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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Fiona Barker
RP Boast
Shaunnagh Dorsett
David Hackett Fischer
Benjamin F Gussen
Mark Hickford

Carwyn Jones
Kate McMillan
Sir Geoffrey Palmer
Andrew Sharp
David V Williams

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The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
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A MĀORI CONSTITUTIONAL TRADITION

*Carwyn Jones**

This paper tentatively sketches the outline of what might be described as a Māori constitutional tradition. The paper describes some key aspects of Māori law and philosophy that influence the development of Māori constitutional thought and practice. It examines the role of key principles such as whanaungatanga, manaakitanga, mana, tapu and utu that underpin Māori law and constitutionalism. These principles set the foundation for Māori forms of social organisation, the responsibilities and accountabilities of leaders, and the exercise of legal and political power within Māori society.

Ka wera hoki i te ahi, e mana ana anō

While the fire burns, the mana is effective¹

I INTRODUCTION

The above whakatauki (saying) draws attention to the continuity of constitutional authority through connection to the land. In this paper I suggest that the continuity of a Māori constitutional tradition can be identified through the key institutions that structure the exercise of public power within te ao Māori (the Māori world). "Public power" within the Māori legal system refers to the exercise of authority in the public sphere. It incorporates the authority to make law, to resolve disputes and to enforce the law on behalf of the community. These aspects of public power are all governed by the key institutions that frame a Māori constitutional tradition.

The concept of a "constitutional tradition" may itself require a brief explanation. In *Legal Traditions of the World*, Patrick Glenn explores the concept and theory of "tradition" as it applies to the legal context.² Glenn suggests that tradition can be seen as a means of capturing information

* Ngāti Kahungunu, Senior Lecturer, Faculty of Law, Victoria University of Wellington, and Co-Editor of the Māori Law Review.

1 "This saying reflects the special meaning of ahi kā, 'the fire burns'. The phrase signifies possession or dominion over a certain territory. From that relationship to the land the person or group referred to derives mana." HM Mead and N Grove *Ngā Pēpeha a ngā Tipuna* (2nd ed, Victoria University Press, Wellington, 2003) at 197.

2 H Patrick Glenn *Legal Traditions of the World* (4th ed, Oxford University Press, Oxford, 2010) at 1–32.

from the past in a way that is meaningful for the present.³ An important characteristic of traditions that contributes to their relevance to the present is that they exist and are transmitted within a particular social context.⁴ Once conceptualized in this way, it becomes clear that traditions are not simply habitually repeated actions that remain fixed and unchanging. In fact:⁵

... tradition as transmitted information ... becomes rather a resource from which reasons for change may be derived, a legitimating agency for ideas which, by themselves, would have no social resonance.

In this paper, I use the term "constitutional tradition" to refer to the framework within which constitutional issues are addressed, the socially resonant resource from which constitutional decisions are legitimised. The term is intended to be broad and inclusive. That is, a constitutional tradition does not exhaustively prescribe every constitutional action or aspect of constitutional design. Instead, it illustrates the underlying constitutional culture and practice that guides decisions about constitutional action and design. It encompasses and reflects the basic attitude of a community towards the exercise of public power, which can be described as "constitutional culture".⁶ A constitutional tradition incorporates not only constitutional values but also the body of rules, norms, and practice that guide decisions about appropriate action and optimum constitutional design.

All politics and legal systems have constitutional traditions that provide reference points for constitutional decisions. The Westminster constitutional tradition might be said to comprise the formal rules and conventions of the common law constitution, developed and refined through statute, judicial decisions, and practice as well as key principles and doctrines such as the rule of law, the supremacy of Parliament, and the separation of powers. These are all factors that structure the exercise of public power within constitutions that are based on the Westminster model. This does not mean that all jurisdictions that have a Westminster-style Parliament operate in exactly the same way or have adopted identical institutions and constitutional mechanisms. The United Kingdom constitution is different from the New Zealand constitution in some quite fundamental ways.⁷ The New Zealand constitution is in turn different from the Canadian and Australian constitutions.⁸ While these constitutions are not identical and, in some respects at least, operate according to very different rules, they can all be said to be part of the same constitutional tradition. These constitutions may have developed different ways of constructing a representative legislature

3 At 13–16.

4 At 12–13.

5 At 24.

6 MSR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 278.

7 Many differences have developed between the two constitutions. One of the most prominent examples of recent years being New Zealand's adoption of the Mixed Member Proportional (MMP) electoral system.

8 For example, both Canada and Australia have written constitutions and New Zealand does not.

or ensuring that there are checks and balances between different branches of government, but ultimately decisions about constitutional design and appropriate constitutional action within these different jurisdictions are all framed by a constitutional tradition that prioritises certain constitutional values and principles and is informed by a shared body of precedent.

