

# *Tino Rangatiratanga and Sustainable Development: Principles For Developing a Just and Effective System of Environmental Law in Aotearoa*

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## I INTRODUCTION

It is now uncontroversial to say that there was once a time when iwi and hapu exercised complete authority over all the lands and natural resources of Aotearoa. But today, many of those lands and resources have been completely removed from any Maori authority. Even those natural resources that remain in the ownership of Maori communities are now subject to an imposed legal system. This is not consistent with the guarantees set out in the Treaty of Waitangi, nor, I argue, is it conducive to producing good environmental outcomes.

This paper is concerned with the development of a just and effective environmental law regime in Aotearoa/New Zealand. In using the term 'just', I am envisaging a regime that would provide for the recognition of the rights and obligations agreed to in the Treaty of Waitangi. A just regime would be a system of environmental laws that are based on the partnership established by the Treaty and deliver on the guarantees in the Treaty, particularly as those guarantees relate to tino rangatiratanga and the recognition of Maori environmental law and practice. An 'effective' environmental law regime, on the other hand, would not only be effective at delivering that Treaty justice, but also effective at delivering good environmental outcomes, specifically the objectives of sustainable development. This paper adopts an interdisciplinary perspective to outline an approach to high-level reform of our system of environmental law. The paper draws on Treaty of Waitangi law and practice, Maori law and practice, and environmental law and practice to suggest a set of principles which could lead to a just and effective system of environmental law.

Part I of this paper considers, in general terms, the basic requirements of a just and effective system of environmental law. This part of the paper sets out the basic requirements of such a system in terms of the Treaty relationship, Maori environmental law, and in terms of sustainable development objectives.

After identifying the basic requirements in Part I, the paper progresses to consider, in Part II, a set of principles to guide the development of environmental law in a way which will meet those requirements. The principles are described at a high level to encompass a wide range of specific legal mechanisms which might be applied in order to give effect to those principles. These principles are, again, drawn from each of the three key areas of law and practice - the Treaty relationship, Maori environmental law and practice, and sustainable development - in which a system of environmental management must deliver if it is to provide a just and effective legal regime. The purpose of this paper is to propose guidelines that could give effect to an envisioned just and effective legal regime. Such a regime could be developed from our existing law and policy arrangements but, at the same time, our aspirations for a

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just and effective regime should not be constrained by the existing arrangements. This paper is, therefore, less concerned with the existing system of environmental law and policy than it is with identifying guidelines that direct us towards a more just and effective system.

## II PART I: BASIC REQUIREMENTS OF A JUST AND EFFECTIVE SYSTEM OF ENVIRONMENTAL LAW

### Requirements from the Treaty of Waitangi and Tino rangatiratanga

A discussion of management of Maori resources should begin by acknowledging the continuing public discussion surrounding Maori autonomy and self-determination, or tino rangatiratanga. Tino rangatiratanga is at the heart of the relationship between Maori and the Crown and issues of environmental governance cannot be discussed without reference to it. Management and development of natural resources must ultimately be seen as a function of indigenous governance.<sup>1</sup> Maori self-determination has always been a contentious issue and the political and legal arguments for the recognition of tino rangatiratanga have previously been articulated by many eminent scholars.<sup>2</sup> A brief overview of tino rangatiratanga is included here in order to suggest the basic characteristics of an environmental law regime that are required by the Treaty of Waitangi.

Maori claims to self-determination have historically been predominantly based on the Treaty of Waitangi, although there are many potential sources of Maori rights and claims to self-determination. For example, reliance on the earlier Declaration of Independence (a document signed in 1835 in which a confederation of chiefs declared their independence, protected by the British Crown) is perhaps a more powerful position for Maori to argue from.<sup>3</sup> There is also a growing field of international human rights law that could prove useful.<sup>4</sup> However, it is broadly accepted that it is the Treaty of Waitangi (although perhaps interpreted with reference to the declaration of Independence, international and common law) that sets out the relationship between Maori and the Crown.<sup>5</sup> It is for this reason that it has been the focus of Maori claims in the past, and will continue to be that focus for the foreseeable future.

As is widely known today, the Treaty of Waitangi has both an English text and a Maori text and the use of two different languages has, from 1840 onwards, resulted in differing expectations as to sovereignty and autonomy.<sup>6</sup> Today, the Waitangi Tribunal is directed by the Treaty of Waitangi Act 1975 to assess claims made under

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<sup>1</sup> Andrea Tunks "Rangatiratanga, Partnership and Protection" in Merata Kawharu (ed) *Whenua: Managing Our Resources* (Reed Books, Auckland, 2002) 322, 323.

<sup>2</sup> See, for example, Moana Jackson "Where Does Sovereignty Lie?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 196; Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Maori" in Michael Belgrave, Merata Kawharu, and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (OUP, Melbourne, 2005) 330; Joe Williams "Not Ceded But Redistributed" in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 190.

<sup>3</sup> Mason Durie *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination* (OUP, Auckland, 1998), 209.

<sup>4</sup> See Claire Charters "Indigenous Peoples and International Law and Policy" in Benjamin J Richardson, Shin Imai, and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oxford, 2009) 161.

<sup>5</sup> Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3<sup>rd</sup> edition, Brookers, Wellington, 2007), 47; Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

<sup>6</sup> Palmer, above n 5, 85.

the Treaty with reference to both texts.<sup>7</sup> This is an approach that the New Zealand courts have also adopted through the development of Treaty principles.<sup>8</sup>

For Maori, it is the guarantee of tino rangatiratanga that is the central concept of the Treaty.<sup>9</sup> Often translated as 'chieftainship'<sup>10</sup> or simply 'authority',<sup>11</sup> people may take different views as to exactly what tino rangatiratanga involves and how best it is to be achieved, but it is this part of the Treaty that Maori rely on most heavily in dealings with the Crown. Various Waitangi Tribunal reports have explored the concept of tino rangatiratanga and found it calls for a level of Maori autonomy.<sup>12</sup> Numerous Maori thinkers such as Moana Jackson,<sup>13</sup> Ranginui Walker,<sup>14</sup> Joe Williams,<sup>15</sup> and Sir Hugh Kawharu<sup>16</sup> have argued for a level of Maori autonomy on legal, moral, and political bases. Mason Durie has suggested that, when the arguments from these different bases are considered, "it is difficult not to conclude that the Treaty of Waitangi was about the establishment of a single nation state and provision for a degree of Maori autonomy".<sup>17</sup> There are of course contrary views,<sup>18</sup> but what has been outlined here is the orthodox position of Treaty scholarship. This position is well established and supported and does not require any additional arguments to be added in this paper.

