RHIANNA EVE MORAR

KIA WHAKATŌMURI TE HAERE WHAKAMUA: IMPLEMENTING TIKANGA MĀORI AS THE JURISDICTIONAL FRAMEWORK FOR OVERLAPPING CLAIMS DISPUTES

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Abstract

This paper addresses the misconception that overlapping rights to land are always in tension with one another. In this paper, I apply a tikanga-based analysis to the policy on overlapping rights that is used in the settlement of historical Treaty of Waitangi claims. I argue that the supremacy of colonial law within the state legal system continues to suppress indigenous relationality and limit the mechanisms for reciprocity. This paper problematises the following claims made about overlapping claims disputes. First, that overlapping rights are too complex for judicial resolution. This paper examines the ways in which overlapping rights are capable of co-existing so as to preserve relationships between different iwi and hapū. Second, that tikanga is a contestable system of law and should not be regarded as a question of law or as a jurisdictional framework for resolving such disputes. This paper critically analyses the extent to which these claims are based on the supremacy of colonial law within the state legal system by considering the application of tikanga in the courts and alternative dispute resolution processes. I argue that tikanga Māori is the only applicable framework whereby differences can be mediated in a way that preserves the relationships between the parties and offers redress mechanisms for continuing reciprocity. This paper concludes that the state legal system at present continues to exacerbate differences between Māori so as to amalgamate tikanga rights into a colonial recognition framework and deny the existence of tikanga Māori as an equal system of law in New Zealand.

Key words: Dispute Resolution, Overlapping Rights, Relationships, Tikanga Māori, Treaty Settlement Process.

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I Introduction

There is a misconception that overlapping rights to land are always in tension with one another. I argue that the state legal system is incapable of recognising the extent to which overlapping rights are informed by the principle of reciprocity. In considering this argument, the following points will be addressed. First, overlapping rights must be recognised within the cultural context from which they derive. Part II of this paper identifies a number of constraints sourced in colonialism which the state legal system imposes. In Part III, I explain that where overlapping rights are considered within their cultural context, tikanga Māori becomes the only jurisdictional framework capable of providing reciprocal redress. The problem is that the Treaty settlement process continues to supress the ways in which tikanga can speak on overlapping claims disputes.

In Parts IV and V, I address some of the challenges within the Treaty settlement process. I explain how the current policy for resolving overlapping claims (‘*The Red Book’*) provides a paradoxical framework that empowers Māori to exercise rangatiratanga in settling their own disputes, but only in so far as it conforms to the kāwanatanga framework. This paper will show that this type of legal recognition continues to perpetuate the supremacy of rights as negotiated by the Crown, at the expense of rights as grounded in tikanga. This is problematic because the use of tikanga-based processes is an essential part of the Crown’s duty to avoid creating fresh grievances. I suggest that to employ a non-customary framework is to balance out the potential for overlapping rights to co-exist, favouring notions of exclusivity, absolute ownership and efficiency.

In Parts VI and VII, I consider the ways in which tikanga is implemented within the state legal system. I argue that the recognition of tikanga as a jurisdictional framework continues to be burdened by the supremacy of colonial law. The increasing litigation of these disputes demonstrates that the settlement process is not working. Despite this, the courts continue to operate on the assumption that overlapping claims are incapable of conventional judicial resolution and that tikanga principles are not questions of law. I suggest that it is wrong to use the diverse practices of tikanga to justify claims that tikanga as a body of law is contested and therefore should not be regarded as a ground of appeal. In Part VIII, I argue that this approach continues the assimilatory practices of the Native Land Court.

The persistence of law grounded solely in western sources serves to distort the substance of a right that would otherwise be given proper recognition under tikanga. This paper shows that the current mechanisms for resolving overlapping claims are so limited and ignorant of tikanga that Māori will continue to be coerced into reconceptualising their rights, so as to be palatable to a colonial recognition framework.

II The Constraints of the Colonial System

From the outset, this paper must recognise the colonial base of New Zealand's state legal system. This paper will identify the ways in which state law may recognise tikanga Māori as a body of law, within a system that is premised on the superiority of colonial ideals. However, I will argue that there are ways in which the state legal system may be used to interrogate the colonial assumptions of the law in order to recognise tikanga Māori as the proper jurisdictional framework for resolving disputes. With that in mind, the opportunity to implement tikanga in arbitration and mediation remains subject to the colonial constraints of the state legal system.[1] This paper does not attempt to reconceptualise these processes as a type of Māori dispute resolution.[2] This problem is best addressed by acknowledging that the ability of state law to understand rights and interests as grounded in tikanga Māori will not bring about an *independent* right for Māori to define and determine their own justice.[3] The focus of this paper is confined to how the existing mechanisms in state law may be leveraged to give better effect to tikanga as a system of law in New Zealand.

The position of this paper is that the courts should not determine customary rights and interests according to tikanga.[4] However, the increasing litigation of overlapping

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1 Amokura Kawharu "Arbitration of Treaty of Waitangi Settlement Cross-Claim Disputes" (2018) 29 PLR 295 at 306.

2 Ani Mikaere "Tikanga as the First Law of Aotearoa" in *Special Issue: Tikanga Māori me te Mana i Waitangi Māori Laws and Values, Te Tiriti o Waitangi, and Human Rights* (2007) 10 Yearbook of New Zealand Jurisprudence 24 at 24 – 26; Nin Tomas and Khylee Quince, "Māori Disputes and Their Resolution," in Peter Spiller (ed.) *Dispute Resolution in New Zealand* (Oxford University Press, Oxford, 1999) 205 at 217 – 218.

3 Moana Jackson "Justice and Political Power: Reasserting Māori Legal Processes" in Kayleen Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy* (Avebury, Aldershot, 1995) 243 at 261.

4 Robert Joseph "Re-Creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 Waikato L.Rev. 74 at 92; Moana Jackson "It's Quite Simply Really" in *Special Issue: Tikanga Māori me te Mana i Waitangi Māori Laws and Values, Te Tiriti o Waitangi, and Human Rights*, above n 2,

claims disputes suggests that Māori who come into the state legal system are bringing their tikanga with them.[5] It is therefore a matter of practical reality that these processes must be structured in a way that allows tikanga to be applied safely, so that customary rights and interests may be understood and recognised against their cultural context.[6] I argue that this understanding cannot be gained where the law attempts to fit customary rights and interests into a colonial recognition framework. Thus, where dispute resolution processes are perceived to reflect and implement tikanga, there is greater potential for Māori legal traditions to transform the way in which the state legal system engages with customary rights and interests.[7] The implementation of tikanga as the applicable law within mainstream dispute resolution will help ensure that the courts are in a better position to consider these rights as grounded in tikanga, and whether the proposed redress is capable of giving effect to those rights.

