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*Adopting Reality:
The Case for the Legal Recognition of Maori Customary Adoption
in New Zealand*

Rhonda Thompson

Submitted for the LLB (Honours) Degree at Victoria University of Wellington
1 September 1999

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The Case for the Legal Recognition of Maori Customary Adoption
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¹ Indian Child Welfare Act 1975 (USA).

² S Pitama "The effects of traditional and non-traditional adoption practices on Maori mental health" in K Sprenger (ed) *Proceedings of the International Conference on Adoption and Healing* (Adoption Education and Healing Trust, Wellington, 1997) 81 ["Maori mental health"].

ADOPTING REALITY: THE CASE FOR THE LEGAL RECOGNITION OF MAORI CUSTOMARY ADOPTION

There is no resource that is more vital to the continued existence and integrity of [Maori] than their children.¹

I INTRODUCTION

There are two fundamentally different adoption systems practiced in New Zealand - Maori customary adoption and traditional legal adoption. However, although the practice of customary adoption is an important part of Maori culture,² only the latter concept is fully recognised by New Zealand law. Earlier this century both systems were recognised but the introduction of new adoption legislation in the 1950s saw the end of this pluralism. It was replaced by a policy of assimilation so that there was one adoption law for both Maori and non-Maori. This change meant that Maori customary adoptions had to be accommodated within the confines of either the Adoption Act 1955 or the Guardianship Act 1968 even though both pieces of legislation failed to accommodate tikanga Maori (Maori customary values and practices). A further problem was that after 1962 the adjudicating body which attempted to define Maori customary adoptions in terms of these pieces of Pakeha legislation was the non-Maori courts who are arguably biased towards a European perspective.

This paper discusses these problems and analyses the case for the legal recognition of Maori customary adoption. It argues that legal recognition is necessary to ensure the welfare of customarily adopted children and to bring about clarity in Maori succession law, particularly with regard to Maori freehold land. It is stressed that as a non-Maori, the writer seeks only to assess the adequacy of the Pakeha legal system with regard to whangai arrangements.

¹ Indian Child Welfare Act 1975 (USA).

² S Pitama "The effects of traditional and non-traditional adoption practices on Maori mental health" in K Spreegers (ed) *Proceedings of the International Conference on Adoption and Healing* (Adoption Education and Healing Trust, Wellington, 1997) 81 ["Maori mental health"].

II CUSTOMARY ADOPTION: A LEGISLATIVE HISTORY

Parliament initially vacillated over the legal recognition of customary adoption. The Adoption of Children Act 1895 laid down a regulatory scheme for customary adoptions but they were recognised by the Pakeha courts.³ The Native Land Claims Adjustment and Laws Amendment Act 1901 provided that no claim by customary adoption to the estate of any Maori who died after 31 March 1902 would be recognised unless the adoption had been formally registered in the Native Land Court.⁴ However, the Native Land Act 1909 stated that only customary adoptions registered before its inception would have effect for the purposes of succession and that adoptions made before or after that Act in accordance with Maori custom were of no "force or effect, whether in respect of intestate succession to Maori land or otherwise."⁵

The Native Land Amendment and Native Land Claims Adjustment Act 1927 provided that certain customary adoptions subsisting when the 1901 Act came into force would be "of full force and effect in respect of intestate succession to Maori land."⁶ That provision was repealed in 1930 and the 1909 Act remained in force.⁷ When the Native Land Act 1909 was repealed, the existing statutory code was mirrored in the 1931 consolidation which stated that:⁸

(2) Any adoption so made and registered before the thirty-first day of March, nineteen hundred and ten, and subsisting at the commencement of this Act, shall have the same force and effect as if lawfully made by an order of adoption under this Part of this Act.

³ *Hineiti Riririre Arani v Public Trustee* [1920] AC 198, 203 (PC).

⁴ Native Land Claims Adjustment and Laws Amendment Act 1901, s 50.

⁵ Native Land Act 1909 s 161. **See also:** *Piripi v Dix* [1918] NZLR 691.

⁶ Native Land Amendment and Native Land Claims Adjustment Act 1927, s 5.

⁷ Native Land Amendment and Native Land Claims Adjustment Act 1930, s 6.

⁸ Native Land Act 1931, s 202.

The Maori Affairs Act 1953 and the Adoption Act 1955 recognised only those registered customary adoptions made prior to the commencement of the Native Land Act 1909⁹.

In *Whittaker v Maori Land Court*¹⁰ the Court of Appeal noted this vacillation over the status of adopted children was "as surprising as it was regrettable". In that case the Court found that, due to the legislative saga outlined above and the particular facts of that case, the relationship between an adoptive mother and daughter was firstly recognised by law (1892-1901), was then recognised by law only if registered (1902-1909), was of no legal effect (1910-1927), was contingently of full force and effect (1927-1929) and was of no effect from 1930 onwards.

III MODERN ADOPTION LAW AND ITS IMPACT ON MAORI

Adoption for both Maori and non-Maori is now governed by the Adoption Act 1955.¹¹ Section 19 of the Adoption Act 1955 states that "... no adoption in accordance with Maori custom shall be of any force or effect, whether in respect of intestate succession to Maori land or otherwise."

In the early years of the Adoption Act 1955 applications could still be heard in the Maori Land Court if the child and at least one applicant were Maori. However, with the passing of the Adoption Amendment Act 1962 Maori could no longer appear before that court and were forced to appear before a Magistrates Court to obtain adoption orders. The Department of Maori Affairs aided Maori by employing community officers to act as adoption social workers but they were only employed at the direction of the court¹². These officers wrote reports and approvals and, as they were often Maori themselves, they were able to advise according to tikanga Maori and support applicants who were daunted by the court environment. The 1962 Act drew violent reactions from some Maori who preferred their land court to the unfamiliar Magistrates

⁹ Adoption Act 1955, s 19(2).

¹⁰ [1997] 15 FRNZ 571.

¹¹ Adoption Act 1955, s 18. Maori is defined in section 2 of the Te Ture Whenua Maori Act 1993 as "a person of the Maori race of New Zealand; and includes a descendant of any such person."

¹² Keith C Griffith *Adoption: History & Practice 1840 - 1996* (K C Griffith, Wellington, 1997) 460 ["Adoption: History & Practice"].

Court. For this reason some Maori simply ignored the provisions of the 1962 Act and did not seek legal recognition of their adoptions. In doing so they risked having their children removed by Child Welfare Officers¹³. This system ended with the closure of the Department of Maori Affairs in 1989¹⁴.

Six years later the deficit of Maori advice on adoptions left by the demise of the Community Officers was dealt with by the Adoption Amendment Act 1995. This altered the definition of "social worker" so that where the adoption of a Maori child was contemplated, a Maori social worker or a member of the Maori community nominated by the Director-General of Social Welfare would advise the court¹⁵.

This survey of legislation relating to customary adoption reveals that the practice was initially legally recognised and allowed to operate alongside the non-Maori adoption system¹⁶. However, this pluralist policy gave way to one of assimilation with the Adoption Act 1955 and today both Maori and non-Maori are dealt with under the Pakeha court system. This system has benefited from the input of Maori advisers but applications are nevertheless analysed according to the Pakeha law¹⁷.