Therefore, if a just resource management regime is to be developed, by which I mean a regime that is consistent with the guarantees set out in the Treaty, then the development of such a regime must acknowledge tino rangatiratanga and take place according to modes of interaction that reflect the guarantees in the Treaty. Principles to achieve this are suggested below in Part II. I suggest that these principles must also be consistent with the requirements of Maori environmental law and practice, and sustainable development, which this paper now turns to consider.

### III REQUIREMENTS FROM MAORI ENVIRONMENTAL LAW AND PRACTICE

The basis of Maori environmental law and practice is the concept of kaitiakitanga. Kaitiakitanga has been the subject of considerable analysis<sup>19</sup> and is often described as the Maori ethic of stewardship, and taking responsibility for looking after one's own.<sup>20</sup> It is inherently connected to tino rangatiratanga and the requirements that

<sup>7</sup> Treaty of Waitangi Act 1975, s 5(2).

<sup>8</sup> *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641 (HC and CA).

<sup>9</sup> See Hineahi Melbourne (ed) *Maori Sovereignty: The Maori Perspective* (Hodder Moa Beckett, Auckland, 1995).

<sup>10</sup> See I H Kawharu's translation reproduced in Michael Belgrave, Merata Kawharu, and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (OUP, Melbourne, 2005) 391.

<sup>11</sup> E T J Durie "The Treaty in Maori History" in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 156.

<sup>12</sup> See, for example, Waitangi Tribunal Ngai Tahu Report: Wai 27 (Brooker & Friend Ltd, Wellington, 1991).

<sup>13</sup> Moana Jackson "The Colonization of Maori Philosophy" in Graham Oddie and Roy Perrett (eds) *Justice, Ethics, and New Zealand Society* (OUP, Auckland, 1992) 1.

<sup>14</sup> Ranginui Walker "The Treaty of Waitangi: As the Focus of Maori Protest" in I H Kawharu (ed) *Waitangi: Maori and Pakehā Perspectives of the Treaty of Waitangi* (OUP, Auckland, 1989) 263.

<sup>15</sup> Williams, above n 2.

<sup>16</sup> I H Kawharu "Mana and the Crown: A Marae at Orakei" in I H Kawharu (ed) *Waitangi: Māori and Pakehā Perspectives of the Treaty of Waitangi* (OUP, Auckland, 1989) 211.

<sup>17</sup> Durie, above n 3, 209.

<sup>18</sup> See for example Richard Epstein "Property Rights Claims of Indigenous Populations: The View from the Common Law" (1999-2000) 31 U Tol L Rev 1, 12-14.

<sup>19</sup> See, for example, M Roberts, W Norman, N Minhinnick, D Wihongi and K Kirkwood "Kaitiakitanga: Maori Perspectives on Conservation" (1995) 2 Pacific Conservation Biology 7.

<sup>20</sup> See New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 40. John Patterson *People of the Land: A Pacific Philosophy* (Dunmore Press, Palmerston North, 2000) 123.

kaitiakitanga place on an environmental law regime come from within the framework of the Maori legal system, which is itself derived from the system of tikanga Maori.

Within such a framework it is the basic balance in the spiritual, emotional, physical or social well-being of the individual or whanau that needs to be maintained, with reference to fundamental values such as whanaungatanga, mana, utu, tapu and noa. Tikanga directs that the way to maintain this balance is through acknowledging the links between all forces and all conduct in a community. For example, in the context of criminal law, this means that the wider kin-group accepts responsibility for the individual's actions and looks to its own dynamics to remove the underlying imbalance because the rights of the individual cannot be separated from the rights of the wider kin-group.<sup>21</sup> This tikanga, or way of behaving, is equally applicable to environmental authority and kaitiakitanga. Kaitiakitanga is not simply about identifying ourselves as having close connections with the natural environment, but identifying as part of the natural environment. Decisions about environmental matters are therefore decisions about the entire community. Consequences of environmental decisions are consequences that directly affect the community (the people and all other parts of the natural world).<sup>22</sup>

According to Maori, the natural and spiritual worlds are both inherently connected to the world of humankind and to each other. At the very centre of Maori identity is the concept of the relationship to the land and the Earth-mother, Papatuanuku.<sup>23</sup>

Furthermore, people are seen very much as agents in the Maori world-view, even as agents of natural phenomena. From this perspective it follows that people must take responsibility for the environment, or at least that everyone's actions have environmental consequences.<sup>24</sup>

In the Maori world, authority does not exist only in human beings. The various atua (supernatural beings/gods) exercise authority over most matters, either through people or through the natural world. Tikanga, or the correct way of behaving in any given situation, is determined by reference to those aspects of the world which link communities to their land and to their ancestors.<sup>25</sup> It is true that these decisions might be made by individuals or groups of individuals as councils or assemblies, but the effective force of these decisions is based on connections with the ancestors.<sup>26</sup>

In the context of environmental law, resource management and sustainable development this means that every action must be environmentally justified. Everything in the natural world, be it a tree, a river, or the land itself, has an intrinsic value. To use these resources changes their intrinsic value, and if the change does not increase their value as part of the natural world, then the change is not justified.<sup>27</sup> Clearly, this does not mean natural resources can never be used. However, it does require that serious consideration be given to any environmental effects, and if the action is to be justified, the benefits must outweigh the damage. This balancing test is not simply an economic cost-benefit analysis, as any change to the natural world automatically involves a high cost. It is more than just sustainable development, but

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<sup>21</sup> Moana Jackson *The Maori and the Criminal Justice System: A New Perspective – He Whaipanga Hou* (Department of Justice, Wellington, 1988) 39.