The Māori constitutional tradition is sourced in tikanga. "Tikanga" describes the right or correct way of doing things within Māori society. It is a system comprised of practices, principles, processes and procedures, and traditional knowledge. It encompasses Māori law but also includes ritual, custom, spiritual and socio-political dimensions that go well beyond the legal domain. Those aspects of tikanga that speak to the organisation of institutions of law and government and the relationships between those institutions, and between those institutions and the citizenry, describe the shape of a Māori constitutional tradition.

Māmari Stephens has explored some aspects of a Māori constitutional tradition. In her recent work, Stephens identifies a Māori *demos*: "the Māori community of citizens that has been able to utilise collective choice, and act collectively to achieve public ends."⁹ This is the specific social context within which a Māori constitutional tradition is transmitted. Stephens' textual analysis examines key aspects of Māori constitutional culture, as evidenced by the development of various approaches to political organisation.¹⁰ Ultimately, she contends that there are some observable Māori attitudes about the exercise of civic decision-making power; particularly as to how that exercise of power ought to be carried out. In particular, that power ought to be exercised:¹¹

1. as a means of meeting collective obligation for civic ends;
2. in a way that facilitates group participation and public input;
3. with due process and regard for the standing of those involved.

Stephens' work, therefore, illustrates key aspects of Māori constitutional culture and some of the key strands of how public power is exercised within the Māori *demos*. This paper builds on Stephens' exploration of Māori constitutional culture to examine the way in which the key institutions of Māori law both shape and give effect to that culture.

This paper describes the key institutions of the Maori legal system and their operation as the basic foundation of a Māori constitutional tradition.¹² As already noted, the Māori legal system is

9 Māmari Stephens "A Loving Excavation: Uncovering the Constitutional Culture of the Māori *Demos*" (2013) 25 NZULR 820 at 822.

10 See also Caren Fox "Change, Past and Present" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia, Wellington, 2010) 41.

11 Stephens, above n 9, at 822–823.

12 See Ani Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato Law Review 125. Though in a slightly different context, see also Te Ahukaramū Charles Royal (ed) *The*

part of a broader social and cultural system of tikanga.¹³ Tikanga and, therefore, the Maori legal system, is a values-based system (as opposed to a rules-based system). Although not an exhaustive or definitive list, the following five values are often identified as foundational:¹⁴

1. Whanaungatanga – "the centrality of relationships to Māori life";¹⁵
2. Manaakitanga (and kaitiakitanga) – "nurturing relationships, looking after people, and being very careful how others are treated"¹⁶ and an ethic of guardianship;
3. Mana – "the importance of spiritually sanctioned authority and the limits on Māori leadership";¹⁷
4. Tapu/Noa – "respect for the spiritual character of all things";¹⁸
5. Utu – "the principle of balance and reciprocity".¹⁹

I contend that these values are the key institutions of te ao Māori which empower constitutional actors and regulate the exercise of public power. As a whole, these values/institutions reflect the importance of recognising and reinforcing the interconnectedness of all living things and maintaining balance within communities.²⁰ Collectively, they provide the framework of a Māori constitutional tradition. It is crucial to note that these values/institutions are not completely discrete and they operate within tikanga Māori to reinforce each other. In this paper, I consider each of these

Woven Universe: Selected Writings of Rev Māori Marsden (Estate of Rev Māori Marsden, Otaki, 2003) at 22–23.

13 It should be noted that tikanga is not equivalent to customary law, though the two concepts share many characteristics. It is not a definite set of rules that apply to discrete areas of social life, rather tikanga operates in all aspects of Māori life and incorporates spiritual, cultural, and practical aspects which are beyond a strictly legal domain. See Moana Jackson *The Māori and the Criminal Justice System: A New Perspective – He Whaipaanga Hou* (Department of Justice, Wellington, 1988) at 43.

14 Though there is some variation in the terminology used, there appears to be agreement as to the basic substantive content of these foundational concepts. See for example Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 28–32; Joe Williams *He Aha te Tikanga Māori?* (Paper presented to the Mai i Te Ata Hāpara Hui, Te Wānanga o Raukawa, Otaki, New Zealand, 2000) at 8; and Law Commission *Māori Custom and Values in New Zealand Law* (NZLC, SP9, 2001) at 28–40.

15 Williams, above n 14.

16 Mead, above n 14, at 29.

17 Williams, above n 14.

18 Williams, above n 14.

19 Williams, above n 14.

20 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) 330 at 332.

fundamental values/institutions in some detail to reveal fundamental aspects of the operation of a Māori constitutional tradition.

II WHANAUNGATANGA – RELATIONSHIPS

Relationships are absolutely central to Māori society. They define rights and obligations between:

- individuals;
- communities;
- the individual and the collective;
- past, present, and future generations;
- people and atua (gods); and
- people and the natural world.

The concept of "whanaungatanga" encapsulates the centrality of relationships within a Māori constitutional tradition. Margaret Mutu, Professor of Māori Studies at Auckland University, has described whanaungatanga as "[o]ne of the most fundamental values that holds any Māori community together".²¹ Grounded in genealogical connections, whanaungatanga is central to individual and community identity and the rights and obligations that are associated with that identity.²²

Knowledge of how one is related to everyone else within a particular community and to neighbouring hapū is fundamental to the understanding of an individual's identity within Māori society. It also determines how an individual relates to and behaves towards other individuals of that community.

