Ko Tikanga Te Mātāmua:
ngā pūrākau, ngā pakiwaitara, me mihi, ka tika

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I. *He Hīnātore - Abstract*

This study highlights pūrākau and pakiwaitara as legal precedents that can bring Tikanga to life in unique ways. Using Kaupapa Māori and Mana Tāne methodologies, I address two problems within a larger project towards further normalising Tikanga within the legal system and legal education.

The first problem is the key misconception that there are two primary sources of law: statutes and common law. My proposed solution involves reconceiving three primary sources of law: Tikanga, statutes and common law. The second problem is how to source from Tikanga in making legal arguments. My proposed solution encourages story analysis of pūrākau and pakiwaitara and the use of these legal precedents within legal submissions. Accordingly, this study has two purposes.

In embarking on my journey of storytelling, I address the first purpose which is to test whether Tikanga is the first law and supreme law of Aotearoa, as was the seminal proposition of Ani Mikaere.[1] This addresses the key misconception referred to above, that there are only two primary sources of law. Through analysis of Tikanga jurists and Western jurists I conclude Mikaere was right. Tikanga is the supreme law of Aotearoa: Ko Tikanga Te Mātāmua. I propose a new model called Te Whānau Ture as a legal family of three primary law sources representing this finding.

This research then addresses the second purpose in showing how ngā pūrākau me ngā pakiwaitara make valuable contributions to the body of law: me mihi, ka tika. Here, this study proposes a new model called, Whai Matua o Te Ture Māori, a symbolic stingray comprised of fourteen objects of Māori law. Later, I propose a further model Ātea Whakaaro, to enable ethical legal story analysis.

This study responds to (a) indigenising legal education, (b) the inevitability of Tikanga test cases and (c) the current Ao Mārama model. The significance of pūrākau and pakiwaitara in legal settings emerges from this study and a reclaiming of a Māori Legal Method becomes inevitable.

[1] Ani Mikaere "Seeing Human Rights Through Maori Eyes" (2007) 10 Yearbook of New Zealand Jurisprudence 53 at 57.

II. *Ngā Mihi Nui - Acknowledgements*

Atua ki Matua

Whakarongo ki te tangi a te manu nei! Kia oho! Kia mataara! Tīkina atu rā i te wai tapu. Tīkina atu rā i te kupu tapu o te atua mana nui. Tīkina atu rā i te hautapu o ngā Ariki. I te tīmatanga ko te kupu, i a te atua te kupu, ko te kupu ko te atua (Hoani 1:1). Ka noho ki a Ike te ira tāne me te ira wahine. Tokona ki runga te ira tāne, poutoko ki raro te ira wahine. He mea hanga nā te atua i te tīmatanga te rangi me te whenua (Kenehi 1:1). Ka mihi ki Ranginui-e-tū-iho-nei. Ka mihi ki Papatūānuku-e-takoto-nei. I te kōpū o te pō, ka heke ko Hako rāua ko te Tohorā.

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Mihi ki te kikini o te manawa pōuri

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“If you leave the people, throw the pounamu back in the awa.” (emphasis in original)

Kāre he tangata tū atu i a koe Whaea. Nāu anō nei ngā kupu, kia kaha taku haere ki te ara piki:

“Know thine enemies e Tama… move towards them.” (emphasis in original)

Mehe Hinekauorohia koe. Ka mihi.

Mihi ki Whaea Linda Te Aho

Nāu i whakaāe te noho hei tautoko āku mahi. I mataku ahau. Nā te mea, kāre au I te tino mōhio, ka pēhea te ao rangahau? Ahakoa I te pukumahi koe nāu I kōrero awhi mai. Kei te mōhio ahau, mehe te wewero a te kina taku ahua i ōna wā. Ki ētahi, “te ao he kina”. Heoi, nāu I wero mai I runga I te pai me te awhi. Ehara nāu I kī “me pēnei”. Koia te tautoko, nā te take o āku mahi tuhituhi. He tupu iti. E tupu ana. Kua pū nei. Ōrahi ki te pai, horahia ki waho rā. Ka mihi.

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Iti taku manu ka tangi! Tangi taku manu ka mihi!

Mihi taku manu ka ao,

Ka pō, ka ao taku manu.

Ka rere i te wai o Rongopapa-tiketike.

Tēnei te manu nō Rehua-tō-ana-i-te-Uru!

Nau mai te ora. Nau mai te manu.

Whakakiki! Whakakiki!

Kua tau-ī-hā!

III. *Te Ara Whānui – Table of Contents*

IV. *Te Ara Whāiti - Table of Figures*

V. *Te Kore*

"I te tīmatanga ko Te Kore" - Whare Wānanga[2]

This whakapapa phrasing speaks to an emergence, beginning or a genesis in silence.

I employ whakapapa phrasing and names to provide a sense of sequence for the reader. Whakapapa literally means to create layers.[3] I write my chapters as layers of whakapapa. I begin with the potent energy that Te Kore alone provides. The energy for a new world to be called Te Ao Mārama.

This energy is symbolic of the two purposes for this thesis. The first purpose is to explore and test whether Tikanga Māori is our first and supreme source of law as Ani Mikaere first proposed.[4] The second is to highlight the valuable contributions that pūrākau and pakiwaitara can make in legal education and legal submissions, by bringing Tikanga to life through stories.

These purposes are fulfilled in five layers:

First, Te Kore engages Kaupapa Māori and Mana Tāne methodologies before introducing theories of pūrākau and pakiwaitara. Then I cover my approach, writer's voice, methods and limitations.

The second layer Kotahi Te Kii explores jurisprudence from well-known Tikanga jurists and western jurists. Here, I test Mikaere's seminal proposition that Tikanga is our first law and supreme law,[5] to fulfil the first purpose of this thesis. My conclusion then leads me to propose a new model, Te Whānau Ture, as a family of three primary law sources.

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[2] "In the beginning there was The Void" – The Highest Traditional House Of Learning.

[3] Compare Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 172-174 and 181.

[4] Mikaere "Human Rights", above n 1, at 57.

[5] Mikaere "Human Rights", above n 1, at 57.

In continuing to create the whakapapa, Kotahi Te Kōrero shows how pūrākau and pakiwaitara can contribute to the body of law to start fulfilling the second purpose of this thesis. This chapter advocates for the inclusion of pūrākau and pakiwaitara as necessary and beneficial to a legal system embracing Tikanga. I propose another new model called Whai Matua o Te Ture Māori, as a symbolic stingray of fourteen objects of Māori law.

Next, Kotahi Te Wānanga will explore key risks of including pūrākau and pakiwaitara in legal submissions, as an intended application of my research. I discuss ethics in drawing on key Indigenous thinkers. I then propose a third new model called Ātea Whakaaro, to bring ethics and story analysis together. This further fulfils the second purpose of this thesis.

To conclude my whakapapa layering Te Kore Makiki Hīrere highlights the major contributions of this research, makes recommendations and parts ways with a pūrākau.

To initiate this layering, I must first enter the void of Te Kore. I must engage my tūpuna and be deliberate with their energy. I must be mindful of tapu.[6] The void is a space of forthcoming creation. You read here not just a thesis, but a child of the void. A child of the realm of all potential. It is done. The first layer is laid.

A. *Methodology*

1. *Kaupapa Māori methodology*

In this thesis I apply Kaupapa Māori methodology as a research approach that asserts the validity of Māori "ways of knowing and being".[7] Kaupapa Māori methodology is a Māori response to imperialism and imperial theory,[8] which claims western ideas are the only ideas to hold about fundamental things regarding life and the world.[9]

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[6] See Ēnoka Murphy "Ka Mate ko te Mate, Ka Ora Taku Toa Ko Ngā Matawhāura o te Rau Tau Tekau mā Iwa" (PhD Thesis, University of Waikato, 2017) at 4.

[7] Rangimarie Mahuika "Kaupapa Māori theory is critical and anti-colonial" (2008) 3 MAI Review at 9.

[8] Mahuika, above n 7, at 10.

[9] Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2012) at 58.

In contrast, Kaupapa Māori theory allows Māori to "regain control of our lives, our culture and research related to those things."[10] Kaupapa Māori theory is accepting of plurality,[11] welcomes uncertainty and does not demand a single story to explain everything.[12]

I reimagine Kaupapa Māori research as tied to "seeing through the eyes of the tūpuna."[13] In reclaiming and validating the legal stories of our tūpuna, lawyers can receive an understanding of their world, laws and legal system. This thesis affirms tūpuna understanding within pūrākau and pakiwaitara is important to reaching our conclusions as Kaupapa Māori researchers.

Through discussing pūrākau and pakiwaitara, my storytelling research project connects to the legacy of tūpuna to better inform our present understanding of law.[14] I desire to stir up a deep appreciation for tūpuna Māori and Māori traditions. My appreciation extends also to theorists like Ngahuia Te Awekotuku[15], Moana Jackson[16] and others who identify responsibilities that researchers have to Māori people. In considering Kaupapa Māori research protocols, I can consider what is tika in research and tika of a researcher.

I now explore learnings from four leading proponents of Kaupapa Māori theory: Linda Smith, Michelle Kidd, Evelyn Fox and Mason Durie.

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[10] Mahuika, above n 7, at 4.

[11] Mahuika, above n 7, at 4.

[12] Leonie Pihama "Kaupapa Māori Theory: Transforming Theory in Aotearoa" in Leonie Pihama, Sarah-Jane Tiakiwai and Kim Southey (eds) *Kaupapa Rangahau: A Reader* (2nd ed, Te Kotahi Research Institute, Hamilton, 2015) 5 at 13. See also Bell Hooks *Teaching to transgress* (Routledge, London, 1994) at 21-22, 33-34 and 46-47. Compare Smith *Decolonizing Methodologies*, above n 9, at 30-34.

[13] Edmond Carrucan "He atua, he tangata, he atua, he tangata - standing with the environment" LawTalk (online ed, Wellington, 22 March 2021).

[14] Smith *Decolonizing Methodologies*, above n 9, at 145.

[15] Ngahuia Te Awekotuku *He Tikanga Whakaaro: Research Ethics in the Maori Community* (Manatu Maori: Ministry of Maori Affairs, Discussion Paper, 1991) at 17-19.

[16] Marie McInerney "Courage, honesty, celebration and imagination – and other ethics for Indigenous health research" Croakey (18 November 2016) <www.croakey.org/courage-honesty-celebration-and-imagination-and-other-ethics-for-indigenous-health-research/>.

(a) Linda Tuhiwai Smith

Smith writes extensively on Kaupapa Māori research methodology and is known for classifying Indigenous research projects and listing the following Kaupapa Māori ethical research protocols:[17]

1 Aroha ki te tangata (a respect for people);

2 Kanohi Kitea (the seen face, that is present yourself to people face to face);

3 Titiro, whakarongo … korero (look, listen ... speak);

4 Manaaki ki te tangata (share and host people, be generous);

5 Kia tūpato (be cautious);

6 Kaua e takahi te mana a te tangata (do not trample over the mana of people); and

7 Kia māhaki (do not flaunt your knowledge).

It is significant that Aroha ki te tangata appears first on Smith's list. In my view, locating aroha at the centre of research breathes life into research and this motivates researchers like me to be bold enough to ask difficult questions that ultimately benefit tāngata.[18] I have endeavoured to adopt all seven protocols in my research methodology. In highlighting aroha ki te tangata, my approach to research is based on my love for Māori people and a desire to proffer solutions that reflect aroha ki te tangata, rather than an objective and emotionless approach.

Through arguing for the normalisation of pūrākau and pakiwaitara in the legal system, this study envisages that Tikanga will be further respected as a source of law. The importance of our ways of knowing and our traditions of storytelling also become further validated.[19]

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[17] Smith *Decolonizing Methodologies*, above n 9, at 124. See also Shawn Wilson *Research is Ceremony: Indigenous Research Methods* (Hignell Book Printing, Winnipeg, 2008) at 77.

[18] Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (3rd ed, Bloomsbury Publishing, Great Britain, 2021) at 189-190. See also Paora Moyle "A model for Māori research for Māori practitioners" (2014) 26(1) Aotearoa N Z Soc Work 29 at 31; Anne Aroha Hiha "Kaupapa Māori Methodology: Trusting the Methodology Through Thick and Thin" (2015) 45(2) Aust J Indig Educ 129 at 129-130; Maui Hudson "He Matatika Māori: Māori and Ethical Review in Health Research" (MHSc Thesis, Auckland University of Technology, 2004) at 107.

[19] Smith *Decolonizing Methodologies*, above n 9, at 143-164.

(b) Whaea Michelle Kidd

Whaea Michelle[20] works tirelessly, helping whānau to navigate Court processes. Whaea Michelle identifies the following research protocols:

1 A whakapapa framework is the best way to express research;[21]

2 A reader, a researcher and participants meet within te mauri o te raparapa;[22] and

3 Research must involve karakia and prayer.[23]

The concept of whakapapa is significant to this thesis. Locating my research journey within a whakapapa allows researchers like me who embrace non-linear thinking to communicate an interconnected and unfinished work[24] that retains sequence and structure.

I have endeavoured to adopt these three protocols in my research methodology. Whaea's notion of a research journey originates with Tāne-nui-a-Rangi,[25] a name Tāne received upon establishing the heavens.[26] This contextualises my research in seeking further normalisation of Tikanga in the legal system to establish a new legal world[27] of strengthened relationships,[28] where pūrākau and pakiwaitara inform effective legal submissions.

(c) Evelyn Fox

[20] This is the name by which I know her.
[21] Michelle Kidd "Ko ngā waiata o ngā kōmako: The Bell birds Sing" (MEd Thesis, University of Auckland, 2001) at 181.
[22] The spirit of the spiral. See Kidd, above n 21, at 53.
[23] Kidd, above n 21, at 2 and 25.
[24] Kidd, above n 21, at 26 and 51-56.
[25] Kidd, above n 21, at 25.
[26] John C Moorfield *Te Māhuri Pukapuka Tātaki: Study Guide* (Longman, Auckland, 2004) at 40-42.
[27] Moorfield, above n 26, at 40-42.
[28] Consider Wilson, above n 17, at 77 and 79.

My Nana was well known within Ngāti Hako as a knowledge keeper. Strictly speaking, my late kuia was never called an academic researcher. However, my experiences with her educated me in two further research protocols:

1 The spiritual and physical realms require attention in research; and

2 Matakite determine limits to their sharing in research.

In adopting her first protocol, I give attention to the potential risks of applying my research in Kotahi Te Wānanga. In adopting her second protocol, I locate myself as matakite by whakapapa. The role of matakite is captured, in the following kupu ōtua from my kuia:[29] "I te mata o te wairua ki te mata o te arero, māna te tangata noho kahukiwi." Here, the normalisation of Tikanga in the legal system, requires normalisation of Māori law as spiritual. In my research as matakite, I further normalise the expansive identities of atua.

(d) Mason Durie

Durie is known for the Te Whare Tapa Whā model and highlighting diverse Māori realities, where:[30]

> Māori individuals have a variety of cultural characteristics and live in a number of cultural and socio-economic realities. The relevance of so-called traditional values is not the same for all Māori, nor can it be assumed that all Māori will wish to define their ethnic identity according to classical constructs.

In adopting Durie's notion of diverse realities, I am located within my Ngāti Hako experience and I apply my own interpretations of Kaupapa Māori theory and later Mana Tāne theory.

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[29] "From the spirit world to the tongue, it is for the person under the kiwi cloak." Korohere Ngāpō, Te Whare Tāhuhu Kōrero o Hauraki Wānanga Kaiako "Ngā Manu Tapu" (Korimako Kauhau 1, Thames College, Hauraki, 27 February 2021).

[30] M H Durie *Ngā Matatini Māori: Diverse Māori Realities* (Māori Health Framework Seminar, Conference Paper, February 1995) at 6.1.

Adopting Kaupapa Māori methodology supports my storytelling project as the protocols and ideas outlined enable me to champion new ideas to further normalise Tikanga in the legal system.

The second methodology I adopt and apply in my research process is that of Mana Tāne.

2. *Mana Tāne methodology*

Mana Tāne theory is defined as "Māori masculinist discourses examining the intersection of being Māori and male".[31] Here, Mana Tāne methodology acknowledges the steady privileging of colonial ideas,[32] that reflect in concerning statistics.[33] This methodology responds to how colonisation was (and is) constructing the Māori male positioning[34] which is not assisted by nil political will for Indigenous males' issues,[35] globally.[36] This is further hampered where the Mana Tāne Kaupapa Inquiry has no set hearing date.[37]

I reimagine Mana Tāne methodology involves resisting "cooption and control" by colonial law.[38] Mikaere notes how illogical it is for Māori to "look to that same law for answers to any of the contemporary ills that plague us."[39] This explains why I later test Tikanga as a separate primary

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[31] Tagan Wetekia Paul "A Mana Wahine Critical analysis of New Zealand Legislation Concerning Education: Implications for Addressing Māori Social Disadvantage" (MDevStud Thesis, Victoria University of Wellington, 2014) at XVI.

[32] Eugene Bingham and Paula Penfold "New Zealand's racist justice system is not colour-blind" *Stuff.co.nz* (online ed, 17 September 2016).

[33] *Adults convicted and sentenced: Data notes and trends for 2020/2021* (Ministry of Justice, Summary Report, June 2021) at 3. Email from Brendan Hokowhitu (Professor of Waikato University) to Edmond Carrucan (Master's Student) regarding a response to a Mana Tāne Methodology Patai (29 March 2021).

[34] Kirsten Aroha Linda Gabel "Poiapoia te tamaiti ki te ūkaipō" (PhD Thesis, University of Waikato, 2013) at 199.

[35] Robert Alexander Innes and Kim Anderson (eds) *Indigenous Men and Masculinities: Legacies, Identities, Regeneration* (University of Manitoba Press, Canada, 2015) at 4.

[36] Keestin O'Dell "Okicitawak: Worthy young men – perceptions of Indigenous manhood" TedxMacEwanU (6 March 2019) YouTube <www.youtube.com/watch?v=D2WFgGFGapc>; Brendan Hokowhitu "Modern Māori Men: Postcolonial formations of Māori Masculinity" (31 March 2016) YouTube <www.youtube.com/watch?v=nrOVZNiHttQ>; "Indigenous masculinity and the lasting impacts of colonization" (5 May 2019) YouTube <www.youtube.com/watch?v=cgwic8jqBfQ>.

[37] Email from Brayden Drummond (Assistant Registrar of the Waitangi Tribunal) to Edmond Carrucan (Master's Student) explaining that nobody knows when the Mana Tāne claims might be heard (1 July 2021).

[38] Mikaere *Colonising Myths*, above n 3, at 164.

[39] Mikaere *Colonising Myths*, above n 3, at 164.

law source that can offer new solutions to a failing legal system "at crisis point".[40] Māori distrust of the system is real.[41] Māori have a whakapapa to their distrust, that merely surfaces as distrust of police.[42] While some disagree,[43] I maintain new ideas are needed.[44]

I next seek to identify Mana Tāne research protocols. Accordingly, I explore learnings from leading proponents of Mana Tāne theory Moana Jackson and Brendan Hokowhitu.

(a) Moana Jackson

First, Jackson is well known for his contributions to the understanding of constitutional law, Te Tiriti o Waitangi and issues facing Māori. In unpacking the warrior gene, Jackson shares:[45]

> The 'warrior race' suggests there are certain races of people that were born to fight, to be violent and to kill… where vengeance and war is the precious lifeblood of an ancestor... where did that image come from?

[40] Te Uepū Hāpai i Te Ora Safe and Effective Justice Advisory Group *Ināia Tonu Nei: Hui Māori Report* (Ministry of Justice, Hui Report, 24 July 2019) at 2.

[41] Juan Tauri "Indigenous perspectives and experiences: Maori and the criminal justice system" in Reece Walters *Introduction to Criminological Thought* (Pearson, Auckland, 2005) at 2-6. Compare Sandra M Bucerius and Michael Tonry (eds) *The Oxford Handbook of Ethnicity, Crime, and* Immigration (Oxford University, New York, Press, 2014) at 365-369; Bridget L Jones "Offending Outcomes for Māori and Non-Māori, An Investigation of Ethnic Bias in the Criminal Justice System: Evidence from a New Zealand Birth Cohort" (MSc Thesis, University of Canterbury, 2016) at 14; Kim Workman "From a Search for Rangatiratanga to a Struggle for Survival – Criminal Justice, the State and Māori, 1985 to 2015" (2016) 22 J N Z Stud 89 at 90-92.

[42] See Pania Te Whaiti and Michael Roguski "Mäori Perceptions of The Police" (New Zealand Police, September 1998) at 13-14; Justine O'Reilly "A review of Police and iwi/Maori relationships: Working together to reduce offending and victimisation among Maori" (New Zealand Police, October 2014) at 29-30.

[43] *To ALL New Zealanders: Are we being conned by the Treaty Industry?* 1Law4All (online ed) at 3. See also Hobson's pledge "About us" <www.hobsonspledge.nz/about_us>; "Don Brash – Has the Treaty Been Hijacked?" (27 February 2019) YouTube <www.youtube.com/watch?v=IypXAdkT0bQ>; John Robinson *Dividing A Nation; the Return of Tikanga* (Tross Publishing, Wellington, 2019) at 9-10 and 27. Compare Andy Oakley *Cannons Creek to Waitangi: Te Pakeha's Treaty Claim for Equality* (Tross Publishing, Wellington, 2014) at 152-177.

[44] Leigh-Marama McLachlan "Māori demand reform to justice system" Radio New Zealand (10 April 2019) <www.rnz.co.nz/news/te-manu-korihi/386716/maori-demand-reform-to-justice-system>.

[45] Moana Jackson "Once were gardeners - Moana Jackson on the scientific method and the 'warrior gene'" (28 October 2009) YouTube <www.youtube.com/watch?v=HfAe3Zvgui4>.

It turns out in connection to a warrior gene, the notion of a warrior race emerges as originating from Columbus' false account of El Dorado, with Sir Walter Raleigh buying into that account.[46] Jackson rejects the notion of a warrior race and the alternative that Māori were "noble savages[47] running around naked and saying prayers all day."[48] Here, I identify one research protocol to be marked avoidance of accepting "something as objective, when it is far from objective and rather a reaffirmation of old and bitter prejudices."[49]

The next chapter, Kotahi Te Kii, applies this protocol researching an area where there are power imbalances, including structural imbalances,[50] that continue to operate in favour of Pākehā.[51]

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[46] Moana Jackson "Once were gardeners", above n 45. See also Paul R Sellin *Treasure, Treason and the Tower: El Dorado and the Murder of Sir Walter Raleigh* (Ashgate Publishing Ltd, New York, 2016) at 171, 175-176, 181 and 183; Frank Swannack "Treasure, Treasure and the Tower: El Dorado and the Murder of Sir Walter Raleigh (review)" (2012) 29 Parergon 251.

[47] See Avril Bell "Relating Maori and Pakeha: the politics of indigenous and settler identities" (PhD Thesis, Massey University, 2004) at 35. See also Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium Of References To The Concepts And Institutions Of Māori Customary Law* (Victoria University Press, Wellington, New Zealand, 2013) at 30.

[48] Moana Jackson "Once were gardeners", above n 45. Compare Brendan Hokowhitu "The Death of Koro Paka: 'traditional' Maori Patriarchy" (2008) 20 Contemp Pac 115 at 119.

[49] Moana Jackson "Once were gardeners" above n 45.

[50] See Eloise Pollard "The Pākehā connection to racism in New Zealand" *Taranaki Daily News* (online ed, 21 December 2020).

[51] See Dame Tariana Turia "Do Maori discriminate against Pakeha?" Talk Treaty - Kōrerotia te Tiriti <talktreaty.org.nz/do-maori-discriminate-against-pakeha/>; Max Harris "Racism and White Defensiveness in Aotearoa: A Pākehā Perspective" (10 June 2018) E-Tangata <e-tangata.co.nz/comment-and-analysis/racism-and-white-defensiveness-in-aotearoa-a-pakeha-perspective/>.

Power imbalances have long imposed nonsensical messages upon Tāne Māori to speak English,[52] love state curriculum,[53] cut our hair[54] and proudly wear colonial clothes.[55] Here, busting nonsensical myths within research is a second identifiable research protocol.

As Taika Waititi put it:[56] "New Zealand is racist as fuck".[57] Life is harder for Māori than many realise.[58] I feel tired and sick of hearing how as Māori we are "lucky", "better off" or how we "need to get over it".[59] That is a myth. Not a fact. It reminds me of the fact that some people have the privilege to merely learn about race-based colonisation while we continue to suffer because of it.[60] My storytelling project is necessary because colonisation is never one moment in time.[61]

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[52] See Charlotte Jones "Councillor disgusted by comments over reo Māori karakia a Grey power meeting" (21 January 2021) Radio New Zealand <www.rnz.co.nz/news/ldr/434865/councillor-disgusted-by-comments-over-reo-maori-karakia-at-grey-power-meeting>; Stephen May "Why should we learn te reo Māori?" (5 June 2018) Ingenio <www.ingenio-magazine.com/why-should-we-learn-te-reo-maori>; "Brash weighs in to te reo debate" (2 December 2017) Radio New Zealand <www.rnz.co.nz/news/national/345248/brash-weighs-in-to-te-reo-debate>; "Racism to blame for aversion to compulsory te reo Māori" *Stuff.co.nz* (online ed, 27 September 2017).

[53] See Laura Walters "Our racist education system" *Newsroom* (online ed, 7 November 2018).

[54] See Simon Collins "Auckland Grammar boy's hair may be test case for school independence" *The New Zealand Herald* (online ed, 26 January 2019). See also "'Extreme haircut': Dunedin student told to undo cornrows" (16 February 2021) *Radio New Zealand* <www.rnz.co.nz/news/national/436530/extreme-haircut-dunedin-student-told-to-undo-cornrows>. See also Khylee Quince "Freedom to wear your hair as you wish is an 'important human right'" *Stuff.co.nz* (online ed, 1 August 2020).

[55] See "Rawiri Waititi ejected from Parliament for not wearing a tie" (9 February 2021) Radio New Zealand <www.rnz.co.nz/news/political/436073/rawiri-waititi-ejected-from-parliament-for-not-wearing-a-tie>; See also Claire Robinson "The phallic necktie is an outdated symbol of white male rule in New Zealand's parliament" *The Guardian* (online ed, 8 February 2021). See also Brittney Deguara "Taonga allowed in all courts instead of ties a 'significant step' forward" *Stuff.co.nz* (online ed, 25 May 2021).

[56] "Unknown Mortal Orchestra & Taika Waititi on New Zealand culture" (5 April 2018) *Dazed* <www.dazeddigital.com/music/article/39590/1/unknown-mortal-orchestra-ruban-nielson-taika-waititi-interview>. See also "'New Zealand is racist as f***' – Taika Waititi" *Newshub* (online ed, 9 April 2018).

[57] See Cherryl Smith and others *Whakatika: A Survey Of Māori Experiences Of Racism* (Te Atawhai o Te Ao, March 2021); Moana Ellis "Most Māori experience racism every day – new research" (22 March 2021) Radio New Zealand <www.rnz.co.nz/news/ldr/438895/most-maori-experience-racism-every-day-new-research>; Sylvia Pack, Keith Tuffin and Antonia Lyons "Accounts Of Blatant Racism Against Māori In Aotearoa New Zealand" 13(2) Sites 85.

[58] See Alice Sneddin "Alice Snedden's Bad News: Treaty Partnership *The Spinoff* (3 September 2020) YouTube <www.youtube.com/watch?v=X6iNBZ59t20>; Andrew Judd "White supremacy entrenched in Aotearoa history" (19 March 2019) YouTube <www.youtube.com/watch?v=Yy6Cue8AXks>.

[59] See Andrew Judd "Lessons from a Recovering Racist" TEDxRuakura (21 November 2017) YouTube <www.youtube.com/watch?v=dOdsEgPlU_0>; Robinson *Dividing A Nation*, above n 43, at 16-17. See also *To ALL New Zealanders: Are we being conned by the Treaty Industry?*, above n 43, at 4-5.

[60] See "Can the trauma of colonialism be inherited?" *Aljazeera* (10 December 2019) <www.aljazeera.com/program/the-stream/2019/12/10/can-the-trauma-of-colonialism-be-inherited>. See Judd "Lessons from a Recovering Racist", above n 59.

[61] See Whakaputanga Rangatahi 2021 at 16. See Judd "Lessons from a Recovering Racist", above n 59.

(b) Brendan Hokowhitu

Hokowhitu is well known in the Mana Tāne space for canvassing Tāne Māori restriction to the concept of physicality and the conditional access this permits into western society;[62] a classic example involves Tāne Māori as rugby players.[63] Hokowhitu explains:[64]

> Mäori men need only turn to understandings of the dynamism of their own culture to realise they are not bound by the constricting notions of traditional masculinity that have pervaded colonial history.

This quote emphasises an alarming loss of dynamism and later proposes, "the answer to healing the suppression of Mäori men lies within tikanga Mäori."[65] Here, I identify three further protocols. First, basing our research around Tikanga knowledge. Second, Tāne Māori needing to dismantle our colonised expectations.[66] Third, considering the consequences of intended research application.

Using names of Tāne Atua as a memory aid,[67] I foreshadow names that feature in this thesis in summarising protocols I identified.

(c) Mana Tāne research protocols

My Mana Tāne ethical research protocols include:

1 Māui: avoiding an acceptance of research that will entrench bias;

2 Tūmatauenga: busting nonsensical myths through research;

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[62] See Brendan Hokowhitu "A Genealogy of Maori Masculinity" in Andrew Vercoe *Educating Jake: Pathways to Empowerment* (Harper Collins, Auckland, 1998) at 47.

[63] Compare Hokowhitu "The Death of Koro Paka", above n 48, at 121-122.

[64] Brendan Hokowhitu "The Silencing of Mäori Men Deconstructing a 'Space' for Mäori Masculinities" (2007) 27(2) NZ Journal of Counselling 63 at 74.

[65] At 74.

[66] Mikaere *Colonising Myths*, above n 3, at 202.

[67] Ivy Taia and others "Maumahara Papahou: A mobile augmented reality memory treasure box based on Māori mnemonic aids" (2019) 8 MAI Journal 110 at 114-115.