<sup>22</sup> Maori Marsden *The Natural World and Natural Resources: Maori Value Systems and Perspectives* (prepared for the Resource Management Law Reform Core Group, Ministry for the Environment, Wellington, 1988).

<sup>23</sup> Patterson, above n 19, 14.

<sup>24</sup> *Ibid.*, 63-75.

<sup>25</sup> Jackson, above n 21, 42.

<sup>26</sup> *Ibid.*

<sup>27</sup> Marsden, above n 22.

restricts development, or use of natural resources, to those measures that actively reinforce the natural environment.

These fundamental aspects of Maori environmental philosophy, and the important differences between this philosophy and what might be generally termed a Pakeha environmental philosophy, must be identified and recognized, because it is only through this recognition that sustainable development systems can be developed which allow these environmental philosophies to co-exist and interact. This would be an important aspect of any regime that could support a just and effective system of environmental law for indigenous and non-indigenous communities in New Zealand. Principles based on Maori law and a Maori environmental philosophy that could help to achieve this recognition in the development of an appropriate resource management regime are identified in Part II. These principles must be consistent with the Treaty relationship, as described above. In order to achieve good environmental outcomes they must also be supportive of sustainable development. This paper now considers the basic requirements that sustainable development objectives place on a system of environmental law and policy.

#### IV REQUIREMENTS FROM SUSTAINABLE DEVELOPMENT

The language of sustainable development permeates the resource management and environmental law discourse. Much has been written about sustainable development, and yet there is no real agreement as to exactly what the concept entails. It is partly for this reason that I have chosen to use sustainable development as a focus of this paper. It is a concept which is demonstrably culturally dependent. One person's perspective of what is sustainable, and indeed what can be considered development, can be different from another's.<sup>28</sup> Some have argued that this renders the concept 'sustainable development' all but useless.<sup>29</sup> However, this paper proceeds from the position that sustainable development can be usefully applied. It is its very flexibility that enables it to be applied in various cultural and economic contexts.

Probably the most commonly cited definition of sustainable development is that proposed in the Brundtland report: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>30</sup> Brundtland's definition is further elaborated and divided into four key aspects: the elimination of poverty; cementing this elimination of poverty through conserving resources and fostering resource growth; including social and cultural growth, as well as the economic aspect, within the concept of development; and the incorporation of both economics and ecology in decision-making.<sup>31</sup> This elaboration indicates that, if sustainable development policies are to achieve their goals, they must incorporate both economic and ecological concerns. The integration of economic and environmental decision-making is perhaps the area of most common agreement in the sustainable development discourse.<sup>32</sup>

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<sup>28</sup> See Desta Mebratu "Sustainability and Sustainable Development: Historical and Conceptual Review" (1998) 18 *Environmental Impact Assessment Review* 493.

<sup>29</sup> Scott Campbell "Green cities, growing cities, just cities?: Urban planning and the Contradictions of Sustainable Development" (1996) 62 *Journal of the American Planning Association* 296.

<sup>30</sup> World Commission on Environment and Development *Our Common Future: Report of the World Commission on Environment and Development* (OUP, New York, 1987) [WCED *Our Common Future*] 43.

<sup>31</sup> *Ibid.*

<sup>32</sup> Robert Prescott-Allen *The Wellbeing of Nations: A Country by Country Index of Quality of Life and the Environment* (Island Press, Washington D.C., 2001). Stephen Knight "Agenda 21 in New Zealand: Not Dead, Just Resting" (2000) 7 *Australian Journal of Environmental Management* 213; Parliamentary Commissioner for the

However, the integration of decision-making processes may not achieve the desired results if sustainable development is viewed merely as a process for setting limits. Drummond and Marsden argue that the concept of sustainable development is sound, and indeed laudable, but better practical use can be made of the concept than current prevailing definitions allow.<sup>33</sup> At present, Drummond and Marsden argue, the discussion around sustainable development is focused on determining appropriate sustainable limits. The sorts of questions that tend to be asked are “Is x amount of economic activity within sustainable ecological constraints? Is the limit of pollution that must not be exceeded set at y? If this generation operates at level z, will all future generations be able to do the same?” These sorts of questions will always be open to debate, and the attention they receive has proved to be ineffective and little more than a diversion from any significant moves toward actual sustainable communities. “The real problem lies in the fact that asking where, precisely, the line should be drawn is the wrong approach. What should be explored is why and how the line will tend to be crossed wherever it is drawn”.<sup>34</sup>

These concerns are also reflected in the comprehensive report on sustainable development released by New Zealand’s parliamentary commissioner for the environment in 2002:<sup>35</sup>

Sustainable development is an evolving process intended to improve the well-being of society for the benefit of current and future generations. . . . Decisions need to reflect an understanding of social, cultural, ethical, economic and environmental interests of the society, and the interactions and tensions that occur among these interests. Decision makers must take responsibility for actions that might affect future generations who are unable to participate in the decision-making process.

In order to address these issues, this paper adopts a realist perspective of sustainable development. A realist perspective recognises that sustainability is dependent on multiple and interconnected factors.<sup>36</sup> This approach will allow the system to be explored as a whole, consistent with a Maori holistic world-view. In this sense sustainable development is more of an ethic or an ideal than a fixed limit. Realistically, the relationships between all the various environmental and ecological factors in any given situation cannot be perfectly and predictably determined. Therefore, the best that those responsible for the environment can do is to continually reduce damaging interference with the complete system. This still inflicts limited changes on the environment and so makes it impossible for future generations to enjoy exactly the same natural environment as we do today. However, striving for perfect sustainability is arguably a much more effective process to engage in than trying to determine the limits of what the environment can bear. The aim of a realist approach is not simply to address the more visible ecological problems, but to look at all the contributing factors, with the view to making the system as sustainable as

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Environment *Creating Our Future: Sustainable Development for New Zealand* (Parliamentary Commissioner for the Environment, Wellington, 2002) [PCE *Creating Our Future*].