The importance of relationships in terms of identity and rights and obligations is also evident in the story of how Māui was re-united with his family. Māui had been abandoned at birth and raised by one of his ancestors. When he returns to his mother and brothers many years later he asserts his identity, but his mother does not believe him until he recites the genealogical connections (whakapapa) that he heard when in the womb. The story illustrates that those kinship connections are important in establishing relationships, rights and duties.²³

The term "whanaungatanga" may be grounded in genealogical connections, but it is today applied to other types of relationships where reciprocal obligations apply. Eminent anthropologist Dame Joan Metge has described the way in which the root concept of "whānau" has itself developed

21 McCully Matiu and Margaret Mutu *Te Whānau Moana: Ngā Kaupapa me ngā Tikanga – Customs and Protocols* (Reed Publishing, Auckland, 2003) at 162.

22 At 163.

23 Ministry of Justice *He Hinatore ki te Ao Māori – A Glimpse into the Māori World* (March 2001) at 22.

and acquired new meaning over the course of the twentieth century so that it is now widely applied to various types of communities and groups and no longer only those with actual blood ties.²⁴

The changing nature of the concept of whānau and whanaungatanga provides a useful example of the way in which the expressions of these fundamental institutions of te ao Māori change and adapt to new environmental challenges.²⁵ Metge has suggested that a discussion of the concept of whānau at the end of the twentieth century ought to reflect five key points:²⁶

- The word whānau has not one but many meanings.
- These include some meanings which have been handed down from pre-European ancestors and many of recent development.
- One meaning – "the whānau that comes first to mind" for most Māori – has primacy for others.
- This whānau of primary reference is a corporate group defined in the first place by descent.
- The non-traditional meanings of whānau are extensions and metaphorical applications of this primary meaning; the whānau thus identified resemble and differ from the whānau of primary reference in significant ways.

The concept of whānau was explored in a Waitangi Tribunal inquiry related to the operation of an urban Māori organization, the members of which were not all linked by actual genealogical connections. However, the organisation had adopted the name "Te Whānau o Waipareira Trust". During the course of the Waitangi Tribunal inquiry, one member of Te Whānau o Waipareira explained why the organisation had chosen to use the term and concept of whānau within their name:²⁷

We acted like a whanau. It was our actions and feelings, our wairua, which knitted us together as a whanau. We made a conscious, unified effort to protect Māori values, and nurture them in the urban environment.

Some observations may be made about the way Māori law operates in general which illustrate the priority given to the maintenance of relationships within a Māori constitutional tradition. For

24 Joan Metge *New Growth from Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) at 291.

25 Note that the effective application of tikanga and key conceptual regulators, such as whanaungatanga, to issues of concern to contemporary Māori communities is challenged by the ongoing effects of colonisation that have eroded Māori social structures and actively suppressed tikanga over a long period of time. However, there is an increasing recognition of the value of cultural reconnection and the recovery of Māori knowledge and tikanga and the resources that this heritage provides to construct a platform from which Māori can confidently face the future. See Mead, above n 14, at 21–23 and 233–235.

26 Mead, above n 14, at 21–23 and 233–235.

27 Waitangi Tribunal *Te Whānau o Waipareira Report* (Wai 414, 1998) at 42.

example, there is significant flexibility in the application of Māori law. Although precedents and past actions are important sources of Māori law, the Māori legal system does not apply legal rules in the same way as the common law's principle of *stare decisis* requires. Precedent within Māori law is used to identify values that are important, rather than rules that ought to be followed when a particular set of facts arises. John Patterson suggests that narratives of past behaviour, proverbs and other sources of Māori law come together as an ethical system, which "provides a wide and rich range of traditional focal points, and leaves it to the good sense and mana of those involved to arrive at reasonable solutions to their problems."²⁸ This produces a quite different type of flexibility than that which can be identified within the common law. The common law can adapt to changing socio-cultural values. However, interpreting and applying established legal rules in light of current legal principles and models of justice (perhaps informed by human rights considerations)²⁹ is quite different to identifying values demonstrated by ancestors and determining the best way to give expression to those values.

Mead explains the role that precedent plays in determining the appropriate tikanga for a tangihanga (funeral) ceremony.³⁰ Mead notes that one must recognise that the practice of tikanga may not always be a perfect expression of the values that underlie that tikanga.³¹ Precedent, while an important reference point, is therefore only part of the framework for interpreting and applying law within a Māori constitutional tradition. In the case of the tangihanga ceremony, the law/tikanga that is applied and practiced is derived from background knowledge of the community (including past practice, but also knowledge of the broader history of the community and its environment), concepts of death and relationships with the spirit world, and wider principles and values that govern Māori life.³² This approach allows for significant variation and flexibility in the tikanga of this ceremony. The flexibility of Māori law is significant for a number of reasons. One that is of particular significance is that it allows different weight to be given to various factors in deciding what the correct course of action ought to be in any given situation.