3 Urutengana: basing research on Tikanga knowledge;

4 Rua Te Pupuke: considering the consequences of research application; and

5 Whiro Te Tupua: taking responsibility for dismantling colonised expectations.

I have endeavoured to adopt all these protocols in this research. It is important that Tūmatauenga features second on my list. My research identifies heavily with that myth-busting protocol, in helping Mana Tāne researchers like me to justify an academic commitment to truth-telling. In highlighting Tūmatauenga, my approach to this research addresses the key misconception that there are only have two primary law sources and desires, to then proffer one solution on how to source Māori law.

Before I describe my approach, I next discuss the two story forms of this research.

B. *Pūrākau and Pakiwaitara*

This section offers some understandings, in the context of this research, of both pūrākau and pakiwaitara which, as taonga, evidence uncolonised (or decolonisable) Māori legal traditions.

1. *Pūrākau*

(a) A basic starting point

Pūrākau are described as one form of Māori narrative originating from oral literature traditions.[68] There are numerous pūrākau, with the simplest perhaps being, "Te Kore. Te Pō. Te Ao Mārama."[69]

I now explore definitions offered by Jenny Lee Morgan and Adrian Woodhouse.

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[68] Rawiri Waretini-Karena "Purakau - Theories, Narratives, Models & Application" Slideshare (30 October 2014) <www.slideshare.net/Rawiri/prkau-theories-narratives-models-application-40940351#:~:text=P%C5%ABr%C4%81kau%20Theory%20Definition%3A%20P%C5%AB%3D%20Origin,the%20tree%20and%20bush%2C%20since> at 8.

[69] "The Void. The Night. The World of Light." See Te Ahukaramū Charles Royal "Te Ao Mārama – the natural world - The world of light and darkness" (24 September 2007) Te Ara Encyclopedia of New Zealand <www.TeAra.govt.nz/en/te-ao-marama-the-natural-world/page-3>.

(b) Jenny Lee-Morgan's definition

Lee-Morgan is a leading theorist in the cross-disciplinary space of story work and the first to propose 'te pū-o-te-rākau' as a wetereo of the word pūrākau in this space.[70] This wetereo introduced the imagery of the roots of the tree,[71] which speaks about Māori people being the trees, in connection to Tāne Mahuta and Tāne Whakapiripiri.[72] This elevates the value of stories to help people grow as trees, because trees need each connection just as humans do.[73] Lee-Morgan stresses everyone, every family and the land has a story.[74]

This definition suggests iwi and hapū adopted the term pūrākau to describe shared stories. I expand Lee-Morgan's wetereo because the '-rākau' is not just a tree and can be inspired by Tūmatauenga.

I affirm that one-dimensional atua Māori are a fiction. Tūmatauenga is not only an atua of war.[75] He is an atua keenly concerned with law, order and civilisation. I submit Te pū-o-te-rākau can be tied to Tūmatauenga and his -rākau traditions, which includes legal analysis.

(c) Adrian Woodhouse's definition

Woodhouse agreeing that pūrākau is storytelling, observes:[76]

> *Traditionally, pūrākau was the symbolic form of storytelling within the visual arts* such as wood and bone carving, and weaving in the form of tukutuku panels. Within these visual representations, it was typical to embed stories of whakapapa, as well as the ethical and moral lessons for living a healthy and spiritually fulfilled life. Pūrākau

[70] Jenny Bol Jun Lee-Morgan "Purakau from the Inside-Out: Regenerating Stories for Cultural Sustainability" in Jo-ann Archbold, Jenny Lee-Morgan and Jason De Santolo (eds) *Decolonizing Research Indigenous Storywork and Methodology* (Bloomsbury Publishing PLC, London, 2019) at 151. See also Te Rau Ora Webinars "Tikanga Rangahau Webinar Series - Pūrākau as Methodology" YouTube (4 September 2017) <www.youtube.com/watch?v=lBBtwUMeKvs>.

[71] Lee-Morgan, above n 70, at 151.

[72] Te Rau Ora Webinars "Tikanga Rangahau Webinar Series - Pūrākau as Methodology", above n 70.

[73] Lee-Morgan, above n 70, at 156.

[74] Te Rau Ora Webinars "Tikanga Rangahau Webinar Series - Pūrākau as Methodology", above n 70.

[75] See Basil Keane "Riri - traditional Māori warfare - Atua – origins of wars" (20 June 2012) Te Ara Encyclopedia of New Zealand <www.TeAra.govt.nz/en/riri-traditional-maori-warfare/page-1>.

[76] Adrian Woodhouse "Pūrākau: Embracing Our Indigneous Identity and Recognising the Equality of the Implicit Other" (2019) 5 Kaupapa Kai Tahu 1 at 13 (emphasis added).

> differentiates itself from pakiwaitara, due to the fact that pakiwaitara is the oral method of storytelling in the form of songs, haka and narratives.

This excites me where visual traditions always represented Māori legal knowledge.[77] Visual traditions bust the myth that Māori never wrote things down.[78] However, the oral and visual divide Woodhouse draws is far from watertight. Alongside the moral lessons, I also locate legal knowledge, which can support the legal submissions this study envisages.

Whakapapa is one core of Tikanga Māori embedded in pūrākau.[79] Without whakapapa Māori, there is no claim to personal Māoritanga.[80] This research accepts Tikanga needs whakapapa, with whom pūrākau can exist and people willing to transmit the legal knowledge.

(d) Reflecting on these definitions

I now explain the importance of providing a definition, relying on the words of Merata Mita that:[81]

> *Our storytelling began to be disempowered the day the stranger began recording our stories*, writing them down. From that day on, the stories started to change, they became a passive collection of words and phrases, sentence and paragraphs, pages of misinterpreted coding, derivative imagery, superficial characters and shallow portrayals. To the stranger from the west, mere collections of fantasy and myth.

Mita observes that Pākehā efforts misrepresented our narratives. Supporting this, Lee-Morgan stresses pūrākau need to be moved from the realm of myths and legends[82] to the realm of critical

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[77] See Arapata Tamati Hakiwai "He Mana Taonga, He Mana Tanata: Māori Taonga And The Politics Of Māori Tribal Identity And Development" (PhD Thesis, Victoria University of Wellington, 2014) at 60-67.

[78] See *Mātauranga Guide* (Environmental Protection Agency, June 2020) at 4 and 11.

[79] Rawiri Te Maire Tau *Ngā Pikitūroa ō Ngāi Tahu: The Oral Traditions of Ngāi Tahu* (Dunedin, University of Otago Press, 2003) at 33-35.

[80] See Leonie Hayden "How to tell if you're Māori" *The Spinoff* (online ed, 2 March 2018); Nadine Anne Hura "So you think you're Māori?" (10 October 2015) E-Tangata <e-tangata.co.nz/identity/so-you-think-youre-maori/>.

[81] Merata Mita, in Teah Anna Lee Carlson "Kaupapa Maori Evaluation Transforming Health Literacy" (PhD Thesis, Massey University, 2018) at 56 (emphasis added).

[82] Te Rau Ora Webinars "Tikanga Rangahau Webinar Series - Pūrākau as Methodology", above n 70. See Sebastian Pelayo Benavides "The usage of traditional Māori narratives as cognitive models and educational tools" (MA Thesis, Massey University, 2009) at 21-25, fig 2, 3 and 5.

stories of how we see the world and who we are.[83] Lee-Morgan explains pūrākau "were selected, framed, elevated and legitimated through "research" and popularized as myths and legends."[84] In addition, pūrākau need to be moved into the realm of Tikanga legal authorities.

(e) A summary of pūrākau

This research summarily defines pūrākau as:

(1) An origin story;
(2) Concerned with the formation of the world;
(3) Connected with atua;
(4) Authoritative on Tikanga as Māori law; and
(5) Evidence of Māori legal tradition.

2. *Pakiwaitara*

(a) An initial definition

Pakiwaitara carefully preserve historical iwi and hapū events including whakapapa.[85] Adding to that, Lee-Morgan notes there are two views of what is encompassed within pakiwaitara. Some claim that pakiwaitara are everyday in nature, meaning they are less esoteric than pūrākau.[86] Yet others claim pakiwaitara are equal with, or another term for pūrākau.[87] Comparatively, Rawiri Te

[83] Te Rau Ora Webinars "Tikanga Rangahau Webinar Series - Pūrākau as Methodology", above n 70. See Lisa Cherrington "The use of Māori mythology in clinical settings: Training issues and needs" in National Māori Graduates of Psychology Symposium (University of Waikato, 2002) 117 at 119.
[84] Lee-Morgan, above n 70, at 153.
[85] See Sheryl Ferguson and others *Pakiwaitara A revitalization model* (Bachelor of Teaching Paper, Te Whare Wānanga ō Awanuiārangi and The National Taitung University) at 3.
[86] Te Rau Ora Webinars "Tikanga Rangahau Webinar Series - Pūrākau as Methodology", above n 70.
[87] Te Rau Ora Webinars "Tikanga Rangahau Webinar Series - Pūrākau as Methodology", above n 70.

Maire Tau, a leading thinker in Ngāi Tahu history and oral traditions, insists that pakiwaitara refer to both recent and distant pasts.[88]

The earlier wetereo of Lee-Morgan, inspired my wetereo of pakiwaitara below,[89] where I advance that pakiwaitara concern a more recent past.

(b) Wetereo: "Pā-ki-Waitara"

This wetereo Pā-ki-Waitara flows from a pūrākau tied to Uepoto, who escapes from Te Pō. He does so by touching ('Pā-ki') Papatūānuku, one of his mother's vaginal fluids ('Waitara').

From the tapu restriction of Te Pō, Uepoto ventured out and saw a white light representing a freedom that existed outside of Te Pō called Te Kore Makiki Hīrere; the title of my fifth chapter. In returning to Te Pō, Uepoto initiated what I described as the first ever Kaupapa Māori Negotiation.[90] A pakiwaitara can then sometimes, become a pūrākau as Uepoto's story is now, because it created a new world. Typically, in pakiwaitara, the origins of the world do not change.[91]

(c) Summary of pakiwaitara

This research summarises pakiwaitara as:

(1) Stories concerned with what follows after pūrākau in the created world;
(2) Connected with Tangata Whenua, relationships and interactions;

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[88] Ferguson and others *Pakiwaitara A revitalization model*, above n 85. See also Tau *Ngā Pikitūroa ō Ngāi Tahu,* above n 79, at 259-263. Compare Robert Pouwhare "Kai hea kai hea te pū o te mate? Reclaiming the power of pūrākau" (2016) 9 Te Kaharoa at 6-8.

[89] See Māmari Stephens "'Wrestling with the Taniwha': An Analysis of Two Māori Language Texts and their Engagement with Western Legal Concepts" (2008) 14 RJP 135 at 143-146.

[90] Edmond Carrucan, Kaupapa Maori Negotiation Demonstration Judge "Feedback on Tikanga aspects of the Negotiation" (Pipitea Marae, Wellington, 28 August 2019).

[91] Kristin Jerram "E Kore Te Tōtara e Tū Noa i Te Pārae, Engari Me Tū i Roto i Te Wao-Nui-a-Tāne: The Symbolism of Rākau and Ngahere in the Huia Short Story Collections" (MA Thesis, Victoria University of Wellington, 2012) at 61.

(3) Capable of becoming a pūrākau, if a new world is created;

(4) Authoritative on Tikanga as a law; and

(5) Evidence of Māori legal tradition.

3. *The difference between pūrākau and pakiwaitara*

If a single word was needed, my tūpuna would not have handed both down to me.[92] I record the unique difference is the foundational place of pūrākau within Māori legal traditions. Without pūrākau, this study affirms that there can be no pakiwaitara. However, pakiwaitara are critical to know how earlier legal ideas are maintained or adapted within whakapapa groupings.

Whakapapa matters.[93] My view is that whakapapa indicates a scope to hapū and iwi legal traditions. Māori can borrow from other groupings, but they also have their own hapū and iwi stories. Then, versions of stories evidence diversity – not error.

I now need a "strategy of inquiry".[94] Therefore, I now set out my research approach.

C. *My Approach*

1. *My chosen approach: Ko te aroha anō he wai*[95]

In applying the Kaupapa Māori protocols from Smith, Kidd, my Nana and Durie, aroha must be the source of my research, otherwise I feel there is no point. In applying Mana Tāne protocols inspired by Jackson and Hokowhitu, myth-busting must be an emphasis, otherwise I risk leaving unchallenged ideas that undermine my research.

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[92] Te Maharanui Mikaere, Te Whare Tāhuhu Kōrero o Hauraki Wānanga Kaiako "Ngā Taniwha o Hauraki: whakamataku, kauanuanu, whakaute" (Korimako Kauhau 2, Thames College, Hauraki, 8 May 2021).

[93] Tau *Ngā Pikitūroa ō Ngāi Tahu*, above n 79, at 33-35.

[94] Wilson *Research is Ceremony*, above n 17, at 39.

[95] My aroha is like water. I acknowledge this phrasing matches lyrics of the waiata 'Tai Aroha.' Some say this was composed by Anaru Kupenga of Ruatōria in 1981. Some attribute this to the late Professor Wharehuia Milroy in 1995. See "Tai Aroha Anaru Kupenga 1981" (May 2019) NZ Folk Song <folksong.org.nz/tai_aroha/index.html>.

Karakia, prayer and waiata keep me going through the reading, writing, ups and downs. Whakapapa needs to feature for me as it did for Whaea Michelle, within my chapter headings.[96] I liken this to a continued layering, in recording a partial genealogy of Ike. Accordingly, each chapter carries a title beginning with Te Kore and descends to Te Kore Makiki Hīrere. I also had to noho kahukiwi,[97] to let the stories guide how much I shared in maintaining awareness of tapu.[98]

In applying both Kaupapa Māori and Mana Tāne protocols, I realise that who I am affects my research and writer's voice. I am positioned as an Indigenous-insider culturally and Tāne Māori.[99]

I am future-focused and encouraging the profession to apply new approaches. This future-focused outlook takes me to the design of our nation's coat of arms.[100] I believe substantive law, law schools, lawyers and judges largely speak for the Pākehā lady holding the haki. The legal system must reflect and realise the Waitangi Tribunal finding that Māori never ceded sovereignty.[101]

2. *My writer's voice: ko te kupu te kaipupuri o taku ngākau.* [102]

(a) I am my writing

Graff and Birkenstein discuss blending academic and colloquial writing styles as a solution,[103] to the artificial nature of academic writing.[104] It is encouraged to "carefully about your audience and purpose",[105] but no longer is writing a thesis "the linguistic equivalent of a black-tie affair".[106] I

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[96] Kidd "Ko ngā waiata o ngā kōmako", above n 21, at 4.
[97] Sit protected, within my matakite whakapapa.
[98] See Ēnoka Murphy, "Ka Mate ko te Mate, Ka Ora Taku Toa Ko Ngā Matawhāura o te Rau Tau Tekau mā Iwa", above n 6, at 4.
[99] See James A Banks "The Lives and Values of Researchers: Implications for Educating Citizens in a Multicultural Society" (1998) 27(7) Am Educ Res J 4 at Figure 1.
[100] See <mch.govt.nz/nz-identity-heritage/coat-arms>.
[101] See Waitangi Tribunal *The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at xxii.
[102] Words are a unity of my soul, not merely expressed ideas.
[103] Gerald Graff and Cathy Birkenstein *They Say/I Say: The moves that matter in academic writing* (3rd ed, W.W. Norton & Company, New York, 2017) at 122-126.
[104] Graff and Birkenstein, above n 103, at 121-122.
[105] Graff and Birkenstein, above n 103, at 127.
[106] Graff and Birkenstein, above n 103, at 128.

share how I feel in this thesis. I write some parts creatively, lyrically and emotionally. I identify with a deep need to be myself when I write.[107] I am my writing.

Leonie Pihama has written that "[t]here are ways to present theory in understandable language",[108] which I agree with. I adopt a particular style that disrupts traditional western legal writing norms. This aligns with my interpretation of Kaupapa Māori theory and cultural ethics. If my writing comes across as self-righteous or whakahihi that is unintentional. I want to flip the narrative. I include footnote translations for only some of my Te Reo Māori text. I use Tikanga and Māori Law interchangeably. I also use the terms Indigenous, Māori and Tangata Whenua.[109]

(b) What underlies my writer's voice?

I embark on a journey, seeing before me a legal world that I consider no Māori should be satisfied with.[110] I insist our tūpuna would not be satisfied either. We have a long way to go. I encourage all Māori to keep believing things can change for us. I believe in a world where all Māori can find peace. On some days, I cry my people's tears as my own. Tears upon tears, like the salt water of the sea. I embolden my people with these words:[111]

Anā he rā, kapo ake te roikura.

I feel disgusted by the idea that if it cannot be measured concretely, a positivist theory would say, there is nothing worth knowing from a "inferior, insignificant and even barbaric" Indigenous

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[107] See Cynthia Dougherty-Bernal *Bleeding on the Page: My soul exposed* (Elusive Publishing, Texas, 2016) at 2 and 6. See also Paul McVeigh "'Everything you write requires a portion of your soul, I think, to make it live'" *The Irish Times* (online ed, 6 May 2016).

[108] Pihama "Kaupapa Māori Theory", above n 12, at 10.

[109] See Michael A Peters and Carl T Mika "Aborigine, Indian, indigenous or first nations?" (2017) 49 Educ Philos Theory Philos 1229 at 1229-1230.

[110] See Edmond Carrucan, Alumni Guest Speaker "Crimes Guest Lecture" (Waikato University, Hamilton, 23 May 2021).

[111] One day, you will cry no more. This is a whakataukī I crafted.

peoples.[112] Such is the epistemological arrogance of positivist thinking "that through objective thought", it is possible to discover "one reality."[113]

This thinking produces a money-making corporate legal system that hurts Māori people.

A system without empathy. Cold. A system claiming objectivity. Blind.

Objectivity is a subjective myth. We are all subjective, all the time.

3. *My methods*

My methods first draw upon my personal experience of the traditions of Ngāti Hako and locating myself as matakite. Second, they include informal kōrero with whānau, tamariki, rangatahi, kuia, koro and pacific whanaunga.[114] Third, they include statutes, cases, and texts.

I decided against interviews. Ethics approval seemed to be a barrier,[115] where cultural ethics can hold Indigenous researchers to a higher standard than modern ethics approval.[116] It is problematic that I would need to get permission to speak with my own hapū and yet,[117] culturally incompetent researchers somehow tick institutional boxes.[118]

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[112] Kerstin Knopf "The Turn Toward the Indigenous: Knowledge Systems and Practices in the Academy" (2015) 60 Amst 179 at 180.
[113] Shawn Wilson *Research is Ceremony*, above n 17, at 36.
[114] See Carwyn Jones "The Treaty of Waitangi Settlement process in Māori Legal History" (PhD Thesis, Victoria University, Wellington, 2013) at 55.
[115] Heather Harris "Coyote Goes to School: The Paradox of Indigenous Higher Education" (2002) 26(2) CJNE 187 at 194-196.
[116] S 'Apo' Aporosa *Yaqona (Kava)and Education in Fiji: Investigating 'cultural complexities' from a post-development perspective* (Office of the Directorate Pasifika, Azima Mazid, Massey University, Auckland, 2014) at 89.
[117] Smith *Decolonizing Methodologies*, above n 9, at 176.
[118] S 'Apo' Aporosa, above n 116, at 99 and n 49.

4. *Limitations*

(a) Time

My first key limitation is time. The final Supreme Court decision concerning the Peter Ellis appeal has not been reported.[119] I expect Tikanga to be thoroughly canvassed. This research disagrees with Natalie Coates' submission that the law is a whāriki.[120] Informal kōrero with a respected kairāranga about Coates' submission led to me being asked "So… do you want to walk all over the law? Do you want to sit on it?" The kairāranga highlighted the obvious purposes of a whāriki,[121] in stressing this submission is problematic.

This conversation restored a cautiousness in me around cases like *Takamore v Clarke*.[122] The notions of "uninterrupted customary law" or "longevity and continuity",[123] seemingly neglect the interrupting effect colonisation has had on people and process.[124] Where is that in the *Takamore v Clarke* Court's common law test? Also, should monojural ideas in a bijural jurisdiction trump in determining what is reasonable?[125] My research foresees a steep learning curve.

(b) A thesis written primarily in English

My second key limitation reflects the pressing need for all members of the legal profession to comprehend the tools this thesis provides. I affirm Tikanga is best understood in Te Reo Māori.

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[119] See Supreme Court of New Zealand "Peter Hugh McGregor Ellis v The Queen" (media release, 16 September 2021).
[120] See *Ellis v The Queen* [2020] NZSC Trans 19 at 6 and 51-53.
[121] See Kahutoi Te Kanawa "Te raranga me te whatu – Whāriki, raranga and whiri" (22 October 2014) Te Ara Encyclopedia of New Zealand <teara.govt.nz/en/te-raranga-me-te-whatu/page-4>.
[122] *Takamore v Clarke* [2012] NZSC 116; *Takamore v Clarke* [2011] NZCA 587. See Shaunnagh Dorsett *Juridical Encounters: Māori and the Colonial Courts, 1840-1852* (Auckland University Press, Auckland, 2017) at 271-281.
[123] *Takamore v Clarke* [2011], above n 122, at [122] - [123].
[124] See *Takamore v Clarke* [2012], above n 122, at [30].
[125] See *Takamore v Clarke* [2012], above n 122, at [31].

5. *Looking ahead to the next chapter*

This chapter explored Kaupapa Māori Methodology and Mana Tāne methodology and then introduced the key story forms of this thesis: pūrākau and pakiwaitara. I next explored my approach, writer's voice and methods. I briefly addressed my two limitations. In the next chapter, I explore jurisprudence to test the seminal proposition of Ani Mikaere that Tikanga is our supreme law. There, I propose my new model Te Whānau Ture, as a family of three primary law sources.

VI. *Kotahi Te Kii*

"Nā Te Kore, Kotahi Te Kii." - Whare Wānanga[126]

This whakapapa phrasing accentuates noise, breaking the silence of Te Kore. Kotahi Te Kii represents a transfer from the energy potential of Te Kore into a sound.

This transfer symbolically leads into my second layer, which considers the jural noise from different conceptions of law. These differences arise in asking,[127] "What is law?", "Why is law?", "Where does law come from?" A complex, confusing,[128] lifelong and emotional questioning.[129]

In unpacking the theory and philosophy of law, my research starts fulfilling its first purpose in testing whether Tikanga is our first law and supreme law – Ani Mikaere's seminal proposition.[130] Ultimately, I agree with Mikaere and propose a new model, Te Whānau Ture, as a family of three primary law sources.

My analysis within this chapter focuses on four jural bases: Tikanga, Positivism, Natural Law and Parliamentary Supremacy. I consider how Tikanga may be viewed by positivist, natural law and parliamentary supremacy jurists.

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[126] "From The Void, came The Single Noise" - Highest House Of Learning.
[127] Compare Shaunnagh Dorsett and Shaun McVeigh "The Persona Of The Jurist In Salmond's Jurisprudence: On The Exposition Of 'What Law Is …'" (2007) 38 VUWLR 771 at 774.
[128] Herbert Lionel Adolphus Hart *Concept of Law* (2nd ed, Clarendon Press, Oxon, 1994) at 1.
[129] See Franz Kafka "Before the Law" Franz Kafka online <www.kafka-online.info/before-the-law.html>, translation by Ian Johnston; Franz Kafka *The Trial* (Project Gutenberg, 2003) at Ch 9 translation by David Wyllie.
[130] Mikaere "Human Rights", above n 1, at 57.

This chapter refutes the long-standing myth that our legal system has only two primary sources of law. As humans we can believe incorrect things.[131] However, no matter the evidence shown, human cognitive bias[132] and irrationality[133] can make a persistent naysayer unreachable.

On entering Kotahi Te Kii, I engage my tūpuna and prepare all my ears, including my inner ear. Te Ao Mārama is still a cosmos dream. You read here not just a thesis, but a child of ringing noise. A child of the ever vibration. It is done. The second layer is laid.

A. *Tikanga*

In this section, I focus on five leading Tikanga jurists. First, Ani Mikaere with her seminal proposition; then Jacinta Ruru, Justice Sir Joseph Williams, Moana Jackson and Carwyn Jones.

1. *Ani Mikaere: Tikanga is our supreme law*

Mikaere explains:[134]

> Our connection with Aotearoa stretches back through the last millennium, throughout which time tikanga Māori operated as the first law of the land. Tikanga Māori is based upon a set of underlying principles that have withstood the test of time…

Clearly, Mikaere supports Tikanga as embodied in a relational and generational accountability, through a connection of Māori with the whenua. This is a consistent theme of the Tikanga school of thought. In addition, Mikaere recognises rangatiratanga was (and much later I agree still is) "a total political authority".[135]

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[131] See Hugo Mercier and Dan Sperber *The Enigma of Reason* (Penguin, Cambridge (MA), 2017) at 16-17; Sara E Gorman and Jack M Gorman *Denying to the Grave* (Oxford University Press, 2016) at 4-16; Tom Chatfield "Why we believe fake news" (9 September 2019) BBC <www.bbc.com/future/article/20190905-how-our-brains-get-overloaded-by-the-21st-century>; Elizabeth Kolbert "Why Facts Don't Change Our Minds" *The New Yorker* (online ed, 27 February 2017).

[132] "The Ultimate List of Cognitive Biases: Why Humans Make Irrational Decisions" HumanHow </humanhow.com/list-of-cognitive-biases-with-examples/>.

[133] Robert Greene *The Laws of Human Nature* (Profile Books, London, 2018) at 13-41.

[134] Mikaere "Human Rights", above n 1, at 54.

[135] Mikaere "Human Rights", above n 1, at 54. See also Moana Jackson "The Treaty and the Word" in G Oddie and R Perret (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, 1992) 1 at 5.

Mikaere compares:[136]

> ... the Crown perception of the legal position in Aotearoa is rather different: the Crown has assumed that the law emanating from Parliament is supreme law and that tikanga exists at the whim of that law: The phrase once used was that Māori 'custom' (cultural arrogance prevented the Crown from accepting that Māori had 'law') could only be allowed to persist insofar as it was not 'repugnant' to Englishmen. This assertion of the supremacy of the coloniser's law has become so dominant, so all-encompassing, that it is easy to fall into the intellectual trap of accepting it as unchallengeable or, at very least, as somehow inevitable.

This is how law is seen from the Crown perspective.[137] Here, Mikaere opposes the "disturbing amount of intellectual dishonesty" that underlies these Crown assumptions, which some ignorantly call "Treaty Jurisprudence".[138]

I observed this Crown assumption as a Crown prosecutor.[139] My Crown colleagues never reached for Māori law. I sensed this was tied to conformity with prosecution guidelines,[140] their legal education and workplace culture. I imagine that Crown workplace represents a common workplace culture that uncritically accepts Tikanga is a law only when Parliament or courts say so.[141]

This renders Māori law invisible.[142] I next raise two implications of Mikaere's proposition.

(a) All statutes passed by Parliament breach Te Tiriti o Waitangi

First, Mikaere asserts that "Te Tiriti o Waitangi clearly reaffirms the supreme authority of the Māori signatories and in so doing, reaffirms the status of Tikanga Māori as supreme law in

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[136] Mikaere "Human Rights", above n 1, at 56.
[137] Cris Shore and Margaret Kawharu "The Crown in New Zealand: Anthropological Perspectives on an Imagined Sovereign" (2014) 11 Sites 17 at 22-23.
[138] Mikaere "Human Rights", above n 1, at 57.
[139] See Elliott Harris "Sir Edward Taihakurei Durie student essay competition 2020 – Interrogating Ellis v The Queen: Tikanga Māori in the common law of Aotearoa New Zealand" (2020) Māori LR.
[140] *Solicitor-General's Prosecution Guidelines* (Crown Law, Prosecution Guidelines, 1 July 2013).
[141] See Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2017) Te Tai Haruru 25 at 29-31 and 41-42.
[142] See Harris, above n 139.

Aotearoa."[143] In applying this thinking, every statute ever passed by Parliament is then a breach of Te Tiriti o Waitangi.[144] The original signatories (and today, their successors) remain our supreme authority and lawmakers. Consequently, all law must be "firmly subject to Tikanga Māori". [145]

(b) The laws of Parliament are steeped in western patriarchy

Second, Mikaere has previously shown how colonised "Christianity and the patriarchy of Western law" have led to "many destructive changes" to "the principle of balance between genders."[146] Patriarchy is a principle of western law.[147] In contrast, gender balance is a Tikanga principle.[148] I feel sad about this. Our "founding mothers",[149] as signatories of Te Tiriti o Waitangi entrenched political power was never for men only, in leadership to exercise. I now turn to Jacinta Ruru.

2. *Jacinta Ruru: Tikanga as our first laws*

Supporting Mikaere's notion of Tikanga Māori as our first laws,[150] Ruru explains that Tikanga laws are whenua-bound, where: "lands of Aotearoa were and are Māori lands. These lands hold stories, traditions and laws that regulate human behaviour."[151]

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[143] Mikaere "Human Rights", above n 1, at 57.

[144] See Alana Thomas, Kaupare Consulting Presenter "Te Tiriti Workshop" (Meredith Connell, Graham Street Office, Auckland, 2019 and 2020).

[145] Mikaere "Human Rights", above n 1, at 55.

[146] Mikaere "Human Rights", above n 1, at 58.

[147] Lynne Henderson "Law's Patriarchy" (1991) 25 Law Soc Rev 411 at 412 and 417-418.

[148] See Ani Mikaere "Cultural invasion continued: the ongoing colonisation of Tikanga Maori" (2005) 18 Yearbook of New Zealand Jurisprudence 134.

[149] Māni Dunlop "Mana Wāhine Inquiry: original claimant Ripeka Evans gives evidence" (3 February 2021) Radio New Zealand <www.rnz.co.nz/news/te-manu-korihi/435730/mana-wahine-inquiry-original-claimant-ripeka-evans-gives-evidence>.

[150] Jacinta Ruru "First Laws: Tikanga Maori in/and the Law" (2018) 49(2) VUWLR 279 at 211-228. See Alex Frame "A few simple points about Customary Law and our Legal System" (2011) 5 Yearbook of New Zealand Jurisprudence 20 at iii.

[151] Ruru "First Laws", above n 150, at 217.

