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A LOVING EXCAVATION: UNCOVERING THE CONSTITUTIONAL CULTURE OF THE MĀORI DEMOS[1]

MĀMARI STEPHENS*

In 2000 Professor Alex Frame suggested that, rather than build the perfect edifice for the New Zealand constitution, we ought to engage in a scholarly process of 'loving excavation' in order to determine the critical values and institutions of our society for our present and future needs.[2] Subsequently, Dr Matthew Palmer in 2007 identified pragmatism, egalitarianism, and authoritarianism as three major cultural values in New Zealand constitutionality.[3] This article argues that there is also a distinctive and constantly evolving Māori constitutional culture with values directly relevant to the New Zealand constitution. This culture is discoverable by way of textual and linguistic evidence for 19th and 20th century Māori political practices. This paper presents some limited linguistic evidence about the certain highly prominent terms that have a notable presence in a set of constitutionally relevant Māori language texts derived from the Legal Māori Corpus, a large body of Māori language texts from between 1828 and 2009. Using such primary information and as further secondary research, this article identifies particular Māori attitudes as to how the exercise of civic decision-making ought to be carried out.

A. An Inquiry into Māori Constitutional Culture

In 2007 Matthew Palmer wrote of the importance of examining New Zealand's "constitutional culture". "The foundations of a constitution" he argued, "are culturally embedded in its operation through the values of those who operate it and who, inherently, subscribe to a national culture."[4] Viewing a constitution by way of the culture of its people eschews a more traditional approach of examining a constitution by way of its instruments and institutions, particularly the documents of a (preferably written) constitution. Palmer's contrasting legal realism also echoes eminent New Zealand jurist John Salmond who understood that people make constitutions; not the other way around:[5]

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1 Alex Frame "Beware The Architectural Metaphor" in C James (ed) *Building The Constitution* (Institute of Policy Studies, Wellington, 2000) 431. In 2000 Professor Frame issued a warning to the participants of the "Building The Constitution" conference in Wellington to "Beware the architectural metaphor". Rather than build the (impossible) perfect edifice for the New Zealand constitution, we ought to engage in a scholarly process of "loving excavation" to determine what the critical values and institutions of our society are to adapt and use for our present and future needs. This article seeks to contribute to this excavation.

2 Alex Frame "Beware the Architectural Metaphor" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) at 431.

3 M Palmer 'New Zealand Constitutional Culture' (2007) 22 NZULR at 578–593.

4 Above, n 3, at 567.

5 J Salmond *Jurisprudence: Or The Theory of Law* (Stevens & Haynes, London, 1902) at 203 as cited in Janet Mclean. "Crown Him With Many Crowns": The Crown and the Treaty of

> The constitution as a matter of fact is logically prior to the constitution as a matter of law. In other words, constitutional practice is logically prior to constitutional law. There may be a state and a constitution without any law, but there can be no law without a state and a constitution.

In focusing on the people who "practise" constitutionality, Palmer identified New Zealand constitutional culture to be "New Zealanders' mindset or a set of attitudes that relate to the exercise of public power".[6] Interestingly, Palmer specifically discounts investigating "cultural attitudes to the use of public power" among different groups within New Zealand, including Māori, which are "likely to be different from, though probably overlapping with, those of non-Māori New Zealanders". This distinction between "New Zealanders' attitudes" and "cultural attitudes" enabled him effectively to place to one side Māori attitudes towards the exercise of public power, preferring to understand the "prevailing constitutional culture" of New Zealand generally.

In Palmer's inquiry into that prevailing culture he points to three major relevant cultural values: pragmatism, egalitarianism, and authoritarianism. Palmer's explication of the last two values is very brief, but much ink has been spilt, including Palmer's, that characterises New Zealand's constitutional culture as "pragmatic" and "ad hoc".[7] New Zealand's constitution itself is understood to be the result of "a series of ad hoc pragmatic responses to the reality of negotiating difficult situations".[8] Indeed, we have a "tradition of pragmatic constitutional evolution".[9]

Palmer identified these three aforementioned values as "the salient aspects of New Zealanders' constitutional culture", therefore underpinning four constitutional norms, or principles: democracy itself, Parliamentary sovereignty, the rule of law and judicial independence, and an unwritten and evolving constitution.[10]

However, Palmer's approach begs a question; what may be said of a Māori "constitutional culture" beyond that it might comprise easily discountable "cultural attitudes" towards the exercise of public power? These are relevant questions to be asking during the course of the current constitutional review. If there is a specific Māori constitutional culture then to ignore it in the ongoing evolution of New Zealand's constitution surely weakens that evolution.

This article argues that there is a distinctive and constantly evolving Māori constitutional culture with values that are directly relevant to the practice of the New Zealand constitution. This culture is discoverable through an exploration of textual and linguistic evidence for 19th and 20th century Māori political practices, among other things.

Waitangi (2008) 6(1) NZJPIL 35 at 35; and M Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2011) at 19–20.

6 Palmer "New Zealand Constitutional Culture", above n 2, at 569.

7 Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution*, above n 3, at 17.

8 Palmer "New Zealand Constitutional Culture", above, n 2, at 574.

9 Mai Chen "The Advantages and Disadvantages of a Supreme Constitution for New Zealand: the Problem with Pragmatic Constitutional Evolution" in C Morris, J Boston, and P Butler P (eds) *Reconstituting The Constitution* (2011) 123–155, at 128.

10 Palmer "New Zealand Constitutional Culture," above n 2, 578–593.

This investigation makes it possible to identify what is described in this paper as the Māori *demos*; the Māori community of citizens that has been able to utilise collective choice, and act collectively to achieve public ends.[11] This term *demos* is used in part to distinguish a Māori community that is not necessarily coexistent with the Māori *ethnos*; the entire Māori ethnic group linked by genealogy and some degree of common culture. Such an ethnic group, said Andrew Sharp, cannot be a "team of action"; simply put: it "cannot act. It can be spoken for and at, attacked, defended, and so on; but it cannot act."[12] The Māori *demos*, on the other hand, at once transcends and comprises traditional kin groups such as iwi and hapū (as those components, peoples of the Māori *demos* continue to change, evolve, and remain) and cannot sufficiently be described as only a voluntary association, such as an urban iwi. Unlike the Māori *ethnos* the Māori *demos* has been able to utilise collective choice, and act collectively to collective ends, but not in a politically unified manner. This paper seeks to demonstrate the 19th century developments that enable the identification of the Māori *demos*, and suggests further avenues for researching the nature of evolution of the modern Māori *demos*. The Māori *demos* identified here is not synonymous with any political movement with a particular political end in sight. The struggle for Māori political unity and rangatiratanga is well documented elsewhere, and only forms part of this inquiry to the extent that it provides useful evidence of Māori attitudes towards the exercise of public power.[13]

To begin to identify Māori constitutional culture this paper presents some limited linguistic evidence about the "keyness" of certain words that are especially prominent in the set of constitutionally relevant Māori language texts from the Legal Māori Corpus. This Corpus comprises a large body of Māori language texts from between 1828 and 2009 designed and compiled to provide evidence of the use of Māori terms for Western legal concepts.[14] Based on such primary information, as well as secondary research, this article identifies particular Māori attitudes as to *how* the exercise of public power (or civic decision-making, as will be explained shortly) *ought* to be carried out. In short, such power ought to be exercised:

1. as a means of meeting collective obligation for civic ends;

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11 The choice of the term *demos* is a deliberate one; reflecting a community of people capable of making decisions for that community, reflecting more in common with an ancient Greek notion of a body of citizens not differentiated into modern "civil" "state" or "economic" divisions. There was, as stated by Ellen Wood: "...no state of Athens or Attica, only the Athenians" in "Demos vs 'We The People'" in J Ober and C Hedrick (eds) *Dēmokratia: a Conversation On Democracies, Ancient and Modern* (Princeton University Press, NJ, 1996) at 128.

