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"BODY SNATCHING" IN CONTEMPORARY AOTEAROA/ NEW ZEALAND:
A LEGAL CONFLICT BETWEEN CULTURES

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A thesis submitted for the degree of Master of Laws,
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DIE BESCHÄFTIGUNG MIT DEM TODE IST DIE WURZEL DER KULTUR.

(People's preoccupation with death is the root of culture.)

Friedrich Dürrenmatt (*05.01.1921 – †14.12.1990)
Introduction

In recent years, there have been several high profile instances where Māori whānau have taken the body of a loved one against the wishes of other immediate family members for the purposes of burying the relative on ancestral land. A high profile incident occurred in 1995, with the uplifting of the entertainer Billy T. James’ body from his home by his uncle, so that, in accordance with Māori custom, the body could lie on a marae for a period of mourning. Since the Billy T. James case, there have been a number of so-called “body snatching” incidents including the “snatching” of the body of John Takamore, and the “snatching” of the body of Tina Marshall-McMenamin.

In December 2007, Tina Marshall-McMenamin died from a suspected drug overdose. Despite arrangements for a Wellington funeral being agreed to, her body was allegedly taken from a Lower Hutt funeral home by her father who drove away with his daughter’s corpse. Her fiancé attempted to drive after him but was blocked by other Māori whānau members. Her body was buried on Ngati Porou land in Ruatoria the next day, although the High Court granted an interim injunction before the burial. Her father told the media afterwards that he had heard that a court injunction was pending, but did not want to wait. Her fiancé was upset that Tina was buried in a town she may never have visited, even though she was not brought up as a Māori and did not know that side of her family. In the end, Tina’s body was disinterred after the families came to an agreement, and the cremated ashes were given to her adoptive family after a High Court hearing at Wellington.

James Takamore died on 17 August 2007. Ms Clarke, the sole executrix of Takamore and his de facto partner, claimed in her affidavit that the deceased wanted to be buried in

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1 Extended families.
2 Traditional, sacred meeting place of Māori people.
3 *Awa v Independent News Auckland Ltd* [1995] 3 NZLR 701 (HC); affd [1997] 3 NZLR 594 (CA) [hereinafter: *Awa*].
4 He has recently been sentenced to two-and-a-half years’ jail for Tina’s manslaughter after injecting her with a fatal shot of morphine [*R v Cox* unreported, HC Wellington, CRI-2008-035-549, 5 March 2009, Clifford J].
7 He mentioned in his will that he wanted to be buried but did not specify where; J. Ihaka *Burial rows give police cultural nightmare* (Auckland, National, 4/5/2009) New Zealand Herald [hereinafter: Ihaka].
Christchurch. However, his body was removed by members of the Taneatua whānau and buried in the Bay of Plenty near Opotoki, even though Panckhurst J granted an interim injunction before the burial. Since the Taneatua whānau refused to relinquish the body, Ms Clarke was granted an order from the High Court at Christchurch forcing the whānau to exhume Takamore’s body from the marae. Additionally, the Ministry of Health issued a disinterment license to the police, with the intention of enabling police forces to comply with the High Court order.

These recent cases have graphically highlighted a gap in law whereby because there is no legal property in a dead body, the police are unable to resort to criminal law to pursue charges of theft. Under the current law it is arguable that a person taking the corpse could only be accused of theft of the coffin, theft of sheets/clothing or theft of tangible things worn by the deceased. Such charges were not brought in any of the above cases.

Because of the inconsistent status, the Ministry of Justice recently recommended that the power to seize bodies with or without a warrant in case of disputes over burial arrangements should be given to the police. However, this is not the only potential solution. Several academics writing in the area have made different suggestions on how to solve the issue. Their proposals stem from various areas of law where property issues are prevalent and the Coroners Act 2006, as integral part of the New Zealand law, is indicatory.

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9 This interim injunction on an ex parte basis was granted on 21 August 2007 by Panckhurst J referred to in Clarke v Takamore, idem.
10 Ihaka, supra n 7.
14 Crimes Act 1961, s219(1),(2). This matter will be considered more fully in the third chapter.
On the other hand, different cultural values may result in potential conflicts about the type of funeral that is appropriate. While most New Zealanders may be familiar with Christian burial rituals, not everyone is familiar with the Māori funeral practice, “tangihanga.” For Māori and many other people with religious views (orthodox or unorthodox), death and interment remain deeply rooted in culture and religion and are normally not considered in legal terms, but as an intrinsically cultural or religious event. At present, New Zealand legislation is in fact silent on whether the tangihanga ceremony should be recognised in courts. This begs the question: Who is to say which beliefs are suitable and which are not? Does te Tiriti o Waitangi/the Treaty of Waitangi,17 which is acknowledged to be the founding document of New Zealand,18 give preference to the position of the Māori whānau over the position of family members from other ethnic groups?

Further, it is questionable to what extent the deceased’s (posthumous) autonomy should be protected by law. This raises further questions about the responsibility for funeral arrangements.19 The Human Tissue Act 2008 will play a key role in this discussion, since this issue is closely related to the complexities of organ donation, which have proliferated in recent years.

The main purpose of this thesis is to consider whether legal sanctions would be capable of deterring the practice of “body snatching,” and, if so, whether the law should be reformed in New Zealand to clarify the legal situation of ownership in, and burial of, a dead body. The project will involve an analysis of existing law, proposed law changes, tikanga Māori, and comparative law elements. It will examine and synthesise primary and secondary legal sources, including relevant case law and statutory law. More specifically, the research aim is to provide an explanation of the legal aspects of the “body snatching” issue within Aotearoa/New Zealand, as it occurs within bicultural Māori and Pākehā20 families.

17 Hereinafter this document is referred to as the Treaty of Waitangi, or simply the Treaty. This reference is intended to be a reference to both the Māori and English texts of this document.
19 The deceased may have misguided assumptions about burial instructions expressed in his/her will.
20 The term Pākehā describes New Zealanders of British origin.
To give context to recent events, *chapter one* of this thesis traces the development of, and differences between, Māori culture and tikanga, and Christianity.\(^{21}\)

*Chapter two* provides an overview of the historical legislation regarding rights of the Indigenous People of New Zealand derived from the Treaty, followed by the question of whether Māori tikanga (particularly on burial) is recognised within New Zealand law. It also discusses the legal aspects of the Treaty in New Zealand, the legal obligation of the Crown to honour and respect tikanga Māori relating to burial, and the principles of the Treaty, as handed down by all five judges in the landmark decision *New Zealand Māori Council v Attorney-General.*\(^{22}\) The chapter concludes that New Zealand courts should recognise the right of Māori to bury whānau according to the tangihanga even though legislation is silent on these rights.\(^{23}\)

*Chapter three* explores the possibility of proprietary and possessory rights in corpses. The chapter will come to the conclusion that the common law does not consider corpses as the subject of property (so-called "no property" rule). An analysis of the issue of who has the right to possession for the purpose of burial, which distinguishes between a person dying testate and intestate, will follow this discussion.

The purpose of *chapter four* is to examine the protection and enforcement of various proprietary and possessory rights, elaborating on criminal sanctions and actions in tort.

*Chapter five* will establish whether a law change is needed in New Zealand after recent cases of "body snatching". Following a positive affirmation, the thesis will examine and critically analyse several solutions, evaluating in particular, the rejection of the "no property" rule. In this context, comparisons between New Zealand law, other common law countries, and civil law countries (for example Germany) will provide practical suggestions. In the end, the chapter will attempt to reassess the discussion on "body snatching" also in the light of succession law, positing that amendments to the Wills Act 2007 could have the effect strived for. Finally, chapter five will come to the conclusion that there is no single clear solution available, and that a combination of solutions is a better approach.

\(^{21}\) According to the 2006 census, Christianity is the predominant religion in New Zealand, observed by 55.6% of the population (available to view at: <http://en.wikipedia.org/wiki/New_zealand>). Therefore, the thesis will contrast mainly Christianity and Māoridom. Islam and Judaism are discussed at suitable opportunities.  

\(^{22}\) [1987] 1 NZLR 641 (HC & CA) [hereinafter: *Lands case*]. The Judges expressed their reasons in five different, but consistent, judgments.  

\(^{23}\) The Bill of Rights Act 1990 is not within the scope of this chapter.
Chapter six provides a conclusion and outlines those legislative amendments that should be adapted to New Zealand law.

Before proceeding to chapter one, one brief comment relating to the meaning and history of the term “body snatching,” which is used commonly in New Zealand’s newspaper articles, must be made. Black’s Law Dictionary describes “body snatching” as “[t]he unlawful removal of a corpse, esp. from a grave.” This definition arose in 19th century Europe where “body snatching” was frequent in wide sections of the educated population. In New Zealand, the first court decision referring to “body snatching” was on 16 October 1995. This decision aroused large media interest due to the fact that it focused on the body of Billy T. James. The High Court considered the question of whether the use of the expression “body snatcher” in a newspaper article to describe a person was defamatory. The publisher could prove that by calling the plaintiff “body snatcher” the commentator was expressing an honestly held opinion without malice, on a matter of legitimate public interest (as affirmed in the Defamation Act 1992, s9), and that he was not making a comment about Māori practice and custom as such. Therefore, the High Court found the respondent not liable in defamation. The judges concluded that readers would have understood the expression as meaning that the plaintiff was “somebody who had taken a body without proper justification.” In the context of this thesis the expression “body snatcher” or “body snatching” should not be misread but be used to describe the taking of a corpse with the intention to bury it elsewhere without the consent of the other side of the family.

25 University lecturers and their students around Europe, for anatomical studies, snatched corpses from graveyards because the only legal way to get a corpse for anatomical intentions was by regulatory action, and only the corpses of people who had been condemned to death and dissection by court were supplied for anatomical. For detailed information see, eg G. MacGregor The history of Burke and Hare and of the ressurectionist times (Glasgow: T.D. Morison, 1884) p 14; S.C. Lawrence Beyond the Grave-The Use and Meaning of Human Body Parts: A Historical Introduction (Research paper, University of Nebraska Faculty Publications, Department of History, 1998) p 111, 118 [hereinafter: Lawrence]; available to view at: <http:/ /digitalcommons.unl.edu/historyfacpub/37> (accessed 12/11/2008).
26 Awa (HC), supra n 3.
27 Idem. Mr Awa, an uncle of Billy T. James claimed that he had been defamed in a newspaper article describing him as “Billy’s body-snatching Uncle Bill”. That was a reference to an incident where Awa took the body of his nephew from his home against the wishes of his widow, so that he could bring him to a marae, where the body could lie for a period of mourning before being buried.
28 Awa (HC), supra n 3 at 590.
29 As some academics criticized. For example, the Māori Law Review [Awa v Independent News Auckland Limited (1997) 2-3] points out that the Human Rights Act 1993 and the law of defamation do not set “an acceptable response to the problem confronting a bicultural nation”. They believe that the judges failed to acknowledge tikanga Māori. Consequentially, Māori status as the tangata whenua of Aotearoa is in jeopardy.
Chapter 1: Māori and Christian Funeral Rites

A Introduction

It is believed that the interment of dead bodies dates back to the Neanderthal man in 70,000 B.C.E. From then on, various burial rites developed within different religious and cultural groups. Even though the actual procedure of the ritual depends on the particular religious and cultural affiliation, some similarities between cultures exist. The predominant religion in New Zealand is Christianity, observed by 55.6% of the population. Today Māori make up approximately 15% of New Zealand's population. In order to reasonably understand the "body snatching" conflict, this chapter will analyse both Māori and Christian religious beliefs, because they encompass significantly different practices for the disposal of a deceased's body. This chapter will then draw a comparison between the Christian and Māori funeral ritual, and subsequently suggest how a cultural conflict may occur.

B Tangihanga: Māori Ceremony of the Dead

I. Miioridom: Mythical Origins of Death

Māori believe that people derive from two immortal personifications: Ranginui, the Sky Father, and Papatūanuku, the Earth Mother. People, therefore, have a Te Tahā Wairua (immortal life force). Elsdon Best points out that Māori culture distinguishes three kinds of death: mate aitu or mate tara whare, death as the result of disease; mate tāua, death in battle.

31 For example, both orthodox Jews and Muslims emphasize the importance of treating the dead body with dignity and that the norm should be to bury the entire body as swiftly as possible, see S. McGuinness & M. Brazier "Respecting the Living Means Respecting the Dead too" (2008) 28 Oxford Journal of Legal Studies 297, 307 [hereinafter: McGuinness & Brazier].
33 Idem.
tle; and mate whaiwhaiiaa, death of witchcraft. Whatever the cause of death, the underlying cause was supernatural. For example, if Māori break the law of tapu (sanctity, sacred) by not living in harmony with the nature, the anger and wrath of the Gods (Atua and Tipua) will invoke, followed by the breakdown of a person’s defence. The evil influences could cause mate wairua (spiritual sickness) and, at worst, result in death.

Symbolically, an old Māori expression describes the subsequent funeral ritual: “Me tangi, ka pa ko te mate it e marama,” which means “Let us weep over him; he has departed for ever; if he had disappeared like the old moon we would not have mourned– he would have appeared to us anew after time.”

II. The Rituals of Tangihanga

In essence, the term “tangihanga” describes the Māori approach to the process of mourning for someone who has died. The noun “tangihanga” is literally translated as “weeping, crying, sound, funeral [or] rites of the dead.” The ritual itself customarily consists of three phases: the initiation of the public, the ceremony itself, and the disposal of the tūpāpaku (body of the deceased person). Since a common belief is that the tūpāpaku should never be left alone after death, traditionally the whānau pani (close family members) guard the body during the tangihanga. This is consistent with the common belief that the wairua (spirit) remains with the tūpāpaku until it is finally buried. Māori generally know what is expected from them during the tangihanga ceremony. Everyone is entitled to participate in the tangihanga event, which usually takes place over a number of days, and during which grief is publicly shared. The ritual itself is often a chance to meet with whānau and distant relatives. It is common for various speakers to narrate the deceased’s life, as public

35 Best, ibid, at 69. Hinetitamata is dreaded as the goddess of death
37 Department of Health (NZ) The Undiscover’d Country- Customs of the cultural and ethnic groups of New Zealand concerning death and dying (Wellington: The Department, 1987) p 3 [hereinafter: Department of Health].
38 G. George Ko ngā whakapepeha me ngā whakaahuareka a ngā tipuna o Aotearoa/ Proverbial and popular sayings of the ancestors of the New Zealand race (Christchurch: Kiwi Publisher, 2004) p 80.
39 Usually abbreviated to “tangi”.
42 Mead, supra n 36 at 137.
43 Oppenheim, supra n 41 at 22; Continuing Education Unit Radio New Zealand Whaikoorero- Ceremonial Farewells to the death (Wellington: The Unit, 1981) p 3.
sharing of grief is believed to strengthen social cohesion. The topic of the kōrero (talks) can either be “cordial” and “hilarious” or even “honest” and “uncomplimentary.” In general, public grieving is one of the two Māori funeral rituals. Nin Tomas specifies these ideals as follows:

...first that short-term grief is best openly expressed and public shared amongst whānau [family] and friends, and second, that the dead should rest amongst their kin in their ancestral land.

The tangihanga is commonly held on a marae, close to the urupā (cemetery). Both the location of the tangihanga and the burial ground are decided by the bereaved family or tribal elder. Therefore, one might assume that the deceased becomes a property of the whānau. If the dead person has links to more than one tribe, disputes may arise between the whānau as to where the tangihanga should be held, and the tūpāpaku should be laid to rest. The matter is usually determined by negotiation as to who has the stronger case. Even though these negotiations can be stressful and heated, such talks are a sign of love and respect for the deceased.

It is common that the coffin is left open during the whole ceremony so that mourners can touch, hug, or kiss the tūpāpaku, accompany the deceased during his final days on earth, and express their grief. With the burial, the recently dead are relieved into the care of Earth Mother and interred into the belly of Papatūānuku from whence people sprang. According to Māori legend, Earth Mother said:

Leave me the dead. Let them return within me. I brought them forth to the light of day; let them return to me [when dead]. Mine shall be the care of the dead.

44 Tomas (2008), supra n 16 at 233.
45 Note that the practices and protocols can differ from tribe to tribe, but the ceremony is similar throughout Māoridom.
46 Tomas (2008), supra n 16 at 223.
47 Nowadays, tangihanga are also held at private residences and funeral parlours.
48 Department of Health, supra n 37 at 8.
49 Interview with J. Hayes, supra n 12.
52 Traditionally the tūpāpaku is laid upon mats of woven or plaited fibres of New Zealand flax, or of kiekie (a climbing plant with leaves which contain a strong fibre).
53 Best, supra n 34 at 41.
It follows that the wairua eventually leaves the body and journeys upwards to the Sky Father, Ranginui, immigrating to an afterworld called the Reinga.\(^54\) In Māori legend, Cape Reinga is the “jumping-off” place for the land of hereafter.\(^55\) Then, the soul returns to the land it came from, and the body comes back to the bosom of Earth Mother.\(^56\)

III. The Tūpāpaku

When a Māori person dies at a private home instead of a marae, the local hapū formally ask the spouse and family whether the tūpāpaku can be taken to the marae. In case of frictions between different tribes, negotiations will be held until an amicable solution is reached. This sometimes leads to compromise, such as the tūpāpaku staying at a marae one night and then at another marae, until it finally gets to the marae where the tangihanga will be held.\(^57\) Bigger issues may arise when a Māori person dies at a hospital, or delays might occur due to coronial inquest if the death was unexpected.

C Christian Burial Rites

Even though attitudes to death and burial vary greatly amongst Christians, similarities exist. It is, for example, common that when a Christian dies a funeral is held\(^58\) for the friends and family to grieve for the deceased and give thanks for their live. It is a common Christian tradition that close family members have the right to decide where the deceased’s body is buried. There is usually a hierarchy in decision-making on funeral arrangements: First in line is the spouse, followed by children and parents, and then the siblings.\(^59\) This person(s) arranges the funeral in consultation with the funeral director, priest or pastor.\(^60\) Commonly, adherents of Christian denominations are buried in graveyards or cremated within a church service and prayer. The ceremony itself is commonly held at a church which is affiliated to a graveyard. Family members, close friends, and colleagues attend the burial ceremony.

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\(^54\) Oppenheim, supra n 41 at 93; Mead, supra n 36 at 147; Reed, supra n 34 at 91.
\(^56\) Tomas (2008), supra n 16 at 235.
\(^57\) Department of Health, supra n 37 at 5.
\(^58\) Traditionally, about a week after death, see BBC Home; available to view at: <http://www.bbc.co.uk/religion/religion/Christianity/ritesrituals/funerals.shtml> (accessed 4/2/2009).
\(^59\) Tomas (2008), supra n 16 at 233. There is no law on this order in New Zealand, see below p 56-69.
\(^60\) Department of Health, supra n 37 at 29.
During the funeral service songs are shared and prayers of intercession are spoken. Funeral orations are commonly held by non relatives. These orations respectfully reflect the positive sides of the deceased’s life. After the burial the close family is left to grief in private.

D Differences between the Māori and Christian Processes of Mourning

Unanimity between the Māori and Christian funeral ceremony is sometimes difficult to reach. Certainly, the tangihanga differs in many ways from Christian funerals. This is not surprising as Māoridom and Christianity stem from different worlds and cultures. The main reasons for the escalation of the cases mentioned in the introduction were the differences between the funeral rituals and the lack of understanding of the opposite culture. Tomas has pointed out two cultural differences that draw adverse comment from Māori:

Without passionate displays and claims of whanaungatanga (kinship, sense of family connection) and whakapapa (descent, genealogy) to raise the mana (spiritual power) of the deceased and proclaim ancestral worth, how can his or her ongoing value as part of the community be acknowledged?

Why should the interests of the spouse take precedence over parents, uncles and aunts, and siblings, who have a longer, and ongoing association with the deceased?"61

Although a lot of European New Zealanders do not actively practise any form of Christianity, many of them believe in the Christian perspective that marriages last "until death do us apart."62 In biblical verses it says that God’s design for marriage is companionship and intimacy. It might be that the family has a longer relationship with the deceased, but in Christianity the spouse is the person who has the deepest and most intimate connection to the deceased. Conversely, genetic heritance is seen as a cultural treasure within the Māori world view because the whakapapa is handed down from one generation to the next.63 This is seen as a defining feature of Māori which becomes apparent because Māori introduce themselves by referring to their ancestors amongst each other. Thus, Māori consider the

61 Tomas (2008), supra n 16 at 233.
63 For a valuable discussion, see Mead supra n 36 at 183, 215.
relation to the spouse as not necessarily everlasting. It could be deemed a tragedy for an iwi if the deceased would be laid to rest in a Christian churchyard solely because of the spouses' wishes. In Māori estimation, one should not lose sight of the fact that a spouse may distance him/herself from the deceased and fall in love again with another partner. Hence, they believe that the location of the tangihanga should be decided by the bereaved family and not the spouse.

In regard to the first statement made above about passionate display and claims of kinship, Māori believe in the existence of mana, brought to earth and endowed by the deities. This is not conformable with Christianity's monotheistic belief. Mana is believed to be the supernatural force in a person, which is heritable (mana tipuna) but can also be lost in case of abuse. Mana, like wairua, stays in the deceased's body until it is buried. Therefore, funeral orators reflect the real way of life of the deceased, not just the honourable and good deeds, and they direct their speeches at the deceased. Straight and harsh tones are not infrequent. This is significantly different to Christian funerals. During Christian funerals, locals of the community and family members talk about the deceased in a eulogy, and not directly to him/her.64 Silent grief is not favoured by Māori.65 It is believed that by making their farewells to the dead together, the fear of expressing grief will be removed.66 While Christians commonly grieve in quiet, Māori seem to "celebrate" the tangihanga. Unsurprisingly, Māori are adverse to cremation services and wish to spend their time with the deceased before the burial.

While we have seen that there are various differences between Māoridom and Christianity, there also exist similarities. Māori, as well as Christians, will frequently lay their loved ones to rest where they lived most of their life or where they came from, if no request was made beforehand.67 Other crucial similarities are the purpose of the tangihanga/funeral. Both are to pay respect to loved ones, to come together and grieve as a group, to speak of the loved one and bury them in the ground.68


65 Best, supra n 34 at 21.


67 Since nowadays many Māori are Christians, it needs to be acknowledged that the comparison concerns Māori and European culture.