Ruru further explains:[152]

> When Sir Āpirana Ngata studied law, the Treaty was regarded as 'a simple nullity'.
>
> In John Chadwick's time of early practice, change was commencing with, for example, the creation of the Waitangi Tribunal.
>
> In the time of our students today, there is more respect for the Treaty in the legal profession, but still little holistic reflection in our law schools about our first laws: Māori laws.

Ruru demonstrates that whilst Te Tiriti o Waitangi and The Treaty of Waitangi are becoming more normalised, Tikanga has not. My research identifies that now is the time for further normalisation of Tikanga as Māori law, particularly where I tire of a descriptor: Māori lore.

As Mikaere explains:[153]

> *Denying the validity of Māori law* by seeking answers in imposed law *is a powerful indication that we have lost faith* in our own legal philosophies, that loss of faith itself a sign of the self-negation that Moana Jackson has described as being a necessary part of the process of colonisation.

In accepting the validity of Māori law, Ruru refers to a widely known framework consisting of three components: Kupe's law, Cook's law and Aotearoa New Zealand law.[154] I focus next on comments regarding Tikanga from his Honour.

3. *Justice Sir Joseph Williams: Tikanga as a vital thread of law*

Justice Williams refers to Tikanga as "customs or behaviours that might not be called law but rather culturally sponsored habits."[155] I disagree. Tikanga cannot be limited to culturally sponsored

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[152] Ruru "First Laws", above n 150, at 216.

[153] Mikaere *Colonising Myths*, above n 3, at 117 (emphasis added). See Roger Keesing and Andrew Strathern *Cultural Anthropology: A Contemporary Perspective* (3rd ed, Harcourt Brace College Publishers, San Diego, 1998) at 288-301.

[154] Ruru "First Laws", above n 150, at 217.

[155] Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern NZ Law" (2013) 21 Wai L Rev 1 at 3.

habits. Perhaps his honour meant Tikanga habits are determined by Māori people and their chosen habits. Whilst this may often be the case, my understanding of Tikanga includes kawa,[156] which I was taught are fixed laws. I address kawa later in this chapter.

His Honour explains:[157]

> …rights depended on right holders remembering their own descent lines as well as the descent lines of other potential claimants to the right. Whakapapa was both sword and shield wielded by Māori custom lawyers. It remains so today.

I agree Whakapapa is "both sword and shield"[158] to the extent that Tikanga was (and is) capable of functioning in an adversarial space.[159] I anticipate many lawyers still do not realise this. I was taught that in times past, rūnanga might hear what lawyers today call disputed matters and that Tikanga always supported adversarial, consensual and mixed processes.

This leads next to ideas Moana Jackson raises. [160]

4. *Moana Jackson: Tikanga as a law growing out of stories*

Jackson says:[161]

> Tikanga itself was thus relational… It set prescriptive and proscriptive guidelines for what was legal or illegal (tika or non-tika) behaviour, and because it was so whakapapa-based people lived with the law rather than under it. The idea that someone might be above it was simply a cultural contradiction...

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[156] Stephanie Vielle "Māori Customary Law: A Relational Approach to Justice" (2012) 3 Int Indig Policy J 1 at 2 and 4; Paul F Majurey and others *Māori Values Supplement* (Ministry for the Environment, December 2010) at 274.
[157] Williams "Lex Aotearoa", above n 155, at 4.
[158] Williams "Lex Aotearoa", above n 155, at 4.
[159] Compare *R v Mason* [2012] NZHC 1361 at n 31.
[160] Moana Jackson Brief of Evidence *Royal Commission of Inquiry into Abuse in Care* Contextual Hearing 29 October – 8 November 2019 at 61.
[161] Jackson Brief of Evidence, above n 160, at 63 (emphasis added).

I agree with Jackson's prescriptive and proscriptive detailing of Tikanga Māori as a law because I was taught Tikanga is knowledge of what is legal and illegal. Then, lawyers need knowledge of Tikanga to know Māori law. Jackson affirms the importance of stories where:[162]

> *Iwi and Hapū long ago developed a law or tikanga that grew out of the stories* and the culture that developed in this land. It developed from philosophies to do with the sacred interrelatedness of whakapapa as well as from precedents and customs devised by the [tīpuna].

Clearly, the stories are what Tikanga grows out of. This study submits pūrākau and pakiwaitara within Māori legal tradition are the story forms underlying Tikanga as Māori law.

The sacred interrelatedness of whakapapa is affirmed where I recall my kuia invoking a form of pana[163] against a whanaunga. He had continued behave in a way that my kuia, as mātāmua had warned him not to. To add, he then tried to falsify whakapapa to try and claim a higher birth rank than he had. None of that was tika for my iwi. He gave my Nana no choice. She publicly cast him from our marae. She consulted nobody and nobody could challenge her. As highest-ranking by birth in our iwi, the word of my kuia was law. It was made clear that only under specific conditions would he be permitted to return.

Comparatively, Jackson observes sacred whakapapa interrelatedness where:[164]

> *The rites* of birth associated with naming and blessing the child *were* not just a cultural celebration but *a legal affirmation of the rights* or entitlements that would vest in the child as he or she grew into adulthood.

Jackson's recognition of a vesting of rights, from the rites surrounding birth clarifies that Tikanga rites of passage are legal rights-vesting processes. Similarly, I shared previously that pepeha are a statement of legal rights.[165] Here, pakiwaitara can capture how vested rights play out practically.

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[162] Jackson Brief of Evidence, above n 160, at 61 (emphasis added).

[163] Expulsion. See Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (Ministry of Justice, Wellington, 2001) at 141-142.

[164] Moana Jackson Brief of Evidence, above n 160, at 62 (emphasis added).

[165] Edmond Carrucan, Guest Workshop Speaker "Māori Moot Competition: Tips, Tricks, Tikanga Māori and Kāi Tahu Mātauranga" (Te Piringa Moot Court, University of Waikato, Hamilton, 11 May 2021).

5. *Carwyn Jones: A law of two streams*

I now consider Jones' notion of sourcing law "in two streams".[166] In delineating two "the laws of England" and "the laws of New Zealand",[167] on the second stream Jones says:[168]

> *Tikanga encompasses Māori law* but also includes ritual, custom, and spiritual and socio-political dimensions that go well beyond the legal domain ...

Clearly, Tikanga encompasses Māori law, which embraces story forms. I am affirming that, legal and illegal in Tikanga can be sourced from pūrākau and pakiwaitara. What Jones does not address is the fixed legal reality of kawa. I address this below.

(a) Kawa: a brief explanation

I was taught that kawa are fixed prescribed standards. This idea of unchanging laws is not unique to my iwi.[169] Obviously, people can violate a kawa analogous to people breaking statutory laws. However, their unlawful act does not change the kawa as an exacting legal standard for behaviour. I was taught that violating a kawa is illegal as kawa were established by atua, taniwha, tupua or a tupuna through exerting greater mana and tapu; changing a kawa is difficult to impossible.

One example of a kawa that is impossible to change involves the law of sexual consent, contained within a pūrākau of Māui and Hine-nui-i-te-pō which is immortalised within some designs of the moko kauae. I was told Hine-nui-i-te-pō established the kawa making rape illegal forever. As a result, rape remains illegal under kawa as a prescribed and fixed standard of Tikanga. I plan to refer to kawa later, when applying natural law.

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[166] Carwyn Jones "Tikanga Māori in NZ Common Law" 2020 943 LawTalk 20.
[167] Jones "Tikanga Māori", above n 166.
[168] Jones "Tikanga Māori", above n 166 (emphasis added).
[169] See Te Waata Cribb "Tikanga Māori" (Ngāti Tarawhai Kura Reo, Lake Okataina, 21 May 2021).

6. *Tikanga Summary: Tikanga laws on an amended timeline*

Summarily, Mikaere seminally proposed that 'Tikanga is our supreme law.' Ruru then echoed this proposition. In Justice Williams' time, Tikanga is gaining recognition in adversarial spaces. Here, Jackson reminds everyone that stories are what Māori law grows out of. Here, Jones' recognises Tikanga is further normalised. Consequently, holistic research into Māori traditions is needed.[170]

B. *Positivism*

I now address the ideas of positivism and apply them to Tikanga in focusing on leading jurists Thomas Hobbes, John Austin, Herbert Hart, Joseph Raz and Hans Kelsen.

1. *Thomas Hobbes: A sovereign makes law*

Hobbes asserts:[171]

> One of the duties of the sovereign is making good laws. But what is a good law? By a good law I do not mean a just law, for no law can be unjust. The law is made by the sovereign power and all that is done by that power is warranted and owned by every one of the people. That which every man will have as so, no man can say it is unjust.

Hobbes succinctly communicates that any law made by a sovereign is a just law. What law is and what law ought to be are separate matters.[172] A sovereign has absolute power,[173] so their laws when written can extinguish customs.[174] It does not matter if posited laws create inequities, hostilities, nor does it matter common law was once customary law.[175]

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[170] See Ruru "First Laws", above n 150.

[171] Thomas Hobbes *Leviathan* (Daniel Kolak (ed) Routledge, Oxon, 2016) at 239.

[172] See Brian Bix *Jurisprudence Theory and Concept* (2nd ed, Carolina Academic Press, Durham, California, 1999) at 31.

[173] David Gauthier "Hobbes on Sovereign Authority: How the Right of Nature Becomes Sovereign Right" (Penn Law, Unpublished Paper) at 33.

[174] Thomas Hobbes *Leviathan* (Daniel Kolak (ed)), above n 171, at 134.

[175] Wayne Rumbles "Seeing Law in Pre European Maori Society" (Te Matahauariki, Draft Working Paper) at 5. Linda H Edwards "Speaking of Stories and Law" (2016) 13 JALWD 157 at 159-163.

2. *John Austin: Law as commands from political superior to inferiors*

Austin builds on Hobbes' ideas in theorising that "[l]aws proper or properly so called, are commands",[176] set "by political superior to political inferiors."[177] Austin attempts to assert an intellectual monopoly,[178] in proposing his command theory requiring law to visit "with an evil" for non-compliance.[179]

Austin's threat of an evil might be evidenced today within criminal law, where on admitting guilt or being found guilty, the sovereign visits an offender with a punishment through sentencing. This is what Austin calls the "evil" which reflects our statutory deterrence purpose in sentencing.[180]

Austin believes a chance of compliance[181] exists within legal groups of actors, which can be influenced by a greater or lesser threat of evil.[182] This asserts a universal assumption,[183] about how people respond to threats for non-compliance.[184] I doubt this assumption, considering the futility of applying fines to the affluent.[185] This undermines the validity of command theory.[186]

3. *Applying Hobbesian and Austinian lenses to Tikanga*

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[176] John Austin *The Province of Jurisprudence Determined* (John Murray, London, 1832) at vii and 119-131.
[177] Austin, above n 176, at 1.
[178] Compare Richard T Bowser and J Stanley McQuade "Austin's Intentions: A Critical Reconstruction of His Concept of Legal Science" (2006) 29 Campbell Law Rev 47 at 50.
[179] Austin, above n 222, at 6.
[180] Sentencing Act 2002, subs 7(1)(f).
[181] Herbert Lionel Adolphus Hart *Concept of Law* (3rd edition, Oxford University Press, Oxon, 2012) at 83-84.
[182] Brian Bix "Legal Positivism" in Martin P Golding and William A Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford University Press, Oxon 2005) 29 at 33.
[183] See Nigel Nicholson "How Hardwired Is Human Behavior?" (1998) Harvard Business Review <hbr.org/1998/07/how-hardwired-is-human-behavior>.
[184] See Tom R Tyler *Why People Obey the Law* (revised ed, Princeton University Press, Princeton, New Jersey, 2006) at 3-4; David Friedman and William Sjostrom "Hanged for a Sheep: The Economics of Marginal Deterrence" (1993) 22(2) J Leg Stud 345 at 346; Glenn C Altschuler "Why We Obey and Disobey the Law: How to measure the impact of law on behaviour" (2016) Psychology Today <www.psychologytoday.com/intl/blog/is-america/201610/why-we-obey-and-disobey-the-law>.
[185] Wendy Searle *Court-imposed fines: A survey of Judges* (Ministry of Justice, July 2003) at 11.
[186] Motoki Miura "Re-examining Austin's Command Theory" (2018) Hermes-IR <hermes-ir.lib.hit-u.ac.jp/hermes/ir/re/29572/0501800301.pdf> at 1. See Bowser and McQuade, above n 178, at 57-58. Compare Bix, above n 182, at 30.

For Hobbes, to be a law, Tikanga would need to be a law that can be posited by a sovereign.[187] Here, I argue that Ngā Rangatira were sovereign and signing He Whakaputanga o te Rangatiratanga o Nu Tireni simply affirmed this reality.[188] My argument views Te Tiriti o Waitangi as a document engaging two nations, where Ngā Rangatira retain absolute power. Te Tiriti o Waitangi then evidences a sovereign Rangatira-made law, further entrenching Tikanga. I conclude that Tikanga is a law.

In satisfying Austin's added requirement of political superiors, there is evidence of Tikanga involving relationships of class.[189] I proffer Ngā Rangatira as our Austinian political superiors, in further concluding Tikanga is a law.

In satisfying Austin's command theory, I note non-compliance with Tikanga can be met with punishment-oriented sanctions,[190] that can even punish generationally.[191] Here, individual compliance increases when sanctions are a "'collective' concern".[192] Therefore, Tikanga is a law.

4. *Herbert Lionel Adolphus Hart: Law is a set of rules with one ultimate rule*

I now focus on Hart, who favoured the earlier ideas of a sovereign law that is non-optional or obligatory.[193] In proposing his notion of primary rules[194] and secondary rules,[195] Hart identified

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[187] Compare Mason Durie *Te Mana, Te Kāwanatanga: The Politics of Maori Self-Determination* (Oxford University Press, Wellington, 1998) at 219. See also Giselle Byrnes "Te Mana Te Kawanatanga: Te Politics of Maori Self-Determination" (1999) 2(1) Kōtare 66 at 67.

[188] He Whakaputanga o te Rangatiiratana o Nu Tireni 1835, arts 1-4; *The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, above n 101, at 529.

[189] See Rāwiri Taonui "Tribal organisation - Social rank" (8 May 2005) Te Ara Encyclopedia of New Zealand, <www.TeAra.govt.nz/en/tribal-organisation/page-5>.

[190] Valmaine Toki *Indigenous courts, self-determination and criminal justice* (Routledge, Oxford and New York, 2018) at 42-44.

[191] Toki, above n 190, at n 73.

[192] Toki, above n 190, at 44.

[193] Hart *Concept of Law* (3rd edition), above n 181, at 82.

[194] See "First Short Paper: Hart's Theory of Rules" MIT OpenCourseWare <ocw.mit.edu/courses/linguistics-and-philosophy/24-235j-philosophy-of-law-spring-2012/assignments/MIT24_235JS12_Hartrules.pdf> at 1.

[195] See above n 194, at 1 and 2.

"the rule of recognition" as "the *ultimate* rule of a system".[196] The rule of recognition is "the criteria by which the validity of other rules of the system is assessed".[197]

Whatever the supreme criterion is, Hart believes it will be a rule "actually accepted and employed in the general operation of the system".[198] Clearly, enactment by a sovereign can be a "supreme criterion of validity."[199] For Hart though, courts identify what counts as law, meaning case law is where an ultimate rule can be found.[200]

The mainstream ultimate rule is "legislation determined by the Queen in Parliament".[201] However, courts confirming what Parliament enacts, is another alternative rule of recognition.[202]

5. *Applying Hart's lens to Tikanga*

Applying Hart's ideas, I look to case law:[203] ***R v Mason,***[204] ***Takamore***[205] ***and Ellis v R.***[206] On one hand, each case shows Tikanga counts as part of the law.[207] On the other hand, the Courts show deference to Parliament-made law,[208] viewing statutes as supreme law.[209]

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[196] Hart *Concept of Law* (3rd edition), above n 181, at 107.
[197] Hart, above n 181, at 105.
[198] Hart, above n 181, at 108.
[199] Hart, above n 181, at 106.
[200] Hart, above n 181, at 108.
[201] See Māmari Stephens "Māori Law and Hart: A Brief Analysis" (2001) 32 VUWLR 853 at 861.
[202] See Scott J Shapiro *What is The Rule Of Recognition (And Does It Exist)?* (Yale Law School, Research Paper No 181, 2008) at 4-5, 14-14 and 32-33.
[203] Stephens, above n 201, at 854 and 867.
[204] *R v Mason*, above n 159.
[205] *Takamore v Clarke* [2011], above 122; *Takamore v Clarke* [2012], above 122.
[206] *Ellis v R* [2020] NZSC 89.
[207] *R v Mason*, above n 159, at [28] and [48]; *Takamore v Clarke* [2011], above n 122, at [12], [92]-[94] and [98].
[208] *R v Mason*, above n 159, at [44], [46] and [54]-[55]; *Takamore v Clarke* [2011], above n 122, at [13]. See Cristina E Parau "Core Principles of the Traditional British Constitutions" Oxford University <www.politics.ox.ac.uk/materials/Core_Principles_of_the_British_Constitutions.pdf> at 14-17.
[209] Jannik Zerbst "A Constitution for Aotearoa in the context of Parliamentary Sovereignty" (LLM Dissertation, Victoria University of Wellington, 2018) at 9-10. See also *Fitzgerald v Muldoon* [1976] 2 NZLR 615 at 622.

Courts count Tikanga as part of the common law.[210] Surely this cannot be. Common law is Judge-made law.[211] Judges do not make Tikanga for Māori. Tikanga must then be qualitatively different.

Hart permits judges to recognise Tikanga as a separate source of law that common law must be subject to. However, I feel hesitant as many Judges have expertise in statutory and case law analysis … not Tikanga and many Judges are not Māori.[212]

My view is cases like *Mason, Takamore and Ellis*, are building towards proper recognition of Tikanga as a separate primary law source (and recognition of Tikanga appeal grounds).

6. *Joseph Raz: No sovereign equals no legal system*

Next, Raz identifies three features of law: "law as normative, institutionalised, and coercive".[213] Critically, Raz maintains post-Austin that "[a] legal system exists if the common legislator of its laws is a sovereign".[214] Consequently, if there is no sovereign, there is no legal system. Raz clarifies Austin's sovereign involved a social fact of obedience.[215]

Raz further describes how sovereign power cannot be conferred or revoked by law.[216] This means sovereign power is legally illimitable and can legislate anything as the sovereign cannot be made subject to legal duties in exercising legislative power.[217] A sovereign is uniquely a non-subordinate person or body.[218]

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[210] *R v Mason*, above n 159, at [12], [15], [31]-[34] and [37]; *Takamore v Clarke* [2011], above n 122, at [99]-[101] and [260]-[262].
[211] Lord Hodge, Justice of The Supreme Court of the United Kingdom "The scope of judicial law-making in the common law tradition" (Max Planck Institute of Comparative and International Private Law Hamburg, Germany, 28 October 2019) at 1-2.
[212] Anusha Bradley "90 percent of High Court, Court of Appeal judges Pākehā" (20 September 2021) Radio New Zealand <www.rnz.co.nz/news/is-this-justice/451867/90-percent-of-high-court-court-of-appeal-judges-pakeha>.
[213] Joseph Raz *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Clarendon Press, Oxon, 1980) at 3.
[214] Raz, above n 213, at 5.
[215] Raz, above n 213, at 6-7.
[216] Raz, above n 213, at 8.
[217] Raz, above n 213, at 8.
[218] Raz, above n 213, at 8.

To Raz, the "assumption that influence exerted by means of commands must be legal influence is completely groundless".[219] Raz's sovereignty is a state free from interference by other states in their "internal affairs", while fairly conceding it is "like chasing a hare trying to determine the scope of sovereignty or what it should be."[220]

7. *Applying Raz's lens to Tikanga*

(a) Applying Raz's three key features of law

Summarily, Raz's law is normative, institutionalised and coercive.[221]

First, to satisfy Raz's normative feature,[222] Tikanga needs to establish norms or standards for behaviour. This is evidenced in observing the norms surrounding a tangihanga process,[223] which were traditionally established in the context of co-operating whānau, hapū and iwi.[224] Therefore, Tikanga is normative.[225]

Second, to satisfy the institutionalised feature,[226] Tikanga needs to establish a practice or activity as a convention within an organisation. I suggest the Tikanga organisations are whānau, hapū, iwi and waka as unique kinship groupings.[227] Within these culturally informed organisations,

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[219] Raz, above n 213, at 42.
[220] Joseph Raz, Guest Lecturer "Sovereignty & Legitimacy: On the Changing Face of Law, Questions & Speculations" (Library of Congress, Frederic R and Molly S Kellogg 2nd Biennial Lecture in Jurisprudence, 5 October 2011); "Sovereignty & Legitimacy: On the Changing Face of Law, Questions & Speculations" (21 January 2012) YouTube <www.youtube.com/watch?v=VMC9u7PZZCo>.
[221] Raz, above n 213, at 3.
[222] Raz, above n 213, at 3.
[223] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia Publishers, Wellington 2016) at 106-120.
[224] Courtney Leone Taumata Sullivan "Te Okiokinga Mutunga Kore – The Eternal Rest: Investigating Māori Attitudes towards Death" (MA Thesis, University of Otago, 2012) at 50-51.
[225] Raz, above n 213, at 4 and 23.
[226] Raz, above n 213, at 3.
[227] Mead, above n 223, at 18.

tangihanga norms are the established way whānau, hapū and iwi,[228] grieve, honour and encourage a wairua on their journey.[229] Therefore, Tikanga is institutionalised.

Third, to satisfy the coercive feature,[230] Tikanga needs to show how force or threats relate to its institutionalised norms. There are coercive forces for legal compliance, such as the wero.[231] I was taught the wero warned visitors of the physical violence they could expect if they violated the law of the hapū they were visiting. Whakamā is also a shaming, coercive force that is "socially damaging to the individual".[232] Therefore, Tikanga can be coercive.

In satisfying all three features of Raz's theory, I conclude Tikanga is law.

(b) Applying Raz's idea of a sovereign

I now apply Raz's idea of a sovereign who cannot be made subject to legal duties in exercising legislative power.[233] This is interesting when Parliament's greatest fiction is rooted in the idea of the Queen conferring upon herself (and Parliament) power,[234] under The Treaty of Waitangi,[235] to purport an illimitable sovereign status in our country.[236]

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[228] Sullivan, above n 224, at 50-72.

[229] Rawinia Higgins "Tangihanga – death customs – Traditional preparations for tangihanga" (5 May 2011) Te Ara <teara.govt.nz/en/tangihanga-death-customs/page-3>; Rawinia Higgins "Tangihanga – death customs – The tangihanga process" (5 May 2011) Te Ara <teara.govt.nz/en/tangihanga-death-customs/page-4>.

[230] Raz, above n 213, at 3.

[231] Mead, above n 223, at 101-103. Compare "Break down of the Māori pōwhiri from New Zealand" (2019) YouTube <www.youtube.com/watch?v=Xcp8191_6ok>.

[232] Mead, above n 223, at 255.

[233] Raz, above n 213, at 8.

[234] Mason Durie *Te Mana, Te Kāwanatanga*, above n 187, at 176 and Tables 7.1-7.3; Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 2005) at 333 and 341; Statute of Westminster 1931; Statute of Westminster Adoption Act 1947; Moana Jackson Brief of Evidence claims in *Te Paparahi o Te Raki Inquiry* Dated 13 September 2010 at 83; Nicole Roughan "The Association of State and Indigenous Law: A Case Study in 'Legal Association'" (2009) 59 Univ Tor Law J 135 at 143.

[235] The Treaty of Waitangi 1840, art 1.

[236] *Theodore v Duncan* [1919] AC 696 (PC) at 706; New Zealand Constitution Act 1852, Preamble. See Aishwarya Bagchi "Confronting The Crown" (PhD Thesis, University of Canterbury, 2019) at 4.5.2. Compare Cheryl Saunders "The concept of the Crown" [2015] 38 Melb U L Rev 873 at 883.

I contend her Majesty (and Parliament) are instead limited to kāwanatanga under Te Tiriti o Waitangi.[237] Accruing legal duties is usual for any state signing a treaty today,[238] having the full capacity to do so.[239] Te Tiriti o Waitangi is no different. I argue her Majesty is not a sovereign here within Raz's definitions, because her power is limited[240] by the legal duty of kāwanatanga.[241]

The only legislative body in our country's history that was not subject to legal duties is Te Wakaminenga o Ngā Hapū o Nu Tireni.[242] Under Raz's theory, this is a textbook sovereign body as their authority was not conferred on them. Signing He Whakaputanga o te Rangatiratanga o Nu Tireni simply helped Rangatira trade internationally and secure a British ally.[243]

Te Wakaminenga o Ngā Hapū o Nu Tireni was established by Rangatira who together possessed the illimitable legal power to disestablish themselves. Therefore, Tikanga is our sovereign law.

Te Wakaminenga o Ngā Hapū o Nu Tireni should reopen as an upper legislative house whilst retaining Parliament to fulfil its legal kāwanatanga duty.

8. *Hans Kelsen: Every legal system has a Grundnorm*

I now focus on Kelsen who asks: "what the law is and how the law is made, not the questions of what the law ought to be".[244] Kelsen maintains that "law is valid only as positive law, that is, only

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[237] Te Tiriti o Waitangi 1840, art 1.

[238] See Shabtai Rosenne "The Temporal Application of the Vienna Convention on the Law of Treaties" (1970) 4 Cornell Int Law J 1 at 20. Compare Vienna Convention On The Law Of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) at arts 3-5 and 24.

[239] Compare arts 6-7 and 46-48.

[240] Kāwanatanga can be found in Te Tiriti. Kāwanatanga is not sovereignty. See F M Brookfield "The Treaty, the 1840 Revolution and Responsible Government" (1992) 5 Cant LR 59 at 59-61.

[241] Compare Vienna Convention On The Law Of Treaties, above n 238, at art 33. Compare with *R v Mason*, above n 159, at [34].

[242] "What was Te Wakaminenga / the Confederation of Chiefs?" (19 February 2020) Network Waitangi Ōtautahi <nwo.org.nz/2020/02/19/what-was-te-wakaminenga-the-confederation-of-chiefs/>.

[243] Moana Jackson Brief of Evidence claims in *Te Paparahi o Te Raki Inquiry*, above n 234, at 47-49.

[244] Hans Kelsen *The Pure Theory of Law* (1st ed, Clarendon Press, Oxon, 1997) at 7. This was translated by Bonnie Litschewski Paulson and Stanley L Paulson from *Reine Rechtslehre*.

as law that has been issued or set".[245] Kelsen's law should not get "entangled in psychology and biology, in ethics and theology."[246]

Kelsen explains that "legal meaning, comes by way of a norm whose content refers to the event and confers legal meaning on it".[247] Consequently, "the legal system – is a system of legal norms".[248] This is a system, theoretically, without any hierarchical "gaps" [249] where "the validity of the norms can be traced back to a single norm as the ultimate basis of validity".[250] This is the grundnorm, which is presupposed as legally valid.[251]

Kelsen describes how to identify a grundnorm:[252]

> If one goes on to ask about the basis of the validity of the constitution, on which rest all statutes and the legal acts stemming from those statutes, one may come across an earlier constitution, and finally the first constitution, historically speaking, established by a single usurper or a council, however assembled. What is to be valid as norm is whatever the framers of the first constitution have expressed …

Identifying a grundnorm necessitates looking to the most historic constitutional instruments.

9. *Applying Kelsen's lens to Tikanga*

In applying Kelsen's requirements, Tikanga can certainly be issued, set, and is normative (referring above to my earlier applications of Hobbes, Austin, Hart and Raz). Conceivably, Tikanga is entangled in the things Kelsen thought law should not be.[253] I then conclude Tikanga is law, albeit entangled law.

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[245] Kelsen, above n 244, at 56.
[246] Kelsen, above n 244, at 8.
[247] Kelsen, above n 244, at 10.
[248] Kelsen, above n 244, at 55.
[249] Kelsen, above n 244, at 87.
[250] Kelsen, above n 244, at 55.
[251] Kelsen, above n 244, at 58.
[252] Kelsen, above n 244, at 57.
[253] Regarding psychology see Andre D McLachlan, Rebecca Wirihana and Terry Huriwai "Whai tikanga: The application of a culturally relevant value centred approach" (2017) 46 N Z J Psychol 46 at 47 and 49. Regarding biology see Garth R Harmsworth and Shaun Awatere "Indigenous Māori Knowledge and Perspectives of Ecosystems" in John Dymond *Ecosystem services in New Zealand – conditions and trends* (Manaaki Whenua Press, Lincoln, New Zealand, 2013) 274 at 278-279 and 281. Regarding ethics see my methodology chapter at Te Kore.

(a) Identifying a Tikanga grundnorm

While some may assume Tikanga could not possibly have a hierarchy of norms,[254] I disagree. Forcing Tikanga values such as manaakitanga[255] into a hierarchy is pointless. However, a hierarchy was taught to me regarding Tikanga laws, within my experience of Ngāti Hako. This hierarchy is:

(1) Kawa (Fixed Prescriptive Laws)

- (1.1) Atua: Almost always fixed law
- (1.2) Taiao, Taniwha and Tupua: Mostly fixed law
- (1.3) Waka: Some fixed law

(2) Tikanga (Whakapapa Tradition Based Laws)

- (2.1) Iwi: Shared laws of several Hapū connected vertically by whakapapa
- (2.2) Hapū: Shared laws of several Whānau connected vertically by whakapapa

(3) Ritenga (Prescriptive and Tradition informed legal practices)

- (3.1) Whānau: The practices shared by individuals connected vertically by whakapapa
- (3.2) Tangata: Individual Practices

From this hierarchical conception, I identify the ultimate norm for Tikanga lies within Te Pō. I suggest the presupposed norm is atua enacting kawa as supreme law. Therefore, Tikanga is law.

There is also perhaps a modern alternative.

(b) A modern Tikanga grundnorm alternative

Regarding theology see "Theological Hui 2017" (Anglican Church in Aotearoa, New Zealand and Polynesia, Summary Report, 19-20 September 2017) at 2-4 and 14.

[254] Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 126.

[255] Law Commission *Māori Custom and* Values, above n 254, at 125, 393 and 398.