IV THE CURRENT LAW ON MAORI CUSTOMARY ADOPTION

Customary adoption has been afforded legal recognition in New Zealand in the following instances:

1. Te Ture Whenua Maori Act 1993 recognises and provides for customary adoptees who are described as "whangai". The Act defines "whangai" as "a person adopted in accordance with tikanga Maori". Section 115 of Te Ture

¹³ Annie Mikaere "Maori Women: Caught in the Contradictions of a Colonised Reality" (1994) 6 WLR 7 ["Maori Women"].

¹⁴ D Durie-Hall & J Metge "Kua Tutu Te Puehu, Kia Mau" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 59 [*Kua Tutu Te Puehu, Kia Mau*].

¹⁵ Adoption Amendment Act 1995 s 2(2)(a).

¹⁶ Adoption of Children Act 1881, Adoption of Children Act 1895, Infant's Act 1908.

¹⁷ Patrick Wahanga Hohepa and David Vernon Williams, *The Taking into Account of te ao Maori in Relation to Reform of the Law of Succession: a Working Paper* (New Zealand Law Commission, Wellington, 1996) 37 [*The Taking into Account of te ao Maori*].

Whenua Maori Act 1993 empowers the Maori Land Court to decide whether to recognise a person as a whangai for the purposes of that section. Section 108(2)(e) of Te Ture Whenua Maori Act 1993 provides that an owner of a beneficial interest in Maori freehold land may will that interest to their whangai. Both sections are stated to "have effect notwithstanding anything in section 19 of the Adoption Act 1955." These provisions amount to limited legal recognition of whangai arrangements.

2. The Family Court has found that legal recognition of customary adoption is implicit in the Child Support Act 1993. In *Pineaha v Pepeko*¹⁸ the Court interpreted "adoption" for the purposes of section 25(1)(a)(ii) of the Child Support Act 1993 to include customary adoptions. As that Act was passed in the same year as the Te Ture Whenua Maori Act 1993 the Court argued that Parliament must have been aware of whangai arrangements. The fact that the Child Support Act 1993 makes no reference to customary adoptions "could only have been deliberate and was intended to enable customary Maori adoptions to be respected and recognised". The birth mother who had adopted her child to adoptive parents in accordance with Maori custom 11 years prior to the hearing was consequently not liable for child support. However, the Court advised that parties to a customary adoption should arrange a ["re-adoption"] under the Adoption Act 1955 to avoid problems in the future¹⁹.

V THE PROBLEM WITH THE CURRENT LAW ON MAORI CUSTOMARY ADOPTION

Adoption as recognised by the Adoption Act 1955 amounts to the transference by court order of all parental rights and obligations from the natural parent(s) to the adoptive parent(s) and effectively severs all ties with the birth family²⁰. The legislation fosters a closed and secret process which contrasts markedly with that favoured by Maori.

¹⁸ (8 June 1995) unreported, Family Court, Waipukurau, CS 081 073 92.

¹⁹ The Crown intends to appeal this case although an appeal has not yet been lodged. Information from Russell Collins, Crown Solicitor, Napier on 25/8/99.

²⁰ Adoption Act 1955, s16.

Maori customary adoption is public and often carried out among relatives²¹. Consequently, although the relevant words such as "tamaiti whangai" and "matua whangai" are translated as "adopted child" and "adoptive parent" in Maori, these "whangai" arrangements are often fundamentally different to modern Pakeha adoptions²². Metge and Hall explain that although Maori see the relationship between the child and the adoptive parents as the primary tie, Maori are opposed to a complete severance of links between the child and the natural parents. This position reflects the importance of whakapapa (genealogy) in establishing personal identity and group membership.²³ However, Metge and Hall add that the Guardianship Act 1968 is inadequate to deal with Maori child placement issues because, like the Adoption Act 1955, it is dismissive of tikanga Maori.

These fundamental differences lead the authors in *Kua Tutu Te Puehu, Kia Mau* to argue that factors such as openness in adoption, consultation with whanau and the opportunity for whanau to stipulate that a child know its cultural heritage are important to Maori but that these features are specifically discouraged by the Adoption Act 1955²⁴ ²⁵. For these reasons the Adoption Act 1955 is arguably contrary to Maori development. Maori commentators have described the Adoption Act 1955 as assimilationist and destructive of Maori beliefs and practices²⁶. *Puao-Te-Ata-Tu*, a Ministerial Report which resulted from consultation with Maori throughout New Zealand stressed that self-determination and collectively made solutions were important to alleviate the inequality, alienation and frustration experienced by New Zealand's indigenous people²⁷. However, the draft Adoptions Local Placement Manual issued in

²¹ In Tai Tokerau (Northland) the term "atawhai" (grace) is used rather than whangai. Other words used are "tiaki" (look after), "whakatipu" (to make grow), and "taurima" (to treat with care).

²² *Adoption: History & Practice* above n 12, 454.

²³ *Kua Tutu Te Puehu, Kia Mau*, above n 14, 72.

²⁴ Adoption Act 1955, s 7, s 16, s 22 and s 23.

²⁵ While the Adoption Act 1955 does not change the child's race (s16(2)(e)), it may destroy the Maori child's links with the whanau, hapu and iwi (s16(2)(a),(b) and (c)).

²⁶ *Kua Tutu Te Puehu, Kia Mau*, above n 14, 59.

²⁷ Department of Social Welfare, *Puao-Te-Ata-Tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the*

March 1995 recognises that kin groups have no rights to be consulted under statute and accordingly states that "should a birth mother insist that her whanau is not involved or consulted despite counselling about the implications for the child and the whanau, this wish must be respected"²⁸. "Re-adoption" as advised in *Pineaha v Pepeko*²⁹ requires that Maori have their adoption practices formalised according to Pakeha law despite the marked differences between the two concepts of adoption. Research has shown that some Maori describe their participation in the legal adoption process as a mere formality. Adoptive families questioned in the research went through the process to legalise their arrangements and protect their families from state interference but did not understand the secrecy inherent in it or recognise many of the effects of a legal adoption³⁰.

VI THE CASE FOR THE LEGAL RECOGNITION OF MAORI CUSTOMARY ADOPTION

A Customary law and the Treaty of Waitangi 1840

The introduction of English law did not oust Maori customary law completely³¹. It was originally recognised by the legislature provided it was not "repugnant to the general principles of humanity"³². As outlined above, legal recognition of customary adoption was removed by statute leaving an ethno-centric adoption system. Parliament has the absolute right to legislate in this manner because under Article I of the Treaty of Waitangi 1840 Maori ceded to the Crown "all rights and powers of Sovereignty".

Department of Social Welfare (Government Printer, Wellington, 1986).

²⁸ New Zealand Children and Young Persons Service *Adoptions Local Placements Manual* (Government Printer, Wellington, 1995) 89.

²⁹ Above n 18.

³⁰ *Maori mental health*, above n2, 79.

³¹ Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1992) 86.

³² Constitution Act 1852, s 71. This section was repealed by the Constitution Act 1986 after a report by the Department of Justice said that it created a source of law separate to the New Zealand Parliament and was "a relic of our colonial status". Department of Justice *Reports of an Official Committee on Constitutional Reform: Second Report* (Government Printer, Wellington, 1986) 27-57.

However, Article II of the Treaty guarantees Maori "te tino rangatiratanga" or full chieftainship over "taonga" or treasured things³³ and "taonga" may be seen as including children³⁴. This would support the right of Maori to self-determination in the area of adoption. If Maori exercise this right and arrange a child placement, refusal to afford that adoption legal recognition could amount to a refusal to recognise the right of self-determination.

