"NEITHER DEAD NOR LOST – UNCOVERING CRITICAL LAW STORIES AT A CRITICAL TIME" THE LECRETIA SEALES MEMORIAL LECTURE 2025

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I ACKNOWLEDGMENTS

Ko Pukenamu tētahi o ngā tino maunga
Ko Wainui te awa
Ko Ngāti Moetonga, Te Rokekā ngā hapū
Ko Wainui te marae
Nō te taha o tōku Pāpā he uri tēnei nō Te Rarawa e mihi kau ana ki a tātou
Nō te taha o tōku Māmā he uri ahau nō Ngāi Pākehā, arā, nō Airangi, nō Ingarangi hoki.
Tēnā koutou, rau Rangatira mā.
Nei rā taku mihi ki tōku whānau e noho ana i konei, ki taku Tāne, a Maynard, ki āku tamariki, Havelund kōutou ko Te Rangihuia, ko Jessica-Lee, ki taku whānau whānui, ka nui te aroha ki a koutou.[1]

I am so grateful to be able to acknowledge Lecretia Seales and her family in the presence of my own family. We do not amount to much without the people who formed us, and for me, a lot of those

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1 Pukenamu is one of our mountains, Wainui is the river, Ngāti Moetonga and Te Rokekā are the peoples and Wainui is marae. From my father's lineage I greet you. From the Irish, Scottish and English lineage of my Pākehā mother I greet you. Greetings to this honoured assembly. I also greet my husband, my children and so many of my own whānau here tonight. My love to you all.

people are here tonight. Those who helped to make Lecretia the person and force for reform that she was, and who in her turn, helped to form the people from her family who are here tonight. And thank you, Matt.

Law reform, in part at least, is about trying to see a way forward when there just does not seem to be one, or when the way forward is just too hard to bring into being. By many people putting their feet in front of each other, change can happen. Lecretia is testament to that.

It is my honour to share with you tonight just some of the work and thinking of several people working on the Borrin-funded research project Te Rauhī i te Tikanga – a Tikanga Companion. Through that work we seek to help law students to understand tikanga Māori as a system of law; to take account of, respect, and protect that legal system.

II FROM LANDSCAPE TO LAWSCAPE

Any account of people and their law starts with landscape. Mountains, valleys, plains, oceans, rivers, streams, forests, alpine zones, desert areas, birds, animals, people, insects—each landscape, even within a single landmass, embodies a unique profusion of life. The challenges to human survival that landscape has imposed upon the smallest bands of people have served to shape the relationships amongst people, and between peoples and their places.

People, guided by need for food, for shelter, for comfort, by population growth, access to fisheries or other imperatives, seek to require others to behave in certain ways, or not to behave in certain ways. Legitimate inter-generational decision-making power will be needed to share or allocate resources, to define the right connection to land, to dissuade people harming each other, and to requiring people to care for each other in certain ways. The correct establishment, dissemination and exercise of power with and over others could be by way of mere force, or by way of something more profound and long-lasting. All people groups eventually need to identify their own vision of the right kind of life and what, by way of the right kind of power, is needed to achieve that for many people, forever. All people groups need and use law, whether other people groups understand their use and control of power to be law or not.

As all peoples have language, all peoples need, make and recognise law. All inhabited landscapes then become—by the exercise of human (and perhaps divine) imagination and will—*lawscapes*.

A Like Kumutoto – Neither Lost nor Dead

As more Wellingtonians now know, Kumutoto, a large river that formed part of the Kumutoto pā (Ngāti Mutunga, Te Ātiawa and Ngāti Te Whiti) was the first awa in Wellington city to be culverted in the 19th century and effectively hidden underground from public sight and most public memory, flowing under Kelburn Parade and down to Te Whanganui a Tara, Wellington Harbour. As with the many other culverted streams and rivers that flow to the sea, hidden from view and damaged,

Kumutoto did not die, and it was never lost. In more recent years, the full life of Kumutoto has been publicly remembered and acknowledged, and restoration efforts are ongoing and heartening.[2]

It is not easy recovering something that has been buried from public view for so long. Without stretching the metaphor too far, a similar observation can be made of tikanga Māori as a legal system with its own integrity. Neither dead, nor lost, tikanga Māori is also undergoing the beginnings of public legal restoration, with all of the risks and uncertainties that accompany any such development.