In overlapping claims disputes, the High Court has described tikanga as a contestable body of law.[8] Although tikanga is very much context-dependent, the Court suggests there is "no clear bright-line of tikanga which [can] be applied to determine the competing claims of mana whenua to [land]".[9] The diverse practices of tikanga are therefore used to suppress the applicability of Māori law on the basis of its "imprecise" and "changeable" aspects.[10] In the end, tikanga becomes limited to questions of fact, rather than questions of law. Amokura Kawharu has argued that this imposes a hurdle on Māori disputants, that is otherwise not applicable to non-Māori, and perpetuates the treatment of tikanga as a secondary or foreign source of law in New Zealand.[11] Although the courts must take a cautious approach in purporting to determine the

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32 at 35; Ani Mikaere *Colonising Myths - Māori Realities: He Rukuruku Whakaaro* (Huia, Wellington, 2011) at 268; Judge Stephanie Milroy "Ngā Tikanga Māori and the Courts" in *Special Issue: Tikanga Māori me te Mana i Waitangi Māori Laws and Values, Te Tiriti o Waitangi, and Human Rights*, above n 2, 15 at 19.

5 See *Ngāti Whātua Ōrākei v Attorney-General* [2019] 1 NZLR 116; *Bidois v Leef* [2017] NZCA 437; *Ngāti Hurungaterangi v Ngāti Wahaio* (CA) [2017] 3 NZLR 770.

6 Judge Milroy, above n 4, at 22 – 23.

7 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (VUP, Wellington, 2016) at 131.

8 *Ngāti Hurungaterangi v Ngāti Wahiao* (HC) [2016] 3 NZLR 378.

9 At [129].

10 At [130].

11 Kawharu, above n 1, at 306.

substance of tikanga, its variation has always been inherent to the operation of Māori law and does not strip away the legal characteristics or implications that occur as a result.[12]

If tikanga is part of New Zealand law then judges must grapple with the many sides of truth that parties bring with them.[13] The search for an unequivocal legal principle to resolve overlapping claims would be contrary to Māori legal traditions, as judges would be refusing to gain an understanding of how each party presents the truth as they see it. There must be a sound understanding of the fact that the diversity in tikanga is healthy, so long as the conceptual regulators that guide its application are maintained. Anything less creates the impression that cases involving the application of tikanga are not really "legal" disputes.[14]

III Overlapping Rights through the lens of Indigenous Relationality

The substance of a right must be informed by the legal system from which it derives.[15] Overlapping rights and interests must therefore be considered within the broader tikanga matrix that guides the relationships between rights-holders. However, the settlement framework only recognises these rights to the extent that they conform to the redress offered by the Crown. This is problematic because the redress is characterised by western theories of property, based on notions of exclusivity and

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12 Mikaere, above n 4, at 264 – 265.

13 See quote: "I am not struck so much by the diversity of testimony as by the many sideness of truth" – Stanely Baldwin in Colin McKenzie and Amster Reedy "A Treaty of Waitangi, Overlapping Claim Mediation: 'A Prospective Hindsight' " (2001) 9 Resource Management Journal 1.

14 Kawharu, above n 1, at 306.

15 The Canadian courts have adopted the approach that the content of aboriginal title must be determined by Indigenous law and custom; *R v Van der Peet* [1996] 2 SCR 507; *Delgamuukw v Attorney General of British Columbia* [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256. In Australia and New Zealand, the courts have modernised the doctrine of tenure by holding that the Crown's radical title is subject to pre-existing property rights as defined by Indigenous law and custom; *Mabo v State of Queensland* (No 2) (1992) 175 CLR 1; *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

absolute ownership.[16] This fails to recognise the extent to which these rights exist in relation to one another in accordance with the overarching principle of reciprocity.[17]

The way in which the courts conceptualise overlapping claims suggests that these disputes tend to be very complex Pākehā legal issues, despite being very simple tikanga issues.[18] The processes used to resolve overlapping claims are said to be "almost impossibly complicated"[19] and involve "[a] complexity of issues and interrelationships".[20] This approach has led to a significant lacuna in the regulation of overlapping claims, which has shifted the responsibility onto Māori to reach a resolution, subject to the colonial constraints of the settlement framework.[21] The problem is that a resolution according to the settlement framework is inconsistent with the understanding and regulation of these rights according to tikanga. Hence, overlapping claims will never appropriately be resolved in the way in which the Crown seeks, so long as the recognition framework continues to deny the existence of protocols which govern these rights according to Māori customary law.

Māori customary law is not equivalent to tikanga, though the two are inextricably linked.[22] The application of customary law is guided by conceptual regulators that are grounded in the practice of tikanga. The application of these conceptual regulators to overlapping claims disputes allows for the extrapolation of broader legal principles which serve to govern the relationships between groups. Edward Durie has identified the following principles that form the basis of the Māori legal order: whanaungatanga (relationships); whakapapa (genealogy) mana (spiritually sanctioned authority); utu

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16 James Tully "Aboriginal Property and Western Theory: Recovering a Middle Ground" in Ellen F, Paul, Fred D. Miller and Jeffrey Paul (eds.), *Property Rights* (Cambridge University Press, Cambridge, 1994) at 168 – 169.

17 Edward Taihakurei Durie "Custom Law" (Research Paper in Treaty of Waitangi Research Unit, Victoria University of Wellington, 1994) at 84.

18 Jackson, above n 4, at 35.

19 *Ngāti Hurungaterangi v Ngāti Wahiao* (CA), above n 5, at [16]; Richard Boast *The Native Land Court – Volume 1, 1862–1887: A Historical Study, Cases and Commentary* (Brookers, Wellington, 2013) at 889.

20 Waitangi Tribunal *The Port Nicholson Block Urgency Report* (WAI 2235, 2012) at 3.

21 Baden Vertongen "Legal Challenges to the Treaty Settlement Process" in Nicola R Wheen and Janine Hayward (ed.) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 65 at 75.

22 Carwyn Jones "Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes" in Morgan Brigg and Roland Bleiker (ed.) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Haiwai'i Press, Honolulu, 2011) 115 at 118.

(reciprocity); kaitiakitanga (stewardship); tapu and noa (complimentary opposites that operate on a spiritual and natural level to restore balance).[23] In overlapping claims disputes, the preservation of relationships through the maintenance of reciprocal obligations is fundamental to achieving a state of ea (state of equilibrium).[24] It is these principles which underpin the ways in which different groups create and maintain relationships with one another.