<sup>33</sup> Ian Drummond and Terry Marsden *The Condition of Sustainability* (Routledge, London, 1999).

<sup>34</sup> *Ibid*, 21.

<sup>35</sup> PCE *Creating Our Future*, above n 32, 38.

<sup>36</sup> I Drummond and T K Marsden “Regulating Sustainable Development” (1995) 5 *Global Environmental Change* 51.

possible. I suggest that a realist theory and a systems-based approach to sustainable development are particularly necessary within the New Zealand context where Maori communities will be involved.

Sustainable development is not a Maori concept. However, Maori have always had a strong ethic of sustaining land and resources as part of sustaining the community. Maori society has also always been willing to encourage development that supports the community as a whole (including the natural environment).<sup>37</sup> Sustainable development can, therefore, make sense in the Maori world, but only if it is applied in a way that allows Maori conceptualisations of sustainability and development to form the basis of a holistic, systems-based ethic. As the Parliamentary Commissioner for the Environment has noted:<sup>38</sup>

Any definition of sustainable development needs to reflect the values of the society or culture concerned. Within New Zealand that includes the values and ethical concerns of tangata whenua. Some values and ethics of Pakeha New Zealanders may be similar to those of tangata whenua, even though there are differing underlying cultural values.

The necessity of a fully integrated approach to sustainable development is a major theme of the Parliamentary Commissioner for the Environment's *Creating Our Future* report.<sup>39</sup> This paper will use sustainable development in the same way that report does.

## **V PART II: PRINCIPLES OF A JUST AND EFFECTIVE SYSTEM**

Part I of this paper identified three key areas from which the basic requirements of a just and effective system of environmental law should be drawn. Part II considers a number of principles drawn from these three key areas to guide the development of our environmental law in a way that could meet the basic requirements of a just and effective system of environmental law as outlined in Part I.

### **A. PRINCIPLES FROM THE TREATY OF WAITANGI AND TINO RANGATIRATANGA**

As demonstrated in the recent Waikato River Settlement, the Treaty of Waitangi relationship provides extraordinary scope to develop resource management law in a way that better reflects tino rangatiratanga.<sup>40</sup> This section examines a number of principles drawn from the Treaty of Waitangi relationship which could be applied to the development of resource management law to provide Maori with effective stewardship of their natural environment.

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<sup>37</sup> Patterson, above n 20, 65-68.

<sup>38</sup> PCE *Creating Our Future*, above n 32, 43.

<sup>39</sup> PCE *Creating Our Future*, above n 32.

<sup>40</sup> Deed of Settlement in Relation to the Waikato River (22 August 2008). While it is still too early to assess the effectiveness of this agreement, the terms of the agreement are significant in that the provisions of this Deed are designed to implement mechanisms for the restoration and protection of the health of the Waikato River, based on the commitment by the Crown and Waikato-Tainui to enter into a "new era of co-management" in relation to the Waikato River.

These principles should not be confused with the Treaty principles that have been developed by the New Zealand courts and the Waitangi Tribunal,<sup>41</sup> nor the Crown negotiating principles that the Office of Treaty Settlements has produced.<sup>42</sup> The guidelines that follow are rather based upon the Treaty guarantees, Maori experiences within the settlement process, and what those experiences suggest is necessary to construct a model of interaction based on the Treaty relationship. They do not necessarily reflect the adversarial bargaining that is often evident in the Treaty settlement process. In many ways, they aim to directly address problematic aspects of that process. The guidelines suggested here are: 'Tino Rangatiratanga' (respecting the guarantees of the Treaty of Waitangi); 'Negotiated Relationships' (developing cooperative ways of working together); and 'Tangata Whenua' (look to indigenous ways of organising).

### **i. 'Tino rangatiratanga' as a principle of environmental law reform**

Tino rangatiratanga is the primary guarantee made to Maori within the Treaty of Waitangi. As such, it has been a central component of many Waitangi Tribunal inquiries.<sup>43</sup> As has been outlined, there are many aspects of tino rangatiratanga, though all related. In the context of the environment and resource management, tino rangatiratanga encompasses the concept of effective Maori authority over Maori resources. The exercise of kaitiakitanga as a function of effective governance and self-determination is definitely included.<sup>44</sup>

The guarantee of tino rangatiratanga in the Treaty is provided in exchange for the cession of kawanatanga. Kawanatanga should also fall within the resource management law reform principle of tino rangatiratanga. Kawanatanga and tino rangatiratanga, together, represent the framework of the Crown-Maori relationship. In the development of environmental law, this framework should be one of the most basic considerations.

The Waitangi Tribunal has determined that among the principles of the Treaty of Waitangi is a principle of mutual benefit and development.<sup>45</sup> It is not difficult to perceive that the Treaty relationship would have initially been entered into for reasons of mutual benefit and development. Tino Rangatiratanga, as applied as a principle of environmental law reform, should include the aim of the mutual benefit and development of Maori communities and the broader New Zealand society.

### **ii. 'Negotiated relationships' as a principle of environmental law reform**

The implementation of the current Treaty settlement process contains many lessons that relate to the development of legal regimes which affect relationships between Maori and the Crown. One of the most important lessons to be learnt from the Treaty settlement process is the importance of fair negotiation at all stages of the process.<sup>46</sup> After all, the Treaty of Waitangi itself demands that the parties deal with each other

<sup>41</sup> See Te Puni Kokiri *He Tirohanga o Kawa ki te Tiriti o Waitangi* (Te Puni Kokiri, Wellington, 2001).