Since late 2022, Te Rauhī i te Tikanga – a Tikanga Companion has been quietly gathering and analysing sources that reveal the practices and principles of tikanga Māori as a coherent system of law. Our hypothesis, over the course of the entire project, is that tikanga Māori includes a significant set of (interconnected) core legal norms that can be articulated and demonstrated, both in broad Māori legal contexts, and in interface with te tātai ture. This core set of legal norms served and continues to serve to drive behaviour by requiring specific legal practices and procedures to be implemented to fulfil the expectations that the norms establish.

In the process of looking at the interplay between norms and practices, we see the operation of a legal system operated within hapū and hapū-based collectives as independent polities. Such legal systems will normally include a body of rules, principles and practices; rules about rulemaking; institutions or bodies charged with making law; and ways of resolving disputes and ways to enforce laws.

B Principles, Norms, Ritenga … A Word on Words

Much of tikanga Māori involves the application of 'principles' or 'values', but in legal contexts, I prefer the use of 'legal norm' referring to standards, conventions, values, principles, obligations and expectations that individuals and collectives are expected to abide by, and importantly, that they *accept* themselves to be bound by.[3] Such norms guide and direct actions.[4] They are a crucial foundation point for the work we have been doing in Te Rauhī i te Tikanga, as our starting point is to

2 See for example the work of the Kumutoto Restoration Project, publicised at <www.facebook.com/KumutotoRestorationProject/> (Last accessed 20 October 2025).

3 Note the test applied by the Supreme Court (now High Court) in *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) in determining whether or not to consider Māori custom (in that case, a tangihanga or mourning process for the dead). The test required a determination as to: (1) whether the custom is a general one; (2) whether the custom is contrary to statute; and (3) whether the custom is reasonable in the circumstances. In determining that the tangihanga in that case was a "general custom", Cooper J accepted the arguments of counsel that a general custom that was "not unreasonable" would also be one that would be "considered morally binding by the Maoris themselves": see headnote and 804–805.

4 See for example Gordon Christie "'Obligations', Decolonization and Indigenous Rights to Governance" (2014) 27(1) CJLJ 259 at 266.

look at what happens on the ground, at legal practices—actions required by legal norms. We identify these legal practices as 'ritenga'.

1 Ritenga

We selected twelve distinct ritenga to examine, that:

(1) involved some distinctive processes and characteristics that make the ritenga clearly identifiable;
(2) offered, together, fair coverage of the main dimensions of Māori social, economic and cultural life;[5]
(3) serve to illustrate a whole system in operation (if not comprehensively or exhaustively);
(4) had substantial entries in *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*;[6] and
(5) were likely to have examples of sufficient substance and depth to be able to necessarily infer, or identify the role of legal norms in their use;

The ritenga we selected for Te Rauhī are set out below with brief (and inevitably incomplete) glosses:

Rāhui – temporary ritual restriction of identified areas from public use;

Muru – redistributive stripping of property from individuals and collectives;

Ōhākī – oral statements issued before death by individuals of great mana;

Pana – expulsion from community;

Tangihanga – mourning and funerary processes taking place over the course of three days in modern time, but over far longer periods in earlier times;

Hui/hui rūnanga – decision-making public gatherings;

Whāngai – the adoption and ongoing care of children;

Aukati – the establishment of boundaries to prevent conflict between people groups;

Raupatu – the confiscation of land and resources;

Rongo/Hohou te rongo/te he tatau pounamu – the process and result of peace-making;

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5 The nine dimensions we have considered in our analysis of sources comprise social obligation (relationship building, allocation of resources, sharing resources, harm of people, spiritual transgsression, family formation, land use, war and peace, and death and birth).

6 Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013).

Hoko (also including *tuku*) – exchange of goods with others, or the release of goods to others; and

Hākari – the practice of redistributive feasting.