68 Other commonalities between the two funeral rituals are related to clothing. For both funeral ceremonies, black is the traditional colour for attendees. Usually, the deceased's body is dressed in its finest clothing for the ceremony, see Laulainen, supra n 64.
Fundamentally there are a lot of similarities between Māoridom and Christianity, with the crucial differences being ideology around where to bury the deceased and who gets to decide this. In this emotionally charged area it is likely that further dispute between Māori and Christian families will arise, especially because Pākehā may not be familiar with the tangihanga procedure.69 Past experiences have shown that Māori are cooperative, and compromise is normally reached in cases of disagreement with other tribes, but this does not mean that negotiations between Māori and non-indigenous New Zealanders would be successful. The Māori tikanga in tono (claim) proves the opposite by directly addressing the spouse, and implying that “in life the deceased was yours, in death he/she returns back to us, to be buried and rest alongside their own tipuna, their own people.”70 Recent disputes, such as the Takamore and Marshall-McMenamin cases, undermine this theory. As mentioned earlier, even police gave up the hope that negotiations between those two groups would lead to amicable solutions, since most negotiations were put on hold. It is of fundamental importance, however, to achieve a consensus, considering that cross-cultural relationships between Māori and other ethnical groups are more and more common in New Zealand.

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69 Since, amongst other things, most churches in New Zealand are very bi-cultural, for example the Anglican Church, Māori are familiar with the Christian funeral ceremony.
70 Matenga-Kohu & Roberts, supra n 66 at 12.
Chapter 2: Recognition of Tikanga Māori and the Treaty of Waitangi

A Introduction

The chapter seeks to answer the question of whether New Zealand should go so far in giving preference to the tikanga surrounding the tangihanga ceremony. It further questions whether there is any legal instrument, statute or case law that strengthens or recognises the significance of tikanga Māori referring to burial.

First and foremost, for a better understanding, the meaning of the expression “tikanga Māori” will be clarified. The following sections provide an overview of the historical legislation regarding rights of the Indigenous People of New Zealand derived from the Treaty, followed by the question of whether Māori tikanga (particularly on burial) is recognised within New Zealand law. New Zealand has no entrenched constitution to supplement Acts, bills, regulations and the Treaty of Waitangi. The Treaty is a unique and significant document that has never been directly incorporated into New Zealand law with binding force for general purposes. This chapter discusses whether its principles are directly or indirectly enforceable in law. Because Parliament had incorporated the Treaty principles into s9 of the State-Owned Enterprise Act 1986, the Court of Appeal interpreted and applied the principles of the Treaty of Waitangi in the Lands case. After concluding that the case itself is significant because it judicially recognises the Treaty as an evolving document, and the judges declared the importance of the “spirit of the Treaty,”71 the impact of this and other cases on New Zealand jurisprudence will be discussed. By the end of the 20th century the Treaty of Waitangi Act 1975 had established the Waitangi Tribunal, which was empowered to hear and determine claims brought by any Māori that an Act or policies of Parliament were in breach of the Treaty, and prejudiced Māori.72 Prominent incidents that helped develop the jurisprudence in the Waitangi Tribunal and courts will be described. Before examining the central question of whether the tangihanga ceremony should be recognised

71 Lands case, supra n 22 at 662.
72 Treaty of Waitangi Act 1975, s6. For further discussions, see Te Runanga o Ngai Tahu v Waitangi Tribunal [2002] 2 NZLR 179 (CA).
in courts despite legislation being silent on the issue, it will be questioned whether tikanga relating to burial should be a formal source of enforceable law in New Zealand today.

B What is Tikanga Māori?\(^{73}\)

The noun, “tikanga” is a common term that is derived from the Māori stative verb, “tika” meaning “lawful” (e.g. of behaviour) or “right” (not wrong).\(^{74}\) It has a variety of meanings, from which most are extensions of the literal meaning of tika. Because tikanga controls social events and relationships between Māori, it is important to have a basic understanding of Māori society in order to understand tikanga.

Māori consider tribes and tribalism to be important.\(^{75}\) Iwi are the largest social unit in Māori everyday population. Each iwi sub-divides into a number of hapū\(^{76}\) who are again composed of several whānau. The Ngāti Whātu iwi, for example, consists of four hapū: Te Uri-o-Hau, Te Roroa, Te Taou, and Ngati Whatua ki Orakei. Statistics New Zealand (Tatauranga Aotearoa) describes the social concept of Māori as:

the focal economic and political unit of the traditional Māori descent and kinship based hierarchy of:
- Iwi (tribe)
- Hapū (sub-tribe)
- Whānau (family).\(^{77}\)

In principle, iwi have the authority to administer tikanga in a number of different ways,\(^{78}\) and iwi can identify circumstances that require adjustments and changes to be made to ti-

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\(^{73}\) This chapter will provide an abstract of the meaning of tikanga Māori. For a valuable discussion, see N. Tomas Key Concepts of Tikanga Māori (Māoris Custom Law) in Tai Tokerau past and present (PhD Thesis, University of Auckland, Law Faculty, 2004) p 28-29; available to download at: <http://www.law.auckland.ac.nz/oa/fms/default/law/docs/Nin_Tomas_PhD.pdf> (accessed 4/2/2009) [hereinafter: Tomas (phd)], Mead, supra n 36 at 34.


\(^{75}\) New Zealand’s largest iwi, the house of Ngāpuhi stretches from Tāmaki Makaurau in the south to Cape Reinga in the north.

\(^{76}\) Who can trace ancestry to a common but remote figure.

\(^{77}\) Statistics New Zealand (Tatauranga Aotearoa) available to view at: <http://www2.stats.govt.nz/domino/external/Web/car sweb.nsf/94772cd5918085044c2567e6007ee2c24c382c1c1d4ba31cc256a41007d0cd6? > (accessed 13/11/2008).
kanga. It is the ability of tikanga to change that accounts for its variations among iwi. Nevertheless, flexibility is not so great as to allow a proposition to be advanced as tikanga, where it is in conflict with core values handed down from relatives. There is no disorder in tikanga, because protocols specify if a specific custom is carried out by a group or individuals, or if a ceremony is public (like the tangihanga) or private.

Being a traditional Māori system, it might be said that tikanga Māori was the first practised law in New Zealand. Although, as established earlier, regional differences in tikanga Māori exist, the term can be brought down to a common denominator. The Dictionary of Māori Words in New Zealand English defines “tikanga” as “Māori culture.” Some lawyers tend to recognise tikanga as “Māori custom law.” Behind this understanding lies a more profound reason: Māori generally know what is expected of them, even though the majority of Māori do not live their day-to-day lives according to tikanga. Hirini Moko Mead suggests that “there is still a long way to go to reach a time when tikanga Māori might be adopted as customary law, binding upon a majority of the Māori population.” Logically, he describes tikanga as “the set of beliefs associated with practices and procedures to be followed in conducting the affairs of a group or individual.”

Tikanga is also expressed in New Zealand’s law. For instance, the Resource Management Act 1991 (s2) and the Te Ture Whenua Māori Act 1993 (s4) defines tikanga as “customary values and practices.” The term “tikanga” appears in the third Article of the Treaty of Waitangi where it is translated (into English) as “rights.” Bishop Manuhuia Bennett has described tikanga as:

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79 This allowed for common tikanga, not only within internal hapū, but also at a regional level (Study Paper 9, supra n 74 at para 236).
81 See, eg Tomas (2008), supra n 16 at 235.
82 Mead, supra n 36 at 137.
84 *Ibid*, at 12.
...the obligation to do things in the right way: doing the right thing for no other reason than because it is the right thing to do. Tikanga draws from many seeds; it has many shades and many applications.\textsuperscript{86}

It is important to acknowledge that tikanga became more widely known and accepted by Pākehā in the final two decades of the 20th century. Nowadays tikanga is still adhered to in Māori settings, such as on the marae, and everyone present is expected to respect the tikanga in operation. The most common meaning of tikanga is “the Māori way”\textsuperscript{87} of living, this serves as a foundation for Māori customary law.

\textbf{C What Did the Treaty of Waitangi Promise?}

Māori people often refer to the Treaty of Waitangi to enforcing tikanga if they believe that their customs have not been administered by the executive or recognised by Parliament or the judiciary. But is it the Treaty’s objective to provide Māori with the opportunity to assert rights? Does it even warrant a special jurisdiction? The primary focus of this section is the Treaty in contemporary New Zealand law rather than in history. Yet, it is prudent to review the Treaty’s place in the New Zealand constitution and its historical understandings, as they are the breeding ground for contemporary understandings. The following discussion is roughly in chronological order.

\textit{I. The Signing of the Treaty in 1840}

In the early European settlement era, before the Treaty was drafted, tikanga Māori was recognised as law by ambassadors of the Crown.\textsuperscript{88} This state was not acknowledged to be perpetual, just temporary. The Crown’s aim was to initially consolidate its interest, and establish an English society in the long term. The Crown was aware of the increasing inter-

\textsuperscript{86} Discussion between the Law Commission and Bishop Bennett, 19 February 2001, Rotorua; printed in Study paper 9, supra n 74 at para 70.
\textsuperscript{87} \textit{Ibid}, at 11.
\textsuperscript{88} \textit{See}, eg E. Shortland \textit{The Southern Districts of New Zealand: A journal} (London: Longman, Brown, Green and Longmans, 1851) p 95.
rests of other imperial powers in New Zealand, which is why it required a treaty to assert its sovereignty over New Zealand.89

After years of negotiation between ambassadors of the Crown and Māori chiefs the Treaty of Waitangi (both the English and Māori text) was finally signed by approximately 500 Māori chiefs and representatives of the British Crown in 1840. The Treaty was clearly a constitutional document at that time and its drafting was a constitutional event.90 Since the Treaty of Waitangi was not considered a treaty between two or more states by the majority of non- Māori, it is not a bilateral treaty as defined in Article 2(1)(a) of the Vienna Convention on the Law of Treaties 196991 but is a “multilateral international agreement.”92 Like all treaties, it is an exchange of promises. It consists of three brief clauses, in which New Zealand became a British Colony.93 It confirmed the rights over properties of the Māori chiefs and tribes, and granted them protection. Additionally, the third Article promises the Māori the “Rights and Privileges of all British Subjects.” Overall, the Treaty signified the establishment of British law in New Zealand while ensuing Māori authority over their own culture and land.

II. Two Versions, Two Self-Understandings

Much of the controversy around the Treaty of Waitangi stems from the two linguistic versions of the Treaty.94 Some academics even suggested that the two documents are not “in

89 New Zealand Ministry of Māori Development He tirohanga o kawa ki te Tiriti o Waitangi (Wellington: Te Punı, 2001) p 28-29[hereinafter: Tiriti o Waitangi].
90 Palmer, supra n 18 at 31.
91 Which implies that a treaty is “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” New Zealand is a signature to the Vienna Convention on the Laws of Treaties and is cognitive of its obligations from the treaty.
92 J. Williams “Chapman is wrong” (1991) NZLJ 373, 374. It is ambiguous whether the Treaty is a valid international, bilingual Treaty of cession. For a valuable discussion, see B. Kingsbury “The Treaty of Waitangi some international law aspects” in I.H. Kawharu Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi (Auckland: Oxford University Press, 1989) p 121-149 (proponent); Palmer, supra n 18 at 164 (opponent).
93 For a critique of the case, see B.V. Harris “The Treaty of Waitangi and the Constitutional Future of New Zealand (2005) NZLR 189 [hereinafter: B.V. Harris]; G. Chapman “The Treaty of Waitangi- fertile ground for judicial (and academic) myth-making” (1991) NZLJ 228, 230. He states that the Treaty, alone is not the document, which New Zealand sovereignty rests upon. In his article, he slashes the meaning of the Treaty conscious that recent cases strengthened the recognition of Treaty rights.
94 The original Treaty text was in English. In February 1840 Henry Williams translated the text into Māori and then again back into English, which became the official version of the Treaty. Williams himself later observed in a letter [Public Record office, London, CO 2097 (17 February 1840) 13-15] to Governor Gipps: “I certify that the above is as literal a translation of the Treaty of Waitangi as the idiom of the language will admit of;” available to view at <http://www.treatyofwaitangi.net.nz/Ruth Ross.html> (accessed 1/5/2009).
any reasonable sense” equivalent to each other.95 In general, there are controversial questions and cases in which the Treaty’s interpretation has been ambiguous. Article two in the Māori version, for example, promises much broader rights for Māori in regard to possession of their existing taonga (treasure) than in the English version. Using the word “taonga,” the Māori version gives Māori control not only over their forests, fisheries, land and other properties, but offers protection of intellectual possessions such as culture and language. Parliament only recently accepted a wider interpretation of Māori language by recognising it as a taonga.96 From this it can be deduced that the Treaty is likely to guarantee some protection of Māori custom.

Covering sovereignty, the first Article of the Treaty attempts to balance the Crown’s sovereignty and rangatiratanga (sovereignty, ownership). Again, discrepancies between the two versions are substantial. While the English version signed the right of sovereignty over to the Crown, the Māori version, which was signed by most of the Māori tribes, granted something very different, called kawanatanga. Kawanatanga is a transliteration of the English word “governorship”. For that reason, the Māori version granted something less than complete sovereign authority to the Crown, namely limited authority of governorship over the Pākehā population only.97

Another question is whether the terms of the Treaty just applied to the tribes who signed it. In 1943, after a series of intertribal conflicts in the Bay of Plenty, the Coronial Office clarified the question by ruling that British law and the terms of the Treaty applied to every single tribe including those who had not signed the Treaty.98

The different versions aside, it was not clear as to whether the Treaty was viewed as “a domestic law contract; or as an international treaty...or as a basic constitutional document evolving in its application to changing circumstances over the years.”99 Parliament’s insertion of the principles of the Treaty of Waitangi into statute100 as per a Privy Council case

95 Briggs, supra n 85 at 311.
97 For a more valuable discussion, see Tiriti o Waitangi supra n 89 at 38-39.
98 Palmer, supra n 18 at 81; Palmer draws a parallel to the fact that British government was able to exercise power in New Zealand without all chiefs having signed the Treaty.
99 Ibid, at 671.
stating that the Treaty cannot be enforced in the Courts except insofar as a statutory recognition of the rights can be found, threw light on the matter.101

D How Was the Treaty Interpreted by the Courts between 1840 and 1970?

In the era between 1840 and 1970, there were a number of challenges facing the courts concerning the Treaty of Waitangi principles. One of the continuing debates was about native title and Māori customary rights. Others concerned the status of the Treaty. Is the Treaty legally binding or does it just have political and moral weight? Should courts nonetheless recognise Treaty rights if it is not legally binding?

The first prominent case to consider the status of the Treaty of Waitangi (The Queen v Symonds)102 in 1847 confirmed the common law recognition of native title. The case examined whether the Crown had the exclusive right of pre-emption to purchase land from Māori as stated in the Treaty. Chief Justice Martin pointed out that the Crown is the only source of title and “acts on behalf of the whole nation.”103 Hence European settlers in New Zealand could only acquire legal interest in land from the Crown, not by purchasing land directly Māori. Consequently, titles to land purchased by settlers directly from Māori tribes were deemed on the one hand to be good against Māori but on the other hand null and void against the Crown.104 In Symonds it was also held that the Crown could extinguish native title, but native title could not be extinguished by tangata whenua (Indigenous People of the land) trading their land to European settlers. The case also declared that customary title could be extinguished only by Māori selling their land to the Crown, or by legislation.

Conversely, in Wi Parata v The Bishop of Wellington & Attorney-General105 Prendergast CJ held that the Crown could unilaterally extinguish all Māori customary ownership without any court being able to challenge its decision to do so.106 Additionally, referring to

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101 Hoani Te Heuheu Tukino v Aotea District Māori Land Board [1941] NZLR 107 (SC and CA); and (1941) NZLR 590; (1941) AC 308 (PC) [hereinafter: Te Heuheu]; endorsed by the Lands case, supra n 22 at 655.
102 (1847) NZ PCC 387.
103 Ibid, at 396.
105 (1877) 3 NZ Jur (NS) 72 [hereinafter: Wi Parata].
106 Today very little land is held under Māori customary title for Māori were encouraged by the Crown to have their titles converted into statutory property rights under the Native Land Act 1865.
Māori as “barbarians”, Prendergast CJ famously ruled that “so far as it purported to cede sovereignty ... [the Treaty] must be regarded as a simple nullity.”

In 1901, the Privy Council reconsidered Prendergast J’s ruling by finding that native title to land was recognised both by statute and common law, and that executive action could not itself extinguish Māori customary title in land. The Privy Council observed that “it is rather late in the day” to say that extinguished title could not be recognised by a court. Nevertheless, New Zealand’s courts refused to follow the observations in the *Baker* case, and continued to apply *Wi Parata*.

Eventually overseas developments in recognising the existence of native rights and title led New Zealand courts and Parliament to re-think the perception of the significance of the Treaty of Waitangi. However, there was still little significant case law on the Treaty following *Baker* until the *Te Heuheu* case in 1941. In *Te Heuheu* the court ruled that unless any purported rights were incorporated into New Zealand statutes, they were not legally binding. This is due to New Zealand’s classification of international treaties where treaties have no direct legal effect in the domestic legal system unless they are incorporated into domestic law by an act of Parliament. The finding of the *Te Heuheu* case has not been displaced and remains the current position in New Zealand law.

Still, nothing had really changed in the ensuing years. *Wi Parata* was followed by New Zealand courts for many more decades until Williamson J set a “welcome trend” by rec-

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107 *Wi Parata*, supra n 105 at 78.
108 *Nireaha Tamaki v Baker* (1901) AC 561; (1901) NZPCC 371. This case upheld the part of *Wi Parata* which held that native title matters involving Crown fall within the Crown’s prerogative powers, and so can be excluded by the Crown from the jurisdiction of the courts.
109 Ibid, (NZPCC) at 382.
111 See, eg *Calder v Attorney-General of British Columbia* (1973) 34 DLR 145.
112 *Te Heuheu* (supra n 101 at 596) is still the most recent judgment by New Zealand’s highest court to consider directly the legal status of the Treaty. For examples of contemporary statutes, see J. Ruru “Treaty of Waitangi principles 20 years on” (2007) NZLJ 87, 88.
tifying part of the reasoning, in the case of Te Weehi v Regional Fisheries Officer\textsuperscript{115} in 1986. The case turned on a common law recognition of Māori fishing rights. A Māori man, who was charged with being in possession of undersized pāua,\textsuperscript{116} claimed that he was exercising a customary Māori fishing right that was exempt from the provisions of the Fisheries Act 1983.\textsuperscript{117} It was controversial whether the fishing right claimed could exist independently of proprietary rights to land. Williamson J held that rights can be non-exclusive rights to fish that do not depend on establishing ownership.\textsuperscript{118} In determining that the common law can be the substantive source of Māori claims, he emphasized the legal significance of the Treaty that was strenuously denied in Wi Parata.

In the years following the signing of the Treaty, legislation has been active in “recognising, suppressing, denying and then making further attempts in recognising”\textsuperscript{119} Māori customary law. Eventually, the Treaty was held to be both equally “valid and binding.”\textsuperscript{120} From being “a simple nullity,”\textsuperscript{121} it became a document of some importance for a society of cultural diversity and tolerance. Generally, the period following Symonds was dominated by the approach of assimilating Māori culture to the European way of life, demonstrating a lack of recognition of tikanga by the courts and Parliament. Cases like Symonds, Wi Parata and Te Weehi concerned claims based on the common law doctrine of native title. This doctrine regards the Treaty as declaratory but not the source of Māori property rights. Above all, Te Heuheu determined that Māori rights are only enforceable if the Treaty is incorporated into domestic law. This implies that tikanga related claims are vulnerable because courts might not recognise the significance of tikanga if legislation is silent on it.


\textsuperscript{116} Pāua is the Māori name for abalone, which is a univalve shellfish that lives in rocky, coastal areas at depths between one and fifteen metres.

\textsuperscript{117} Section 88(2). The section reads: “Nothing in this Act shall affect any Māori fishing rights”.

\textsuperscript{118} Te Weehi, supra n 115 at 682. More recently, the Court of Appeal reaffirmed the place of Aboriginal title in the common law of New Zealand (Te Rūnanga o Te Ika Whenua Inc Society v Attorney General [1994] 2 NZLR 20 (HC)).

\textsuperscript{119} Study Paper 9, supra n 74 at para 364.


\textsuperscript{121} Wi Parata, supra n 105 at 78.
E What is the Current Treaty of Waitangi Jurisprudence?

The research in this part focuses on the current jurisdiction in order to determine if New Zealand law satisfactorily recognises the significance of tikanga, even in cases like “body snatching” where the legislation could be silent. Since the 1970’s the courts have become more sensitive towards native title and the principles of the Treaty. This has resulted in the establishment of the Waitangi Tribunal, which developed important jurisprudence regarding the Treaty principles. However, recognition and definition of Māori rights is developing from current courts cases. In 1987 the Court of Appeal considered for the first time what the principles of the Treaty are. Further cases interpreted tikanga in regard of statutes that did not refer to the Treaty.

I. The Courts’ Developing Jurisprudence

I. The Treaty of Waitangi Principles

The Lands case is a milestone case that is comparable with the groundbreaking cases Mabo v Queensland (No 2), Delgamuukw v British Columbia and Worcester v State of Georgia. In this case, the Court of Appeal elaborated on the Treaty principles as required by the State-Owned Enterprises Act 1986. The Act provides for the possibility of the Crown to transfer assets and liabilities to state enterprises. Maori were concerned that once land was transferred by the Crown to a state enterprise, they might not be able to purchase the land back, since the state enterprise might have disposed of the land within the scope of its own business dealings. An obvious solution to this conflict seemed to stem from the unique wording of s9 of the State-Owned Enterprise Act that read: “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.” This section was of great significance, because no other statute had ever confined public agencies in the exercise of their duties due to have to regard for

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122 For a valuable discussion on Cabinet decisions on the Treaty, see Palmer, supra n 18 at 130-147.
123 Lands Case, supra n 22.
125 (1997) 3 SCR 1010.
127 State-Owned Enterprise Act 1986, s23(1).
the Treaty. In conclusion, the Court found that it was a breach of the Treaty principles for legislation to elude future Treaty claims over the land. In his judgment, Cooke P identified the principles of the Treaty as: partnership between Māori and the Crown, reasonableness and utmost good faith. Other hallmarks are the Crown’s duty to actively protect Māori taonga and Māori loyalty to the Crown. As Cooke P explained in that case, the “principles require the Pākehā and Māori partners to act towards each other reasonably and with the utmost good faith.” He emphasised the importance that: the duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the court will be to insist that it be honoured.

