THE RECOGNITION OF TIKANGA IN THE COMMON LAW OF NEW ZEALAND

Natalie Coates[1]

E tuku mihi ana ki a koe e te whaea Nin. E te rangatira aumangea, ko koe he kaiarataki wahine i roto i te ao ture. Kei te noho mokemoke tonu tātou te hunga mātauranga. E moe, e oki, e kore mātou e warewaretia i a koe i tō ake mahi mō tātou te iwi Māori.

We thank the editors of the NZ Law Review for allowing the republication of this article, originally published in [2015] NZ Law Review 1.

I. Introduction

Mr James Takamore passed away in August 2007.[2] Mr Takamore, of Māori descent and a member of the Tūhoe tribe, had resided in Christchurch, where he had lived with his non-Māori partner Denise Clark and their two children for twenty years. Ms Clark was the executrix of his will and contrary to her wishes, Mr Takamore's body was taken from Christchurch by his sister and other members of his family and buried at Kutarere marae (in the North Island) beside other whānau (family) members. This polarising and emotionally contentious set of facts highlights a clash of legal orders. On one hand, Ms Clark claimed rights under the common law, as executrix, to decide where the body should be buried. On the other hand, Mr Takamore's Māori family asserted that they had a right to the body by virtue of tikanga Māori (or Māori customary law), which also has status under the common law.

This factual scenario goes to the heart of an issue that the New Zealand legal system has been struggling with for over 150 years: the role and interaction between tikanga and the New Zealand state legal system.

For Māori, tikanga has always existed as a framework for regulating behaviour. It operated before Pākehā came to New Zealand and it continues to play a valued and relevant role in the lives of many Māori today. However, the routes by which tikanga can

---

[1] Solicitor at Kahui Legal, New Zealand. Parts of this article are adapted from a research paper that I completed for my Master of Laws from Harvard University. I wish to thank Claire Charters, Janet McLean and Treasa Dunworth for their comments and constructive feedback on early versions of this work.

[2] These facts are taken from the case of *Takamore v Clark* [2011] NZCA 587, [2011] 1 NZLR 573 [*Takamore* CA].

engage in a form of "legal association" with the mainstream New Zealand legal system are limited.[3] The basic dominant legal structure, in essence, only positively recognises and enforces two primary sources of law: those statutes enacted by the New Zealand Parliament and judge-made common law.[4] Therefore under current constitutional arrangements and orthodox legal thinking, tikanga either has to be recognised by these two sources of law or function as a normative order outside the system, permissible only where it does not conflict with the pervasive state legal scheme.

This article examines the interaction between tikanga and the common law and the potential of this route, as distinct from legislative incorporation, as a means by which tikanga can claim space within the state legal system. It does this by:

1. providing a basic explanation of the common law and tikanga Māori and their interaction;
2. giving a brief overview of the interaction between tikanga and the common law throughout New Zealand legal history;
3. making an argument that the common law should positively facilitate the recognition of tikanga;
4. exploring the current legal framework and its potential; and
5. pointing out a number of the broader limitations of this form of recognition.

The article concludes that, despite the many limitations and dangers in the current framework of association, there is scope for the common law to be a vehicle by which tikanga finds a limited space in the state legal system, provided that the judiciary is willing and takes care in the manner that they traverse the interaction between the two legal systems.

---

[3] The term "legal association" is borrowed from Nicole Roughan's article "The Association of State and Indigenous Law: A Case Study in 'Legal Association'" (2009) 59 U.T.L.J. 135. It derives from legal pluralism and involves the opening of a legal system's borders to another legal system. Roughan defines it as "inter-systemic relationships that are deliberate, involving the integrations, incorporations, or other formal interactions that occur between legal systems" at 136.

[4] See Paul McHugh *The Māori Magna Carta* (Oxford University Press, Auckland, 1991) at 11 for a discussion on the sources of Anglo-New Zealand law.

II. The Common Law and Tikanga Māori

The common law in a broad sense refers to the system of law that developed in England and was subsequently transplanted into most former colonies of the British Empire. New Zealand accordingly inherited this legal system. It is characterised by law that is developed by judges through decisions of courts. Unlike civil law legal systems that are founded on extensive legal codes, the centrality of precedent is integral to the common law legal system. The common law in a more narrow sense refers to only part of the legal system and can be defined in contrast to statute.[5] For simplicity, it can be thought about in two ways. First, there is the pure common law. This is law that arises from the inherent authority of courts to define the law, in the absence of an underlying statute. This is when judges create law with reference to situations that come before the court and past decisions, without the aid of legislation. The historical foundation of this law was community customs and practices.[6] In the New Zealand context, this pure common law is based on imported English common law that has been modified over time by developments and decisions made by New Zealand domestic courts.

Second, there is interstitial common law, which is law that results when courts define law that is promulgated by legislative bodies. This is the system of precedents that arise when courts apply legislation or regulations to specific factual situations. In the process of interpretation and application, due to the precedential nature of this system, judges in effect create law. This article is primarily concerned with the former stream of pure common law as an avenue for the recognition of tikanga or Māori customary laws and practices.[7]

Tikanga Māori literally translated means the "right" Māori way of doing things. In this article the terms "tikanga Māori" and "Māori customary law" are used interchangeably. Māori customary law is a complex notion to define and there are a number of different ways of looking at it. It can be seen in a narrow legalistic sense to refer to those customs that have met particular legal tests and are enforceable in court, or in a broader sense

---

[5] See John Gardner "Some Types of Law" in Douglas E Edlin (ed) *Common Law Theory* (Cambridge University Press, Cambridge, 2007) 51 at 72–74 for a discussion on the difference between the "Common Law" system in the broad sense and the "common law" in its narrow sense.

[6] See Michael Lobban "Custom, common law reasoning and the law of nations in the nineteenth century" in Amanda Perreau-Saussine and James Bernard Murphy (eds) *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, Cambridge, 2007) 256 at 257.

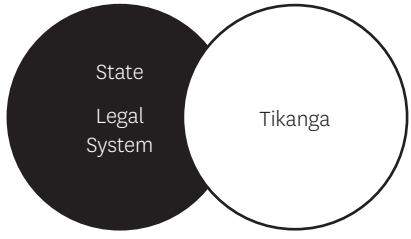
[7] Note that this article will, however, go on to make some comments on the potential relevance of tikanga for interstitial common law

to refer to that body of rules developed by Māori to govern themselves.[8]

Although this article is about the association of tikanga with the state legal system and whether it has status within courts, when "tikanga" or "Māori customary law" is referred to generally, it is used in its wider sense as representing a body of law within its own cultural context. This is in a similar vein to Sir Eddie Taihakurei Durie who has described Māori customary law broadly as "[the] values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct".[9] It includes not only the procedures, protocols, practices and rules, but also the principles and values that inform these such as whakapapa, whānaungatanga, mana, manaakitanga, aroha, wairua and utu.

Tikanga can be conceptualised as being a sphere of law in its own right, a self-contained functional legal order that has rules, values, principles and processes dictating how customary practices are identified, how disputes are resolved, and how rules and protocols can change or be developed over time. When questions or issues pertaining to tikanga arise, unless it conflicts with the state legal system, they are usually resolved in the appropriate tikanga-orientated Māori forum. For example, the questions of whether cremation is consistent with tikanga or whether women should be permitted to deliver whaikōrero (oratory) in the pōwhiri (welcoming) process on marae are questions that are usually worked out in accordance with the tikanga of particular iwi (tribes).

Although tikanga and the state legal system can be conceived as two distinct legal spheres, there are instances when the two are forced to intersect and interact. This relationship is represented in the diagram below:



[8] See Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP 9, 2001) at [1].
[9] At [69].

This intersection can be called a "legal association", which refers to "the integrations, incorporations, or other formal interactions that occur between legal systems".[10] There are many different ways that this confluence between the two legal systems in New Zealand can be reconciled. Alternative models can range from the state legal system simply trumping tikanga, to tikanga being recognised subject to certain tests and adjudication within the state legal structure, to tikanga being dominant and applying. This article is interested in what happens at this intersection when tikanga intersects with and seeks recognition within the common law.

III. The Legal Association between Common Law and Tikanga Thus Far

In New Zealand the state legal framework is dominant and asserts itself as the mechanism that dictates what occurs when tikanga intersects with the common law.

English common law developed to accept that when English law is transposed onto a new country, the laws of the Indigenous inhabitants survive the assumption of British sovereignty.[11] This presumption of continuity was designed to facilitate reconciliation between two fundamentally different legal norms and cultures.[12] The case of *Campbell v Hall* (1774) is typically associated, at least in the instance of settled colonies, with the recognition of this continuity doctrine.[13] This case proposed that: (1) all inhabitants become subject to the legislative government of Parliament; (2) the inhabitants become British subjects; and (3) the laws of the newly acquired territory remain in force until altered by the Crown.[14]

According to the common law, Māori customary law therefore continued to operate as a normative legal order and was recognisable by the state legal system. The imposed English law was applied only "so far as applicable to the circumstances thereof".[15] One area where the common law clearly accepts the existence and continuation of

---

[10] Roughan, above n 3, at 136.