A Māori constitutional tradition therefore provides that relationships can be, and often are, prioritised.³³ The three fundamental characteristics of the exercise of public power that Stephens identifies (that public power in the Māori world ought to be deployed as a means of meeting

28 John Patterson *Exploring Māori Values* (Dunmore Press, Palmerston North, 1992) at 75.

29 Kellinde Turcotte "Why Legal Flexibility is not a Threat to either the Common Law System of England and Australia or the Civil Law System of France in the Twenty-first Century" (2005) 1 *Hanse Law Review* 190 at 191–192.

30 Mead, above n 14, at 18–19.

31 At 18–19.

32 At 18–19.

33 See Nin Tomas and Khylee Quince "Māori Disputes and their Resolution" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Oxford, 1999) 205 at 207–208.

collective obligation for civic ends; in a way that facilitates group participation and public input; and with due process and regard for the standing of those involved) all gravitate around the institution of whanaungatanga, illustrating the centrality of relationships within Māori constitutional culture and practice.

III MANA – AUTHORITY

Mana is the central concept that underlies Māori leadership and accountability. The concept also includes notions of influence, prestige, power, force and vitality. The term derives from an ancient Oceanic concept of mana which was used to describe supernatural power.³⁴ A description of the concept of mana in the context of rights and obligations in relation to the Mohaka River is set out in evidence given by members of the tribal group Ngāti Pahauwera in their Waitangi Tribunal claim:³⁵

The control of the river has been our mana from way back. It came from our ancestors and down through the generations. Even though these things have been taken, we stand firm (in our belief). Tawhirirangi is the mountain, Mohaka is the river, etc, etc. Our ancestors discovered the mana. They found the mana in the hills, in the rivers, and that is why we battle for their return ... Tino Rangatiratanga can be understood as meaning "full authority, status, and prestige with regard to their possessions and interests". Mana is the personalisation of that authority. [Mana] is the psychic force within us. What is the essential element of mana? To us, it is not us. We say that it is the culmination of the story of the river. To me our mana is derived from the river. Without that heritage of the river we are nobody. To us the river is spiritual in all things. People go and talk to the river.

There are many different types of mana. Māori linguist Margaret Mutu has categorised the different types of mana that she has identified as relevant to her people, Te Whanau Moana:³⁶

Mana atua is the very sacred power of the gods which is given to those persons who conform to sacred ritual and principles.

Mana tupuna is authority and power handed down through chiefly lineage.

Mana whenua is the mana that the gods planted with Pāpā-tua-nuku (Mother Earth) to give her the power to produce the bounties of nature. A person or tribe who "possesses" land is said to hold or be the mana whenua of the area and hence has the power and authority to produce a livelihood for the family and the tribe from this land and its natural resources. ...

Mana tangata is the power acquired by an individual according to his or her ability and effort to develop skills and to gain knowledge in particular areas.

34 R Benton, A Frame and P Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 154.

35 Waitangi Tribunal *The Mohaka River Report* (Wai 119, 1992) at 18–19.

36 Matiu and Mutu, above n 21, at 156–157.

Mana moana is the equivalent of mana whenua as it applies to the sea and its resources. The two forms of mana overlap considerably since the land is considered to extend well into the sea, while the sea's effects impinge some distance inland.

The different types of mana are extremely important for maintaining a relatively low level of executive authority in Māori leaders and a relatively high level of accountability of leaders to the community. In particular, the concept of mana tangata requires that leaders must continually demonstrate the qualities of leadership and indicates that their positions as leaders can never be taken for granted. Māori leaders traditionally did not command obedience but rather needed to persuade. This not only affected the substance of decisions made but meant that the decision-making process needed to be one which had legitimacy and one in which people felt that their voice had been heard.³⁷ Eddie Taihakurei Durie has pointed out that mana is therefore both ascribed and achieved:³⁸

Mana tupuna expressed the basic ideology that all things came from ancestors, land rights, status, authority, kinship, knowledge, ability, etc. Mana was usually presented as ascribed but ascription was usually retrospective to validate achievement ("he is brave, caring, etc for he is the descendant of so and so") so that in practice, mana was both ascribed and achieved.

The demi-god Māui was the archetype of a Māori leader that established his position through ability, irrespective of his place in the family. Māui was the youngest of five brothers and, all other things being equal, the expectation would have been that his elder brothers would take up positions of leadership ahead of him. However, Māui showed resourcefulness, imagination and creativity, demonstrating that he was a much more capable leader than his brothers. Consequently, the elders who held special knowledge and expertise identified him as someone worthy to pass such knowledge to and by his actions Māui took on important leadership roles. The Māui story cycle reminds us that no matter what one's family position, mana and the authority to lead can be determined by one's own actions and abilities.³⁹

The different strands of mana described above provide inherent limitations to the authority of rangatira or leaders. Māori politician Shane Jones has noted:⁴⁰

Inherent in the Māori conception of power is the notion that the agent who uses it in an unprincipled manner will lose it. Authority which is exercised beyond the value framework is not rangatiratanga.