2 Legal Norms

In order to examine the operation of tikanga Māori as a system of law, we gathered sources for each ritenga, examining the role and apparent relative importance of legal norms, or principles of tikanga Māori relevant to each example of the ritenga. The norms comprised the following (with brief and, once again, incomplete glosses):

Mana: comprising authority, spiritual and temporal power, personal standing;

Tapu: including spiritual restriction and power, the "setting aside" of things, people and places for special purposes;

Noa: a state of ordinariness, of freedom from restriction;

Wairuatanga: spiritual imperative, involving necessary process and ritual;

Utu: comprising a return in response to an action of another or others, a usually proportionate response to a precedent action, a requirement that imbalance be discharged in returning to normality;

Whakapapa: the layering of lineage and kinship connections defining rights and obligation between people of earlier, current and future generations;

Whanaungatanga: incorporating kin-based relationship obligations, and (in a modern context) relationship obligations not dependent on kinship connection;

Ea: the state of balance, with no important obligation left unmet;

Kaitiakitanga: obligation arising from responsibilities held by collectives to look after aspects of the natural world; and

Manaakitanga: reciprocal obligations to provide hospitality and appropriate generosity to others, obligations that are not necessarily kin-based.

Such norms set expected standards of behaviour that underpin the creation of enforceable obligations and determine the nature of remedies and penalties in the event of breach. These legal norms are not abstract notions and mean little in and of themselves if they are not tethered to, and expressed in, well-established procedures such as rāhui, whāngai, hoko and ōhākī. Such processes themselves should be examined for what they can reveal about the operation of the legal norms.

III SOURCES

We have assessed and analysed well over 700 ritenga sources in the project from a wide range of sources from the 1820s to today, including Tribunal and court evidence; Māori governance

documents; Government reports, scholarly works; print, broadcast and internet media; correspondence; interviews in the public domain; and beyond. We identified good sources as being most pertinent to, and illustrative of, a specific ritenga.

Without going into detail at this point (as the research is still ongoing), we can make some broad-brush observations about the 12 ritenga we looked at for the purposes of this lecture:

- Gatherings are legally necessary as part of the correct process for most of the ritenga we examined.
- The ritenga seem broadly recognisable across people groups and geography, although the names and finer details of such ritenga may differ from place to place.
- Several ritenga require the redistribution of goods and moveable property frequently between and among peoples.
- Birth status often attaches to different legal states and consequences.
- Ritenga can be crucial to risk management for the survival of Māori collectives.
- Ritenga have had to adapt and change under external forces—but they have (mostly) survived the past 200 years. Rather like the analogy of Wellington's underwater streams, the flow has been impeded, blocked up, choked even, but the ritenga have had to adapt for survival, and that has mostly succeeded.

Similarly, we can also make some similarly general observations about the legal norms we identified as being relevant to the various ritenga:

- The legal norms also seem broadly recognisable and consistent across people groups and geography.
- The legal norms of tikanga Māori are often hard and demanding to uphold in the ritenga we examined, and costly to Māori collectives.
- Their full application by way of different types of ritenga requires and builds social cohesion.
- The legal norms too have adapted, changed due to external forces, and have largely survived.
- Sometimes the legal norms lose depth and richness in modern discourse. Rattling off a list of "tangas" cannot communicate the importance and centrality of the norms in Māori thought and society.

To illustrate a couple of these points, it may be easy and very acceptable to say that having a hākari at a wedding or on the final day of a tangi is an exercise of manaakitanga. That is true. Being generous by feeding people at such occasions is a common expression of manaaki. However, what that illustration misses out is that when we understand manaakitanga as a legal norm in a given situation, standards must be met, and obligations upheld, as determined in context.

What 19th century examples of hākari have shown us is how costly such events often were. Massive platforms would often be built, huge amounts of food would be made available for people to eat and take away and planning for the requisite amount of kumara and preserved meats might have required two years to gather and store sufficient harvest. Then those who received the parcels would

be under a corresponding obligation to respond correctly, as demanded by another legal norm—utu. The norms coalesce. Therefore, what is required to discharge some obligations of manaakitanga is likely to be expensive—for individuals and for collectives—and even more expensive in the breach of those who fail to meet the standards required.

Our everyday use of a term, like manaakitanga in New Zealand English, is inevitable but can sometimes disguise the depth of the concept. The loss of depth may be symptomatic of a broader problem we observed years ago with the development of the first legal Māori dictionary. After the 19th century, English quickly became the primary language of legal enactment, and the role for Māori as a language of law became largely to translate, critique, describe, explain and protest. If, as we hope, the civic and legal role of te reo and tikanga Māori is to grow, and if the language is ultimately to regain the function of legal enactment, the depth and richness of the Māori legal norms should be more broadly understood.[7]

IV A JOURNEY INTO MURU (IN THE CASE OF ACCIDENTS)

Our project, Te Rauhī i te Tikanga also has an English name, A Tikanga Companion, because we think of the resource as being one that accompanies users as they learn about the norms and ritenga of tikanga Māori. Of course, an immediate problem arises. With the enormous amount of information out there about tikanga, how were we to select, arrange and organise this material, as well as create a resource that can help others make sense of such information? We decided to look to ritenga first, and then to the norms. The ritenga of muru can provide a useful illustration.