In travelling backwards, I arrive first at Te Tiriti o Waitangi as a constitutional document between two sovereign nations. Next, I arrive at He Whakaputanga o te Rangatiratanga o Nu Tireni. In applying Kelsen's theory again, our two founding documents as drafted in te reo Māori must hold the presupposed norm of our current legal system.[256] I suggest this presupposed norm is that only Rangatira can enact supreme law; as a modern grundnorm. Therefore, Tikanga is law.

10. *Positivism Summary: Tikanga is a law*

First, Tikanga is law because it is enacted by sovereign Rangatira as political superiors in satisfying Hobbes' and Austin's requirements. Next, for Hart the Courts recognising Tikanga makes it law, amongst ongoing deference to Parliament as the sovereign. Tikanga as normative, institutionalised and coercive satisfied Raz's conception of law, with Te Wakaminenga o Ngā Hapū o Nu Tireni emerging as Raz's textbook sovereign. Tikanga, in concluding this section, satisfied Kelsen's conception of law where atua enacting kawa or Rangatira enact laws as identifiable grundnorms.

C. *Natural Law*

In this section I focus on Plato, Aristotle and Thomas Aquinas as three leading natural law thinkers.

1. *Plato: Gods and Men in an orderly universe*

Plato asserts that:[257]

> … gods and men are held together by communion and friendship, by orderliness, temperance, and justice; and that is the reason, my friend, why they call the whole of this world by the name of order

Although Plato never explicitly recorded the words "natural law" in his writing, he conceives of an orderly universe. Next, Aristotle was then able to express natural law more explicitly.

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[256] David V Williams "Unique Treaty-Based Relationships Remain Elusive" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 2005) at 366 at 368, 370, 375 and 383.

[257] Plato *Gorgias* (around 380 BC) at 508a.

2. *Aristotle: law is tied to a common and natural knowing*

Aristotle declares that:[258]

> … there are two kinds of laws, particular and general. By particular laws I mean those established by each people in reference to themselves, which again are divided into written and unwritten; by general laws I mean those based upon nature. In fact, there is a general idea of just and unjust in accordance with nature, as all men in a manner divine, even if there is neither communication nor agreement between them.

Aristotle speaks of a common and natural knowing where humans inherently know what is right and wrong. To Aristotle just and unjust are in accordance with our nature.[259] Some people question Aristotle's status as a natural law theorist.[260] However, his notion of common knowing involves universals of humanity and justice,[261] seem relevant to natural law.[262] In proposing a common knowing deeper than teachable morality,[263] Aristotle's general law is effectively natural law.

3. *Thomas Aquinas: The Christian God and 4 types of law*

Aquinas suggests there are four types of law: eternal, natural, human and divine.[264] Eternal law originated with God and is "made known to us by its effects."[265] Then, "all laws proceed" from eternal law;[266] as all people are under eternal law.[267]

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[258] Aristotle *Rhetoric* (around 322 BC) at 1373b[2].

[259] George Duke "Aristotle and Natural Law" (2020) 82 Rev Politics 1 at 20 and 23. Compare Bernard Yack "Natural Right and Aristotle's Understanding of Justice" (1990) 18 Polit Theory 216 at 223.

[260] Duke "Aristotle and Natural Law" above n 259, at 13. See Tony Burns "Aristotle and Natural Law" 19(2) HPT 142.

[261] Piripi Whaanga "Maori Values Can Reinvigorate a New Zealand Philosophy" (MA Thesis, Victoria University of Wellington, 2012) at 44.

[262] Constitutional Rights Foundation "Plato and Aristotle on Tyranny and the Rule of Law" Bill of Rights in Action (Los Angeles, California, Fall 2010) at 6-10.

[263] See Waisma Shehzad "Can Morality be Taught? Role of Education in Moral Development" (2008) 17 JHSS 159 at 163-164.

[264] Thomas Aquinas *Summa Theologiae* (Benziger Brothers Printers to the Holy Apostolic See, 1485) at Q91, arts 1-4. Translated into English around 1911.

[265] Aquinas, above n 264, at Q93, art 2, Reply to Objection 1. Aquinas relied on Romans 1:20.

[266] Aquinas, above n 264, at Q93, art 3. Aquinas relied on Proverbs 8:15.

[267] Aquinas, above n 264, at Q93, art 6.

Natural law then expresses eternal law proportionate to the capacity of a human and within them.[268] Natural law is not a habit,[269] and instead "all those things to which a man is inclined naturally".[270]

Human law next proceeds from this natural law of "general principles",[271] to determine certain matters. However, this law plagued by humans forming "different judgements on human acts".[272]

This human uncertainty necessitates divine law "for man to be directed in his proper acts by a law given by God".[273] Aquinas' thinking accepts the bible as Divine law, in rendering a law for the interior acts of humans, which are presupposed as unseen by human law. Compared with positivist jural traditions, Aquinas maintains a sovereign's source of authority is their people.[274]

4. *Applying Natural Law to Tikanga*

I now apply Plato's, Aristotle's and Aquinas' theories to further analyse Tikanga.

(a) Platonism: The requirement of an orderly universe

Plato's idea of law involves Gods and men in an orderly universe, which I argue is fulfilled by Atua and tangata within Te Taiao,[275] with tangata as "human reflections of divinity".[276] Supporting this, Tikanga incorporates māramataka, where atua order human activities and engagement with

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[268] Aquinas, above n 264, at Q91, art 4.
[269] Aquinas, above n 264, at Q94, art 1.
[270] Aquinas, above n 264, at Q94, art 4.
[271] Aquinas, above n 264, at Q91, art 3.
[272] See Aquinas, above n 264, at Q91, art 4.
[273] Aquinas, above n 264, at Q91, art 4. Aquinas relied on Psalm 118:8.
[274] Zachary Lomo "Sovereignty and Canadian Nigerian Human Rights Engagements: Some Theoretical Reflections" (2019) 6 THR 26 at 29.
[275] Te Ahukaramū Charles Royal "Te Ao Mārama – the natural world" (24 September 2007) Te Ara <teara.govt.nz/en/te-ao-marama-the-natural-world/print>.
[276] Whaanga "Maori Values", above n 261, at 37.

the natural environment.[277] Various māramataka pūrākau reflect an ongoing communion of tangata and atua in receiving legal knowledge. In conclusion, Tikanga is law.

(b) Aristotelianism: The requirement a common (and divine) knowing

I now apply Aristotle's two notions of a common knowing.[278] Humanity as the first notion is common to "the culture of all people … that we are all human beings".[279] I argue Tikanga captures humanity through the notion of Tangata,[280] where my kaumātua taught a person is of a larger humanity.[281] Therefore, Tikanga satisfies Aristotle's notion of humanity.

Aristotle's second notion is justice,[282] reflected in the norms we as humans "adopt to support our values",[283] as a way of determining what just actions are. I argue these values can include a myriad beyond Ngā Uara,[284] as Tikanga values of whanaungatanga, mana, tapu, utu, and kaitiakitanga.[285]

In selecting whanaungatanga, Aristotle's notion of justice can be tied to the practice of a just action in the practice of whāngai, where "a child is given to family members to raise".[286] This practice continues today in supporting the value of whanaungatanga.[287] Therefore, Tikanga satisfies Aristotle's notion of justice.

In conclusion, Tikanga is law.

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[277] Qiane Matata-Sipu "Move over astrology, it's time to return to the Māori lunar calendar" *The Spinoff* (online ed, 7 August 2018).
[278] Whaanga "Maori Values", above n 261, at 8.
[279] Whaanga, above n 261, at 44.
[280] Whaanga, above n 261, at 17 and 64-65.
[281] Whaanga, above n 261, at 118.
[282] Whaanga, above n 261, at 44.
[283] Whaanga, above n 261, at 96.
[284] Law Commission *He Aha Te Tikanga* (NZLC MP, 1998) at 28.
[285] Law Commission *He Aha Te Tikanga,* above n 284, at 28-29.
[286] Law Commission *He Aha Te Tikanga,* above n 284, at 55-56.
[287] Kerry O'Halloran "The Politics of Adoption" in Mortimer Sellers and James Maxeiner (eds) *Ius Gentium: comparative Perspectives on Law and Justice* (4th ed, Springer International Publishing, Cham, Switzerland, 2021) 495 at 506.

(c) Applying Thomistic theory: The four types of law

I now apply the four law types from Aquinas.

First, I apply human law, where Tikanga can be created by humans. An example of this includes giving koha, which Māori adapted from first gifts of feathers, pounamu or even just food.[288] Today, koha practices changed to focus on gifting of money.[289] Therefore, Tikanga is human law.

Second, I apply divine law, where if divine revelation occurs within one culture, it can occur in other cultures too. First then, aspects of Tikanga could be the result of divine revelation, through pūrākau and pakiwaitara which encounter atua and kawa;[290] to regulate unseen human behaviour. Alternatively, to the extent Tikanga has been increasingly Christianised and biblically informed within some iwi,[291] a connection of Christian divine revelation and Tikanga is clearer. Either way, Tikanga can be divine law.

Third, I apply eternal law, where the Tikanga concept of kauwae runga[292] presents as a conception of eternal law. I was taught that kawa resides within the kauwae runga, which was likened to how the upper jaw of your mouth never moves. Therefore, Tikanga can be eternal law.

Fourth, I address natural law. Can it be said that Tikanga, like "[g]eneral substantive precepts of the Natural Law are likewise self-evident"?[293] I suggested this in applying humanity and justice earlier as part of Aristotle's theory. Therefore, Tikanga can be natural law.

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[288] Te Arikirangi Mamaku "Koha: More than a gift" (30 May 2014) Radio New Zealand <www.rnz.co.nz/news/the-wireless/371516/koha-more-than-a-gift>.
[289] Whaanga "Maori Values", above n 261, at 86-87.
[290] See Jo-Ann Archibald *Indigenous Storywork: Educating the Heart, mind, Body, and Spirit* (UBC Press, Vancouver, British Columbia, 2008) at 47.
[291] See Whaanga "Maori Values", above n 261, at 59, 71 and 78-79.
[292] I was taught this is an upper jaw, of things celestial and unchanging.
[293] Aquinas *Summa Theologiae, I-II* at [436]. Translation by R J Henle (University of Notre Dame Press, Notre Dame, Indiana, 1993).

In applying Aquinas' notion of sovereignty, an upper legislative house of Rangatira, as proffered earlier, affirms consent lies with Māori people,[294] whose "respect and allegiance"[295] towards desirable attributes[296] empowers Rangatira in fulfilling key "duties to the tribe".[297]

I now summarise the findings of this section.

5. *Natural Law Summary: Tikanga is law*

In summary, Tikanga is law for Plato where there is a world of communion with atua and tangata. Next, Tikanga satisfied Aristosle's common knowing of humanity and justice. Then, Tikanga overlaps with Aquinas' envisaged eternal, divine, natural and human laws.

D. *Parliamentary Supremacy*

Parliamentary supremacy emerges as my persistent naysayers in claiming only Parliament can make (and unmake) laws without challenge.[298] In New Zealand, parliamentary supremacy over the Queen is apparently established in England by the Bill of Rights 1688.[299] This view accepts a "sovereign who reigns, but a government who rules".[300] I next cover two of parliamentary supremacy's engineering jurists,[301] to explain this theory.[302]

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[294] Zachary Lomo "Sovereignty and Canadian Nigerian Human Rights Engagements: Some Theoretical Reflections" (2019) 6 THR 26 at 29.
[295] Selwyn Katene "Modelling Māori leadership What makes for good leadership?" (2010) 2 MAI Rev at 4.
[296] Katene, above n 295, at 10-11.
[297] Fiona Te Momo "Whakanekeneke Rangatira: Evolving Leadership" (2011) 2 MAI Review at 1.
[298] See Austin *The Province of Jurisprudence Determined*, above n 176, at 225.
[299] Imperial Laws Application Act 1988, subs 3(1) and Sch 1.
[300] See David V Williams "Crown Prerogative: Reining in the Powers" in Cris Shore and David V Williams (eds) *The Shapeshifting Crown: Locating the State in Postcolonial New Zealand, Australia, Canada and the UK* (Cambridge University Press, Cornwall, 2019) at 208.
[301] Michael Gordon *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Bloomsbury, London, 2015) at 1.
[302] N W Barber "Sovereignty Re-examined: The Courts, Parliament and Statutes" (2000) 20 Oxf J Leg Stud 131 at 132-133.

1. *Ivor Jennings: Courts accept parliamentary Acts as a legal rule*

First, Jennings suggests parliamentary supremacy is rooted in the legal rule that courts accept legislation that Parliament enacts is law.[303] This can explain why our Courts do not strike down legislation, as they interpret to the extent legislation allows.[304] Jennings affirms Parliament's dominance over courts,[305] as only "Parliament has the right to make or unmake any law".[306]

Jennings affirmation is reinforced where Royal assent is needed in New Zealand,[307] but constitutional convention exists that the Governor-General must assent, except in extraordinary circumstances.[308] This suggests "full power" to make and unmake laws stays with Parliament.[309]

2. *Albert Venn Dicey: Common law supports Parliamentary Supremacy*

Second, Dicey asserts parliamentary supremacy is rooted in common law,[310] as three principles:[311]

- *Parliament is the supreme law making body* and may enact laws on any subject matter;
- no Parliament may be bound by a predecessor or bind a successor;
- no person or body - including a court of law - may question the validity of Parliament's enactments.

Surprisingly, despite popularising this theory as being unchallengeable Dicey never demonstrated "that this was so."[312] No statute and no case comes to mind.[313] The uncritical origin of this theory

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[303] Ivor Jennings *The Law of the Constitution* (5th ed, London University Press, London, 1959) at 149.

[304] Interpretation Act 1999, s 5. See Justice Susan Glazebrook "Statutory Interpretation in the Supreme Court" (Parliamentary Counsel Office, Wellington 4 September 2015).

[305] See Jennings *The Law of the Constitution*, above n 303, at 149 and 242-243.

[306] See Jennings *The Law of the Constitution*, above n 303, at 144.

[307] Constitution Act 1986, s16. See Ross Carter *Burrows and Carter—Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 6–7.

[308] See Mary Harris and David Wilson (eds) *McGee Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 453-458; "Modern Duties" (14 July 2014) Ministry for Culture and Heritage <nzhistory.govt.nz/politics/history-of-the-governor-general/modern-duties>.

[309] Constitution Act 1986, s 15.

[310] Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1915) at xxxvi and 19.

[311] Lars Puvogel "A V Dicey and the New Zealand Court of Appeal. Must theory finally give in to legal realities?" (2003) 4 CanterLawRw 111 at II (emphasis added).

[312] A W B Simpson "The Common Law and Legal Theory" in A W B Simpson (ed) *Oxford Essays in Jurisprudence* (2nd series, Oxford University Press, Oxon, 1973) at 77, 96.

[313] Puvogel, above n 311 at II.

is problematic as even our Courts have relied upon Dicey.[314] Adhering to this doctrine denies our realities of common law constitutionalism and Te Tiriti o Waitangi.[315]

I now focus on what England's Courts have said. Clearly, parliamentary supremacy has not gone unchallenged where Coke J asserted:[316]

> … in many cases *the common law will control Acts of Parliament and sometimes adjudge them to be utterly void*: for when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void.

Equally, Coke J's idea was not consistently upheld where:[317]

> … the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's [C]ourts in interpreting and applying the law.

I now focus on what New Zealand Courts have said. It seems:[318]

> … clear and unambiguous. Parliament is supreme and the function of the courts is to interpret the law as laid down by Parliament. The courts do not have a power to consider the validity of properly enacted laws.

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[314] See *Fitzgerald v Muldoon*, above n 209, at 622; *Attorney-General v Taylor* [2017] NZCA 215 at [46], [53]-[54] and [61]; *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 463; *Taueki v R* [2013] NZSC 146 at [37]; *Attorney-General v Edwards* (1891) 9 NZLR 321 at 331 and 337. Compare *Koroi v Commissioner of Inland Revenue* [2003] NZAR 18 at 29; *Prasad v Republic of Fiji* [2001] NZAR 21 at 38.

[315] Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIL 7 at 8. Compare C J S Knight "Bi-Polar Sovereignty Restated" (2009) 68 Camb Law J 361 at 365-366, 375-376 and 386; Barber "Sovereignty Re-examined: The Courts, Parliament and Statutes", above n 302, at 142-149.

[316] *Bonham's Case* [1572] EngR 106; 77 ER 638 (PC) at 652 (emphasis added). See also William Edward Hearn *The Government of England: Its Structure and its Development* (Longmas and others, London, 1887) at 48; *Rowles v Mason* [1612] EngR 19; 123 ER 892 (PC) at 895.

[317] *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 (HL) at 48 per Bridge L. See also Trevor R S Allan *Constitutional Justice A Liberal Theory Of The Rule Of Law* (Paperback ed, Oxford University Press, Oxon, 2003) at 14.

[318] *Rothmans of Pall Mall (NZ) Ltd v A-G* [1991] 2 NZLR 323 (HC) at 330 per Robertson J. See Robert French AC "Common Law Constitutionalism (2016) 14 NZJPIL 153 at 162; "Assessment resource unit standard 27836" (2013) NZQA <www.nzqa.govt.nz/assets/Providers-and-partners/Assessment-and-moderation/Assessment-of-standards/Support-Materials/Legal-Studies/Level-2/27836-Level-2-Student-Guidelines.pdf>.

Although, our position is also challenged where "Some common law rights presumably lie so deep that even Parliament could not override them."[319] Consequently, Dicey is guilty of a contradiction typical of parliamentary sovereignty jurists.

Dicey's passionate political views[320] caused him to theorise untenably and unrealistically.[321] How? First, Parliament can supposedly enact any laws, yet politically speaking this may be impossible. Second, it remains possible the Governor-General or Courts will intervene.[322] There is no statutory ground for the Governor-General refusing assent,[323] so refusal might be remarkable.[324] However, the Governor-General's unmatched obligation to all people of New Zealand,[325] extends beyond limits imposed upon monarchy reserve powers.[326]

3. *Applying a Parliamentary Supremacy lens to Tikanga*

I now apply parliamentary supremacy to Tikanga. It is the total antithesis of Jennings' and Dicey's engineered theory to accept a more supreme law, than Parliament made law. This leaves open the codification of Tikanga in statutes as part of supreme law. It remains unclear whether parts of Tikanga run so deep that even Parliament cannot touch them. Also, where Tikanga has the presumption of continuance,[327] these jurists must concede Tikanga remains a law.

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[319] *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398 per Cooke J. See Rt Hon Beverley McLachlin "Unwritten Constitutional Principles: What Is Going On?" (2006) 4 NZJPIL 147 at 148.

[320] Dan Priel "The Political Origins of English Private Law" (2013) 40(4) J L & Soc 481 at 483, 485 and 507. See also John V Orth "On the Relation Between The Rule Of Law And Public Opinion" (1982) 80(4) Mich Law Rev 753.

[321] Iain McLean *What's Wrong with the British Constitution?*" (Oxford University Press, New York, 2009) at 129. See also Jeffrey Goldsworthy *Parliamentary Sovereignty Contemporary Debates* (Cambridge University Press, Cambridge, 2010) at 267-318.

[322] See Rt Hon Beverley McLachlin "Unwritten Constitutional Principles: What Is Going On?", above n 319.

[323] Constitution Act 1986, s 56.

[324] See John E Martin "Refusal of Assent – A Hidden Element of Constitutional History in New Zealand" (2010) 41 VUWLR 51 at 55; K J Scott The New Zealand Constitution (Oxford University Press, Oxford, 1962) at 85.

[325] See New Zealand Bill of Rights Act 1990, s 7. Surely, the conception of a Governor-General's obligation must be greater still than this.

[326] See Williams "Crown Prerogative: Reining in the Powers", above n 300, at 215-220

[327] See English Laws Act 1858 (NZ) 21 & 22 Vict.

In summary, Tikanga is law, on a statute-by-statute basis or where it has not been extinguished.

4. *Testing the proposition of Ani Mikaere*

I now analyse whether Tikanga is supreme law, as Mikaere proposed, in revisiting Tikanga, Positivism, Natural Law and Parliamentary Supremacy as jural bases.

5. *Tikanga: Koia!*[328]

I look first to Tikanga. A primary source of law from a Tikanga lens can be analysed through a connection to the whenua and second, the length of time a law has existed in connection with that whenua.[329] This two-point analysis derives from the whenua-bound requirement of Mikaere, Ruru and Jackson. Justice Williams agrees with Mikaere,[330] in holding that the first law exists in the "present tense";[331] this is echoed by Jones.[332]

In analysing point one, Māori as Tangata Whenua chose to establish "whakapapa as the source of relationships and knowledge".[333] I was taught from a young age that whakapapa included legal knowledge. They explained whakapapa was more than human genealogy. "Whaka-Papatūānuku", was about becoming one with Papatūānuku, living with her and with our whenua bound law. This is a perspective Jackson shares.[334] I then conclude Tikanga is law.

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[328] It is!

[329] Mikaere "Human Rights", above n 1. See also C F Black *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge-Cavendish, New York, 2011) at xi-xiii and 6. Compare Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxon, 2011) at 5.

[330] Williams "Lex Aotearoa", above n 155, at 2.

[331] Williams "Lex Aotearoa", above n 155, at 32.

[332] Jones "Tikanga Māori", above n 166.

[333] Moana Jackson "Moana Jackson: Decolonisation and the stories in the land" (9 May 2019) E-Tangata <e-tangata.co.nz/comment-and-analysis/moana-jackson-decolonisation-and-the-stories-in-the-land/>.

[334] Jackson "Decolonisation and the stories in the land", above n 333.

In analysing point two, Tikanga existed and operated prior to 1840,[335] even if you accept that Tikanga does not "fit neatly into Western notions of law".[336] Then, Tikanga has the longest connection to Aotearoa, predating both Parliament and case-law. I conclude this makes Tikanga is the first and supreme law of Aotearoa.

6. *Positivism: Yes!… only Hart disagrees*

I argued Rangatira signatories were Hobbesian sovereigns. He Whakaputanga o te Rangatiratanga o Nu Tireni evidences the reality of their absolute power.[337] Next, I proposed Rangatira as Austin's political superior in Nu Tireni.[338] Later, Raz introduced 'a sovereign free from legal duties' to which I proffered Te Wakaminenga o Ngā Hapū o Nu Tireni as a textbook, illimitable sovereign. Sovereign law for these theorists is supreme law. In connection to this, I affirm the Rangatira law of Nu Tireni was (and is) Tikanga. Therefore, Tikanga is supreme law.

Kelsen separately required a basic norm to validate an entire legal system.[339] I suggested that any basic norm will be found in Te Pō traditionally or alternatively, in He Whakaputanga o te Rangatiratanga o Nu Tireni and Te Tiriti o Waitangi.[340] Then I asserted a basic Tikanga norm, in atua enacting kawa or Rangatira enacting sovereign law. Therefore, Tikanga is supreme law again.

Hart is the holdout, agreeing Tikanga is law, only where courts recognise it.[341] However, Hart disagrees Tikanga is supreme law yet. Hart needs courts to say that first.

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[335] E T Durie *Custom Law* (Treaty of Waitangi Research Unit, Reprinted Edition of a Privately Circulated Paper, 2013) at 2.
[336] Timoti Gallagher "Tikanga Māori Pre-1840" 0 Te Kāhui Kura Māori.
[337] Thomas Hobbes *Leviathan* (Daniel Kolak (ed)), above n 171, at 121, 134-135, 138-139.
[338] Thomas Hobbes *Leviathan* (Daniel Kolak (ed)), above n 171, at 18.
[339] Kelsen *The Pure Theory of Law*, above n 244, at 10.
[340] See David V Williams "Indigenous Customary Rights Aad The Constitution of Aotearoa New Zealand" (2006) 14 Wai L Rev 120.
[341] *NZ Maori Council v AG* [1987] 1 NZLR 641, (1987) 6 NZAR 353; NZCA Trans 54/87 (the *Lands* case) at 15. Compare *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC). See Jacinta Ruru and Jacobi Kohu-Morris "Why te Tiriti should place a limit on the supremacy of parliament" (2 February 2021) *The Spinoff* (online ed, 2 February 2021).

7. *Natural Law: Āmine!*[342]

I now seek an answer from Natural Law. Plato and Aristotle did not explicitly consider a supreme law so here, the Thomistic position emerges identifying four broad heads of law.[343] I have already concluded that Tikanga was human law, and that it overlapped the other three heads of law which means Aquinas elevates Tikanga above mere human laws. In this sense, Tikanga is supreme law.

Here, the biblical idea of sovereigns as appointed by God emerges[344] (the Divine Right of Kings),[345] which appears in the common law,[346] present day oaths[347] and in the Governor-General giving assent to statutes,[348] that then become law.[349] This idea can support that God appointed Rangatira as the sovereigns of Aotearoa. Therefore, Tikanga simply reflects sovereign law.

8. *Parliamentary Supremacy: Nay! … unless Tikanga is codified*

Finally, parliamentary supremacy responds: it remains antithetical to find Tikanga is supreme law, except where Tikanga has been codified into legislation.[350] Codification has had various reasons,[351] coupled with varying results.[352] Where legislated for, parliamentary supremacy supports the idea of Tikanga within statutes as our supreme law.

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[342] Agreed! or Amen!

[343] Aquinas *Summa Theologiae*, above n 264.

[344] Romans 13:1.

[345] Melvyn Bragg "The Divine Right of Kings" (11 October 2007) BBC <www.bbc.co.uk/sounds/play/b0080xph>.

[346] Jacinta Ruru "Introducing Why It Matters: Indigenous Peoples, The Law And Water" 20 J Water Law 221 at 221-222.

[347] Oaths and Declarations Act 1957, ss 17-21.

[348] Cabinet Office *Cabinet Manual 2017* at 1.

[349] *Cabinet Manual 2017*, above n 348, at 1-6.

[350] Consider the following small selection of Acts, past and recent: Ngāi Tahu Settlement Act 1998, s 239; Ngāti Pahauwera Treaty Claims Settlement Act 2012, Preamble (12); Oranga Tamariki Act 1989, ss 2, 4, 5, 7AA and 13; Native Exemption Ordinance 1844; Resident Magistrates' Act 1867; Resident Magistrates Courts Ordinance 1846; New Zealand Constitution Act 1852, s71.

[351] See Robert Joseph "Re-Creating Legal Space for the First Law of Aotearoa – New Zealand" (2009) 17 Wai L Rev 74.

[352] See Imperial Laws Application Act 1988, s5; Oranga Tamariki Act 1989, ss 2, 4, 5, 7AA and 13; Crimes Act 1961, s 20; Sentencing Act 2002, ss 7, 8, 9, 10A, 19, 27, 86A-86I. Compare The Native Exemption Ordinance 1844; Resident Magistrates' Act 1867; Resident Magistrates Courts Ordinance 1846; New Zealand Constitution Act 1852.

9. *My final position: Ko Tikanga Te Mātāmua*

I now, finally, give the position of this research: Tikanga is our first law and supreme law.

I affirm the Treaty of Waitangi "is irrelevant to our understanding of Te Tiriti" o Waitangi.[353] Rangatira signatories to Te Tiriti o Waitangi, were sovereign lawmakers with "full authority to enact" law, that others commonly restrict to "legislation".[354] I accept the Rangatira never gathered,[355] although they shared concepts of Tikanga.[356] I affirm Rangatira retain full authority,[357] to make (and unmake) law as sovereignty was never ceded.[358]

My position necessitates that all future law must be subject to Tikanga. Uniquely, I reimagine our primary laws to be a legal whānau. I propose below, that Tikanga is the first born and the supreme legal authority, which this study defines as Te Mātāmua.

E. *Te Whānau Ture Model*

1. *Background*

There are other conceptions of our legal system.[359] My whānau perspective affirms three primary sources of law. Annette Sykes might have reservations to not "expect the Crown to become a

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See also Ngāti Pāhauwera Treaty Claims Settlement Act 2012 at Preamble and Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; Ngāi Tahu Claims Settlement Act 1998.

[353] Patu Hohepa Linguisitic Evidence of Patu Hohepa in Wai 1040, dated 22 September 2010 at 134.

[354] Raymond Bradley "The Relation Between Natural Law and Human Law in Thomas Aquinas" (1975) 21 Cathol Lawyer 42 at 48.

[355] Basil Keane "He Whakaputanga – Declaration of Independence – The aftermath of the declaration" (20 June 2012) Te Ara <teara.govt.nz/en/he-whakaputanga-declaration-of-independence/page-3>.

[356] *The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, above n 101, at 429, 436, 449-450, 452, 471, 503 and 514. See also Joan Metge *Rautahi: The Maoris of New Zealand* (Routledge, London, 2004) at 54-74.

[357] *The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, above n 101, at 526-527.

[358] At 529.

[359] See *Ellis v The Queen* Trans 19, above n 120; Williams "Lex Aotearoa", above n 155; and "Two Streams", Carwyn Jones "Tikanga Māori", above n 166.

revolutionary and hand over or even share real power".[360] I recall Sykes explaining "Once the courts got hold of Te Tiriti they went on a frolic of their own developing Treaty principles that simply affirmed Crown sovereignty and showed contempt for tino rangatiratanga".[361]

Sykes' comments affirm that our Courts make massive mistakes in conceiving of Tikanga. My model makes it unmistakable that Tikanga is our supreme law.

2. *An explanation of the model*

I emphasise the mātāmua principle and tuakana-teina relationships in this model.[362] When lawyers, judges or students have legal questions, this model affirms an order to approaching the sources of law, lawyers turn to for answers. My view is that all three primary sources of law – including statutes and cases – are important. In adopting a horizontal hierarchy, Te Whānau Ture asserts that no type of law is inherently superior and second, that all three primary sources are important.

Adopting this research's perspective requires lawyers and courts to reach first for Tikanga as Te Mātāmua. Second, for statutes, Te Mātāmuri, to reflect statutes take precedence over common law, as Te Mātāroto, if that is accepted by the common law.

3. *A brief pūrākau for added context*

Urutengana is an example of mātāmua, being a first born of Rangi and Papa. He resides far west, hence the longer place name of the far west, Te Tai Hau-ā-Urutengana. Sun, Moon, and stars seem to follow him, which emphasised his supremacy and authority. He has his hiding place, to the far left of this Te Whānau Ture model. Urutengana is always just beyond human sight. He was so cunning he even successfully hid from Ranginui. Tikanga is visually placed near his home.

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[360] Annette Sykes "The myth of tikanga in the Pākehā law" (7 February 2021) E-Tangata <e-tangata.co.nz/comment-and-analysis/the-myth-of-tikanga-in-the-pakeha-law/>.