37 Tomas and Quince, above n 33, at 212–215.

38 ET Durie *Custom Law* (Treaty of Waitangi Research Unit, 1994) at 7–8.

39 Ministry of Justice, above n 23, at 22.

40 S Jones "Consultation with Tangata Whenua" (1992) as cited in Nin Tomas *Key Concepts of Tikanga Māori (Māori Custom Law) in Tai Tokerau past and present* (PhD Thesis, University of Auckland, 2006) at 95.

"Rangatiratanga", the powers and authority of leaders, then can be seen to reflect the autonomy and self-determination of the community itself, rather than the absolute authority of an individual leader.⁴¹ This captures both the grant of public power and the limitations that the exercise of such power is subject to within a Māori constitutional tradition.

IV MANAAKITANGA AND KAITIAKITANGA – NURTURING AND STEWARDSHIP

Manaakitanga and kaitiakitanga reflect the importance of nurturing and the responsibility of looking after those in your care. They are distinct concepts – kaitiakitanga embodies the ethic of stewardship and guardianship (particularly in relation to the natural environment), whereas manaakitanga encompasses selflessness and generosity and is often used to express the type of responsibilities that a host has to his or her guest. When identifying the fundamental institutions that underpin tikanga Māori/Māori law, some scholars have chosen manaakitanga as the overarching value while others have opted to use kaitiakitanga instead. Though closely connected, the terms are not synonyms. The distinctive elements of each have particular relevance to the consideration of a Māori constitutional tradition and so I address these two concepts together in this section.

A Manaakitanga

Manaakitanga is based around the root word "manaaki". "Manaaki" itself is formed from the words "mana" and "aki". A detailed explanation of the concept of "mana" (authority and prestige) is explained above, while "aki" is a Proto-Polynesian word which, although no longer used this way in modern Māori, conveyed the sense of reciprocal action. This suggests that "the giving and acceptance of kindness and hospitality bestows mana on both host and guest."⁴²

Mead explains the way in which key principles such as manaakitanga have retained their relevance in contemporary Māori life:⁴³

All tikanga are underpinned by the high value placed upon manaakitanga – nurturing relationships, looking after people, and being very careful about how others are treated. Thus in the tikanga of muru ... for the groups of people who come to take away the heirlooms, goods, products of the land, sea and forest, the animals and, in fact, anything moveable, the value of manaakitanga still holds: that is, the principle or standard of behaviour must remain in place. These people are given a meal and are allowed

41 See, for example, the comments of missionary Octavius Hadfield in *Native Tenure: Opinions of Various Authorities* [1861] AJHR E1 Appendix A at 9:

The Chief of the tribe, since he has no absolute right over the territory of the various *hapu*, nor over the lands of individual freeman of his own *hapu*, cannot sell any lands but his own ... nor can he do so in opposition to the opinion of the Chiefs of the *hapu* of the tribe, if they consider the territory, and thus the independence of the tribe impaired by doing so.

42 Benton, Frame and Meredith, above n 34, at 205.

43 Mead, above n 14, at 29.

to leave in peace ... Aroha is an essential part of manaakitanga and is an expected dimension of whanaungatanga. It cannot be stressed enough that manaakitanga is always important no matter what the circumstances might be.

The importance of manaakitanga can also be seen in the Māui story cycle. In a number of the stories, Māui builds close relationships with various ancestors. Although sometimes ultimately exhibiting deceitfulness and a trickster's nature,⁴⁴ Māui, at least initially, builds these relationships on the basis of trust, respect and manaakitanga. Reciprocal relationships are established in which Māui provides care and support for his elders and, importantly, demonstrates his intelligence and ability. His ancestors also provide support to Māui and, in seeing his ability, identify him as someone to whom they can pass on sacred knowledge and/or powerful and magical objects and tools. Māui is then able to achieve fantastic feats because of what he has gained from the reciprocal relationships built upon manaakitanga.⁴⁵

B Kaitiakitanga

The way in which kaitiakitanga is currently used has quite recent origins even though the root word, kaitiaki (guardian), is clearly a traditional concept with a long history. Kaitiakitanga has become a central concept in environmental law to express the Māori interest in resource management decisions.

Early documented uses of the term suggest that a kaitiaki commonly took the form, not of a living individual, but perhaps of an ancestor, an animal, or even a supernatural being. A letter to the editor in a Māori newspaper from the turn of the twentieth century referred to the kaitiaki of the headland at Te Uruti. In this context, kaitiaki referred to the guardians of the headland, who took the form of tipua (supernatural beings): "I still live on that headland now ... The *tipua* which live on the outskirts of Uruti are *kaitiaki* [guardians] that descend from crayfish, they are called Turuawahine, they are female and are ancestors of Ngai-Teao [the local people], I am their descendant."⁴⁶

44 For example, in one well-known story Māui tricks his ancestress, Mahuika, the keeper of fire, into giving him nearly all her magical and treasured supply of fire.

