Old*, (1995). 6-8.

<sup>34</sup> Joan Metge, *New Growth from Old*, (1995). 8

vested interests, and protect and perpetrate them. It is not so much that might makes right as that power conveys the means to define what is legitimate.<sup>35</sup>

Leadership in Maori Society devolved on chiefs, rank and status normally being ascribed to those in the most direct lines of descent from the ancestor-gods and therefore inheritors of spiritual potency, or mana, and knowledge of the rituals to make it effective for the well being of their kin. However the chiefly principle was also flexible: the possession of mana was deemed to be revealed through efficiency in leadership, both in the peaceful arts: cultivation; fishing; hunting and in war. Despite seniority of decent, ineffective men could be considered as lacking mana and effective chieftainship could pass to a younger brother or near kinsman who proved more resourceful, although the senior decent might still be called upon to recite the rituals associated with the cycle of cultivation. If there was a change in leadership genealogies were manipulated to make a claimant to high rank appear close to the senior lines of ancestry.<sup>36</sup>

The senior chiefs could not stand back and give orders, although their lead or opinion was often accepted, the rangatira (the active heads of each family) and the kaumatua also had considerable authority in their own right. Chiefs were dependent for economic and military strength upon reciprocal services of their kinsmen, and therefore could not take

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<sup>35</sup> Roger Keesing and Andrew Strathern, *Cultural Anthropology: A Contemporary Perspective*, (3rd edition ed, 1998 (1981)). 294.

<sup>36</sup> Alan Ward, *A Show of Justice*, (1995). 5.

independent decisions or persistently flout public opinion without the risk of repudiation.<sup>37</sup>

While a chief's authority over rangatira was limited, it was nevertheless important. Under traditional religion a high ranking and powerful chief, a person of great mana, was charged with powers that made contact with him or his artefacts extremely precarious for ordinary men: he was tapu. The Mana and tapu principles were the source of both order and dispute in Maori society. Kinship orientation and community routine of cultivating, hunting and fighting were focussed upon them.

A chief was the recipient of wealth through gifts from his kin, and he distributed that wealth in feasts on important occasions. A chief's power was a source of control which could be used to tapu property or person, to make a crop safe from trespass, to set aside a tree for canoe building or to conserve a stretch of forest or shell fish ground for an important feast. The burial places of chiefs were highly tapu . These prohibitions were generally well known to the members of the community whose chiefs created them, and would not normally be violated for fear of sickness or catastrophe which would follow as a result of the anger of the spirits and ancestor dead. But strangers could unwittingly infringe tapu and the community whose sacred places were violated would be impelled to

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<sup>37</sup> Alan Ward, *A Show of Justice*, (1995).6. See also Eddie Durie, *Custom Law*, (1994). 36.

The absence of permanent state-like institutions meant there was a high adaptability in rule formation but a tendency to atomise, or for groups to fractionate when disputes could not be settled. It meant adjustable group definitions, re-definitions of standards (rules were made to suit cases), complex exchange relationships for the maintenance of peace and a change in expectations during war. The power and authority of the people, the kaumatua and the rangatira at any place and time, must be assessed in terms of the relationships and circumstances then pertaining

exact compensation from or even kill the intruder, least their own ancestor-dead take retribution on them for the unrequited affront. Moreover possessors of mana were impelled to demonstrate it, by boldness and by constant concern for their names and stations. This made chiefs, especially young and aspiring chiefs enterprising travellers, entrepreneurs, adapters and innovators when European material wealth came on to the scene. It also made them highly sensitive to insult , slight or diminution of status.<sup>38</sup>

Just as Metge described that tikanga arises out of an on-going community debate so too did authority arise out of continuing community conversation. Community support was necessary in order to exercise the authority. Durie makes the point that authority for all matters may not rest in one chief. Thus some leaders may lead in times of peace but not in war. Authority was sometimes divided in other ways such as a chief may have mana over the people but the mana over land and resources might be vested in another.<sup>39</sup>

### **How was Custom law enforced?**

The distinction between civil and criminal law in Maori customary law is not helpful, because all disputes are dealt with by the parties themselves and a greater or lesser circle of kin. On the other hand disputes between hapu, especially those leading to full-scale battles, had something of the character of war between separate states.