Even though the moral obligation of “good faith” to the Crown is very significant, when applying the principles to the current issue of “body snatching” it seems that the most important principle is the one of “on-going partnership”. This principle signifies that steps should be taken by the Crown “as a partner acting towards the Māori partner with the utmost good faith, which is the characteristic obligation of partnership.” On the other hand, the principle involves “co-operation and independence between distinct cultural or ethnic groups within one nation” and does not mean that a fifty-fifty entitlement exists. It is quite an “abstract idea” of co-operation and consideration. Common sense suggests that the duty applies to both sides, and as Cooke P stated:

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128 Before then the Treaty of Waitangi Act 1975 was the only other statute using the phrase “the principles of the Treaty of Waitangi,” see Preamble, Treaty of Waitangi Act 1975, s6(1)(d), 8(1), 8A(2)(a)(ii) and 8HB (1)(a)(ii).
129 Lands Case, supra n 22 at 661-667.
132 Ibid, at 667.
133 It was referred to not only by Cooke P but Richardson J (ibid, at 682) and Somers J (ibid, at 693).
134 Ibid, at 703 (per Casey J).
135 Lands Case, supra n 22 at 664 (per Cooke P) and 703-704 (per Casey J).
137 Ibid, with reference to the Court of Appeal’s warning against a fifty-fifty model of partnership in Mahuta and Tainui Māori Trust Board v Attorney-General [1989] 2 NZLR 513, 527 (CA). Palmer (supra n 18 at 79-81), suggest that public power was shared between Māori chiefs and the Crown in the 19th century. However, he admits that the terms on which the shared power was exercised were unspecific both in reality and the Treaty, and Parliament and Cabinet were controlled by British settlers and backed by the British Army. This lead to the assumption that the power was not equally shared between Pākehā and Māori.
138 Mason, supra n 136 at 13.
The duty to act reasonably and in the utmost good faith is not one-sided. For their part the Māori people have undertaken a duty of loyalty to the Queen, full acceptance of her government through her responsible Ministers, and reasonable co-operation.¹³⁹

It is important to note, however, that partnership was not meant to be equal.¹⁴⁰ Indeed, on a closer examination, the principle of partnership does not entirely relate to the recognition of tikanga.

Perhaps the important principle of active protection raises the need for courts to recognise tikanga. The principle encompasses the Crown’s obligation to protect Māori interests.¹⁴¹ Primarily, courts considered this principle in association with property interests as guaranteed in Article 2 of the Treaty. As mentioned earlier, it is the Crown’s duty to actively protect Māori taonga. This legal topic was revisited in a Privy Council case in 1994 where it was held that whenever a taonga is threatened, the principle of active protection requires forceful action.¹⁴² At the most basic level, the case established that te reo Māori (Māori language) is taonga, the protection of which was guaranteed by Article 2 of the Treaty.¹⁴³ In 1987, the Waitangi Tribunal emphasised in the Orakei Report that “taonga is not limited to property and possessions.”¹⁴⁴ Both jurisdictions underline the Crown’s duty to assist in the legal prevention of deterioration of intangible Māori values. The crucial question is: Does the Crown have an obligation to actively protect tikanga Māori? In order to answer that question, we need to refer to the origin and meaning of the word “taonga.” Most dictionaries define the word “taonga” as property, or treasure, or something prised.¹⁴⁵ Yet, others define taonga as things.¹⁴⁶ Such a vast definition would include intangible things like customs. These various definitions do not clarify the subject but on closer inspection, the Māori understanding does. Māori interpret the term “taonga” in a more abstract man-

¹³⁹ Ibid, at 664.
¹⁴⁰ NZ Māori Council v Attorney-General (1989), supra n 130 at 152.
¹⁴¹ Tiriti o Waitangi, supra n 89 at 93.
¹⁴⁴ Waitangi Tribunal, Orakei Report. (Wai 9, 1987) p 188; other Waitangi Tribunal Reports that emphasised that taonga may be more then objects of tangible value are the Manukau Claim. (Wai 8, 1985) and the Te Reo Māori Claim. (Wai 11, 1989).
ner, so it is likely to include intangible values such as "important customs."\textsuperscript{147} Equally, according to the \textit{Te Rora Report},\textsuperscript{148} taonga includes not only tangible indigenous treasures like human remains, but also intangible things like important customs. Thus, the conclusion that tikanga is encompassed in the term "taonga" can be reached. From this, it follows that the Crown has the duty to actively protect tikanga if a particular statute references the Treaty principles. Although litigation started after 1987 when Parliament began to insert mandatory directions into statutes, the principles of the Treaty were not incorporated into any "body snatching" related statutes. Hence, the question remains whether courts should recognise tikanga in cases where statutes do not specifically mention the Treaty.

2. Recognition of Tikanga in Cases where Legislation is Silent

The \textit{Lands} case explicitly left the issue of the status of the Treaty within New Zealand’s legislation to one side, but as jurisprudence has developed, it became apparent that Treaty principles are not directly enforceable in the courts unless they are incorporated into legislation by Parliament, because Parliament is the supreme lawmaking body under New Zealand constitution.\textsuperscript{149} But should New Zealand courts not also recognise tikanga when the legislation is silent?

Twenty-two years ago, one particular High Court case strayed from the standard path. The judgment of Chilwell J in \textit{Huakina Development Trust v Waikato Valley Authority & Bowater}\textsuperscript{150} recognised Māori cultural values in a statutory context where the statute itself did not mention them, and thereby ascribed special significance to tikanga Māori. Chilwell J was convinced that the Planning Tribunal was obliged to consider Māori cultural and spiritual values when exercising its powers under the Water and Soil Conservation Act 1967.\textsuperscript{151} Since the Treaty is an international agreement, Chilwell J suggested that Parliament may be presumed to legislate in accordance with the Treaty or any other international obliga-

\textsuperscript{147} Tiriti o Waitangi, supra n 89 at 39; Tomas (2008), supra \textnumero 16 at 236.
\textsuperscript{148} \textit{Te Heuheu}, supra n 101; for more valuable information, see Palmer, supra n 18; P. Spiller, J. Finn & R. Boast \textit{A New Zealand Legal History} (Wellington: Brookers, 2001) 2nd ed. p 123-185 [hereinafter: NZ Legal History].
\textsuperscript{149} \textit{ibid} (1987) 2 NZLR 188; (1987) NZTPA 129 (HC) [hereinafter: \textit{Huakina}].
\textsuperscript{150} \textit{ibid} (NZLR), at 196. He found statutory support in the Town and Country Planning Act 1977. Recognising Māori customs and values, this Act operates in close conjunction with the relevant Water and Soil Conservation Act. Hence, Chilwell J pointed out that both Acts "have to be complied with" (\textit{Huakina ibid}, at 210), resulting in the circumstance that the Water and Soil Conservation Act has to be interpreted in accordance with the Treaty of Waitangi.
He emphasised the importance of there being “no doubt that the Treaty is part of the fabric of New Zealand society” because he believed that the Treaty is of “constitutional significance in the New Zealand legal system.” He characterised the Treaty as part of the backdrop of public policy against which legislation was to be interpreted. Chilwell J acknowledged that his earlier argument has not been convincing, so he drew parliamentary support for his findings by referring to sections of a parliamentary debate from 1975, in which the government plead in favour for the “statutory recognition and promotion of the full meaning of the treaty.” Additionally, he was able to underpin his findings by judgments of Cooke J in Metekingi and Turner SM in Keam. In general, Huakina revealed that the Treaty could be used to interpret statutes that did not refer to the Treaty. It is important, however, not to overstate the effect of this case. The case is primarily an authority for the use of Treaty principles in the interpretation of legislation where the statute does not refer to it explicitly.

Huakina is not the only case dealing with statutory provisions where the relevant legislation did not refer to the Treaty principles. For example, in Attorney-General v New Zealand Māori Council it was held that the Crown was bound to consider the Waitangi Tribunal’s recommendations before deciding whether to tender out radio frequencies.

Further, some family related judgments determined that Treaty principles may be applicable even if the relevant statutes did not refer to the Treaty. The cases of Barton-Prescott v Director-General of Social Welfare and Hineiti: Rirerire Arani v Public Trustee focus on the customary right of whānau, hapū and iwi to sanction or approve the adoption of a family member. The issue was whether courts were bound to acknowledge non-statutory adoption under Māori custom. Since Māori children are seen as a taonga, Māori believe

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152 Ibid, at 215-217. However, Chilwell J avows that those obligations are of more moral force than legal force.
154 Ibid, at 196.
155 Idem, referring to (1975) 401 New Zealand Parliamentary Debate 4342 (Hon Matiu Rata).
157 Keam v National Water and Soil Conservation Authority (1979) 7 NZTPA 11.
158 McHugh, supra n 115 at 1; Palmer, supra n 18 at 204-205.
159 [1991] 2 NZLR 129 (CA).
160 [1997] 3 NZLR 179 (HC) [hereinafter: BP v D-GSW].
161 (1920) AC 198 [hereinafter: Arani].
162 For a valuable discussion, see D. Baragwanath “The Evolution of Treaty Jurisprudence” (2007) 15 Waikato LR 1, 3-5 [hereinafter: Baragwanath].
they should receive protection from the Treaty because they fall within its ambit. Against this backdrop both courts held that tikanga Māori should have “a direct bearing whether or not there is reference to the Treaty in the statute.” Courts accepted that the Treaty was relevant to interpreting the Guardianship Act 1968 until Māori feel that New Zealand law values their familial constitutions, although family related statutes do not refer to the Treaty. Accordingly, “all Acts dealing with the status, future and control of children, are to be interpreted as coloured by the principles of the Treaty of Waitangi.”

There has also been a recent case about forests that concerned the recognition of tikanga, where the Treaty was not statutorily incorporated. This lawsuit dealt with the Crown’s disposal of Crown forestry assets in a way which the New Zealand Māori Council claimed was inconsistent with the Lands case ruling. The Council argued that the Crown would be in breach of its fiduciary duty to the plaintiffs “through failing to act in good faith, fairly, reasonably and honourably.” Since this was a delicate area, the High Court was reluctant to provide a direct response, and first considered observations about justiciability. It was recognised that courts could not tell Parliament “what it can and what it cannot do” and make a declaration to have that effect. After concluding that “the Courts cannot intervene,” Gendall J held that the Treaty of Waitangi “must be heeded and given recognition by the Courts irrespective of a specific statutory provision such as s9 of the State-Owned Enterprise Act.” Significantly, the High Court confirmed that courts can enforce the Treaty principles where legislation was silent on forestry matters, because the Treaty is to be regarded as an obligation on the Crown. However, such an obligation may not be directly enforceable by a court, but it leaves more discretion to the courts to take into account the Treaty principles. Further, the Court of Appeal did not acknowledge the recogni-

164 BP v D-GSW, supra n 160 at 184; similar: Arani, supra n 161 at 6.
165 Idem (both).
166 BP v D-GSW, ibid, at 643. Yet, it was held in Re Walker (Deceased) [2002] NZFLR 481 (affd [2003] NZFLR 64) that a child adopted pursuant to Māori custom does not come within the class of persons entitled to claim under s3 of the Family Protection Act 1955. As a consequence of this case, if Māori want to make it clear that such a child is to be included in a will, he/she has to be named or referred to be beneficiary.
167 New Zealand Māori Council v Attorney-General unreported, HC Wellington, CIV-2007-485-000095, 4 May 2007, Gendall J [hereinafter: Forest (HC)]. In this case the High Court considered whether implications of the inclusion in the Nga Kaihautu o Te Arawa Executive Council deed of settlement of provisions were inconsistent with an agreement between the Crown and Māori from 1989.
168 Ibid, at 89.
169 The Court of Appeal confirmed that principle, ibid, at [83].
170 Forest (HC), supra n 167.
171 Palmer, supra n 18 at 178.
tion of indigenous rights in cases where they were not statutory incorporated.\textsuperscript{172} Although the appeals were withdrawn, the Supreme Court recorded obscurely that:

The Crown acknowledges that it was the provision in the Affiliate Te Arawa Iwi/Hapu Settlement dated 30 September 2006 that the Crown would be the confirmed beneficiary of certain rental proceeds under the Crown Forestry Rental Trust Deed which was a significant prompt to the litigation. While the Crown’s intentions were always that this fund would be committed to Māori development purposes, the Crown appreciates that the appellants did not consider this to be a good faith step consistent with the Crown Forest Assets Act 1989 and the underlying 1989 Deed. The Crown regrets this, and apologises to the appellants.\textsuperscript{173}

Subsequently, it also recorded that the High Court’s and Court of Appeal’s comments concerning the Crown’s fiduciary duty to the Māori under the Treaty are \textit{obiter dicta}.

While it might be that a declaration, such as the one considered earlier, is the way forward from \textit{Te Heuheu},\textsuperscript{174} it should be noted that the cases left the Treaty’s formal status basically unchanged.\textsuperscript{175} Māori customary law now appears in some 14 statutes.\textsuperscript{176} The above cases highlight that, where important tikanga exists, courts can use the Treaty as an aid to interpret other legislation.\textsuperscript{177}

\textbf{II. The Developing Jurisprudence of the Waitangi Tribunal}

The Waitangi Tribunal was formed in 1975 by the Treaty of Waitangi Act 1975 as a result of intense negotiations between the Crown and the New Zealand Māori Council.\textsuperscript{178} It has exclusive authority to interpret the Treaty principles for the purpose of the Treaty of Waitangi.

\textsuperscript{172} The Court of Appeal upheld the decision of Gendall J to decline to make the declarations sought by the appellants, and dismissed the appeal; \textit{New Zealand Māori Council v Attorney-General} (2007) NZCA 269; [2008] 1 NZLR 318 (CA).
\textsuperscript{174} \textit{Baragwanath}, supra n 162 at 10.
\textsuperscript{175} NZ Legal History, supra n 149 at 181.
\textsuperscript{176} For legislation containing Treaty of Waitangi reference, see \textit{Tiriti o Waitangi}, supra n 89 at 111; Study Paper 9, supra n 74 at para 352.
\textsuperscript{177} Palmer, supra n 18 at 204, 212-215.
\textsuperscript{178} For a valuable discussion on the Waitangi Tribunal, see Palmer, supra n 18 at 107-152, who describes the Tribunal as a “semi-judicial” body that was established by Parliament (at 24).
tangi Act, but its interpretation is not binding over other tribunals or courts.\textsuperscript{179} Hence, it is, with one exception,\textsuperscript{180} solely charged to make recommendations on claims brought by Māori relating breaches of Treaty rights.\textsuperscript{181} Largely, those recommendations depend for their impact on public opinion seizing any statement to put political pressure on Parliament and the Government. In simple terms, the Waitangi Tribunal has a more general jurisdiction to deliberate whether the Crown has acted in a manner “inconsistent with the principles of the Treaty.”\textsuperscript{182}

Over the years, the Tribunal has had to decide cases about tikanga Māori and the Treaty principles. In the \textit{Te Maunga Railways Report},\textsuperscript{183} the Tribunal mentioned the Crown’s duty to protect rangatiratanga (sovereignty, ownership). A few years prior to this case, the Tribunal strengthened Māori fishing customs in the controversial \textit{Muriwhenua Fishing Claim Report}.
\textsuperscript{184} In this claim it dealt with various alleged failings of the Crown to meet its obligations under the Treaty in regards to fishing rights removed from Māori during the colonial process.\textsuperscript{185} The Tribunal reported its findings in the hope that it would assist Māori and the Crown in the negotiations that both were then engaged in. Eventually the Tribunal found that the Crown had failed to meet its Treaty obligations.\textsuperscript{186}

One of the more prominent reports is the Waitangi Tribunal’s report on the Crown Foreshore and Seabed Policy,\textsuperscript{187} where the Tribunal analysed whether land was held according to tikanga. The Māori claimants affirmed their connections to places by naming them, and by reciting relationships with them.\textsuperscript{188} As a result, the commission stressed that “the relationship between Māori peoples and the foreshore and seabed is based on whakapapa and is intensely personal.”\textsuperscript{189} Since the Crown offers a more limited customary title, the Tri-

\textsuperscript{179} Treaty of Waitangi Act 1975, s5(2). Although there is no authority on this point, it is submitted that this applies with undiminished force to the Māori Land Court.
\textsuperscript{180} The exception is provided by the Treaty of Waitangi Act 1975, s6(1). The Tribunal can make a binding mandatory order that land, which the Crown transferred to, or vested in, stated-owned enterprises (mostly resumption jurisdiction), be resumed by the Crown for transfer to a Treaty claimant.
\textsuperscript{181} See Treaty of Waitangi Act 1975, s5(1).
\textsuperscript{182} Treaty of Waitangi Act 1975, s6. It adopted an inquisitorial approach enquiring directly into the matter itself; Palmer supra n 18 at 112-113.
\textsuperscript{184} Waitangi Tribunal, \textit{Muriwhenua Fishing Claim Report} (Wai 22, 1988) p 26 [hereinafter: \textit{Muriwhenua Fishing}].
\textsuperscript{185} Eventually it burgeoned into what became a challenge to the State Owned Enterprise Bill which was the essential element of the policies of the fourth Labour Government.
\textsuperscript{186} \textit{Muriwhenua Fishing}, supra n 184 at 16.
\textsuperscript{187} Waitangi Tribunal, \textit{Report on the Crowns Foreshore and Seabed Policy}. (Wai 1071, 2004); for a valuable discussion on New Zealand’s foreshore and seabed policy, see B.V. Harris, supra n 93.
\textsuperscript{188} \textit{Ibid}, at para 1.3.4.
\textsuperscript{189} \textit{Idem}.
bunal arrived at the conclusion that the Crown governs in a manner that is inconsistent with fundamental rights guaranteed to Māori in Article 2 of the Treaty. It further considered that the Crown’s foreshore and seabed policy was contrary to Article 3 of the Treaty, as it fails to treat Māori and non-Māori citizens equally. More significantly, the consequent enactment of the Foreshore and Seabed Act 2004 exposed the vulnerability of customary rights to being overridden by Parliament.

Of real importance is the attention of the Tribunal towards the protection of Māori ways of life. In the course of its analysis, the Tribunal pointed out that “the Treaty was directed to the protection of Māori interests generally and not merely the classes of property interest specified in article 2.”190 The Tribunal emphasised the recognition and protection of tikanga guaranteed by Article 2 of the Treaty. Beyond this, the Tribunal found that an order may be made to compensate generally for tribal loss without evidence of a direct nexus between the land in question and the alleged Treaty breach.191

Although the Tribunal was given binding, recommendatory powers, it does not have the power to hand down judgments that are enforceable at law. In order to be equivalent to courts, a role change from recommendatory to adjudicative would be required. Nevertheless, it is significant that policy-makers use the reports of the Waitangi Tribunal to inform process.192 Furthermore, the Evidence Act 2006193 points out that the Tribunal’s reports can be of use to courts to provide valuable evidence. Being a specialist Tribunal, the Waitangi Tribunal’s interpretations of the Treaty are accorded significant weight and respect by ordinary courts.194

III. Tikanga as New Zealand Law

Although there has been no sustained attempt to give the Treaty independent legal status, the Crown is obligated to maintain and protect tikanga, because the Treaty itself is of “con-
stitutional significance in the New Zealand legal system. A set of principles developed by the Court of Appeal and the Waitangi Tribunal are aimed to overcome problems posed by varying interpretations of the Treaty. Both New Zealand courts and the Waitangi Tribunal concluded that tikanga itself is “not a regulating process from beyond age,” but a relevant taonga guaranteed under Article 2 of the Treaty of Waitangi.

Concerning the Forest case, the High Court lately ruled that the principles of the Treaty of Waitangi “must be heeded and given recognition by the Courts irrespective of a specific statutory provision such as s9 of the State-Owned Enterprises Act.” This jurisdiction is not concrete. It appears that tikanga, even where not incorporated by statute, might form part of the body of New Zealand common law and might be taken into account and enforced in ordinary courts. Nevertheless, discussed cases have shown that its recognition is very limited. On the other hand, contemporary case law has proven that courts are more willing to enforce tikanga, unless the custom has been extinguished by statute. Especially Huakina, but also other cases, use the Treaty in the interpretation of legislation where legislation does not refer to it explicitly. The Forest case indicates that 21st century New Zealand law is prepared to recognise ethical duties, particularly those arising from the Treaty relationship, whether or not there is contractual or statutory provision. Following the Te Weehi rationale, it can be proposed that if the defendant had a right to fish, then Māori people also have the right to bury whānau according to tikanga. But should this notion manifest itself within jurisdiction concerning tikanga regarding burial?

Recognition and enforcement of tikanga is dependent on the extent to which it or the Treaty is recognised. Further research will demonstrate that tikanga in terms of burial is partially statutory incorporated. However, the focus of the following chapter is on tikanga Māori without statutory incorporation, and the direct acknowledgement of tikanga by New Zealand courts. In the course of this discussion one needs to consider the difference between tikanga Māori, and the two legal bases for Māori claims: statutory recognition of the Treaty, and the common law’s recognition of native title.

195 Ibid, at 196.
197 Forest (HC), supra n 167 para 66. Cooke P (Lands case, supra n 22 at 665-666) observed that the Treaty could be used as an extrinsic aid in statutory interpretation.
198 Lloyd, supra n 163 at 31.
Do the Courts Recognise Tikanga as it Relates to Burial?

I. Tikanga on Burial – Subject of Change

Even though tikanga principles are dynamic and crucial to Maori, only few cases recognising tikanga relating to burial have been heard by New Zealand’s Courts. Moreover, influence of Pākehā culture caused the adoption of European customs and rights, complicating the contemporary situation. For Māori, it is significant that conformity with basic Māori beliefs, in particular during the “vital ceremony" of tangihanga, is maintained. At the highest level of tikanga relating to burial in the Ngāpuhi region, there are a number of core values that underpin the totality of tikanga Māori: “Tukuna ma te whare e kōrero” (let the house decide), “Ahika mai tawhiti” (burning fire from afar) and “Tamatāne hōki ki to ūkaipō” (son returns to the breast suckled at night). While the second and third values are presumptions rather than rules, the first is a rule, which directs that public discussion regarding the decision-making process should be followed stringently. It is significant that according to marae protocols throughout New Zealand, the deceased’s body should not be left unattended at any time. At this point, the thesis will consider whether this custom or “Tukuna ma te whare e kōrero” is a feature of New Zealand law at present time.