[361] Sykes, above n 360.

[362] See Benton, Frame and Meredith *Te Mātāpunenga*, above n 47, at 440.

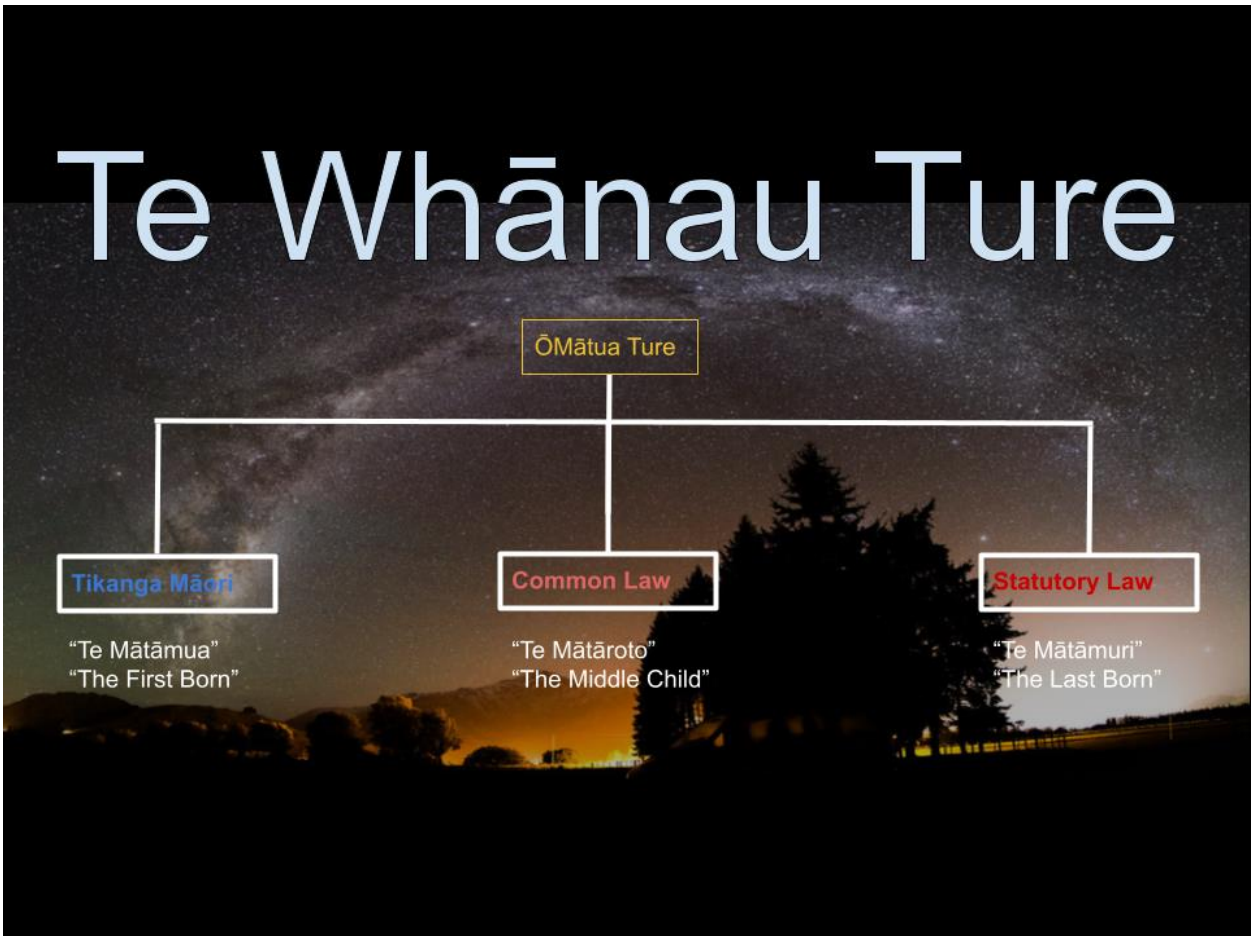

Figure 1. Te Whānau Ture[363]

4. *Looking ahead to the next chapter*

I agree Tikanga is our first law and supreme law as Mikaere initially proposed. This chapter's analysis showed that both Tikanga and western jurists support this proposition. I then proposed my new model Te Whānau Ture, as a family of our three primary sources of law. I can next start theorising how this whānau works practically. In Kotahi Te Kōrero, the practical contribution pūrākau and pakiwaitara can make to law and legal processes starts fulfilling the second purpose of this thesis.

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[363] This work "Te Whānau Ture" is a derivative of "star" by Kiwi Tom (Tom Hall), used under CC BY 2.0, obtained from Creative Commons as a license for commercial use, modification and adaptation. See Tom Hall "Star" (15 April 2015) Flickr < https://www.flickr.com/photos/127665714@N08/17210849885>.

VII. *Kotahi Te Kōrero*

"Na Kotahi Te Kii, Kotahi Te Kōrero." - Whare Wānanga[364]

The ringing vibration Kotahi Te Kii turns into intelligible sound. Kotahi Te Kōrero indicates a second energy transfer and symbolises the idea that many things are born of kupu.

Within the ever-vibrating void, to kōrero is to literally create. Te Ao Mārama is nearing creation. However, linear-like time is not yet established.

I highlight in this chapter the utility of pūrākau and pakiwaitara through the valuable contributions that they make to the body of law, including, the benefits of including them in legal submissions. Within my discussion of highlighted ideas, I also propose Whai Matua o Te Ture Māori, as a new stingray model comprised of fourteen objects of Māori Law. I then identify what is needed to realise the precedents inclusion into submissions. I conclude with ideas to assist implementation.

This starts to fulfil the second purpose of this thesis, noted in Te Kore.

I now enter the intelligible sound. I must engage my tūpuna and prepare for the return to the deep roots of the spoken word. You read here not just a thesis, but a child of the first kupu. A child of the realm of spoken creation. It is done. The third layer is laid.

A. *Utility: What is the point?*

I now highlight valuable contributions pūrākau and pakiwaitara make to the body of law.

1. *Learning about Law from Pūrākau and Pakiwaitara*

Here, I raise four arguments about what lawyers can learn about law. In reaching these arguments, I repeat from my last chapter that Tikanga is part of Te Whānau Ture. As the member of that

[364] "From The Single Noise, came Intelligible Sound" - Highest House Of Learning.

whānau and particularly as Te Mātāmua, Tikanga is well-positioned to educate lawyers, judges and law students about the law.

(a) Lesson One: Law contains principles and is whenua-bound

First, I submit pūrākau and pakiwaitara affirm law as containing principles and being whenua-bound. To support that submission, I briefly record a pūrākau, of 'Māui and Tuna' below.[365] I focus on one version and later, one path of analysis.

(i) Māui and Tuna

Tuna was a fearsome mystical being; an atua eel much larger than any eel you might typically catch today. Tuna travelled between the awa and sea, frequently.

One day, Tuna frightened two wāhine, namely, Hine-tū-repo and Hine-ngaru-moana. Tuna had been swimming along when he saw they were wading in, near the river mouth. Tuna sprung upon them both. The wāhine were frightened and ran back to their village nearby to tell Māui what happened.

Māui had won the affection of both wāhine through the ancient custom of tapatapa.[366] Each had birthed a child of Māui. You may have heard of them as two stars, Tāwera and Meremere.

On hearing from both wāhine that they were frightened, Māui was not impressed. As a result of their shock, it became apparent that Māui needed to decide what to do.[367] Māui quickly retrieved his toki Te Matoritori and ran down to the river mouth. He went to challenge Tuna.

Upon wading into the water, a great fight took place. Tuna was powerful and it was not an easy fight. After much tumbling and turning, they eventually rolled out onto the riverbank. Here, Māui

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[365] See Basil Keane "Te hopu tuna – eeling - Origins and types of tuna – eels" (24 September 2007) Te Ara Encyclopedia of New Zealand <www.TeAra.govt.nz/en/te-hopu-tuna-eeling/page-1>.
[366] Tapatapa is a custom where a person will contest and compete for a relationship similar to an arranged marriage.
[367] Consider "Law of the Rangatira" in Carwyn Jones "Indigenous Law/Stories: An Approach to Working With Maori Law" in Jo-ann Archibald, Jenny Bol Jun Lee-Morgan and Jason De Santolo (eds) *Decolonizing Research Indigenous Storywork as Methodology* (Bloomsbury, London, 2019) 120 at 123.

was able to strike a blow to the belly of Tuna. This cut Tuna in half. One half of Tuna went flying into the sea. The other half went flying further down the river.

(ii) Carwyn Jones: Prior Research

To analyse this story, I next consider some prior research where Jones identifies five principles relevant to Tikanga story analysis:[368]

(i) whanaungatanga;
(ii) mana;
(iii) tapu/noa;
(iv) manaakitanga; and
(v) utu.

Principles can simplify analysis. However, I disagree with restricting analysis to these five principles. I was taught that such an approach risks two things. First, a loss of complexity, which pūrākau and pakiwaitara contain. Second, story interpretation that forces every story to fit a list.

In applying my freeform approach below, I identify principles outside Jones' list. I do not unpack this pūrākau entirely. Instead, I demonstrate, through one pūrākau, that law contains principles and is whenua-bound.

(iii) Māui and Tuna freeform analysis

[368] See Jones "Indigenous Law/Stories", above n 367, at 123-126. Compare Nin Tomas "Maori Concepts and Practices of *Rangatiratanga*" in Julie Evans and others *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press, O'ahu, 2012) at 225-227.

I analyse this pūrākau as principles affirming of aroha, mauri, mana,[369] tapu,[370] whakapapa, whanaungatanga,[371] atuatanga, take, utu,[372] ea and tau. I consider these principles are bound in the actions of the atua Tuna, Hine-tū-repo, Hine-ngaru-moana and Māui. These principles are also affirmed by actions not taken, such as Māui abandoning the wāhine to sort the issue out themselves.

I submit this pūrākau affirms whenua-bound laws of the laws of the awa, the laws of Tuna, the laws of mana wāhine, the laws of papa kāinga and the laws of utu. I see the laws as bound to the whenua literally in the spaces of the awa and the village. These laws are bound to the Tangata Whenua: Hine-tū-repo, Hine-ngaru-moana and Māui. Here, Māori legal method can be perceived.

(b) Lesson Two: A Māori legal method is perceivable

Second, pūrākau and pakiwaitara enable insight into a Māori legal method. As materials for learning,[373] they evidence Jones' observations of Tikanga as laws of:

(i) the spiritual world;[374]
(ii) the natural world;[375]
(iii) the rūnanga;[376]
(iv) the rangatira;[377] and
(v) the ancestors.[378]

Jones further observes:[379]

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[369] See Jones "Indigenous Law/Stories", above n 367, at 124.
[370] Jones "Indigenous Law/Stories", above n 367, at 125.
[371] Jones "Indigenous Law/Stories", above n 367, at 123-124.
[372] Jones "Indigenous Law/Stories", above n 367, at 125.
[373] See Heemi McDonald "Data, story, and mātauranga Māori" (6 February 2019) TKI <nzcurriculum.tki.org.nz/Curriculum-resources/NZC-Online-blog/Data-story-and-matauranga-Maori>.
[374] Jones "Indigenous Law/Stories", above n 367, at 121-122.
[375] Jones "Indigenous Law/Stories", above n 367, at 122.
[376] Jones "Indigenous Law/Stories", above n 367, at 122.
[377] Jones "Indigenous Law/Stories", above n 367, at 123.
[378] Jones "Indigenous Law/Stories", above n 367, at 123.
[379] Jones "Indigenous Law/Stories", above n 367, at 121.

> The Māori legal system, therefore, developed law that not only differed from common law in substance; its processes for creating, amending, repealing, applying, and enforcing law were also different.

It is helpful to internalise this comment because the processes many of us learned at law school, in analysing common law judgments should not be applied (without significant modification) to pūrākau and pakiwaitara.[380] My study affirms the value of plural legal methods to access different sources of law. Without a method for analysing pūrākau and pakiwaitara that is rational, spiritual, consistent and flexible, making effective legal submissions will be difficult. Here, Māori legal method is perceptible.

I propose my new model Ātea Whakaaro in the following chapter to address this. Below, I share Jones' prescriptive model.

(i) Jones' Kōrero Analysis Framework

In terms of unpacking Māori legal precedents in depth, Jones has provided the Kōrero Analysis Framework as a method for story analysis by asking:[381]

1. Who is involved in this story? What are the relationships that are involved?
2. In this story, do you see expressions of key principles such as whanaungatanga (centrality of relationships), manaakitanga (value of nurturing/caring for others), mana (power and authority), tapu and noa (respect for the spiritual and everyday dimensions of all things), and utu (reciprocity)? Are there examples of key principles being breached? If so, what are the consequences?
3. Why do people in the story do what they do? Are their actions determined by:
    a. Key values/principles?
    b. Past action (precedent)?
    c. Their relationships to one another?
    d. Actions or statements of people in leadership roles?

[380] Jones "Indigenous Law/Stories", above n 367, at 126.
[381] Jones "Indigenous Law/Stories", above n 367, at 127.

e. Something else?

4. What is the central message of this story?
5. If you were to re-tell this story, what would you see as the essential points?

This is one starting method which works.[382] Jones' framework is valuable alongside mine, in providing different tools to help lawyers analyse pūrākau and pakiwaitara as legal precedents. I next reflect on Val Napoleon,[383] who spoke about Indigenous laws at a conference.

(ii)Val Napoleon: Using Indigenous stories to teach Indigenous laws

From Napoleon's presentation,[384] teaching on general and specific areas of Indigenous law is already happening overseas. My resulting epiphany was that teaching iwi and hapū specific legal traditions could be achievable locally.

My epiphany is supported by Napoleon's explanation:[385]

> Each year, in law schools across Canada, many people learn the internal aspects of the common law and the civil law traditions. They do not become experts in any particular area, but they develop a foundation that enables them to work with and apply legal principles to factual situations in legal practice. It makes sense that learning the internal aspects of Indigenous legal traditions could enable them to build a similar foundation for practical application.

My view forms here that to sufficiently learn the internal aspects of Tikanga as a legal tradition, pūrākau and pakiwaitara must be engaged. In learning about an iwi and hapū legal traditions through pūrākau and pakiwaitara, students can gain a working foundation of ability and humility

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[382] Jones "Indigenous Law/Stories", above n 367, at 129-133.

[383] See Edmond Carrucan "Val Napoleon - Indigenising Law" (3 May 2021) WordPress. <temahirangahau.wordpress.com/2021/05/03/val-napoleon-indigenising-law/>.

[384] Val Napoleon, International Keynote Speaker "Did I Break It? Recording and Teaching Indigenous Law" (Te Hunga Rōia Māori Hui-ā-tau, Victoria University, Wellington, 29 August 2019).

[385] Val Napoleon and Hadley Friedland "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61(4) McGill L J 725 at 741-742.

to safely engage with Tikanga. Appreciating pūrākau and pakiwaitara as legal precedents is the gamechanger.

(iii) Story education informing legal practice in Aotearoa

Pūrākau and pakiwaitara can enlighten us on what Māori legal traditions consider legal issues. This can assist lawyers in handling cases to know which aspects of Māori law are most relevant. These story forms also help us to ask more specific legal questions of Tikanga. This furthers the skill of critical evaluation of legal arguments.

Responding to John Borrows work, Napoleon observes:[386]

> … he explicitly retold stories as cases and used the common-law "case method" to identify legal principles within single stories. We decided that connecting these legal pedagogies seemed sensible and effective. After all, cases or written decisions in Canadian law are also stories.

This is commendable where the case method is familiar to a western legal tradition. My study adopts pūrākau and pakiwaitara as containers of Māori laws and legal methods, not because each story is a "one hundred per cent verifiable fact".[387]

(c) Lesson Three: Colonisation needs confronting

Third, lawyers can learn from pūrākau and pakiwaitara about colonisation and confront it.

(i) How interpretation can be informed by a theory

[386] Hadley Friedland and Val Napoleon "Gathering the Threads: Developing A Methodology For Researching And Rebuilding Indigenous Legal Traditions" (2015) 1(1) LLJ 16 at 22.
[387] Jones "Indigenous Law/Stories", above n 367, at 121. Compare Durie *Custom Law*, above n 335, at 7 and 57.

I encourage learning how to delve into different interpretations, as an aid, to working with pūrākau and pakiwaitara. Without guidance you may misunderstand, the pūrākau I shared, for example as women being helpless and in need of Māui to save the day.

In support of this, Mikaere says:[388]

> ... it was the misinterpretation of tapu and noa that was particularly destructive of the spiritual significance of the whare tangata. The denial of the inherent tapu of women struck a devastating blow to the worth of all Māori women. it diminished the value of all female functions and activities.

(ii)Interpretative thoughts on Māui and Tuna

How do I then see the pūrākau of Māui and Tuna? Briefly, Māui is attentive and empathic towards Hine-tū-repo and Hine-ngarumoana. He knows they have a right to be heard.[389] Māui then enters their emotional experience. Māui only decides what to do, because in a shocked state it is difficult for them to decide what to do.

I explain next where interpretations often go awry.

(iii) Misunderstandings that have grown out of colonisation

I reflect here on Paulo Freire's ideas antidialogical theory conceptualises a single-minded route towards oppression.[390] Freire was acknowledging that cultural invasion is one way to change society, for through invasion, oppressed groups are forced to adopt oppressor views. Consequently, misunderstandings resulting from colonisation continue to be a problem.

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[388] Ani Mikaere "The balance destroyed: The consequences for Māori women of the colonisation of tikanga Māori" (MJur Thesis, University of Waikato, 1995) at 90.

[389] Compare New Zealand Bill of Rights Act 1990, subs 27(1).

[390] Paulo Freire *Pedagogy of the Oppressed* (30th anniversary ed, Bloomsbury, London, 2014) at 152.

The absence of dialogue with iwi and hapū around pūrākau and pakiwaitara explains why there remain popular misinterpretations which colonially imposed the words "marry" or "married",[391] "he" or "she",[392] among others.[393] I submit that "committed" and "they" would respectively be more accurate translations sometimes. I anticipate many people are unaware that some atua are intersex.[394] This should promote careful story analysis that appreciates iwi and hapū diversity.

(d) Lesson Four: Meaningful participation matters

The fourth learning relates to access to justice, where meaningful participation is critical to law.

Jones mentions:[395]

> Stories not only play an important role in the production and maintenance of legal culture within communities, they are also employed to communicate legal rules and principles in various cultural communities.

Jones is emphasising that storytelling as a means of cultural reproduction and communication is not unique to Māori culture.[396] I agree. Storytelling can be important in other Indigenous communities too.[397] However, where "Maori people did not so much live under the law, as with it",[398] this thesis supports living with law through storytelling.[399]

(i) The idea of tensions

[391] See "Moea" (May 2018) Te Whariki Takapou <tewhariki.org.nz/glossary/moea/>.
[392] See "Pronouns" <kupu.maori.nz/more/pronouns>.
[393] See Aroha Yates-Smith "Hine! E Hine! Rediscovering the Feminine in Maori Spirituality" (PhD thesis, University of Waikato, 1998) at 3-5.
[394] As an example, I was taught about the atua Te Mamaru as intersex. See Yates-Smith "Hine! E Hine! Rediscovering the Feminine in Maori Spirituality", above n 393.
[395] Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Maori Law* (UBC Press, Vancouver, 2016) at ix.
[396] See Jones *New Treaty, New Tradition*, above n 395, at xii.
[397] Maluseu ('Joe') Monise, Presenter "Hanuju - storytelling Rotuman style" (Te Kōpū Mānia o Kirikiriroa Te Tuarua Marae, Hamilton, 14 May 2021).
[398] Jackson "Decolonisation and the stories in the land", above n 333.
[399] See Yates-Smith "Hine! E Hine!", above n 393, at n 2.

Helpfully, Jones' three observed tensions address adaptation, relationship to the treaty partner and renewal.[400] This is helpful because concerning relationship to the treaty partner, a disengagement with the state legal system is not ideal in my view, where the state system can, should and must create decision-making spaces for Māori that enable increased participation.[401]

(ii)Tensions as a calling for future changes

Here, pūrākau and pakiwaitara might encourage us to reconsider what meaningful legal participation looks like.

I encourage courts to consider participants' feelings,[402] the physical space they inhabit, who they see[403] and what they hear.[404] I say this appreciating that some people, including Māori, prefer the anonymity, privacy and individualistic processes that protect them from collective accountability and responsibility.[405] However, these legal processes are fraught with emotions.[406]

Storytelling in times past was an activity that established "common understandings of legal rights and obligations".[407] I then suggest collaborative storytelling promoted access to justice and

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[400] See Jones *New Treaty, New Tradition*, above n 395, at 23.

[401] Khylee Quince "Māori Disputes and Their Resolution" in Peter Spiller *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, Auckland, 2007) at 280, 282, 285-288 and 292.

[402] See Toki *Indigenous courts, self-determination and criminal justice*, above n 190, at 217; Law Commission *Justice: The Experiences of Māori Women Te Tikanga o Te Ture Te Mātauranga o ngä Wähine Mäori e pä ana ki tënei* (NZLC R53, 1999) at 27, 43, 121-122, 134 and 142. See also Moana Jackson *The Māori and the Criminal Justice System: He Whaipaanga Hou, Part I*, (Department of Justice, Study Series 18 Paper, February 1987) at 11.

[403] See Toki *Indigenous courts, self-determination and criminal justice*, above n 190, at 214.

[404] Toki, above n 190, at 212-213.

[405] Toki, above n 190, at 39.

[406] See Meriana Johnsen "Māori families feel ignored by Family Court judges - report" (27 July 2020) Radio New Zealand <www.rnz.co.nz/news/national/422153/maori-families-feel-ignored-by-family-court-judges-report>; "Taking lessons from the Rangatahi Courts" The District Court of New Zealand <www.districtcourts.govt.nz/youth-court/publications/taking-lessons-from-the-rangatahi-courts/>.

[407] See Jones *New Treaty*, above n 395, at ix-x. See also Robert Anthony Williams Jr. *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (Oxford University Press, Oxford/New York, 1997) at 83–97.

fulfilled natural justice. This elevated listening, not speaking, as the more prized skill.[408] Māui listening first to Hine-ngarumoana and Hine-tū-repo helps affirm how important listening is.

(e) Summary of learnings about law from pūrākau and pakiwaitara

Summarily, lawyers learn in general that law:

(i) embodies principles and is whenua-bound;
(ii) is a means of revealing Māori legal method;
(iii) enables us to confront colonisation; and
(iv) should realise meaningful participation matters.

I next cover five benefits of having pūrākau and pakiwaitara before our Courts in legal submissions.

2. *Five benefits of Pūrākau and Pakiwaitara as Māori Law sources before the Courts*

(a) Benefit #1: Sources of law have increased change capability

First, pūrākau and pakiwaitara within legal submissions remind us that all sources of law can grow and change. Although precedents are important, not all precedents bind future decisions engaging Māori Law.[409]

Tikanga can change for pragmatic reasons,[410] that assist iwi and hapū with ongoing survival.[411] The pūrākau of Māui and Tuna, as shared earlier, indicates where to find tuna as a source of kai to promote survival: the moana and awa. I keep excepting only kawa from this flexibility.

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[408] See Toki, above n 190, at 42; Alanna Irving "Surrounded by Taonga How learning from Māori has enriched my life" (24 July 2019) Medium <alannairving.medium.com/surrounded-by-taonga-2320c3f31921>.
[409] Jones "The Treaty of Waitangi Settlement Process In Māori Legal History", above n 114, at 105.
[410] Durie *Custom Law*, above n 335, at 4.
[411] Mead *Tikanga Māori*, above n 223, at 20-21.

(b) Benefit #2: Lawyers can ask different legal questions

Second, pūrākau and pakiwaitara inspire an asking of questions that western law might not.

I believe this comes back to identification of the worldview and inputs underlying laws. A reliance upon pūrākau and pakiwaitara as inputs, encourage us to question remedies and outcomes across spaces including the civil,[412] succession,[413] criminal justice[414] and emerging spaces.[415] I share questions now, arising from an extended reflection on Māui and Tuna.

(i) Questions from extended reflection

Why is the sentencing hierarchy void of Tikanga specific sentencing options?[416] What would the system do if imprisonment was not an option?[417] What Tikanga civil redress could be awarded?[418] Why is whanaungatanga not a greater part of daily legal process?[419] Why is there not have a free and dedicated counselling service within our Court buildings?[420] Why are crimes still viewed as

[412] See "Māori economy soars to $68b, a growth of 60% in five years" (29 January 2021) Chapman Tripp (29 January 2021) <chapmantripp.com/trends-insights/maori-economy-soars-to-68b-a-growth-of-60-in-five-years/>.
[413] See Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP, 1996) at 115-117.
[414] See Toki *Indigenous courts, self-determination and criminal justice*, above n 190, at 234-236.
[415] See Edmond Carrucan Te Hunga Rōia Māori o Aotearoa Draft Submissions regarding the Budapest Convention on Cybercrime (returned with edits from Toni Love), 15 September 2020.
[416] See Sentencing Act 2002, subss 8(g) and 10A.
[417] See Sentencing Act 2002, subs 10A(2)(f). See also Deanna Van Buren "What a world without prisons could look like" (November 2017) TED <www.ted.com/talks/deanna_van_buren_what_a_world_without_prisons_could_look_like>; John W Buttle "Imagining an Aotearoa/New Zealand without Prisons" (2017) 3 Counterfutures Journal 99; Tania Sawicki Mead "A World Without Prisons" (31 August 2019) YouTube <www.youtube.com/watch?v=7hlkHov5grs>.
[418] Mead *Tikanga Māori*, above n 223, at 161-176.
[419] Mead, above n 223, at 32-33.
[420] See David Wexler *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, Durham, Carolina, 2008) at 2 and 6-7; David B Wexler "Two Decades of Therapeutic Jurisprudence" (2014) 24(1) Touro Law Rev 17 at 18.

only against the Queen?[421] If pepeha features in Rangatahi Court, why does it not feature regularly in other courts as a means of formal introduction?[422]

(ii) Remedies, pūrākau and pakiwaitara

In reflecting on individual pūrākau and pakiwaitara, lawyers encounter remedies and outcomes that tūpuna found effective to grapple with a particular situation.[423] In the pūrākau I share, Māui found it effective to sever Tuna into two, with the toki Te Matoritori. Māui's severing reduced the size of Tuna and yet, Māui did not kill Tuna. This pūrākau demonstrates that conceptions of justice and process, are culturally informed and not, universally agreed.[424]

Tuna was never charged. Tuna never had to appear in court but engaged with Māui one-on-one at the awa. Tuna never went to prison. Tuna was not displaced from his world of the moana and awa. In addition, I am still yet to hear a sequel to Māui and Tuna with worsening problems.

(c) Benefit #3: The Courts must engage with Tikanga

Third, pūrākau and pakiwaitara require courts to engage with Tikanga.

Informally, one Judge shared with me that reading and analysing story forms will initially be a hurdle. Courts would have to consider what terms like mana, tapu, noa mean based on the pūrākau, pakiwaitara and case facts before them. I address why this might invite risk in my next chapter, Kotahi Te Wānanga. This is tied into the need for Tikanga submissions.

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[421] Mead, above n 223, at 249-251.

[422] See "Rangatahi Courts and Pasifika Courts" Youth Court of New Zealand <youthcourt.govt.nz/about-youth-court/rangatahi-courts-and-pasifika-courts/#:~:text=During%20the%20time%20that%20the,will%20practice%20delivering%20their%20pepeha.>; Anusha Bradley "Success of Rangatahi Courts applauded by judges and minister" (16 October 2020) Radio New Zealand <www.rnz.co.nz/news/national/428477/success-of-rangatahi-courts-applauded-by-judges-and-minister>.

[423] Napoleon agreed remedies may be growth space in her 2019 International Keynote presentation, see above n 384.

[424] See Tim Hughes *Justice, Wellbeing and Social Capital* (The Treasury, Discussion Paper 20/01, February 2020) at 1, 14 and 36.

(i) The need for Tikanga legal submissions

Jones observes "a willingness to engage with tikanga Māori as a source of law."[425] However, despite any willingness, if courts do not receive written or oral submissions on Tikanga they may never consider it. Using even small parts from pūrākau and pakiwaitara within more standard submissions could be effective in encouraging courts to gradually engage Tikanga.

Using pūrākau and pakiwaitara in submissions will also encourage judges to learn more about Tikanga and Te Reo. I encourage ongoing learning by judges.[426] Here, I recall one conversation with the late Matiu Dickson that being fluent in Te Reo Māori with competence in Tikanga and Te Tiriti o Waitangi should be non-negotiable for judicial appointment. I agree with this view.

Even if courts reject use of pūrākau and pakiwaitara in submissions there is a benefit: the courts are having to consider pūrākau or pakiwaitara before excluding Tikanga. Here, I encourage counsel to seek recorded reasons for exclusion and to appeal wherever sensible.

(d) Benefit #4: Advocacy expands in a more holistic direction

Fourth, pūrākau and pakiwaitara let us rethink what it means to be an advocate.

Using pūrākau and pakiwaitara can add flair and promote creativity. It also affirms advocacy is more than adversarial.[427] However, some training in storytelling itself is good for improving,[428]

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[425] Jones "Tikanga Māori", above n 166.

[426] See "High Court judges learn te reo Māori online" *Stuff.co.nz* (online ed, 13 July 2020).

[427] See Christine Parker "A Critical Morality for Lawyers: Four Approaches To Lawyers' Ethics" (2004) 41 Mon L Rev 49 at 56; E W Timberlake Jr "Origin and Development of Advocacy as a Profession" (1922) 9 Va Law Rev 25; Sophie Bryan "Personally Professional: A Law Student in Search of an Advocacy Model" (2000) 35 Harv Civ Rights-Civ Liberties Law Rev 277.

[428] See Vanessa Borris "What Makes Storytelling So Effective for Learning?" (20 December 2017) HarvardBusiness <www.harvardbusiness.org/what-makes-storytelling-so-effective-for-

lawyers' court advocacy.[429] Stories told plainly reduce legalese. I have experienced the way pūrākau and pakiwaitara enable an entire submission to be advocated.