In *R v R*³⁵ a father argued that the Treaty of Waitangi 1840 gave him an absolute right to the custody of his daughter as taonga. However, the Treaty of Waitangi cannot override an Act of Parliament³⁶ and the High Court considered the case in the light of the relevant statute, the Guardianship Act 1968. That Act states that the paramount consideration in guardianship deliberations should be "the welfare of the child"³⁷. The Court decided it was not consistent with the child's welfare for the father to gain custody due to his history of violence, his unemployment, a lack of family support and no evidence of bonding with the child.

Finding that the Treaty had no bearing on the private arena of child custody law and was not relevant in interpreting the Guardianship Act, Tipping J noted that the decisions on which the father relied were decisions where the Treaty was directly imported by statute into the legislation under consideration.

Maori self-determination as guaranteed by the Treaty of Waitangi 1840 has been an issue for other child custody applicants. In a claim lodged in the Waitangi Tribunal in 1992, a Tuhoë grandmother who had been unsuccessful in her bid to gain custody of her grandchild, argued that children are "taonga" and that the tribe are guaranteed full and exclusive control over them by the Treaty of Waitangi except when "for some dire reason" Article I powers needed to be invoked by the Government³⁸. This grandmother

³³ *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA); *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

³⁴ *Kua Tutu Te Puehu, Kia Mau* above n 14, 64.

³⁵ (1990) 6 FRNZ 232 (HC).

³⁶ *Hoani Te Heu Heu Tukino v Attorney-General* [1941] AC 308.

³⁷ Guardianship Act 1968, s 23.

³⁸ Claim by DEB Tait-Jones before the Waitangi Tribunal concerning the Treaty of Waitangi Act 1975, adoption and guardianship, Wai 286

is not alone in her concerns as the prejudicial effects on Maori of current child custody legislation are cited in two further Waitangi Tribunal claims³⁹.

These concerns met with a more sympathetic response in *Barton-Prescott v Director General of Social Welfare*⁴⁰ when a Maori grandmother seeking custody and guardianship of her granddaughter argued that the Guardianship Act 1968 should be interpreted in a manner consistent with the Treaty of Waitangi. The High Court stated that because the Treaty of Waitangi had been designed to have general application all child custody legislation should be interpreted as coloured by its principles whether or not this was explicitly provided for in the legislation⁴¹.

It could be argued that a reading of the Adoption Act 1955 which is "coloured" by the principles of the Treaty may encourage the Family Court to grant adoption orders to whangai arrangements carried out in accordance with tikanga Maori. However, this does not remove the need for applicants to use the Courts and legislation which is arguably contrary to Maori values and advancement for a formalisation of their customary adoptions.

B Judicial Analysis of the "Welfare of the Child"

An adoption order is often refused on the basis that it would not promote the "welfare and interests of the child" as required by section 11 of the Adoption Act 1955⁴². The

(Department of Justice, Wellington, 27 May 1992). The Tribunal commissioned research on the claim but to date no report has been done and the claim has not been processed.

³⁹ Claim by T C Reihana before the Waitangi Tribunal concerning the Treaty of Waitangi Act 1975, the Guardianship Act 1968 and other issues, Wai 160 (Department of Justice, Wellington, 20 October 1989); claim by T R Waitai before the Waitangi Tribunal concerning the Treaty of Waitangi Act 1975, adoption and succession, Wai 634 (Department of Justice, Wellington, 26 August 1996).

⁴⁰ (1997) 15 FRNZ 501 (HC).

⁴¹ This case concerned the Guardianship Act 1968 which has been criticised by Maori for similar reasons as the Adoption Act 1955. It is surprising, therefore, that the Court stated: "'We are not confronted with and do not comment on the situation which might arise where a statutory provision was seen to be in conflict with the Treaty of Waitangi or related principles'".

⁴² Adoption Act 1955, s 11.

preservation of a child's links with its culture can be an important part of the welfare analysis for a Maori child. However, the courts have given cultural issues varying weight in considering customary adoptions. This lends weight to the argument that the courts are an inappropriate forum for the recognition of customary adoptions as they lack consistency.

In discussing the welfare principle, the Australian Law Commission noted that the difficulty "is who decides what is in the best interests of an Aboriginal child and what standards are used in reaching this decision"⁴³. As there is no specific legislation requiring the New Zealand courts to have regard to cultural factors in adoption cases, "who decides" may dictate "what standards are used".

In the early nineties there was a perceived movement towards promoting cultural heritage as a factor of greater importance in guardianship and adoption applications⁴⁴. Yet in *Barton-Prescott v Director of Social Welfare*⁴⁵ the High Court found that such considerations were merely a "starting point" which would be "subsumed" by other matters including the strength of existing and future bonding and parenting attitudes and ability. The important matters listed in that case vary markedly from the important outcomes for raising Maori children listed by Walker⁴⁶. These include knowledge of whakapapa and history, the availability of traditional healers, language, crafts and respect for elders.

Although consensus on the importance of "the provision of shelter, clothing, food, together with love and affection"⁴⁷ is easily achieved, beyond these basic factors there

⁴³ Human Rights and Equal Opportunities Commission *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) <<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen50.html>> (last accessed 1 September 1999).

⁴⁴ Graeme Austin *Children: Stories the Law Tells* (Victoria University Press, Wellington, 1994) 109.

⁴⁵ *Barton-Prescott v Director-General of Social Welfare* above n 40, 512.

⁴⁶ Harry Walker "We are born of our people - The unseen ties that bind the forces of kinship" in K Spreegers (ed) *Proceedings of the International Conference on Adoption and Healing* (New Zealand Adoption, Education and Healing Trust, Wellington, 1997) 10.

⁴⁷ *E v M* (13 September 1979) unreported, High Court, Wellington Registry, M 361.79.

will always be room for disagreement in a pluralistic society. However, it is arguable that there is increasing acceptance of the importance of culture in society. Other jurisdictions such as the United States, Canada and Australia have given specific statutory recognition to the importance of indigenous children knowing their cultural, racial and linguistic heritages. In Australia the New South Wales Law Reform Commission recommended that a "Cultural Heritage Placement Principle" be adopted in determining the placement of Aboriginal children in order to safeguard their cultural identities. The Principle dictates that the first preference for child placement is with people who belong to the birth parents' community. Where this is not possible the child should be placed with another Aboriginal community. Placement with non-Aboriginal applicants is reserved for situations where the first two preferences cannot be met. Non-Aboriginal applicants must "have the capacity to assist the child to develop a healthy and positive cultural identity" and help the child learn about and maintain links with their cultural heritage⁴⁸. Similar placement preferences were instituted by the Indian Child Welfare Act in 1978 (USA)⁴⁹. Such guidelines are important because without them decisions will inevitably be influenced by judges' values, beliefs and prejudices⁵⁰.

C *The Welfare of the Child and Adoptions by Relatives*

It is difficult to assess the actual weight given to cultural factors in welfare of the child analyses because of the widely varying circumstances of each case. However, one concept that highlights the cultural differences facing the courts and which has often been unpopular with them, whether or not other circumstances are favourable, is that of adoption applications by relatives and particularly by grandparents.

The courts have tended to see adoptions by relatives and particularly by grandparents as distorting the existing relationships of the parties⁵¹. In 1962 the Adoption

⁴⁸ New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965* Discussion Paper 34 (1994) <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/DP34CHP4>> (last accessed 1 September 1999).