[11] See *Takamore CA*, above n 2, at [112] and the Canadian case of *Delgamuukw v British Columbia* [1993] 5 CNLR 1 (BCCA) at [241].

[12] See McHugh, above n 4, at 84 where he notes that as a practical matter, this continuity doctrine was necessary as immediate transition to new imported systems of British law was simply unrealistic in settled colonies.

[13] *Campbell v Hall* (1774) 1 Cowper 204, 98 ER 1045 (KB).

[14] At [208]–[209].

[15] The presumption of continuity can explain the English Laws Act 1858 (NZ) 21 & 22 Vict, which was passed by the New Zealand Parliament to clarify the status of English law in New Zealand. It stated that English law is part of the law of New Zealand with effect from 1840 only so far as applicable to the circumstances of New Zealand.

customary rights is in relation to the doctrine of aboriginal or native title.[16] This is the doctrine that customary land tenure and proprietary rights in physical resources persist after the assumption of sovereignty. Because the source of this title is in the traditional customary connection that Indigenous peoples have to their lands or waters, by implication the doctrine has also been held to extend to associated rights to hunt, fish and gather.[17] This article is concerned with the potential of the common law to recognise custom and tikanga that extends beyond those rights and practices that are encompassed by aboriginal title. Although dividing out customary practices in this way is not a natural distinction to make as land and natural resources are an inherent and central part of tikanga, there is already extensive discourse dealing with native and aboriginal title.[18] Further, in New Zealand land ownership and traditional food-gathering practices are heavily regulated by statute.[19] The focus is therefore on the development of this separate common law doctrine of recognition.

A. Initial framing of the boundaries of recognition

Although the presumption of Indigenous customs continuing existed when the British came to New Zealand, the way that the state legal system and officials within

---

[16] See Richard Boast "Māori Customary Law and Land Tenure" in Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 21 at 31.

[17] In Australia, for example, Kirby P in the case of *Mason v Tritton* (1994) 34 NSWLR 575 (CA) at 579 stated that "'a right to fish' based upon traditional laws and customs is a recognisable form of native title defended by the common law of Australia". The Australian High Court in *Yanner v Eaton* (1999) 201 CLR 351 also accepted that native title included a right to hunt crocodiles; and in *Yarmirr v Northern Territory* (1998) 156 ALR 370 (FCA) at [87], [115] and [162(4)(b)] Olney J held that native title included free access to the sea and seabed for purposes which included fi ng and hunting "for the purpose of satisfying their personal, domestic or non-commercial communal needs …". A New Zealand example is the case of Te *Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682 CHCS where the Court recognised an aboriginal title claim that involved the granting of non-exclusive customary fishing and shell-fish gathering rights. There have also been a number of Canadian cases including: *R v Adams* [1996] 3 SCR 101, *R v Cote* [1996] 3 SCR 139 and *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

[18] See, for example, Paul McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011) that provides a history of the doctrine of aboriginal title. Also see Louis A Knafl and Haijo Westra (eds) *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (UBC Press, Vancouver, 2010); Kent McNeil *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989); Peter H Russell *Recognising Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (University of New South Wales Press, Sydney, 2006); and Richard H Bartlett *Native Title in Australia* (2nd ed, LexisNexis, Sydney, 2004).

[19] See, for example, Te Ture Whenua Māori Act 1993, the Land Transfer Act 1952 and the Land Transfer Regulations 2002 that provides the primary statutory framework for dealing with land. There is also the Fisheries (Amateur Fishing) Regulations 1986 and the Wild Animal Control Act 1977 that set out the fishing and hunting limitations.

the system have viewed tikanga has varied over time. When the Declaration of Independence was signed in 1835 and the Treaty of Waitangi in 1840, it was generally accepted by officials that Māori operated a tikanga-based customary system akin to law.[20] This view, however, was infamously rejected in the case of *Wi Parata v Bishop of Wellington* (1877).[21] Chief Justice Prendergast's position cast Māori as savages and denied they had any settled system of law that could apply.[22] Here the reconciliation of the confluence of two legal systems was simply the denial and rejection of tikanga.

Although *Wi Parata* remained a good precedent for many years, courts subsequently retreated from Prendergast's extreme position. The Privy Council in *Nireaha Tamaki v Baker* [1901],[23] for example, rejected the notion that a court cannot take cognisance of Māori customary law and said that it is "rather late in the day for such an argument to be addressed to a New Zealand court".[24] This rejection of *Wi Parata* was confirmed in 2003 by the Court of Appeal in *Attorney-General v Ngāti Apa*.[25]

In 1908, in the case of *Public Trustee v Loasby*, the Supreme Court was asked to directly confront the question of the extent that the common law could recognise Māori custom.[26] The custom in question was that on the death of a chief or person of importance, the costs of the tangi (funeral) should be met by the deceased's estate. The Court held that custom could be recognised, provided that a number of tests were met. Cooper J stated the three relevant inquiries when considering a question dealing with the ancient customs of Māori:[27]

1. ... whether such custom exists as a general custom of that particular class of the inhabitants of this Dominion that constitute the Māori race; ...
2. ... [whether] the custom [was] contrary to any statute law of the Dominion ...
3. ... [whether the custom was] reasonable, taking the whole of the circumstances into consideration.

---

[20] See dispatch from Lord John Russell to Governor Hobson dated 9th December 1840 cited in Alex Frame "Colonising Attitudes Towards Māori Custom" (1981) NZLJ 105 at 105–106.

[21] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 77 (SC).

[22] According to "good sense" and "indubitable facts", no such body of law existed: at [14].

[23] *Nireaha Tamaki v Baker* [1901] AC 561 (PC).

[24] At 577

[25] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

[26] Public Trustee v Loasby (1908) 27 NZLR 801 (SC).

[27] At 806.

In this case the Supreme Court found that the tests were satisfied and the custom was therefore applied.

This three-part test in *Loasby* was later cited with approval in the High Court in 1987 in the case of *Huakina Development Trust v Waikato Valley Authority*[28] and in 2004 in the case of *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority*.[29]

Another case arose in 1919 where the Privy Council in *Hineiti Rirerire Arani v Public Trustee* (1919) directly considered the application of the Māori customary law of adoption.[30] The Privy Council found that the particular custom had a legal status, and that, in the absence of a legislative provision to the contrary, it was not interfered with by the enactment of the Adoption of Children Act 1895.[31] The courts therefore have indicated the potential for the recognition of tikanga within the parameters set by the common law.

B. Recent revision of recognition

The case law that directly dealt with the common law recognition of tikanga up until 2007 is limited at best.[32] It was not until the *Takamore* line of cases that the question of the status of tikanga arose again.[33] These cases addressed the factual situation set out at the beginning of this article where Māori were asserting the application of customary law relating to burial rights, in which the whānau declared a right to take and bury a deceased. Because legislation is silent on the issue of who has the right

---

[28] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 215. The Court also went on to say that "customs and practices that include spiritual elements are cognisable in a Court of law provided they are properly established, usually by evidence" at 215.

[29] *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority* [2004] 2 NZLR 201 (HC) at 206 where the tests were described as "the criteria for qualification that Māori custom has to meet to be part of the common law of New Zealand".

[30] *Hineiti Rirerire Arani v Public Trustee* [1920] AC 198 (PC).

[31] Adoption of Children Act 1895 (NZ) 59 Vict. Section 19 of the Adoption Act 1955 later explicitly extinguished the legal recognition of Māori customary adoptions.

[32] Note that in some instances the recognition of tikanga overlaps with the politics and the recognition of the Treaty of Waitangi. For example, in *Baldick v Jackson* (1910) 30 NZLR 343 (SC), Chief Justice Stout accepted that because Māori engaged in whaling, they could claim customary ownership of dead whales that washed up on the beaches. This, however, was asserted on the basis of art 2 of the Treaty of Waitangi that included the guarantee that Māori fishing was not to be interfered with. This article does not to delve into Treaty of Waitangi issues and jurisprudence as they are usually around proprietary concerns and it is more concerned with the explicit common law interaction with tikanga.

[33] See *Clarke v Takamore* [2010] 2 NZLR 525 (HC), *Takamore CA*, above n 2; and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 [*Takamore* SC].

to decide where a body is buried, this was a unique opportunity for the courts to confront the question of the place of tikanga within the common law of New Zealand.

In the High Court, Fogarty J framed the case as a choice between two conflicting common law positions.[34] He initially looked at the general English common law position, which was that the executor has the right to obtain possession of the body for burial.[35] However, that was then set against the competing common law doctrine that the customs of the Indigenous peoples survive and can have legal status. In this respect Fogarty J cited the three-part test in *Loasby* with approval and held that Māori customary law can be recognised as part of the common law.[36] Fogarty J, however, went on to conclude that the Tūhoe custom did not meet the "reasonableness" test in this instance.[37] The custom was therefore not recognised and the Court went on to apply the general common law executor rule.