(i) One practice example

I reflect upon one day at Auckland District Court. My appearance was entered as the Crown for a bail breach. I was unopposed to readmission and seeking a warning yet, I needed to explain why I adopted this position.[430] I recall my oral submission was:

> Tēnā Koe e Te Kaiwhakawā,
>
> I am not opposed to readmission today because the bail breach of a residence condition reminds me of a particular pūrākau of Mahuika and Māui.
>
> Māui was a bit of a trickster and Mahuika was the goddess of fire and his kuia. Mahuika had asked Māui to take fire, which was contained in her fingernails, back home and to stay there. In a sense, Māui was subject to some restrictions. The thing was though, Māui kept returning before his kuia with every conceivable excuse for why he hadn't done what she had asked him to do. From the beginning he was asked to do three things:
>
> (1) take a fingernail containing the fire;
>
> (2) go home; and
>
> (3) stay there.
>
> Mahuika warned Māui repeatedly of the consequences of his failure to do what she asked, but eventually she ran out of fingernails and Māui ran out of chances. Māui suffered dearly because he didn't heed the warnings of his kuia to do as she asked.
>
> Your Honour, Mahuika as his grandmother was a symbol of authority, somewhat like the Court today. The defendant is currently making choices somewhat like Māui in that pūrākau. If his poor bail compliance continues, he will eventually run out of chances and be remanded no matter his excuse. However, a warning and readmission is what I seek today.

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learning/#:~:text=Telling%20stories%20is%20one%20of,and%20values%20that%20unite%20people.>; "Why Storytelling Works: The Science" (1 October 2014) Ariel <www.arielgroup.com/why-storytelling-works-the-science/>.

[429] See Keith A Belzer "Storytelling in The Courtroom" Idaho Association of Criminal Defense Lawyers <www.idacdl.org/uploads/MeetingMaterials/Storytelling%20in%20the%20Courtroom.pdf>; Jeff Isler "Why Are So Many People Talking About Storytelling in Court?" (29 August 2014) Infographics <www.ignyc.com/why-are-so-many-people-talking-about-storytelling-in-court/>.

[430] Bail Act 2000, s 8.

Now, the Judge presiding looked surprised in a good way. His Honour ultimately readmitted the defendant to bail. I was not advocating for the defendant. I was assisting the Court, which is always a lawyer's ultimate responsibility.[431] Lawyers are always lawyers of the Court first. This was the best way I could assist the Court to grasp my reasoning.

Without a knowledge of pūrākau and pakiwaitara, that submission framing would not have been possible. I sometimes reflect on that day and wonder how many opportunities are being passed up to use pūrākau and pakiwaitara, even as tools of analogy.

(ii)Before the Submissions

I now make a few additional comments on this example. There were only two people of colour present for the bail breach: the Māori defendant and me. This was commonplace in my work, making court appearances alienating experiences for Māori. On arriving, I noticed the defendant had an exaggerated slouch which spoke volumes about his disengagement. He did not care about what was happening.

Then, he sees me: another Māori. He cannot believe his eyes. I greet him. Unsurprisingly, nobody else does. My practice experience consistently showed me common courtesy was uncommon. Suddenly, he looks less angry, straightens up and is engaged.

(iii) During the Submissions

From the corner of my eye, when I was retelling the pūrākau of Mahuika and Māui, the defendant was nodding. On finishing, I could see the tears welling in his eyes. I believe this was because he no longer felt invisible. Visibility matters.

[431] See Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.1.

I believe really seeing people is the reason why when I appeared as Crown sentencing appearances, even where Māori people have gone to prison, they have thanked me with tears running down their face. I was often told that these responses were very unusual. I grasp others may not understand why they would thank me. I do because our choice of words matters. I chose heartfelt words.

(iv) Further Personal Context

To try and illuminate further, when I first started appearing in court, I had the strong impression that some Judges thought I was a nicely dressed defendant. Yes … judges can be racist. It happens.

I even remember the Police identification checking me at a library while I was studying for professionals, even though I told them I was working for the Crown and had my Crown-issued laptop well within view. I was the only person of colour in the area. This sticks out because they even said from the start, I was not who they were "looking for", but they still checked anyway.

This unsettling and commonplace racism was echoed by colleagues I worked with. I recall comments such as, "you are naïve about how the Māori world works." I remember my disbelief.

So, you see … I had nothing to lose.

(e) Benefit #5: Tikanga may allow for the striking of legislation

I now propose something that is a tiny bit radical.

Fifth, pūrākau and pakiwaitara afford judges the opportunity to consider whether a power to strike down legislation can be sourced in Tikanga.[432]

[432] Compare Phil Smith "Dear Parliament, Try again, Sincerely, the Courts" (25 April 2021) Radio New Zealand <www.rnz.co.nz/national/programmes/the-house/audio/2018791883/dear-parliament-try-again-sincerely-the-courts>.

This may become important if fundamental rights are at stake[433] and it lets courts navigate, perceived restrictions stopping them from striking down legislation.[434] Here, this study further affirms Tikanga is supreme law, Te Mātāmua in Te Whānau Ture.

No court should just assume a power to strike legislation.[435] Courts could instead utilise pūrākau and pakiwaitara to inform a Tikanga and Te Tiriti o Waitangi constitutional doctrine.[436] I stress a need to protect Māori rights, laws, interests and Te Tiriti o Waitangi, from changing opinion, hostility and apathy.[437] Tikanga was never (and is not) dependent on Parliament.

(f) Summary: Many Benefits

Summarily, by including pūrākau and pakiwaitara in submissions, the body of law benefits from:

(i) being reminded that law can change;
(ii) the asking of questions that may be missed;
(iii) courts having to engage with Tikanga;
(iv) added value to submissions and advocacy; and
(v) judges being able to consider a basis for striking legislation.

3. *The objects of Māori Law*

I next look respectively to Te Kooti, Kīngi Pōtatau, Ruawehea and a seminal report calling for indigenised legal education locally, to later propose my new model, Whai Matua o Te Ture Māori.

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[433] See *Taylor v New Zealand Poultry Board*, above n 319, per Cooke J.
[434] New Zealand Bill of Rights Act 1990, s 4.
[435] Compare Rachael Jones "The Problem of Constitutional Law Reform in New Zealand: A Comparative Analysis" (LLB Hon Dissertation, University of Otago, 2013) at 5 and 8.
[436] Ruru and Kohu-Morris "Why te Tiriti should place a limit on the supremacy of parliament", above n 341. See also Aditya Vasudevan "Restoring Rangatiratanga: Theoretical Arguments for Constitutional Transformation" (2017) 23 Auckland U L Rev 91 at 93, 98 and 104-117.
[437] Ruru and Kohu-Morris "Why te Tiriti should place a limit on the supremacy of parliament", above n 341.

(a) Te Kooti: Law as Parent to the Oppressed

First, I look to the whakataukī of Te Kooti:[438]

> Ka kuhu au ki te ture, hei matua mō te pani.

This whakataukī reveals to me that laws are ultimately parental.[439] From this whakatauki, I submit two objectives of Māori Law are identifiable:

(1) access to justice; and
(2) the protection of those who are vulnerable.

(b) Kīngi Pōtatau Te Wherowhero: Law as fundamental

Second, I consider the whakataukī of Kīngi Pōtatau Te Wherowhero I:[440]

> I muri, kia mau ki te whakapono, *kia mau ki te aroha, ki te ture*. Hei aha te aha, hei aha te aha.

Clearly, aroha has different meanings.[441] However, this whakataukī reveals aroha as something tangible, practical and within our grasp. From this whakataukī, I identify three further objectives of Māori Law as:

(3) to maintain aroha as a legal value;
(4) to maintain the value of the law itself; and
(5) to ensure law protects Māori spiritual and religious beliefs.

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[438] See Joseph Williams "Ka kuhu au ki te ture, hei matua mō te pani - I seek refuge in the law for it is a parent to the oppressed" (2018) November Māori LR.
[439] Edmond Carrucan "Ki te ture hei matua mō te tangata whaikaha" LawTalk (online ed, 25 June 2021).
[440] Carmen Kirkwood *Tāwhiao: king or prophet* (MAI Systems, Huntly, 2000) at 42 (emphasis added).
[441] See Che Wilson, Moerangi Tetāpuhi and Watson Ohia "Episode 9 - Aroha with Watson Ohia (Reo Māori)" (15 January 2020) YouTube <www.youtube.com/watch?v=bsyX8QkqZUU>.

(c) Ruawehea: Law as carrying the future

I now look to words of my tupuna Ruawehea, in considering the Ngāti Hako whakataukī:[442]

> Nau mai, haere mai, kuhu noa mai i ngā hūhā o Ruawehea.

I previously spoke on the importance of these kupu.[443] I identify here, five further objects as:

(6) to ensure legal change is a pōwhiri process that Tikanga initiates;

(7) to ensure legal change is welcoming of diverse peoples;

(8) surviving and thriving of both whakapapa and mātauranga;

(9) to affirm all whakapapa, including critically, mātāmua whakapapa as leaders and final decision makers; and

(10) to ensure future generations are provided for.

(d) Report to inspire Indigenous legal education

Fourth, I look to the present in considering the ten key messages in the Stage 1 report on indigenising of the Bachelor of Laws.[444] Of those ten messages I record as critical:[445]

...

> 5. A bijural legal education presupposes the existence of Māori law founded on tikanga Māori, which is taught as a legitimate and continuing source and influence on the rights, obligations, rules and policy in Aotearoa New Zealand's legal system. *Māori law can and should be taught as part of the multi-year core LLB curriculum* in a manner that adheres to Māori transmission methods of knowledge.
>
> 6. A bicultural legal education implements structures, develops processes and provides resources grounded in Te Tiriti o Waitangi | the Treaty of Waitangi, including the

[442] See Te Ahukaramū Charles Royal "Hauraki Tribes - The first tribes" (3 March 2017) Te Ara Encyclopedia of New Zealand <teara.govt.nz/en/hauraki-tribes/print>; Edmond Carrucan, Kaikōrero "Tūpuna and Tikanga - Ngāti Hako" (Whakapapa Wānanga, Kerepeehi Marae, Hauraki, 27 June 2021).

[443] See Edmond Carrucan, Kaiwhaikōrero Manuwhiri mō te Pōwhiri (Te Whare Tahuhu Korero o Hauraki, 2019).

[444] Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree* (Ngā Pae O Te Māramatanga, Issues Paper, August 2020).

[445] Ruru and others, above n 444, at 8 and 9 (emphasis added).

> employment of Māori, and sharing of resources, leadership and decision making with iwi, hapū and Māori academic staff. Specific steps include:
>
> …
>
> ii. the recruitment and retention of high numbers of Māori teaching staff;
>
> …
>
> vi. *recognition of the Māori epistemologies* for teaching and instruction, such as wananga, pūrākau, the use of te reo Māori and the legal knowledge held by kaumātua.

…

> 9. Care will be required to progress this aspirational systemic change, especially in regard to ensuring mana whenua are supportive of these moves. The change should be *Māori led and Māori designed, with substantial allied support* from Deans of law schools and the legal profession, including the judiciary, law practitioners, law academics and law students."

My takeaway is that increasing recruitment and retention of Māori teaching staff is needed to effect a better recognition of Māori epistemologies and indigenised legal education.[446] This points to four added objectives of Māori law:

(11) Māori recruitment;

(12) to affirm Māori epistemologies;

(13) to create and maintain a Māori led and Māori designed legal education as an ongoing basis for allied support; and

(14) to create different spaces to discuss Māori Law.

In summary, a complete list of those objects includes:

(1) access to justice;

(2) the protection of those who are vulnerable;

(3) to maintain aroha as a legal value;

(4) to maintain the value of the law itself;

(5) to ensure law protects Māori spiritual and religious beliefs;

(6) to ensure legal change is a pōwhiri process that Tikanga initiates;

(7) to ensure legal change is welcoming of diverse peoples;

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[446] See also Ruru and others, above n 444, at 35 and 41.

(8) surviving and thriving of both whakapapa and mātauranga;

(9) to affirm all whakapapa, including critically, mātāmua whakapapa as leaders and final decision makers;

(10) to ensure future generations are provided for;

(11) Māori recruitment;

(12) to affirm Māori epistemologies;

(13) to create and maintain a Māori led and Māori designed legal education as an ongoing basis for allied support; and

(14) to create different spaces to discuss Māori Law.

B. *Whai Matua o Te Ture Māori Model*

1. *Background*

I propose my new model, Whai Matua o Te Ture Māori, that I have drawn (below), as a symbolic stingray presenting these objects in a non-linear visual diagram,

2. *An explanation of the model*

Whai Matua symbolises resilience and persistence of Māori legal traditions. This model enables the use of Tikanga to be scrutinised respectfully. Others might adopt the Whai as an ethical compass, rearranging it differently for their personal use as lawyers. I encourage this.

3. *A brief pūrākau for added context*

Rua Te Pupuke set out to claim some beautiful treasures at the bottom of the ocean that he heard were called whakairo. Rua Te Pupuke descended to wharenui that existed beneath the sea. Within the wharenui were beautiful carvings. However, there were all sorts of sea life asleep inside this whare. Feeling impatient, he took his patu and created a loud noise stirring up the whare.

All the sea life fled from the whare. When the Whai Matua was fleeing out the front door, Rua Te Pupuke bashed them hard on the head. As a result, the stingray became flatter, but escaped. I now present this model.

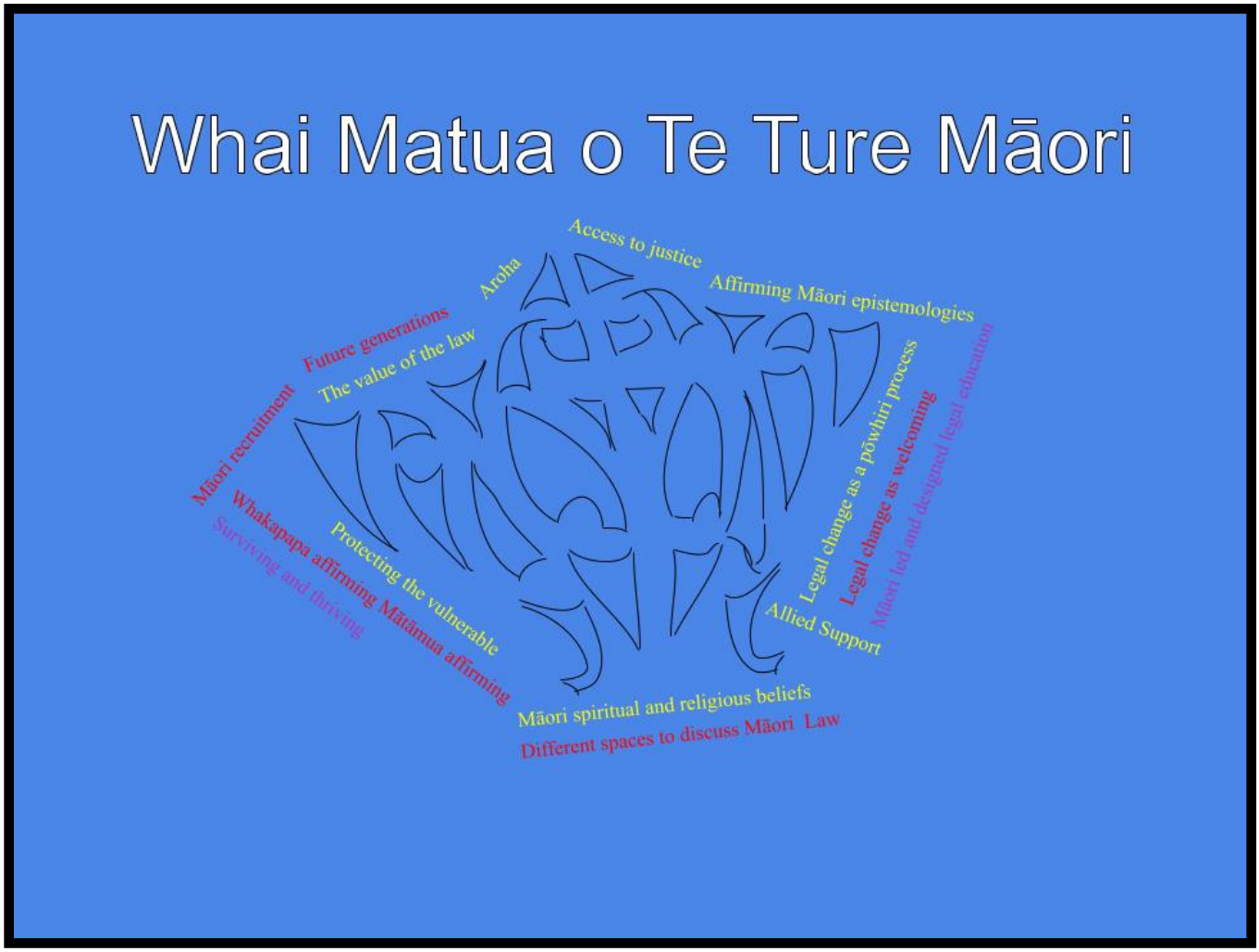

Figure 2. Whai Matua o Te Ture Māori

C. *Practical Implementation: How can this be done?*

I next address six requirements to practically implement Tikanga legal submissions.

1. *Six requirements for Māori Law to be before the Courts*

(a) Requirement #1: Action around Indigenising the Bachelor of Laws

I feel surprised if anyone thinks Tikanga is ready for complete integration into the courts because, unless you want to favour a minority of lawyers, who have Tikanga expertise, Indigenising the Bachelor of Laws is essential to level the playing field.[447]

(b) Requirement #2: A recording of Māori Law

The second requirement is a commitment to recording our law. Napoleon contributes for scholars who are hesitant to recording Indigenous law:[448]

> On the question of recording indigenous law, my starting place is that all law is recorded whether it is past or present, indigenous or non-indigenous, state law or non-state law, formal or informal. After all, law is public, it is collaborative, and people have to know what it is to apply it or challenge it.

From Napoleon's contribution, there emerges strong critiques of recording Indigenous law.[449] I interpret two of them within my topic. First, the depth and meaning of Tikanga could be lost when recording pūrākau and pakiwaitara.[450] Second, in recording law, a decontextualising of some pūrākau and pakiwaitara from their pre-Christian and pre-colonial, spiritual moorings may force Tikanga to comply with positivist tradition.[451] It then really matters who records this knowledge.

(c) Requirement #3: A commitment to internal negotiations

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[447] Ruru and others, above n 444, at 40, 42, 44 and 46.
[448] Val Napoleon "Did I Break It? Recording Indigenous (Customary) Law" (2019) 22(1) PELJ 2 at 15.
[449] Napoleon "Did I Break It?", above n 448, at 14-16.
[450] Napoleon "Did I Break It?", above n 448, at 14.
[451] Napoleon "Did I Break It?", above n 448, at 14.

The third requirement is internal negotiation, to address the depth, meaning and context of pūrākau- and pakiwaitara-based learning. This will need to be balanced against the available teaching time and resources of law schools.

(d) Requirement #4: A commitment to grappling with the naysayers

As a fourth requirement it must be accepted that some people will simply never be fans of such a shift. Here, academics need a reasoned response, where some disagree with a Bachelor of Laws trajectory to become more indigenised. Stephen Franks opposed this idea because:[452]

> Common law was created to take the tribal element out of justice. As the basis of a modern society, it has the advantage of being written down and universal.
>
> It deliberately takes social connections and matters of religion and belief out of the equation as much as possible. For a multicultural nation, Franks says that is particularly important.

I can see Franks' intent may be towards fairness and the rule of law. However, I doubt common law is universal.[453] The argument that Indigenous law is not written down is also contestable.[454]

I struggle to see how taking social connections out of the equation of "a multicultural nation",[455] makes sense.[456] Social connections are important,[457] in assisting courts who desire to engage communities. I interpret Franks wants courtrooms to be robotic and emotionless experiences.

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[452] John McCrone "New Zealand challenged by Māori academics to decolonise its legal training" *Stuff.co.nz* (online ed, 9 January 2021).
[453] See Rumbles "Seeing Law In Pre European Maori Society", above n 175.
[454] Woodhouse "Pūrākau: Embracing Our Indigneous Identity", above n 76.
[455] McCrone "New Zealand challenged by Māori academics", above n 452.
[456] See Jones "Indigenous Law/Stories", above n 367, at 123-127; Mead *Tikanga Māori*, above n 223, at 161-176.
[457] See Margreet Frieling and others *The Measurement of Social Connectedness and its Relationship to Wellbeing* (Ministry of Social Development, Literature Review Paper, December 2018) at 8-11.

The thought of our Courts becoming further disconnected from people's lives is undesirable to me.[458] Using criminal law to illustrate, ignorance of the law does not matter for criminal liability.[459] I advocate that the public needs to know things like this and connectedness with courts can aid in communication of the law to the public.

Kris Gledhill contributes that universities:[460]

> … have had to update their commercial law courses to take account of the digital age – chucking out older contract law to make space for the new concepts. No-one complains about that …

There needs to be ongoing discussions, between academics around how to engage with views against indigenisation. This is for two reasons: first, to explain indigenisation to students; and second, to respectfully address disapproving views. Three such views come to my mind.

First, the objection that there were (and are) two sources of primary law.[461] Second, the objection that a historical inquiry into what Tikanga once was, "is not necessary".[462] Third, the objection that Tikanga is so "ill defined" that it lacks certainty for use.[463] I now respond to these views.

This first objection is harmful. It is perhaps the same thinking that led people to think Māori were lawless savages in the first place.[464] I can accept Tikanga would be unlikely to have a binding force overseas.[465] The error results when there is a struggle to accept the Tikanga as law in New Zealand.

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[458] See Jeffrey Fagan and Victoria Malkin "Theorizing Community Justice Through Community Courts" (2003) 30(3) Fordham Urban Law J 897; Todd Clear and David Karp *The Community Justice Ideal: Preventing Crime and Achieving Justice* (Routledge, New York, 1999) at 38-39, 53-57, 129 and 147-149.

[459] Crimes Act 1961, s 25.

[460] McCrone "New Zealand challenged by Māori academics", above n 452.

[461] See A H McLintock (ed) *An Encyclopedia of New Zealand* (Adam & Charles Black, Wellington, 1966); compare Margaret Greville "Update: Access to New Zealand Law" (January 2019) GlobaLex <www.nyulawglobal.org/globalex/New_Zealand1.html> at 5.

[462] Law Commission *He Aha Te Tikanga*, above n 284, at 2. Compare at 4 and 5.

[463] "Is Tikanga Now the Law?" (4 June 2021) *Scoop* (online ed, 4 June 2021).

[464] See Phillip Matthews "'Cunning, deceitful savages': 200 years of Māori bad press" *Stuff.co.nz* (online ed, 3 June 2018).

[465] See Ryan Boswell "Māori claim to Sydney land dismissed by Australia's Federal Court" (6 November 2019) One News <www.tvnz.co.nz/one-news/new-zealand/m-ori-claim-sydney-land-dismissed-australias-federal-court>.

The second objection is ridiculous. Historical inquiry will always be necessary to ensure that lawyers increase and challenge our knowledge generally. Critically, New Zealand legal history is Māori history.[466] This objection then fails to realise historical inquiry underlies legal scholarship.[467]

The third objection is confusing. If lawyers keep asking general questions of Tikanga, we will then get general answers. However, even when Tikanga topics are contested,[468] they are not uncertain. Courts can discuss and if needed, make a careful factual assessment of which Tikanga applies.[469]

(e) Requirement #5: The need for ethical frameworks

As a fifth requirement, there needs to be thought around ethics, to distil minimal, recommended and ideal standards of pūrākau and pakiwaitara analysis. Then, sixthly, I can discuss access.

(f) Requirement #6: The need for accessibility

Napoleon has suggested that:[470]

> ...the importance of law that is understandable, accessible and applicable cannot be overstated if law is going to have any place or utility in the world. If it is not understandable, not accessible and not applicable, then perhaps it should not exist.

I submit Napoleon is describing, in one context, parallel challenges facing Tikanga. The public needs access and needs to know what is reliable. My response here is that lawyers could compile

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[466] Nepia Mahuika "New Zealand history is Maori history: Tikanga as the ethical foundation of historical scholarship In Aotearoa New Zealand" (2015) 49(1) NZJH 5.

[467] Earl Finbar Murphy "The Necessity of Policy Guides In Legal Historical Research" 12(2) J Legal Educ 207 at 207. See also Matthew J Festa "Applying a Usable Past: The Use of History in Law" (2008) 38 Seton Hall Law Rev 479 at 486-498, in particular "Critiques" at 498-499; Mark Tushnet "Interdisciplinary Legal Scholarship: The Case Of History-In-Law" (1996) 71(3) Chi-Kent L Rev 909.

[468] See Indiana Aroha Christbelle Shewen "Tahe: Tīkanga And Abortion" 4th ed (2020) NZWLJ 36 at 41.

[469] *Re Edwards (Te Whakatōhea (No 2))* [2021] NZHC 1025 at [130]-[131] and [311]-[331].

[470] Napoleon "Did I Break It?", above n 448, at 27.

several pūrākau and pakiwaitara into an online database as a collaborative project alongside willing iwi groups as a solution. I am also willing to give presentations. I next explore what application of my research could mean for courts in the future.

2. *The Courts facing a future of Pūrākau and Pakiwaitara*

I present three initial options for how courts could respond significantly to this research.

(a) Option One: Court based Tikanga expert roles are established

The Law Commission, reviewing the Property (Relationships) Act 1976, reported:[471]

> *Their Honours considered that at a minimum the court must appoint an expert to provide a report and that it would be preferable that an expert sit alongside the Family Court judge to hear and determine any question of tikanga.*

I agree with this perspective on Family Courts, from leveraging judicial resources.[472] Across our Courts as a short-term option, a Tikanga expert could sit alongside judges.

Alternatively, Tikanga expertise might come from judges themselves instead.

(b) Option Two: Judges are required to be Tikanga experts

I consider that this could be a mid- to long-term measure. I hold the view that a judge *must* have Tikanga expertise because from my research a lawyer who does not understand Tikanga does not understand the law. Tikanga is now considered vital,[473] so the standard of Tikanga knowledge is higher for judicial officers.

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[471] Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession*, above n 413, at 9.42 (emphasis added).
[472] Law Commission, above n 413, at 9.50.
[473] See Natalie Coates, Guest Zoom Hui Speaker "Tikanga and the Law" (Zoom Discussion, 19 May 2021).

Linda Te Aho once described how "New Zealand cases grappled with the notion of Māori customary law".[474] It appears that knowledge of Tikanga may be improving, professionally. However, grappling continues to be an appropriate descriptor.[475]

(c) Option Three: A Specialist Tikanga Court

My third option proposes Tikanga needs a new Court: Te Kōti Pūrākau. Justice Williams notes:[476]

> Whether specialised Māori Courts can be taken up on a national scale is a big question but it is a question that should be asked

I agree. The Supreme Court was never established to be a court of Tikanga experts.[477] Te Kōti Pūrākau could be established this way and free-standing to the current four-tier hierarchy.

3. *Looking ahead to the next chapter*

This chapter highlighted the valuable contributions pūrākau and pakiwaitara can make to the body of law. I outlined how pūrākau and pakiwaitara are useful in learning about the law. I then considered some implications of Tikanga in the state legal system and ideas around practical implementation. Critical to this chapter, Whai Matua o Te Ture Māori, as a symbolic stingray and set of objects underlying Māori law, can help guide the increasing dynamism of law in the future.

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[474] Linda Te Aho "Tikanga Maori, historical context and the interface with Pakeha law in Aotearoa/New Zealand" (2007) 10 Yearbook of New Zealand Jurisprudence 10 at 10 and 12.

[475] See *Ellis v R*, above n 206; *Witehira v Ram* [2020] NZHC 2326; *Reedy v Atkins* (2019) 76 Takitimu MB 54 (76 TKT 54) at [16]; *Tukaki v Commonwealth of Australia* [2018] NZSC 109 at [4] and [5]; *Tukaki v District Court of Tauranga* [2017] NZHC 843 at [70] and [71]. See *Oneroa Hill v Department of Corrections* [2018] NZHC 163 at [7], [12], [15] and [32]; *Tuwhangai v Police* [2020] NZHC 3428 at [36] to [38]; *R v Hura* [2018] NZHC 3347 at [39]; *R v Chase* [2018] NZHC 3332 at [50], [51], [54] and [59]; *R v Te Kani* [2018] NZHC 3134 at [30] and [70]; *R v Hegotule* [2018] NZHC 2790 at [9] and [11]; *R v Parker* [2018] NZHC 2035 at [22]-[24] and [31]; *Taylor v R* [2018] NZHC 688 at [9] - [11] and [19]. Compare *R v Heke* [2018] NZHC 3168 at [8] and [11] to [14], [24], [25] and [27]; *R v Karekare* [2018] NZHC 1364 at [11], [12] and [30]. See *R v Harrison* [2018] NZDC 14886 at [29]; *R v Hurrell* [2018] NZHC 2505 at [40]-[52]; *Police v ES* [2018] NZYC 574 at [15], [16] and [27]. See *Nikau v Nikau* [2018] NZHC 1862 at [18] - [23] and [63] - [65].

[476] Justice Sir Joseph Williams "Justice Joe Williams: The future has never been brighter" LawTalk (online ed, 6 October 2011).

[477] Supreme Court Act 2003, s 3.

This leads into the next chapter Kotahi Te Wānanga, which anticipates there are risks to inclusion of pūrākau and pakiwaitara that need mitigation. There, I propose my third model, Ātea Whakaaro.

VIII. *Kotahi Te Wānanga*

"Nā Kotahi Te Kōrero, Kotahi Te Wānanga." - Whare Wānanga[478]

Unique learning within Kotahi Te Wānanga now begins. I understand wānanga was a concept born here. Kotahi Te Wānanga indicates a third energy transfer.

All things have whakapapa; even ideas.[479] Engaging in wānanga is metaphorically planting seeds. Here, the seed of Te Ao Mārama and time itself was established.[480]

In this chapter, the key risks of including pūrākau and pakiwaitara in legal submissions are discussed to further fulfil the second purpose of this thesis. This research further enables valuable contributions from pūrākau and pakiwaitara earlier in Kotahi Te Kōrero, to be carefully realised.