II. Statutory Recognition of the Tangihanga

The tangihanga practice is a vital part of New Zealand Māori culture, in spite of the fact that no statute refers to it expressly. Some statutory provisions like s3 of the Burial and Cremation Act 1964 indirectly recognise the tangihanga ceremony by acknowledging cultural differences between the Pākehā and Māori burial practice through excluding Māori burial grounds from the Act’s burial and cremation limitations. Others like s4(4) of the

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200 Ibid, at 133; Study Paper 9, supra n 74 at para 16.
201 Ngāpuhi is the largest tribe in New Zealand. Its tribal area is located in the far North (at Te Tai Tokerau); maps and more information are available at: <http://www.teara.govt.nz/NewZealanders/MāoriNewZealanders/NgāPuhi/1/en> (accessed 12/11/2008).
203 The second presumption states “that a woman will remain with her husband’s people” and the second “that a son should be buried next to his mother”. See, eg Tomas (2008) supra n 16 at 235.
204 Burial and Cremation Act 1964, s3 purports that “Except as is expressly provided in this Act, this Act shall not apply to Maori burial grounds or to the burial of bodies therein”. 32
District Courts Act 1947 imply that any judge may hold, or direct the holding of a particular sitting of a court at any place the judge deems convenient.205 Urgent family meetings, for example, during which the location of the burial ground can be discussed, could be held in the presence of the coroner on a marae. Features of the tangihanga can be found within the Coroners Act 2006. Section 25, for example, states that the family of the deceased is allowed to appoint a family representative to attend and touch the deceased while under the coroner’s control as long as the integrity of the pathologist’s examination is ensured. This is due to Māori necessity for a karakia206 to be performed to lift the tapu of the deceased.207 These few sections seem to take into account tikanga relating to burial. However, case law also deals with Māori burial custom.

III. The Public Trustee v Loasby

The oldest known tangihanga related judgment, The Public Trustee v Loasby,208 in which the court had to give proof of whether or not the administrator of the estate was liable for expenses of a well-known Wairarapa rangatira, Mahupuku’s tangihanga, dates back to 1908. The case raised the question whether Māori customary law was applicable. In his finding, Cooper J observed that:

the custom among the Māori that on the death of a chief or person of importance a tangi or funeral feast should be held, and that the cost of the tangi should be borne by the property of the dead person, seeing that it was a general and immemorial custom, that it was not contrary to any statute, that it was not unreasonable, and that it was considered morally binding upon them and not merely optional by the Māoris themselves, was a custom which ought to be recognised by the Court as law, and consequently in the administration of the estate of a deceased Māori chief the cost of the tangi to a reasonable amount should be treated as funeral expense.209

205 Pursuant to the District Courts Act 1947, s4(4) “notwithstanding anything in the foregoing provisions of this section a Judge may hold or direct the holding of a particular sitting of a Court at any place he deems convenient”.
206 A karakia is a prayer or ritual. There are karakia for all aspects of life, including for major rituals, such as the mourning of the dead.
208 Loasby, supra n 199.
209 Ibid, at 801 per Cooper J.
In this vein, in order to adopt a rule of tikanga, three matters need to be relevant to the case. First, the Māori custom has to exist as a matter of fact. Secondly, the custom must not be contrary to statute. Finally, the custom has to be "reasonable taking the whole of the circumstances into consideration." Cooper J was in no doubt that the tangihanga describes "well established Māori custom" and is not contrary to statute. In his view to omit tangihanga for this would be a "great insult to the memory of the deceased." Since all three criteria were met, Cooper J found that the tangihanga ritual should be enforced by law.

IV. Inconsistent Courts

The period following Loasby was characterised by inconsistency and fluctuation within the judiciary. A lot of decisions in the courts were made against the backdrop of facts where no statutory provisions regarding tikanga relating to burial existed.

The most prominent case relating to Māori burial rites was the defamation case Billy T. James, even though it did not turn on the tangihanga practice directly. In relying on a defence of fair comment, the newspaper essentially argued that an opinion could honestly be held that the treatment of James’ remains was morally blameworthy, even if carried out for reasons of tikanga. Eventually, although the appeal was dismissed, the Court favoured neither the tangihanga nor Pākehā burial practice. It commented on the procedure of uplifting a human corpse without considering tikanga in regard to burial as relevant to the case.

Over the course of the last decades, a few cases (mostly out-of-court-settlements) regarding unburied Māori remains were ruled in the interest of Māori whānau. In the late 1980s, tikanga relating to burial was effectively recognised, as Greig J granted an application to prohibit a Māori head to be sold by auction in London. An English woman, the putative owner of the Māori head, had to give the preserved head back to the Māori tribe (in

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210 This rule was evidently approved by Chilwell J in Huakina (supra n 150 at 215) for the establishment of a rule of customary law.
211 Ibid, at 806.
212 Ibid.
213 Ibid, at 805.
214 Eventually remedy issues prevented the appeal from being successful.
216 Re Tupuna, supra n 199.
order that the tribe could bury it according to the tangihanga) in return for a carved green-
stone mere.217 The case indicates that Māori burial practices can be pivotal, irrespective of
specific statutory provision. Accordingly, it was stated that the “court’s implicit recogni-
tion of Māori custom”218 is welcome in the context of remains of Māori and Māori arte-
facts. It should be noted that this is not a solitary case where Māori were granted permissi-
on from Parliament to return goods from overseas. In 2004, for example, the Scottish
Museum had to return three preserved Māori warrior heads which had been hidden in
Glasgow for decades.219

On the contrary, the Environmental Court, which has been challenged with a number of
cases regarding tikanga relating to burial, has interpreted tikanga claims differently. In the
Takamore Trustees’ litigation220 the Court declined to prevent a road from being built over
a whai tapu221 site, alleged to be an urupa. The court was presented with Māori concerns,
but rejected the evidence primarily because it was cryptic. The Takamore litigation is not
the only example of the Environmental Court’s preference for infrastructural develop-
ment.222 The case is a negative example of the recognition of the significance of tikanga,
and the decision was criticised on a number of points of law by the High Court.223 Signifi-
cantly, the High Court found that the Environmental Court failed to consider pertinence of
the principles of the Treaty and neglected to take them “into account”.224

In general, the courts’ recognition of Māori custom seems to depend on the circumstances
and views of those involved in the issue at the time considered. The importance of specific
tikanga is worked out case by case through interpretation and development of the Treaty
principles.

217 A short, flat weapon of stone.
220 Takamore Trustees v Kaipiti District Council (2003) NZRMA 433. The entire Takamore case history can
phanson].
221 This is a “place sacred to Māori in the traditional, spiritual, religious, or mythological sense” according to
the Historic Places Act 1993, s2.
222 For examples, see Ruru & Stephanson, supra n 220.
224 Ibid (NZRMA), at para 94.
V. Tikanga on Burial – More Likely to be Recognised

In the Loasby case, the tangihanga ritual regarding payment for tangihanga costs was ascribed the force of law. Arguably this customary law rule should be incorporated into statute in order to disallow avoidance of this particular tikanga. Otherwise, if the Loasby three-part test is passed, one could assume that tikanga relating to burial will be recognised by the courts even though legislation is silent. The Environmental Court, on the contrary, reduced the recognition of tikanga relating to burial once the bodies were buried in the Takamore jurisdiction. On the other hand, non-statutory adoption under Māori was recognised by the Privy Council which suggested the possibility that:

the old custom as it existed before the arrival of Europeans... [which] has developed, and become adapted to the changed circumstances of the Maori race of today.

might be recognised by law in New Zealand. In reality, customary law is complicated, as tikanga is naturally flexible and usually not codified into written law. It could, therefore, be argued that non-Māori burials receive more protection under New Zealand law than Māori burials. However, the significance of some iwi-wide uniform tikanga seems to be partly recognised in New Zealand jurisdiction and legislation. From this pervasive, positivistic jurisdiction it can be gathered that tikanga relating to burial is more likely to be enforced, even without its statutory recognition.

G Should New Zealand Law Recognise the Significance of the Tangihanga?

Notwithstanding the lack of recognition by courts that Māori custom law has suffered, tikanga survived because Māori struggled to hold onto their culture and values, as guaranteed under the Treaty of Waitangi. Although tikanga is based upon pre-European customs, it “has developed, and become adapted to the changing circumstances of the Māori

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225 Arani, supra n 161.
226 See, eg Binning, supra n 16.
227 Listed above on page 31-32, for a valuable discussion, see Tomas (2008) supra n 16 at 235.
228 See, eg Loasby, supra n 199.
229 See, eg Coroners Act 2006, s25.
230 Study Paper 9, supra n 74 at para 117.
race of today.” Therefore, for having tikanga recognised, Māori are prepared to fight for the values that underline tikanga by whatever means possible, including by courts and legislation. Therefore it seems that the Treaty can truly be referred to as “the great charter of Māori Rights.” The current wisdom of tikanga is to allow more consideration of cultural differences. For this reason, the question of whether the Treaty should protect the tangihanga ceremony seems to be rhetorical at best. However, appearances can be deceiving.

The proposal to give tikanga relating to burial the force of law is hampered by various organisations and judgments. Several lawyers have spent considerable time thinking that “it is too difficult to make the Treaty a part of the law because it is insufficiently precise.” Admittedly, such positions no longer enjoy widespread popularity because quite a few decisions recognise tikanga, where it is not incorporated into statute, for example Te Weehi. Moreover, Loasby’s three-part test for the establishment of a rule of customary law further illustrated the substantial recognition of tikanga in cases where legislation is silent.

In addition, the Waitangi Tribunal plays a part in contributing to the recognition of tikanga. In the 1992 Te Roroa Report, the Waitangi Tribunal discussed the responsibility of the Crown to protect Māori taonga. In particular, the claim itself referred to burial chests and spiritual places. The Report describes taonga as:

An umbrella term, inclusive of a wide range of things upon which Māori in general and the whatu-ora (claimants) of this claim place great value and regard as treasures. Among them are intangibles like spiritual values as well as tangible objects.

This description includes things associated with death. This gives the emotional and spiritual context of the tangihanga, which is important, but also clarifies that the tangihanga is a taonga protected under Article 2 of the Treaty. But, as considered above, the Treaty and its

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234 See, eg Temm QC, supra n 120 at 19.
236 Te Roroa Report, supra n 148 para 6.2.
principles are, with the exception of a few cases like Te Heuheu, only recognised by New Zealand law if they are incorporated into statute. This conclusion can be disputed by questioning whether the Treaty of Waitangi should be a mandatory consideration when it is relevant to decision-making, including adjudication. In connection with this theory the paper is faced with the problem of the courts’ lack of specialist knowledge about tikanga. New Zealand judges are not trained in knowledge of customs, but in the complex laws that were introduced to replace customary tenure. For this reason, it would be feasible to incorporate important tikanga into statutory provisions in order to assist Coroners, and “judges of the Planning Tribunal, Family court and lawyers that service them.” On the contrary, this assumption lacks persuasive power because High Court judges can seek advice from the Māori Land Court in cases where tikanga is concerned.

Yet, there is another additional argument based on equating tikanga with native title that mitigates this assumption. Though an in-depth analysis is beyond the scope of this paper because the argument is based on native title which in turn is part of the inherited British common law, it is hoped that the following sketch will provide ideas that can be expanded upon. The argument itself proceeds from two assumptions, both of which are extracted from Te Runanganui o Te Ika Whenua Inc. Society v Attorney-General and a connection of ideas. Cooke P first affirmed the equalisation of tikanga and customary rights. This thought is not so far-fetched, considering the number of academics that interpret tikanga as Māori customary law. Cooke’s second notion is that “the treaty must have intended effectively to preserve for Māori their customary title.” This statement must be comprehended against the backdrop of a Canadian Supreme Court decision. The Court decided that native title is just a subcategory of the wider group of customary rights. From this theory, native title and tikanga should be equally weighted in court, meaning that New Zealand law should recognise the significance of the tangihanga. So far, no New Zealand court has accepted the equality of customary title and right before the law. Full judicial assessment of tikanga relating to burial is likely to be stronger where New Zealand law is the substantial source of the Māori claim. In a similar vein, it was held during a New Zealand Law Society Seminar that:

237 Durie, supra n 231 at 326.
238 Idem.
239 Te Ture Whenua Māori Act 1993/ Māori Land Act, s 61 (1)(b).
240 Supra n 118.
241 Idem.
244 See, eg Te Weehi, supra n 115.
the primary source of Treaty law is of course the Treaty itself with its guarantees of real property rights, tribal autonomy, the protection of Māori customary law and equality. 245

After considering the relation between tikanga and native title, and tikanga and the Treaty, it can be understood that there is a good opportunity for the tangihanga practice to be recognised as significant by courts, even though it is not statutorily incorporated. 246 But again, in the end, all improvements in recognising tikanga seem to rely on the Treaty concept of taonga, and without the helping intervention of statute, it may prove difficult to be established. 247

On the other hand, although it is acknowledged that the Treaty does not create rights or obligations in law except where it is given effect by legislation, the Guidelines on the Process and Content of Legislation state that the Treaty:

has become a constitutional standard. Legislation is expected to comply with the principles of the Treaty. Generally the Courts will presume that Parliament intends to legislate in accordance with those principles and that in relevant contexts they should have appropriate application (so that, eg, decision makers may have to take some account of the principles), even perhaps in the absence of any mention of the Treaty in the particular legislation. 248

The question of how well these guidelines are enforced aside, the requirements give important signals to politicians as to what is important, and increase the extent to which public servants take into account the Treaty and its principles. 249

245 J. Williams, supra n 192 at 30.
246 This assumption stems from the distinctive aspect of New Zealand’s constitution, its unwritten and evolving nature, which resonates with both the Māori notion of tikanga and New Zealand’s British constitutional heritage. In this context, M.S.R. Palmer (“New Zealand Constitutional Structure” (2007) 22 N.Z.U.L.Rev. 565, 567) stated that the New Zealand’s constitution “is not a thing but a way of doing things.” Therefore, New Zealand judges may recognise tikanga in a context where it is not statutory incorporated.
249 Palmer, supra n 18 at 223.
H Conclusion

Although Māori burial customs could be supplanted by burial-related statute in many more contexts, there is no parliamentary indication that this might happen in the near future. This could change, but case-law concerning the recognition of the right of Māori to bury whānau according to the tangihanga ceremony is also inconsistent in New Zealand. Taking more far-reaching measures for the recognition of tikanga is important in order to realise the Treaty promise to grant a secure place for Māori values within New Zealand society. For that reason, a more substantial recognition of tikanga could only be brought about by Parliament. Matthew Palmer points out that a Supreme Court finding that the Treaty is enforceable as a matter of equity could have an equal effect. Nevertheless, he reckons that such a finding is unlikely to find favour with New Zealanders, and that "the Supreme Court is, as yet, too new and insecure a body to take on this set of issues." A possible solution would be for future written statutes to incorporate the Treaty in both versions, and; in addition, to incorporate advisory notes that are intended to assist the Treaty's interpretation.

Another solution would be to apply the European legal principle of legality to the Treaty of Waitangi. According to New Zealand Courts, the principle of legality is a strong presumption that Parliament does not intend to legislate contrary to fundamental human rights. The consequence of the principle of legality is that "an instrument may be so constitutionally significant that a court may not take Parliament, in passing a later statute that appears to be inconsistent with that instrument, to mean that the earlier instrument is overridden." In other words, courts would give effect to important legal obligations that express fundamental values, including values expressive of human rights, if the obligation is not incorporated by Parliament into legislation. Interestingly enough, the Court of Appeal has held that a ratified but unincorporated treaty could influence an exercise of discretion.

For instance, amendment to the Burial and Cremation Act 1964 could guarantee the deceased a proper burial according to Māori custom.

Palmer (supra n 18 at 27, 333-346) even suggest that the Treaty should be given legal force, judged independently by a new Treaty of Waitangi Court, composed of selected High Court Judges and Waitangi Tribunal Members.

Likewise, Boast, supra n 232 at 35.

Supra n 18 at 203.

Concerning constitutional incorporation of the Treaty, see B.V. Harris, supra n 93 at 212.


Palmer, supra n 18 at 213. For a valuable discussion on this so-called doctrine of implement repeal, see ibid at 204, 212-215.

tion. Since the Waitangi Tribunal itself stated that the Treaty “should be seen as a basic constitutional document,” it would therefore not be too farfetched for the principle of legality to be applied to the Treaty. This principle is, however, controversial as it eludes Parliament’s monopoly of law-making authority.

A more practical way forward would be for Parliament to specifically spell out Treaty rights surrounding Māori principles and protocols associated with the tangihanga, and therewith stabilise tikanga in New Zealand’s constitution. The maintaining of important tikanga could result from minor amendments to funeral-related statutes, such as the Burial and Cremation Act 1964, the Wills Act 2007 and the Coroners Act 2006. Meanwhile, essential tikanga should be appreciated in considering law changes to prevent “body snatching” incidents. The fact that tikanga is taonga, a Treaty right, makes this argument even more compelling. Cases like Loasby and Billy T. James seem to have increased the awareness of tangihanga and Māori custom among New Zealand’s society. Nevertheless, although Parliament has so far not debated on whether the tangihanga should be incorporated into burial-related statues, Māori who took the body of their loved ones without consent, have not been put on trial. That being so, the legal status quo might in spite of the lack incorporation of tikanga relating to burial, be sufficient to protect the tangihanga practice. Before this assumption can be made, this paper proceeds to analyse possible legal barriers for “body snatching”.

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258 Ashby v Minister of Immigration [1981] 1 NZLR 222 (CA).
261 Tomas (2008), supra n 16 at 236; Palmer, supra n 18 at 101.
262 This can be achieved by incorporating the term “by taking into account tikanga on burial” into the purpose of the Act.
Chapter 3: Proprietary and Possessory Rights in Corpses

A Introduction

Up until now, “body snatchers” have neither been prosecuted for theft, or of committing an intentional or negligent tort. The purpose of this chapter is to clarify why New Zealand “body snatchers” could escape legal punishment. The problem lies in the highly controversial legal status of a dead body. In order for the rules of theft to apply, the Crimes Act 1961 requires that objects or things be the subject of property. The question, then, is whether a body can be regarded as “property.” The common law has been unwilling to recognise corpses as the subject of property. Thus, the problems at hand can be seen as part of a more general question: Does anyone own the deceased’s unburied body? As we may see, even the common law recognises persons to have property rights in, or over, unburied corpses in some conditions. Only in rare cases do unburied corpses represent an exception to the rule that corpses cannot be owned.

An area of particular concern is the right of possession of the deceased’s body for burial. There is uncertainty about whose responsibility it is to arrange the funeral. This question has proven particularly acute in inter-cultural families, as Māori are generally devout people with a strong belief in cultural heritage treasure. As the former chapters have shown, problems emanate from the existence of disagreement within Māori and Pākehā family hierarchies, and clashes between the wishes of the surviving spouse and the immediate family. It is useful to focus on common law in the United Kingdom and the United States, and to consider the extent to which the deceased him/herself may have a say in his/her will.

263 Crimes Act 1961, ss219(1)(a) and (b) state that only “property” can be the subject of theft.
265 This thesis examines the status of unburied (or undisposed of) corpses only, since these have been the subject in the “body snatching” cases.
266 Whereby I will also refer to its former colonies.
B The Body as Property

I. The “No Theft” Rule

New Zealand newspapers associate “body snatching” with theft of property. This point is significant, because it means that removing a corpse is seen as a criminal act, and therefore is generally considered to be wrong.

New Zealand criminal law distinguishes between two types of theft; theft by taking, and theft by using or dealing with the property (theft by conversion). The basic element of first type of theft is “taking”, something that is partly defined in s219(4) of the Crimes Act: “For tangible property, theft is committed by taking when the offender moves the property or causes it to move.” But what if the person has legitimately possessed the item? Certainly, theft under s219(1)(b) of the Crimes Act includes a person acting in a way that is unauthorised, or inconsistent with the rights of the owner. Problems, however, do not lie in the act of removing a corpse, but in the simple fact that in order to fulfil the actus reus of theft, corpses must be able to be the subject of property. But what counts as property? Pursuant to s2(1) of the Crimes Act, most things can be stolen. Some things though, cannot be stolen, in particular things that are not “susceptible of being owned.” Common law considers corpses not to be subject to rights of ownership, and therefore they cannot be stolen. Consequently, New Zealand “body snatchers” cannot be found guilty of theft.

II. The “No Property” Rule

The critical question is: What is the origin of the idea that corpses are not capable of being owned? In 1965, it was suggested that “before a right or an interest can be admitted into the category of property, or a right affecting property, it must be definable, identifiable by third parties, and have some degree of permanence or stability.” At present time, the

267 Crimes Act 1961, s219(1)(a).
268 Crimes Act 1961, s219(1)(b).
270 Simester & Brookbanks, ibid, at 669.
271 This principle is commonly called the “no property” rule.
272 National Provincial Bank v Ainsworth (1965) A.C. 1175, 1247.
Property Law Act 2007 clarifies property, *inter alia*, as "everything that is capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property." Property rights, however, are considered to be "a bundle of mutual rights and obligations" that are defined and protected by the domestic sovereign power. At first glance, this description does not exclude the possibility of a place for human bodies within the property regime. Yet, at common law, it is still the prevailing opinion that a dead body is a *nullius in rebus*/*res nullius*, meaning that a dead body is incapable of becoming the subject of ownership. As many legal academics explain, the origin of this principle is quite obscure. Some of these academics even question the *raison d'être* and utility of this principle. Nevertheless, over the years, as jurisprudence has developed, the principle became common law, and was so treated by 18th century’s judges. Even when questioned, the principle has maintained its position for nearly 400 years. This chapter shall now explore the origins of the principle that there can be no property in a deceased’s body.

1. The Origin of the "No Property" Rule

The theory that no person can be the owner of his/her own body is traceable to the beginning of modern Western philosophy. Immanuel Kant’s dignity-based doctrine in particular has led to today’s position. The German philosopher established the theory that "it is not possible, of course, to be at once a thing and a person, a proprietor and a property at the same time."