The case was appealed to the Court of Appeal. The majority of Glazebrook and Wild JJ accepted that the acquisition of British sovereignty did not displace Māori customs which continued under the common law.[38] They then, however, went on to make an analogy to local English custom that is recognisable under the common law for boroughs and other local areas.[39]

Under this route custom is not unqualified. The Court of Appeal drew upon the requirements set out in *Halsbury's Laws of England* that in order for a custom to be recognised:[40]

- it must have existed since time immemorial;
- it must have continued as of right and without interruption since its origin;
- it must be reasonable;

---

[34] See *Clarke v Takamore*, above n 33.

[35] At [23]–[53].

[36] At [81].

[37] This is because the custom was inconsistent with the general common law presumption of individual freedom at [82]–[90]. His reasoning was that the collective will of Tūhoe cannot be imposed upon his executor or over Mr Takamore's body unless the deceased had made it clear during his life that he lived in accordance with Tūhoe tikanga. In this case it was held that Mr Takamore had chosen to live outside the customs of his tribe therefore there had been no legal authority for the defendant to dispossess his body.

[38] See *Takamore CA*, above n 2, at [112].

[39] At [109].

[40] At [109]. Note that the foundation case for these requirements is The Case of Tanistry (1608) Davies 28, 80 ER 516 (KB) at 32.

- it must be certain in its terms, and in respect of locality to which it obtains and the persons it binds; and
- it must not have been extinguished by statute

This is a slightly different approach than that taken in *Loasby*.[41]

In relation to the particular custom in question, the majority found that the burial custom did not satisfy the reasonableness test,[42] and they also suggested that the custom would have struggled to meet the certainty requirement.[43] They therefore clearly rejected the view that custom applies in and of its own right as a separate stream of law.

The majority, however, then turned to the general common law position, namely that the executor has a duty to dispose of the body of the deceased. They then took what they termed a "more modern approach", where customary law is integrated into the general common law position where possible.[44] In regards to the issue of burial rights, they did this by finding that a compromise would require that the custom was a relevant cultural consideration for an executor or executrix to take into account in determining the method and place of burial and that a culturally appropriate process of discussion and negotiation take place. The extent to which this more "modern" integration of tikanga actually changes the general common law executor position in relation to burials is questionable.[45] What is of note is the two-step approach that was taken where the Court examined if the custom met the gatekeeping tests so that it could be recognised by the common law as existing continuing customary law in and of itself. If the requirements of these tests were not met, then the Court turned to the general common law rule. The Court of Appeal (unlike the High Court) then took the extra step of finding that custom can still be relevant and modify the existing common law rule.

---

[41] See Laura Lincoln "*Takamore v Clarke* [2011] NZCA 587: The Most Significant Legal Development Affecting Māori" (2013) Māori LR for an analysis of the differences between the approach taken by the Court of Appeal in *Takamore* and that taken by the High Court in *Loasby*.

[42] See *Takamore CA*, above n 2, at [163]–[165], as it conflicted with the principle of "right not might".

[43] At [167].

[44] At [254]–[258].

[45] See Lincoln, above n 41, who argues that although it increases the chance the executor will consider the wishes of the deceased, that requirement was already an implicit one in the executor's common law duty.

The *Takamore* case was then appealed to the Supreme Court.[46] The 2012 Supreme Court decision framed the issue differently than the courts below it. It did not undertake the two-step process. The majority of Tipping, McGrath and Blanchard JJ instead ultimately took a similar legal position to the more "modern approach" in the Court of Appeal. However, they did so without engaging the first step of addressing the possibility of customary law being recognised as law in and of itself. They went straight to the premise that the common law prioritises the executor (or person with the highest claim to be appointed administrator of an estate) in the first instance. They then went on to recognise that the executor's duty and right of deciding where a body is buried is not unfettered. As stated by Tipping, McGrath and Blanchard JJ:[47]

> [164] The common law is not displaced when the deceased is of Māori descent and the whānau invokes the tikanga concerning customary burial practices … . Rather, the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation.

On their view, the common law accommodated custom and tikanga by influencing and adjusting the executor primacy rule so that tikanga is relevant in the matrix of considerations to be weighed by the executor in making their decision, or the court in its oversight of that decision. The Court therefore avoided the specific customary practice that involved the assertion of control over the body but went on to find that Māori burial practices, values and interests form part of the common law decision-making rubric.

Elias CJ in her minority decision rejected the executor primacy rule as being determinative. However, she also went on to find that Māori custom is a part of the "values" of New Zealand's common law and is a matter to be weighed by the Court against other values.[48]

---

[46] *Takamore SC*, above n 33. See Natalie Coates "What Does *Takamore* Mean for Tikanga? – *Takamore v Clarke* [2012] NZSC 116" (2013) Feb Māori LR 14, available at <www.Māorilawreview.co.nz>, for a discussion on the impact of the Supreme Court case on the recognition of tikanga.

[47] *Takamore* SC, above n 33.

[48] At [94].

The Supreme Court decision leaves the law in a somewhat confused state. Although all of the Justices found that customary law is clearly relevant in the common law, they did not explicitly address the possibility of customary law being recognised as law based on the doctrine of continuity and the additional tests set out in *Loasby* and by the Court of Appeal's Takamore decision. This is important because if a custom satisfies those tests, it could be recognised by the common law as a valid existing custom or practice that trumps other general common law rules (like the executor primacy rule).[49] Despite the eschewal of the Supreme Court to address tikanga being recognised as law in and of itself, a strong argument can be made that the Supreme Court decision should be read in a manner that opens doors for the recognition of custom and not closes them. In the specific case of burials, the fact that the Court went straight to a position whereby tikanga was relegated to a value to be weighed could be explained by the existence of a strong rule concerning executor primacy. Further, none of these judgments expressly overruled the Court of Appeal two-step approach to the recognition of custom.

It is therefore suggested that the Court has left open the potential for there to be two possible paths by which tikanga can be recognised:

1. as existing law that, subject to certain tests (such as that found in the Court of Appeal in *Takamore*), is bound to be respected;
2. or failing satisfaction of those tests, as forming part of the common law as a value or relevant consideration that has a legal impact and informs other common law rules.

The former route is more conducive to the recognition of specific rights and interests. It has the potential to recognise provable customary practices, such as the practice of collective decision-making in respect of burials. The latter is less about the specific manifestation of a customary practice and more orientated around the relevance and legal weight of normative values and principles implicit within tikanga.

[49] This is asserted on the basis that the very essence of the continuity doctrine is that the custom continues and is also supported by judicial interpretation of the "reasonableness" test where courts have said that a custom will not be considered unreasonable for merely being inconsistent with a particular common law maxim or rule. See *Loasby*, above n 26, at 806, *Takamore CA*, above n 2, at [111]; and *Tyson v Smith* (1838) 9 Ad & E 406, 112 ER 1265 (Exch Ch) at [421].

IV. Putting a Case for Recognition

The jurisprudence that emerged from the courts in the *Takamore* case broke new ground. It was a renewed realisation of the largely latent potential of the common law to engage with tikanga. Although it opened up the door for greater recognition and acknowledgement of tikanga, it is still relatively undeveloped and untested. There are many limitations and dangers with this form of association. However, if Māori on balance choose to pursue this form of recognition, there are a number of reasons why the judiciary and the state legal system should positively respond.

The overlay of the state legal system on the assumption of sovereignty left space for tikanga to continue. The recognition of custom, particularly in respect of specific pre-existing customary practices, can be framed as an "Indigenous right" protected under domestic law. Analogies can be drawn with native title claims where a proprietary right is sourced in Indigenous custom and is directly enforceable as a right within the state legal system. As expressed by the Australian High Court in the landmark *Mabo v Queensland (No 1)* decision, when there is a proprietary title capable of recognition, there is no reason why those antecedent rights and interests should not be recognised as a burden on the Crown's radical title.[50] The same argument in principle can be made here. If custom or tikanga produces a right or entitlement that is protected by the common law the court should recognise it. Further, in the native title context, it has been acknowledged that to not recognise such proprietary rights or to deny them could constitute racial discrimination. This was also recognised in the *Mabo*[51] decision and by the United Nations Committee on the Elimination of Racial Discrimination in respect of the New Zealand legislation that extinguished Māori customary title over the foreshore and seabed.[52] A similar argument in principle can be made in the customary law context. Section 19(1) of the New Zealand Bill of Rights Act 1990

---

[50] See *Mabo v Queensland (No 1)* [1990] 166 CLR 186 at [53] and [62].

[51] In *Mabo* the High Court struck down the Queensland Coast Islands Declaratory Act 1985 that purported to confirm the extinguishment of the property rights of the Torres Strait Islanders when the islands came under the rule of the Queensland government. It was found that this Act was inconsistent with s 10 of the Racial Discrimination Act 1975 and constituted discrimination on the basis of race as it impaired the rights of the Aboriginal Meriam people whilst leaving intact the property rights of other Queenslanders whose rights did not originate from the laws and customs of the Meriam people.