This chapter promotes story ethics in canvassing the ideas of leading Indigenous scholars. I then propose my new ethics-focused model for story analysis: Ātea Whakaaro. This model enables lawyers, students and judges to start analysing pūrākau and pakiwaitara as legal precedents.

I now enter the wānanga. I engage my tūpuna and prepare for the return to the deepest learning of our very existence. You read here not just a thesis, but a child of the first wānanga. A child of the realm of endless learning. It is done. The fourth layer is laid.

A. *Key risks and mitigation*

Robert Merton theorised:[481]

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[478] "From The Intelligible Sound, came Learning" - Highest House Of Learning

[479] See Lesley Rameka "Te Ira Atua: The spiritual spark of the child" (2015) 4(2) He Kupu 82 at 84.

[480] See Te Ahukaramū Charles Royal Te Ahukaramū Charles Royal "Te Ao Mārama – the natural world - The traditional Māori world view" (24 September 2007) Te Ara Encyclopedia of New Zealand <teara.govt.nz/en/te-ao-marama-the-natural-world/page-1>.

[481] Robert K Merton "The Unanticipated Consequences of Purposive Social Action" (1936) 1(6) ASR 894 at 894.

> … the problem of the unanticipated consequences of purposive action has been treated by virtually every substantial contributor to the long history of social thought.

Humans cannot control or account for every conceivable outcome.[482] When thinking about the intended application of my research within legal submissions, I consider unintended consequences.[483] This reflects one best practice within Kaupapa Māori methodology.[484]

Consequently, I next identify five foreseeable risks if my research is applied, as intended and I proffer ideas to mitigate them. This leads me to the first risk – that of further colonisation.

1. *Risk #1 Further Colonisation: Ao Mārama versus Te Pō*

Claiming that non-Māori are an ongoing threat to Tikanga,[485] disregards non-Māori allied support for Tikanga in the legal system. I appreciate that some believe this because judges denied Māori custom,[486] Māori asserting tino rangatiratanga[487] and brought problems with the rule of law.[488]

I accept that all lawyers ought to be careful, realising that even well-intentioned efforts could colonise Tikanga further.[489] Helping me articulate this first risk, Annette Sykes shares:[490]

> Indeed, the very basic question "What is tikanga?" requires some consideration of that dispossession, because colonisation has never just been about the now acknowledged

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[482] See Mark Manson "The Law of Unintended Consequences" MM.NET <markmanson.net/unintended-consequences>.

[483] See "The Law of Unintended Consequences: Shakespeare, Cobra Breeding, and a Tower in Pisa" (February 2018) *fs* <fs.blog/2018/02/unintended-consequences/>.

[484] Maui Hudson *Te Ara Tika Guidelines for Māori research ethics: A framework for researchers and ethics committee members* (Health Research Council, 2010) at 10.

[485] See John Reid and others *The Colonising Environment: An Aetiology Of The Trauma Of Settler Colonisation and Land Alienation On Ngāi Tahu Whānau* (Ngāi Tahu Research Centre, University of Canterbury 2017) at 15-17.

[486] Joseph "Re-Creating Legal Space", above n 351.

[487] See *R v P* (HC Auckland CRI 2005-063-1213 9 August 2006 Priestly J). Compare *Police v Ionatana* [2017] WSSC 50.

[488] See the literature review at pages 10-11 that was prepared for Madeleine Ashton-Martyn, Laura O'Connell Rapira *They're Our Whānau* (Action Station, 3 October 2018).

[489] See *They're Our Whānau*, above n 488, at 4, 6-8 and 10-12. See also "Justice system a tool of colonisation, says research report" (4 October 2018) NZLS <www.lawsociety.org.nz/news/legal-news/justice-system-a-tool-of-colonisation-says-research-report/>.

[490] Sykes "The myth of tikanga in the Pākehā law", above n 360 (emphasis added, bold in original).

> confiscations of land or the depredations of war waged against iwi and hapū. It has also inevitably involved *the redefining and misrepresentation of Māori knowledge, law, and philosophy...*
>
> I doubt without my own grounding in tikanga I would have survived my participation in what is still *an institution built on colonial values and practices*, where its decision-makers still hold the power to decide whether or not to permit Māori to be an active element and, if so, on what terms and how far…
>
> Let me be blunt. This is a system that really hates us…
>
> Now to ***Ellis***. We need to ask why we had to wait for a Pākehā man who was charged in an extreme case involving allegations of sexual violence against the most vulnerable of our communities to argue the need for restorative justice. There were Māori cases where it could have been as easily argued — Rua [Kēnana], Mokomoko, Teina Pora, or David Tamihere spring to mind…
>
> A number of other cases reinforce my thinking that *the myth of tikanga in Pākehā law is just window dressing*.

These words identify a risk of further colonisation if Tikanga exists within the current system. Sykes reminds lawyers the Courts are "built on colonial values and practices" and to think critically about courts deciding "whether or not to permit Māori to be an active element."[491] I still see a system that hates us,[492] that must do more to become ready for Tikanga.[493]

This is complicated where some Māori have legitimised the application of British law.[494] This supported a driving "colonial policy" to individualise Māori society,[495] where Tikanga can be utilised as court window dressing.

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[491] Sykes "The myth of tikanga in the Pākehā law", above n 360.

[492] Sacha McMeeking "Māori and Justice" in Jarrod Gilbert and Greg Newbold (eds) *Criminal Justice: A New Zealand* Introduction (Auckland University Press, Auckland, 2017) 176; Peter Gluckman *Using Evidence to Build a Better Justice System: The Challenge of Rising Prison Costs* (Office of the Prime Minister's Chief Science Advisor, March 2018) at 19; Eugene Bingham and Paula Penfold "New Zealand's racist justice system", above n 39; Bronwyn Morrison *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (Ministry of Justice, Research Report, 2009); Craig Linkhorn "Criminal justice -Te Uepū Hāpai I te Ora – He Waka Roimata" (2019) Maori LR; "Criminal Justice Summit Highlights #1" (21 August 2018) YouTube <www.youtube.com/watch?v=3Brd2HY5lCI>.

[493] See Dale Husband "Julia Whaipooti: Māorifying prisons isn't the solution to too many Māori in prison" (15 April 2018) E-Tangata <e-tangata.co.nz/korero/maorifying-prisons-isnt-the-solution-to-too-many-maori-in-prison/>. See also Anaru Erueti "Conceptualising Indigenous Rights in Aotearoa New Zealand" (2017) 27 NZULR 715 at 740.

[494] Emmet Maclaurin "The Application of the British Criminal Law Towards Māori During the Early Colonial Period" (LLB (Hons) Dissertation, University of Otago, 2015) at 45-47.

[495] Maclaurin "The Application of the British Criminal Law Towards Māori", above n 494, at 50.

When courts do not regularly call for legal submissions on Tikanga, this creates the impression that Tikanga is only to be rolled out for high-profile appellate cases.

2. *Mitigation: Nau Mai Te Ao Mārama*

Helping mitigate this risk, Chief District Court Judge Hēmi Taumaunu shared his vision that:[496]

> Under the Te Ao Mārama model I expect that the infusion of *tikanga and te reo will be explored with local iwi* in each court location. A one size fits all approach will not be appropriate …
>
> Within the physical space itself, courtrooms could be reimagined as a community and participant centred space that reflects tikanga …
>
> …places for service providers to be located to provide access to wrap-around services and *opportunities for healing*, and as places that encourage the supportive presence of whānau…
>
> Many initiatives have recognised that not all offending necessarily must, or even should, be resolved in the formal court system…
>
> *The successful introduction of the Te Ao Mārama model will require a cultural shift.* Focus will be centred on the people who are affected by the business of the court, understanding their whakapapa, their upbringing and the circumstances that have led them into the justice system.

Focusing on these comments, three ideas centre upon cultural shift from the inside,[497] to reduce the likelihood of further colonisation.[498]

First, Tikanga and te reo exploration with local iwi, helps prepare spaces that are less likely to misrepresent Māori knowledge, law and philosophy. An exploration of this nature creates a

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[496] Hēmi Taumaunu, Chief District Court Judge of New Zealand "Mai te pō ki te ao mārama" (Norris Ward McKinnon Annual Lecture 2020, Waikato Law School, Hamilton, 11 November 2020) (emphasis added).
[497] See John McCrone "A punitive nation: NZ contemplates radical overhaul of its justice system" *Stuff.co.nz* (online ed, 29 February 2020). Compare Waitangi Tribunal *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at x. See also Frank Neil "We can learn from traditional Māori practices" LawTalk (online ed, 15 September 2020).
[498] See Phillip Matthews "Mind your language: the backlash against the te reo revival" *Stuff.co.nz* (online ed, 11 June 2021).

meaningful and localised accountability of courts to iwi.[499] This is critical where effort to normalise Tikanga could unintentionally deter iwi and hapū level nation building.[500]

This is echoed in Napoleon's view that:[501]

> Recovering and revitalizing Indigenous legal traditions is fundamentally about reclaiming and rebuilding practices of Indigenous citizenry, collective deliberation, and public reasoning processes.... so they can critically and vigorously interact in a more symmetrical way with other legal traditions...

Here, courts can offer to assist with iwi and hapū nation-building, to keep relationships centred on mutual benefit and revitalisation.[502] New ideas are then a result of meaningful relationships.[503]

Second, court spaces can be reimagined.[504] I submit localised iwi relationships would assist with exploring the various practices of rūnanga.[505] Key learnings on rūnanga location, designated seating, choice of space, structure/process, decision-making and outcomes, can inform future courts.

Other alternatives to investigate include: (a) utilisation of Marae,[506] (b) expanding the Rangatahi Court jurisdiction, (c) Māori Mediation[507] and (d) the not well documented Paa Kooti process.

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[499] See *Iwi Led Crime Prevention Plan* (Te Rūnanga o Ngāti Whātua, September 2011) at 39-40.

[500] See Parekura Horomia "Nation Building and Māori Development" (Nation Building and Māori Development Conference, Hamilton, 30 August 2020); Jason Mika "Making Māori Independence A Legitimate Policy Objective" (MPP Research Paper, Victoria University, 2002) at 9, 19-23.

[501] Napoleon and Friedland "An Inside Job", above, n 385, at 748.

[502] See *Iwi Led Crime Prevention Plan*, above n 499, at 40.

[503] See Dale Husband "Khylee Quince: Seeing beyond Pākehā law" (4 July 2020) E-Tangata <e-tangata.co.nz/korero/khylee-quince-seeing-beyond-pakeha-law/>. See Emily Stannard "Therapeutic Jurisprudence in Aotearoa New Zealand's Family Justice System" (LLM Thesis, University of Otago, 2019) at 81.

[504] See Buren "What a world without prisons could look like", above n 417.

[505] See Benton, Frame and Meredith *Te Mātāpunenga*, above n 47, at 343-362.

[506] John Te Piki Kotuku Bennett "Marae: A whakapapa of the Maori Marae" (PhD Thesis, University of Canterbury, 2007) at 145-152.

[507] Te Reo O Te Omeka Hau "To What Extent are Principles of Kaupapa Māori Reflected in the Current Practices of Māori Mediators in Aotearoa?" (MBS Thesis, Massey University, 2018) at 113-119.

Third, courts must incorporate more alternative resolution practices and theories.[508] Tikanga theories and practices could lead to offending being resolved outside the formal court system.[509]

Criminal Courts are still punitive first, then rehabilitative second,[510] in reflecting colonial values and retributive culture.[511] These ideas originate from an ancient notion of *lex talionis* (a law of retaliation).[512] Here, more Tikanga practices and theories, disrupts the courts' colonial values base.

3. *Risk #2 Misunderstanding: Multi-disciplinary Tools versus Only Legal Precedents*

There is a second risk that pūrākau and pakiwaitara will become seen only as legal precedents. I observe the comments of Aroha Yates-Smith that:[513]

> … the Maori people's bible is preserved in minds… there were so many beliefs not all could be collected...

From this quote a starting point of humility must be how everyone approaches pūrākau and pakiwaitara, for they are so much more than legal precedents. Yates-Smith reminds us how:[514]

> … many women experiencing a surge of courage and an increase in [self-esteem] on hearing about the supernatural beginnings of Maori women…

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[508] See Kay Saville-Smith and Ruth Fraser *Alternative Dispute Resolution: General Civil Cases* (Ministry of Justice, June 2004) at 25-32; Rhianna Eve Morar "Kia Whakatōmuri Te Haere Whakamua: Implementing Tikanga Māori as the Framework for Overlapping Claims Disputes" (2021) 52 VUWLR 197 at 213-214; P D Mahoney, former Principal Family Court Judge "Private Settlement - Public Justice?" (New Zealand Institute for Dispute Resolution Colloquium, 29 June 1999); William Steele "Judicial Specialisation in a Generalist Jurisdiction: Is Commercial Specialisation Within The High Court Justified?" 46(2) VUWLR 307 at 313-314 and 322-324; Charlotte Austin *An introduction to online dispute resolution (ODR) and its benefits and drawbacks* (Ministry of Business, Innovation & Employment, February 2017) at 10-27.

[509] See *Solicitor-General's Prosecution Guidelines*, above n 140, at 5.6.

[510] See Toki *Indigenous courts, self-determination and criminal justice*, above n 190, at 202.

[511] Judy Paulin, Wendy Searle and Trish Knaggs *Attitudes to Crime and Punishment: A New Zealand Study* (Ministry of Justice, December 2003) at 64. See also Roscoe Pound "Inherent and Acquired Difficulties on the Administration of Punitive Justice" (1907) 4 Am Political Sci Rev 222 at 226-227.

[512] See Exodus 21:23-25, Leviticus 24:19-20 and Deuteronomy 19:18-21; Allan Chester Johnson, Paul Robinson Coleman-Norton and Frank Card Bourne *Ancient Roman Statutes: A Translation with Introduction, Commentary, Glossary, and Index* (University of Texas Press, Texas, 1961) at 9-18.

[513] See Yates-Smith "Hine! E Hine!", above n 393, at n 2.

[514] See Yates-Smith, above n 393, at 6.

This quote reinforces that pūrākau and pakiwaitara can heal and connect people. This evidences Indigenous thinking within therapeutic jurisprudence.[515] It may be that pūrākau and pakiwaitara could become a means of effecting Indigenous therapeutic jurisprudence.

The concept of Indigenous therapeutic jurisprudence can be explained as a space of "strong parallels with Indigenous culture",[516] where "there is clear enthusiasm for problem-solving courts"[517], an "importance of process"[518] (how justice is arrived at)[519] and, which is "grounded in the needs expressed by the community rather than imposed "top down"[520] as self-determination.

My view of Māori therapeutic jurisprudence is then taking patient, kind and informed actions at the intersect of whānau, community and courts that perseveres in addressing causes of offending, especially colonisation. When whānau are safe and find peace, many courts become unnecessary.

This should grab court attention. I have seen first-hand how in rehabilitative programmes, pūrākau and pakiwaitara can blend with therapeutic models.[521] Lawyers must remember pūrākau and pakiwaitara have many spaces that they can traverse which:[522]

> … provides depth to an idea, inspires or issues a caution, and can not only encourage an intellectual response but also provoke emotional, spiritual and physical reactions and should stimulate reflective thinking.

Here, ongoing education is needed.

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[515] See Stannard "Therapeutic Jurisprudence", above n 503, at 77 and 136. See also Bonnie Summer and Melanie Reid "Marae Standoff: A sense of hope" *Newsroom* (online ed, 23 July 2021).
[516] Erin S Mackay "Therapeutic jurisprudence: A just framework for Indigenous victim/survivors of sexual violence?" (PhD Thesis, University of New South Wales, 2013) at 71.
[517] Mackay, above n 516, at 72.
[518] Mackay, above n 516, at 74.
[519] Mackay, above n 516, at 74.
[520] Mackay, above n 516, at 75.
[521] I remember this was a part of programme design when I worked for Corrections.
[522] Felicity Ware, Mary Breheny and Margaret Forster (2018) "Kaupapa Kōrero: A Māori cultural approach to narrative inquiry" 14(1) Altern J 45 at 48.

4. *Mitigation: Ongoing Education*

Ongoing education focusing on pūrākau and pakiwaitara needs to go beyond legal analysis.[523] I anticipate some lawyers will be displeased, where it is difficult already to meet annual continuing professional development requirements alongside legal practice demands.[524] However an offering ensures wherever a lawyer attains their Bachelor of Laws, does not unfairly disadvantage them.

5. *Risk #3 Misapplication: Story Use versus Story Abuse*

If you accept Justice Williams' analogy that whakapapa is the sword and shield,[525] it could then be said pūrākau and pakiwaitara are additional weapons for fighting a case. It makes more sense to me to view them as tools to build a case and assist the Court first. Following that, pūrākau and pakiwaitara can then be respectively viewed as an adversarial taiaha and kahupeka.

It is possible that through introducing pūrākau and pakiwaitara as Tikanga legal precedents, they could be misused by judges. I reflect here upon the therapeutic space of Te Kōti Whakapiki Wairua, where a Judge shamefully asked (in terms of exiting someone), "Do we want to cut him loose because of the publicity?"[526] This highlights issues with unregulated judicial discretion.[527]

I am anticipating a higher-level tension between the need for immediate use against a need for long-term protection from the abuse that can occur where judicial discretion goes unregulated. I anticipate that tension where, pūrākau and pakiwaitara could never be used any way that a lawyer or judge likes. This should be unsurprising.[528] The stories need ethics to address this tension.

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[523] See Stannard, "Therapeutic Jurisprudence in Aotearoa New Zealand's Family Justice System", above n 503, at 78 and 108. See Hauiti Hakopa "Pūrākau: The Sacred Geographies Of Belonging" (PhD Thesis, Te Whare Wānanga o Awanuiārangi, 2019) at 34-41.

[524] See Kristy McDonald "What's wrong with compulsory CLE?" LawTalk (online ed, 16 March 2020).

[525] Williams "Lex Aotearoa", above n 155, at 4.

[526] See Carr Toni Carr "Governing Addiction: The Alcohol and Other Drug Treatment Court In New Zealand" (PhD Thesis, Victoria University, 2020), at 185.

[527] See Carr "Governing Addiction", above n 526, at 175-213 and 217.

[528] Chris Gallavin "What if… More people could understand the law?" (1 May 2015) YouTube <www.youtube.com/watch?v=hKMdCqMqyBk>.

6. *Mitigation: Ethics for story work*

Ethics resurfaces here as a mitigating factor where according to the area of law in question, some pūrākau or pakiwaitara will be more appropriate. I have never encountered one pūrākau, pakiwaitara, case or statute that answers all imaginable legal questions.

I suggest story-specific legal ethics are needed. I later propose in this chapter, an ethics model: Ātea Whakaaro. I encourage the viewing pūrākau and pakiwaitara in connection and yet, accept all legal analysis is personalised and tailored analysis. This leads into the fourth risk.

7. *Risk #4 Misinterpretation: Genuine Complexity versus Popular Simplicity*

Misinterpretation of pūrākau and pakiwaitara is troubling. Here, I often encounter simplistic understandings such as the characterisation of Tūmatauenga as the "ugly faced Māori god of war".[529] An atua can have popular associations,[530] however, atua are not one-dimensional.

I share one pūrākau, explaining his name Tū-whakamana-tamaiti,[531] which goes beyond Tūmatauenga's ugly-faced and war faring stereotype below.

Tū and Taiaha

Tūmatauenga, which can translate as Tū who was born headfirst or Tū who was distinct from his siblings is an atua of many things. He certainly was feared for his skill in combat and battle strategy by all his siblings. Tū was handsome and is best known for doing what is necessary.

Even hearing many of his other names … Tū-kā-riri, Tū-te-ngaehe, Tū-tawake, Tū-whakamoana-ariki, Tū-kai-taua, Tū-kai-tangata ... a problem arises. Tū is lesser known as Tū-whakamana-tamaiti, for his aroha towards his nephew Taiaha.

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[529] Hirini George Reedy "Te Tohu-A-Tuu (The Sign Of Tuu) A Study Of The Warrior Arts Of The Māori" (MPhil Thesis, Massey University, 1996) at ii, 31 and 32.
[530] See Mahi Tahi Media "Te Kōkōmuka Episode 18 - Te ao wairua, the seen and unseen" (25 November 2020) YouTube <www.youtube.com/watch?v=LLBp9iCr4pc>.
[531] Tū who imbues children with pride.

Taiaha was a baby son of Rongomaraeroa (Rongo) who you may know as the atua of peace. On being born, Rongo was disgusted at the appearance of what he thought was a very ugly child. "Taiaha" was the name given to capture the shock of Rongo on seeing his son. Here was a son with two faces, two eyes, two tongues and so on.

Consequently, Rongo abandoned Taiaha shortly after birth. He would not raise him. Rongo refused to be associated with something he considered so ugly. Of all his siblings, Tūmatauenga, who was fearsome and handsome to behold, was extremely upset that his younger brother Rongo did this. Tū, motivated by aroha for his nephew, decided that day he would raise Taiaha. Tū knew someone had to intervene, because from experience Rongo never changed his mind about such things.

Tū made sure to encourage Taiaha every day. Tū saw potential for his nephew where Rongo had only felt disgust. Taiaha learned from Tū the elements of surprise, balance and distraction.

With time Tū even took Taiaha to meet his father, because Tū knew that Rongo would not dare refuse them both entry into his house. Rongo was still disgusted, but even he had to admit he was surprised. This is because Taiaha had grown up strong, fearsome, filled with pride and it showed. His name Taiaha had literally taken upon itself a "fresh breath" of meaning.

Yet even then Rongo started saying something unpleasant, "Kāre he tama...".[532] Tū cutting him off, replied, "Kī mai koe... he aroha, ka tupumana te tama nei."[533] Rongo went silent before his older brother Tū. Taiaha then left the house of Rongo with Tū.

Since then, Taiaha has always stayed close to Tū and upholds his uncle's honour. This is one origin story of the taiaha and an explanation for the continued use of taiaha as part of wero during pōwhiri. There, I see an uncle and a nephew side by side once more.

[532] This is no boy...
[533] So you say … this boy grew into his mana from love.

So beyond hearing different stories, a next key to mitigating misinterpretation is recognising that "less attention [is] paid to how Indigenist narratives are best analysed."[534] What then matters most is the analysis process lawyers employ (and how it is informed).

8. *Mitigation: A keen focus on story analysis processes*

The dilemma appears to be that "analysis processes are by nature Western".[535] Countering that, analysis processes could be Indigenous processes or a set of Indigenous principles. I later propose Ātea Whakaaro to realise the possibility of such a process. I suggest using Māori-made tools, blueprints and aids to unlock and draw out the law from pūrākau and pakiwaitara in a culturally authentic way.

Devices that allow for a degree of consistency in approach, but which are not rigidly prescriptive are in my view the gold standard, because they guide lawyers into personalised analysis.

9. *Risk #5 Analysis Paralysis: Using Tools versus Ignoring Tools*

Robert Joseph observes:[536]

> While tikanga Mäori customary law has now re-entered the legal system, there is evidence that the system may not yet have the tools, capacity, or to have developed a sufficiently informed approach to dealing appropriately with those customary laws.

The key risk was then a lack of tools, capacity and approaches towards appropriately dealing with Tikanga. Where more tools keep emerging to address this, each lawyer must decide whether to use them or to ignore them, in applying the common law approach.[537]

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[534] Robyn Amy Sandri "Weaving the past into the present: Indigenous stories of education across generations" (PhD thesis, Queensland University of Technology, 2013) at 101.
[535] Sandri "Weaving the past", above n 534, at 102.
[536] Joseph "Re-Creating Legal Space", above n 351, at 96.
[537] *Takamore v Clarke* [2011], above n 122, at [122]-[123].

10. *Mitigation: Using what is available now, but welcoming improvement*

Many tools are emerging elsewhere,[538] alongside Te Whānau Ture,[539] Whai Matua o Te Ture Māori[540] and later, Ātea Whakaaro.[541] My three tools take further steps toward a sufficiently informed approach for dealing with Tikanga as law, from the proposed:

(1) Relationships affirmed by Te Whānau Ture;
(2) Objects affirmed by Whai Matua o Te Ture Māori; and
(3) Ethical analysis of stories enabled by Ātea Whakaaro.

B. *Moving towards a model for ethical story interpretation*

1. *Existing Models*

In moving towards my proposed model for story interpretation, I suggest that models for grappling with Indigenous stories fall into two categories.

(a) Category 1: Analysis Models

First, there are models for analysis. This category includes Jones' Kōrero Analysis model[542] and similar adapted case briefing methodologies from overseas.[543] This category is focused on

[538] Natalie Coates has spoken of 'He Whariki' and 'Kotahi Te Kohao' with reference to Tongikura. Carwyn Jones has provided the Kōrero Analysis Framework, with reference to a set of quasi-prescribed questions.
[539] Above at fig 1.
[540] Above at fig 2.
[541] Below at fig 3.
[542] Jones "Indigenous Law/Stories", above n 367, at 127.
[543] See Hadley Louise Friedland "Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada" (PhD Thesis, University of Alberta, 2016) at 41-49. See also Friedland and Napoleon "Gathering The Threads: Developing A Methodology For Researching And Rebuilding Indigenous Legal Traditions", above n 386, at 23-24. See also Rebecca Johnson and Lori Groft "Learning Indigenous Law: Reflections On Working With Inuit Stories" (2017) 2(2) LLJ 117 at 125 and 126-131.

"developing the literacy (familiarity with stories, practices of engagement, contexts, legal theories)".[544] Typically, this is made up of prescribed questions to guide thought processes.

This category also includes Te-āta-tū Pūrākau: A Five Step Data Analysis Method[545] and codification models for oral tradition.[546] The focus being placement of stories into frameworks, to increase overall coherence and ease of understanding; referencing systems of collated oral data.

(b) Category 2: Retelling Models

Second, there are models for retelling,[547] which include models for presenting[548] and re-presenting.[549] It could be argued that even a perfect recitation, is strictly a retelling. However, these models focus on how to effectively convey pūrākau and pakiwaitara to a modern audience through creative mediums; kapa haka, art, literature, film, music and digital media.

2. *My Approach to a model begins*

I believe most of these models lack a focus on story ethics and analysis for legal learning and legal practice. However, these categories allow for readers to place my later discussion of an ethical story work model from Archibald,[550] as a retelling model.

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[544] Johnson and Groft "Learning Indigenous Law", above n 543, at 125.

[545] Alayne Mikahere-Hall "Tūhono Māori: A Research Study of Attachment from an Indigenous Māori Perspective" (2019) 23(1) Ata 61 at 71-72. See also Alayne Hall "An Indigenous Kaupapa Māori Approach: Mother's Experiences of Partner Violence and the Nurturing of Affectional Bonds with Tamariki" (PhD Thesis, Auckland University of Technology, 2015) at 160-165.

[546] Eruera Ropata Prendergast-Tarena "He Atua, He Tipua, He Takata Rānei: The Dynamics of Change on South Island Māori Oral Traditions" (MA in Māori Thesis, University of Canterbury, 2008) at 20 and 22.

[547] Witi Ihimaera and Whiti Hereaka (eds) *Pūrākau: Māori Myths Retold by Māori Writers* (Illustrated ed, Penguin Random House, Auckland, 2019).

[548] Linda Tuhiwai Smith "Interview with a tree" in Leonie Pihama and Cheryl Waerea-I-te-rangi Smith (eds) *Fisheries & commodifying iwi: Economics, politics & colonisation Volume Three* (IRI/Moko Productions, Auckland 1998) 73.

[549] See the Tokotoko Form in Ihimaera and Hereaka *Pūrākau: Māori Myths Retold by Māori Writers*, above n 547. See "Pūrākau" Māori Television <www.maoritelevision.com/shows/purakau>; "Sanctuary" Āhuru Mōwai <www.sanctuary.maori.nz/>.

[550] Jo-Ann Archibald "Coyote learns to make a storybasket: The place of First Nations stories in Education" (PhD in Education Thesis, Simon Fraser University, 1997).

Before that discussion, I briefly engage two thinkers, John Borrows and Jackson.

(a) John Borrows: Indigenous legal ethics today and tomorrow

First, John Borrows describes Indigenous legal ethics as:[551]

(1) Promotion of the interests of the state;
(2) Serving the cause of justice;
(3) Maintaining the authority and dignity of the courts;
(4) Being faithful to clients;
(5) Being candid and faithful with other lawyers; and
(6) Demonstrating personal integrity.

I submit this list is similar to our Conduct and Client Care Rules.[552] It should be comforting to know that western and Indigenous conceptions of lawyering ethics are not chasmic in their differences. I am hopeful conceptual differences become points of learning for lawyers.

Following on from Borrows, Jackson has a description to present us.

(b) Moana Jackson: A tradition of cosmos inspired creativity

Second, Moana Jackson describes how as Māori:[553]

> Wherever we went, history and the soft hands of the land kept us close. Distance was only as relative as the deep pause between sleeping and waking, and even the swirling mass of Te Kore that hung beyond the stars was only a mystery we could tell in stories where the horizon pulled at the changing tides. The night might sometimes be a long restlessness till dawn, but light still shone clear to the whatihua, the far universe where origins were forged and new thoughts flourished.
>
> So while we learned to be at home and wondered what Papatūānuku might have to say, we developed an intellectual tradition in which the world around us was as ordinary and extraordinary as tapu.

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[551] John Borrows "How Indigenous Ethics are Relevant to the Practice of Law today" (30 October 2020) YouTube <www.youtube.com/watch?v=oOr2dN0BAvE>.

[552] Conduct and Client Care Rules 2008.

[553] Jackson "Moana Jackson: Decolonisation and the stories in the land", above n 333.

> In its cleansing waters, we learned that time and relationships moved with each other across the land like a river finding the sea. Whakapapa became a series of never-ending beginnings where the nature and effect of relationships crossed from the past into the future, through what Patricia Grace has called the "now-time".
>
> In that intimacy of time and knowledge and place, that sense of big-yet-small islandness, we lived the very human lives of people seeking the consolations and winds of home — the hau kāinga …
>
> In this intellectual tradition we learned that memory and hope may sometimes seem fanciful but they can also lead to new realities. We learned of our very human fallibility, and understood that, when conflict arose or relationships were damaged, resolution would need to be found. Like all cultures, we therefore developed a jural tradition or tikanga, which Ani Mikaere has described as the "first law of Aotearoa".