12 See A Sharp "Blood, Customs, Consent: Three Kinds of Māori Groups and the Challenges they Present to Governments" 52 U Toronto Law Journal 9, at 18; See also J Sissons "Building a House Society: The Reorganization of Maori Communities Around Meeting Houses" (2010) 16(2) Journal of The Royal Anthropological Institute 372, at 374.

13 See particularly L Cox *Kotahitanga – The Search For Māori Political Unity* (Oxford University Press, Auckland, 1993).

14 See section B below for more information on the Corpus. Further details about the Legal Māori Corpus are also available at <http://www.victoria.ac.nz/law/research/research-projects/legal-maori/corpus>.

2. in a way that facilitates group participation and public input;
3. with due process and regard for the standing of those involved.

These attitudes are not exhaustive and are revealed across the Māori political spectrum by the ways in which Māori behave in the exercise, or attempted exercise, of civic decision-making power. The focus of this paper is to investigate the development of these attitudes and concentrates mainly on 19th century materials, on the basis that this exploration serves as a basis for further investigation of such developments in the 20th century and beyond. There are a number of specifically Māori values that may be said to be reflected in these attitudes, and a number of these will be mentioned in the paper. This paper does not pretend, however, to define the limits and content of specific Māori values, as has already been done in other scholarship.[15]

1. *Constitutional culture and "public power"*

Māori constitutional culture in this paper refers specifically to Māori attitudes to the exercise of civic decision-making power. Some overlap exists between the idea of "public power" and "civic decision-making power", but the latter refers more broadly to the capacity of, in this case, Māori to make decisions affecting Māori well beyond the decision-makers' own immediate kin affiliations; even including all or most Māori. Civic decision-making power may not necessarily be enforced by the backing of a constitutional institution, whereas "public power" in the more general sense refers mainly to the exercise of power with such broad effect that it is enforced and institutionalised.

A broader view is necessary. Public power, as upheld and channelled through the four constitutional norms Palmer wrote of (democracy, Parliamentary sovereignty, the rule of law and judicial independence), was by no means firmly established in New Zealand in practice until, arguably, the later decades of the 19th century. Paul McHugh's exposure of what he describes as the dominant Whig historiography of New Zealand's constitutional history critiques the characterisation of New Zealand constitutionalism as a kind of "triumphal march" resulting in the inexorable establishment of effective constitutional institutions over the course of New Zealand history.[16] Indeed the landscape of New Zealand's constitutional development and the nature of public power remained negotiable for much of the 19th century, particularly in its application.[17] Evolving Māori attitudes to

15 See for example HM Mead *Tikanga Māori – Living By Māori Values* (Huia Publishers, Wellington, 2003); C Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1991); Apirana Mahuika 'Whakapapa is the heart' in K Coates. and P Mchugh *Living Relationships: Kokiri Ngatai, The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington,1998) 214-221; R Benton, A Frame, P Meredith (eds) "Te Mātāpunenga A Compendium of References To The Concepts and Institutions of Maori Customary Law" Unpublished Manuscript (forthcoming, Victoria University Press, Wellington, 2013).

16 See Paul McHugh's critique of the Whig paradigm of constitutional development in New Zealand: P McHugh "New Zealand's Constitutional History" in PA Joseph (ed) *Essays on the Constitution* (Brookers Ltd, Wellington, 1995) 344–367 at 348 ff. Contrast PA Joseph in the same text at 25.

17 For examples of this fragility of New Zealand constitutionality see R Boast, *Buying The Land, Selling The Land* (Victoria University Press, Wellington, 2008) at 97–99; D Ward

Māori exercise of civic decision-making power begin to be discernible in the early decades of the 19th century, before the notion of "public power" could be said to be relevant in the New Zealand context. A broader understanding of public power so as to include the exercise by Māori of civic decision-making power is not only useful, it is necessary if any contextual understanding of a peculiarly Māori constitutional culture is to be arrived at.

Grand constitutional narratives aside, there has been a relative lack of specific discourse about Māori constitutional culture in other scholarship, perhaps due to a presumption that Māori constitutionality is merely synonymous with self determination, autonomy, nationhood and rangatiratanga (the latter perhaps employed as a gloss for these other notions).[18] James Tully warns of conducting constitutional discourse in the dominant language of constitutionalism evinced by words such as: "popular sovereignty, people, self government, citizens, agreement, rule of law, rights, equality, recognition and nation."[19] These words form part of a vast network of conventions, setting a framework for Western constitutional discourse, a framework closed to other modes of indigenous constitutionalism.[20] Instead, actual Māori practice of civic decision-making power will demonstrate more effectively a constitutional culture. Such practice also grants us a wider scope for constitutional exploration than does the Treaty of Waitangi discourse alone. Moana Jackson recently identified "the Treaty Parachute Syndrome" as a widespread belief that somehow the Treaty "fell out of the sky on the sixth of February and we had never known what a treaty was before".[21] A similar phenomenon is a belief that only the Treaty, that "grand constitutional compact",[22] created Māori as a sector of the New Zealand public with a concomitant interest in participating in New Zealand civic life. This frame, within which Māori constitutionality is usually seen to exist, tightly restricts perceptions of that constitutionality, and Māori as a people with identifiable attitudes to the exercise of civic decision-making power that have been continually evolving *since well before* 1840 almost vanishes from sight and consideration, even as, ironically, the Treaty creates at least some much-needed space for this diluted modern constitutional discourse.

This inquiry into the constitutional culture, by particularly examining early years of the 19th century, identities a level of constitutional development that

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"Territory, Jurisdiction, and Colonial Governance: 'A Bill To Repeal The British Constitution', 1856-1860" (2012) 33(3) The Journal of Legal History 313–333. R Boast, "Recognising Multi-Textualism: Rethinking New Zealand's Legal History" (2006) 37 VUWLR at 547.

18 See also M Durie *Te Mana, Te Kāwanatanga –The Politics of Māori Self Determination* (Oxford University Press, Auckland,) 218–219.

19 J Tully *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge University Press, Cambridge, 1995) at 35

20 M Bennett "'Indigeneity' As Self Determination" (2005) 4 Indigenous Law Journal 71 at 88

21 M Jackson "Constitutional Transformation" in M Mulholland and V Tawhai (eds) *Weeping Waters – The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) at 325.

22 R Cooke, "Introduction" (1990) 14 NZULR 1 at 8.

is natural and observable, building upon exisiting traditions.[23] A realist approach has been chosen here in the belief that Māori attitudes to the exercise of civic decision-making power cannot be identified or understood merely by way of analysing the orthodox instruments of current constitutional institutions and their impact on Māori. Richard Boast, identifying the need to use mundane Māori written sources in Pacific historiography, rather than view Māori only through the establishment and impact of institutions, wrote:[24]

> It might be useful to move the Native Land Court and the government land purchaser off centre stage for once and to explore, instead, how Māori saw themselves as reflected in documents that they themselves wrote.

The same can also be said of the quest to understand both Māori attitudes to the exercise of civic decision-making power, and ways in which Māori have sought to constitute ourselves.