[52] See the Committee on the Elimination of Racial Discrimination *Decision 1 (66) New Zealand Foreshore and Seabed Act 2004* CERD/C/DEC/NZL/1 (2005). This report stated that "Bearing in mind the complexity of the issues involved, the [proposed Foreshore and Seabed Act] legislation appears to the Committee, on balance, to contain discriminatory aspects against the Māori, in particular in its extinguishment of the possibility of establishing Māori customary titles over the foreshore and seabed …" at [6].

protects the right of freedom from discrimination.

If the common law accepts the right to exercise a custom under tikanga, to fail to recognise it whilst recognising other common law rights could constitute discrimination.[53]

Recognition of customary law is also consistent with developing jurisprudence around Indigenous rights in the international sphere. The preamble of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that was adopted by the General Assembly in 2007 recognises:[54] the urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources[.]

There are a number of other rights in the Declaration that also support recognition, including article 11, which protects the right of Indigenous people "to practise and revitalize their cultural traditions and customs". Article 34 articulates the right of Indigenous peoples "to promote, develop and maintain their … distinctive customs, spirituality, traditions, procedures, practices and, in cases where they exist, juridical systems or customs".[55] Developing the state legal system so that the Māori juridical system has legal status is consistent with these rights.[56]

---

[53] The contrary argument is that Indigenous rights in fact discriminate against non- Indigenous peoples. See Claire Charters "Do Māori Rights Racially Discriminate Against Non Māori?" (2009) 40 VUWLR 649.

[54] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007) [UNDRIP].

[55] The qualification on this right can be found in art 34 that provides that the customs and traditions are in accordance with international human rights standards.

[56] Claire Charters in her brief of evidence for the Waitangi Tribunal (*Re Māori Community Development Act Claim (Brief of Evidence of Dr Charters*) Waitangi Tribunal, Wai 2417, 20 January 2014) discusses the relevance of UNDRIP in New Zealand. She recognises at [59] that the Declaration permeates the legal and political landscape on Indigenous peoples' rights in New Zealand. She recognises that international law, including UNDRIP, is relevant to the application and interpretation of law in New Zealand (see *Takamore CA*, above n 2; N*ew Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289 per Keith J; *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA); *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); and *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC)). Further, the New Zealand courts have already taken note of the UNDRIP on a number of occasions including in: *New Zealand Māori Council v Attorney-General* [2013] 3 NZLR 31 at [92]; *Takamore SC*, above n 33, at [12]; *Takamore CA*, above n 2, at [242] and [252]; and *Greenpeace of New Zealand Inc v Minister of Energy and Resources* [2012] NZHC 1422 at [141].

The recognition of tikanga as having status in the state legal system is also a strong and positive symbolic statement. It is somewhat of a mihi (acknowledgement) that tikanga as the first law of Aotearoa is a valid and valuable part of the New Zealand heritage and continues to be relevant today. This view is evident in Robert Joseph's forward-looking statement that:[57]

> [t]he future of Aotearoa-New Zealand must lie in a single legal system which nevertheless recognises and respects the world views, values, customary laws and institutions of the two great founding cultures of this country, Māori and British, as well as "others" where appropriate. The existing legal framework must be modified thereby permitting the first law of this country, tikanga Māori customary law, to operate effectively.

The Rt Hon Sir Edmund Thomas, retired judge of the Court of Appeal of New Zealand and a former acting judge of the Supreme Court, reflects a similar view and recognises the promise in vesting tikanga Māori with legal status.[58] He frames recognition as being a positive enrichment of the law:[59]

> As tikanga are essentially principles rather than rules, and those principles are not static, tikanga Māori could readily be absorbed into the common law of this country. Again, there is no reason why the judges should not assimilate its principles in the development of the law generally so as to develop an endemic jurisprudence just as the judges in days gone by assimilated the customs of the times into the growing body of the common law of England. The aim would be to enrich the law by incorporating tikanga as and when appropriate. Māori principles regarding respect for the environment, for example, could have much to offer.

A genuine engagement with tikanga would therefore acknowledge our dual legal heritage. It would also align with the promises that were made in the Treaty of Waitangi and the generally accepted view that tikanga and Māori customary laws are a "taonga" under art 2 and that the Crown therefore has an obligation to protect them in

---

[57] Robert Joseph "Re-creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 Wai L Rev 74 at 96.

[58] See Rt Hon Sir Edmund Thomas "The Treaty of Waitangi" [2009] NZLJ 277.

[59] At 280.

good faith.[60] It is also consistent with the oral undertakings to the Treaty of Waitangi, known as the fourth article or protocol, that Māori custom would be protected by the Governor.[61] Finally, recognition accords with the increasingly popular practice of giving more formal recognition to Indigenous peoples worldwide in international law, legislation and constitutions.[62] In regards to the common law jurisprudence on the recognition of custom, New Zealand could be an international leader. If it is generally accepted that if Māori seek recognition of their tikanga then the common law should facilitate this, the next question is the likelihood of tikanga garnering recognition. The few cases that have come before the courts thus far demonstrate that the first route, that of outright recognition of a particular and discrete custom as law (as per the *Takamore* Court of Appeal test), is laden with significant barriers that have been erected by the common law. This article addresses these barriers and points out where there is potential for them to be interpreted or reconstructed in a manner that is more likely to facilitate the recognition of custom. It then turns to the second route for recognising tikanga, which was acknowledged by the Supreme Court, and examines the potential and promise in this approach.

V. Routes of Recognition: Barriers and Potential

A. The Takamore Court of Appeal tests

If one is looking to prove that a custom is recognisable under the tests in the Court of Appeal's *Takamore* decision, it must be shown that the custom has not been extinguished by legislation, that it has existed since time immemorial, that it is

---

[60] See, for example, Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 3 where the Tribunal states: "In our view, the Crown's guarantee of te tino raNgātiratanga is meaningless if the tikanga that sustain and regulate the raNgātira and his relationship to the people, and the land, are discounted and undermined. Indeed, we go further. We say that in order properly to fulfil the role of Treaty partner, and actively protect the cultural foundation of what it is to be Māori, the Crown must itself be schooled in the essentials of tikanga."

[61] See Waitangi Tribunal, *Muriwhenua Land Report* (Wai 45, 1997) at 113–114 citing W Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Wellington, 1890) that states that the Governor assured Māori that "The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome and also the Māori custom, shall be alike protected by him". In Māori the fourth article is said to have stated: "E mea ana te Kawana, ko nga whakapono katoa, o Ingarani, o nga Weteriana, o Roma, me te ritenga Māori hoki, e tiakina ngatahitie e ia: see Māori Council of Churches *He Korero Mo Waitangi* (Te Runanga o Waitangi, Ngaruawahia, New Zealand,1984) at 178.

[62] Andrew Erueti also makes this claim in relation to the recognition of Indigenous land rights. See Andrew Erueti " Demarcation of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law" (2006) 23 Ariz J Int'l & Comp L 543 at 551.

reasonable, and that it is certain.[63] Although each of these is a significant barrier to recognition, the common law is a flexible tool, and provided judges are willing to see it as a genuine site of legal association, there is potential here.[64]

(1) The problem of legislative extinguishment[65]

The most prohibitive barrier to the recognition of tikanga within the common law under this route is that it cannot be recognised if the custom is extinguished or modified by legislation. This test reflects the fundamental proposition in the New Zealand state legal system that Parliament is sovereign and that common law is subordinate to legislation.

This is a huge barrier to the recognition of custom as the scope of statutory law in New Zealand is vast and in many instances any potential for custom to be recognised will have simply been replaced by elaborate statutory regimes.[66] Examples include the Crimes Act 1961, which codifies the criminal law of New Zealand,[67] the Adoption

---

[63] See *Takamore CA*, above n 2, at [109].

[64] See Law Commission, above n 8, at 10 for a discussion on the flexibility of the common law when looking at custom.

65 One of the tests that the common requires is that the custom must have "continued without interruption since time immemorial". This means that there cannot be an interruption of the right to practise the custom, and if this right is halted for any period of time the right is extinguished. The question, however, then becomes how a right to practise the custom can be discontinued or "interrupted". In *Takamore CA*, above n 2, at [136] and [133]– [134] the Court of Appeal conflated its discussion on existence since "time immemorial" with "uninterrupted continuity" and treated "legislative extinguishment" separately. However, because the custom was shown to be long-standing and still actively practiced, they simply made no further comment. In regards to how this "continued without interruption" aspect of the common law has been interpreted elsewhere, Norman Zlotkin, in discussing the common law in Canada, unambiguously states that "interruption means legal interruption in the form of statutory abrogation by an act of the appropriate legislative body" and "through exercise of the royal prerogative or the lawful authority of an aboriginal government": Norman Zlotkin "From Time Immemorial: The Recognition of Aboriginal Customary Law in Canada" in Catherine E Bell and Robert K Paterson (eds) *Protection of First Nation Cultural Heritage: Laws, Policy, and Reform* (UBC Press, Vancouver, 2009) 343 at 354 and 354, n 76. Although the approach taken in New Zealand is somewhat confused (compare *Loasby*, above n 26, where the uninterrupted continuity test was replaced by the inconsistency with legislation language, with the Court of Appeal in *Takamore CA*, above n 2, at [168]–[169], that treated customary extinguishment separately from their discussion on continuity), in essence it is consistent with the Canadian interpretation. A custom is likely to be considered to have been "interrupted" in New Zealand if it is displaced by the presumption of sovereignty, abolished by Indigenous peoples themselves, or extinguished by legislation. The most extensive and far-reaching of these "interruptions" and the one discussed in this article is legislative extinguishment or modification.