<sup>42</sup> Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future* (2 ed, Office of Treaty Settlements, Wellington, 2002) [OTS *Ka Tika a Muri, Ka Tika a Mua*] 30.

<sup>43</sup> See Palmer, above n 5, 116-117.

<sup>44</sup> Waitangi Tribunal *Whanganui River Report: Wai 167* (Legislation Direct, Wellington, 1999) 263-264.

<sup>45</sup> Waitangi Tribunal *Te Whanau o te Waipereira Report: Wai 414* (GP Publications, Wellington, 1998) xviii.

<sup>46</sup> See Crown Forestry Rental Trust *Maori Experiences of the Direct Negotiation Process* (Crown Forestry Rental Trust, Wellington, 2003) 14.



fairly.<sup>47</sup> Any group that is developing environmental law in Aotearoa should be sure to negotiate the process of development itself with Maori communities.

If the development of the law was negotiated fairly in such a way as to include a Maori world-view (for how could fair negotiation exclude this perspective?), then this could provide a foundation for a bijuridical legal regime, that is, one that draws on both Maori and state environmental laws and objectives.

It is not just within the development of a new legal regime that negotiating the Crown-Maori relationship is necessary. The operation and application of the subsequent law must also be subject to negotiation between Maori and the Crown. If Maori are to exercise tino rangatiratanga in a meaningful way, then Maori communities must be free to make their own decisions as regards the management of their natural resources.<sup>48</sup> However, the Crown must also be able to make decisions in fulfilment of their kawanatanga responsibilities.<sup>49</sup> Both parties must be free from the command of the other, and yet both must be subject to the relationship set out in the Treaty of Waitangi. Any new resource management regime must allow for the operation and application of the law to be the subject of continual negotiation between Maori and the Crown as equal partners.

### iii. 'Tangata whenua' as a principle of environmental law reform

One important aspect of the contemporary application of tino rangatiratanga is an emphasis on local control.<sup>50</sup> This can also be seen in the Treaty of Waitangi settlements. Provisions are included for local input into environmental decision-making.<sup>51</sup> The development of environmental law should also reflect the importance of local authority. This will no doubt be encouraged if other principles outlined in this paper are applied. For instance, processes, such as those discussed below, which encourage community input also encourage local authority. A principle of mana is also addressed below. Enhancing the mana of those involved encourages local authority. Nevertheless, the 'tangata whenua' principles is considered here as a separate principle so that local control is promoted to the greatest possible extent and as an end in itself.

The basic requirements set out in Part I also suggest the need to develop appropriate Maori structures. The need to work with indigenous, rather than externally imposed, governance structures and processes is gaining increased attention, particularly with regard to Treaty settlements.<sup>52</sup> The development of Maori structures will be a major factor in the incorporation of Maori values within any new legal regime. The creation of a truly bijuridical regime, the operation of which would be designed around both Maori and state laws, would also necessitate the participation of truly Maori institutions. The establishment of Maori structures would help to

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<sup>47</sup> *New Zealand Maori Council v Attorney-General* [1987] 2 NZLR 641 (CA). Waitangi Tribunal *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa claims: Wai 814* (Legislation Direct, Wellington, 2004) 120.

<sup>48</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim: Wai 6* (Department of Justice, Wellington, 1983) 51-52.

<sup>49</sup> *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517 Lord Woolf. *New Zealand Maori Council v Attorney-General*, above n 47.

<sup>50</sup> See, for example, *Te Awanui: Tauranga Harbour Iwi Management Plan* (Te Runanga o Ngai Te Rangi, Tauranga, 2008) 16-17.

<sup>51</sup> See *Otska Tika a Muri, Ka Tika a Mua*, above n 42, 96-123.

<sup>52</sup> See, for example, New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, Wellington, 2006).

engage Maori communities in resource management processes and contribute to the development of legitimate local authority.

## **B PRINCIPLES FROM MAORI ENVIRONMENTAL LAW AND PRACTICE**

The next category of principles that this paper examines is comprised of those principles that are part of a Maori environmental philosophy and comprise key aspects of Maori environmental law and practice. If Maori are to exercise effective authority over their natural resources, a Maori environmental philosophy must necessarily provide the basis for that authority. This section identifies a number of principles drawn from tikanga Maori that could be usefully applied to the development of resource management law which might lead to more effective Maori control over their natural resources and a better expression of tino rangatiratanga. These principles are: 'Whanaungatanga' (recognising the way kinship relationships work and using these structures appropriately); 'Mana' (affirming the authority of the tangata whenua); 'Kaitiakitanga' (respecting relationships with the natural environment).

### **i. 'Whanaungatanga' as a principle of environmental law reform**

Even amongst the other fundamental values that underlie tikanga Maori, whanaungatanga can be seen as a central organising concept.<sup>53</sup> Whanaungatanga must be a fundamental consideration in any project involving Maori, from Waitangi Tribunal hearings to research with Maori communities to provision of public services to Maori. Developing appropriate legal responses to concerns about resource management in Aotearoa is no exception. This section of the paper then considers how whanaungatanga might be used as a principle of resource management law reform. Using whanaungatanga as a principle of resource management law reform would mean that any legal regime that is developed must recognise four key aspects of the application of whanaungatanga: Maori communities must be engaged at various appropriate levels; whanaungatanga will be the primary guide for determining appropriate action; whakapapa is, and must remain, flexible; and, basic responsibilities resides with the collective.<sup>54</sup>

The concept of whanaungatanga should provide the framework for the appropriate engagement of Maori communities in any process. Environmental law and resource management processes are no exceptions. As noted above, whanaungatanga is seen as the central value underlying the Maori legal system. Maori society operates through a system of kinship networks and obligations and responsibilities are developed through the recognition of these relationships.<sup>55</sup> A new construction of resource management laws must recognise this aspect of Maori social organisation. The system of environmental law should look to provide opportunities for rights and obligations to be developed between Maori communities and other communities of interest in a way that acknowledges and respects the values of whanaungatanga.