The fluidity of Māori social organisation has always required extensive protocols for intra and inter group cooperation. These protocols are based on the kinship obligations of those with ancestral connections to the land, and the principle of reciprocity which granted neighbouring groups use rights to the land.[25] The term "take" is used to define the ancestral source of a right, which may be characterised as possessing a residual right inherent in the land based on whakapapa. In contrast, the term "use rights" is a conditional right which derives its legitimacy from ancestral rights.[26] The mutual respectability of these rights hinged upon the principle of reciprocity. In other words, those with use rights would make a regular contribution to the hapū who possessed ancestral rights to the land.[27] If the relationship to the hapū, and thereby the land, was continually maintained then such rights were passed down to descendants. As a result, inchoate rights existed by reference to past associations and whakapapa.[28] Edward Durie has conceptualised the different intensities of rights as follows: primary (by descent and residence), secondary (by descent but not residence), contingent (by descent with an intention to return) and permissive (by residence but no descent).[29] These categories do not represent rankings or predominance for the purposes of absolute ownership, rather they illustrate the broader tikanga matrix in which overlapping rights to land were acquired, lost or maintained.[30]

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23 Jones at 119; Durie, above n 17, at 4 – 5; Jackson, above n 3, at 247; Mikaere, above n 4, at 255.

24 For further commentary see Waitangi Tribunal *Hauraki Report Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019) at 93.

25 Durie, above n 17, at 66 – 67.

26 At 66.

27 At 69.

28 At 70.

29 At 70 – 72.

30 At 80 – 81.

The simplification of Māori land rights in terms of idealised patterns of exclusive and absolute ownership has resulted in the law regarding overlapping claims becoming dysfunctional, rigid and divorced from community relationships.[31] The conversion of use rights to absolute ownership or exclusive rights over a defined area in the current recognition framework ignores the extent to which these rights are subject to the extensive protocols concerned with the maintenance of community relationships.[32] The importance of tikanga concepts such as whakapapa, ahikāroa (fires of occupation) and mana whenua (authority in relation to land) illustrates the extent to which the granting of exclusive proprietary rights, independent of community relations, is problematic. This paper has noted that occupation or residence may exist in relation to both ancestral and use rights.[33] Thus, although mana whenua may be strengthened by the maintenance of ahikāroa, the centrality of whakapapa requires that descent rights will always be stronger than purely occupational rights.[34] However, this centrality should not be equated with absolute and exclusive ownership.[35] Mana whenua has always been exercised alongside the complimentary use of occupational rights held by other groups.[36] As a result, both mana whenua and ahikāroa have a considerable degree of overlap and are intrinsically linked. The interpretation of these concepts as denoting exclusivity or an absolute right to land continues to suppress the interdependent relations which seek to govern the exercise of those rights.

The complex layers of these rights should not be divorced from the cultural context in which they operate. Any recognition of these rights within the settlement framework must accommodate the extent to which these rights are permitted to exist in harmony. With that in mind, the amalgamation of these rights into categories of redress has created disputes between Māori, where such disputes did not exist under tikanga.

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31 At 67.

32 At 84.

33 See "Ahikāroa" in Richard Benton and others *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (VUP, Wellington, 2013) at 33 – 37.

34 See "Mana Whenua" at 178 – 179; Hirini Moko Mead *Tikanga Māori (Revised Edition): Living by Māori Values* (3rd ed, Huia, Wellington, 2019) at 296.

35 Durie, above n 17, at 84 – 85; Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (WAI 1362, 2007) at 105; *The Port Nicholson Block Urgency Report*, above n 20, at 25.

36 Durie, above n 17, at 85 – 88.

IV Contradictions in the State Legal System

A The Interaction Between Tikanga Māori and Colonial Law

What may lie behind a challenge to overlapping claims is found in the interaction between the first and second laws of New Zealand, tikanga Māori and colonial law. The first law, brought by Kupe's people, is a values-based system primarily built around kinship. It was a legal system for small communities in which constant reciprocity was the key to community relationships.[37] The second law, brought by Cook's people, defined relationships primarily by contract rather than kinship. It emphasised the autonomous individual and self-determination through freedom of choice over one's self and property.[38] The second law tends to make a clear separation between law and culture, whereas the first law sees the principle of reciprocity and the relationships between rights-holders as being very much intrinsic to how the law should operate.[39] Thus, disputes arise from the inevitable friction between the two different cultural systems, particularly where rights grounded in tikanga are subject to a colonial system.[40]

To achieve reconciliation between groups with overlapping interests, parties continue to seek direct engagement with their tikanga by the Crown.[41] According to tikanga, it is not necessarily about the sameness of an interest, rather it is about understanding difference that best promotes the legitimate uniqueness of different rights in relation to land.[42] These differences can only be recognised within a broader relational framework that promotes the continuity of whanaungatanga and manaakitanga between groups.[43] The recognition framework must therefore be capable of giving effect to the tikanga

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37 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law*"* (2013) 21 Wai L Rev 1 at 5.

38 At 6.

39 Joseph, above n 4, at 82.

40 Moana Jackson *Māori and the Criminal Justice System – A New Perspective: He Whaipaanga Hou: Part 2* (Department of Justice, Wellington, 1988) at 45.

41 McKenzie and Reedy, above n 13, at 2.

42 Moana Jackson, Wayne Ngata and Potiki Tahu "The Findings of the Adjudication Panel in the CNI Iwi Mana Whenua Process" (Arbitration Panel convened by the Central North island Iwi for Te Kaingaroa A Haungaroa Crown Forest Licenses, 26 June 2014) at 11 – 12.

43 At 9.

matrix in which overlapping rights and interests exist in relation to one another, as opposed to contributing to each other's demise.

B The Crown's Duty to Avoid Creating Fresh Grievances

The Crown's duty to avoid creating fresh grievances is intrinsically linked to the preservation of relationships. It is therefore problematic that rights are divorced from the relational protocols that enable these rights to exist between different groups. The inability of settlement redress to provide arrangements for reciprocity continues to emphasise conflict between rights-holders, rather than cooperation. The Waitangi Tribunal has repeatedly emphasised that the Crown should not create new wrongs when settling the injustices of the past.[44] Although the continuous failure of the Crown to avoid creating fresh grievances has been recognised by the Tribunal,[45] I would go further to suggest that such deliberate inaction has played more of an active role in creating these disputes. An example of this is the mediation of overlapping rights between Ngāti Tama and Ngāti Maniapoto. Ngāti Maniapoto approached the mediation as a Māori dispute resolution process, concentrating on their rights as founded in tikanga. In contrast, Ngāti Tama based their rights on the negotiated terms of the settlement redress and were focused on concluding their settlement.[46] The corollary is that Ngāti Tama was able to reconceptualise their rights in accordance with the type of redress the settlement process itself gives priority. This is problematic because the

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44 "The Crown has a duty to protect all parties, whether settled or not, and to promote and maintain relationships with all tangata whenua groups […] The *Tāmaki Makaurau Settlement Process Report* said that the Crown must proactively seek to avoid damaging relationships between iwi" in *Hauraki Report Settlement Overlapping Claims Inquiry Report*, above n 24, at 93; "The Tribunal has [previously] emphasised that the Crown should not create new wrongs when settling the injustices of the past" in *The Port Nicholson Block Urgency Report*, above n 20, at 59; "The importance of whanaungatanga relates to the guarantee of tino rangatiratanga in Article II. [It requires] the Crown to: understand the relationships between all groups; wherever possible to preserve amicable tribal relations; and act fairly and impartially towards all iwi, not giving unfair advantage to one, especially in situations where inter-group rivalry is present" in *The Tāmaki Makaurau Settlement Process Report*, above n 35, at 101.