[66] See discussion by Boast, above n 16, at 35.

[67] In *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695 at [37] Heath J found that the combined effect of ss 5 and 9 of the Crimes Act 1961 was that the Māori customary system had been extinguished and it is not possible to regard it as an existing parallel system.

Act 1955 that expressly denies recognition to Māori customary adoptions[68] and the Resource Management Act 1991 that provides an extensive articulation of how natural and physical resources are to be managed and incorporates tikanga in a different limited sense.[69] Because in New Zealand activities are largely controlled by statute, there are very few cracks in our comprehensive legislative regime in which Māori customary law can seep up through the common law. The *Takamore* case, which was considered under the common law because there was no clear legislation addressing the issue of a right to a deceased body, could have been the first real custom to fit in to a legislative gap in contemporary times.

Further, the doctrine of parliamentary sovereignty is such that even if Māori customary law was recognised through the common law, Parliament retains the power to simply legislate over and extinguish this recognition. This is what the government did when the Court of Appeal, in its *Ngāti Apa* decision,[70] recognised that Māori had the right to go to court to determine whether they had a customary land right to the foreshore and seabed of New Zealand. Based on the mere *potential* that a customary right could be claimed, within six months of the Court's decision, the government passed legislation that vested full legal title of all of the public foreshore and seabed within the Crown.[71]

This severe limitation is based on our vertical constitutional structure where Parliament sits at the top and there is no tradition of shared sovereignty. Given this limitation, short of a constitutional revolution, the only real argument that goes towards facilitating the recognition of custom is for this legislative supremacy to be read in as strict a manner as possible. The courts in New Zealand have attempted to do this by holding that customary rights cannot be extinguished by a side-wind.[72] This means that legislative extinguishment can only occur by enactment of "clear and plain" statutory provision and that custom cannot be extinguished or restricted by remote implication.

This is the biggest barrier limiting the capacity of the common law to recognise Māori

---

[68] See ss 18 and 19.

[69] For example, s 7 of the Resource Management Act 1991 requires decision-makers to ave particular regard to kaitiakitanga. See Natalie Coates "Should Māori Customary Law be Incorporated into Legislation?" (LLB (Hons) Dissertation, University of Otago, 2010) at 40–48 for a discussion on the advantages and disadvantages of incorporating a Māori word or concept into legislation.

[70] *Ngāti Apa*, above n 25.

[71] See s 4 of the Foreshore and Seabed Act 2004, which was subsequently repealed by the Marine and Coastal Area (Takutai Moana) Act 2011.

[72] See comments by Keith and Anderson JJ in *Ngāti Apa*, above n 25, at [147] to [154].

customary law. Because of this, for tikanga to gain space, a strict reading of legislative enactments should be enforced so that extinguishment or modification of a custom must be done through explicit statutory language.

(2) Time immemorial

In regards to the time immemorial test, New Zealand has already indicated a departure from the strict English interpretation that a custom must have existed since when there is "no memory of man to the contrary", which in Britain was arbitrarily designated to be before 1189.[73] Instead, the New Zealand Court of Appeal held that in our context what is required is "proof of a 'long-standing, consistent custom' that demonstrates 'continuity with a preceding legal system'".[74] This is important because it suggests that, when looking at tikanga, the common law not only recognises customary rules but also customary legal systems.

The traditional interpretation of the "time immemorial" test, embodied in the English approach to local customs, is to take a custom on its face value and simply look back to see if the custom is reflected in relatively the same form. It treats a rule or a custom as merely being a fixed rule of conduct that cannot change and which tells a person what they can and cannot do and what consequences attach to obedience or disobedience.[75] An alternative way is for the common law to treat Māori customary law as more of a whole functioning legal system that has the ability to change its rules.[76] From this perspective, the requirement that the custom have existed from "time immemorial" can be met even though the custom seeking recognition may have existed in a different form in the past. In this instance, the "long- standing" test is met by focusing on the original custom but recognising that Māori have mechanisms to change their rules. There is therefore a bridge by which the original custom is related to the modern custom. This approach does not merely incorporate a rule but a second layer and deeper part of the legal system.

If one accepts that Māori have a normative order whereby a modern form of custom or tikanga can be linked to an old custom by a modification that occurred in accordance

---

[73] This is the first year of the reign of Richard I. Lord Blackburn in *Dalton v Angus* (1881) 6 App Cas 740; [1881–5] All ER Rep 1 recognises that this particular date is linked to the Statute of Westminster (AD 1275) which limited real actions to the arbitrary 1189 date.

[74] *Takamore*, above n 2, at [122].

[75] This is what HLA Hart identifies as a "primary rule" in HLA Hart *The Concept of Law* (2nd ed, Oxford University Press, 1994) at 79–99.

[76] See at 91–99 for a discussion on primary and secondary rules.

with normative systemic change, the question of how far one can push this arises. A conceptual continuum can be imagined ranging from a relatively slight modification of the custom to a complete overhaul of an old rule where a new custom is essentially created and there is merely a loose connection between the old and new custom. On this approach the "time immemorial" requirement could attach to the traditional rule that was simply transformed according to the legal regime and now exists in a contemporary and totally modified form.

The courts in native title cases, where continuity is also required, have tended *not* to take a generous interpretation of the similar "continuity" test.[77] In the High Court of Australia it was held that although alterations and development of the custom can occur, that to be recognised the custom must have its origins in the normative rules of the Aboriginal society that existed before the Crown acquired sovereignty.[78] This meant that in Australia, native title cannot recognise new customs or rights that were established after sovereignty.[79]

Despite this strict approach taken in the native title context, it is important to recognise that, if there is to be meaningful engagement with tikanga, it is vital that the "time immemorial" test takes into account change. This is important because although Māori customary law has stayed true to its fundamental values, it has undergone changes since colonisation and the introduction of British law. Māori have had to adapt, sometimes radically, to survive the introduction of a new legal system. If the time immemorial requirement did not recognise this, it would promote racialised stereotypes that freezes Māori at the point of contact. It would tell Māori that for their laws to be recognisable in the 21st century they have to exist in the same form as they did before colonisation. Not recognising the changing character of Māori customary law would therefore either commit Māori law to a state of non-recognition or force Māori into a stagnated form of being.

---

[77] See *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, 214 CLR 422 at [43] that sets out the Australian position where the Court held that the law and custom must not have lost its "traditional" character and must have remained if not demonstrably identical than at least recognisably the same as it did at the time of obtaining sovereignty. In the case of *Delgamuukw*, above n 11, the Canadian test for title requires proof of exclusive use and occupation at the time of Crown sovereignty. Claimants must establish a connection with the pre-sovereign group upon whose practices they rely to assert title or claim and must show the group's connection with the land was "of a central significance to their distinctive culture" (see *R v Marshall* 2005 SCC 43, [2005] 2 SCR 220 at [67]).

[78] See *Yorta Yorta Aboriginal Community*, above n 77, at [43].

[79] See at [44] where the justification for this is that there can be no parallel law-making after the assertion of sovereignty.

Thus far, the only customs which have been considered by the New Zealand courts are those long-standing primary rules that have existed in the same form for significant periods of time.[80] Although there may be difficulties in pushing the test to the limits and attempting to claim recognition of a new law, there is potential here for courts to adopt an expansive approach to the time immemorial test that could recognise a broad array of customs under its umbrella.

(3) Reasonableness

The element of the test that proved fatal for the *Takamore* Māori burial custom in the High Court and Court of Appeal was that it failed to meet the "reasonableness" requirement.[81] This standard attempts to act as a litmus test that ensures that a custom meets minimum qualifications before the common law will open the door to recognition.

The benchmark of what will constitute "reasonableness" has been inconsistently applied by the New Zealand courts. The High Court in *Clarke* examined reasonableness by looking at whether the custom was consistent with "other principles" of the common law and whether it was reasonable taking "the whole of the circumstances into account".[82] The emphasis of the Court in this case was on maintaining the internal coherency of the state legal system.[83] The Court of Appeal in *Takamore*, however, adopted the *Halsbury's* approach and applied the stricter test of whether the custom was inconsistent with *fundamental* principles of the legal system.[84] Under this approach, to constitute unreasonableness a custom must therefore conflict with a higher criterion than the mere maxims and ordinary principles of the common law.[85] Even if this stricter test were adopted, what constitutes a fundamental or root principle of the law for the purposes of the reasonableness test is difficult to identify. Fogarty J in the *Clarke* case held that the custom was unreasonable on the basis that it was incompatible with the notion of individual autonomy, which he saw to be a fundamental principle of the common law.[86] Essentially his position was that imbued within the

---

[80] See *Takamore CA*, above n 2, at [122] (involving burial rights); *Hineiti Rirerire Arani*, above n 30 (involving customary adoptions); and *Loasby*, above n 26 (involving Māori funerals and providing for guests).