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<sup>53</sup> Joe Williams, Chief Judge of the Maori Land Court "He Aha te Tikanga?" (Paper presented at Mai i te Ata Hapara conference, Te Wananga o Raukawa, Otaki, 11-13 August 2000).

<sup>54</sup> Hirini Moko Mead *Tikanga Maori: Living by Māori Values* (Huia Publishers, Wellington, 2003) 59-62, 215.

<sup>55</sup> Mead, above n 54.

Whanaungatanga also guides decision-making. Rights and obligations are determined by reference to genealogy. To give appropriate recognition to whanaungatanga, the system of environmental law must allow Maori to continue to make decisions according to whakapapa. The legal regime should respect and promote whakapapa and whanaungatanga as central parts of the Maori decision-making process.<sup>56</sup>

One of the most important characteristics of traditional Maori social organisation is the flexibility of whakapapa. The manipulation of genealogy provides for dynamic social communities. This may be a relatively difficult concept to translate into a different legal system. However, within the environmental law regime, this flexibility will need to be recognised, and furthermore it will need to be incorporated into that system, if Maori are to engage actively and effectively with the regime.

As is illustrated above, Maori society is based around relationships. Interactions between Maori communities begin with acknowledgements of the various relationships that are important in the context of those interactions. This can be seen in every-day activities or social forms such as the components of the powhiri.<sup>57</sup> Therefore, the emphasis on whakapapa in sustainable development must focus on making connections and must not become about isolating genealogical lines into fixed and separate positions.

Collective responsibility may be another aspect of whanaungatanga that will be difficult to apply within a state legal system that owes so much to the rights of the individual. But, as with the flexibility principle, this is something that must be considered in the construction of a new regime if Maori are to engage with the system and see their values reflected in the operation of that system. Collective responsibility could be usefully applied to many areas of the law, but in relation to environmental law it could be particularly useful because it is a concept that is appropriate to Maori and which also promotes an ethical outlook that is extremely compatible with the movement towards sustainable development.<sup>58</sup>

## ii. 'Mana' as a principle of environmental law reform

Mana is also an important conceptual regulator within tikanga Maori. Mana is the primary concept that underlies Maori leadership. It is therefore a vital consideration in the development of environmental and resource management laws that more effectively express Maori authority over their natural resources. There are two parts to the concept of applying mana as a principle of environmental law reform. The first part of the concept is that the law should be developed in a way that affirms the mana of the tangata whenua within the development process itself. The second part of the concept is that the substance of the legal regime should reflect the mana of the tangata whenua.

The mana of Maori and the various hapu and iwi must be respected and promoted in the development of a new system of environmental law. Mana is a fundamental motivating factor amongst Maori. If the process of constructing a new legal regime is a process which enhances the mana of those involved, then it is likely that Maori will actively participate. However, if the mana of the participants is degraded, then Maori, like anyone else, will not want to be a part of the process. This

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<sup>56</sup> Compare Waitangi Tribunal *Tamaki Makaurau Settlement Process Report: Wai 1362* (Legislation Direct, Wellington, 2007).

<sup>57</sup> Mead, above n 54, 117-132.

<sup>58</sup> Patterson, above n 20, 43-48.

means that Maori should be involved at every step of the process. Good consultation would appear to be one obvious way in which contributions from those who choose to participate are respected, and again, this would apply to non-Maori as well as Maori. The more that Maori are involved in the process of developing the law, the greater the likelihood that the law will reflect Maori values and concerns. Ultimately, the aim is of course to develop a legal regime in this area that is effective and encourages participation from all sectors of the community. One way to achieve this is to ensure that, from the very beginning of the law-making process, the mana of those involved is enhanced by their participation. The Diceyan/Hobbesian approach that reinforces the authority of a centralised institution, and is the orthodox framework through which the New Zealand constitution is viewed, is quite unhelpful in this context.<sup>59</sup>

Ideally mana will also be enhanced by engaging with the legal regime that results. If the law is to be effective in addressing Maori concerns in relation to the environment, then the legal regime must recognise the mana of Maori communities in every aspect of its operation. This recognition will probably need to come through a variety of mechanisms, and consequently a variety of models of legal interaction. Some examples of how the mana of Maori communities can be enhanced within an environmental regime are provided by the Auckland iwi of Ngati Whatua ki Orakei.<sup>60</sup> This community has taken responsibility for naming streets according to Ngati Whatua tradition, and is also buying back traditional land. Other iwi have created specific forms of property title to place additional protections on the iwi's land assets.<sup>61</sup> These measures provide an important indication of the aspirations of Maori to manage their natural resources in a way that reflects their own environmental philosophy, laws, and practices. This could be taken further under an environmental regime that justly and effectively reflects the mana of Maori communities. Land transfers could be subject only to Maori custom and disputes over the natural environment could be resolved with Maori dispute resolution processes.<sup>62</sup> This would support iwi to maintain their connections with the natural world, and, by doing so, ensure Maori cultural investment in sound environmental stewardship.

### iii. 'Kaitiakitanga' as a principle of environmental law reform

The suggestion to include the concept of kaitiakitanga as a principle of resource management law reform is perhaps one of the more obvious suggestions, as kaitiakitanga relates directly to interaction with the natural world.<sup>63</sup> Kaitiakitanga relates to many of the ideas that underlie sustainable development, particularly the idea of managing resources with future generations in mind. The central concept of whanaungatanga is closely connected to kaitiakitanga.<sup>64</sup>

The special relationship between tangata whenua and the natural environment has been noted in numerous Waitangi Tribunal reports.<sup>65</sup> It also finds expression in

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<sup>59</sup> Andrew Sharp *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s* (2 ed, OUP, Auckland, 1997).

<sup>60</sup> Precious Clark "Te Mana Whenua o Ngati Whatua o Orakei" (2001) 9 Auck U LR 562.