⁴⁹ Public Law 95-608, 95th Congress.

⁵⁰ *Children: Stories the Law Tells* above n 44, 31.

⁵¹ *Re DX (an infant)* [1949] Ch D 320; *MR v Department of Social Welfare* (1986) 4 NZFLR 326.

Amendment Act was opposed by Maori MPs because they feared the removal of adoptions from the Maori Land Court would lead to the refusal of adoption applications by relatives. Their fears were realised when the Magistrates Courts proceeded to turn down many such applications⁵².

In *Re Adoption of A*⁵³ the District Court granted an adoption order to maternal grandparents who had customarily adopted their grandchild. The Court found that in terms of Maori customs and values, A's interests and welfare would be promoted by the adoption because there would be openness over the arrangements and no disruption of lineage or succession. The Court argued that in this case the advantages of adoption and the importance of Maori custom outweighed any legal artificiality in terms of family relationships or arguments for guardianship.

However, in the more recent case of *T v T*⁵⁴ the High Court refused an adoption application by paternal grandparents because "putting an adoption net across the family link" would not be in the child's welfare and interests. The Court found that the certainty and security the order would afford the grandparents was insufficient to allow such a legal fiction to be put in place and the granting of guardianship would be sufficient to ensure the child's welfare.

Thus, the authorities appear to prefer a view which is hostile to relative adoptions even though the new relationships arising from inter-family adoptions are not seen as artificial in the Maori context. For example, in *Application for Adoption by RRM and RBM*⁵⁵ the adoptive parents had both the prospective adopted child and her older natural sister in their care. The older sister was reported to understand and accept that she could not be adopted because Maori culture dictates that the first born child must remain the child of its natural parents.

The courts have made creative judicial attempts to interpret the Adoption Act 1955 so as to incorporate Maoritanga⁵⁶. However, the assessment of Maori customary adoption

⁵² *Maori mental health* above n 13, 8.

⁵³ [1992] NZFLR 422.

⁵⁴ (1998) 16 FRNZ 599.

⁵⁵ [1994] NZFLR 231.

⁵⁶ *Re Adoption by Paul and Hauraki* [1993] NZFLR 266.

by the courts has led to varying outcomes for applicants. This has been justified by the welfare of the child analysis and, arguably, a shifting recognition of the importance of cultural factors. The level of recognition is often dependent upon the relevant decision-maker who is free to give pre-eminence to cultural issues or find them "subsumed" by other factors.

D Current Trends in International Law

The right of Maori to "cultural self-determination"⁵⁷ in the area of child welfare is upheld by customary international law. While the international community has not been willing to recognise that indigenous peoples are entitled to the right of self-determination there has been general recognition that indigenous peoples and other minorities have rights and deserve protection⁵⁸.

Such protection in the child welfare arena is afforded by conventions such as Article 27 of the International Convention on Civil and Political Rights and a similar provision in Article 30 of the Convention on the Rights of the Child which states:

... a child ... who is indigenous shall not be denied the right, in community with the other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989 ensures that indigenous peoples "shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights."⁵⁹

The Convention on the Prevention and Punishment of the Crime of Genocide prohibits "forcibly transferring children from one group to another group"⁶⁰. The international law principle means that children should be placed as close to their parents as possible

⁵⁷ Anaya *A Contemporary Definition of the International Norm of Self-Determination* (1993) 3 TLCP 131, 143.

⁵⁸ Western Sahara Advisory Opinion, 1975 ICJ Rep. 12.

⁵⁹ Art 8(2).

⁶⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Art 2.

or, failing that, as close to their culture as possible. However, it may be difficult to argue that properly conducted adoption practices amount to the "forcible" transference of children.⁶¹

This principle is not simply desirable from the perspective of the protection of Maori culture but is required by international law. It is arguable that properly conducted adoption practices cannot fit into the category of the "forcible" transference of children. Further, the Draft Declaration on the Rights of Indigenous Peoples states that: "indigenous peoples have the collective right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards".

Thus, the principle of recognising indigenous customary law is upheld by a variety of international law instruments. These instruments are so widely recognised that they are considered to be customary international law⁶². Magallanes has argued that the conventions mean that Maori children should be cared for by Maori families, Maori should participate in decisions relating to Maori child care, custody and placement; and Maori should be responsible for decisions on Maori child welfare, which should be made through Maori institutions, should Maori so desire⁶³. Magallanes adds that it is less clear whether international law requires states to provide resources to develop Maori institutions to the point where they can take control over those matters.

While countries such as Australia have stated they will recognise a right of indigenous people to autonomy or self-government⁶⁴, New Zealand has instead upheld the right of indigenous people to participation in national government⁶⁵. However, Maori participation in mainstream governance is quite a different thing to self-determination

⁶¹ C J I Magallanes "A New Zealand Case Study: Child Welfare" in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) 145 [*Recognising the Rights of Indigenous Peoples*].

⁶² *Recognising the Rights of Indigenous Peoples* above n 61, 144.

⁶³ Above n 61, 133.

⁶⁴ Above n 61, 150.

⁶⁵ See statement by New Zealand Government to the WGIP, 26 July 1994.

but that latter concept would require major changes to legislation Maori have identified as being problematic including the Adoption Act 1955 and the Guardianship Act 1968.

E Accommodating two cultures within one law

1 Cultural relativism

In *Re Adoption of A*⁶⁶, Judge Boshier commented that "it might not be thought that the Family Court is necessarily ideally equipped to consider a wide range of family issues beyond a European perspective."⁶⁷ This comment accepts that, although different cultures may take varying approaches to issues such as adoption, the courts may lean towards a European bias. This means that European judges may struggle to fully understand customary Maori adoption practices and may impose an inappropriate ethnocentric viewpoint.

This can be explained in terms of cultural relativist theory which argues that because all individuals see the world through the filtered eyes of their own culture, attempts to impose a majority viewpoint on people with different cultural perceptions are unjust⁶⁸. This is an "imperialist routine" which attempts to make the values of a particular culture general⁶⁹. Modern adoption law has imposed a European legislative standard upon Maori and administers the system with a court process which is arguably biased towards such a world view. Austin has described a challenge to this system as a "challenge to the possibility of mainstream law's colonisation of Maori law relating to children"⁷⁰.

Garkawe has argued that the flexibility of the family law system could be a strength in that expressions and phrases used in the law could be interpreted in a manner which takes account of cultural relativist theory⁷¹. For example, where legislation uses the term "adopted child", the court would interpret this to include "customarily adopted

⁶⁶ [1992] NZFLR 422.

⁶⁷ Above n 66, 424.

⁶⁸ S Garkawe *The Impact of the Doctrine of Cultural Relativism on the Australian Legal System* (1995) 2 E Law 1 ["Cultural Relativism"].

⁶⁹ R J Vincent *Human Rights and International Relations* (Cambridge University Press, London, 1986) 37/8.

⁷⁰ *Children: Stories the Law Tells*, above n 44, 113.

⁷¹ *Cultural Relativism*, above n 68, 12.

child" in the case of a Maori person. This was the course the Family Court took in *Pineaha v Pepeko*⁷² and the Crown sought to appeal the judgment. This highlights the problem with Garkawe's argument that because the law in this area has a European bias, an interpretation that is consistent with Maori custom may arguably be contrary to the legislation.

An acceptance of cultural relativist arguments raises the issues of how to accommodate two world views while ensuring that there is only one law before which all persons are equal.