45 *Hauraki Report Settlement Overlapping Claims Inquiry Report,* above n 24, at 86 – 92.

46 Mereana Hond "Resort to Mediation in Māori-to-Māori dispute resolution: Is It The Elixir to Cure All Ills" (2002) 33 VUWLR 155 at 162.

Crown's standards of justice are obviously quite different from tikanga-based visions of justice.[47]

The principle of partnership places a duty on the Crown to consult with groups that have overlapping interests, as does its duty to avoid creating fresh grievances. This requires that the Crown "fully understands all parties overlapping interests".[48] While this may result in new issues and potentially new forms of redress, the Crown must persevere and engage meaningfully with those groups who have overlapping interests. Importantly, it must "test out" its understanding of those interests with groups when developing redress proposals.[49] This is a clear signal that any redress must therefore be informed by the substance of those rights as determined by tikanga. Although the Crown says that settlement redress is not intended as a "reflection of mana whenua", it is often perceived by those groups as an "expression of mana whenua status within the rohe in which the redress lies".[50] As a result, the Crown cannot distance itself from the practical consequences of offering redress to groups in certain areas where strong interests are held by others. The provision of exclusive redress to one group over another has been recognised to "effect the long-term reconciliation of Crown and Māori that the settlements seek to achieve".[51]

The understanding of overlapping rights is fundamental to the Crown's duty to avoid creating fresh grievances. The problem is that this understanding is subject to redress conceptualised by a colonial recognition framework. Thus, overlapping rights are only understood to the extent that they conform to the redress offered, which usually requires that some groups are afforded absolute proprietary rights at the expense of any reciprocal arrangements that would otherwise exist between different rights-holders under tikanga. As a result, the Crown will continue to actively create disputes between Māori unless the redress offered becomes capable of recognising the extent to which such rights depend upon reciprocal mechanisms in order to preserve indigenous relationality.

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47 For further commentary see Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (VUP, Wellington, 2016) at 128.

48 *Hauraki Report Settlement Overlapping Claims Inquiry Report,* above n 24, at 75.

49 At 82.

50 At 84 – 85.

51 *The Port Nicholson Block Urgency Report*, above n 20, at 59

V The Supremacy of the Colonial Recognition Framework

The *Red Book* empowers Māori to resolve their own disputes only in so far as they suppress their own tikanga in order to fit within the colonial recognition framework. This way, the Crown purports to absolve itself of any responsibility, while tightly controlling the extent to which overlapping claims must be resolved against a framework grounded solely in a western understanding of property rights. Both exclusive and non-exclusive redress fail to recognise overlapping rights as tikanga rights. Non-exclusive redress does this through statutory instruments which are only concerned with vesting ownership in fee simple, providing beneficial entitlements or acknowledgements of association with reserve land. These types of redress only go as far as providing Māori with mere consultation rights. The problem is that tikanga does not provide the jurisdictional framework for determining: when alternate forms of redress should be employed; what that redress should look from a tikanga lens, and; how it might ensure the preservation of relationships.

A The Overlapping Claims Process and the Suppression of Tikanga Māori

There is a significant lacuna in the law relating to how the customary rights and interests of claimants not engaged in negotiations with the Crown should be addressed, particularly when their neighbours proceed to settlement. The *Red Book* simply notes that the Crown's preference is for parties themselves to resolve overlapping claims disputes and that where this proves unsuccessful, the Crown will engage in a balancing exercise subject to the following objectives:[52]

1. to reach a fair and appropriate settlement with the claimant group in negotiations; and
2. to maintain, as far as possible, capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.

In theory, this empowers Māori to resolve overlapping claims in accordance with tikanga, seemingly going beyond the kāwanatanga framework. However, this is undermined by the Crown's power to intervene when no 'acceptable' resolution has been achieved by the parties themselves. Thus, the opportunity to engage tikanga on

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[52] Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua – Healing the Past, Building a Future: A guide to Treaty of Waitangi claims and negotiations with the Crown* online ed. (Wellington, New Zealand Ministry of Justice: Office of Treaty Settlements, 2018) at 54.

the matter is subsumed by the kāwanatanga framework. The balancing of interests would then take place against the Crown's principal objectives, displacing the principle of reciprocity and the centrality of relationships that would otherwise be required under tikanga. The corollary is that iwi and hapū are deprived of a forum in which they can seek authoritative determinations of customary rights and interests in accordance with tikanga. In the end, many disputes remain unresolved and proceed to litigation.

B The Recolonisation of Rights for Redress

The ultimate measure of a "fair and appropriate" settlement is the extent to which the redress is capable of accommodating the different customary rights and interests in relation to land. The *Red Book* refers to the *Ngāti Awa Raupatu Report* which provides that:[53]

> "[T]he essence of Māori existence was founded not upon political boundaries, which serve to divide, but upon whakapapa or genealogical ties, which served to unite or bind. The principle was not that of exclusivity but that of associations."

The Crown says its approach is consistent with these findings through its preference to offer non-exclusive redress where there are overlapping claims.[54] Firstly, the Crown must decide whether or not these alternative forms of redress should be employed in the particular case. The *Red Book* notes that exclusive redress may be considered where a claimant group has a "strong enough association with a site to justify this approach (taking into account any information or submissions about the association of overlapping claimants with that site)".[55] I argue that Māori are more likely to reconceptualise their rights in accordance with the type of redress the settlement process itself gives priority to, so as to avoid lesser forms of recognition such as associational rights.