B. Mining Māori Language Texts

This section identifies how a set of texts, many of them suitably "mundane", was collated in order to be able to identify at least a starting point for examining what Māori attitudes to the exercise of civic decisionmaking power might have been, and might be now, and which values can be said to reflect that Māori constitutional culture.

Such textual analysis identified a set of key terms that appear to shed light on Māori enagagement with important constitutional moments over the past couple of centuries. Those key terms are explained shortly, and include tikanga, pitihana, kāwanatanga, ritenga, rūnanga, whakahaere, kotahitanga, and mana. In order to understand how those terms were identified and useful at this stage in the search for Māori constitutional culture, some background about the Legal Māori Corpus is necessary.

1. *Background*

The Legal Māori Corpus (LMC) is a digitised collection of some 40,000 pages of Māori language legal and law-related texts dated between 1828 and 2009.[25] It was designed and compiled over 2008–2010 at the Law Faculty of Victoria University of Wellington to enable examination of evidence for the use of the Māori language for the communication of Western legal concepts, as well as for customary legal terms, over the years since 1828. The LMC was the set of primary sources that enabled the writing of entries for M Stephens and M Boyce (eds) *He Papakupu Reo Ture – A Dictionary of Māori Legal Terms*

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23 C Fox "Change, Past and Present" in M Mulholland and V Tawhai (eds) *Weeping Waters – The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) at 43. See also C Jones "Whakaeke I Ngā Ngaru – Riding The Waves – Māori Legal Traditions and New Zealand Public Life" in L Ford and T Rowse (eds) *Between Indigenous and Settler Governance* (Routledge, Abingdon, 2013) at 176.

24 R Boast "Bringing The New Philology To Pacific Legal History" (2011) 42 VUWLR 399 at 416.

25 See section B below for more information on the Corpus. Further details about the Legal Māori Corpus are also available at <www.victoria.ac.nz/law/research/research-projects/legal-maori/corpus>.

(LexisNexis 2013). The LMC is the largest known readily available and structured corpus of Māori language texts, with approximately 8 million tokens of running text. In order to ensure that the corpus could be said to fairly represent how Māori was being used in legal contexts we arranged the texts into categories.

Table 1 gives the proportions of each category of text in the Legal Māori Corpus:

Table 1: The complete Legal Māori Corpus by text category (numbers rounded)

Category of language		No. of words	No. of docs	Time span
01	Crown language *(eg official notices* Hansard, Kahiti*)*	4,567,240	512	1840–2010
02	Māori community language *(eg petitions, letters, parliamentary submissions)*	711,140	218	1939–2009
03	Statutory language *(eg translations of Acts and Bills)*	840,460	143	1845–2008
04	Agreement and obligation *(eg land deeds, contracts, settlements)*	638,000	33	1828–2009
05	Courts and tribunals *(eg hearings, court transcripts, evidence)*	825,400	153	1856–2009
06	Māori governing bodies *(eg proceedings of Kotahitanga and Kīngitanga parliaments, Synod)*	437, 120	33	1861–2008
	TOTALS:	**7,582,800***	**1092**	

* This figure comprises words only, excluding numerals in the corpus texts from the total token count.

Although this is a "legal" corpus, it is a necessarily broad collection of documents. Within the LMC itself are many texts that could be suitable for analysis in regards to Māori constitutional culture, but careful decisions had to be made as to which texts would be selected for analysis for this purpose. Happily, help was at hand.

(a) 2005 Constitutional "milestones"

The 2005 Constitutional Review Committee identified several "constitutional milestones" as being of particular relevance to Māori.[26] Almost every milestone identified by the Committee was represented within the LMC by a number of Māori language texts that were written about the event at the time or near to the time of the event. Texts in the LMC also related to the passage of the Foreshore and Seabed Act 2004 (and its sequel, the Marine and Coastal Areas (Takutai Moana) Act 2011). This legislation was excluded from the Committee's list of milestones, but has been included for the purposes of this research. All such relevant texts were then collated into a sub-corpus ("Milestones Subcorpus") that enabled some analysis to take place about the patterns of words used in these texts. Looking at how frequently particular words appear, what company such words keep, and the dispersion of such words across such a corpus, can provide very useful insights into the culture and society the corpus derives from.[27] In this case the Milestones Subcorpus included texts pertaining to the following milestones:

- The signing of the Declaration of Independence 1835;
- The signing of the Treaty of Waitangi, 1840;
- The appointment of the first Māori King in 1858;
- The Kohimarama conference in 1860;
- The commencement of the Taranaki and Waikato wars of the 1860s;
- The establishment of Māori electoral seats in 1867;
- The Repudiation hui at Pākōwhai in 1876 (occasionally called the Waiohiki hui);
- The establishment of the Kīngitanga's parliament, Te Kauhanganui in 1882;
- The establishment of the Kotahitanga parliaments of the 1890s;
- The passage of the Māori Councils Act 1900 and the Māori Lands Administration Act 1900;
- The establishment of the Waitangi Tribunal in 1975;[28]
- The enactment of the 1987 Māori Language Act;
- The 1993 fiscal envelope hui at Hiranga;
- *[The passage of the Foreshore and Seabed Act 2004].*[29]

Without seeking to critique here the merits of the identification of each item above as constitutional milestones, these were indeed all important (although not the only) constitutional moments, as each event involved an active, even

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26 Appendix B of the report of the Constitutional Arrangements Committee. The report is available at <www.parliament.nz/NR/rdonlyres/575b1b52-5414-495a-9baf-c9054195af02/15160/dbsch_scr_3229_2302.pdf> (date of last access 1 April 2013).

27 D Biber, S Conrad and R Reppen *Corpus Linguistics: Investigating Language Structure and Use* (Cambridge University Press, Cambridge 1998) at 4–5, 21.

28 The Milestones Subcorpus had no Māori language printed texts for the the establishment of the Waitangi Tribunal in 1975.

29 As alluded to above, this milestone was not included in the Committee's list, but was included here in view of the extraordinary Māori public and political mobilisation in response to the Act and its sequel.

dominant, contribution by Māori that could be said to have resulted in nationally relevant change for Māori in the government of Māori lives in New Zealand. Restricting the characterisation of the Māori contribution to New Zealand's constitutional development to "key moments" of a grand constitutional narrative gives a necessarily incomplete picture of Māori constitutionality. Nevertheless there were several texts for almost every event on the list in the LMC, many of them written by ordinary Māori, some written by the Crown to Māori, and some comprising records of Māori civic proceedings, even where such proceedings were called for by the Crown, such as the Kohimarama Conference in 1860. The Milestones Subcorpus comprised approximately 997,000 word tokens out of the total LMC, and comprises the following text types:

- Māori language proceedings of important hui and Māori parliamentary bodies such as Te Kauhanganui of the Kīngitanga, and the Kotahitanga parliaments.
- Māori language correspondence and petitions requesting, for example, the passage of the Māori Representation Act 1867.
- Māori translations of relevant legislation including of the Māori Councils Act 1900 and the Māori Representation Act 1867.
- Petitions and submissions by Māori, including submissions to Parliament on the repeal of the Foreshore and Seabed Act 2004 and submissions on the Marine and Coastal Area (Takutai Moana) Bill in 2009.

This Milestones Subcorpus is not exhaustive; and is unlikely to include every printed Māori language text that may have been generated by each of these constitutional "moments". Nevertheless taking into consideration the extent of the known sources available, this collection is fairly representative of the printed Māori language texts that were available and accessible from those milestones.