2 *Legal monoculture versus pluralism*

Proponents of the Adoption Amendment Act 1962 which required both Maori and non-Maori adoptions to go through the Magistrates Court process supported the move by arguing there should be one law for all.⁷³ However, this view of the importance of a legal monoculture is relatively recent and the authors of British sovereignty in New Zealand actually expected some form of legal pluralism to eventuate in the new colony.⁷⁴

3 *Current examples of pluralism in New Zealand*

Early legislation relating to customary adoption did demonstrate this plurality⁷⁵ as does some modern legislation and policy. For example, the Maatua Whangai programme is funded by the Department of Social Welfare but is a Maori initiative designed to strengthen whanau, hapu and iwi connections and use them as a basis for all the Department's child welfare services⁷⁶. The programme is intended to strengthen Maori institutions to take control of all Maori child welfare matters in the future. The Children, Young Persons and Their Families Act 1989 recognises Maori familial and

⁷² Above n 18.

⁷³ *Maori Women* above n 13, 8.

⁷⁴ *The Maori Magna Carta* above n 31, 86.

⁷⁵ Above n 16.

⁷⁶ *Kua Tutu Te Puehu, Kia Mau*, above n 14, 73.

societal structures and gives them some control and decision-making power in relation to children. Plurality is achieved in such programmes by making the jurisdiction of customary law personal rather than territorial. Thus, customary law applies to a particular group of people rather than all those living within a particular area. However, these programmes amount to including Maori in the decision making process in the same way as Maori social workers make reports to the court on a customary adoption. They do not yet amount to a dual legal framework or self-determination by Maori in this area.

4 *Justifications for plurality*

A separate adoption policy for Maori could be justified on the basis that customary adoption is a purely internal matter for Maori over which "chieftainship" in terms of the Treaty of Waitangi applies. In Canada the federal government has said that adoption is suitable for the exercise of aboriginal jurisdiction, being a matter "that [is] internal to the group [and] integral to its distinct aboriginal culture"⁷⁷.

Hohepa and Williams argue that a dual system is necessary because the Maori and Western based legal systems are incompatible given that the former is part of a "magico religious or spiritual system."⁷⁸ Where two cultures are so fundamentally different and there is only one law, it is inevitable that the law of the dominant group will prevail to the detriment of the other group.

However, a system which imposes one adoption law and procedure for all has a number of strengths. One adoption agency may be more efficient and cheaper to run than two. In a racially mixed society which is overwhelmingly non-Maori the imposition of the dominant culture is appropriate for the majority of people.

A further concern is that two legal systems will raise concerns about apartheid. Claims of racial discrimination would be contrary to the Bill of Rights Act 1990⁷⁹. However, section 17(2) of the Bill of Rights Act 1990 states that "measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged

⁷⁷ Indian Affairs and Northern Development, Federal Policy Guide: *Aboriginal Self-Government - The Government of Canada's Approach to the Implementation of the Inherent Rights and Negotiation of Aboriginal Self-Government* (Ottawa, 1995).

⁷⁸ *The Taking into Account of te ao Maori* above n 17, ch 8.

⁷⁹ The New Zealand Bill of Rights Act 1990, s19.

because of ... race ... do not constitute discrimination". This could be used to argue that a system of two laws is not discriminatory if it remedies the disadvantages meted out to Maori via the Adoption Act 1955.

Further, it could be argued that if the concept of pluralism is taken to its logical conclusion there could be a number of bodies arranging adoptions for a variety of cultural and religious groups. This would be untenable given the falling number of legally recognised adoptions. However, as New Zealand's indigenous people and a Treaty partner, Maori have a greater right than any other group in society to have their customary practices recognised. Maori have expressed the desire for autonomy in family law and consequently a separate Maori adoption law deserves consideration despite resource constraints.

F Discrimination and the Bill of Rights Act 1990

Modern adoption policy has been described as discriminatory against tamaiti whangai in that it removes links to their genetic origins, tribal affiliations, culture and subsequent entitlement to customary land⁸⁰. These concerns may lessen if the intended revision of the Adoption Act 1955 brings about a more open adoption policy⁸¹. However, Maori have described the need for them to have their adoptions formalised in a European court as discriminatory⁸².

The discrimination claim is not only heard from those seeking adoption orders. A 1998 Ministry of Justice report found that the definition of "relative" in section 2 of the Antiquities Act 1975 excluded whangai and thus discriminated against them.

The Zealand Bill of Rights Act 1990 ensures against discrimination on the grounds of race but while an interpretation consistent with the Act is to be preferred, the Bill of Rights does not affect other enactments⁸³. An interpretation consistent with the Bill of

⁸⁰ J Bradley, "Kei konei tonu matou (We are still here)" in *Proceedings of the International Conference on Adoption and Healing* (New Zealand Adoption, Education and Healing Trust, Wellington, 1997) 41.

⁸¹ Press release by Justice Minister, Tony Ryall dated 26 May 1999 entitled *Law Commission to Review 1955 Adoption Laws*.

⁸² *Re Paul and Hauraki* above n 56, 271.

Rights Act 1990 is not possible in this area because the discrimination springs from the parties having to go to court in the first place, regardless of the interpretation the court places on the facts of the case. Thus, the Adoption Act 1955 stands whether or not it is discriminatory.

G Whangai and Succession

As noted above, whangai are now legally recognised in New Zealand for the purposes of succession under the Te Ture Whenua Maori Act 1993 (TTWMA)⁸⁴. This is unsurprising given that the history of customary adoption in New Zealand is closely bound up with the important issues of Maori succession and land ownership. Hohepa and Williams state that the problem of balancing the succession rights of whangai and their adoptive and natural parents is a significant one for Maori⁸⁵. However, the fact that some Maori prefer to have their adoptions formalised where succession issues are likely to arise raises the question of whether this recognition is sufficient⁸⁶. The recognition given by the TTWMA does not create a separate legal framework for Maori customary adoptions. It simply recognises that they exist and may benefit from their adoptive parent's wills. It is submitted that there are two problems with this partial recognition:

1 Conflict between European and Maori succession laws

The relevant cases demonstrate an ongoing conflict between the European view that for succession purposes an adopted child is to be treated as the natural child of the adopting parents and the view held by many Maori that only blood relatives should succeed⁸⁷ and that interests in land should revert to the source from which they were derived⁸⁸. One of the aims of the Te Ture Whenua Maori Act 1993 is of keeping land,

⁸³ New Zealand Bill of Rights Act 1990, s 4, s 6 and s 19.

⁸⁴ Te Ture Whenua Maori Act 1993, s 108 and s 115.

⁸⁵ *The Taking into Account of te ao Maori* above n 17, 48.

⁸⁶ *T v T* 16 [1998] FRNZ 599.

⁸⁷ *Re Nehe Waiti Deceased* (1984) 22 Ruatoria MB 34.

⁸⁸ *Re Pareihe Whakatomo* [1933] NZLR supp 123; *Re Kahumate Reupena, deceased*, Digest of Selected Decisions of The Maori Appellate Court, The Maori Land Court and the Chief Judge of the

which is of immense importance to Maori, in the hands of its owners, their whanau, and their hapu⁸⁹. The outcome of the European view of succession may be that land is transferred to persons outside the relevant ancestral line.

The Te Ture Whenua Maori Act 1993 does not settle this conflict. It allows the Maori Land Court to decide who is a whangai and whether or not that whangai may succeed to Maori freehold land formerly owned by the adoptive parent as "if that person had been the child of the deceased owner"⁹⁰.