<sup>61</sup> See, for example, Ngati Awa Claims Settlement Act 2005, Part 6.

<sup>62</sup> For an overview of the fundamental aspects of Maori dispute resolution processes, see

<sup>63</sup> Khylee Quince "Māori Disputes and their Resolution" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2 ed, OUP, Melbourne, 2007) 256.

<sup>64</sup> Patterson, above n 20.

<sup>65</sup> See Nicola R When and Jacinta Ruru "The Environmental Reports" in Janine Hayward and Nicola R When (eds) *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004) 97.

the current Resource Management Act 1991,<sup>66</sup> and provides the basis of iwi resource management plans.<sup>67</sup> The recognition of the fundamental importance of these relationships must be at the heart of any legal structures that deal with resource management issues in Aotearoa.

Kaitiakitanga refers to the responsibilities and obligations of the local people as guardians and stewards of the natural environment. It is entirely consistent with the inter-generational equality embedded within sustainable development. For the effective exercise of kaitiakitanga, for local communities to effectively take on the responsibilities and obligations kaitiakitanga entails, kaitiakitanga must be seen as a function of indigenous and environmental governance. Effective and legitimate authority in this area must stem from the recognition of kaitiakitanga as an expression of tino rangatiratanga.<sup>68</sup>

## C PRINCIPLES FROM SUSTAINABLE DEVELOPMENT

Sustainable development may be a rather nebulous concept, but it is nevertheless very useful. It is a concept that, quite appropriately, underlies the current resource management regime in Aotearoa. As a concept, it has not always been helpful to indigenous peoples. Indigenous practices have often been criticized for being unsustainable by conservationists.<sup>69</sup> On the other hand, some sectors have argued that too great a protection of indigenous interests establishes intolerable impediments to development.<sup>70</sup> There is arguably an approach to sustainable development that is not only consistent with what might broadly be termed indigenous interests, but can actually provide a means of achieving greater indigenous input into how natural resources are used. This section identifies a number of sustainable development principles that could be applied to this end. These principles are: the 'Integrated/Systems approach'; 'Community input'; and the 'Primacy of Process'.

### i. 'Integrated/Systems approach' as a principle of environmental law reform

The very concept of sustainable development is based on the recognition that economic and ecological considerations should not be separated from each other. Integrating decision-making is a fundamental component of sustainable development.<sup>71</sup> One way of encouraging integrated decision-making is to apply a 'systems' approach to problem-solving. The interactions and links between the environmental, economic, and social factors would be analysed under this approach, rather than isolating each of the individual components. A systems approach to sustainable development issues is advocated because, as noted in *Creating Our Future*: "Decision makers can be faced with a wide range of biological, social,

<sup>66</sup> Resource Management Act 1991, s 7(a).

<sup>67</sup> See, for example, *Te Awanui: Tauranga Harbour Iwi Management Plan*, above n 50, 16-17.

<sup>68</sup> See also Murray Hemi "Local Government and the Waitangi Tribunal" in Janine Hayward (ed) *Local Government and the Treaty of Waitangi* (OUP, Melbourne, 2003) 55.

<sup>69</sup> See, for example, L M Shields "Are Conservation Goals and Aboriginal Rights Incompatible?" (2000) 10 *Journal of Environmental Law and Practice* 187.

<sup>70</sup> See, for example, Don Brash, Leader of the National Party "Nationhood" (Speech to the Orewa Rotary Club, 27 January 2004).

<sup>71</sup> *PCE Creating Our Future*, above n 32.

cultural, physical, ethical, and economic considerations. No one component on its own determines whether the system is functioning in a sustainable way.”<sup>72</sup>

A systems approach is also consistent with a Maori environmental philosophy. One of the most striking characteristics of the Maori world-view is its holistic nature, recognizing the inter-connectedness of all things.<sup>73</sup> This world-view shapes responses to a range of social problems, and especially environmental issues.<sup>74</sup> Adopting a systems approach could therefore also be useful in giving effect to a Maori environmental philosophy within a resource management regime.

The compatibility of the systems approach and a Maori environmental philosophy might even suggest that this might be an appropriate area of the legal regime to apply a bijuridical model of legal interaction. By definition, the holistic nature of both approaches necessitates decision-makers have some form of jurisdictional overview of the entire system. To incorporate a Maori holistic approach and a non-Maori systems approach in a way in which each retains this system overview becomes more difficult the more separated one approach is from the other. Therefore it is suggested that a bijuridical system of laws be co-developed in this area. The development of a bijuridical system is never a simple process, but the compatibility of the philosophies that underlie the approaches to this specific aspect of a legal regime relating to the management of the environment and natural resources means that the development of such a system should not prove impossible.

## ii. ‘Community input’ as a principle of environmental law reform

Another common feature of both Maori social organisation and the New Zealand state’s liberal-democratic values is the ideal of accountability of leaders and decision-makers to the wider community. It is of course also true to say that these two systems of accountability tend to operate in different ways. Nevertheless, a key aspect of both systems of authority is that of public participation. Public participation is as necessary for modern Western liberal democracies<sup>75</sup> as it is for the continued health and well-being of hapu and iwi.<sup>76</sup> Public participation is particularly important in environmental decision-making and resource management processes.<sup>77</sup> One of the main aims of the Resource Management Act 1991 was to increase public participation, and it is generally accepted that resource management processes are now more accessible to the general public than prior to the enactment of this legislation.<sup>78</sup> However, it should also be noted that there are many people who consider that the rhetoric of public participation is not satisfactorily fulfilled in community decision-making in Aotearoa.<sup>79</sup>

Many of the difficulties that have arisen from the current resource management processes and the Treaty of Waitangi settlement negotiations relate to

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<sup>72</sup> PCE *Creating Our Future*, above n 32, 37.

<sup>73</sup> Marsden, above n 22.