Entering the Milestones Subcorpus texts into a specific word analysis programme (WordsmithTools Version 5[30]) enabled the identification of a set of words that appeared in a manner that showed they were "key" for that subcorpus. These "keywords" occurred with unusually high frequency within that set of texts, when compared with a set of reference texts of ordinary Māori; that is, not "constitutional" or particularly "legal" or "civic" Māori.[31] Words that have this attribute of "keyness" can be said to be a pointer to social attitudes:[32]

30 M Scott "Wordsmith Tools Version 5" (Lexical Analysis Software, Liverpool, 2008).

31 The reference corpus in this case was the 1 million token Māori Broadcast Corpus, a corpus of Māori used in Māori language broadcasting between 1995-1996. Without a specific political or legal focus, and not a corpus of specialised language itself, the Māori Broadcast Corpus provides useful "ordinary" Māori against which more specialised technical or otherwise specialised Māori can be compared. See M Boyce "A Corpus of Modern Spoken Māori" (PhD thesis, Victoria University of Wellington, 2006).

32 M Stubbs in M Scott "PC Analysis of Key Words" in (1997) 25(2) *System* 233 at 235.

> The study of recurrent wordings is therefore of central importance in the study of language and ideology and can provide empirical evidence of how the culture is expressed in lexical patterns.

Using the "KeyWord" tool from WordSmith Tools a set of words were identified as *unusually frequent* and therefore unusually characteristic (or stereotypical) of the source texts in the Milestones Subcorpus. These "keywords" are set out below in order of "keyness". Interestingly, all but two of them (pitihana and whakahaere) have entries in *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*:[33]

Milestones Subcorpus keywords

tikanga	"rule, plan, method", extending through to any normal or usual way of being or acting; Also used to refer to "reason, meaning, custom" Also, in legal contexts: "authority, control, legal condition or criterion, even provision or clause"
pitihana	petition
kāwanatanga	government, governance, province, governorship
ritenga	a normal way of doing things, such as a custom, habit, or practice.
rūnanga	assembly, council
whakahaere	practice, manage
kotahitanga	unity, state of togetherness
mana	vitality, recognized authority, influence and prestige, thus also power and the ability to control people and events.

There are a few interesting observations that arise here about these keywords identified in the Milestones Subcorpus. A notable absence is the word "rangatiratanga". In fact, rangatiratanga was not "key" in any subset of texts in the Milestones Subcorpus or the entire LMC. This is not to say that the idea of rangatiratanga is unimportant; merely that, while it was reasonably frequently used in the Milestones Subcorpus texts, it has no *special* prominence within the LMC in general, and none at all within the Milestones Subcorpus. The absence of rangatiratanga from this list provides a timely caution in the investigation of Māori attitudes towards the exercise of civic decision-making power. It may be less important to look for evidence of values *expressed* specifically by Māori in civic and political discourse in this investigation; rather, the focus needs to be on how Māori were *actually* behaving, acting,

33 The explanation for these terms (except pitihana and whakahaere provided by the author) derive mainly from R Benton, A Frame and P Meredith (eds) *Te Mātāpunenga: A Compendium of References To The Concepts and Institutions of Maori Customary Law* (Victoria University Press, Wellington, 2013) (forthcoming).

deciding and contesting constitutional matters. Stated expressions of value arguably provide a limited kind of insight into Māori attitudes to the exercise of civic decisionmaking power.

A second observation is that two of the words on the list were "key" largely because they appeared as titles in a number of the Milestones Subcorpus texts; Kāwanatanga (Government) and Kotahitanga (the name of the 19th century pan-tribal parliamentary movement). The keyness of these two terms needed to be treated a little carefully, but still merits important considerations.

The "keywords" above provide insight into lexical *markers* of what was unusually characteristic or stereotypical in the language used in the texts of the Māori constitutional milestones identified earlier in this paper. Such words clearly offer insight for how we read those texts for their own sake, but they also provide valuable lenses with which to sift through *other* secondary scholarship and primary materials (outside of the corpus based texts thus far discussed) that illustrate the practice of Māori constitutional culture.

Two avenues for further exploration, based on the prevalence of the keywords "kotahitanga", "pitihana", "rūnanga" and "kāwanatanga", include looking at the extent to which Māori have utilised *collective* decision-making for civic ends, as well at the importance of public participation and public input as a part of Māori civic decision-making. A third line of inquiry, based on the keyness of words such as "ritenga", "tikanga", and "mana", was to explore the importance of procedure; how were decisions made? Which kinds of decisions would be considered valid? How is authority recognised? This paper, for reasons of space, focuses primarily on the first two lines of research inquiry: what does the secondary research and other relevant primary texts tell us specifically about *collective* decision-making for civic ends and about public participation and public input as a part of Māori civic decision-making?

C. The Development of Māori Civic Collectivism

Sufficient evidence exists to suggest the post-contact development of important constitutional practices that remain in place today. These practices and the attitudes of Māori to them did not arise out of nowhere; they developed from pre-existing practices and attitudes, but their manifestation in Māori constitutional practice was innovative. In following the insight provided by the "keywords" particularly "kotahitanga" and "rūnanga" above, which refer to collective decision-making and processes, the constitutional practice to be explored here is civic collectivism, and civic collective obligation: the capacity for a group or its representatives to make decisions for and on behalf of many, most, or even all Māori even in the absence of direct kin relationship.

1. *The development of civic collectivism*

Understanding civic collectivism requires first a grasp of the importance of whakapapa as the most important organising principle of Māori society, pre- and post-contact.[34] Often glossed as "genealogy", whakapapa refers more to a

34 See C Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture*, above n 13, 171–174. See also K Quince "Māori and the Criminal Justice System in New Zealand" in J Tolmie and W Brookbanks (eds) *The New Zealand Criminal Justice System* (Auckland, LexisNexis, 2007) at [12.2.1].

way of processing knowledge than just the knowledge alone, comprising the "the systematic recitation or presentation of a genealogy". In contemporary Māori it is often also used as a verb, meaning "to trace one's ancestry back to a particular point of connection".[35] The existence of connections by way of whakapapa determines how people live and interact with each other:[36]

> Whakapapa is the determinant of all mana rights to land, to marae, to membership of a whānau, hapū, and collectively, the iwi, whakapapa determines kinship roles and responsibilities to other kin, as well as one's place and status within society.

With whakapapa as a principle for ordering Māori life based on kinship connection, whanaungatanga is the value that calls for the creation and maintenance of relationships, utilising the "expected mode of behaviour" based on those whakapapa connections.[37] The traditional Māori value of whanaungatanga is broadly understood today to refer to the notion of *collective obligation* understood to exist within kin groups whereby the collective is entitled to expect the support of its individuals; whereby also individuals are entitled to the support of the collective. Whanaungatanga is not restricted to kin groups, but can also arise between non-kin, as Mead describes: "on the basis of shared experience."[38]

What emerges from a necessarily brief review of the history of Māori constitutional activity in the 19th century, and is still evident today, is that the notion of collective obligation between groups and individuals has remained vitally important. However, such obligations began to take on a civic aspect, whereby decisions began to be made for and on behalf of groups outside of close kin-based connections. Such "civic" collectivism can be seen to be developing in the early decades of the 19th century. This civic aspect is identifiable from formal decision-making undertaken by Māori with implications for all, or many, Māori, based on the existence of collective obligations between larger tribal and even non-tribal groupings. There were three necessary preconditions for the development of this civic collectivism. One was an increased willingness for tribal groupings even non-kin affiliated groups to cohere for specific purposes. The second was an acceptance of the idea of a Māori supra-tribal identity. The third precondition was the making of decisions for *many* Māori not only members of the immediate hapu, or close hapū of the decision-makers. Arguably, all preconditions were in place well before the middle of the 19th century.