The Courts were initially clear that "the effect of an order by which the adoption of a Native child is accomplished is controlled by the rules of Native custom"⁹¹. This would appear to support the Maori view. However, the Courts have struggled to determine the Maori custom on certain points and to what extent established "custom" is actually a creation of the Native Land Court⁹². In more recent years the Courts have been doubtful that Maori custom should receive any weight and have preferred the European view⁹³.

The Te Ture Whenua Maori Act 1993 allows the Maori Land Court to decide in line with either the European or the Maori view. This suggests that the Maori Land Court does not work from a purely Maori base because the legislation relating to whangai allows either a Maori or a Pakeha view to be taken.

If a Maori testator fails to leave land to a whangai the decision may be measured against the test of a breach of moral duty as judged by the standards of "a wise and just testator"⁹⁴. The question then becomes whether the test of wisdom and justice should be set according to the European or the Maori view of succession. Custom would suggest that a Maori adoptive parent may overlook a tamaiti whangai in favour of blood relatives but this would be contrary to the European view and the case law on

Maori Land Court acting under section 452 of the Maori Affairs Act, 1953.

⁸⁹ Te Ture Whenua Maori Act 1993, preamble.

⁹⁰ Te Ture Whenua Maori Act 1993, s 115(2)(a) & (b).

⁹¹ *Re Pareihe Whakatomo* above n 88.

⁹² *Re Pareihe Whakatomo* above n 88.

⁹³ *Re Stubbing* (1988) 4 FRNZ 392; *Re Wakarua* (1988) 4 FRNZ 650.

⁹⁴ Family Protection Act 1955; *Little v Angus* [1981] 1 NZLR 126.

this point⁹⁵. The High Court has found that the courts would probably recognise a moral duty of a testator towards children adopted customarily even though they are unable to bring a claim under the Family Protection Act 1955⁹⁶.

This suggests that partial recognition of customary adoption raises problems for the courts in terms of interpreting Maori custom. The courts have also found the partial recognition of customary adoption problematic in terms of statutory interpretation. As outlined above, in *Pineaha v Pepeko*⁹⁷ the Family Court gave legal recognition to a customary adoption thus freeing the birth mother from liability under the Child Support Act 1991. This was due to the legal recognition afforded these adoptions in section 108 and 115 of the TTWMA. However, section 18 of the Adoption Act 1955 is clear that customary adoptions have no effect and would suggest that the legislature did not intend "adoptive parent" to include adoptive parents by Maori custom as held by the Family Court. Similar problems of interpretation could arise in other statutes that define terms such as "relative", "parent" or "child" in a way that does not specifically deal with customary adoption.

2 The definition of "whangai"

The Te Ture Whenua Maori Act 1993 defines the term "whangai" to mean "a person adopted in accordance with tikanga Maori". As the foregoing discussion of problems with defining what amounts to tikanga Maori would suggest, greater clarity may be needed to give certainty to this area of the law. Further, as there is no registration or similar system in place, the Maori Land Court will have to rely on precedent decisions to determine whether someone really is a whangai rather than, for example, a foster child. Maori customary adoptions are often different to the European model in terms of

⁹⁵ In *Wairau Block 12 Subdivision 13 regarding the succession to Heni Hekiera*, cited in *Re Pareihe Whakatomo* above n 88, the Native Land Court, finding that adoptive parents and children are entitled to succeed each other, stated: "we see no reason why it should not be incorporated into the present Native custom of succession, more especially as natural justice would seem to require that adopting parents should have even more right to succeed to the child they have adopted and upon whom they have expended their substance and fostering care ..."

⁹⁶ *In Re Green (deceased) and Green v Robson* (16 December 1994) unreported, High Court, Hamilton Registry, M366/90.

⁹⁷ Above n 18.

the reasons for adoptions, the age of the child and even the length of the adoption. Given these differences and the European bias of the Maori Land Court⁹⁸, that Court may have some difficulty in analysing exactly what amounts to a whangai arrangement. It is likely that the Maori Land Court would be instructed by the ten guidelines laid down by the Native Land Court in 1895 to determine what amounted to a whangai arrangement:⁹⁹

- (i) Complete adoption would be where the child was taken in early infancy and lived with its adopting parent until adulthood.
- (ii) The Court would have to look to the surrounding circumstances of the case if the first factor was not fulfilled.
- (iii) No special ceremony was necessary.
- (iv) The adopted child would usually be a relative by blood of the adopting parents.
- (v) If the adoptions were made with the consent of the "hapu" or "tribe", and the adopted child remained with such tribe or hapu, it would be entitled to share the tribal or hapu lands.
- (vi) Under such conditions the adopted child would be entitled to succeed to the whole of the interest of the adopting parents.
- (vii) If there were no near relatives, and the adopted child had duly cared for the adopting parents in their old age, he would succeed to the whole of the interest of the adopting parent.
- (viii) If there were near relatives, the adopted child would share in the succession.
- (ix) The adopted child would lose his rights if he neglected his adopting parent in his old age, or ceased to act with, or as a member of, the hapu, or tribe.
- (x) The rights of adopted children, as above set out, might be modified if the adopted parent made an "Ohaki" (verbal or Maori will or covenant).¹⁰⁰

⁹⁸ *The Taking into Account of te ao Maori* above n 17, ch 10.

⁹⁹ **See also:** *Re Tuatahi Tuwhahipa Deceased* (January 6th 1930) CJMB 1 Folio 246.

¹⁰⁰ It is notable that these points seem to support a pakcha view of succession law in that the adopted child would succeed to the adoptive parents. Note too the recognition of the importance of relative adoptions.

H Benefits and Treaty Claims

Customary adoptions registered with the Native Land Court early this century were able to secure benefit payments, allowances and housing opportunities. Where a child has been customarily adopted but there has been no official adoption, guardianship or custody order made by the Family Court, it is possible that the parties will have difficulty in applying for benefits. The old registration system meant the adoptive parents had a formal record of the adoption with which to satisfy the relevant government departments. Conversely, the High Court has refused to recognise a customary adoption citing as one of the reasons that it may cut the child off from benefiting from Treaty of Waitangi claims currently being settled.¹⁰¹

I Consent and Formal Notice

Parental consent for medical procedures or school activities may be obtained from an incorrect source if an unrecognised customary adoption has taken place. If a child has been taken into care or a custody dispute is in progress, the caregiving parents may not receive notice because child welfare legislation does not recognise "parent" as including parents by customary adoption.

J Birth Certificates

Given the unofficial nature of customary adoptions, it is likely that birth certificates will not be amended in response to a customary adoption and this could create confusion for the child later in life.

K Maori Identity

If the practice of customary adoption contributes to a sense of Maori identity then this identity may be eroded if recognition is withheld. Alternatively, it may contribute to a sense of alienation from the "colonising" culture. Research into Maori adoption concluded that a failure to recognise Maori adoption practices "would act towards further trying to pull the Maori family and its essence apart". Self identity and family structure are vital parts of an individual's and a culture's existence and progress. Thus,

¹⁰¹ *T v T* [1998] FRNZ 599.

it is not surprising that the research concluded that current adoption practices negatively influence Maori mental health¹⁰².