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273 Property Law Act 2007, s4. The Property Law Act 2007 came into effect on 1 January 2008 and should provide certainty in property dealings, facilitate the resolution of disputes and reduce litigation. For a valuable discussion on the concept of property, see Hammond, supra n 215 at 1-36.

274 For example, selling, leasing, inheritance, etc. This modern view of property is recognised by various academics in the field of property law, see K.J. Gray & P.D Symes *Real Property and Real People* (London: Butterworths, 1981) p 8-9; T.C. Grey *The Disintegration of Property* (New York: Garland, 2000) p 69 (with further references). Similarly *Union Oil Co. v State Board of Equal.* (1963) 60 Cal.2d 441, 447 [hereinafter: *Union Oil*] provides that ownership is "a bundle of rights and privileges as well as obligation".

275 *Doodeward v Spence* (1908) 6 CLR 406 per Griffith CJ (HCA) [hereinafter: *Doodeward*].


The rule itself is assumed to be derived from the *Exelby v Handyside* (Handyside’s case), published in a passage in the *East’s Pleas of the Crown* in 1824. Nevertheless, Peter Skegg finds much older origins of the enigma of this rule which has not been traced down beyond a passage in Coke’s *Third Part of Coke’s Institute of the Law of England 1614*. It is ironic that Coke himself never mentioned the rule of “no property” in human remains. On the topic of constructing sepulchres, he wrote: “The burial of the Cadaver (that is *caro data vermibus*) is nullius in bonis.” As Rohan Hardcastle explains, like others, Coke was concerned with the literal construction of the word *cadaver*. The word is an “acronym for the Latin phrase *caro data vermibus*, meaning *flesh given to worms*.” According to the *Oxford English Dictionary*, the word *cadaver* actually has its origin in the French word *cadaver*, which in turn was derived from the verb *cad-ere* meaning “to fall.”

The *Haynes’s case* is deemed to be the earliest English common law authority, even though the majority of academics believe that this is actually not an authority for the “no property” principle. Hayne’s conviction for stealing several burial sheets, which were owned by the mortician who prepared the corpse for its final journey, led to this (putative) first recorded case, but significantly, the decision does not appear to address property rights in corpses. Instead, the court ruled that the deceased could not own the sheets. Unfortunately, in the following centuries, misinterpretations of this statement finally led to the assumption that the *Haynes’s case* was the authority from which the principle of no property in corpses was derived.

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279 Skegg (1992), supra n 16 at 311.
282 Coke, supra n 280.
284 Idem.
287 Idem, supra n 283 at 26.
In the late 18th century, *Handyside's case*\(^{289}\) gave explicit judicial recognition to the “no property” rule. The subject matter of the action was the preserved bodies of conjoined twins that Dr Handyside kept in his surgery. Lord Wills dismissed the action and held that it “would not” lie, “as no person had any property in corpse.”\(^{290}\) The case ever been cited in later English cases and is therefore the only case in which the “no property” rule appears to have been the “sole ground of the decision.”\(^{291}\) Historical research has shown that when the phrase, “the action would not lie” is used instead of “did not lie,” it is difficult to contend that the “no property” rule is part of the *ratio decidendi*.\(^{292}\)

2. Nineteenth Century Developments

Finally, by the middle of the 19th century it was common English law that a corpse could not be the subject of theft.\(^{293}\) In all except one case, however, the judges’ statements were *obiter dictum*, so the common law developed other means to thwart “body snatching” behaviour.

Two significant 19th century civil court decisions, *R v Lynn*\(^{294}\) and *R v Sharpe*,\(^{295}\) which related to the exhumation of buried corpses for anatomic or religious purposes, require examination here. In *R v Lynn* the defendant was arrested for digging up a corpse in order to perform a dissection. The counsel quoted Coke’s dictum, which refused to recognise corpses as the subject of ownership, but did not comment on this statement. It was held that an unlawful disinterment of a body was an offence which was “cognizable in a Criminal Law Court, as being highly indecent and *contra bonus mores.*”\(^{296}\) The decision in *R v Sharpe* supported the classification of the behaviour as a criminal offence.\(^{297}\) There, the defendant was convicted of the common law offence of trespass upon the burial ground. He unlawfully opened his mother’s grave and removed her body from the graveyard without license, in order to bury her in another cemetery with his father’s corpse. Erle J stated in his *obiter* that “[o]ur law recognises no property in a corpse…” This passage seems to

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\(^{289}\) *Handyside's Case*, supra n 278.
\(^{290}\) E.H. East *Pleas of the Crown* (1803), II 652.
\(^{291}\) Skegg (1975), supra n 281 at 413.
\(^{292}\) Matthews (1983), supra n 276 at 413.
\(^{293}\) *Doodeward*, supra n 275 at 406.
\(^{294}\) 100 E.R. 394 (1788).
\(^{295}\) (1857) Dears & Bells 160, 163; 169 ER 959, 960.
\(^{296}\) *ibid*, at 734; 396.
\(^{297}\) Apart from *R v Shape* 169 E.R. 959 (1857), also *R v Price* (1884) 12 Q.B. 247, 252 and *Foster v Dodd* (1867-68) L.R. 3 Q.B. 67, 77 followed this approach.
refer directly to the “no property” principle. On the contrary, some academics argue that Erle J was simply explaining the form of indictment used. In their opinion, Erle J utilised the “no property” rule in order to defend this form of indictment, rather than to respond to any proprietary right that the defendant might occupy in his relative’s corpses.

As these cases show, it did not amount to “theft” to remove a buried or unburied body from its location. Still, one should bear in mind that these judgments are obiter dicta only, meaning other courts are not bound to these findings.

3. Modern-Day Authorities

In the Sharpe case, the only precedent in which a judge had referred to the “no property” rule was Williams v Williams in 1882. There, in a codicil to his will, the testator directed that he wanted to be cremated, and for that purpose his body should be given to his woman friend, Ms Williams. After reaching consensus with other relatives, Ms Williams took the corpse to Italy and cremated it there. The court was asked to decide whether Ms Williams could claim a refund of the money she spent in carrying out the testator’s instructions. Kay J held that “the law of this country recognises no property in a corpse,” meaning that the dead person cannot own his/her own body, hence the corpse cannot be disposed of by will. Therefore, the court dismissed Ms Williams’ suit on the basis that the corpse could not form part of the estate.

The “no property” rule was affirmed by R v Price, and more recently in R v Kelly and AB v Leeds Teaching Hospital NHS Trust. These modern day cases show that both common and civil law have adopted the general principle that there can be no property in a human corpse. Yet, as noted above, all major English authorities for the “no property”
principle were unambiguously suspicious, and originate from “quirky fact situations.” Similarly, an early Canadian case has acknowledged that the “no property” rule was of “doubtful historicity” and was derived mainly from obiter dicta. Moreover, most of the relevant authorities are very old and might need to be reconsidered.

4. Moore: New Perspectives

In contrast to English courts, American courts have dealt with the more challenging question of research participants’ property interests in human biological material in the oft-cited Moore case. John Moore’s spleen had to be removed due to hairy-cell leukaemia. After developing a cell-line from the spleen cells, capable of producing pharmaceutical products, the health team patented the cell-line and made commercial agreements with pharmaceutical companies worth hundreds of thousands of dollars. In 1984, Moore sued the medical team, who were given licenses to commercially exploit the cell line, alleging the tort of conversion based on the fact that his spleen was his property. Conversion being a form of trespass to property, the plaintiff needed to prove that his spleen cells were indeed capable of being owned. In the end, an action in conversion failed, primarily due to overriding public policy grounds. The research “end-product” was different from Moore’s original cell-line, but more importantly, the majority of the Supreme Court found that establishing a property interest in the subsequent exploitation of Moore’s original bodily material would hamper medical research per se. The court accepted the argument that the researchers created a patent by harvesting Moore’s original cell material, whereas Moore did not make a contribution towards the discovery other than donating the tissue. It was not

311 Mortimer (supra n 309 at 237) thinks differently. He argues that it is not correct to dismiss Kay J’s no property statement in R v Sharpe as obiter dictum.
312 In this case the Californian Supreme Court.
313 Moore v Regents of the University of California, 249 Cal. Rptr. 494 (1988); (1990) 51 Cal.Rptr. 146, 793 P.2d 497; cert. denied 111 S.CT. 1388 (1991) [hereinafter: Moore case]. Other American judgments concerning the “no property” rule are, eg Bouvia v Superior Court 225 Cal Rptr 297 (Court of Appeal California, 1986) and Schloendorff v Society of New York Hospital, 105 N.E. 92 (1914).
314 First named “Mo Cell Line” and later “RLC Cell Line”.
315 In return for $330,000 (US) cash and 75,000 stock options in Genetics Institute Inc.
the original material in which the value lay, but the information extracted from it. The court felt that it was inappropriate to consider the issue of whether Moore’s bodily material was the subject of property, and further, how much it would have been worth.17

The judgment in Moore has been sharply criticised.318 Amongst others things,319 the Judges have been accused of being too circular in dealing with existing categories of property rights instead of recognising the progressive concept that a new (intangible) proprietary category could be created. While the majority did not address ethical, moral and religious issues raised by a potential property interest in human tissue, Arabian J did so in his concurring opinion. Even though Arabian J focused on the medical research issues, and spoke approvingly of a “licensing scheme,” he avoided the question of whether there could be property in human tissue.320 In general, his opinion appears to be doubly ironical, because his appeal to the other judges to take into account cultural, moral and religious aspects was rather bogus.321 In the end, cultural, ethical and moral issues were not addressed by court. Instead, the court disposed of the case “on public policy grounds.”322 The majority held that to consider removed tissue the subject of property (or even possession) of the patient would hinder important medical and scientific research. However, the refusal to construe a proprietary interest was not supported by evidence in any form.

Mosk J’s dissenting opinion323 in Moore suggested that ownership is “a bundle of rights and privileges,”324 since there are many other circumstances in which the law limits or forbids the exercise of rights over certain forms of property. Owners of private properties, for example, may be restricted in their use of the land by planning permits and building leases. After describing various illustrative examples for comparison, Mosk J finally held that:

317 In the end, Moore’s thirst for justice was quenched by an out of court settlement that ranged between $200,000 and $400,000; see R. Cairney “Venting His Spleen (Doctor Patented Quirk in Patient’s Unusual Genetic Code)” (1998) Canadian Medical Assoc. Journal 1451.

318 Mortimer, supra n 309 at 222.


320 Moore, supra n 313 at 498 per Arabian J.

321 Idem. For a more valuable discussion, see Lawrence, supra n 25 at 131; Sperling, supra n 308 at 120.


323 There is also a dissent by Broussard J. Sadly, although this is the clearest discussion of the property issue, Broussard J does not really offer a single worthwhile point in his counter-argument. A discussion on both dissents can be viewed in M. O’Connell “A Guide to Moore v. Regents of the University of California” [Northeastern University (Boston) Publications, School of Law, 2008]; available to download at: <http://www.slaw.neu.edu/affairs/fall2008-oconnell-mooreguide.pdf> (accessed 8/6/09).

324 See Union Oil, supra n 274.
[t]he Court of Appeal summed up the point by observing that defendants' position that plaintiff cannot own his tissue, but that they can, is fraught with irony. It is also legally untenable. As noted above, the majority cite no case holding that an individual's right to develop and exploit the commercial potential of his own tissue is not a right of sufficient worth or dignity to be deemed a protectable property interest. In the absence of such authority-or of legislation to the same effect-, the right falls within the traditionally broad concept of property in our law.325

The question of exists proprietary interests in (removed) human tissue can exist has not been clearly answered. Many other American cases326 followed the Moore case, but none of them incorporated Mosk J’s dissent nor recognised a proprietary right in either human tissue, or in the whole human body.

5. The New Zealand Position on the “No Property” Principle

Although New Zealand courts are not legally bound by the “no property” principle,327 local courts are unlikely to deviate from this well tried rule nowadays.328 One of the very few New Zealand cases that has touched on this issue is R v X,329 where the question arose as to whether a semen sample is admissible evidence. There, a diplomat was alleged to have indecently assaulted his children’s nanny by masturbating to ejaculation over her while she pretended to sleep. The nanny discovered sperm in her hair, which she cut off and placed in a plastic bag as evidence. The following day she made a complaint to the police, giving them the plastic bag containing the sample. The diplomat claimed, however, that the semen sample belonged to him and thus was inadmissible evidence. Making no comment on the ownership status of the sperm, the court held in this particular case, that “the semen as such was abandoned or discarded”330 by the diplomat, and therefore was admissible evidence.

325 Moore, supra n 313 at 510.
327 Meaning that they could hold that corpses are the subject of ownership.
330 Doodeward, supra n 275.
Further chapters of this thesis will address possible alterations of the “no property” principle in regard to the Human Tissue Act 2008.\footnote{This is implicit stated in part 3 and s2 of the Human Tissue Act 2008.}

III. Exceptions to the “No Property” Rule

1. The “Work or Skill” Exception

One of the leading cases holding authorities for the theory that there can be no property in dead bodies is the Australian case of \textit{Doodeward v Spence}. The case deals with ownership over a two-headed stillborn child that had been kept preserved in a bottle of spirits as a curiosity, bought by Doodeward’s father at auction, and eventually inherited by Doodeward. After the preserved body was seized under warrant, Doodeward commenced civil proceedings for conversion and detinue of the stillborn baby’s body. The Australian High Court had to determine whether or not Doodeward had lawful possession of the corpse. In the first instance it was held that immediately after death, a corpse is not the subject of ownership and, consequently not the subject of an action for conversion and detinue.\footnote{The Supreme Court, which dismissed an appeal from a judgment of nonsuit in a District Court in an action for detinue, brought to the appellant (Mr Doodeward).}

On appeal, Doodeward succeeded on his claim by a majority,\footnote{Barton J was of dissenting opinion that a stillborn baby is not even a corpse.} as the High Court reinforced the lower court’s decision, with one decisive exception “that a corpse can be so changed that it becomes the subject of property.”\footnote{\textit{Doodeward}, supra n 275 at 417; The holding is weak according to Matthews [(1983), supra n 276 at 214]. In his opinion, the key argument is that a person who possesses preserved corpses can only be challenged by “a person with a better right to possession”.} Chief Justice Griffith justified the exception as follows:

\begin{quote}
I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that, so far as it continues property, a human body...is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such right may be acquired, but I entertain no doubt, that when a person has by the law exercise of work or skill so dealt with a human body...in his lawful possession that is has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as course,
\end{quote}
to any positive law which forbids its retention under the particular circumstances.\(^{335}\)

From this it follows that bodies which have been preserved and used for medical or scientific purposes can be owned and even sold. This has become known as the "work or skill" exception.

Another example of this controversial issue that divided the Doodeward judges is the travelling exhibition "Body Worlds,"\(^{336}\) developed by the German anatomist Gunther von Hagens. This worldwide exhibition shows dead bodies that are prepared using a technique called plastination to reveal inner anatomic structures. The exhibition has been surrounded by controversy all over the world. In particular, the Catholic Church\(^ {337}\) and some Jewish Rabbis\(^ {338}\) have complained that the exhibition is inconsistent with reverence towards the human body. Similarly, Māori are troubled by the concept of possession of the deceased because of their view of life and death.\(^ {339}\)

The Re Tupuna case, mentioned earlier, concerned ownership in a preserved Māori head (moko mōkai) that was to be sold by auction in London.\(^ {340}\) After the auction went public, various human rights organisations such as Survival International put pressure on the auctioneer to withdraw the head from the auction. The auctioneer, however, claimed the head to be her personal property and refused to stay the auction. Justice Greig granted an injunction stopping the sale in order to regain and bury the warrior's head according to Māori law and custom.\(^ {341}\) He expressed disgust at the sale and purchase of human heads and remains in general, for gain or curiosity.\(^ {342}\) So why did Greig J not adopt the "work or skill" exception? It has been suggested that the decision was influenced by the "no property" principle.

\(^{335}\) Ibid, at 406 per Griffith CJ.


\(^{339}\) Report 62, supra n 207 at para 271.

\(^{340}\) Re Tupuna, supra n 199; case description above, p 31.

\(^{341}\) Idem.

ple,\textsuperscript{343} and the theory that a dead body “belongs to the public.”\textsuperscript{344} Additionally, it was quoted that:

> protection the deceased was arguably entitled to and has, even though belatedly, received in the grant of administration here made to Sir Graham Latimer as a Rangatira of his likely iwi. The standing of Ngapuhi...is consistent with the very indefinite limits placed by the courts on the class of persons having the right and duty to bury a dead person.\textsuperscript{345}

It appears that the right of ownership was assigned to the iwi of the deceased warrior because the iwi had the right to bury the head in this particular case.

In summary, it can be said that a dead, unburied human body cannot be subject of property immediately after death. However, a dead body can become the subject of property when it has lost the characteristic of a corpse; such as a long-dead creature like a mummy. According to the High Court of Australia, three qualifications are required. First, the person asserting the right of property must be in lawful possession of the body.\textsuperscript{346} Secondly, the person must, by use of “skill or work,” have changed the nature of the corpse.\textsuperscript{347} Thirdly, this person obtains a simple right of possession, and not an ownership right, if the manner of use is scientific and controlled by the state. Despite detailed explanation by Griffith CJ about the primary features of this exception, there may still be uncertainty about what exactly must be done to the body, or parts thereof, to become the subject of property.\textsuperscript{348}

Evidently, all these requirements were not met in “body snatching” cases. In particular, the manner of use is generally not scientific, but cultural.

\textsuperscript{342} Brookfield, supra n 218 at 218.  
\textsuperscript{343} Foster v Dodd, supra n 297 at 77.  
\textsuperscript{344} Brookfield, supra n 218 at 218.  
\textsuperscript{345} This subject will be explored in the following chapter.  
\textsuperscript{346} Doodeward, supra n 275 at 406 per Barton J.  
2. Exceptions Based on the Human Tissue Act 2008

The Human Tissue Act 2008 (HTA) regulates the use and collection of human tissue, primarily from dead bodies. The new HTA was introduced at a time when the Auckland Green Lane Hospital scandal brought enormous negative attention to the practice of medical research with human tissue. Concerns had arisen over the hierarchy of consent required for organ donation. Additionally, it had been uncertain for a long time whether human tissue used in medical research could actually be owned by a research team. The scope of this section does not permit an in-depth analysis of the new HTA, but some notions, especially the property approach, will be outlined. In general, the Act contains provisions relating to post-mortem examinations, the removal of tissue for therapeutic purposes, the practice of anatomy and the purpose of research. Primarily, it is a response to the need for a more effective supply of human tissue and organs for medical training and education.

Some submissions on the Human Tissue Bill questioned whether the HTA should incorporate a property framework, in which human tissue can be the subject of ownership. For example, Toi te tāiao/the Bioethics Council suggested in its submission to the Human Tissue Bill, that according to clause 55 (now: s56 of the HTA), seized human tissue had the status of property, hence it could be sold after removal. Section 56 of the HTA provides that a person is not allowed to take a fee or accept any payment when trading in human

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351 D. Mussen Secret Deals over Missing Babies’ Organs (7/10/2008) Sunday Star Times <http://www.stuff.co.nz/nelsonmail/4785134a6417.html> (accessed 23/2/2009); Skegg (2003), supra n 328 at 425-426. The hospital stunned New Zealand families by admitting it had kept more than 1300 hearts, of which many were taken without permission after autopsies, for more than fifty years.
352 Similar scandals and cases can be found in other Common Law countries. In England, the Alder Hey scandal shocked the nation. This scandal involved the unauthorized removal, retention, and disposal of human tissue. Information regarding this subject is provided by R.N. Nwabueze Biotechnology and the Challenge of Property-Property Rights in Dead Bodies, Body Parts, and Genetic Information (Hampshire: Ashgate Publishing Ltd, 2007) p 48 [hereinafter: Nwabueze (Biotechnology)]. More recently, Re Human Tissue Products Liability Litigation, [Slip Copy, 2008 WL 4665755, D.N.J., October 22, 2008] (No. CIV-06-135, MDL)] the United States District Court, New Jersey, focused on a criminal enterprise by Biomedical Tissue Services, Ltd. and Mastromarino to harvest tissue from corpses without obtaining proper consent.
353 On the other hand, it should increase organ donation rates. In fact, the New Zealand transplant rate is amongst the lowest in the Western World (second last, with Australia coming in last). In 2000, for example, there were only 10.6 donors per million of the population. Source: J. Nagahooro & G. Gillett “Over my dead body: the ethics of organ donation in New Zealand” 117 NZ Medical Journal 1201.
354 For example, Submission HTB9 on the Human Tissue Bill, Dunedin Community Law Centre, p 6-7 (February 2007); Submission HTB10 on the Human Tissue Bill, toi te tāiao (the Bioethics Council), p 8 (March 2007); available to view at: <http://www.bioethics.org.nz/publications/human-tissue-bill-submission-mar07/index.html> (accessed 19/5/09) [hereinafter: toi te tāiao].
355 Clause 55 of the Human Tissue Bill is given in Appendix two.
tissue. The Bioethics Council’s submission was dismissed by the Ministry of Health’s report which stated:

... this section is clear about the way in which any human tissue that is seized must be treated and disposed of, and it is not being thought of as property in the usual sense.\(^{357}\)

The Ministry of Health argued that there is no need to clarify the section “Trading in blood, controlled human substances, or other human tissue” further because by virtue of s56 of the HTA, the trading of human tissue is generally prohibited; meaning that people must not commercialise their body or parts of it.\(^{358}\) This appears to be a flat refusal to introduce a property framework to the HTA. However, s72 of the HTA (Disposal of property seized) undermines this refusal, because it equates property with human tissue seized. In other parts, the HTA introduces the language of possession as it assigns the right of custody over body parts to the person responsible (s14, 15 of the HTA). The person responsible (the person who is lawfully in possession of the body) however, is not implicitly equal to the person lawfully entrusted with the body for the purpose of its burial, cremation, or other lawful disposal.\(^{359}\) In essence, tissue can be in possession of a hospital or clinic, but interestingly enough, separated human tissue can become property of a faculty or an academic institution for research, if permitted by the Ministry of Health (s 60 of the HTA). This reflects the sole exception to the “no property” principle within the HTA. Regardless of this progress, corpses can still not become property under the Act, since the definition of human tissue does not include a dead human body as a whole, because a deceased’s body is not “...collected from a living individual.”\(^{360}\) The HTA rather regulates the collection and/or use of biological materials separated from dead or living persons only and does not provide an exception to the “no property” rule for whole unburied corpses.