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<sup>38</sup> Alan Ward, *A Show of Justice*, (1995).

<sup>39</sup> Eddie Durie, *Custom Law*, (1994). 38-40.

Some disputes were dealt with by the parties directly concerned , but more serious wrongs for example murder involved the whole community and involved retribution from community leaders. How the wrong was dealt with depended not only what the wrong was but on its degree, reputation and who the victim was.

If a wrongdoer made a victim of a chief the denouncement might come earlier than if he had confined his attentions to people of low rank. The goal of a dispute settlement also varied with the degree of the offence. The dominant purposes in the case of petty or first time offences were usually to remove the causes of tension, to reconcile the parties and restore normal social relationships. A just appropriation of responsibility was usually followed appropriate transfer of goods to the injured party as *utu* or satisfaction.<sup>40</sup>

If an offence was more serious or its victims was of high rank or the offender was flagrantly or persistently anti-social the concept of retribution could be very swift and severe. *Muru* could be used to formally plunder the offender and their kin. This was usually a formalised process where the leaders of both parties would discuss the matter in great detail. The *whakawa* – accusation, investigation and decision or judgement- were quite often formal and structured. *Tikanga* might be cited, but the complexities of inter/intra *whanau* /*hapu* relationships were take into account. This type of litigation had a high sense of equity, but it was equity according to the mores of the society at the time.<sup>41</sup>

It is a mistake to equate the equity of pre-contact Maori with that of the neo-liberal situated in the late 1990s, and will only result in conflict of values.<sup>42</sup>

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<sup>40</sup> Alan Ward, *A Show of Justice*, (1995). 8.

<sup>41</sup> Alan Ward, *A Show of Justice*, (1995). 8-9

Ward uses the example of a chief's wife being seduced by a slave – it might be appropriate for the chief to kill the slave, but if the chief had abused his wife which had caused her to stray , then the wife's kin might *mu* the chief.

<sup>42</sup> It is more useful to recognise that pre-contact Maori was situated, and any application of Maori customary law today would be adapted to the context of the present society. While the underlying principles may remain the same the application and punishment will (as has always been the case) will be adapted for the circumstances.

If the offender was clearly guilty then the their kin may readily offer compensation, but if the claim was contested or seen as excessive then this would be resisted or might result in a counter claim.<sup>43</sup> Like all forms of mediation *uru* could only be effective if both parties were willing to avoid conflict. Although marriage or descent ties between contesting parties may have limited excesses, if there was serious conflict of interests, or where there was an extreme imbalance between the parties, might may prevail. This could result in the defeated party in nursing their resentment, trying to build strength and await a chance to secure *utu*.<sup>44</sup>

Metge characterises *utu* as the driving force of pre-contact Maori, *utu* drove more than just warfare, where injury, death and damage attracted comparable evils (*kinonga*) in return, but also included gift exchange. In which the giving of goods (foodstuffs, raw materials, and artefacts), services and spouses attracted comparable gifts (*taonga*) in return.<sup>45</sup>

Tohunga also played a significant role in the enforcement of law through the setting up of *rahui* and exacting of punishment on those who breached the restriction s of *rahui* in the form of *makutu*. Tohunga who mastered the art of *makutu* where supposed to exercise it only on behalf of the community. No doubt some *tohunga* used their power to coerce

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<sup>43</sup> Alan Ward, *A Show of Justice*, (1995). 9.

<sup>44</sup> Alan Ward, *A Show of Justice*, (1995). 9.

<sup>45</sup> Joan Metge, *New Growth from Old*, (1995). 100. See also further sections, especially Paul Meredith's on **Concepts** and Rachel Parr's on **Trade and Exchange**.

people into doing their bidding or to curse personal enemies, however such misuse was inhibited by the belief that failed sorcery turned back on its originator.<sup>46</sup>

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<sup>46</sup> Joan Metge, "Commentary on Judge Durie's Custom Law," (1995) . part 2, 6.

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