<sup>74</sup> Patterson, above n 20, 63-75.

<sup>75</sup> Julia Abelson, Pierre-Gerlier Forest, John Eyles, Patricia Smith, Elisabeth Martin, Francois-Pierre Gauvin “Deliberations About Deliberative Methods: Issues in the Design and Evaluation of Public Participation Processes” (2003) 57 *Social Science and Medicine* 239.

<sup>76</sup> Jackson, above n 21, 39-40.

<sup>77</sup> Anne E Simon “Valuing Public Participation” (1998-1999) 25 *Ecology Law Quarterly* 757.

<sup>78</sup> M Southgate “Sustainable Planning in Practice?” (1998) 67 *Town and Country Planning* 372.

<sup>79</sup> Julie Frieder *Approaching Sustainability: Integrated Environmental Management and New Zealand’s Resource Management Act* (Ian Axford (New Zealand) Fellowships in Public Policy, Wellington, 1997).

the capacity of Maori communities to engage effectively in these processes.<sup>80</sup> Part of the reason that the Resource Management Act does not fulfil its participatory aims is because of a lack of capacity among those who have, for various reasons, historically been excluded from the decision-making process.<sup>81</sup> Among such communities are many Maori communities. Maori are often asked to participate in processes that they did not create. Effective participation requires the skills and financial resources that are necessary to operate within these processes. One approach to these issues would of course be to include Maori in the development of the processes, so that the processes include a Maori way of doing things. It does not make sense to expect that communities who have been deprived of effective control of their resources should suddenly be prepared to participate in processes that not only require particular skills and significant financial resources, but are also alien to their own systems of environmental philosophy and practice.

The reason why public participation is considered necessary in environmental processes is not simply a matter of making people feel included. Public participation is considered to be a contributing factor of robust public decision-making.<sup>82</sup> Part of this is indeed about making people feel included in the process; the thinking being that if a wide cross-section of the community can see its values represented in decisions taken by community leaders, then the various communities of interest will be more likely to support and engage with the legal regime that has been established and to respect decisions that are made.<sup>83</sup>

There is another pragmatic aspect to the aim of broad public involvement in decision-making. This is that better decisions will result from consideration of a wide range of views.<sup>84</sup> It should not be forgotten that although developing good processes is vitally important, we must be careful to ensure that these lead to robust environmental outcomes.

### iii. Primacy of process as a principle of environmental law reform

Of course the consistency of robust results often depends on good processes. The involvement of a wide cross-section of the community definitely depends on good processes being in place. This is why the recent developments in resource management law have often focused on the development of procedural safe-guards.<sup>85</sup>

Tikanga Maori can be seen to be very process-based.<sup>86</sup> The conceptual regulators that underlie the system of tikanga, such as whanaungatanga, mana, and kaitiakitanga, can each be understood as process guides. Focusing on process may make the task of inter-twining Maori and state systems of environmental law slightly less complex. Though there would still be many complicated aspects to such a project, a focus on process might assist in creating, or at least identifying, larger areas of compatibility between the legal systems.

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<sup>80</sup> Tikitu Tutua-Nathan "Kaitiakitanga: A Commentary on the Resource Management Act 1991" in Janine Hayward (ed) *Local Government and the Treaty of Waitangi* (OUP, Melbourne, 2003) 39, 42.

<sup>81</sup> Janet Stephenson "Recognising Rangatiratanga in Resource Management for Maori Land: A Need for a New Set of Arrangements?" (2001) 5 NZJEL 159.

<sup>82</sup> Abelson, et al., above n 75.

<sup>83</sup> Manley A Begay and Stephen Cornell "What Is Cultural Match and Why Is it So Important?" (Paper presented at the Indigenous Governance Conference, Jabiru, Northern Territory, 5-6 November 2003).

<sup>84</sup> Abelson, et al, above n 75.

<sup>85</sup> See also Richard Boast "The Treaty and Local Government: Emerging Jurisprudence" in Janine Hayward (ed) *Local Government and the Treaty of Waitangi* (OUP, Melbourne, 2003) 157.

<sup>86</sup> Mead, above n 54.

## VI CONCLUSION

This paper suggests that there are a number of factors that should guide the development of a system of environmental law that reflects Maori values and the guarantees of the Treaty of Waitangi whilst fostering sustainable development.

As explored in Part I of this paper, the development of a just and effective system of environmental law should be informed by factors that are derived from law and practice relating to the Treaty of Waitangi, Maori environmental law and practice, and sustainable development objectives and policy. Each of these three fields sets some fundamental, basic requirements that must be met by a system of environmental law and policy, here in Aotearoa, that aspires to be both just and effective. These basic requirements are discussed in Part I.

When brought together, these basic requirements suggest a number of core principles for the development of a just and effective system of environmental law. By adopting an interdisciplinary perspective, some high-level principles can be identified that direct the development of law and policy towards a more just and effective system, and which are also compatible with, and complementary of, each other. Part II of this paper identifies a set of such principles, following the basic requirements set out in Part I, and drawing on the three key areas of Treaty law and practice, Maori environmental law, and sustainable development objectives.

It is suggested that these principles should guide the development of new legal structures relating to management of natural resources in Aotearoa. These principles are stated at a high level and in relatively general terms because it is recognised that there will be a range of specific legal and policy mechanisms which could be applied to implement these principles and, as such, meet the basic requirements of a just and effective system of environmental law. The purpose of using these principles to guide the development of law and policy in this area is not to dictate any particular reforms or measures. Rather, the purpose is to provide a set of guidelines for the development of a system of environmental law and policy that better reflects the Maori-Crown relationship and the protection of tino rangatiratanga set out in the Treaty of Waitangi, and which, at the same time, recognises that a regime that respects Maori laws, values, and authority, is more likely to encourage sustainable development amongst Maori communities. The overriding concern is, therefore, not the specific legal and policy instruments, but instead the more general concern of moving towards a system of environmental law that is truly just and effective.