\(^{357}\) Report HTB7 on the Human Tissue Bill, Ministry of Health, p 68.
\(^{358}\) Exceptions exist for academics needing tissue for their research (HTA, s60).
\(^{359}\) HTA, s12.
\(^{360}\) HTA, s7.
C The Rights of Possession for the Purpose of Burial

There are several people or organisations who may have a legal right of possession of the body of the deceased because of a general duty to bring the dead to a decent interment. In New Zealand there is virtually no legislative guidance in this branch of law, and as a result the exact character of this duty is unclear. It seems to be a question of who has possessory interests in the dead body for the purpose of burial. Two competing interests in the disposal of the deceased’s body are, on the one hand, the wishes of the surviving spouse, and, on the other hand, the wishes of the next of kin, or other claimants of equal standing as the next of kin, and both interests have to be balanced with the wishes of the deceased. The disposal itself is a public duty of great significance as it carries with it an enforceable right to possession of the corpse, so it is important to identify who is in possession of the body.

I. The Coroners’ Overriding Right to Possession

Within the scope of an inquest into the cause of death under s19 of the Coroners Act 2006, coroners have a statutory right to take possession of a corpse for the purpose of conduct-
In New Zealand, the coroner's role is to establish the cause and circumstances of death in cases of sudden or unexplained deaths, and deaths in other special circumstances. A coroner is competent to act on behalf of the state to inquire into such deaths. Once the medical examination is complete, a coroner must release the body to the person responsible for the burial, or authorise the disposal of the body by virtue of s42 Coroners Act. Therefore, a coroner has an overriding right to custody of a body for the purpose of coronial inquiries. Additionally, coroners have an overriding right to possession even if they are not yet aware of the death, or even if it is not clear whether a post-mortem examination needs to be performed at all.

Problems may arise if cultural and religious interests are concerned. Under certain cultural codes, an examination of a dead body is an act of desecration. For example, Māori believe that it is vitally important to be buried whole. In 2006, Tariana Turia expressed this in the first reading of the Human Tissue Bill:

[m]any Māori are very uncomfortable with the concept of organ donation following death—the tūpāpaku is tapu, and to interfere with it in any way is abhorrent to our culture. Human tissue organ donation is a massive issue for us, and it raises huge questions about issues of protection, informed consent, tangata whenua control of information and medical processes, access to information and medical care, and, most of all, cultural respect.

It can be gathered from this that a dead body is considered tapu by Māori. The Māori Party made it clear that Māori are not comfortable with post-mortem donation, but are willing to donate organs between their members while alive. Furthermore, Māori are offended by the circumstance that the body of the loved one might be left alone in a mortuary or an exami-

367 Similar to coroners, police have certain rights to possession of the body in prosecuting offences and investigating crime: Chief Constable of Kent v V (1982) 3 All E.R. 36; Chic Fashion (West Wales) Ltd. v Jones (1968) 2 Q.B. 299.
368 Coroners Act 2006, s19.
369 Sperling, supra n 308 at 97.
370 R v Bristol Coroner (1974) Q.B. 652, 659 per Kerr J.
371 Coroners Act 2006, s19.
372 For example the Aboriginal Yolngu belief, see Atherton (ALJ 2003), supra n 276 at 189. Also an autopsy is regarded as an act of desecration and as such inimical to the deepest principles and feelings of people of the orthodox Jewish faith, see unpublished paper, R. Atherton “Body-snatching: Rights over Human Body Parts”, a keynote address delivered at the seminar, Jewish Law, Ethics and Organ Donation and Transplantation, for the Australian Jewish Medical Federation (NSW) p 20.
373 Current Co-Leader of the Māori Party.
374 (2006) 635 New Zealand Parliament Debate 6467 (Hon Tariana Turia) [hereinafter: Turia]. Unsurprisingly, her statement resulted in three votes against the Bill from the Maori Party in the second reading and the final rejection of it in the third reading.
nation room of the pathologist. Family disputes over burial have so far not been incorpo­rated in the Coroners Act 2006, and coroners currently do not have the right of custody in cases where the body of a deceased who died a natural death has been taken.

II. Possession by the Hospital

Some academics\textsuperscript{375} suggest that it is the hospital that is in lawful possession of the body of a patient, if the dead body is physically situated within the confines of the institution. This conclusion is supported by \textit{R v Feist},\textsuperscript{376} where the master of the workhouse in which the deceased died was granted the right to possession of the body. This assumption is affirmed by s12(2)(a) of the HTA, which defines the person responsible as the person lawfully in possession of a body, including the "person for the time being in charge of a hospital." In this case, the hospital has crucial decision-making powers, and can give consent for body parts to be lawfully removed for medical purposes. Although hospitals are most likely to be in possession of the deceased's body immediately after death, it is not the hospital who will arrange the funeral. It is logical to conclude that the hospitals' possession is lawful until it is transferred to relatives for preparation of funeral arrangements.\textsuperscript{377}

III. The Executor's Right to Possession

When a person dies testate, the administration of his/her estate is carried out by the executor, who is appointed by the deceased person (the testator) under his/her will. If the testator does not appoint an executor an administrator can be appointed by the court to administer the estate. But, is this arrangement consistent with the duty to arrange the funeral? In other words, does a corpse fall within the definition of estate? If so, the executor's right to possession sets in at the moment of death with retrospective effect once the will has been granted. "Estate" is a legal term used for all assets owned by a person at the time of death, which shall be distributed according to the individual's wishes.\textsuperscript{378} Section 2 of the Admini-

\textsuperscript{376} 169 E.R. 1132 (1858).
\textsuperscript{377} Meyers, supra n 375 at 190; Price (2002), supra n 288 at 39.
stration Act 1969 defines estate as “real and personal property of every kind, including things in action.” Since no one can establish ownership in a dead human body, it does not come under the definition of estate.

In England, the right to possess a corpse flows from the public duty to dispose of the deceased. In Dobson v North Tyneside Health Authority Gibson LJ held that:

[the executors or administrators quoted of the deceased or other persons charged by the law with the duty of interring the body have a right to custody and possession of it until it is properly buried.

Gibson LJ then affirmed the established principle that the executor has an enforceable right to possess a dead body.

Similarly, in New Zealand both the right and the duty to dispose of a deceased’s body vest in the executor. Therefore, the deceased’s body has to be delivered into the possession of the executor after death. This raises serious questions about the interests of the executor versus competing interests of the next of kin, spouse, and even the testator him/herself.

1. The “No Will” Rule

Does the executor’s right to possession include the privilege of determining the place of burial? Can the testator prevent unwanted arrangements or are instructions that the deceased made in his/her will are just directions? Assuming that the testator can make binding declarations concerning his/her burial, the issue of materialisation of an individual’s body arises. The subject is related to the debate about whether an individual should be able

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380 For foreign jurisdiction, see Enos v Snyder, (1900) 131 Cal. 68, 69 [hereinafter: Enos v Snyder].
381 R v Stewart, supra n 362 at 1009.
382 (1997) 1 WLR 569 (CA) [hereinafter: Dobson].
383 Ibid, at 600.
to sell organs for transplantation purposes while alive; an important issue in some developing countries such as Egypt, Brazil and India. Particularly significant is the argument that “at Common Law, a person does not own her/his body.” This argument underpins the so-called “no will” rule, that (in most common law countries) a person can only give non-binding indications about the burial arrangements and disposal following his/her death. Logically, the deceased’s expressed wishes are not enforceable by law. Yet, the testator can increase the probability of his/her wishes being followed by choosing an executor carefully and can specify bequests for those who follow the wishes expressed in the will.

A similar problem arose during the discussions of the Human Tissue Bill. It was a debatable point whether the will of the deceased regarding the use of his/her tissue should be respected, or whether the relatives of the deceased should have to be consulted, and finally have the power of veto. The Interchurch Bioethics Council postulated in its submission that “if a person is competent then their wishes regarding the use of their body after death should be respected, and should not be over-ruled by the family.” Using comparative law analysis, one submission recited that in the United States the relatives of a deceased are “not themselves decision makers but interpreters of the opinion of the deceased.” In addition, the submission referred to Austria where, in respect for the deceased’s autonomy, relatives do not even have to be consulted at all. In stark contrast, New Zealand’s Māori believe that the tūpāpaku belongs to the whānau, and consequently the deceased cannot dispose of his/her body beyond the grave. This idea is based on the assumption that in the end the family, not the deceased, has to live with the consequences of the organ donation. In New Zealand, Parliament has given the immediate family the right to “give informed consent,” or “raise an informed objection” if certain conditions apply. Subsequently, under current law, the family’s refusal can override the individual’s wish to do-

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385 The selling and buying of organs for transplantation purposes is a criminal offence in nearly all countries except China and Iran, see S. Wilkinson Bodies for sale: Ethics and Exploitation in the Human Body Trade (New York: Routledge, 2003) 104 (ft. 10) [hereinafter: S. Wilkinson].
386 Ibid, at 104-107. One notable example here is India, where organ purchasing is rife, even though organ sale was made illegal in 1995. See, eg P. Kandela “India: kidney bazaar. (widespread practice of selling kidneys for transplantation)” (June 22, 1991) The Lancet 1534 (1).
387 Awa (HC) per Hammond J, supra n 3 at 55.
388 Sperling, supra n 308 at 110.
389 Skegg (1997), supra n 276 at 227; Atherton (ALJ 2003), supra n 276 at 188.
389 Sperling, supra n 308 at 113.
390 Submission HTB1 on the Human Tissue Bill, by the Interchurch Ethics Council, p 1.
393 HTA, s40.
nate. Nevertheless, it is strange that the question of whether to assign a right, or the power of veto, to the executor did not come up during the decision-making process of the Human Tissue Bill. That person would have to make vastly different decisions about burial and the possibility of organ donation, but ultimately the executor has been excluded from the decision-making process for organ donation, for the enormous amount of time it could take to find an executor. Despite their similar themes, Parliament, like the judiciary, decided to deal with burial arrangements and organ donation separately.

In summary, under current law a person cannot make binding decisions in his/her will about the place of burial. This indicates that New Zealand law considers the surviving relative’s wishes more important than the autonomy of the deceased. Since the HTA is relatively recent, it remains to be seen whether an adjustment of terms will take place. At the present time the executor can override the testator’s wishes concerning the burial place. 395

2. Disputes with the Spouse and Family

Disputes in respect of a deceased’s body usually occur where different people or groups feel antipathetic towards each other or each other’s culture. In case of burial disputes, established jurisdiction gives preference to the executor; meaning that if there are “disputes between the executor and the spouse, the executor will prevail.” 396 The executor is authorised to take civil action (for example an injunction) prior to burial, in which the Judge can allocate the right to custody and possession to the executor “even against the wishes of the widow.” 397 In other words, both the right and the duty to bury the corpse lie with the executor “to the exclusion of other persons”. 398 This principle originated in the English case of Hunter v Hunter, 399 where the court ruled that the deceased’s son, who was the executor of the will, and not the deceased’s spouse, had the responsibility to bury the body. The son was even granted an injunction in order to prevent other family members to interfere in the

395 The issue is related to organ donation, where the family can override the deceased’s donation directions.
396 Tomas (2008), supra n 16 at 234.
397 Hunter v Hunter (1930) 65 OLR 586 [hereinafter: Hunter v Hunter]; Awa (HC), supra n 3 at 709; likely Kay J in Williams v Williams relied upon R v Fox (1841) 2 Q.B. 246 [hereinafter: R v Fox].
398 Tapora v Tapora, supra n 384.
399 Hunter v Hunter, supra n 397. Another comparable case of the Ontario Court is Saleh v Reichert (1993) 104 DLR (4th) 384. There, a husband became the administrator of his wife’s estate and wanted her remains cremated in accordance with her wishes. The deceased’s father, who wanted to inherit her body in order with Muslim faith, challenged the planned cremation in court. In the end, the court allowed the cremation.
burial. The case illuminates the strong position of the executor within the network of people warranted to hold possession.

In *Tapora v Tapora*[^400] disputes arose as to the disposal of the deceased’s body. The deceased man, who died in Auckland, appointed the appellants as executors and directed in an annexure to his will that he wanted to be buried in his home village. The surviving widow, however, wished him to be buried elsewhere. Relying on *Hunter v Hunter*, Henry J held that the appellants “are entitled, as against the Defendant or any other person, to dispose of the body of the Deceased as they think fit.”[^401]

In summary, after probate of the will has been granted, and in the absence of a coroner’s prior right to possession, the executor is entitled to dispose of the corpse as he/she sees fit.

### IV. Intestacy - Revolving Competing Rights to Possession

If the deceased dies intestate the law is less definite.[^402] Usually, the court appoints an administrator to distribute the deceased’s estate in such cases,[^403] and until the court appoints an administrator, the estate is appointed to the Public Trustee.[^404] But, who is most likely to be appointed as the administrator, and who is in lawful possession of the body until it is handed over to the administrator?

The person lawfully in possession “is the person in control of the place where the body is lying.”[^405] This will often, but not necessarily always be the hospital the person died in.[^406] Traditionally, when it comes to identifying the person with the right to possession for the purpose of burial, “four potential categories”[^407] of persons exist: the relatives[^408] of the deceased, including the spouse and next-of-kin; the person entitled to letters of administra-

[^400]: Supra n 384 at 303.
[^401]: Ibid, at 1.
[^402]: A person dies intestate who either has made no testament at all or has made one that is not legally valid.
[^403]: Holtham v Arnold (1986) 2 BMLR 123; Please note that the deceased can appoint an administrator in a letter of administration even if he did not appoint an executor.
[^404]: Hardcastle, supra n 283 at 48.
[^405]: See, Skegg (2003), supra n 328 at 429 ft. 34.
[^406]: See, HTA, s12(1),(2).
[^407]: Idem.
[^408]: Clerk v London General Omnibus Co Ltd (1906) 2 KB 648 (CA) 663-64; Jenikins v Tucker (1778) 138 E.R. 55, 57.
tion; the local authority; and the occupiers of the premises where the deceased passed away, for example the hospital. The absence of an executor is a situation which will invariably apply in the case of the death of a young child for example. In these cases, the natural parents of a child have the right to possession of the body for the purpose of burial over other guardians or caregivers expires at death. But how should we solve issues between persons who are potentially in possession of an adult's body? It is not clear whether the deceased's body should belong to relatives, since every human being experiences "some others as part of ourselves."

In cases where there is dispute between family members over the responsibility for burying the corpses, parties can seek directions from courts. This, however, might result in delay. Moreover, it is unclear who is responsible for the burial of the dead body, and thereby has a right to possession.

1. Foreign Concepts

Both Australian and English law recognise duties to bury the deceased's body and associate rights of possession over corpses. The legal protection of corpses in the United States is somewhat different. There, interestingly enough, the "no property" rule has been superseded by a so-called "quasi-property" theory. "Quasi-property" is a right similar to ownership in the deceased's body for the purpose of burial. It manifests certain key features of property, such as exclusive control and possession of the corpses.

409 National Assistance Act 1948 UK, s50(1); Public Health (Control of Deceased) Act 1984 UK, s46.
410 R v Stewart, supra n 362 at 779, 1009.
411 Arising disputes between relatives and the occupiers of the premises where the deceased passed away will not be discussed here, as they generally occur in case of organ transplant and tissue or organ removal. This special right of possession is conferred under the Human Tissue Act 2008.
412 Waterne v Vercoe (NZFLR) 193. Here, disagreement as to inscription on the headstone of the deceased child's grave led to disputes between the guardians. It was held that the deceased child is no longer a child within the meaning of the Guardianship Act 1968. The corollary was that guardianship expires at the child's death; see, also Guardianship Act 1968, ss3,23.
415 One of the first occurrences of "quasi-property" being found by a court under American law was in the case of International News Service v Associated Press, 248 U.S. 215 (1918).
416 Mason & Laurie, supra n 308 at 723.
Ever since the Supreme Court of Pennsylvania observed that:

[w]hen a man dies, public policy and regard for the public health, as well as the universal sense of propriety, require that this body should be decently cared for and disposed of. The duty of disposition therefore devolves from upon some-one, and must carry with it the right to perform.

it has been an obligatory public duty to bury the deceased. In the cited case the Supreme Court assigned the responsibility for burial to the surviving spouse and next of kin on behalf of the public, however this regulation does not resolve inter-family problems. Two recent cases that have aroused enormous media interest illustrate the conflict. At the beginning of 2007 the 4th District Court of Appeal of Florida ruled that actress Anna Nicole Smith’s body should be buried in the Bahamas beside her son as the deceased wished, rather than in Texas as her mother wished. In 2006, a similar court battle ensued over the remains of the professional baseball player Kirby Puckett. The Supreme Court of Arizona ruled that Puckett’s children were entitled to possession of his dead body rather than his fiancé. American courts in general have a long tradition of looking beyond family relations to consider the actual relationship between the deceased and his/her survivors.

b) England

English law recognises a right to possession of a deceased’s body that does not involve an independent duty to dispose of the body. This possessory right arises when three criteria are met: First, the relatives must have knowledge of the death. Secondly, they must ac-

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417 Pettigrew v Pettigrew (1904) 56 A. 878, 879.
418 Idem.
420 Re Estate of Pucket, PB 2006-000799, at 4 (Ariz. Super. Ct. Maricopa County Oct. 23, 2006); for a valuable discussion, see Foster, supra n 419 at 1363.
421 Courts have used a so-called “behavior based approach” in cases involving relatives with different degrees of kinship, see, eg Spanich v Reichelderfer, (1993), 90 Ohio App.3d 148, 628 N.E.2d 102, 104; for a summary of examples of such cases see Foster, supra n 419 at 1393-1398 and the cited cases. The approach will be discussed in more detail on page 129-130.
422 Dobson, supra n 382 at 478.
423 AB v Teaching Hospital, supra n 306.
tually be in possession of the corpse, located on their premises. This means that there is no other person (for example an administrator or executor) with a prior duty of disposal. Thirdly, it is necessary that the person is granted the right to be appointed by the administrator of the deceased’s estate (see Non-Contentious Probate Rules 1987, UK). In case of disputes between the relatives, the spouse is the person entitled to commence arrangements for the funeral. Once the body is buried, the spouse loses any right of custody and possession. The English approach seems to be feasible as long as the spouse is capable of acting.

c) Australia

Just like other common law countries, Australia has no statutory guidance in this area of law. Nevertheless, two court decisions seem to indicate that legal suits might be the only way to determine who is lawfully in possession of the body. Concerning burial conflicts among Indigenous people themselves, or between Indigenous people and European inhabitants, both the Supreme Courts of South Australia and the Northern Territory decision set precedents in this domain of law.

In Smith v Tamworth City Council the issue was whether the deceased’s mother or father had the right to arrange the funeral. The case was delicate because both parents had an equal relationship with the deceased, and joint right to possession of his remains. The deceased, whose father was a member of the Bardi Aboriginal tribe, died intestate. The mother’s wish was a Roman Catholic burial in Darwin, whereas the father wanted his son to be buried in a family burial plot their homeland in South Hedland, in accordance with aboriginal custom. The court held that the body should be buried in Darwin, as this was the place where it already had been stored, and where the burial arrangements were far advanced. Young J referred to Calma v Sesar where it was held that:

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425 AB v Teaching Hospital, supra n 306 at 296; Magnusson, supra n 276 at 31.
426 (1997) 41 NSWLR 680.
427 Australian Aboriginal Indigenous people believe that if the body is dealt with appropriately, the spirit be reincarnated in animal form.
It requires that the Court resolve the argument in a practical way paying due regard to the need to have a body disposed of without unreasonable delay, but with all proper respect and decency.428

Subsequently, he provided a detailed table of the hierarchy of claims,429 chiefly implying that if a will exists, the executor is responsible for the burial. However, if a person dies intestate “the right of the surviving spouse or de facto will be preferred to the right of children.”430 And, as already indicated, in case of two equal claims, the person who can arrange the burial without “unreasonable delay”431 is entitled to arrange the funeral. Unfortunately, this entails a de facto disadvantage for Indigenous people whose custom requires their relatives to be buried in the “homeland” which can often be remotely rural and far from the place where the deceased may have died.

In Jones v Dodd432 the father and former de facto spouse of the deceased could not come to an agreement as to where the body of the deceased should be laid to rest. The latter wished to have the body buried in Port Augusta (South Australia) so that their children could visit their father’s grave more easily. The father sought to have the body buried in accordance to Aboriginal custom in Oodnadatta (also South Australia).433 Even though they were the nearest in kin, the deceased’s children (age 10 and 11) where too young to claim administration of the estate. Therefore, the court in the first instance court, and subsequently the Supreme Court ruled in favour of the father. However, Perry J in the Supreme Court felt that Debell J, in the lower court, overemphasised the right of the next of kin to arrange the funeral, criticising the merely functional argument that the person who is likely to obtain a grant of letters of administration should determine the funeral arrangements. He also stated that the framework provided by Smith is not authority for the “next of kin rule”.434 It was innovative of Perry J to implicate cultural values by referring to Article 12.1 of the UN Declaration on the Rights of Indigenous People435 by acknowledging that “Indigenous
People have the right to manifest, practice, develop and teach their spiritual and traditional rights" including "the right of the repatriation of their human remains." Both findings gave support to Perry J’s own assumption that Australian courts are more likely to decide in favour of convenience.

In summary, American, English and Australian courts do not approach the problem uniformly. Considering that New Zealand has to simultaneously acknowledge a variety of cultural burial claims, specifically from Pākehā and Māori, it is likely that American and Australian approaches would be applicable under New Zealand law, since these two nations also have bicultural populations.

2. New Zealand's Position

In the event that a person dies intestate it has long been accepted that, similar to other common law countries, close relatives are authorised to take responsibility for the funeral arrangements. However, since awareness of tikanga Māori has increased in New Zealand over the past two decades, it is uncertain if this remains the pervasive practice. Both the Loasby case and statutory rights, such as s15 of the New Zealand Bill of Rights Act 1990, seem to strengthen Māori cultural practices. Taking into account cultural issues, the Court of Appeal’s view on treatment of dead bodies was briefly, but effectively, expressed in the Billy T. James case. Commenting on the possession of the widow, the case determined that nobody had a common law right to Billy T. James’ body. On the contrary, Hammond J assigned the right to possession to the spouse:

... the body was in the lawful possession of the widow and those in the Muriwai house. Why they were proceeding as they were was for them; they were proceeding to a decent interment when the plaintiff entered the property and


While referring to the Declaration it is important to recall that Australia was one of the four countries (including New Zealand) which objected to the Declaration.