[81] See *Clarke v Takamore*, above n 33, at [83]–[89].

[82] At [82]: the High Court relied upon the reasonableness standard set out in *Loasby*, above n 26, at 806.

[83] At [83].

[84] *Takamore CA*, above n 2, at [166].

[85] See *Johnson v Clark* [1908] 1 Ch 303 (Ch) at 311 per Parker J.

[86] *Clarke v Takamore*, above n 33, at [81]–[89].

common law is a liberal ideology that everyone is free to live life as he or she wishes. This common law presumption is fundamentally different to tribal custom which involves a collective decision-making process.[87] The majority of the Court of Appeal disagreed with Fogarty and simply stated that this was "not an area where individual autonomy rule[d] at common law".[88] The Court of Appeal went on to find that instead, the custom was unreasonable on the basis that it violated the "right not might" principle.[89]

What these conflicting decisions and opinions clearly highlight is the ambiguity and difficulties in identifying what constitutes a fundamental rule of the legal system. However, if the common law aims to be a site of association where Māori customary law can be recognised, judges should take a restricted and narrow view of what constitutes a "root" principle of the law for the purposes of the reasonableness test. The liberal notion of individual autonomy, for example, although it is reflected in many aspects of the New Zealand system should not be considered a fundamental principle, particularly in the context of the facts in *Takamore*. It would be hypocritical to prioritise the autonomy of the deceased individual as to where they are buried as even under the general common law a deceased's direction, including that expressed in a will, is only regarded as being declaratory and is not legally binding or enforceable.[90]

For a principle to be fundamental, it implies that it is consistently applied and a vital part of the coherency of the state legal system. Judges should boil this test down to only those principles that can truly be considered fundamental cornerstones of the legal system. Further, they should justify and convincingly cite the basis upon which they assert that a principle meets this criterion; otherwise it could constitute discrimination against Indigenous custom.

Even if judges engage in a narrow reading of these fundamental principles, the custom under the current approach will still inevitably be assessed according to internal standards drawn exclusively from the state's own legal framework. The reasonableness

---

[87] At [88]: Fogarty J went on to say: "it is beyond doubt that the late Mr Jim Takamore chose to live outside tribal life and the customs of his tribe. Under the common law he was entitled to expect the choices he made during his life to be respected by the executor of his will when it came to the decision as to his funeral. … He has personal rights as a New Zealand subject to the benefits of the common law of New Zealand. The collective will of the Tuhoe cannot be imposed upon his executor and over his body, unless he made it clear during his life that he lived in accord with Tuhoe tikanga."

[88] *Takamore CA*, above n 2, at [150].

[89] At [163]–[166]. This is because the custom is such that if there is no agreement reached, then it is permissible by force to simply take the body.

[90] See s 4 of the Family Protection Act 1955 where a court is given the power to redistribute an estate *against* the specific testamentary wishes of the deceased.

test is therefore a one-way conversation in which Māori customary law is subjected to judgement by a Western yardstick that defines the acceptance parameters for custom. This facet of the common law test clearly denotes the inferiority of Māori customary law and its subordination to the primacy of the values of the state legal system. In *Takamore*, the Court of Appeal denied the custom recognition on the basis of the "right not might" principle.[91] However, in this case, the Māori whānau argued that they did act in the right way; it is simply that their "right" was founded and reasonable in Māori customary law.

One way of going forward could be for legal systems to engage in a more dialogical approach, where instead of looking solely at the fundamental values of the state legal system, a court could engage with Māori as to the internal reasonableness of the custom within the Māori legal system. This aligns with the position of the Canadian courts, which have tended to judge customs by their reasonableness at the time of their inception and have therefore held that current conditions should not be examined to determine reasonableness.[92] This could indicate that reasonableness should be measured in the context of the Indigenous culture from which the custom is derived.

Ultimately, however, if the fundamental values of the two systems conflict in an irreconcilable way, an outcome needs to be reached. The location of this discussion and examination is such that it takes place within the hierarchical framework of state law dominance. Given this, if the custom was repugnant and in conflict with the fundamental principles of the state legal system, a judge is unlikely to recognise it. At the very least, however, the competition and conflict of values needs to be transparent. Highlighting where the values of the two systems depart is important in gaining critical consciousness about the values that we are favouring in society. This consciousness is instrumental in then being able to deconstruct and challenge those preferences.

Further, even if part of the custom is viewed as being unreasonable through the lens of common law values, it should not negate the other important aspects of the custom and Māori thinking being considered "reasonable" and continuing to constitute part of the common law.[93]

---

[91] *Takamore CA*, above n 2, at [163]–[166].

[92] See Zlotkin, above n 65, at 352–353.

[93] For example, in the Takamore set of facts, although the practice of taking a body may be considered unreasonable as per the decisions in the High Court (*Clarke v Takamore*, above n 33) and the Court of Appeal (*Takamore CA*, above n 2), the rest of the custom that could be framed as the process of collective decision-making may not.

(4) Certainty

Halsbury's states that there must be a definite limit claimed to exist under an alleged custom in respect of its nature generally, the locality where the custom is said to exist, and who is affected by it.[94]

In *Takamore* the Court of Appeal recognised that the certainty test may need to be adapted to the specific New Zealand context and the nature of Māori customary law.[95] Māori customary law is primarily based around fundamental values as opposed to rules. These values are not only likely to have varying application in different cases and situations but this application is also likely to differ amongst Māori tribes. Because of the primacy of values and the centrality of the collective, Māori customary law also tends not to be comprised principally of single decisive rules but rather places an emphasis on mediated outcomes. The Court of Appeal in Takamore therefore stated that, given the nature of Māori customary law, "the certainty criterion cannot apply with the same rigour as it does in relation to English customs".[96]

This "certainty" requirement has not extensively examined or applied in the New Zealand context. I suggest that certainty can attach to custom in a number of different ways. At a basic level, for example, there are those rules that are *certain by virtue of their substance*. This refers to those Māori customary practices that are like rules and that are very specific in their nature in that they clearly set out what the custom is, who is affected, and where it applies. An example may be that in certain iwi in the pōwhiri (formal welcoming process) women will perform a karanga (call) when a new group comes onto the marae.

At a second level are those examples of Māori custom where there is not a clear rule but a custom which is restrained and informed by the value system. Take, for instance, the Māori customary practice of collecting seafood for events, such as tangihanga (funerals).[97] The amount of food that Māori need to take under the custom will vary

---

[94] *Halsbury's Laws of England* (5th ed, reissue, 2008) vol 32 Custom and Usage at [15].

[95] *Takamore CA*, above n 2, at [129].

[96] At [132].

[97] Under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 tangata whenua (Māori that belong to and have tribal connections to the land concerned) can appoint a "kaitiaki" or "tangata tiaki". This person, or group of people, once confirmed by the Minister of Fisheries, gains the power to authorise individuals to take aquatic life for customary, non-commercial, food-gathering purposes.

depending on the size of the funeral and how much mana the deceased had.[98] Although this prima facie seems uncertain, the amount of food that can be taken is tempered by the customary notions of kaitiakitanga,[99] manaaki,[100] and the idea that the atua (gods) are embodied in the natural world. These customary concepts and values are antithetical to the over-exploitation of resources. Therefore, although Māori customary law does not stipulate a maximum catch limit, the values and concepts underlying Māori customary law places broad parameters and limits on what can be done. In this instance the substance of the custom is more fluid and flexible. The permanence and *existence of the values is certain* and this constrains the exercise of the custom. These values, however, are not like specific rules and are open to interpretation.

At another level, there is *certainty of process*. An example of this is the *Takamore* case where the custom to decide where a body should be buried provides initially for a debate and negotiation and if consensus is not reached whoever takes the body has a right to it.[101] The Court of Appeal indicated that this custom would not meet the certainty test as it did not provide a mechanism for making a final decision.[102] However, this conclusion is questionable. Instead of adopting an approach akin to the common law, where the decision is simply handed over to the executor, the outcome under Māori customary law is based initially on the collective and then who can assert control over the body. This process does not indicate what the outcome will be in advance, where the body will be buried and whose interest will necessarily take priority. However, the general common law position also does not indicate these outcomes. Instead, it provides a process by which the executor has to take into account a number of considerations before making a final decision of how and where to dispose the body.[103] Both laws therefore dictate a method by which an outcome is ultimately reached. They simply adopt fundamentally different methods. There is therefore a strong argument to be made, that in cases where the process under Māori customary law is certain, even though the outcome under the process is indeterminate, the requirement of certainty should be satisfied.