L Formal Assessment of Placements

An important part of the legal adoption process is the formal assessment of prospective adoptive parents but there is no such assessment of parties to a customary adoption. Traditionally, assessment of customary adoptions would occur in the Maori context when placements were negotiated by whanau members and particularly by the kaumatua (respected elders) who ensured that the child would be properly valued and given access to its heritage by birth as well as by adoption¹⁰³. This is applicable to Maori communities working along traditional lines but other Maori, particularly those in urban settings, may not have or even want access to such whanau support. Yet such support and assessment is necessary for the welfare of the adopted child, primarily at the start of a placement but also if the adoption breaks down.

It should be noted that problems can exist with whangai arrangements. For example, one whangai whose mother by customary adoption had died when she was ten years old leaving her with an alcoholic father said she had felt abandoned by her family and refused to let her child become the whangai of her birth mother.¹⁰⁴

A more accessible and culturally appropriate procedure for the recognition and assessment of customary adoptions may encourage more adoptive parents to formalise their arrangements. This could mean that more customary adoptions are formally assessed in some way.

VII NEW ZEALAND: OPTIONS FOR REFORM

It is submitted that the above discussion provides strong support for the legal recognition of customary adoption in New Zealand. There is already very limited legal recognition of the practice but whether this should be extended and how is a matter for Maori to determine and consequently this paper seeks only to offer a general discussion of the options for reform.

¹⁰² *Maori mental health* above n 2, 80.

¹⁰³ *Kua Tutu Te Puehu Kia Mau* above n14, 71.

¹⁰⁴ *Nikau v Nikau* [1998] NZFLR 721.

However, any suggestions for reform must take account of the issues that have been identified as vital to the adoption reform process by some Maori. These include the importance of consultation with whanau, hapu and iwi on adoption placements and the opportunity for whanau to stipulate that a child know its cultural heritage. Mead has asserted that children should be placed within whanau or hapu situations where the continuation of whakapapa (genealogy) and whanaungatanga (kinship relationships) is assured. If such a placement is not possible, Mead asserts there should be mandatory visiting rights to the relevant whanau¹⁰⁵.

Pitama has argued that the whangai system, administered by Maori adoption workers, should become the legal procedure for Maori seeking to adopt, instead of the continuance of an imposed foreign adoption system.¹⁰⁶ Pitama stresses the importance of adequate resources for any formal whangai system to ensure the safety of the child and their whanau.

Maori writers have pointed to the need for their adoption hearings to be held in open court and the relevant court records to be available on request to all parties concerned¹⁰⁷. Further, given the communal nature of Maori decision making, they state that, where appropriate, birth fathers should have the right to make submissions to the court as to the placement of their child¹⁰⁸.

It would also be necessary to research and take account of any problems that traditionally arise in the whangai context. Pitama has identified a possibility of problems if a child is adopted by the paternal side of a family.¹⁰⁹ There is little research in this area in New Zealand but studies of customary adoption amongst Torres Strait Islanders in Australia have identified some problems with the practice. Firstly, there have been problems when the relinquishing family has sought the return of a child because of a misunderstanding as to the permanence of the transfer of care¹¹⁰. Secondly, inheritance

¹⁰⁵ H M Mead "Tamaiti Whangai the Adopted Child, Maori Customary Practices" in *Adoption: History & Practice* above n 12, 472.

¹⁰⁶ *Maori mental health* above n 2, 80.

¹⁰⁷ *Adoption: History & Practice*, above n 12, 462.

¹⁰⁸ *Kua Tutu Te Puehu Kia Mau* above n 14, 71.

¹⁰⁹ *Maori mental health*, above n 2, 80.

rights have been confused where the child's birth certificate has not been amended to reflect the correct situation and, thirdly, it is of concern that Torres Islander culture dictates that the basis of the adoption may be reciprocity rather than the best interests of the child. It is noted that despite these difficulties the Queensland Government is moving towards the legal recognition of "kupai werem" or customary adoption because it occurs frequently and is an important social practice for Torres Islanders.¹¹¹

Maori customary adoption is fundamentally different to European adoption and the former practice is not adequately catered for in either the Adoption Act 1955 or under the provisions of the Guardianship Act 1968. This situation can be rectified in a more conservative fashion by legislating to provide for the recognition of customary adoption and the maintenance of a child's culture. The more radical and possibly controversial alternative is to enable Maori to implement a completely separate adoption procedure.

A The Conservative Approach: Legislative Change

1 Legal recognition of the importance of cultural heritage

As outlined above, judges give varying degrees of importance to cultural factors and this can lead to uncertainty for applicants. Legislation could provide that cultural factors must be considered when the court is analysing an adoption application but given the fact rather than rule based nature of family law¹¹² this would only operate as a guide.

An example of such legislation is the British Columbian Adoption Act 1996 of Canada which lays down a such a standard by providing: "If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests."¹¹³

However, although only a guide such a provision may encourage the court to find creative solutions to foster a child's links with its cultural heritage and may mean that the courts are more ready to accept adoptions by relatives, which are only unusual

¹¹⁰ P Ban *The Quest for Legal Recognition of Torres Strait Islander Customary Adoption Practice* 2 ALB 60, 5.

¹¹¹ Queensland Government Press Release of 21 October 1998.

¹¹² *Children: Stories the Law Tells* above n 44, 10.

¹¹³ Adoption Act 1996, s 3(2) (British Columbia, Canada).

when viewed from a European perspective¹¹⁴. Such a provision may also encourage judges and lawyers to become more educated about cultural differences.

2 *The legislative recognition of customary adoption*

Legislation could ensure that customary adoptions that have already been arranged by Maori are automatically given the same status as adoptions carried out under the Adoption Act 1955. An example of such legislation is found in Canada where the customary adoptions of several indigenous groups are recognised under the Federal Indian Act¹¹⁵ provided they are registered with the Department of Indian and Northern Affairs.

Section 46 of the Adoption Act 1996 of British Columbia, Canada provides:¹¹⁶

(1) On application, the court may recognise that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act.

(2) Subsection (1) does not affect any aboriginal rights a person has.

Until this Act was passed the Canadian courts had regularly recognised aboriginal adoptive customs as having essentially the same effect at law as an adoption order¹¹⁷. However, section 46 took the recognition of customary adoption one step further to allow a declaration that the customary status existing within the Aboriginal community has the same effect as an adoption resulting from the procedure available under other provisions of the statute.

Such legislation would make it clear that "child" or "adopted child" includes "customarily adopted child" for the purposes of such important legislation as the Child

¹¹⁴ An example of such creativity is found in *T v F* (1996) 14 FRNZ 415 & *Application by GN (adoption)* [1991] NZFLR 513 where the courts intimated that a Maori father or grandparent may be appointed additional guardians of the adopted child under the Guardianship Act 1968, s 8 to preserve the child's heritage.

¹¹⁵ RSC 1985, c I-5, s2(1).

¹¹⁶ RSBC 1996, c 5.

¹¹⁷ *Re Katie* (1961), 32 DLR (NWTTC); *Re Beaulieu* (1969), 3 DLR (3rd) 479 (NWTTC); *Re Deborah* (1972), 28 DLR (3d) 483 (NWTTC).

Support Act 1991, the Income Tax Act 1976 or the Accident Rehabilitation and Insurance Act 1992.

3 The Definition of "Whangai"

For the sake of clarity, any change to the law should include a definition of what amounts to a "whangai" arrangement. This will be dictated by tikanga Maori and may include some of the Maori Land Court's ten guidelines¹¹⁸.