Loasby supra n 199.

For a valuable discussion on the Bill of Rights Act, see G. Palmer Unbridled Power (Auckland: Oxford University Press, 1994) 2nd ed. p 212-231.

Awa (CA), supra n 3.
snatched the body from them. He [Mr Awa] could hardly be surprised if he was described as he was.441

By giving preference to the spouse rather than the next of kin, it seems that the judges adopted the English and Australian approaches mentioned above. But does New Zealand law specify whether precedence should be given to the spouse?

The strong position of the spouse, civil union partners, or de facto partner is enshrined in part 3 of the Administration Act 1969, where they are ranked first to inherit the deceased’s estate to the disadvantage of the next of kin.442 This clearly collides with tikanga and other Māori values, such as the tikanga that the deceased’s personhood “finds expression as kin of others,”443 and it is also at odds with religious and cultural views, such as the manifestation of the next of kin’s wishes. If there is to be intermarriage between Pākehā and Māori, both parties should make an effort to communicate their wishes instead of claiming absolute validity.444 Although New Zealand law remains silent about burial responsibilities, there are two possible explanations for the underlying interest protected by law:

The first (and more openly acknowledged view) is that the duty to bury arises from consideration of public health and safety. On this view it is the interest of society to ensure that dead bodies are buried and, accordingly, that someone is allocated a right to control a dead body to ensure that the task is performed.

A second (end equally plausible) explanation for the duty and right to bury stems from the respect for human dignity that the law accords to individuals.445

These explanations illustrate both a public interest in the disposal of the body, and the importance of the deceased’s autonomy. Controversial foreign cases such asJones v Dodd denote that indigenous rights may indeed influence decisions about possessory rights over corpses. In the past, however, New Zealand judges have more or less rejected arguments based on cultural values. Moreover, they have dismissed competing desires and wishes of

441 Ibd, at 710.
442 Administration Act 1996, s77.
443 Atherton (ALJ 2003), supra n 276 at 188.
444 S. Pah1 “Whose Body is it Anyway?” Course Materials at the University of Auckland (Law Faculty); available to view at: <http://www.vanuatu.usp.ac.fj/courses/LA300_Property_Law_1/Readings/LA300_pahl_whosebody.html> (accessed 11/10/2009).
445 Atherton (ALJ 2003), supra n 276 at 188.
the bereaved family as irrelevant in this context. Judges are likely to encourage mediation between the disenfranchised relatives, and subsequently intervene to resolve the problem. Loasby and Awa are the only two judgments referring to burial in light of tikanga Māori. Unfortunately, no clear concept can be deduced from these cases because their outcomes are inconsistent. Furthermore, it appears likely that in cases where two persons have an equal duty to bury the deceased’s body, a joint right to possession, and relatives are reluctant to agree, the courts will resolve the dispute on a practical basis, with a preference for securing a prompt burial for the sake of public health. Decisions are discretionary, and can depend largely on the background of the judge and his/her interpretation of the facts, since the issue cannot be explicitly answered by statute or common law.

D Conclusion

Since the establishment of the “no property” rule in the 18th century, courts have acknowledged that there are proprietary rights in corpses. Meanwhile, courts have qualified the traditional “no property” rule by recognising that ownership rights may arise under the “work or skill” exception propounded by Griffith J in Doodeward v Spence. Furthermore, s6 of the HTA provides an opportunity for separated human tissue to become property.

A person may have a limited right to possess a body for the purpose of burial. Cases in which the deceased died leaving a will are distinguishable from cases where the deceased died intestate when determining who might hold the limited right to possess the body for burial. In cases where the deceased dies testate, the executor has the right to arrange the funeral, after probate of the will has been granted. These arrangements do not necessarily need to be consistent with the deceased’s expressed wishes, because they are considered to be non-binding indications rather than directions. If the deceased dies intestate, it is unclear the extent to which others, in particular the relatives of the deceased, have a right to possess the body. In the past, New Zealand judges have given priority to the spouse rather than the relatives, and in cases where more than one person had right a to possession judges have resolved the dispute on a practical basis, with a preference for securing prompt burial.

447 In Loasby (supra n 199) the Māori family members prevailed, whereas in Awa (CA) (supra n 3) the court (in an obiter dictum) favoured the spouse’s interests.
448 See, eg Calma v Sesar, supra n 361 at 446.
449 C. Thomas “A framework for the Collection, Retention and Use of Human Body Parts” (Dr thesis, Victoria University of Wellington, Department of Philosophy, 2006 [hereinafter: Thomas (phd)].
Chapter 4: Methods of Enforcement

A Introduction

Is the right to possession of a dead body for the purpose of burial currently protected by law in New Zealand? This question seems to be answered in the negative, as “body snatching” seems to operate in a legal vacuum. On the other hand, *ubi ius, ibi remedium* suggests that when the law recognises a right it should also provide a remedy.

Should a court order, for example, a prerogative writ, be issued if an unauthorised person refuses to give up possession of the dead body? Granting an injunction or disinterment license to the person rightfully in possession of the body could be used to gain possession of corpses. This was the exact outcome in *Clarke v Takamore*, where the police were granted an *interim* injunction and a disinterment license, authorising the exhumation of the body from a Māori burial ground. But granting court injunctions has not always proven to be feasible, especially in cases where people have refused to hand over the corpse.

Other methods are only effective if those responsible for the removal of the body are liable in prosecution. Potentially, any “snatcher” may be convicted of two criminal offences: theft of the coffin or other assets, or misconduct in respect of human remains.

An action in tort of conversion (originally trover) or trespass in goods could protect the interest of the person lawfully in possession of the corpse. Alternatively, family members might even be able to claim compensation for wounded feelings or shock caused by the unauthorised removal, and “improper” treatment of the body. In this context, prosecution in general shall obviate the action and tort shall compensate for the loss.

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451 See, eg *R v Fox*, supra n 397, where Denman CJ issued a mandamus ordering a gaoler to deliver up the body of a deceased prisoner to the executor of the will.
452 *Clarke v Takamore*, supra n 8 at 3.
454 Crimes Act 1961, s150.
455 A brief history of trover and detinue can be found in: N. Curwen “Title to Sue in Conversion” (2004) 68 Conveyancer 308, 309-310.
B Civil Law Enforcement Options

I. Injunction

Court injunctions prevent non-owners of property from using it illegally. An injunction is defined as “an order of a court requiring a party either to do a specific act or acts (a mandatory or positive injunction) or to refrain from doing a specific act or acts (a prohibitory or negative injunction).” 458 Both varieties could apply in the case of “body snatching.” A mandatory injunction could be granted against the person removing the body, ordering that he/she should release the body. It is also possible, however, to grant a prohibitory injunction against the “snatcher,” to prevent a burial. 459 In *Clarke v Takamore*, Panckhurst J granted an *interim* injunction against the Takamore relatives because:

... he was satisfied that there was a serious question to be tried with reference to the right of an executrix to determine the place of burial, based on the Court of Appeal’s decision in *Tapora and White v Tapora* CA 206/96 28 August 1996. 460

The other noteworthy development in that case was that the police obtained a disinterment license authorising the exhumation of the deceased’s body.

II. Enforcement Issues

Battles fought fiercely through the media in 2008 emphasised the practical limitations of court injunctions. Notwithstanding an *interim* injunction granted to his de facto spouse, Mr Takamore was laid to rest in a sacred Māori cemetery. His Māori relatives claimed that they had not been served with the injunction at the time they proceeded with the burial. This highlights the question of whether the police have enough resources to enforce injunctions such as this. According to the Māori strategic adviser, Superintendent Houmaha, they do not. In an interview, he said: “With only four officers and a small window of opportu-

459 Idem. It may be noted that mandatory injunctions are less common, and seldom granted as an interim measure.
460 *Clarke v Takamore*, supra n 8 at 3.
nity, staff were in a difficult position trying to enforce the order." He criticised that there was not enough time after the granting of the injunction to serve it, because a grave had already been dug. Additionally, media reports the night before gave the Māori relatives warning about the police intention to serve the injunction notice, and they were consequently, able to prepare the funeral in short time.

Like the right to possession of a corpse, it cannot be predicted who will be granted with an injunction. As it was concluded in Tapora v Tapora, the law appoints the rights and powers concerning the type and place of burial to the executor. If a person dies intestate, the administrator of the estate, usually the spouse or next of kin, is entitled to arrange the funeral. However, there is still no mechanism to determine who the body should be released to, so until statutory changes have been made to clarify this matter, it remains unclear who should be granted an injunction.

C Criminal Law Enforcement Options

As outlined, New Zealand law does not consider corpses to be the subjects of property, which is why they cannot be stolen. Possible offences within the Crimes Act 1961 are theft (by taking) of the coffin or other assets, such as the winding sheets or valuables left on the deceased, misconduct in respect of human remains and the common law offence of preventing the lawful burial. This section will question whether these offences provide an adequate mechanism to enforce the rights assigned to the person responsible for the burial.

1. Theft of the Coffin or Other Valuables

Crimes against the rights of property are controlled by Part Ten of the Crimes Act 1961. Even though most things can be subject to theft, human corpses are not considered to be capable of being stolen.

462 Idem.
463 Supra n 384.
464 Crimes Act 1961, s2(1).
A funeral director who was personally involved in a “body snatching” incident, stated in an interview that items family members have paid for, such as the casket or clothes the person is buried in, are their property, and as such their removal constitutes theft.465 However, there appears to be no New Zealand authority on the issue of theft of the coffin or other valuables left on the deceased. This property-based reasoning has been applied in a few common law cases only.466

_Dewar v HM Advocate_467 involved a secretary of a crematory who had removed two coffins and a large number of coffin lids from the mortuary. Abusing his authority, the defendant then used the coffins for the cremation of children, and removed the lids of coffins to use them as fire wood. Lord Normand underlined the “no theft rule” by stating that, “[i]n our law, the crime of disinterring human remains after interment is not punishable as theft...”468 Eventually, the defendant was sentenced to three years in prison for the theft of the coffins and coffin lids.

More recently, friends of the American songwriter and singer Gram Parson469 took his body from Los Angeles International Airport with the intention to burn it in a special place. Outraged by this plan, Parson’s father took legal action. The two friends were charged with theft of the coffin,470 and Parson was laid to rest in New Orleans.

In a similar vein, minority Judge Broussard in _Moore_, stated that the container in which the spleen was kept could be the subject of theft rather than the organ itself.471

Even though New Zealand courts generally do not follow American precedents, the Ministry of Justice announced in its burial disputes briefing paper that “an offence may be committed if the deceased’s casket or attire have been wrongfully taken.”472 On this basis, tak-

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466 The _Haynes’ Case_ (supra n 302289), where Haynes dug up several graves in the night in order to take the deceased’s winding sheets, seems to be the prominent case.
467 (1945) S.L.T. 114.
468 Ibid., at 115.
469 Gram Parson (05.11.1946-19.09.1973) was a member of _The Fallen Angels_ and _The Birds_.
471 _Moore_, supra n 313 at 501.
472 MoJ-Briefing Paper, supra n 414 at 2.
ing a coffin, for example, can amount to the offence of theft by taking, with a maximum sentence of seven years imprisonment, depending on the value of the item stolen.

II. Misconduct in Respect of Human Remains

The offence of 'misconduct in respect of human remains' provides that any person "(a) who neglects to perform any duty imposed on him by law or undertaken by him with reference to the burial or cremation of any dead human body or human remains" or "(b) improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not, shall be liable to imprisonment for a term not exceeding two years." As discussed previously, the obligation to dispose of the corpse primarily rests on the executor of the will, therefore any other person could theoretically commit this offence. It would seem somewhat paradoxical if "body snatchers" were charged with the crime of misconduct in respect of human remains under paragraph (a), since the purpose of the offence is to punish those who neglect burial duty. In fact, Māori family members who "snatch" bodies generally intend to fulfil their duty by burying the body on ancestral land. Section 150(b) of the Crimes Act 1961, which protects the deceased's dignity, is even less pertinent to "body snatchers" than paragraph (a) because "interfering with indignity" was said to require "unworthy, contemptuous or insolent" conduct. The essence of the tangihanga ceremony is to preserve the dignity of the deceased. Considering the general intention behind s150 of the Crimes Act 1961, it is rather doubtful that it is applicable to cases where a body has been wrongfully taken, but the "snatcher" does not otherwise interfere with the body. In other words, "body snatching" is not about showing indignity towards the deceased, but about enforcing a perceived specific burial rite.

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474 Crimes Act 1961, s223.
476 The person responsible for the funeral is limited in their decisions by Burial and Cremation Act 1964.
477 Quite contrary, the taking Māori family members intend to fulfil their duty by burying the body on ancestral land.
478 _R v Mills_ (1992) 77 CCC (3d) 318 (CA).
479 A "skinhead" who simulated to urinate on a Jewish gravestone was held to be offering an indignity to human remains [R v _Moyer_ (1994) 92 CCC (3d) 1 (SCC)].
480 MoJ-Briefing Paper, supra n 414 at 2.
III. Enforcement Issues

The Crimes Act fails to provide offences to deter "body snatching" primarily because the person who takes the body seems to lack malicious intent. Under current law human remains can be taken "without committing theft, wilful damage or assault." There is no criminal precedent for "body snatching" cases and it is impossible to predict if judges are likely to want to create one. Currently, if the "snatcher" has no interest in valuables (like clothing) or the coffin they could simply avoid committing a crime by taking the unclothed corpse. Overall, criminal offences do not seem to be aimed at enforcing the responsible person's right to burial; instead they are "about prosecuting an offender for wrongdoing." 

D Liability in Tort

In the 19th and 20th century, Anglo-American courts in particular have judged removal of corpses as torts. In some cases it has been held that "any person who unreasonably ignores or overrides the wishes of the next of kin" or the executor "as to the treatment of the disposal of the body of the deceased [might commit] an actionable wrong." It is doubtful whether New Zealand courts would adapt the Anglo-American judicial approach, since it is unclear whether a tort system makes it worthwhile for the person lawfully entitled to possession of the dead body to sue a person for taking it. The first issue to be discussed under this heading is actions in negligence, specifically claiming damages for mental injury. The discussion will also include an examination of which tort is more suitable to "body snatching" cases: conversion by taking, or trespass to goods. The focus will be on common law cases and academic analysis of the issue of "body snatching" as a tortious wrong. Again, there appears to be no New Zealand authority on this issue.

481 Idem.
482 With exception of the Billy T. James case that did not turn on the act of taking the body.
483 MoJ-Briefing Paper, supra n 414 at 3.
484 Lawrence, supra n 25 at 115. For a valuable discussion, see Sperling, supra n 308 at 138-140.
485 T.W. Price "Legal Rights and Duties in Regard to Dead Bodies, Post-Mortems and Dissections" (1951) 68 SALJ 403, 406.
I. Tort of Negligence – Actions Claiming Mental Injury

In the past it has been argued that the unauthorised removal of transplant material could amount to an action in negligence causing mental injury or nervous shock. Nevertheless, taking human tissue material without consent and “body snatching” are not entirely comparable because in the latter instance the accused is not a doctor but a family member and therefore a potential victim him/herself. In terms of “body snatching,” it is uncertain whether the person responsible for the burial may be awarded compensation for mental anguish under the tort of negligence. Family members responsible for the burial who suffer mental injury after being exposed to a sudden traumatic event, such as “body snatching” could be covered by the tort of negligence or s21 of the Injury Prevention, Rehabilitation and Compensation Act 2001. However, s27 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 makes it clear that mental injury is only compensable if it is suffered in combination with physical injuries, and the classification of “mental injury” is one of the more problematic issues. So in other cases, such as where a victim suffers mental injury caused by fright or by watching the “snatching” of a beloved one’s body, an action in tort can lie. The victim has the burden to prove that the “snatcher” did possess the capacity to foresee the risk that other family members responsible for the funeral would suffer from nervous shock. In “body snatching” cases it is fair to say that families may suffer shock, or even massive trauma, and the “snatcher” may foresee that risk, since otherwise he/she would not have opted to take the body, instead of negotiating with the other side of the family. These theories are merely hypothetical since so far there has been no case regarding compensation for mental injury relating to “body snatching”. However, there are overseas precedents in tort law relating to the taking of human corpses or tissue.

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486 This tort is known as solatium for affront in Scotland.
488 The thesis refers to negligence, not intention, because the act of “body snatching” is not comparable to the intentional torts of defamation and nuisance.
490 King v Phillips (1953) 1 Q.B. 429, 441. Exceptions can be found in Todd [supra n 489 at 160-166] where it is distinguished between primary and secondary victims. In our cases, the persons who come into question are the spouse and close family members. These persons are either classified as primary victims, because they were present during the taking, or secondary victims, because of immediate family ties.
491 Ihaka, supra n 7.
492 In fact, in New Zealand the Supreme Court or Court of Appeal has not yet made a definite ruling on the requirements for actions claiming mental injury, see Todd, supra n 489 at 158.
Recognising the availability of compensation for *solatium* for wounded feelings (*actio iniuriarum*) for more than one century, Scottish law serves as a notable example. In two oft-cited cases (*Pollok* and *Hughes*) judges found the defendants liable for “solatium of the relatives wounded feelings arising from unauthorised and wrongful removal and retention of organs at post-mortem.” The defendants were sued to pay *solatium* for injured feelings of the substantial amount of £250 and £196, respectively. For the first time in Scottish law, damages were awarded solely in respect of injury to feelings. But, similar to New Zealand law, not every relative is entitled to plead an injury of their feelings. According to Lord Kyllachy, distant relatives who were not living with or near the deceased, and were not in close contact with the deceased, had “little chance of obtaining any substantial award of damages.” In consideration of these cases, MacAulay J recently concluded that it is common law in Scotland that unauthorised post-mortem examinations infringe the law, and therefore close relatives and the spouse can take action of *solatium* for affront.

Comparable verdicts have been delivered in American courts. In *Carney v Knollwood Cemetery Association* the Judges awarded the family damages for mental anguish against the defendant, who dug up the grave of the plaintiff’s grandmother. Judge Jackson held that the compensation for emotional distress was worth US$40,000. Further American cases refer to the removal of human tissue in case of post-mortem examinations. For instance, a doctor who removes human tissue from a corpse and, in connection with this, could have foreseen that the person in possession of the corpse for the purpose of burial would be negatively and physically effected by his act, may be liable to that person. For compensation to be awarded in cases such as this, three premises must be fulfilled: First, the doctor must have a duty to the plaintiff, secondly, the injury caused by the shock must be foreseeable, and thirdly the nervous shock must be some “recognizable psychiatric illness.”

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493 *Pollok v Workman* (1900) 2 F. 354 [hereinafter: Pollok].
494 *Hughes v Robertson* (1913) S.C. 394 [hereinafter: Hughes].
495 Hardcastle, supra n 283 at 57.
496 *Pollok*, supra n 493 at 354.
497 *Hughes*, supra n 494 at 395.
498 *Pollok*, supra n 493 at 355.
500 Supra n 457 at 430.
502 McColl Kennedy, supra n 487 at.
503 *Bourhill v Young* (1943) A.C. 92.
504 *Hinz v Berry*, (1970) 1 AER 1074, 1075.
It is apparent from this discussion that foreign courts have viewed claims for mental injury in regard to the removal of corpses with considerable caution. In New Zealand, similar to the United States, only claims for medically identifiable mental injury suffered by primary or secondary victims seem to be successful. Claims that do not fulfil these legal requirements are unsuccessful as they open the floodgate of litigation.\textsuperscript{505} In terms of "body snatching" close relatives or the spouse may take an action claiming mental injury if the injury is foreseeable and medically recognisable.

\textit{II. Wrongful Interference with Goods}

New Zealand does not have legislation similar to the Torts Act in England.\textsuperscript{506} Instead, it recognises two common law rights of action for wrongful interference with goods: conversion by taking, and trespass to goods. Their aim is to vindicate the claimant's right to be free from interference to their property.\textsuperscript{507} Generally, both torts are described as "theft" in civil law.\textsuperscript{508} However, neither English law nor New Zealand law has supported a tort of wrongful interference with a dead body in the past. The question of whether such a tort could be accommodated into the common law system has been the subject of academic debate over the past century.

\textit{I. Conversion by Taking}

The lack of legislative guidance led the Court of Appeal to define the \textit{actus reus} of the tort of conversion in 1987:

\begin{quote}
The tort of conversion is constituted by the interference with the use and possession of a chattel of another, wilfully and without lawful justification. It requires a dealing with the chattel in a manner inconsistent with the plaintiff's right and with an intention in doing to deny that right, or to assert an inconsistent right.\textsuperscript{509}
\end{quote}

\textsuperscript{505} Todd, supra n 489 at 157-158.
\textsuperscript{506} Torts (Interference with Goods) Act 1977.
\textsuperscript{508} \textit{Ibid}, at 281.
\textsuperscript{509} \textit{Cuff v Broadlands Finance Ltd} (1987) 2 NZLR 343, 346 per Somers J.
Using the term “chattel” is significant, as seems to indicate that only things which are capable of being property shall be subject of conversion by taking. Since conversion is a type of theft, the plaintiff is considered the owner of the converted property if, similar to s218(1) of the Crimes Act 1969, he/she has either possession, a right to take possession immediately, or control of the property.\textsuperscript{510} However, in contrast to theft, it is uncertain if the “thief” must claim ownership of the goods as to s218 of the Crimes Act. Even though there can be no property in a corpse in principal,\textsuperscript{511} the “snatcher” would not generally deem his/herself to be the owner of the corpse, but rather as the preserver of cultural heritage. Therefore, the aggravating factor of the intention to assert control\textsuperscript{512} is obviously lacking in the “body snatching” cases. This line of reasoning is not without problems: in particular, it is highly debatable whether a plaintiff must own an object before he/she can sue for conversion in respect of it.\textsuperscript{513} A further difficulty, both practical and morally, would be to establish whether corpses have measurable value, since a remedy for conversion is often damages equal to the fair market value of the property.