---

[98] Mana has a number of meanings including: authority, control, influence, power, prestige, psychic force, effectual binding authority.

[99] This denotes the obligation of stewardship and protection and requires the observance of conduct respectful of the resources in question.

[100] This means to show respect and kindness.

[101] Note that the custom is of course much more complex than this. See *Clarke v Takamore*, above n 33, at [57] where Counsel for Mr Takamore's Māori whānau summarises some of the fundamental components of the custom.

[102] *Takamore CA*, above n 2, at [167].

[103] See at [199]–[218] for a discussion on the duties of the executor.

These are just some of the ways that certainty can be conceptualised. It is accepted that a degree of certainty is necessary in any coherently functioning legal order. This clarity and stability is important so that people know how to act and how customary law may bind them. This is no different for Māori. Māori do not live in a limitless open society where anything goes. One of the underlying fears of accepting Māori customary law into the folds of the state legal system is that Māori can invent "custom" to reach a favourable outcome and abuse the general lack of knowledge on the part of non-Māori, particularly judges.[104] This fear, however, largely derives from a lack of understanding and knowledge of tikanga. Judges, in assessing tikanga, need to be willing to engage deeply with Māori customary concepts and the law to see that limits, guidelines and broad parameters exist and that in specific contexts this value-based system can be applied in a way that does provide a degree of certainty.

This article has explored a number of ways in which the certainty test can be construed and reconstructed so that it takes into account the nature of Māori customary law. If all of these gatekeeping tests are satisfied, then it can be argued under the Court of Appeal's approach in *Takamore* that tikanga is a free-standing part of the common law and will trump other common law positions. These tests, however, are not easy to meet and pose significant barriers to the recognition of custom. In particular, the extensive and pervasive nature of our legislative scheme makes it difficult to conceive of any customs that could be recognised under this route. However, it is still a legal avenue that is open to development and can be pursued by advocates.

VI. The Potential of the Modern Approach

As well as tikanga being capable of recognition as law in and of itself under the Court of Appeal tests, the "modern approach" also holds some promise. All of the Supreme Court Judges accepted that tikanga and its values are part of the common law without measuring it against the Court of Appeal gatekeeping tests.[105] It is unclear exactly what this means yet, and specific facts will need to test how far this could extend. However, it is a potentially exciting recognition of the relevance and applicability of tikanga and it opens up the possibility for lawyers to make a range of arguments in the courts.

---

[104] See Eddie Durie "Ethics and Values in Māori Research" (paper presented at the Te Oru Rangahau Māori Research and Development Conference, Massey University, 7–9 June 1998) in Te Pūmanawa Haurora (ed) *Proceedings of Te Oru Rangahau Māori Research and Development Conference* (Massey University, Palmerston North, 1998) who noted that because judges are assessing custom that is foreign to them there is "scope for those who would profit from the situation" to effectively "pull the wool over the judges' eyes".

[105] See *Takamore SC*, above n 33.

One way in which this route has potential is that instead of focusing solely on the particular customary practice, it can also take into account the values that inform it. For example, in the Supreme Court's *Takamore* decision, it was held that Māori burial practices *and* the relevant values and principles informing Māori thinking and actions are part of the required decision-making framework.[106] In this burial context the relevant values include the importance of intergenerational connectivity of people to their whakapapa (genealogy) and ancestral land, and the emphasis of the collective over the individual. The common law framework therefore allows for the recognition of different elements of tikanga without having to accept either "all or none" of it.[107] This is a legal development that could pave the way for recognition of tikanga as being legally relevant beyond specific customary practices. This approach reflects the nature of tikanga.

A further area that potentially holds promise going forward is whether the idea of tikanga forming part of the "values" of the common law could be pushed further than the pure judicially derived stream of common law. It is beyond the scope of this article to explore this issue in-depth. However, the automatic acceptance of tikanga as having a legal impact by the Supreme Court could mean that a case can be made that tikanga is relevant in respect of interstitial common law or the law that is constructed over time when judges interpret legislation. Tikanga could form part of the general framework of legal principles and values that work to inform legal outcomes and the judicial legal reasoning process. In hard cases where statutory rules have some ambiguity, Ronald Dworkin sees principles as underlying the legal structure and being the basis upon which decisions are made.[108] Principles are considerations of "justice or fairness or some other dimension of morality"[109] and Dworkin argues they are found throughout the law and are an inherent and vital part of the legal system. If tikanga forms part of the "values" of the common law, then they can perhaps be seen as part of the network of legal principles that can be applied in contentious and hard cases.

There has been some positive movement from the courts in treating the Treaty of Waitangi as relevant or an aid to interpretation even when not specifically incorporated

---

[106] At [149]–[164].

[107] Whether this is a good or bad thing is another question. As in *Takamore SC*, above n 33, although tikanga was held to be relevant it still became only one value amongst many to be weighed by the executor or courts.

[108] See Ronald Dworkin "'The Model of Rules I' from *Taking Rights Seriously*" in Keith C Culver (ed) *Readings in the Philosophy of Law* (2nd ed, Broadview Press, Petersborough, Ontario, 2008) 148.

[109] At 153–154.

into legislation. [110]An even stronger argument can be made that tikanga should be seen as part of our legal framework of thinking and balancing due to its recognition within the common law. This may be particularly appropriate when there is discretion or weighing of values. It is a difficult yet interesting question to explore: could or should tikanga values be part of the common law principles used in statutory interpretation?

It is unknown how the judiciary will interpret what it means to have "values" within the law and whether this will allow for some of the constraints of the Court of Appeal's common law test to be avoided. It does, however, leave open hope that Māori practices, experiences and values could come to be seen as a valued part of the legal framework of New Zealand.

VII. Implications and Limitations of Recognition

This article has argued that there is potential in the common law to develop in a manner that is more conducive to the incorporation and recognition of tikanga. There are, however, a number of general concerns that are raised with seeking recognition in this forum.

One of the major limitations is that the development of the common law depends on the receptiveness of the judiciary to tikanga-orientated arguments. Through one prism, the courts can view the common law as a flexible tool designed to recognise Māori customary law as a dynamic living body of law that is applicable to New Zealand society today and is part of our legal framework. Through another, the common law can be seen like it was when colonisation first occurred, merely as a transitional mechanism that should be read strictly to only recognise a certain limited type of traditional and static custom.

The recognition of tikanga within the state legal system, as demonstrated by the intense media scrutiny and interest in the outcome of the *Takamore* case, is highly contentious and political. The development of native title jurisprudence has shown that in similarly

---

[110] See *Huakina Development Trust*, above n 28, at 210 where Chilwell J took into account the Treaty of Waitangi as an aid to interpretation, when construing the term "the public interest", despite there being no statutory reference to the Treaty in the relevant provisions. In the case of *Barton-Prescott v Attorney-General* [1997] 3 NZLR 179 (HC) at 184 the Court took a similar approach and stated that "[w]e are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the statute".

controversial areas of law, courts "have tend[ed] to err on the side of conservatism".[111] Certainly, the initial promise of the native title doctrine was never realised, as after the emergence of the doctrine and the accompanying public glare and accusations of activism, the judiciaries in Canada and Australia tended to resile and interpret the various gatekeeping tests in a relatively restrictive manner that has made native title difficult to establish.[112] Further, if one casts their eyes internationally, beyond the native title context, the common law route of recognition of custom has not been embraced. In Australia, for example, there has not yet been a case in over 200 years where the common law rules for recognition of custom have been satisfied.[113]

As well as the potential reluctance from the state legal system to positively engage with tikanga, there are concerns that may arise for Māori with a non-Māori institution having the power to apply and interpret Māori customary law. A judge may have very little understanding or background in tikanga, which leaves open the possibility of misinterpretation or for meaning to be lost in translation. These distorted constructions run the risk of altering the substance of tikanga and becoming codified in judicial precedent. Further, recognition of customary law within the common law is clearly a hierarchical form of legal association, in which the dominant system controls and defines the parameters of the recognition of tikanga. In this model of association, where the common law and the judiciary are the moderators of what is permitted to enter, the two legal systems are not on an equal playing field. This subordinate status was evidenced in the High Court *Clarke* case where Fogarty J rejected the custom because it was considered "unreasonable" on the basis of the liberal emphasis on the individual.[114]

There are some Māori legal scholars who challenge these political arrangements and reject the supremacy of the state legal system as a given.[115] On their view, recognition

---

[111] Erueti, above n 62, at 579 where he points out judicial conservatism in the context of the development of native title. Also see McHugh, above n 18, at 331 where he notes that the immense controversy that arose as a result of the *Ngāti Apa* judgement concerning the foreshore and seabed spooked the judiciary and may have made their subsequently cautious.

[112] See McHugh, above n 18, at 106–188 where he sets out what he describes as the "evisceration" of native title in Canada and Australia "through tests of continuity, scope, desuetude, and extinction".

[113] See the Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (ALRC Report 31, 1986) at [62].

[114] See *Clarke v Takamore*, above n 33, at [86]–[89].