Although these other types of redress are "non-exclusive" in a strict sense, the statutory instruments that provide legal recognition of rights are premised upon western concepts of vesting ownership in fee simple estate and deriving a particular beneficial entitlement.[56] Unfortunately, this is precisely the type of redress in which tikanga does

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53 At 53.
54 At 54.
55 At 55.
56 At 116 – 119.

not really speak. Other mechanisms include the provision of overlay classifications, which merely impose consultation obligations on the Department of Conservation to engage with the parties on matters of significance.[57] Whether something is a matter of significance depends upon the authorities interpretation of what necessitates consultation, depriving iwi and hapū of any real decision-making powers. The Crown may also decide to vest reserves subject to the Reserves Act 1977, where the claimant group becomes the administering body of the reserve. This provides for a limited form of autonomy, subject to the provisions of the Act.[58] Furthermore, the Crown may include a statutory acknowledgement of any cultural, historical, spiritual and/or traditional associations with an area. These acknowledgements confer similar weak forms of legal obligations to parties, including notification of resource consents and a requirement that the authority must "have regard to" any associations when deciding whether to hear Māori at proceedings affecting those sites.[59]

Ultimately, these forms of redress only provide, at best, a consultation entitlement or some type of administrative authority subject to the parameters of legislation. Non-exclusive redress does not go much further than exclusive redress in the sense that both mechanisms fail to account for how overlapping rights may be recognised within the cultural context from which they derive. The majority of instruments available for non-exclusive redress focus on historical associations with land, without providing any real means for the contemporary exercise of those rights or managing those rights subject to the principle of reciprocity so as to protect indigenous relationality.

C Indigenous Relationality through the Restoration of Mana

The interventionist approach to resolving overlapping claims has shifted the focus from preserving the relationship between parties, towards the satisfaction of the Crown. It is important that the satisfaction of the Crown and the duty to preserve relationships are not conflated. The Crown's principal objectives may, at times, be inconsistent with the means necessary to recognise the mana of both groups in a way that maintains amicable relations.

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57 At 121.

58 At 120.

59 At 122.

The Crown must exercise its role as an 'honest broker' to effect reconciliation.[60] Even if the parties themselves are motivated to strike a deal at a cost to their relationship, the Crown's focus must be broader, for those parties are only in that position because of breaches by the Crown.[61] It is not enough for the Crown to act in good faith only in so far as customary interests are legitimised against their own objectives. The Crown must take an expansive approach and gain a sophisticated understanding of the modern-day tribal relations.[62] This speaks to the acknowledgement of mana as an essential component for positive relationships going forward, thus ensuring the durability of settlements.[63] Although this acknowledgement may seem relatively insignificant to the Crown, the failure to understand relationships may result in an increased appearance of mana in one group and the diminishing of another groups mana.[64]

Despite the limitations of the settlement framework, overlapping claims disputes are situations in which tikanga must speak. The existence of any reciprocal arrangements between groups, in order to maintain relationships, rests upon a mutual respectability of mana.

VI Implementing Tikanga as the Jurisdictional Framework

I argue that the implementation of tikanga as the jurisdictional framework for which overlapping claims are resolved would demonstrate a shift towards the promotion of whanaungatanga and manaakitanga between parties.

A Ka Tika Ā Muri, Ka Tika Ā Mua?

The *Tāmaki Makaurau Settlement Process Report* is the cornerstone report condemning the Crown's approach to overlapping claims. In this report, the Waitangi Tribunal found that the Crown had relied too heavily on its relationship with Ngāti Whātua o Ōrākei ('Ngāti Whātua'), given that its relationship with other tangata whenua groups was "no

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60 Waitangi Tribunal *The Ngāti Awa Settlement Cross-Claims Report* (Wai 958, 2002) at 88;

61 Waitangi Tribunal *The Ngāti Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wai 996, 2003) at 53.

62 At 61.

63 Waitangi Tribunal *The Ngāti Maniapoto/ Ngāti Tama Settlement Cross-Claims Report* (Wai 788/ 800, 2001) at 15 and 21.

64 *Ngāti Tuwharetoa ki Kawerau Settlement Cross-Claims Report*, above n 61, at 60.

more and no less" the same in Treaty terms.[65] Furthermore, the Crown was found to be "denying reality" by providing exclusive redress to Ngāti Whātua when it had failed to weigh the "dense layers of interest" of all tangata whenua groups.[66] As a result, it concluded that the finding of "predominant" interests was the wrong approach to adopt where there are multiple interests at play.[67] Despite the fact that Ngāti Whātua had failed to engage with other groups concerning their overlapping interests, the Tribunal found that it was wrong for the Crown to absolve itself of its overriding duty to preserve relationships in exchange for expediency.[68]

Subsequently, the *Port Nicholson Block Urgency Report* reaffirmed this approach, placing emphasis on the Crown's duty to avoid the creation of fresh grievances.[69] The report coined the term the 'silo' approach in referring to a situation where negotiations involving overlapping interests are conducted in relative isolation, without any clear overview of how those interests intersect and how the redress offered might affect those interests.[70] In summarising their approach, the Tribunal noted that "the burden on both Māori and Pākehā of the great wrongs that were done in the past will not be lifted if the process of settling creates new wrongs."[71]

In spite of this, the Crown's approach to overlapping claims remains unchanged. With that in mind, the *Hauraki Settlement Overlapping Claims Inquiry Report* places more emphasis on how tikanga may be used to assist the Crown in upholding its duty to avoid the creation of fresh grievances. This report noted for the first time that a values-based approach to overlapping claims was encompassed by the Red Book's title: *Ka tika ā muri, ka tika ā mua* (when the back of the house is good, the front of the house will run smoothly).[72] Despite this, the policy was found to be "essentially silent on the subject". Furthermore, although the policy purports to empower Māori to implement their own

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65 *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007), above n 35, 18.

66 At 47 – 48.

67 At 105.

68 At 50 – 53.

69 *The Port Nicholson Block Urgency Report*, above n 20, at 59.

70 At 60.

71 At 64.

72 In other words, "healing the past, building a future" as adapted by the Office of Treaty Settlements in *Ka tika ā muri, ka tika ā mua – Healing the Past, Building a Future: A guide to Treaty of Waitangi claims and negotiations with the Crown*, above n 52.

processes for resolving disputes, it does not require those interests or the proposed redress to be addressed by tikanga. Nor does it require the Crown to actively support or monitor tikanga-based processes.[73] The report actively encourages the use of tikanga as the jurisdictional framework on the basis that adopting a values-based approach is likely to improve the substance of the decision, in that "a satisfactory outcome for all groups is even more likely".[74] This requires the Crown to move away from a one-size-fits-all model, by empowering processes that are designed and implemented in terms of the parties own values, relationships and circumstances. To that end, the report provides a list of principles and practices which serve to guide tikanga-based processes, with the aim of developing, regulating and maintaining relationships.[75] In summarising its approach, the Tribunal was of the view that this was an opportunity for the Crown to empower parties to transform their relationships using traditional practices, customs, and values to resolve issues of tribal significance.[76] This process empowers the independent exercise of rangatiratanga beyond the confines of the colonial recognition framework.