A From Pā Harakeke to Kete

In determining how we would go about creating a useful research process, we thought of the life cycle, if you like, of harakeke (*phormium tenax* flax). To arrive at a beautiful complete kete or kākahu, we must always start with the profusion of the pā harakeke. Selecting, arranging, processing, preparing and weaving are necessary steps before the completion of a kete or kākahu is even possible.

So it is with the well-known practice of muru. This is one of the more well documented ritenga. We have to figure out how best to understand this ritenga, and how it is informed by legal norms.

1 Kohikohi

We needed first to gather sufficient examples of muru in action. We also needed enough examples that were substantial enough to be able to see, highlighting how legal norms of tikanga Māori drive different kinds of muru, and how the practice of muru reflects the importance of the norms.

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7 Māmari Stephens and Mary Boyce (eds) *He Papakupu Reo Ture: A Dictionary of Māori Legal terms* (LexisNexis, Wellington, 2013).

2 *Wetewete*

We needed to then develop a mode of *analysis* to be able to group muru examples into categories. We also needed enough examples to be confident in the kinds of situations that muru would be used, and to be able to discern differences between the relevant circumstances in which muru would be appropriate. In our work, we identified four main categories of muru (and a couple of smaller catergories that ended up being *too* small for useful application):

(a) muru in the case of accidents;
(b) muru in the event of threats to marriage;
(c) muru for smaller incidents of harm/disputes; and
(d) muru in the case of breaches of wāhi tapu.

3 *Hononga*

A key part of our analysis was the extent of the *connection* between the legal norms of tikanga and the ritenga of muru in its different categories. This step required researchers to examine sources carefully, to 'score' to what extent legal norms seemed to be applicable in the examples of muru and to articulate why that might be the case.

4 *Pūrākau (narratives)*

It is not enough to just do the analysis, we still have to bring people with us as they use the resource. We decided that constructing fictional exemplar narratives for each category of ritenga would be a key tool to demonstrate, in a relatively controlled way to users, how norms and ritenga connect, and what drives the operation of the law. Mythological narrative-based storytelling, as we all know from our own communities of origin, is a great teacher of understanding the priorities of the natural cultural world. Using structured narratives here will enable us to present key aspects of the ritenga muru in a memorable way and reveal distinctive aspects of the operation of the practice and norms. Equipped with such understandings, users will be better able to uderstand the historical examples of muru that we provide.

5 *Rukua! Deeper dives.*

We are conscious that users of the final resource will be law students across a broad spectrum. Some users will be very inexperienced in the learning of tikanga, and others will be highly knowledgeable, looking for greater depth, and everything in between. Similarly, some students will be highly knowledgeable in te tātai ture, others far less so. Further historical examples are profiled that show clearly how some tikanga Māori and English legal concepts can be in direct tension with each other, or sometimes show consonance with each other.

B Understanding the Prevalence of Legal Norms in Ritenga – Pūrākau (Narratives)

As mentioned above, we examined our sources to determine how legal norms may have required the implementation of the ritenga. For example, in the case of muru arising from accidents, our researchers identified that some legal norms were prominent than others in the sources they analysed.