2. *The aftermath of inter-tribal conflicts (1800-1830): new corporate entities.*

Māori tribal organisation itself had already begun to change during the early decades of the 19th century, largely in response to the imperatives provided by

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35 See R Benton, A Frame, P Meredith (eds) "Te Mātāpunenga A Compendium of References To The Concepts and Institutions of Maori Customary Law", above n 13 at 465.

36 Apirana Mahuika 'Whakapapa is the Heart' in K Coates and P McHugh *Living Relationships: Kokiri Ngatai, The Treaty of Waitangi in the New Millennium* (Wellington, Victoria University Press, 1998) 214, at 219.

37 See R Benton, A Frame, P Meredith (eds) "Te Mātāpunenga A Compendium of References To The Concepts and Institutions of Maori Customary Law", above n 13 at 484.

38 HM Mead *Tikanga Māori – Living By Māori Values,* above n 13, 28–29.

inter-tribal warfare. Even by 1800 "iwi", while providing a mode for acknowledgment of descent from a founding tūpuna and corresponding whakapapa connections, could not be said to be regularised, effective political or corporate units of society. Instead, political activity, including warfare, was undertaken by hapū and alliances of hapū.[39] Yet within a few short decades larger collective entities began to be observed in action. By the early 1840s Octavius Hadfield was able to inform George Grey about larger "tribes" with hapū as their "subdivisions", based on his observation of Ngāti Toa, Ngāti Apa and Ngāti Raukawa, Muaupoko, Rangitāne, Ngāti Kahungunu and others battling for control of the lower North Island and upper South Island. Hadfield was not mistaken about his observations; what he witnessed was the evolution of new Māori political formation whereby iwi were beginning to function as modern corporate entities.[40]

Notwithstanding these developments, by the early decades of the 18th century Māori social organisation had not been deeply threatened by the post-contact arrival of Europeans. Indeed such organisation was flexible enough to create appropriate new connections in the pursuit of ordinary whanaungatanga, thereby upholding relevant whakapapa principles. Māori relations with European traders, in the Far North for example, often involved incorporation *into* the local hapū by way of intermarriage and allocation of land.[41] The idea of a supra-tribal "Māori" cultural or political identity did not develop immediately upon contact with Europeans, but arguably, by the late 1830s such a notion was becoming widespread.

3. *Being Māori, being māori: the idea of a Māori supra-tribal identity*

In 1831 a group of 13 northern rangatira discussed the rumour of a French plan to avenge the killings of Marion DuFresne and many of his men in 1772.[42] Encouraged by Church Mission Society (CMS) missionary William Yate, they signed a petition drafted by Yate to the British Government asking for protection – the first such missive of its kind.

In 1833 newly minted British Resident James Busby arrived, the petition having been the last straw in a string of events that prompted the British government to establish a formal presence in New Zealand.[43] Numerous authors have pointed to this event as either providing some evidence of Māori understanding of territorial sovereignty,[44] or as evidence of missionary

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39 A Ballara Taua *"Musket Wars", "Land Wars", Or Tikanga? Warfare in Māori Society in The Early 19th Century* (Penguin, Auckland, 2003) at 69. See also L Cox *Kotahitanga – The Search For Māori Political Unity,* above n 11, 19–20.

40 A Ballara, above n 37, at 70.

41 See A Puckey *Trading Cultures – A History of The Far North* (Huia Publishers, Wellington, 2011) 21–23.

42 See C Orange *The Treaty of Waitangi* (Bridget Williams Books Ltd, Wellington, 1987) at 11–12.

43 Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution*, above n 3, at 38.

44 L Head "Land, Authority and the Forgetting of Being in Early Colonial Maori History" (PhD thesis, 2006, Canterbury University) at 51; M Henare "The Changing Images of Nineteenth Century Māori Society – From Tribes to Nation" (PhD thesis, Victoria University of Wellington, 2003).

machinations to promote British intervention in New Zealand affairs.[45] Whatever the ultimate importance of the document, the use of the term "tangata Māori" may be significant ("the people of this land") in the text:[46]

> A ki te mea ka tu tetahi o ou tangata ki a matou, ka noho nei hoki he hinu ki te wenua nei he mea oma mai i runga i te kaipuke mau ra pea ratou i riri kia rongo ai, kei oho noa te riri o te *tangata Māori.* (Emphasis added)

It is usually understood that a lack of capitalisation of "Māori" means that the word reflects the notion of ordinariness. On that reading "Māori" in these documents refers to "ordinary" people, and is not a specific label for ethnicity or culture.[47] Nevertheless this usage in the 1831 document draws a distinction between "te tangata Māori" as contrasted with ship deserters ("he mea oma mai i te kaipuke") in the immediately previous words of the sentence.

The usage "tangata Māori" had appeared in early Māori writing before, appearing in 1820 as "te tángata máodi" recorded with the translation "the people of their country".[48] Nevertheless the language of this petition clearly presented to the British government the notion of a "people" of New Zealand. Another document to use "tangata Māori" in 1831, to contrast "native" or "Māori" people with "other" people was the memorandum of sale for the Wahapū Block to Gilbert Mair that refers to him being able to call on King William IV to protect his possession against any other "British subject or any other person or persons, whether Natives of this country or otherwise". The phrase used in the original Māori is far simpler and more binary: "ahakoa Pakeha, ahakoa tangata Māori" (whether Pākehā or māori).[49] A difference between the 1831 examples and the 1820 example may be the agreement by the Māori parties to both texts to present to the world a public "Māori" identity. Neither document is conclusive evidence that Māori routinely presented themselves as a "collective" entity beyond the hapū or the iwi but both documents involve the making of a public declaration of sorts, and do suggest that by the beginning of the 1830s northern Māori at least had begun to

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45 See, for example, P Moon *Fatal Frontiers – A New History of New Zealand in The Decade Before The Treaty* (Penguin, Auckland, 2006) at 55.

46 "... and if any of thy people should be troublesome towards us – for some persons are living here who have run away from ships – we pray thee to be angry with them that they may be obedient, lest the anger of the people of this land fall upon them" (emphasis added)" Bay of Islands.—Transmitting Letter of Maori Chiefs. Waimate, New Zealand, 16th November, 1831 in HH Turton *An Epitome of Official Documents Relative To Native Affairs and Land Purchases in The North Island of New Zealand* (Government Printer, Wellington, 1883) No 1 at A-1. This English translation is also available through the Legal Māori Archive at <http://nzetc.victoria.ac.nz/tm/scholarly/tei-TurEpit-t1-g1-t1-g1-t2-g1-t2.html>. The Māori language original is in Great Britain Parliamentary Papers (GBPP) 1840, [238], at 7.

47 A Jones and K Jenkins *He Kōrero – Words Between Us – First Māori – Pākehā Conversations On Paper* (Huia Publishers, Wellington, 2011) at 168.

48 From T Kendall *Grammar and Vocabulary of T he Language of New Zealand* (London, Church Missionary Society, 1820) as reproduced in A Jones and K Jenkins, above n 45.