The use of tikanga-based processes for resolving overlapping claims is an essential part of the Crown's duty to avoid creating fresh grievances. Although there is a lack of distinct policy on whether tikanga is the appropriate starting point, it is nevertheless inherent in the spirit and intent of the *Red Book*. Over the last decade, the Waitangi Tribunal has consistently endorsed the view that such processes are necessary in order for the Crown to discharge its obligations under the Treaty of Waitangi. In giving effect to tikanga, the Crown must ensure that such processes are determined by the parties themselves, and that the balancing of interests remains subject to the preservation of relationships. What is clear is that customary rights exist to be governed by tikanga and thus any legal recognition or reconciliation of those rights must be guided by a jurisdictional framework grounded in those practices, principles and values.

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73 *Hauraki Report Settlement Overlapping Claims Inquiry Report*, above n 24, at 86 – 87.

74 At 89.

75 At 90.

76 At 91.

B The Opportunity in Alternative Dispute Resolution

The failure to implement tikanga and the prioritisation of colonial law continues to leave parties without a sense of justice. As a result, Māori are increasingly bringing their disputes into the courts, along with their tikanga. Although tikanga has been recognised as being part of the values of the common law, it is interpreted only in so far as it conforms to the underlying values of western law.[77] The corollary is that tikanga is often balanced out against other legal principles, or fashioned into a narrowly defined set of proprietary rights so as to be constrained by the colonial recognition framework.[78] I will argue that there is an opportunity in alternative dispute resolution processes, such as arbitration and mediation, to reconceptualise rights in accordance with tikanga.

The opportunity is that parties are able to implement tikanga as the applicable law for resolving disputes. This supports the proposition that Māori customary rights exist to be governed by tikanga and that the legal recognition framework must adapt to realise this.[79] The resolution of disputes in this way is therefore beyond the balancing exercise, and provides a platform whereby Māori legal traditions and the state legal system interact with each other through the recognition of tikanga as an equal system of law. Amokura Kawharu has argued that alternative dispute resolution processes allow tikanga to apply in a way that is not likely to happen through mainstream law.[80] By recognising tikanga as a jurisdictional framework in and of itself, decision-makers are provided with the necessary means to reconceptualise the ways in which judges understand the harm and how that should be addressed within the appropriate cultural context.[81] To achieve a state of ea, the dispute must be viewed as a relational event.[82] This paper shows that overlapping rights represent the relationships that exist between

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77 Jacinta Ruru "The Failing Modern Jurisprudence" in Carwyn Jones and Mark Hickford (ed) *Indigenous Peoples and the State: International perspective on the Treaty of Waitangi* (Routledge, New York, 2019) at 118 – 122; Joseph, above n 4, at 91 – 92; Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 17 – 22.

78 Hond, above n 46, at 158.

79 Kawharu, above n 1, at 301 - 302.

80 At 308 – 309.

81 Jackson, above n 40, at 40 – 45.

82 Stephanie Vieille "Māori Customary Law: A Relational Approach to Justice" (2012) 3 International Indigenous Policy Journal 4 at 5 – 6.

different groups and the land. Thus, a relational approach to justice is required so that redress is properly informed by the substance of the right.[83] This approach is illustrative of the references in settlement deeds and terms of reference to determining mana whenua through oral histories (including whakapapa, waiata and tribal history) and written sources (including Native Land Court and Waitangi Tribunal evidence and decisions) in a way that promotes "whanaungatanga, manaakitanga and kotahitanga" among the respective iwi.[84] A relational approach uses history to inform how those rights should be exercised in the present. History tells us that these rights exist to be governed by relational protocols, and that the present recognition framework must be capable of providing such protocols. In support of this, the Adjudication Panel in the CNI Iwi Mana Whenua Process noted that while there had been disputes in meaning, there was an acceptance of the right of each iwi to tell their stories "for themselves, on their own terms, *answerable to one another*".[85]

This raises more questions as to whether the application of tikanga in this context has been successful in reaching a resolution which is not only accepted by each party individually, but also provides for the relationship between them. There are many external factors that will influence a parties acceptance of an outcome. The appeal of an award does not mean that tikanga, as a legal framework, is ineffective. One factor which must be considered is the availability of settlement redress.[86] The problem is that the current recognition framework does not provide redress which is capable of giving effect to overlapping rights as grounded in tikanga, as it denies the opportunity for these rights to co-exist. It therefore becomes an impossible task for tikanga to achieve a state of ea between parties where the redress it has been given only recognises those rights

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[83] Robert Joseph "Unsettling Treaty Settlements: Contemporary Māori Identity and Representation Challenges" in Nicola R Wheen and Janine Hayward (ed.), *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 151 at 152 – 156.

[84] *Ngāti Hurungaterangi v Ngāti Wahiao* (CA), above n 5, at [33] – [36]; Jackson et al, above n 42, at 16.

[85] At 19 (emphasis added).

[86] Vertongen, above n 21, at 67; Hond, above n 46, at 163 – 165.

to the extent that they fit within the colonial parameters of the settlement framework.[87]

C Incorporating Tikanga Principles into Mainstream Dispute Resolution

The implementation of tikanga principles within a mainstream dispute resolution process is an often under-recognised step in ensuring that processes are acceptable to parties and maximise the durability of resolutions.[88] A values-based inquiry moves towards a focus on the protocols for reciprocity between parties, away from solutions based on competing notions of exclusivity.

By way of illustration, the mediators involved in the Ngāti Tama and Ngāti Maniapoto settlement have questioned whether the mediation process itself was limited by not giving sufficient recognition to the underlying tikanga values that drive Māori dispute resolution processes.[89] The provision of a tikanga based framework would have allowed parties to gain a better understanding of tikanga concepts in a way that emphasised "who" the parties were in relation to each other, rather than "what" the parties wanted in a final protection mechanism.[90] From this perspective, the resolution process is focused on mediating across differences in order to maintain relationships, as opposed to leveraging those differences to gain a particular outcome. The mediators argue that values-based disputes should not be re-framed as some sort of interest-based dispute, as this too quickly channels such issues into court which leads to the frustration of those relationships.[91] One example where tikanga has flourished as a jurisdictional framework within a mainstream dispute resolution process is the CNI Iwi Mana Whenua Process. Importantly, the Panel recognised that once mana whenua had been established, this was subject to "the need to respect and indeed manaaki the interests and rights of others".[92] Although the Panel recognised the need for balancing different interests, those differences had to be balanced "in order to promote whanaungatanga,

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87 Maria Bargh "The Post-settlement World (So Far): Impacts for Māori" in Nicola R Wheen and Janine Hayward (ed.), *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 166 at 173 – 174.