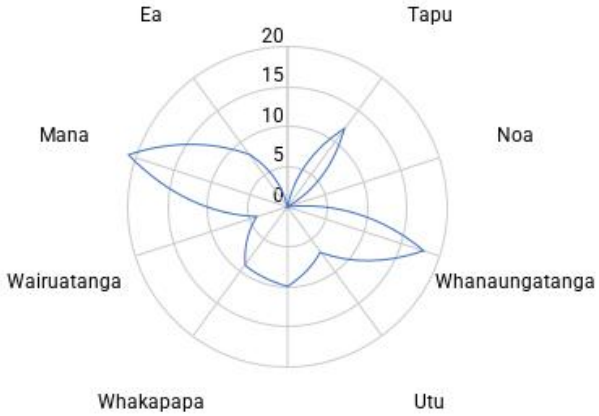
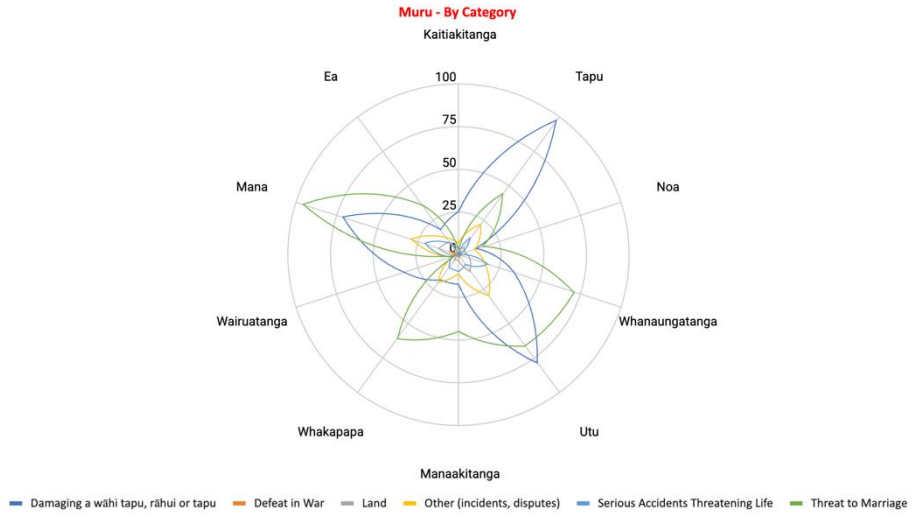


Fig 1

Fig 1 shows that of the 35 or so sources that gave the best illustration of this category of muru, almost all sources showed that the legal norm of *mana* will have been relevant. The next most identified norm was *tapu* and then *whanaungatanga*. Interestingly, different categories of muru showed somewhat different results, as you can see in Fig 2:



This radial dial refers to a couple of other very small categories with fewer than 20 entries (land-based disputes and defeat in war). The largest category by far was Threat to Marriage (green) and it can be clearly seen above that those examples reflected the norms of utu and whanaungatanga as being important alongside mana. These are slightly different profiles. Naturally, the next questions would include asking *why some norms appear more prevalent than others*, and how to engage users in identifying the answers to that question.

This is where narrative (pūrākau) can be useful. Any legal system will have accompanying story-based narratives that reveal what is important to the people groups of that legal system. Often, such narratives will serve as foundation points to legitimate a legal system, and sometimes the primary concerns and key principles of the legal system are simply revealed in new narratives.

For the category of muru in the case of accidents, we created the following narrative to illustrate the role of norms in the enactment of the example of muru described in this piece. What follows is a slightly shortened version of the pūrākau.

Hei Pūrākau

In a village near a lake lived a young rangatira, Kahu. His people had lived on the lake's shores for generations, thriving on abundant food and resources from both the lake and the forest. Kahu was married to Hinewai, whose people were descended from Mārohirohi, the taniwha and kaitiaki of the lake. When Hinewai married Kahu, she gave up her personal power to be able to move between the land and water, a gift from her ancestor.

Over time, Kahu's people noticed the forest was no longer providing enough food. Neighbouring hapū had taken over parts of the forest and depleted its birdlife, forcing Kahu's people to rely more on the lake's resources. Fearing for their future, Kahu asked Hinewai to speak with her family for help. Hinewai, pregnant with their first child, was told by her people that the child would inherit her powers, ensuring access to the lake's abundance and securing the village's future.

When the child, Tahi, was born, their connection with the lake provided a steady food source, and the village thrived despite the loss of the forest. When the child was four, Hinewai left the village to visit her relatives, and Kahu, distracted by a visiting rangatira, failed to watch the child. The child wandered and fell, injuring their leg. Upon her return, Hinewai was furious. Though accidental, she knew there would be consequences for the harm Tahi had suffered. Her people called on Mārohirohi, who then flooded the village, sweeping away all Kahu's people's belongings, leaving them with nothing but their lives.

Devastated, Kahu's people considered moving away, but Hinewai insisted they rebuild the village by the lake. She explained that as long as her child remained, the lake would provide, and her people would no longer harm them. The village did indeed rebuild, and as Tahi grew, they continued to ensure the well-being of Kahu's people, but always under the watchful eye of Mārohirohi.