49 Memorandum of Purchase, Te Wahapu Block, River Kawakawa, Bay of Islands District 1 June 1831, reprinted in HH Turton *Maori Deeds of Old Private Land Purchases in New Zealand, From The Year 1815 To 1840, with Pre-Emptive and other Claims* (Government Printer, Wellington 1882) p77-79. Available online at the Legal Māori Archive on <http://nzetc.victoria.ac.nz/tm/scholarly/tei-TurOldP.html> (last access 1 April 2013).

accept a public characterisation of themselves as a collective of "ordinary people" defined by their difference from other populations.[50]

The phrase "tangata Māori" *and* "tangata Māori" to refer to "the" Natives was not uncommon in land deeds, and related correspondence, by the 1850s in other parts of the country, suggesting this self identification had spread and was well established by then.[51] Nor is this language restricted to documents written by Pākehā missionaries or government officials. Donald McLean's correspondence with Māori from as early as 1844 shows that Māori writers also juxtaposed "Māori" as a collective noun and "tangata Māori" with "Pakeha" in a binary fashion.[52]

4. *Making decisions that would impact other Māori beyond the immediate or close hapū*

The rangatira who signed the Declaration of Independence in 1835 and the Treaty of Waitangi in 1840 undoubtedly understood that the documents they signed were intended to have effect on other Māori beyond any of their own immediate hapū, although the effects on their own hapū were their primary considerations. In addition to dealing with problems that were common to the tribes and hapū of the signatories (such as dealings with land speculators) rangatira had begun to understand that the British Crown could be an instrument, independent of the CMS, to achieve resolution for those problems for their own, as well as for others', hapū and even problems between tribes. As stated by Wakena Rukaruka to Busby circa 1839, his chiefly authority could be lowered if Rukaruka himself were to take part in negotiations with other hapū and iwi, but the Resident could be an appropriate intermediary between the parties.[53] The signing of the Treaty of Waitangi shortly thereafter,

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50 It is arguably too early to say that any change in conceptualisation to seeing Māori as a definable group could be descended from Christian teachings. In 1830 there were three adult Christian converts in the Bay of Islands. See A Ballara *Taua: "Musket Wars", "Land Wars", Or Tikanga? Warfare in Māori Society in The Early Nineteenth Century*, above n 37, 419. Re Māori self identification in collective *religious* terms, see B Elsemore *Mana From Heaven – A Century of Māori Prophets in New Zealand* (Moana Press, Tauranga, 1989) at 168. Contrast L Paterson "*Kiri Mā, Kiri Mangu* – the Terminology of Race and Civilisation in the Nineteenth Century Maori-Language Newspapers" in J Curnow, N Hopa and J Mcrae (eds) *Rere Atu, Taku Manu!: Discovering History, Language and Politics in The Maori-Language Newspapers* (Auckland University Press, Auckland, 2002) at 78–97.

51 For example, "Enclosure in No. 329 — Deed of Grant to Tutahi and Others of Land at Pohuenui, in the Waipu Block" in HH Turton *Maori Deeds of Old Private Land Purchases in New Zealand, From The Year 1815 To 1840, with Pre-Emptive and other Claims*, above n 48; "No. 39 Pukekohe.—Desiring that the European Settlers may be removed" Auckland, 4 December 1857 in HH Turton, *An Epitome of Official Documents Relative To Native Affairs and Land Purchases in The North Island of New Zealand* (George Didsbury, Wellington, 1883); "C 295 *Deeds—No. 236. Hunua Block, Wairoa, Auckland District*, 22 March 1854" in HH Turton *Maori Deeds of Land Purchases in the North Island of New Zealand: Volume One* (George Didsbury, Wellington, 1877) at 292–293.

52 See for example Letter from Wi Kingi and others to Governor, 14 Dec 1844 Ms-Papers-0032-0668-14. Object #1030992; Letter From Chiefs to McLean, 24 Mar 1845; Ms-Papers-0032-0669a-06. Object #1030062. These letters are searchable in English and Māori at <http://mp.natlib.govt.nz/static/introduction-mclean?tc=0&numresults=20&l=en> (date of last access 1 April 2013).

53 C Orange *The Treaty of Waitangi*, above n 40, at 17.

regardless of the common understanding of the Articles, was surely looked upon as a significant event affecting all, or most Māori. Haami Piripi identifies the signing by rangatira over the course of 1840 of the Treaty as the "earliest evidence of commitment to a public good in New Zealand".[54]

By the early 1840s all three conditions for a civic collectivism to be in place can be identified in the North, and beyond. Māori social and political organisation had changed in the early decades of the century so that iwi, while still not the primary political unit, could cohere, when required to achieve specific purposes. This evolution, married with the growing sense of Māori identity as distinct and separate from "Pākehā", proved fertile ground for the development of the notion that hapū and iwi could have interests in common, and that it could be possible to be responsible for making "good" decisions for "Māori" rather than just for one's own immediate or closely related hapū.

In an obvious, and by no means isolated, example of the fruits of this civic collectivism, Wiremu Tamihana Te Waharoa Tarapipipi, rangatira of the Ngāti Haua iwi (also known as "The Kingmaker" and described by Boast as "a remarkable constitutional theorist"[55]) convened a rūnanga (assembly) for Waikato tribes at Paetai over the course of several days in May 1857. Much negotiation occurred between iwi "loyal" to the Governor, and those wanting to establish a Māori king. Tamihana was adamant that the establishment of such a king was to be a unifying symbol, but was also to provide a way for iwi to constitute their own organs of government:[56]

> I love New Zealand. I want order and laws. The king could give us these better than the Governor; for the Governor has never done anything except when a pakeha is killed; he lets us kill each other and fight. A king would stop these evils.

Over a year later the decision was taken to choose Te Wherowhero to be the first Māori king, Potatau, at the great rūnanga at Ngaruawāhia in June 1858. An account given by Thomas Buddle noted the following speech (in translation) given by Tamihana once the decision had been arrived at that Potatau would be installed as the first Māori king as a lawgiver:[57]

> We have united this day to give the power into the hands of one man, so as to give force to the laws of God and man amongst us. The birds of heaven are uniting and warbling their thoughts, the fishes in the sea are doing the like, the rivers and rivulets are running into one body, and so we are uniting to give hands and feet to

54 H Piripi "Te Tiriti O Waitangi and The New Zealand Public Sector" in V Tawhai and K Gray-Sharp (eds) *"Always Speaking" – The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington 2011) at 229–244.

55 R Boast *Buying The Land, Selling The Land*, above n 16, at 30.

56 *Daily Southern Cross* (Auckland, New Zealand, 5 June 1857) vol xiv (1037) at 3. Available at <http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=dsc18570605.2.12&e=-------10--1----0--> (date of last access 1 April 2013).

57 See Rev T Buddle *The Maori King Movement in New Zealand* (The New Zealander Office, Auckland, 1860) 13–14. This account was also published in the *Lyttelton Times* (Canterbury, New Zealand, 24 July 1858). vol x (597), available at <http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=LT18580724&e=-------10--1----0--> (date of last access 1 April 2013).

> this man, that he may assist the oppressed and wrench the sword out of the hands of those that are dark.