88 Jones, above n 22, at 136.

89 McKenzie and Reedy, above n 13, at 3 & 6.

90 At 4.

91 At 5.

92 Jackson et al, above n 42, at 9.

manaakitanga and kotahitanga among the iwi".[93] This shows that where tikanga is the jurisdictional framework for such disputes, the balancing of differences must be subject to the preservation of relationships. The difference between this and a balancing exercise subject to western law is that indigenous relationality remains the paramount consideration. More importantly, just because tikanga aims to preserve relationships does not mean that it is incapable of balancing out differences in order to reach a resolution. Instead, such balancing is permitted in so far as it remains subject to the promotion of whanaungatanga and manaakitanga.

In giving effect to tikanga, the Panel found that the single title model was not always adequate for recognising the relationship between the parties who hold mana whenua. In some instances, alternative mechanisms may be required to ensure "respectful and ongoing cooperation based on whakapapa relationships". The Panel went further to say "there are quite distinct and varying interests and application of mana whenua that represent equally distinct histories and traditions. Each is valid and each is worthy of respect."[94]

This shows that where tikanga is employed as the jurisdictional framework, there is scope to move beyond recognition that is based on absolute and exclusive ownership. There are existing legal mechanisms which can play a formal role in preserving the integrity of overlapping customary rights and interests. Furthermore, there is a balancing exercise unique to a values-based framework grounded in tikanga. Such an approach provides for the mediation of differences in a way that promotes indigenous relationality and mechanisms for reciprocity.

VII The Colonial Ambulance at the Bottom of the Cliff

A The Subjugation of Tikanga Māori by the Courts

The increasing litigation of awards arising out of alternative dispute resolution suggests that it is up to the courts to ensure that tikanga has been appropriately applied to overlapping claims. However, this paper acknowledges that the courts are not the best forum for doing so. This position is best illustrated by the *Ngāti Hurungaterangi v Ngāti Wahaio* litigation which concerned an arbitration award that decided lands would be

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[93] Ibid.

[94] At 11 – 12.

jointly and equally held between Ngāti Whakaue and Ngāti Wahaio.[95] The Trust Deed provided that arbitration was to be the primary mechanism for resolving overlapping claims disputes and that land would be held on trust until ownership issues were resolved.[96] The parties appealed the decision on the basis that the arbitral tribunal had failed to "have regard to mana whenua *as determined according to tikanga*".[97]

From the outset, both the High Court and the Court of Appeal were of the view that overlapping claims disputes are simply incapable of judicial resolution. I argue that such a view is underpinned by the misconception that judicial standards should only be construed in accordance with western sources of law. However, if tikanga is part of New Zealand law, it is erroneous to say that such disputes are irreconcilable given that tikanga, as a system of law, provides a values-based framework capable of mediating differences, with the aim of preserving the relationship between the parties.

The High Court described the different historical accounts given by each party as "contradictory and incapable of resolution adopting conventional judicial methods".[98] This depended upon the Court's interpretation that "the principles of tikanga themselves were hotly contested".[99] Although the Court of Appeal did not directly address this issue, they frame the dispute as one which is "almost impossibly complicated, characterised by large numbers of overlapping claims and claimant groups".[100] This is wrong because, despite the variegating practices of tikanga, the principled framework in which those practices operate remains largely uncontested.[101] Although there may be multiple interests in land which are unable to co-exist in accordance with western sources of law, this does not mean that the tikanga principles themselves are contested or that tikanga should not be regarded as law on that basis. Rather, this illustrates that where western judicial methods are incapable of resolving disputes, tikanga must be employed as the proper legal framework for which disputes can be resolved. However, the High Court instead adopted a "holistic" approach so as

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95 *Ngāti Hurungaterangi v Ngāti Wahiao* (HC), above n 8, at [54].

96 At [27] - [32].

97 At [34] (emphasis added).

98 At [121].

99 At [129].

100 *Ngāti Hurungaterangi v Ngāti Wahiao* (CA), above n 5, at [16].

101 See part III in this essay on "Overlapping Rights through the lens of Indigenous Relationality".

to identify "where the beneficial ownership interests lie, in accordance with the *imprecise* and *changeable* aspects of tikanga".[102] This shows that even where justice demands that disputes should be decided according to tikanga, the courts will use the diversity in tikanga to justify applying a standard that is 'holistic' only in accordance with western sources of law.

In addition to this, it is pitiful that the arbitration process itself also regressed into applying western sources of law, despite being required to decide mana whenua in accordance with tikanga. Although the High Court upheld the Panel's reasoning, it had described its lack of engagement as "regrettable"[103] and "limited".[104] The Court of Appeal overturned the High Court's decision, on the basis that the complexity of the interests did not absolve the Panel from "its fundamental duty to determine ownership by reference to mana whenua".[105] The significance of this approach is that the Court of Appeal rejects the notion that the complexity of overlapping claims will justify a lack of engagement with tikanga on the matter. The problem, however, is that the Panel is required to determine what customary rights exist according to tikanga, while simultaneously applying those rights to a colonial recognition framework in deciding who should be entitled to redress. The paradox is that the court is recognising that these rights exist to be governed by tikanga, but only to the extent that these rights are then forced into redress premised upon western notions of exclusivity which fail to provide for indigenous relationality. If tikanga can only exist in this way, this undermines any opportunity for disputes to resolved to the satisfaction of both parties. As a result, parties are incentivised to make arguments that reconceptualise their substantive rights so as to be preferred by the colonial recognition framework. I argue that it is the framework itself which must be informed by the substance of those rights in giving effect to indigenous relationality under tikanga.

The position that tikanga principles relating to overlapping claims cannot be appealed is problematic. It is unfortunate that the Court of Appeal did not address the High Court's treatment of whether the application of tikanga could amount to an error of law.

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[102] *Ngāti Hurungaterangi v Ngāti Wahiao* (HC), above n 8, at [130] (emphasis added).
[103] At [120].
[104] At [130].
[105] *Ngāti Hurungaterangi v Ngāti Wahiao* (CA), above n 5, at [101].