This tauira (or example) narrative reveals a few key matters:

- the importance of sustainable use and sharing of resources and a threat to those resources;
- important relationships between peoples;
- damage to those relationships that threaten survival;
- the pre-eminent importance and mana of the child;
- breach of agreement;
- failure of risk management by the father *and* the people;
- the loss of relationship between the parties;
- relevance of the key legal norms of *mana*, *whanaungatanga* and *tapu*;
- the ritenga of muru *restores* mana and relationships; and
- the people survive—a negotiated survival.

As is clear, this pūrākau focuses on the ritenga muru in the case of accident and demonstrates the key norms of *mana*, *whanaungatanga* and *tapu* and how those norms are relevant to the ritenga.

1 What factors indicate that mana is relevant?

The factors that show the presence of mana include:

(a) Kahu is a Rangatira, a person of high mana;
(b) Mārohirohi, the kaitiaki, as a taniwha, is an entity of great mana; and
(c) Hinewai and her family, as descendants of the taniwha Mārohirohi, have considerable mana (including power).

The factors that show the risk of diminishing mana include:

(a) the encroachment of neighbouring hapū on the resources previously relied on by Kahu's people;
(b) Kahu failing to be responsible for the safety of Tahi and for preventing accidents to the child; and
(c) Kahu's people allowing him to fail in that obligation.

2 Which matters show the importance of tapu?

The factors that show the importance of the role of tapu include how:

(a) the encroachment of the other iwi on the lands and resources of Kahu's people, which also threatens special places and resources that may be restricted to others—tapu may well have been breached;
(b) the taniwha is an entity that has high mana, but is also one that poses great physical risk, and because Mārohirohi can take the lives of others, restrictions needed to be placed between Mārohirohi and the people;
(c) Tahi experiences serious physical injury to the body, affecting his personal tapu;

(d) the relationship between Hinewai and Mārohirohi and the lake is one 'set apart' and special because of her whakapapa which includes ordinary and divine/spiritual aspects; and
(e) the powers of Hinewai indicate her and Tahi to be people that required special treatment and consideration.

3 What factors show the importance of whanaungatanga?

The factors that show the importance of the role of whanaungatanga include:

(a) the relationship between Kahu's people and the taniwha Mārohirohi as needing to be treated carefully, and the obligations upheld to prevent further muru;
(b) the relationship between Kahu's people and Hinewai and her son as being extremely important for the survival of Kahu's people;
(c) the muru showing how dependent Kahu's people were on that balance, and the obligations of whanaungatanga;
(d) the encroachment of the other hapū showing how fragile ecosystems can be when populations increased, but connections between peoples not renegotiated; and
(e) the future offspring of the child, and the ongoing relationship with Mārohirohi creating stability for the future.

While the pūrākau reveals the role of norms in the fictional scenario, historical examples gathered and analysed by the Project reinforce the role of those tikanga norms in the operation of ritenga.

C Muru in the Case of Accidents: Historical Examples

The sources we have gathered that detail muru in the case of accidents come largely from Wairoa, Taranaki, Bay of Islands, Bay of Plenty and Wairarapa. Not all geographic and iwi areas are represented in this sample. Nevertheless we were satisfied that the historical examples were consistent in how the legal norms appeared to be relevant and consistent with the tauira narrative. Each source gathered and analysed were examined by at least two researchers—the research leader, Dr Ria Holmes, and the author in the audit process—and by our other research leads, Tai Ahu, Associate Professor Carwyn Jones and Paul Meredith.

1 Mana is highly relevant to imposing a muru in the case of accidents

If a rangatira or whānau member of rangatira suffers a serious accident, that rangatira would likely then be subject to muru by those hapū under the mana of that rangatira (or under their influence). Upholding the mana of the highborn, including rangatira, requires taking due care of the rangatira and not exposing them to unnecessary risk so the responsible collective (including the

whānau itself) would be subject to the punishment.[8] The imposition of a muru would be considered necessary to affirm the mana of the person and people subject to the muru. While property would be stripped from people already suffering, to do otherwise would increase the misery as they would be left as "a person, of no consequence".[9]

2 Whanaungatanga is highly relevant to imposing a muru in the case of accidents

Such events could, depending on particulars, threaten the relationships between hapū. The hapū under whose sphere of mana the accident occurred, could be subject to muru as a form of punishment for the breach of those relationships. Individual fault does not need to be found, but it could still be important to ensure that the right collective should be targeted for the muru, as this enables the right obligations of whanaungatanga to be upheld.