Some other criteria that may be helpful in defining whether an arrangement amounts to an adoption by Aboriginal custom was set out for use in British Columbia, Canada in *Re Tagornak Adoption Petition*. This required:¹¹⁹

- (a) that there is consent of natural and adopting parents;
- (b) that the child has been voluntarily placed with the adopting parents;
- (c) that the adopting parents are indeed native or entitled to rely on native custom; and
- (d) that the rationale for native custom adoptions is present.

In Canada not only Indians but also Inuit, Metis, non-status aboriginal people and non-native individuals who have been accepted by the native community have been entitled to rely on native custom. For example in *Re Wah-Shee*¹²⁰ it was held that a customary adoption was valid where the Caucasian petitioner was a member of an Indian band with full status.

The question of who is entitled to rely on native custom raises the question of whether a customary adoption in New Zealand would only be recognised where both the birth parents and the adoptive parents were Maori, or whether it would be sufficient for only one of the prospective or relinquishing parent(s) to be Maori. Griffith raises the idea of adoption legislation that provides one procedure for situations where at least one birth parent or adoptive parent is Maori and another for situations where at least one birth

¹¹⁸ Above n 99.

¹¹⁹ [1984] 1 CNLR 185 at 187 (NWTSC).

¹²⁰ (1975) (NWTSC).

parent or adoptive parent is Pakeha. Where the parties cannot decide which option to take, the matter could be referred to the Family Court for decision¹²¹.

In situations where the parties are entitled to rely on native custom, there will be no difficulty effecting the legal recognition of a customary adoption by registration or by a court process where the natural and adoptive parents are in agreement. The difficulties usually arise when there is disagreement between whanau members and birth parents as to the appropriate placement of the child¹²². This is unsurprising in a racially mixed society like New Zealand where one birth parent may be pakeha and be more comfortable with the individualism and privacy which accompanies an adoption with the Department of Social Welfare¹²³. However, customary adoptions where all parties are in agreement and are considered to be entitled to rely on native custom should not be deprived of legal recognition because of such difficult cases.

4 *Legislative change: Using the Guardianship Act 1968 and the Children, Young Persons and Their Families Act 1989*

Bradley has argued that repealing the Adoption Act 1955 and the Adult Adoption Information Act 1985 would allow the openness in adoptions which is important to Maori.¹²⁴ This would be achieved by using the provisions of the Guardianship Act 1968 and the Children, Young Persons and Their Families Act 1989 to award sole guardianship to one set of parents in a manner that is consistent with tikanga Maori. A problem with this option, as with any partial legislative change, is that it would not address all the issues outlined above. For example, more legislative change would be necessary to ensure the rights of tamaiti whangai in customary land succession.

¹²¹ *Adoption: History & Practice* above n 12, 465.

¹²² B Atkin, *Report to Minister of Social Welfare: Adoption Practices Review Committee* (Government Printer, Wellington, 1990) 4.

¹²³ Further issues are the fact that the current legislative framework is built around the nuclear family model rather than the extended family model and that the recent increase in recognition of confidentiality and privacy issues is inconsistent with the public nature of Maori adoption.

¹²⁴ *Kei konei tonu matou (We are still here)* above n 80, 42.

B The Radical Approach: Maori Self-Determination in Child Welfare

Customary international law arguably supports the right of indigenous people to self-determination in the area of child welfare. Some measure of self-determination has already been put in place with the establishment in 1995 of an Iwi Social Service for Ngati Ruanui. This has mandatory power to assume sole guardianship of children and young people of the Ngati Ruanui iwi and hapu.¹²⁵ Such social service agencies could take over the assessment and registration of customary adoptions.

There are a number of problems with self-government many of which spring from insufficient funding. One answer is for Maori to contribute to the cost of their own government. However, this would be unworkable given the prevalence of poverty in Maori communities and the fact that poverty tends to increase the need for interventions on behalf of children which in turn increases the amount of work and expense involved.¹²⁶ Magallanes identifies further problems for Maori in the area of self-determination as being an historic dependence on central government, that decision makers in small communities often know the parties involved and that too few trained personnel are available to fill the positions required for effective self-government.

Were adequate funding to be made available to overcome these problems, self-determination in the area of customary adoption could be achieved in the following ways.

1 Registration

Legal recognition of customary adoptions could be achieved via a registration system as was used successfully earlier in the century. Although this would solve some of the problems listed above, it would not provide for the assessment of prospective adoptive applicants unless alternative structures were put in place to achieve this end. It would be important to have a system which is simple and easily accessible in remote parts of

¹²⁵ Children, Young Persons and Their Families Service *Social Welfare in New Zealand: Children, Young Persons and Their Families Service - Post-Election Ministerial Briefing Paper 1996*, 18.

¹²⁶ *Recognising the Rights of Indigenous Peoples* above n 61, 161.

New Zealand to ensure that customary adoptions are registered. This would avoid the evidential problems with registration the Maori Land Court has identified in the past.¹²⁷

2 *The Maori Land Court versus the Family Court*

Maori customary adoptions could be heard before or registered in the Maori Land Court¹²⁸. The Maori Land Court had varying degrees of jurisdiction in this area for 97 years until 1962 and the system worked well¹²⁹. The system was changed not because it was inadequate but because of a desire to implement an assimilationist policy. However, Hohepa and Williams argue that the Maori Land Court is not competent to deal with such issues given its number of non-Maori judges and its foundations of Pakeha legal doctrines.¹³⁰ Given the mixed racial nature of the New Zealand population and the Maori Land Court's limited resources, it may be preferable to equip the Family Court to deal with cultural differences¹³¹.

3 *Marae as "Family Courts"*

Hohepa and Williams argue that strong adherence to marae and their role in strengthening tikanga Maori make them ideal to operate as a Maori court.¹³² They state that tikanga Maori cannot be exercised in the Maori Land Court, the High Court and the Family Court "because its structure and philosophy subverts or coopts and is antithetical to tikanga". The authors point out that for generations judges have been the definers and in some cases the inventors of tikanga. It may be thought that this argument is supported by the definition of "whangai" given in 1895 by the Native Land Court.

¹²⁷ *Re Haana Johnson*, Maori Land Court 1993 CJMB Folio 530.

¹²⁸ *Adoption: History & Practice* above n 12, 464.

¹²⁹ Iriaka Ratana MP quoted in *Adoption: History & Practice* above n 12, 461.

¹³⁰ *The Taking into account of te ao Maori* above n 17, 38.

¹³¹ *Adoption: History & Practice* above n 12, 465.

¹³² *The Taking into Account of te ao Maori* above n 17, ch 10.

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XI CONCLUSION

Adoption legislation and policy do not reflect the reality that Maori customary adoptions occur. There are important practical reasons for such legal recognition and, perhaps more importantly, such a change may be required by the Treaty of Waitangi 1840 and certain international law instruments. There are a number of possible options for reform in this area from minor legislative change or implementing a separate adoption procedure for Maori under the auspices of the Department of Social Welfare, to complete self-determination for Maori in the area of child welfare.

As noted above, this is a matter for Maori to determine but it is submitted that the paramount consideration should be whether a change will benefit Maori children by fostering their links with their culture and whakapapa and by putting adequately funded and culturally appropriate adoption assessment procedures in place. If such procedures can be implemented they will benefit Maori as a people because there is no resource that is more vital to the continued existence and integrity of [Maori] than their children¹³³.

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¹³³ Above n 1.

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