45 Ministry of Justice, above n 23, at 24.

46 A Harawira "Letter to the Editor" *Te Puke Ki Hikurangi* (Greytown, 30 January 1903) at 3.

Māori Marsden, who later provided scholarship on the application of the concept of kaitiakitanga to resource management law, described the concept of a kaitiaki as follows:⁴⁷

The ancient ones (*tawhito*), the spiritual sons and daughters of Rangi and Papa were the "*Kaitiaki*" or guardians. Tāne was the Kaitiaki of the forest; Tangaroa of the sea; Rongo of herbs and root crops; Hine Nui Te Pō of the portals of death and so on. Different *tawhito* had oversight of the various departments of nature. And whilst man could harvest those resources they were duty bound to thank and propitiate the guardians of those resources. Thus Māori made ritual acts of propitiation before embarking upon hunting, fishing, digging root crops, cutting down trees and other pursuits of a similar nature.

More recently "kaitiakitanga" has taken on a specific statutory meaning through its use in the Resource Management Act 1991. The details of this legislation are not relevant to the present discussion, but it should be noted that the Resource Management Act was a major consolidation and, to some extent, a restructuring of environmental and planning law in New Zealand. The Act requires that all those exercising powers and functions under the legislation must have particular regard to a number of matters, one of which is "kaitiakitanga". The current statutory formulation of "kaitiakitanga" is "the exercise of guardianship by the tangata whenua [local people, literally 'people of the land'] of an area in accordance with tikanga Māori [Māori law and practice] in relation to natural and physical resources; and includes the ethic of stewardship."⁴⁸

In its wide-ranging 2011 report, *Ko Aotearoa Tenei*, the Waitangi Tribunal deployed the concept of kaitiakitanga in order to assess the Maori interest in various aspects of law and policy. The Tribunal made a clear link between the concepts of mana and kaitiakitanga, noting that, in te ao Māori, kaitiaki relationships always include both rights and corresponding responsibilities.⁴⁹

Again, this demonstrates the clearly defined scope of public power within a Māori constitutional tradition. If, consistent with Glenn's articulation of legal traditions, a constitutional tradition is understood as capturing a body of information that guides constitutional action in a form that has social resonance, then we can identify one of the key markers of a Māori constitutional tradition as the condition that the exercise of public power goes hand in hand with the obligation to nurture the well-being of the collective. This is the means by which authority is legitimised within a Māori constitutional tradition.

⁴⁷ Royal, above n 12, at 67.

⁴⁸ Resource Management Act 1991, s 2.

⁴⁹ See Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011). Relying on evidence presented by Māori in the course of this inquiry and other research, the Tribunal identifies whanaungatanga as the defining principle that frames Māori knowledge systems and the rights and obligations that were relevant to the inquiry, see for example at 16–17, 35–38, 81–84, 115–118 and 237.

V *TAPU AND NOA – RECOGNITION OF THE SPIRITUAL DIMENSION*

Tapu and noa are complementary opposites and are both central to the operation of a Māori constitutional tradition. The concept of tapu recognises the spiritual quality of all things and the associated restrictions and regulation which necessarily relate to the spiritual dimension. Noa, on the other hand, suggests a freedom from such restriction and is often used in the context of processes which normalise or make safe interaction with things which would otherwise be restricted. Settlers and anthropologists have often identified tapu as the key mechanism of Māori law, though tapu has religious and socio-political aspects as well as strictly legal dimensions. The theologian Māori Marsden has described the concept as follows:⁵⁰

The Māori idea of tapu is close to the Jewish idea translated in the words "sacred" and "holy", although it does not have the later ethical connotations of the New Testament of moral righteousness[.] ... It has both religious and legal connotations. A person, place or thing is dedicated to a deity and by that act it is set aside or reserved for the sole use of that deity. The person or object is thus removed from the sphere of the profane and put into the sphere of the sacred. It is untouchable, no longer to be put in common use. It is this untouchable quality that is the main element in the concept of tapu. In other words, the object is sacred and any profane use is sacrilege, breaking the law of tapu[.] ... From a purely legal aspect, it suggests a contractual relationship has been made between the individual and his deity whereby a person dedicates himself or an object to the service of a deity in return for protection against malevolent forces and the power to manipulate his environment to meet needs and demands.

The importance of the concept of noa in relation to tapu is explained by Mead:⁵¹

Noa is often paired with tapu indicating that often noa refers to restoring a balance. A high level of tapu is regarded as dangerous. Here the role of tikanga and of tohunga [skilled spiritual leaders or experts] is to reduce the level of dangerous tapu until it is noa or safe. It is not useful to think of noa as being the opposite of tapu or as the absence of tapu. This is plainly not the case. For example a person can be very tapu if one is very ill or there is bleeding and shedding of blood. Once these tapu-increasing symptoms have passed the person returns to a safe state, but still has personal tapu. The state of noa indicates that a balance has been reached, a crisis is over, health is restored and life is normal again.