The High Court was mistaken in using the variation of tikanga to justify why its application could not amount to an error of law.[106] The relevant tikanga principles were referred to and explained in the trust deed underpinning the arbitral process, and were known and accepted by the parties in advance.[107] I have argued that the principled framework for which these substantive rights are determined is of common acceptance within Te Ao Māori. Therefore, the "applicable law" in this context, according to the High Court's interpretation, is understood to mean western law as opposed to the law chosen by parties.[108] A more favourable approach would be to recognise that the jurisdictional framework grounded in tikanga must continue with any appeal to the courts. Although the court process is adversarial by nature, accepting tikanga as the appropriate jurisdiction for dealing with and understanding harm would reconceptualise disputes as the breakdown of relationships in accordance with a framework that aims to promote indigenous relationality.

The challenge is that even a proper evaluation of customary law through a principled approach grounded in tikanga continues to be measured against the colonial recognition framework. Hence these substantive rights will continue to be negotiated to the extent that they conform to the redress offered.

VIII Continuing the Assimilation of the Native Land Court

The suppression of tikanga through the colonial recognition framework illustrates that the state legal system continues to perpetuate the assimilation practices of the Native Land Court. The commonality is that both the current recognition framework and the former jurisdiction of the Native Land Court are so limited and ignorant of tikanga that parties are incentivised to reconceptualise their rights in terms of the Crown's expectations.[109] What this paper attempts to demonstrate is that there is a marked difference between rights grounded in tikanga and rights reconceptualised for the Crown. The continuation of pre-determined recognition frameworks grounded in

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[106] The High Court decision refers to Edward Durie's evidence explaining the variegating practices of tikanga at [165] – [167]; the balancing exercise in *Takamore v Clarke* [2013] 2 NZLR 733 at [169]; and the evidence and proof requirements as explained by Richard Boast at [170] – [172].

[107] Kawharu, above n 1, at 304.

[108] At 306.

[109] Law Commission *Māori Custom Law and Values in New Zealand Law* (NZLC SP9, 2001) at 65.

western sources of law only serves to distort the substance of a right that would otherwise be given proper recognition under tikanga.

The jurisdiction of the Native Land Court is well traversed and I do not wish to cover any further ground.[110] However, the problem with the Native Land Court was that Māori customary rights were forced into categories of ownership and exclusivity grounded in western law.[111] The effect of this was the legal fracturing of Māori social organisation through the divisive nature of allocating proprietary rights to one group, or persons, over others who had equal standing under Māori customary law.[112] Boast has emphasised that "land rights were intricate, overlapping and multi-layered" and that "[i]t is not enough to [say] that Māori land tenure was complicated; the complications have to be understood".[113] Yet, similar criticisms are made in this paper about the judicial assumption that overlapping claims are incapable of reconciliation.

This position is supported by the fact that redress will only go as far as granting limited forms of consultation rights to multiple parties, or recognising only one party's predominant and exclusive interests in the land. There is an opportunity, however, to implement tikanga as the applicable law by using alternative dispute resolution processes. Nevertheless, the arbitration that was appealed in *Ngāti Hurungaterangi v Ngāti Wahaio* suggests that these processes may sometimes fail to engage authentically with tikanga. As a result, parties are incentivised to bring their tikanga into the courts so as to avoid the dilution of their rights where the redress fails to preserve indigenous relationality. The courts have taken the view that overlapping claims are incapable of conventional judicial resolution and that tikanga principles are not questions of law. The corollary is that the success of tikanga as a jurisdictional framework continues to be burdened by the existence of recognition frameworks grounded in western sources

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[110] See Richard Boast's multi-volume commentary: *The Native Land Court – Volume 1, 1862 - 1887: a historical study, cases, and commentary* (Brookers NZ, Auckland, 2013); *The Native Land Court – Volume 2, 1888 - 1909: a historical study, cases, and commentary* (Thomson Reuters, Wellington, 2015); *The Native/ Māori Land Court – Volume 3, 1910 - 1953: collectivism, land development and the law* (Thomson Reuters, Wellington, 2019).

[111] Joseph Williams "The Māori Land Court: A Separate Legal System?" (New Zealand Centre for Public Law Occasional Paper 4, Victoria University of Wellington, 2001) at 2 – 4.

[112] Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865 – 1921* (VUP, Wellington, 2008) at 107 – 109; See also Williams, above n 111, at 3 – 4.

[113] Boast at 108.

of law which cannot appropriately account for the full nature and extent of customary rights as they exist under tikanga.

IX Conclusion

The current recognition of overlapping rights in land perpetuates the notion that tikanga rights should be assimilated into a colonial legal order. I have argued that it is problematic to assume that overlapping claims are so complex that tikanga should not be regarded as a question of law.

The *Red Book* fails to consider mechanisms that provide for indigenous relationality. This is problematic as the principles of the Treaty of Waitangi impose a duty on the Crown to avoid creating fresh grievances. However, the spirit and intent of the *Red Book* suggests that tikanga-based processes should be an essential part of fulfilling the Crown's duty. To fill this lacuna, parties continue to seek justice through alternative dispute resolution processes. These processes provide a significant opportunity to implement tikanga as the applicable law. The recognition of tikanga as the applicable law provides the framework for addressing and understanding these disputes as the breakdown of relationships. To that end, the aim of the law should be to mediate across differences in a way that preserves the relationship between the parties and to offer redress mechanisms for continuing reciprocity. In contrast, the colonial recognition framework continues to position overlapping rights against eachother by either diluting multiple parties rights to mere consultation entitlements, or by constructing a hierarchy in which only one party has predominant interests in land. Although parties continue to appeal these decisions, the courts operate on the assumption that overlapping claims are too complex for conventional judicial resolution. However, what is necessary is for these complications to be understood. I have argued that the courts must employ tikanga as the jurisdictional framework in order to understand the complex web of relationships.

In the end, the state legal system continues to exacerbate differences between Māori so as to amalgamate tikanga rights into the colonial recognition framework and deny the existence of tikanga Māori as an equal system of law in New Zealand.

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Appendix 1: Glossary of Māori Terms

Ahikāroa	fires of occupation
Ea	state of equilibrium
Hapū	section of extended kin group
Iwi	extended Māori kin group
Kaitiakitanga	guardianship/ stewardship
Kāwanatanga	government
Kotahitanga	unity
Mana	spiritually sanctioned authority
Manaakitanga	nurturing relationships
Mana whenua	authority in relation to land
Noa	profane/ ordinary/ complimentary opposite of tapu
Pākehā	New Zealanders of European descent

Rangatiratanga	Māori self-determination/ chiefly authority
Rohe	defined area/ territory
Take	ancestral right
Tangata whenua	Indigenous/ ‘people of the land’
Tapu	spiritual character of all things
Te Ao Māori	Māori world/ worldview
Tikanga Māori	system that encompasses Māori law
Utu	reciprocity
Waiata	song
Whakapapa	genealogy
Whanaungatanga	relationships