It is important to note that Potatau's accession to the throne was contested and debated over the course of many gatherings, and rejected by a significant number of iwi. The fact that the Kīngitanga was never to become the unified body for all Māori as Tamihana wanted does not contradict or undermine in any way the existence, by the 1850s, of the notion that tribes and hapū could come together to make decisions for potentially all Māori. Over the course of the 19th century, in fact, there was no fatal incompatibility between tribalism and the development of a broader Māori civic collectivism,[58] but there was certainly tension between these two modes of collectivism. The growth of civic collectivism continued to develop, finding expression in many subsequent Māori political movements, the Repudiation movement, the Kotahitanga movement and the National Māori Congress, the Māori War Effort Organisation of the 1940s, the development of the National Māori Council, the Māori Women's Welfare league, Te Reo Māori Society, and many others, as well as the growth of modern broader-based political parties such as Mana Motuhake, the Mana and Māori Parties. The fact that many such organisations were never able to make decisions for Māori that had the kind of wide impact they wanted does not negate the existence of civic collectivism as a major driving force over the course of New Zealand legal and political history. Civic collectivism and the notion of civic obligation did not replace other more localised or hapū-based collectivism at all, and Māori constitutional history may even be defined by an ever present tension between civic and more kin-based collective imperatives.

Civic collectivism between Māori who were not necessarily connected by direct kinship was more than a theoretical idea; it required a mode of application, and the pre-eminent mode of fostering civic collectivism became the same as that utilised for more ordinary tribal collectivism: the hui, or more specifically, the rūnanga (assembly). Indeed, rūnanga as a means of collective decision-making and public assemblage in the mid-late 19th century, were important adaptations of traditional mechanisms, just as kōmiti in their many forms met tribal and broader public needs.[59]

D. Public Participation

This section briefly explores the second line of inquiry prompted by the identification of the "keywords" set out in Part II. Specifically, "kotahitanga", "rūnanga", "pitihana" and "kāwanatanga" not only refer to collective decision-making, but also to group participation and public input in those processes. This section briefly explores how rūnanga, and similar decision-making bodies were utilised particularly in the 19th century, not only in order to achieve civic

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58 V O'Malley "Reinventing Tribal Mechanisms of Governance: The Emergence of Maori Rūnanga and Komiti in New Zealand Before 1900" (2009) 56(1) Ethnohistory 69 at 89. However, in regards to modern manifestations of tribalism, contrast E Rata "Encircling The Commons: Neotribal Capitalism in New Zealand Since 2000" (2001) 11 *Anthropological Theory* 327 at 337ff.

59 O'Malley "Reinventing Tribal Mechanisms of Governance", above n 56 at 89.

collectivism and uphold civic obligations, but also to enable public participation and input as a part of Māori civic decision-making.

Civic collectivism can be identified as an important driving force for Māori political activity requiring that civic decision-making power by Māori be exercised with civic collective ends and civic obligations in mind. It is clear, over the course of the 19th century and beyond, that public participation – that is participation by ordinary Māori, as well as by rangatira, in civic decision-making is a critically important part of contesting and of ensuring the validity of any such decisions made. Of the 14 constitutional milestones identified in section B, nine occurred by way of, or were given legitimacy by, public gathering.

During the 19th century the phenomenon of rūnanga served to demonstrate the importance of public participation in Māori civic decision-making. Māori ability to effect public participation and appropriate procedures in civic decision-making came under threat as the 19th century progressed, particularly when the Crown attempted to co-opt Māori decision-making bodies, such as rūnanga. That such civic participation has been, and continues to be, vulnerable to other political imperatives does not render it any less important as a valued component of Māori constitutional development.

In fact one response to the increasing formalism of Crown-established or directed rūnanga and other similar bodies, and the growing exclusion of Māori from participation in civic decision-making, may well be seen in the extraordinary use made by Māori throughout the country of the capacity to submit petitions to the Crown, particularly from 1872, to submit petitions to the Native Affairs Committee often as a means of contesting, and seeking to influence directly, the exercise by the Crown and its institutions of public power.

1. *Rūnanga*

> "I ngā rā o mua i noho hapū te Māori, engari nō te wā nei ka noho komiti kē."[60]

There is strong evidence that the institution of rūnanga as a mode of collective decisionmaking within and between hapū went through considerable change in the early decades of the 19th century. This change ensured that the growing civic identity for Māori referred to in section C was to have at its disposal a vitally important institution for the exercise of civic decision-making power.

Benton (and others) describe the traditional meaning of rūnanga: "A local term, probably derived from the nominalized form of rūnā - draw together with a cord; steer; keep in line; assemble." [61] An early reference demonstrating the traditional role of rūnanga comes from *Ngā Mōteatea* in a lament for Tuwhare,

60 "In the days of yore we lived under the control of our extended families, today it is at the behest of committees" – Tainui Stephens (Whaikōrero, dedication of Te Tokotoru Tapu, Wainui Marae, Ahipara 13 April 2013) (translation: T Stephens).

61 See R Benton, A Frame and P Meredith (eds) *Te Mātāpunenga: A Compendium of References To The Concepts and Institutions of Maori Customary Law*, above n 13, at 312.

son of Taaoho, senior rangatira of of Te Roroa, and Ngāti Whātua who died in 1820. (Emphasis added):[62]

> I te nohonga **rūnanga**,e
> I a Matohi mā nei
> Tēnei ngā patu, ē, kei ō mātua,
> Kei a Muru-paenga,ē, hei here i te waka;
> Hei kōrero tū, hei whakaaro i te riri.
>
> In **council** you oft sat with Matohi and the others.
> Here there are weapons still with you elders;
> With Muru-paenga, he who will fasten the canoe;
> Or in flowing speech, will deliver plans of war.[63]

As noted by Vincent O'Malley pre-contact dispute resolution, and satisfaction for wrongs will often have been achieved by way of a taua muru, or by the imposition of a rāhui.[64] This remained the case for some time after contact, but the post-contact era began to see different parties to disputes emerge. Rangatira and ordinary people within traditional tribal groupings began to behave in collective ways, intended to achieve collective ends to impact, not only upon their immediate hapū, but also upon Māori who were not part of their immediate kin structure; including other hapū and iwi. Such change was reflected in the increased use and modification of the traditional rūnanga.

(a) Public participation

In the post-war era of the 1830s, 40s and beyond, rūnanga and newly coined komiti (committees) underwent a reinvigoration. They provided new methods and spaces by which, and within which, decisions could be reached and disputes settled, with the use of tikanga Māori,[65] even as the nature of the basis upon which those disputes were founded was changing.[66] These fora allowed, as traditional rūnanga also had, for the airing of new kinds of disputes and the public playing out of the contestable nature of those disputes. In fact, as noted by Fenton in 1857, the gathering, and public participation by ordinary people in assembly was critically important:[67]

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62 "He Tangi mō Tuwhare" in A Ngata and P Jones (ed) *Ngā Moteatea: The Songs Part III* (Auckland University Press, Auckland, 2006) 291 at 552–553.

63 See above, n 61. Translation in the original.

64 O'Malley "Reinventing Tribal Mechanisms of Governance", above n 56, at 73.

65 O'Malley "Reinventing Tribal Mechanisms of Governance", above n 56 at 75: "Cattle trespass, pigs caught rooting in tapu spots, the ownership of imported items and animals, for which there was no precedent, the division of proceeds earned from working for Europeans, and sundry other matters all added to the number of issues now requiring resolution."

66 Ballara *Taua: 'Musket Wars', 'Land Wars', Or Tikanga? Warfare in Māori Society in The Early Nineteenth Century*, above n 38, 436–443. The word "rūnanga" was also chosen to translate concepts such as "council", "assembly" and "consult", See R Benton, A Frame and P Meredith (eds) *Te Mātāpunenga: A Compendium of References To The Concepts and Institutions of Maori Customary Law* above n 13.