In an incident where Busby had property stolen and was injured in a subsequent skirmish, delicate relationships between hapū were affected. Here, it was unclear which hapū may have been responsible with Ngāti Hine sending a taua muru due to being accused of the muru. The rangatira, Rete, was found to have caused the injury to Busby[10] so the obligations could be correctly implemented. Elsdon Best describes witnessing a muru in the event of the assault of a child that the hapū ought to have prevented.[11]

3 Tapu is highly relevant in the imposing a muru in the case of accidents

Aituā, including accidents involving serious injury would certainly involve considerations of tapu (a high degree of ritual restriction that, if broken, incurs primarily spiritual punishment). Serious illness prior to a death may also place the person under a state of tapu. If a person was struck down by serious illness/injury, those conditions may have been considered to have occurred as a result of the violation of tapu. This violation might necessitate the use of muru to punish whatever that violation of tapu might have involved.

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8 These references identify sources examined in the Project. [MUR 57] refers to the 57th example of muru analysed. In this case the source text was Hugh Francis Carleton *The life of Henry Williams, Archdeacon of Waimate* (Upton & Co, Auckland, 1874) vol 1 at [vi].

9 [MUR 96]; and Thomas Lambert "Law of Plunder" in *Pioneering Reminiscences of Old Wairoa* (Thomas Avery and Sons Limited, New Plymouth, 1936) at 65.

10 [MUR 108] and [MUR 109]; and Waitangi Tribunal *The Wairarapa ki Tararua Report Volume 1: The People and the Land* (Wai 863, 2010) at 41.

11 [MUR 11]; and JHS "Maori Memories Two Strange Laws" *Wairarapa Times-Age* (New Zealand, 22 July 1939) at 11.

D Muru in the Case of Accidents: Tensions and Sympathies between Legal Orders.

The historical examples briefly outlined above also showed how Pākehā and Māori legal understandings could conflict, and also where there could be sympathy between the systems. In the middle of the 19th century, if Pākehā were injured by way of accident, there could also be a muru-based response too, depending if the person injured was under the protection of the hapū. If they were, the mana of that relevant hapū could be undermined, requiring a muru-based response.[12] Similarly, if Māori were accidently wounded by settlers, the people of the settlement might be deemed collectively responsible, and therefore liable to muru.[13]

1 An example

James Busby came to New Zealand in 1833 and settled at Waitangi. He was the first official British resident in New Zealand and played a significant role in the Treaty of Waitangi by helping to draft and negotiate the document with Māori chiefs. He facilitated meetings with chiefs, particularly in 1835, which led to the Declaration of Independence and, later, the Treaty of Waitangi. An abbreviated account of an accident and its implications is set out below:

In 1834, James Busby's storeroom was broken into and some goods stolen. In a scuffle, shots were fired at the residence and a splinter of wood accidently hit Busby in the head. Busby and other settlers were upset that the incident was not being taken seriously by local Māori. Busby wanted the person responsible to be expelled from the area.

Busby was not in fact aware of the delicacy of inter-hapū relations and the constraints on the northern alliance leadership, who, in fact, took the matter very seriously. Angela Ballara argues that the whole Bay of Islands was thrown into turmoil because of the incident. As alluded to above, Kāwiti of Ngāti Hine led a taua muru to the Paihia mission station, complaining that the missionaries had spread a report that he had been the one responsible for the attack. The southern alliance hapu gathered at Ōtuihu, preparing for the expected attack from the northern hapū. Peace was not re-established until it was finally accepted that a Ngāti Tautahi chief, Rete, had been responsible. Another rangatira, Titore, had offered his own service on a ship to Sydney, a significant concession, if another resolution could not be found.

Rete was eventually forced to cede land in compensation for the muru. This incident highlights some immediate differences between the legal order. There is no time to go into those differences here in any great detail, but these are matters to be explored by users of the resource.

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12 [MUR108].

13 [MUR 108].