Similarly, Ani Mikaere has emphasised the role of noa:⁵²

Absolutely pivotal to the effectiveness of tapu as a means of social control, was the complementary institution of noa. Just as vital as the ability to impose restrictions through the use of tapu was the ability to remove such restrictions. For the majority of people the roles and tasks of daily life led them

50 Royal, above n 12, at 5.

51 Mead, above n 14, at 31–32.

52 Ani Mikaere *He Rukuruku Whakaaro – Colonising Myths, Māori Realities* (Huia, Wellington, 2011) at 212.

backwards and forwards across the boundaries of tapu and noa. It was imperative that this be so, that spiritual balance be preserved.

Both the spiritual and more instrumental aspects of tapu are illustrated by the way in which tapu is addressed in the story of how Māui met his father. According to this story, Māui found his father by secretly following his mother, turning into a bird to disguise himself. When Māui identifies himself to his father, his father performs a blessing for Māui, but makes a mistake in the ceremony, which eventually has profound consequences for Māui.

There are two points of engagement with tapu and the spiritual dimension in this story. The first is when Māui uses a karakia (prayer or incantation) to turn himself into a bird. Although Māui is here clearly calling upon supernatural forces, he does so for quite a functional purpose. This reflects the fact that the existence and management of tapu is an ordinary and instrumental part of dealing with the spiritual dimension of all things in the natural world.

The second point of engagement with tapu in this story illustrates the consequences of a breach of tapu. When engaging with spiritual matters, it is important to ensure that the proper rituals and processes are completed. In this instance, Māui's father does not complete the relevant ceremony correctly. This mistake has severe ramifications, costing Māui his immortality. As noted in *Hinatore ki te Ao Māori*:⁵³

This highlights that ceremonial processes have to be conducted correctly in Māori society. If they are not accurately recited then the burden is cast upon the people involved. The inevitable consequence of a mistake is misfortune and death. Projects are doomed by neglecting to use the correct forms of words without hesitation or error.

Tapu and noa therefore still play a central role in relation to the maintenance of Māori law. These concepts provide a key motivation for obedience to laws and the perceived consequences of breaching tapu act as an enforcement mechanism.⁵⁴ These are therefore central institutions within a Māori constitutional tradition.

VI UTU – RECIPROCITY

Numerous scholars have noted that utu, the principle of reciprocity and balance, is a central principle in the operation of Māori law. Joan Metge describes it as "one of the most important ordering principles in traditional Māori society".⁵⁵ Pākehā philosopher John Patterson has pointed to

⁵³ Ministry of Justice, above n 23, at 23. This is not completely foreign to the common law, for example the use of oaths as a means of certifying the veracity of statements.

⁵⁴ Matiu and Mutu, above n 21, at 159.

⁵⁵ Joan Metge *Tuamaka: The Challenge of Difference in Aotearoa/New Zealand* (Auckland University Press, Auckland, 2010) at 19.

parallels between the concept of utu and Western concepts of punishment and suggested that, while there are some similarities, the differences between the two concepts are significant:⁵⁶

Apart from the law of tapu, which can operate without the need of human intervention, Māori parallels to a European system of legal punishment are found in the practice of utu and in particular in the version of utu known as muru. But the parallels are approximate only. Although both punishment and utu involve a deliberate response to an offence or injury and aim to achieve retribution or repayment, they differ in important respects. Ethically speaking, punishment can be forgone, but utu cannot; punishment should be unpleasant enough to deter, but utu may be entirely friendly and welcome; punishment should be confined to offenders who have been proven guilty of intentional offences, but utu may be exacted from individuals who have done no wrong. The aims of punishment are complex and contentious, but the aim of utu can be seen as being more straightforward – utu is essentially a mechanism for restoring lost mana.

Utū is about restoring balance, not only reciprocating good gifts (food stuffs, items of clothing, tools, luxury items) but also responding to "bad gifts" (insults, thefts, other offences).⁵⁷ Mead notes that there is not necessarily a single way of responding to a gift (good or bad) but that an assessment made according to the key institutions of Māori law will dictate the response in any given situation. The process of muru (ritualized confiscation), which is described in more detail below, was one model for restoring balance by taking physical property in response to being wronged. Historically, gifts of land were made by communities to their allies to acknowledge their services in war.⁵⁸ Mead suggests a number of questions that may be relevant to ask in order to determine an appropriate form of utu where some breach has occurred, including:⁵⁹

- Who is implicated in the breach?
- What was the reason for the breach? Was harm intended? Or was the intention to benefit people?
- Did those responsible for the breach assess the likely effects on others before taking action?

The goal is to reach a state of resolution where relationships are restored. Determining the course of action necessary to restore relationships will also include reference to the nature of the particular relationships at stake, the mana of those involved, the seriousness of any breach of tapu, and any precedent or past practice.⁶⁰ The appropriate response for a breach involving close kin will likely differ from the response for the same offence committed by a distant relative. One's own

⁵⁶ Patterson, above n 28, at 134–135.