67 FD Fenton, "Report As To Native Affairs in the Waikato District, March 1857" [1860] AJHR E-1c at 11. Available at <http://atojs.natlib.govt.nz/cgi-bin/atojs?a=d&d=ajhr1860-i.2.1.6.4&e=-------10--1------0--> (date of last access 31 March 2013).

> No system of government that the world ever saw can be more democratic than that of the Māoris. The chief alone has no power. The whole tribe deliberate[s] on every subject, not only politically on such as are of public interest, but even judicially they hold their "komitis" [committees] on every private quarrel. ... In case of a war the old chief would be a paramount dictator: in times of peace he is an ordinary citizen. "*Ma te runanga e whakatu i a au, ka tu ahau.*" "*If the assembly constitutes me, I shall be established,*" is an expression I heard used by a chief of rank, and perfectly represents the public sentiment on the question.[68] (Emphasis added)

The rūnanga had, by the 1850s, developed broader usage, even between hapū or district-wide, adopting distinct procedures influenced by European committee procedures.[69] In addition to distinct procedures that rūnanga adopted to fit the applicable circumstances, they were understood by Pākehā observers to be an important way of gauging popular Māori opinion. In 1860, Donald McLean was asked about his observation of the rūnanga at an inquiry launched by Governor Gore-Browne in order to determine the usefulness of establishing government-sponsored rūnanga in opposition to the Kīngitanga. He certainly saw the rūnanga as an expression of Māori political will: "I believe that the runanga has been much more resorted to as a means of ascertaining the popular will among some of the tribes within the last few years."[70]

In a number of later cases many rūnanga dispensed with true assembly-based decision-making, although accountability to the collective was often maintained by having the rūnanga conducted before all of the people of the locale that were involved.[71] Even when such assembly-based decision-making declined, the importance of the assembly of people to observe, and validate proceedings remained. As already shown in section C, the institution of the Kīngitanga and its ongoing operation was accompanied by many public gatherings. The ongoing importance of public gathering to the Kīngitanga remains today, as demonstrated by the 28 annual Poukai carried on throughout the Tainui Confederation.[72] Public gatherings were also important to the functioning and validation of the activities of the various parliaments held between 1879 and the end of the century. Over 300 attended the parliament called by Paora Tuhaere at Ōrakei in 1879, over 1000 individuals and 50

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68 For numerous other European accounts of women, old people, and children speaking at rūnanga, see *Te Manuhiri Tuarangi and Maori Intelligencer* (No. 10, Auckland, New Zealand, 1 August 1861) at 11; "Correspondence Explanatory of the Relations between his Excellency and his Responsible Advisers in Reference to Native Affairs" [1858] AJHR E-5 at 9; JS Polack *Manners and Customs of The New Zealanders* (James Madden and Co, London, 1840) at 61.

69 A district wide rūnanga operated in Turanga for many years, See O'Malley, "Reinventing Tribal Mechanisms of Governance", above n 56 at 79.

70 "Minutes of Evidence Taken Before The Waikato Committee" [1860] AJHR F-3 at 96–97 in R Benton, A Frame and P Meredith (eds) *Te Mātāpunenga: A Compendium of References To The Concepts and Institutions of Maori Customary Law,* above n 13.

71 O'Malley "Reinventing Tribal Mechanisms of Governance", above n 56, at 77.

72 T van Meijl "The Poukai Ceremony of the Māori King Movement: an Ethnohistorical Interpretation" *The Journal of The Polynesian Society* Vol. 118, No. 3 (September 2009) 233, at 233.

individual rangatira attended a hui at in the Bay of Islands in 1892 to arrange the structure of the first Paremata Māori.[73]

Even Māori architecture testified to the importance placed upon public participation in the mid to late late 19th century.[74] The 1860s and 1870s alone saw the construction of approximately 24 great whare rūnanga all built by North Island Māori communities: "to host large political gatherings and/or to symbolize alliances between groups in opposition to the colonial government."[75] Such houses were often used for hosting of the later parliaments (such as Te Tiriti o Waitangi at Pewhairangi built in 1881 for the 1892 hui mentioned above).

(b) Co-option

The role of the public in supporting and validating civic decision-making was important, but direct public input into the making of such decisions did decline, as can be seen when the Crown attempted to co-opt the way in which rūnanga operated, as occurred with the failed establishment of George Grey's District Rūnanga system by way of the Native Districts Regulation Act 1858, alongside the Native Circuit Courts Act 1858.[76] The powers of these Rūnanga were to be fairly wide: the creation of by-laws, management of Native school inspections, construction of hospitals, as well as the determination of disputed land boundaries.[77]

Even as the Crown expended some considerable effort in establishing these rūnanga, and capitalising on existing rūnanga success within Māori communities, it also sought to restrict public participation in the new hybrid bodies. In 1862 a gathering of 500, convened at the inception of the Government-convened Bay of Islands District Rūnanga, complained almost immediately at the requirement that only 10 representatives could represent all the interests of all hapū. A further two members were consequently added, but greater public participation and representation were not facilitated.[78] Unofficial rūnanga, largely in response to this over formalisation and restricted representation, continued to thrive, much to the government's frustration over the ensuing years.[79]

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73 Cox *Kotahitanga – The Search For Māori Political Unity*, above n 11, 66–68.

74 D Brown *Māori Architecture – From Fale To Wharenui and Beyond* (Raupō, Auckland, 2009) at 48–49.

75 J Sissons "Building a House Society", above n 10, at 379. Examples include Mataatua (Ngāti Awa), Tamatekapua (Ngāti Whakaue) and Te Tokanganui built by Te Kooti for the Māori King. Sisson argues that this era of "settlement houses" has largely passed, as landholdings became more fractured by the end of the 19th century; leading to a new emergence of the hapū house as barometers of social worth in Māori society. His analysis did not take into account the development of urban marae complexes in the 20th century.

76 Other attempts to "connect" the traditional rūnanga to formal government bodies included the Native Councils Bill 1860, Native Committees Act 1883, and the Native Land Administration Act 1886. The Māori Councils Act 1900 too can be seen as descended from those earlier efforts.

77 V O'Malley "English Law and the Māori Response: a Case Study From The Rūnanga System in Northland", 1861-65 *The Journal of The Polynesian Society*, 2007 7–33, at 18.

78 Malley, above n 75, at 23.

79 Malley, above n 75, at 25ff.

power provides a more relevant foundation for investigating how such attitudes survive today and ought to be fostered in the future.

Further research on modern manifestations of Māori constitutionalism might provide further demonstration of the existence and characteristics of the Māori *demos*. For example, another legacy of 19th century conditions is that there remain today specific markers of legality that members of the Māori *demos* can currently choose to utilise that other New Zealanders cannot in the same way. For instance, differential regulation underpinning the choice by Māori to enrol either on the Māori or General electoral roll, [89] as well as utilising access to the Māori Land Court and laying a claim before the Waitangi Tribunal. If Māori are a distinct constitutional people, as this article argues, with a distinct constitutional culture, a question for further consideration might also be: does this have implications for Māori, comprising, with Pākehā, a single constituent subject?[90] Can it be argued, for example, that Māori and Pākehā comprise more than one constituent subject? These and other questions about the modern nature of the Māori *demos* await further consideration and research.

89 A Geddis "A Dual Track Democracy? The Symbolic Role of the Māori Seats in New Zealand's Electoral System" (2006) 5(4) Election Law Journal Vol 5, no 4, 2006, 347 at 353.

90 See J Colon-Rios "New Zealand's Constitutional Crisis" (2011) 24(3) NZULR 449 at 475-476.