2 A deeper dive: tensions between tikanga and te tātai ture.

Busby has suffered theft of his property and harm to his person. These matters are well recognised in English law and require a penalty to be applied in accordance with the relevant law. The penalty would apply to individuals at fault. In a fault-based conception of law, causation, behaviour and matters such as intent are relevant, so penalties would only be directed to the person or persons at fault. In such thinking, whakapapa connections between those affected would not be considered relevant because any individuals not involved in committing the harm, such as Kāwiti, simply cannot be culpable. In English criminal law, legislation was necessary to identify criminal offences.

Therefore, the Offences Against the Person Act 1837 could be the relevant law to establish fault, and penalty in the case of the personal injury.[14] Section 11 of the Act empowered the Court to imprison offenders found guilty of assault for a term not exceeding three years.

As a matter of tikanga Māori, however, fault is not a matter of determining causation and a guilty mind. Rather, the inquiry would be directed at determining under which collective's mana the matter occurred, whether tapu had been breached, how to restore damaged relationships and what resolution was necessary to these ends. The norms and institutions of tikanga Māori are deeply interconnected to greater and lesser degrees, which is not the case in determining legal liability in the English legal context.

Ritenga and norms of Tikanga Māori

Hara –The theft of goods, damage to his residence and personal injury all involve some kind of wrong or harm that needed to be attributed to the right individuals and collective(s) and addressed. Misattributed harm could create more harm, for example, when Kāwiti and his people were blamed incorrectly.

Whanaungatanga – The whole of the Bay of Islands was thrown into turmoil that could not be calmed until it was found that Rete was the culprit, meaning the harm to relationships between hapū could finally be dealt with.

Mana – Busby's mana is likely to have been significant for hapū as he was considered an access point to trade and technology, as well as the relationship with British Crown.

Rangatira – Many rangatira were involved in this event, and the issues needed to be resolved to also uphold the mana of the rangatira and their hapū.

English legal responses and concepts

Potential criminal law response:

Harm – Busby had lost personal *property* (*stolen goods*). Busby suffered *personal injury* (by way of a splinter).

Offences were usually determined by Parliament, for example:

- The Offences against the Person Act 1828; and
- The Larceny Act 1828

These matters may ordinarily incur individualised *criminal sanction* under English law.

Sanctions would be decided by *Courts*, not by individuals connected to the incident. Sanctions that could be imposed at the time could include *imprisonment*, *transportation* or *fines*. None of these responses were available to Busby in the 1830s.

Property law response

There may have been an issue of *encroachment on property (trespass).* Rather than a criminal

14 Offences Against the Person Act 1837 (UK) 7 Wil 4 & 1 Vict c 85.

Hui – A hui between southern rangatira took place.

Utu – The hara requires an appropriate utu to be mad. The response eventually proposed is the permanent ceding of land to Busby.

Ea – Balance was finally achieved with cession of land and settling of relationships.

Tuku – Ceding of the land to Busby would *not* normally be a permanent arrangement, but would be the basis of ongoing relationship.

Pana – Busby's preferred solution was for Rete to be banished from the area (a ritenga often exercised against individuals).

Tapu – Tapu was not strongly demonstrated in this source, but the fact that a splinter of wood hit Busby's head may have exacerbated the seriousness of the hara.

sanction, some kind of civil damages might have been payable if the elements of trespass were shown. Once again, liability is on an individual basis.

Busby's claim was satisfied under tikanga Māori by way of land cession. Individual *ownership* of land under such circumstances was not easily recognisable under English law in Aotearoa New Zealand prior to the *signing of Te Tiriti o Waitangi* and the establishment of land ownership statutes. It is unclear if any *deed* was signed in this transaction, but it is highly likely that Busby would have viewed this cession as permanent—a very different understanding to tuku carried out under tikanga Māori.

This example can offer a small taste of the kind of work we have been doing to explore and explain how Māori legal thinking and the legal thinking of te tātai ture intersect, usually with a degree of conflict, and sometimes with resonance. There is much more work to be done. Perhaps we can conclude with the imagery of water, and of the flow of Kumutoto. Our job as law schools throughout the country is to teach people how to understand the operation of tikanga Māori—not to become tikanga Māori experts. Law schools cannot do that. However, we can teach students how to see waters that have been hidden under their feet for so long. Perhaps that is the best we can hope for—for our students to grasp that the system still exists, to have a sense of the good things it hold, and to understand that this system has its own integrity that is worth protecting, as difficult as that will undoubtedly be.

Tēnā tatou.