⁵⁷ Metge *Tuamaka*, above n 55.

⁵⁸ Mead, above n 14, at 186.

⁵⁹ At 342.

⁶⁰ At 343–347.

mana is affected by the mana of one's kin and, therefore, to impose severe penalties on close kin may also be of further detriment to the mana of the injured party, and consequently do little to restore balance. Historian Angela Ballara recounts an incident from the mid-19th century involving several close relatives from the hapū of Ngāti Uru. In this incident, Te Puhi of Whangaroa shot and killed a relative named Mahue. The nephew of both Te Puhi and Mahue, Young Te Puhi, took up a musket intending to kill Te Puhi (senior) for the murder, but was persuaded not to do so. Three days later, a party of 200–300 men came from a nearby settlement to punish Te Puhi (senior). They stripped the crops of Te Puhi's settlement, took two of Te Puhi's slaves, and killed another slave. Ballara notes that the killing of Mahue by a close kinsman was an aberration and that if Mahue had not been a close relative of Te Puhi (senior) "matters would have been much more serious; war would have been inevitable".⁶¹

According to Mead, the basic purpose of the system of tikanga/Māori law is to maintain balance, particularly where tapu may have been affected.⁶² An illustration of the way in which the overall objective of maintaining balance in these crucial areas of life drives the development of Māori legal processes in accordance with a Māori constitutional tradition can be seen in the ritualised confiscation (and sometimes destruction) of property as compensation for an offence, known as "muru". An eyewitness account of a relatively large-scale muru, which took place in the late nineteenth century, serves as an example of this process.⁶³ In that case, the offence occurred when a young couple eloped, despite the relationship being adulterous according to the practices of their communities. Both the young man and the young woman who eloped were of high rank, which elevated the seriousness of the situation. Under tikanga Māori, those affected by the couple's actions were not simply the wronged partners and immediate families, but included the communities of all involved. Likewise, it was not only the young man who was seen to be responsible for the offence, but his entire community. The process for restoring balance among the parties, therefore, must offer some form of restitution to the communities that were wronged. In this instance, the appropriate course of action was a ritualized confiscation and destruction of the property of the young man's community. All the affected communities were entitled to take property as compensation. Once the appropriate compensation had been made, balance was deemed to have been restored, the previously existing marriage and betrothal were annulled, and the young couple's marriage, originally in breach of tikanga, was deemed to have been confirmed in accordance with the community's law.

Mead's framework suggests that there are constitutional limits to the exercise of public power in te ao Māori. The institutions of utu, mana, tapu, manaakitanga and whanaungatanga determine that coercive force may be appropriate for maintaining balance and redressing imbalance when it occurs. The example of the ritualised confiscation, or the muru, referred to above may be an extreme case,

61 Angela Ballara *Taua: "Musket Wars", "Land Wars" or Tikanga?* (Penguin Books, Auckland, 2003) at 102.

62 Mead, above n 14, at 337–338. See also, Patterson, above n 28, at 17–45.

63 A Taranaki Veteran "The Great Muru" (1919) 28 *Journal of the Polynesian Society* 97.

but it does demonstrate the way in which the process addresses the central values of tikanga Māori, the key institutions of Māori law. The sense of reciprocity and restoring balance that is integral to the concept of utu is perhaps most obvious. But one can see too the importance of assessing the seriousness of the breach of tapu and/or the offence to mana. Whanaungatanga also plays a role in regulating this process, because muru is primarily a process for dealing with disputes amongst close kin. Avoiding full-scale conflict is most important when all parties are related. Without those kinship connections, a serious offence would almost certainly lead to some form of physical conflict. A Māori constitutional tradition therefore sanctions the use of public power in accordance with the key institutions of Māori law, but only within the limits prescribed by those institutions.⁶⁴

VII CONCLUSION

A Māori constitutional tradition must be understood as part of Māori culture, reflecting Māori systems of social organisation and political authority, aimed at reinforcing values that stem from a Māori worldview. As illustrated in this paper, the key institutions of whanaungatanga, mana, manaakitanga and kaitiakitanga, tapu and noa, and utu drive the development of Māori law in accordance with an identifiable Māori constitutional tradition.

These key institutions embody both values and practice. They transmit information about the correct way of behaving from one generation to the next. Within a constitutional context this means transmitting information about the appropriate relationships between constitutional actors and between leaders and the community. These institutions, built on principles and precedent, provide a resource that can be drawn upon to provide reasoned responses to constitutional questions – from how to place limits on law-making authority to how a person or body exercising public power should react to a given set of circumstances. Understanding these key institutions and the role they play in directing Māori constitutional thought and practice is at the heart of identifying a distinctive Māori constitutional tradition.

64 See also Hohaia Collier "A Kaupapa-based Constitution" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia, Wellington, 2010) 305.