[115] See 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, Melbourne, 2005) 330 at 334. Also see Moana Jackson "Justice and Political Power: Reasserting Māori Legal Processes" in Kayleen M Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury, Sydney, 1995) 243 at 254.

of tikanga within the state legal system is part of the continuing colonisation of the Indigenous soul.[116] They see a danger in seeking space within the state legal system as it could be perceived as giving legitimacy to the whole enterprise, that is, a colonialist construct that has often been the engine for the denial of Māori rights. On this view, the model of association should either be one that is more of a dialogue, or tikanga, as the first law of Aotearoa, should trump. The current hierarchical state-centric model that we have therefore prompts the questions: Why should Māori expect the common law to do anything differently this time? Is seeking recognition of tikanga within the common law "another futile use of the 'master's language … to dismantle the master's house?'"[117] This links into the conceptual and practical question faced by Indigenous peoples around the world: Should they attempt to carve out a small space within the whare (house) of the state legal system if the whenua (ground) and foundations upon which it is built are defective?

Achieving recognition of tikanga through this route faces multiple challenges. The *Takamore* jurisprudence, however, will likely mean that the courts will be forced to increasingly address and take a position on the place and status of tikanga. On balance, this article contends that, depending on the manner of engagement with tikanga, common law recognition can be a positive development for the New Zealand legal system and for Māori. In regards to judicial reluctance, a number of reasons that support recognition have already been advanced.[118] Further, the *Takamore* developments can also be seen as an indication that the New Zealand courts at the highest level are attempting to confront the difficult task of practically engaging with tikanga. This is supported by the musings and excitement on the potential of the common law avenue by Justice Joseph Williams of the High Court of New Zealand.[119] The door is open for the judges to positively diverge from the restrictive approach taken in native title jurisprudence.

With respect to Māori concerns about the common law generally, including submitting to the colonialist design, John Borrows makes some encouraging comments.[120] Borrows

---

[116] See Moana Jackson "Where does Sovereignty Lie?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 196 at 197.

[117] John Borrows and Leonard I Rotman "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36(1) Alta L Rev 9 at 27.

[118] See reasons outlined above in part IV.

[119] See Justice Joe Williams "Henry Harkness Lecture: Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law (podcast, 7 November 2013) YouTube <www.youtube.com>.

[120] See Borrows and Rotman, above n 117.

views the finding of space within the common law not as consent to colonialism but as serving:[121]

> the limited purpose of providing a toehold to bridge out of colonial territory into one they can call their own. ...In employing this application of law, Aboriginal people only want to dismantle that part of the master's house that keeps them incarcerated.

Borrows' basic assertion is that using and attempting to redesign the common law, to more closely address the needs and reflect the position of Aboriginal nations, does not mean submitting to being trapped within the system. Instead, he sees it more as a "bridge that permits an exit from colonialism's hostile and confining thicket",[122] and a way of clearing a site that respects aboriginal perspectives. This reasoning is primarily based on the argument that aboriginal rights recognised by the common law are sui generis as they take their source in Indigenous custom, practices, traditions and tikanga.[123] As a consequence he contends their essence is somewhat insulated and protected against inappropriate intrusions in their interaction with common law.[124] Borrows recognises that Western bias will of course continue to restrain aboriginal rights. However, he downplays the potential impact of recognition on aboriginal customs as he believes that aboriginal people will continue to be guided by their own teachings regardless of formal recognition, that customs have resisted and survived colonial onslaught thus far, and that common law recognition should not be seen in a vacuum.[125]

These arguments are all applicable in the present discussion. Attempting to carve out Indigenous space within the state legal system and seeking fundamental constitutional change are not mutually exclusive goals. Further, the limitations of what the common law route does and does not do also need to be acknowledged. This route does not deliver self-determination to Māori and it is unlikely to satisfy Māori constitutional, political, economic or legal aspirations. However, it can be viewed as but one tool that can be wielded in a greater Māori movement. Further, taking an incremental approach by subtly altering the sources of state law could facilitate the creation of an intellectual and political climate whereby greater constitutional change becomes

---

[121] At 28.

[122] At 28.

[123] At 30–31.

[124] At 31.

[125] At 30.

possible in the future.

The potential of this route to be a positive development for Māori does of course depend entirely on how the judges engage with tikanga and the interpretive principles that are employed if they choose to recognise it. It is beyond the scope of this article to set out the tools that courts should employ in this process. However, as stated by Walters, in these instances of confluence "a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives".[126] This is therefore a challenge to the judiciary to genuinely engage with tikanga and the Māori legal perspective. The discussion on the limitations of the gatekeeping tests for custom and where they have the potential to be reconstructed to facilitate recognition of tikanga is a starting point. However, some of the other relevant considerations that require further exploration include: the degree of autonomy that Māori have over the content, application and interpretation of their tikanga; the corresponding standard of required evidential proof; and the best practices to avoid cultural misunderstandings. It could be that a specialist court, such as the Māori Land Court, is deemed the appropriate body to hear questions of custom or provide expert opinions and advice to the general courts on the interpretation or application of tikanga.[127]

There will always be challenges that arise from the meeting of two dissimilar legal cultures. In particular, there will always be a question about which culture is to provide the vantage point from which the association will be determined and defined. The current framework of association is one where the common law controls how tikanga is incorporated and accepted into it. This article has argued that there is scope within the current framework for the common law to be interpreted so as to facilitate the recognition of tikanga. It has identified that provided that care is taken in the manner that the interaction between the two legal systems is traversed, the common law can act as a bridge between tikanga and the state legal system. This could provide a platform for a movement to there being more of a negotiated dialogue and relationship between the common law and tikanga in the future.

---

[126] See M Walters "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's LJ 350 at 413 as cited in *R v Vanderpeet* [1996] 2 SCR 507 at [49].

[127] This is suggested as under s 7(2A) of Te Ture Whenua Māori Act 1993 a person must not be appointed as a Māori Land Court Judge unless they are "suitable, having regard to the person's knowledge and experience of te reo Māori, tikanga Māori, and the Treaty of Waitangi".

VIII. Concluding Remarks

The scope of this article is such that it only addresses a sliver of the vast array of issues involved in considering the recognition of customary law by the common law. This area of law is a minefield of fascinating questions that warrant further research and intellectual consideration. For example, there are issues around who Māori customary law can and should apply to, the institutional and practical constraints of the judiciary to hear such cases, and the actual effect that incorporation may have on custom at a broader level.[128] Further, to determine whether the common law is a favourable route for Māori to seek recognition, more work could be done around comparing it to alternatives. Legislative incorporation has the benefit of having the flexibility to recognise Māori aspirations in virtually any form, including giving them greater autonomy. However, it is also dependent upon political will. These questions feed into the broader question about the appropriate manner in which Māori customary law and the state legal system can engage with each other and the different ways that Māori can seek to have their aspirations met.

The common law route of recognition is by no means perfect for Māori. It is an association whereby Māori customary law is subordinated and forced to measure its validity against the standards set by another legal system.[129] Seeking recognition within the common law is a route that has not been favourable for Indigenous peoples thus far. It also risks being part of the "politics of distraction" where the legal system presents as being sympathetic to the recognition of tikanga whereas in reality the legal threshold may be such that it is unlikely to ever result in any genuine engagement or recognition.

However, when there is a confluence between legal systems, an outcome needs to be reached. Despite its many limitations, this article argues that there is residual potential for the common law to be used as a tool to fight for space within the dominant legal framework of New Zealand. There is the Court of Appeal's approach in *Takamore*, which although restrictive, can be read in a way that facilitates

---

[128] If customary law was recognised would the court become the arbiter of every dispute? Would recognition in the Western sense bind the custom into a frozen enforceable legal precedent? Would it have a floodgates effect that would encourage those that would not have practised the custom to do so? Would recognition change the fundamental character of the custom? Would it have an essentialising effect?

[129] As recognised by the South African Constitutional Court, there are dangers of assessing Indigenous customary law through a "common law prism" as "[t]he two systems of law developed in different situations, under different cultures and in response to different conditions": see *Alexkor Ltd v Richtersveld Community 2003* (12) BCLR 1301 (CC) at [56].

recognition of tikanga as outright free-standing law. There is also the potential and promise of tikanga being part of the common law regardless of whether it measures up against the Court of Appeal tests.

The effectiveness of the common law as a route of recognition of tikanga should of course not be overstated. A co-option and incorporation of tikanga values into the legal system through the common law is not a complete solution for Māori. However, the common law is a tool, a site where advocates can argue and where limited concessions can potentially be achieved.

The challenge that the common law faces is whether it can be reforged to accommodate the insertion of Indigenous legal thought in a manner for which it was not originally designed. It has the potential to be a more functional site of legal pluralism, and not only recognise those rights or traditions that are deemed capable of mirroring it, but also become an association of contestation and of dialogue where Māori values can be considered relevant and seep into common law decision-making. If this occurs it would go some way towards recognising that Māori, as first peoples of our land, should have a greater space within the legal order of New Zealand.