I find this illuminating, because earlier I encountered "that analysis processes are by nature Western."[554] It is understandable how this view might be reached, from the outside-in perspective of positivist academia.[555] Comparably, Māori methods for analysing and understanding Māori law view tūpuna intellectual traditions inside-out, that presupposes a whakapapa layering to the world.[556] All pūrākau and pakiwaitara retain and reflect that layering.

3. *An example of an ethics model – Jo Ann Archibald*

I now summarise Archibald's retelling model I mentioned earlier,[557] where the ethics focus on:

(1) Permission: Seeking permission from storyteller/s (for example, calls, letters and in-person visits);[558]

(2) Protocol: processes to ensure cultural sensitivity, (for example, being subject to community scrutiny);[559]

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[554] Sandri "Weaving the past", above n 534, at 102.

[555] Smith *Decolonizing Methodologies*, above n 9, at 30-34.

[556] See Proceedings of the Mātauranga Taketake: Traditional Knowledge Conference (Ngā Pae o te Māramatanga, 2007) at 213-219.

[557] Archibald "Coyote learns to make a storybasket", above n 550, at 173.

[558] Archibald "Coyote learns to make a storybasket", above n 550, at 174.

[559] Archibald "Coyote learns to make a storybasket", above n 550, at 174-175.

(3) Verification: processes for the ongoing use of stories (for example, signing off the presentation of stories);[560] and
(4) Copyright: retention of copyright by the storyteller/s (for example, acknowledgements).[561]

(a) Discussing Archibald's model

This model was never built with legal story work in mind.[562] I focus on this model because it distils principles that apply to all story work, where:[563]

> Patience and trust are essential for preparing to listen to stories. Listening involves more than just using the auditory sense. Listening encompasses visualising the characters and their actions and letting the emotions surface. Some say one should listen with three ears "two on our head and one in our heart.

This guidance echoes Smith's thinking that "[i]n the end, ethics are really about relationships and the nature of relationships".[564] These comments are relevant, because pūrākau and pakiwaitara require relationships to be formed. Academics must think about who can form those relationships.

(b) Thinking more about Verification

From Archibald's model, verification stands out to me. The key issues here involved using published and archived stories,[565] keeping the spirit of the story alive[566] and how non-first nations teachers can ethically tell first nation stories.[567] I anticipate these issues will re-emerge in law.

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[560] Archibald "Coyote learns to make a storybasket", above n 550, at 175-177.
[561] Archibald, above n 550, at 177-178.
[562] See Jo-Ann Archibald "Dr. Jo-Ann Archibald – On Indigenous stories and their framework" (2012) Vimeo <vimeo.com/46993624>.
[563] Archibald "Coyote learns to make a storybasket", above n 550, at 10.
[564] "Linda Smith, Ethics, 2006" (15 May 2016) YouTube <www.youtube.com/watch?v=jxoOnhaxQ0M>.
[565] Archibald "Coyote learns to make a storybasket", above n 550, at 178-179.
[566] Archibald, above n 550, at 179-181.
[567] Archibald, above n 550, at 181-185.

On ethically telling Indigenous stories, Archibald illuminates that:[568]

> If non-Native teachers and First Nations teachers are to use/tell First Nation stories ethically, then they must begin a cultural sensitivity learning process which includes gaining knowledge about storytelling protocol and learning how to make meaning/knowledge from First Nations stories.

It is interesting that learning a process is the difference maker for Archibald. This exact line of thinking is mirrored by Borrows,[569] Napoleon[570] and locally by Jones.[571] I also feel confident that learning a process is what matters in proposing Ātea Whakaaro.

C. *Ātea Whakaaro Model*

I now present my new model.

[568] Archibald "Coyote learns to make a storybasket", above n 550, at 184.
[569] See "Learning From the Land" (29 March 2018) YouTube <www.youtube.com/watch?v=YJ1SXnN4zkU>.
[570] Napoleon and Friedland "An Inside Job: Engaging with Indigenous Legal Traditions through Stories", above n 385, at 741-742.
[571] See the story of Tamatea in Jones *New Treaty, New Tradition*, above n 395, at 3-5.

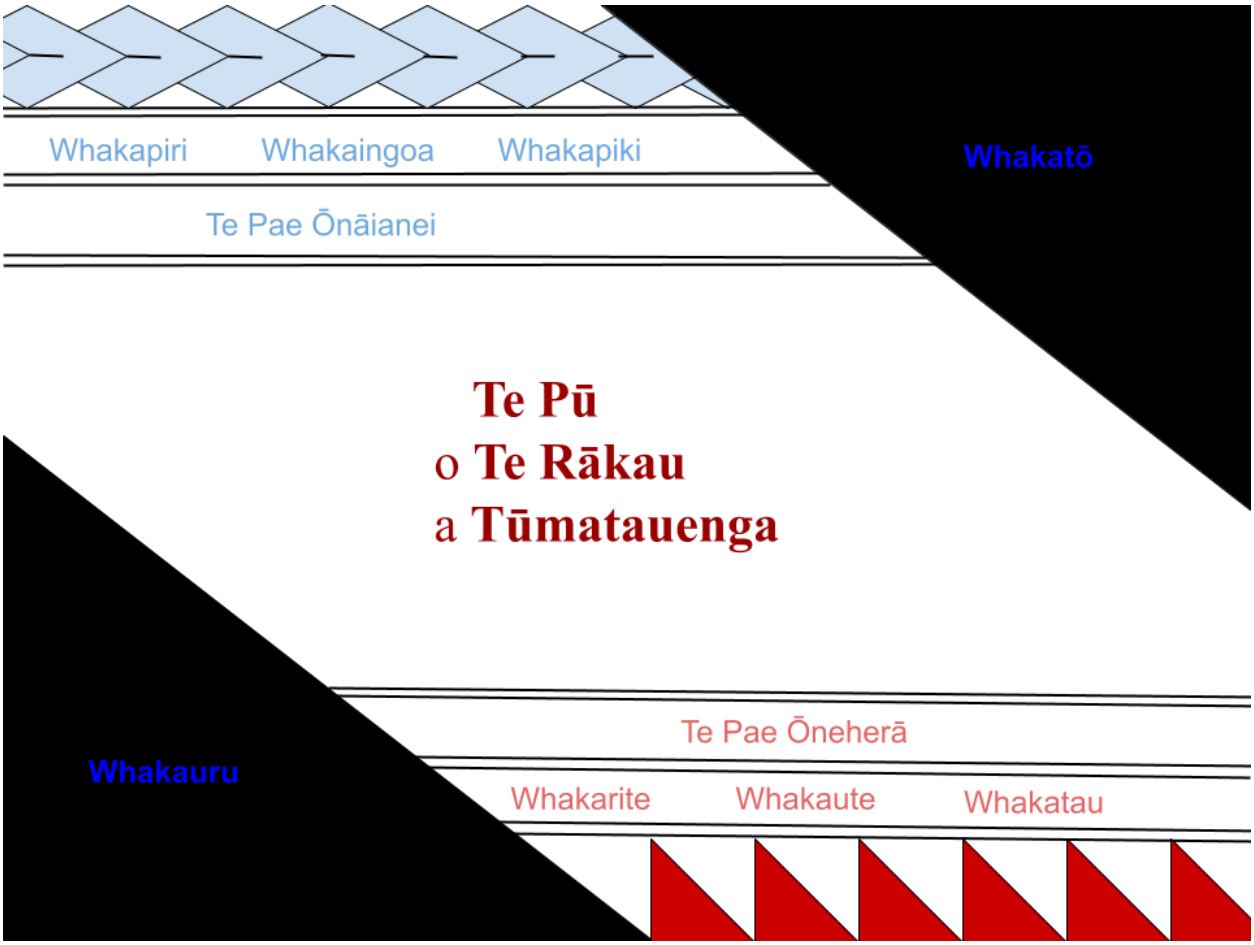

Figure 3. Ātea Whakaaro

1. *A brief explanation of Ātea Whakaaro*

This model consists of two interconnected layers for ethical legal analysis of pūrākau and pakiwaitara legal analysis. One way to interpret this model's employs the whaikōrero imagery of handing over the rākau kōrero, as a dynamic analysis process operating within the ethics.[572]

Whakarite, Whakaute and Whakatau form Te Pae Ōneherā. Whakauru signals a handing over of the rākau to Whakapiri, Whakaingoa and Whakapiki who form Te Pae Ōnāianei. Whakatō signals a returning of the rākau to Te Pae Ōneherā. Here, Whakatau, as final speaker, retains the rākau.

[572] The right to speak, as part of an ongoing formal discussion.

2. *Two differences of Ātea Whakaaro as a story work model*

First, principles allow a student, lawyer or judge to identify fluidly where they are at during analysis in a group or individually; a whakapapa-like placement.[573] Second, this model does not follow a prescriptive question trail approach. I provide later below only example questions[574] and sentences.[575] I utilise the earlier pūrākau of Tū and Taiaha in providing these examples.

3. *The two parts of Ātea Whakaaro*

(a) Tū-ki-te-ara-o-Mārama[576]

These ethical principles, are namely:

(i) Whakaute: A respectful starting point for pūrākau and pakiwaitara, captured in the imagery of manu aute in flight. Here, Tikanga is supreme law.

(ii) Whakarite: A preparation of oneself by realising your learning needs or question, captured in the imagery of noho puku. Here, deep concentration is required to engage Tikanga.

(iii) Whakauru: A deliberate and intentional seeking of pūrākau and pakiwaitara with a process for entry, captured through imagery of reciting karakia. A process to initiate story work is essential.

(iv) Whakapiri: A coming together of people through stories, captured in the imagery of walking shoulder-to-shoulder onto the ātea. This affirms that stories touch relationships of the living and the dead.

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[573] See Nēpia Mahuika "A Brief History of Whakapapa: Māori Approaches to Genealogy" (2019) 3(2) Genealogy; Hakopa "Pūrākau: The Sacred Geographies Of Belonging", above n 523, at 43-44 and 57-67.

[574] See Emily Snyder and others *Mikimosis and the Wetiko: A Teaching Guide for Youth, Community and Post-Secondary Educators* (Indigenous Law Research Unit, Vancouver, British Columbia, 2014), at 32-62.

[575] See Snyder and others, above n 574, at 65-67.

[576] This is the name of the ethical principles component.

(v) Whakaingoa: A naming of the story/stories, Tangata Whenua, rohe and iwi or hapū, captured in the imagery of ngā pou o te whare. Pronunciation, copyright and attribution matter.[577]

(vi) Whakapiki: An effort to recite, discuss, challenge and understand pūrākau and pakiwaitara, captured in the imagery of pae kōrero. Active story deliberation is an expectation, every single time.

(vii) Whakatō: An ending to discussion that returns to the intention, underlying whakauru, captured in the imagery of imminent sunset. Here, reflection is a critical component of story work.

(viii) Whakatau: A leaving of story and story space, intentionally, captured in the imagery of the flicking of water upon oneself. This affirms that ethical rigor can affect body, mind, emotion and spirit.

(b) Te Pū o Te Rākau a Tūmatauenga[578]

The analysis principles are contained across three stages:

Te Pū…

Reflection on the pūrākau or pakiwaitara, in terms of both content and storytelling techniques used to convey content (for example, structure, character, tension, tone, themes, …). This approach presupposes a dynamic between the story, the storyteller and the listener.

[577] See Edmond Carrucan, Intellectual Property Law Panelist "War Cries" (Pacific Law and Culture Conference, University of Canterbury, 4 July 2018).

[578] This is the name of the analysis principles component.

…o Te Rākau…

Consideration of the pūrākau or pakiwaitara, in terms of what it communicates and carries about Tikanga as a law (for example a statement of law, principle, rights, burden of proof, …). This presupposes that all stories contain law, which can then be drawn out through reasoning.[579] It accepts collaboration and guidance can be required at times.

…a Tūmatauenga

Challenging and testing initial conclusions (for example considering alternative views and arguments). This approach presupposes that from critique and debate that initial arguments can be improved. It accepts that stories can support very different arguments. Choosing a final conclusion and applying this to facts, then forms our final steps.

I now address examples of analysis, related to the pūrākau of Tū and Taiaha.

(c) Example: At the first stage – Te Pū

Example questions that could be asked, initially, include:[580]

(1) How may "who I am and how I am feeling" show up in my analysis?
(2) Who do I think is the focus at each point?
(3) Where in the narrative do I see Tikanga principles emerge?
(4) Why do I think the story is structured this way?
(5) Does the story strike me as balanced or not?
(6) What quotes stand out to me?
(7) What explanations are explicit in the story itself?
(8) Is there anything I think is missing, incorrect or minimised?
(9) Are there many versions of the story?
(10) Who am I hearing or reading from?

[579] See Friedland "Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada", above n 543, at 61.
[580] See Snyder and others *Mikimosis and the Wetiko*, above n 574, at 65-67.

Examples of resulting partial analysis might start:[581]

(1) "The pūrākau Tū and Taiaha was difficult to understand. This is because I contend key content was missing, the name of Taiaha's mother, which … "

(2) "Tū and Taiaha, was told in a largely linear fashion, which made me consider that … "

(3) "I focus on 'Kī mai koe... he aroha, ka tupumana te tama nei' from the pūrākau, as a quote … "

(d) Example: At the second stage – o Te Rākau

Example questions that could be asked, at step two, include:[582]

(1) Is there a clear statement of a legal principle?

(2) What areas of law could this story apply to?

(3) Does this story align with any objects of 'Whai Matua o Te Ture Māori'?

(4) Of the 5 types of law according to Carwyn Jones, what type might feature here?

(5) Why does the law here matter in theory and practice?

(6) Is there a kawa of fixed law to apply?

(7) Why might this story be remembered today?

Partial examples, continuing from the first step, may continue:[583]

(1) "… But, I can appreciate that the story may be remembered this way, because his mother was not at fault, just his father, Rongo, who … "

(2) "If the story had been non-linear, I may not have recognised how obligations to care for Taiaha is being demonstrated as more than momentary …"

(3) " … This is a clear statement of law, because Tū emerges as a law maker … "

(e) Example: At the final stage – a Tūmatauenga

[581] See Snyder and others, above n 574, at 65-67.
[582] See Snyder and others, above n 574, at 65-67.
[583] See Snyder and others, above n 574, at 65-67.

Example questions that could be asked, at this final step, include:[584]

(1) Do I think the story is very straightforward?

(2) How do other people interpret this story?

(3) Why have I relied on this version?

(4) What whakapapa supports or challenges my position?

(5) Is this story referenced in ritenga, waiata, haka, whakataukī, whakairo or rāranga?

(6) How might lenses of sex, gender, age and status change my analysis?

(7) How might I address any romanticising or demonising?

(8) If I was wrong, what might the story instead be about?

(9) What do other stories say about my initial position?

(10) Which interpretation will I advance today?

Examples of concluding partial analysis, may then conclude as:[585]

(1) "Without the inclusion of his mother, I accept we may lose a key perspective. In one sense, this retelling may unintentionally serve to write a wahine out of history. However, I maintain this is a story focused on whakamā and Rongomaraeroa. I conclude narrowly that shame as a legal concept …

In applying this story today, we can explore whether shame needs to feature as a mitigating factor in sentencing today.

I submit … "

(2) "I find the story straightforward. I contend the obligations to care for a nephew do not cease upon their entry into young adulthood. I conclude that a parent-like relationship can be characterised by ...

I submit, it is then difficult to see how any of the custody orders, sought make sense, because … "

(3) "I can appreciate that there may be many reasons why Rongo went quiet. Perhaps he was disengaged or disinterested in what Tū had to say. Regardless, I submit a tuakana is declaring the law …

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[584] See Snyder and others, above n 574, at 65-67.

[585] See Snyder and others, above n 574, at 65-67.

> I submit then that it is appropriate to give exceptional weight today, to the position that … ”

This brings a discussion of this model to an end.

4. *Looking ahead to the next chapter*

Having covered the possible risks of including pūrākau and pakiwaitara and categorised existing story work models, I then proposed Ātea Whakaaro: as my new model bringing ethics and analysis together and gave detailed guidance on how analysis might look.

In the next chapter, I highlight my key contributions to new knowledge, make recommendations and generally, reflect upon this research.

IX. *Te Kore Makiki Hīrere*

"Nā Kotahi Te Wānanga, Te Kore Makiki Hīrere." - Whare Wānanga[586]

Te Kore Makiki Hīrere erupts forth as ever-flowing white light and indicates a fifth energy transfer.

Te Ao Mārama awaits only one later event: the escape of Uepoto from te pō.[587] The physical world has become inevitable.

The five-chapter journey undertaken, has fulfilled the two purposes with which the journey started. Acknowledging the first purpose, I explored and tested whether Tikanga Māori is our first and supreme source of law as Ani Mikaere first proposed in Kotahi Te Kii.[588] Second, I highlighted the valuable contributions that pūrākau and pakiwaitara can make to the body of law, within Kotahi Te Kōrero and Kotahi Te Wānanga.

I briefly recap my layering now.

Te Kore: This layer covered two methodologies before introducing a focus of pūrākau and pakiwaitara. I addressed my methods, approach and writing style.

Kotahi Te Kii: I explored four schools of jurisprudence. Here, I concluded that Tikanga is our supreme source of law as Mikaere proposed. My new Te Whānau Ture model reflects this.

Kotahi Te Kōrero: I explored what pūrākau and pakiwaitara contribute to the body of law. I proposed Whai Matua o Te Ture Māori as a new model presenting objects of Māori Law.

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[586] "From Learning, came Understanding" - Highest House Of Learning
[587] See Ataria Rangipikitia Sharman "Mana Wahine and Atua Wāhine" (MA Thesis in Māori Studies, Victoria University of Wellington, 2019) at 32.
[588] Mikaere "Human Rights", above n 1, at 57.

Kotahi Te Wānanga: I considered risks the application of my research might cause, alongside mitigation of them. I proposed my new ethics and analysis model – Ātea Whakaaro.

Here, my final chapter highlights key contributions to new knowledge from this thesis. I then list recommendations and finish my thesis by sharing a final pūrākau.

From Kotahi Te Wānanga, I now enter the light of understanding. I must engage my tūpuna and prepare for the return to the origins of flowing white light. You read here not just a thesis, but a child of the overflowing light. The precepts of existence. It is done. The fifth layer is laid.

A. *Contributions to new knowledge*

I now highlight contributions of four kinds within this research.

1. *Structure, visual modelling and writer's voice*

First, the whakapapa-based structure of this thesis,[589] its three visual models[590] and my writer's voice[591] are a form of new knowledge for pushing the boundaries on what constitutes a thesis.

2. *The organisation of key thinking*

Second, this thesis is unique in including and organising key thinkers, principles, pūrākau and pakiwaitara. In future, this helps someone else having to locate and bring them together.

3. *The analysis undertaken and new ideas*

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[589] See at ch V-IX headings and introductory passages.
[590] See Te Whānau Ture in ch VI Kotahi Te Kii at E. See Whai Matua o Te Ture Māori at ch VII, Kotahi Te Kōrero at B. See Ātea Whakaaro in ch VIII Kotahi Te Wānanga at C.
[591] See ch V Te Kore.

Third, some of the analysis and ideas I offered were novel contributions.

(a) Methodologies

I was able to contribute some thoughts around Kaupapa Māori theory[592] and Mana Tāne, where I proposed ethical research protocols.[593] This enabled fulfilment of the two purposes of this thesis.

(b) Fulfilment of the two purposes of this thesis

I was giving my reasoning for ultimately agreeing with the seminal position of Mikaere, that Tikanga is our supreme law. An example of how I spelt this out was in relation to international commitments.[594] I shared the utility of pūrākau and pakiwaitara. I identified some key risks and suggested mitigation, which has made those risks more avoidable.

My three models contribute significantly to new knowledge.

(c) Te Whānau Ture

The set of relationships in this model,[595]presents my finding that Tikanga is the mātāmua. It also affirms the continuing importance of all three primary sources.

(d) Whai Matua o Te Ture Māori

The set of objects in this model,[596] let anyone ask, "does this submission about Māori Law really make sense?" This set of objects promotes integrity to use of Māori Law. Let the objects breathe.

(e) Ātea Whakaaro

[592] See ch V Te Kore at A1.
[593] See ch V Te Kore A2.
[594] See ch VII, Kotahi Te Korero.
[595] At fig 1.
[596] At fig 2.

This principles-centric model,[597] lets lawyers analyse pūrākau and pakiwaitara as legal precedents. Here, a cyclic-like set of eight ethics supports a three-step analysis.

4. *Recommendations from my research*

Fourth, I now address my recommendations as a contribution to new knowledge.

B. *Recommendations*

1. *That the Bachelor of Laws be indigenised;*

This needs to be undertaken by law schools long-term, in terms of changing core requirements, paper offerings, paper content, lecture structuring, lecture spaces and assessment methods.

This envisions the three models of this thesis, alongside other models of story analysis becoming a required component of Indigenous legal method coursework within the Bachelor of Laws, over the next 2 years. An equivalent postgraduate research methods paper amendment is needed also.

2. *Recruitment and retention of Māori teaching staff by all law schools;*

This is supported by a taskforce report.[598] Law school recruitment needs to prioritise Māori applicants with expertise in Te Reo Māori and Tikanga, not merely known Māori academics. Connected to that, the benefits and remuneration of Māori teaching staff and academics by law schools needs to improve significantly. Law schools desiring staff with Tikanga expertise need to pay more than usual to acknowledge cultural intelligence and their needs to stick around.

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[597] At fig 3.

[598] Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree*, above n 444, at 40-41.

3. *That future research is undertaken;*

Research should address, as follows:

(a) Decolonising Writing:

There should be critical Indigenous reflection on the rules, expectations and forms of writing that academia permits. This will support Indigenous writing styles within academia.

(b) Mana Tāne, as a methodology and theory:

I stress a need for research into how Māori men have been, in some cases, treated differently to Māori women and this needs to be exposed. This elevates the need for Mana Tāne claims to be heard by the Waitangi Tribunal. There also needs to be more Mana Tāne ethical research protocols.

(c) Critical thought around the story analysis model categories:

It may be that there are more than two categories of models or even subcategories.

(d) A transition plan, for working lawyers:

I submit there should be practical thinking about pūrākau and pakiwaitara. What I suggest is a focus on two questions. First, how to upskill lawyers who will not re-enrol at university? Second, whether pūrākau and pakiwaitara can be grouped according to the area of legal practice?

(e) A Māori legal method:

Māori legal method needs defining and outlining. I plan to explore this area further to support skilled use of Tikanga at law school and in practice. Initial research questions include:

(A) How might we know what a Māori legal method is?

(B) How does a Māori legal method look/operate?

(C) How should a Māori legal method look/operate into the future?

(D) Can we reclaim a Māori legal method or must we remake it?

(E) Where/who does a Māori legal method come from?

(F) How can a Māori legal method ensure integrity in legal work?

(G) Why can a Māori legal method mitigate your personal positioning?

(H) When does a Māori legal method require us to reach out to experts?

(f) The possibility of carving out both larger and smaller areas of Māori Law:

I question the assertion by Emmet Maclaurin that Māori did not distinguish between civil and criminal wrongs and thus, it is somewhat artificial to describe a Māori "criminal law".[599] Uncritical acceptance of Maclaurin's view might limit Tikanga. I say, "Let Tikanga answer the legal questions of today." I believe readiness ties into responsibility. This is how law stays current.

(g) The broader applications of pūrākau and pakiwaitara:

Separate reports focusing on pūrākau and pakiwaitara to support therapeutic jurisprudence, seems appropriate within further cross-disciplinary story research. I next share a final pūrākau.

C. *A final pūrākau*

1. *Background to the pūrākau*

I share below a pūrākau of Whiro Te Tupua, who is often called "te pūtake o te kino".[600] He is often associated with disease, sickness, death and destruction. You may have idolised Tāne who ascended to Tihi-o-manōno, in the heavens. This is not what I know.

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[599] Maclaurin "The Application of the British Criminal Law Towards Māori During the Early Colonial Period", above n 494, at 18.

[600] "The origin of evil". See Tīmoti Kāretu "Te Kete Tuawhā, Te Kete Aroiti – The Fourth Basket" (2008) 1 Te Kaharoa 86 at 87. See also Waikaremoana Waitoki "The baskets of knowledge: A curriculum for an Indigenous psychology" in Waikaremoana Waitoki and Michelle Levy (eds) *Te Manu Kai i Te Mātauranga: Indigenous Psychology in Aotearoa/New Zealand* (The New Zealand Psychological Society, Wellington, 2016) 283 at 288. See Jessica Tyson "Black hole "resembles Whiro, atua of darkness" - Māori astronomer" (11 April 2019) Te Ao Māori News <www.teaomaori.news/black-hole-resembles-whiro-atua-darkness-maori-astronomer>.

2. *Te Kete Ngaro*

Whiro had started an ascent into the lower heavens, resting at the second heaven Rangitamaku. Whiro was pursuing the baskets of knowledge. Not for mankind, but because they were his birth right (and burden) as tuakana. At some point, he became aware that Tāne, his overly ambitious taina, had outpaced him and was close to reaching Tihi-o-manōno.

Whiro felt envious and sad. He believed the kete were rightfully his as tuakana. Equally, Whiro felt a sense of duty to retrieve them. So naturally, he felt cheated by Tāne. He knew, deep inside, Tāne was immature and almost certainly had outside help. A short conversation with the high flying Kahu confirmed that Whiro was right. Tāne indeed had a lot of help along the way … from Hinekauorohia, Tāwhiri ... and the list goes on.

Whiro became angry on hearing this.

So, he hatched a plan. Whiro sent up hordes of insects and birds to intercept his brother. Whiro wanted to teach him a lesson. Rehua, who had just agreed to help Tāne (when he was entering the tenth heaven, Rangi-nanao-ariki) intervened. The intervention of Rehua caused the insects and birds to fall back towards earth.

Whiro was thwarted by outside help. Whiro was stewing inside.

He looked upward. Tāne had reached the kete. Whiro looked downward, imagining Tāne … with his smug little face … the three kete in his arms. This could have been the prime opportunity for everyone to change their opinion of Whiro. To Whiro, Tāne couldn't help himself.

Again, to Whiro, Tāne was such a desperate attention seeker… and it showed … big time.

It seemed as if separating their parents, Rangi and Papa (and severely fracturing their whānau) was not enough for Tāne. Tāne and his ambition was what had forced their whānau to pick sides during

Te Pō. Not many listened when Whiro expressed that he rather liked the dark, warm and loving embrace of their parents. None listened when he warned that Tāne might not know what was best.

That was a bleak memory. Whiro then felt what has become called “wainuku”.

For Whiro, that night was when he had his parents and his whānau forced apart. Whiro had aroha in his heart once long ago. He could still remember the arguing and fighting, like it was still happening. He remembered Tāne would not acknowledge his recklessness and inexperience. Tāne was quick to demand. For Whiro, Tāne simply had no respect for any of his elders.

Whiro wondered … how would he ever get, even just a little recognition within the whānau? Not while big mouth Tāne was busy gloating, he thought.

So, he hatched another plan … because... Tāne still had to descend after all. On the way down, he would fight him. This did not go to plan either. Some of their other siblings intervened in support of Tāne, casting Whiro down to the earthly realm. For Whiro, this was not the first time his whānau had been violent towards him. He thought of them as cowards.

It was then Whiro asked... “why am I so hated?”

He certainly felt that way.

In his deep sadness, he had an epiphany: *There had to be other baskets*. This gave him hope.

With this new hope, Whiro ascended back into the heavens. He snuck past the celebrations of his overly proud and … pitiful siblings. He saw Tāne was all too eager to show off the kete and receive the attention he so craved. For the first time in a long time, Whiro felt sorry for him, but just for a passing moment.

On passing Rehua, within the tenth realm, Whiro wasn't even acknowledged. He then remembered how this so-called 'protégé of Ike' had just slighted him. So, he said nothing, when he could have warned him about something important to do with a coming gift of food.

Whiro then reached Te Tihi-o-Manōno.

There he met with Ike. The creator. The source of all things.

Ike knew why Whiro was there. Ike asked if he wanted to know how many kete there were. "No", Whiro replied, "I hoped I might simply receive just a little knowledge of my own." Ike smiled wide and his eyes, which some call matamoe[601], opened fully to Whiro in examining him.

Ike explained that no being was smarter than him. Ike explained that some things are not for anyone, let alone mankind to question. Ike then explained with sadness that unlike Whiro, Tāne had failed his test, long before he sought the kete.

Ike explained the difference of what some would call education and knowledge. Ike explained that humanity didn't need to know everything to believe something. Ike explained the insatiable thirst for knowledge is often youthful and boastful. At times, it is harmful. But above all, it is foolish. "With age", Whiro suggested, "we eventually learn some things, are not worth knowing."

Ike was very impressed.

Ike emphasised that Tāne did not understand this. Ike chuckled, asking rhetorically, "Where did Tāne think *a kete* full of stars really came from anyhow?" Whiro understood what Ike meant. It was right in front of Tāne the whole time. There always was more than three kete.

Whiro was speechless.

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[601] Sleepy eyes.

Ike then told Whiro something he did not expect. “I feel your pain. I see the burden that torments you.” Whiro cried because he no longer felt alone.

“You are not hated”, Ike softly assured him. “Your parents' love for you is great. They have both watched you stand up to Tāne, again and again. You are not what others say you are. They, like Rehua, have misjudged you at their own peril.”

Whiro felt Ike embrace him with aroha. He had not felt this way since Te Pō.

Ike then presented Whiro with Te Kete Ngaro, which, contained knowledge of an unreal kind. Ike cautioned Whiro to keep it safe.

Whiro agreed, thanked him and descended.

On the way back down … he could hear his siblings laughter. Tāne, it appeared, had decided to give himself two new titles … Tāne-nui-ā-Rangi and Tāne-i-te-Wānanga. Whiro was unsurprised. To him, Tāne just might always be his grandiose little brother. And a violent big mouth. Both a hard pass for Whiro.

Whiro took Te Kete Ngaro back to the earthly realm. This was indeed a kete unlike any others. Whiro knew that Tāne would try to come after him for this sort of knowledge. Whiro took it for safety to another realm, Rarohina, where Tāne could not follow him. Whiro made a home there.

To this day, Whiro and Te Kete Ngaro remain there.

The kete is beyond the reach of all. And that is probably for the best.

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I. *Dissertations*

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Hadley Louise Friedland "Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada" (PhD Thesis, University of Alberta, 2016).

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