English courts reiterated this in the more recent case of \textit{AB v Teaching Hospital},\textsuperscript{514} where parents of deceased children whose organs had been removed and subsequently disposed of by doctors, claimed a potential tort of wrongful interference. The removal of the organs was performed without the parents’ knowledge, although they had consented to the post-mortem examination. The court held that the retention of these organs was lawful and the parents’ right of possession of the organs for the purpose of burial did not factor. Accordingly, the Judges stated that there could be no action for wrongful interference with the bodies of the children.\textsuperscript{515} Nevertheless, it was unclear whether the cause of action was in trespass or conversion. In the eyes of Gage J “it was probably a species of conversion.”\textsuperscript{516} Underpinning his decision he stated:

> Assuming that my conclusions are correct that the claimants have no right of burial and possession of organs lawfully removed at post mortem and retained, in my judgment, there can be no action for wrongful interference with the body.

\textsuperscript{510} Todd, supra n 489 at 469; A. Grubb (series editor) \textit{The Law of Tort} (London; Dayton, Ohio: LexisNexis/Butterworths, 2007) 2\textsuperscript{nd} ed. para 11.50 (by M Lunney) [hereinafter: Grubb-Torts].
\textsuperscript{511} With the exception of cases in which the “work or skill” exception applies.
\textsuperscript{512} Todd, supra n 489 at 470.
\textsuperscript{513} While most researchers subscribed to the view that possessory interest are sufficient to take action in conversion, some older English cases were opposed to this approach, eg, \textit{Armory v Delamirie} 93 E.R. 664 (1722); \textit{Parker v British Airways Board} (1982) Q.B. 1004.
\textsuperscript{514} Supra n 306.
\textsuperscript{515} \textit{Ibid}, at 161.
\textsuperscript{516} \textit{Ibid}, at 152.
of the child. If, on the other hand, a parent or parents when consenting to a post mortem specifically asked for the return of an organ I can see that in certain circumstances it might be arguable that a cause of action based on conversion exists, if conversion is what is being alleged by the claimants in this group action. But in the absence of such a cause of action in respect of the body of a deceased person being recognised by an English court I am not prepared to hold that one does exist.517

It is important to note, however, that Gage J did not deny the possibility of conversion within the “work or skill” exception. Incidentally, the claim also failed because “[l]etters of administration were not issued until just before the claim was instituted.”518 The decisions cited in AB v Teaching Hospital519 solely concern unauthorised post-mortem s, and not the removal of the whole corpse. This weakens the ownership approach. When asking “whether the claimant’s right to possession of a corpse could be a sufficient interest to found a claim in conversion,”520 one has to consider the negative response that a human corpse is not a thing that can be owned, and the right to possession of human remains does not entail a property right. On this basis “[t]he right to possession cannot ... be protected by the tort of conversion”521 and, according to Gibson in Dobson v North Tyside Health Authority,522 the sole right of possession in order to dispose of the body is not sufficient to take action in conversion anyway.

In Moore the Supreme Court of California held that an action in conversion would hinder the growth of the fledgling biotechnology industry by making each cell sample “the potential subject matter of a lawsuit.”523 This approach has been criticised because persons with a right to possession of the corpse “have an interest, albeit limited, in the goods and a right to immediate possession in accordance with that interest.”524 Even though explicitly stating that the removal of human tissue without consent might amount to conversion,525 critics

517 Ibid, at 397.
518 Ibid, at 394.
519 See, eg R v Welsh (1974) R.T.R. 478; R v Rothery (1976) R.T.R. 550 where blood and urine have been accepted as property for the purpose of theft.
520 Idem.
521 Idem.
522 Supra n 382 at 596, 600 per Gibson P.
523 Moore, supra n 313 at 495; The Florida Federal Court [Greenberg v Miami, supra n 326 at 1074] cited Moore for the proposition that the law does not recognise property interests in excised human tissue for the purpose of a conversion claim. Broussard J disagreed with the majority’s view that a conversion did not take place (Ibid, at 501).
524 Grubb-Torts, supra n 510 at 11.45.
525 Ibid, at 11.45.
missed the opportunity to specify whether this statement should also apply to corpses. In support of a possessory element, academics have noted that in terms of conversion, it is *possession* and not ownership which is protected.\(^{526}\) Consequently, in the United States conversion seems to be available if, at the time of the wrongful act, the claimant had either possession or a right to take possession immediately. In the context of “body snatching”, a family member or executor would have possession of the body if it was on their premises.\(^{527}\)

In another United States case, *Colvation v New York Organ Donor Network Inc.*,\(^{528}\) the deceased’s widow decided to donate the deceased’s kidneys to an old family friend (the plaintiff), who suffered from a kidney disease. The deceased’s left kidney was flown to the Miami hospital where the plaintiff awaited his transplantation. The right kidney was, on instruction of the New York hospital, transplanted into another donee’s body. Unfortunately, the plaintiff’s surgeon discovered that the left kidney was damaged and could not be implanted. The plaintiff demanded that the intact right kidney should be sent to him. This, however, was impossible, as it had been donated to someone else. Consequently, he took an action of conversion, which was dismissed by the District Court with the reasoning that “it is against public policy to recognise broad property right in the body of the deceased.”\(^{529}\) In the end, while it was found on appeal that under New York Public Health Law a person could have “an enforceable property right in a functioning organ”\(^{530}\) thereby strengthening the plaintiff’s position,\(^{531}\) Rosenblatt J found that the plaintiff had no enforceable right to the kidney.\(^{532}\)

In essence, both courts and academics are on the whole clear that in the context of “body snatching” no action for the tort of conversion by taking exists.\(^{533}\) The lack of precedence in this area requires an examination of other available remedies\(^{534}\) for the interference with dead bodies. Nonetheless, it is doubtful if the New Zealand legislature ever had the inten-

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\(^{527}\) If the body is at an undertaker’s premises the question is whether the rights of the executor amount to a right to immediate possession. For a valuable discussion, see, eg Murphy, *ibid*, at 278.

\(^{528}\) 438 F 3d 214 (2nd Cir 2006) Court of Appeal [hereinafter: *Colvation*].

\(^{529}\) *Idem.*

\(^{530}\) *Colvation*, supra n 528 at 225.

\(^{531}\) This gave the plaintiff new hope. Regrettably, he died before the appeal was heard. A clear summary of these statements can be found in Hardcastle, supra n 283 at 44-45.

\(^{532}\) *Idem.*

\(^{533}\) Hardcastle, supra n 283 at 43.

\(^{534}\) Nwabueze [(2007), supra n 456 at 64] brought an action under the law of privacy into discussion (eg the tort of invasion of privacy as recognized in the United States). This is not availing because it protects living and not dead persons.
tion to compensate the claimant who legally possesses the corpse, for the interference with that right.

2. Trespass to Goods

Some academics tend to assign actions based on possessory rights to the tort of trespass, and the protection of proprietary interest to conversion. This appears to have been the approach in one of the only reported cases, the Scottish case of Ward v Macauley, where Lord Kenyon C.J. noted that:

[the distinction between the actions of trespass and trover [now called conversion] is well settled: The former is founded on possession; the latter on property.]

Thus, it does not seem essential for the plaintiff to technically own the corpse in order to take an action in trespass for unlawful interference. However, it is questionable whether the person legally in possession of the corpse may bring trespass for unlawful interference.

New Zealand courts have not considered the question of trespass to corpse yet, but there are American, Scottish and Canadian cases of trespass with comparable outcomes to the conversion cases above. In a similar way, some common law academics remark that although there is no property in a dead body, the executor or administrator of the deceased or other persons charged by the law with the duty of interring the body have a right to the custody and possession of it until it is properly buried. Any violation of that physical right to possession, such as unauthorised post-mortem examination, is a trespass for which an action lies. Therefore, the person responsible for the funeral may have a right against

535 Giliker & Beckwith, supra n 507 at 183.
536 (1791) 4 T.R. 489, 490; 100 ER 1135.
537 Ward v Macauley 100 E.R. 1135 (1791).
538 Larson v Chase, 47 Minn. 307, 50 N.W. 238 (1891).
539 Pollok, supra n 493; Hughes, supra n 494. In both cases a doctor made an unauthorised post-mortem examination of the deceased's body. The defendants were sued to pay solatium of the amount of £250 respectively £190.
540 Phillips v Montreal General Hospital (1908) 33 Que. S.C. 483.
541 J.F. Clerk & W.H.B. Lindsell Clerk and Lindsell on Torts (1982) 15th ed, para. 21-45; Sperling, supra n 308 at 139.
542 Idem (Clerk & Lindsell); in the current edition (19th edition) of Clerk and Lindsell on Torts (passage 17-39) this text has been changed to “However, if there can be no property in a corpse, it seems that personal representatives or either persons charged with the duty of burying a body have a right to its custody in the
the “snatcher”. On the contrary, trespass can only lie “in respect of the interference with any corporeal personal property, and subject to the same limitations.”543 This argument concentrates on the well-established assumption that dead bodies are not subject to ownership.544 Others oppose this assumption because they argue that “[w]hether the claimant is the owner is immaterial.”545 From this, it is often erroneously deduced that the plaintiff does not need to own the concerned subject.

It appears that an action in trespass to corpses would be unlikely to succeed since corpses are not the subject of ownership. Further, the aim of putting the claimant back in possession of the corpse cannot be achieved by an action in trespass to goods, because claimants are usually entitled to the value of the goods by way of damage.546

3. Trespass to Land

Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.547 Trespass could be committed if the “body snatcher” enters another person’s premises in order to remove the body.548 The problem lies in the fact that the alleged trespasser must be given a warning549 to leave the place before a person can be arrested for trespassing, and in “body snatching” cases this warning usually comes too late for the police to intervene. Besides, actions in trespass to land in this context generally involve the exhumation of the dead rather than the taking of unburied corpses.550 As a result, it is unlikely that a “body snatcher” would be prosecuted if he/she left the property when asked, and if no damage has been done to the property.

interim, infringements of which are actionable.” However, the word “actionable” footnotes the same cases as the above cited passage from 1982.
544 Ibid, at ft. 63.
545 Murphy, supra n 526 at 278.
546 Ibid, at 280.
547 Clerk & Lindsell, supra n 543 at para 19-01.
548 Doodeward, supra n 275 at 406.
549 Idem.
550 See, eg the Canadian case of O’Connor v City of Victoria (1913) 11 DLR 577 [BCSC]. The case turned on an action in trespass against the City of Victoria for authorising the exhumation and reburial of bodies in plots belonging to the plaintiffs in order to make room for a road construction.
E Conclusion

The chapter has established that, because under current common law a human body cannot be owned, there is no established tort or crime which is obviously applicable to "body snatching." In terms of possessory actions, there is no legal evidence to assume that possessory interests in corpses are to be treated differently to proprietary interests. For this reason, no one has ever been arrested or charged in connection with "body snatching" incidents in New Zealand. Although there has been some state resistance towards "body snatching," the law, so far, has been reluctant to regulate rights in human corpses. There has also been some executive resistance, but in the Takamore case police continued to work with the members of the family to reach a satisfactory resolution even though the court had issued an order to prevent Takamore’s body from being buried in the first place.\(^{551}\) Subsequently, a license issued by the Ministry of Health to exhume Takamore’s corpse was followed by the disinterment of his corpse. The case reflects the fragmentary legal situation in which reform stagnates and no one feels responsible for the consequences. This crucial question is: Should Parliament pass a law that regulates "body snatching" in order to avoid further escapades between multi-cultural families, and to strengthen the "very weak"\(^{552}\) constitutional protection of human corpses.

\(^{551}\) Tomas (2008), supra n 16 at 233.
\(^{552}\) Sperling, supra n 308 at 97.
Chapter 5: A Way Forward for New Zealand

A Introduction

This chapter will focus on the current legal situation on "body snatching" in New Zealand and then question whether a law change is needed after recent cases of "body snatching". Different options for reform will be considered, and suggestions made for processes to deal with "body snatching" incidents in the future. The following sections will describe the pro- and contra arguments of various approaches for law changes. In this context, the chapter will draw comparisons to other common law, and civil law countries. The chapter will conclude that individual law changes are not ideal, and that Parliament should seek to combine several proposals.

B Differing Opinion: Does New Zealand Need a Law Change?

I. The Status Quo

Under the current framework "body snatching" is not criminalised, and the person responsible for the funeral cannot bring an action in tort. Regarding burial, courts have held that the executor can override the relatives' instructions for the deceased's funeral where the deceased dies testate, even if the executor is not a member of the family.553 Where the deceased dies intestate, close relatives are commonly responsible for funeral arrangements. This may not necessarily reflect the deceased's relationship status while alive, and may not correspond with the deceased's idea of his/her family. The current legal structure ignores some key relationships. For example, persons living in a cohabitant relationship with the deceased may not have a say when it comes to burial arrangements.554 It is important to ensure that Māori are able to maintain their tikanga, including funeral rites, however this

553 Hunter v Hunter, supra n 397; Awa (HC), supra n 3 at 709; likely Kay J. in Williams v Williams (supra n 300) relied upon R v Fox (supra n 397).
554 Because cohabitants currently have no entitlement to any share of a deceased partner's estate on intestacy (see Administration Act 1969) and because there is no protection for cohabitants whose partners die leaving a will which fails to appoint them as executors. Due to the increasing incidence of cohabitation, other countries introduced some intestacy provisions for cohabitants, see, eg The Scottish Law Commission Discussion Paper on Succession (No 136) (Edinburgh: The Stationary Office, 2008) p 14, 26, 91-107; The Irish Law Reform Commission Report: rights and duties of cohabitants (Dublin: Law Reform Commission, 2006).
has been complicated by the fact that common law in regard to dead bodies originates from a time where only one religion was nationally recognised. Nowadays it is increasingly important that New Zealand maintains the richness of cultures for future generations, and to preserve the vital components of Māori culture.

II. A Necessity to Introduce a Law

Media coverage of “body snatching” incidents in the past has complicated, if not decelerated, negotiations within bereaved families, therefore family protection from public display is a decisive argument in favour of introducing a law on “body snatching.” National MP, John Hayes, recently postulated that there is no need to legislate for regulation in this area. He reminded the public that, in the end, the Marshall-McMenamin case was solved within the family without external interference. Hayes further pointed out that law changes may raise the potential for clashes between families and police. However, clashes are occurring anyway, and without the possibility of police involvement, and the support of the law, the most determined family will prevail.

From a cultural perspective, Māori are concerned that tikanga relating to burial will not be taken into account by courts if not codified. Considering former lawsuits dealing with multicultural family burial issues, courts have been faced with the compound responsibility of balancing Māori values with New Zealand legislation. It is therefore rather doubtful whether judges would recognise the significance of tikanga relating to burial. As mentioned above, judges have mostly strengthened the spouses’ position as opposed to the family or iwi. From a Māori point of view, Tomas critiques this approach by referring to the Billy T. James case:

556 Idem; John Hayes was involved in the Marshall-McMenamin case. He was in contact with family members, and was able to bring the issue to an end without calling in the police but getting the family to discuss the problem; Crombie, supra n 2 at 2.
557 This, according to G. Ford (Is taking the body becoming a habit? (Masterton, Editorials, 22/12/2007) Wairarapa Times Age p 5) is “anarchy” and not common sense.
558 Ihaka, supra n 7.
Awa although not directly on point...show the need for courts to recognise that the period between death and burial needs to be regulated when disputes erupt between the parties.\textsuperscript{559}

Should courts continue to manage this issue on a case by case basis, or should Parliament step in to implement a law change? Since case law in the area of biotechnology and human tissue is limited, and because Parliament is able to enact clear rules to regulate dead bodies, it seems more appropriate that Parliament, an institution with a democratic mandate, resolve this fundamental question of policy.

Among other things, Parliament must consider that Māori hold a unique position as Indigenous people of this country. This special position finds its expression in the Treaty of Waitangi, and Acts and regulations referring to the Treaty of Waitangi principles. Although the Treaty principles were not included in the Bill of Rights Act 1990 by choice of Māori, minority rights in the Bill of Rights Act\textsuperscript{560} apply to all minorities, including Māori.\textsuperscript{561} The right to practice religion is among the most fundamental of the freedoms guaranteed in the Bill of Rights Act. People have the right to practice their chosen custom, including the performance of funeral ceremonies. But unlike other cultural claims, Māori claims are supported by the Treaty principles, specially the principle of partnership.

C Recently Discussed Options for Reform

In October 2008, the Ministry of Justice recommended a “legislative amendment [should] be made to give the police power to seize bodies with or without a warrant.”\textsuperscript{562} However, various academics and politicians have pushed for other approaches to law changes, legislative and non-legislative, that dissent from the Ministry of Justice’s preferred option for reform.

\textsuperscript{559} Tomas (2008), supra n 16 at 235.
\textsuperscript{560} Section 20.
\textsuperscript{561} See, eg Bill of Rights Act 1990, s20 which is read: “A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language, of that minority”.
\textsuperscript{562} MoJ-Briefing-Paper, supra n 414 at 1.
I. Non-Legislative Changes

In its briefing paper of March 2008, the Ministry of Justice addressed the question of non-legislative changes. Focusing on public expectations, it provided a fragmented discussion that described a few approaches rather than giving a systematic critique. The Ministry of Justice considered several non-legislative recommendations, although it ultimately rejected them. Two of the recommendations are considered below.\textsuperscript{563}

1. Renewal of Māori Protocols

By addressing the issue of “body snatching” in the context of the Māori community, Māori culture was brought into dispute by the suggestion that Māori leaders should use their authority to establish a set of protocols for tangihanga to prevent further “snatchings”.\textsuperscript{564} It was suggested that Māori tribes should establish protocols to help courts and police reach solutions in conflicted situations. Based on this approach, it has been suggested that:

\begin{quote}
if Māori leadership can't exercise oversight and consolidate a set of protocols as to what is the appropriate conduct in times of tangi then the community at large will be left to drift as to what is acceptable and what is a genuine reflection of Māori cultural standards.\textsuperscript{565}
\end{quote}

It can be taken from this statement that creating tangihanga protocols is not an absolute solution to the problem itself, but a basis on which ideas, such as changes in different areas of law, can be raised. Other New Zealand academics, nonetheless, called attention to already existing Māori protocols on tangihanga. It has been suggested that:

\begin{quote}
Māori elders ought to be capable and willing to provide the kind of moral and compassionate guidance at times like this so I think [protocols are] there, but they certainly just need to be revised.\textsuperscript{566}
\end{quote}

\textsuperscript{563} Ibid, at 5.
\textsuperscript{564} Binning, supra n 16.
\textsuperscript{565} Idem.
\textsuperscript{566} Idem.
Establishing up-to-date protocols might in fact stop the police being accused of cultural insensitivity when it comes to family disputes over a dead body. These protocols would clarify whether or not a person wanted to be buried in a Māori cemetery. There is a mutual benefit in that, on one side, Māori can influence police practice, and, on the other side, the police can rely on the protocol, as in this recommendation.

Updating protocols is only one step that would have to be taken. Instead of renewing existing protocols, Māori tribes and hapū could establish their own burial registers. In this way, iwi and hapū would have a greater bearing on educating and monitoring the tribe members to encourage them to state where they want to be buried. Even though this system might provide a cost advantage, it also yields a bureaucratic disadvantage and, consequently, delays in burying the deceased’s body. The time when New Zealanders generally are better educated about, and accepting of tikanga relating to burial is a long way off.

2. Tikanga Relating to Burial Needs to Be More Widely Known

Another approach aims at encouraging New Zealand’s non-Māori community to become better informed about tikanga, and the place of the Treaty in the country’s structure. In a similar vein, others propose that Māori protocols need to be better known if New Zealand is to avoid unseemly cultural collusions involving disinterment licenses. Yet, this might only occur if there is a law change concerning tikanga relating to burial. Referring to the abovementioned Loasby, case in which tikanga relating to burial was regarded as pivotal, it is recommended that courts should occupy a supervisory role only, and that a judge’s decision should be the last resort.

Having reviewed the above matters, sui generis law being applied to the “body snatching” problem is a serious concern to both non-legislative approaches. Certainly, New Zealand law is flexible enough to accommodate penalties for the exploitation of human remains for

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567 Tomas (2008), supra n 16 at 236.
568 Unfortunately, the MoJ-Briefing-Paper (supra n 414) does not expand on this resolution in its conclusion.
569 Ibid.
570 Ibid, at 236.
572 Ibid.
commercial, scientific, and educational purposes. However, considering that the “no property” rule is deeply entrenched within the common law, and mediations can significantly postpone funerals, contrary to Māori custom, legislative actions are regarded to be inevitable to eventually reach a state of legal clarity and certainty in this context.

II. Legislative Changes

1. Augmenting the Police Power

After several significant “body snatching” occurrences, the government consulted the Ministry of Justice in March 2008. The Ministry made a recommendation to the government that power to seize bodies with or without a warrant when there are disputes over burial arrangements should be given to the police. As mentioned at the outset, the police cannot intervene for two reasons under current law: Family disputes over the body are a civil matter; and the police cannot act if a large crowd (for example a part of a Māori tribe) protects the body from being seized. The Ministry preferred a law change in favour of police power because it is considered to elude struggles. The Police Commissioner has so far not commented on the briefing paper.

a) The Current Duty of the Police

According to the Coroners Act 2006, the police must attend to several duties: an unusual death, for example, has to be reported to the New Zealand police (s14), who pass that information immediately on to the coroner (s15). Furthermore, the police may attend the post-mortem examination. In terms of disinterment licenses issued by the Ministry of Health, the police play a merely observing role. The police function would be to keep the peace when and if the parties involved agreed to an exhumation. They would not as generally assumed be physically involved in the exhumation. Section 17 of the Coroners Act provides that the Commissioner of the police must make members of the police cooperate to achieve the purpose of the Coroners Act, and to assist with all inquiries and investiga-

573 Idem.
574 MoJ-Briefing Paper, supra n 414.
575 Idem.
576 Coroners Act 2006, s38(1)(g).
577 Information gathered from Letter: King-Anderton, supra n 12.
tions made under the current Act. More importantly, the police have the exclusive right to custody of a dead body from the time it is suspected, on reasonable grounds, that a death to which the Coroners Act applies, may have occurred.578 These rights and duties illustrate that, by supporting coroners, the police play a crucial role in post-mortem investigations. Moreover, the law deems police officers to be qualified to take custody of the body in risky situations.

b) Are the Police Capable of this Task?

The Ministry’s recommendation has been tested for its efficiency in the Takamore case, where the police received the authority to carry out the disinterment of Takamore’s body in early September 2007. Gary Smith579 said that action regarding the disinterment of Takamore would not be taken until an amicable agreement was found.580 In other words, the police’s next steps were dependent on the outcome of the discussions within the Takamore family. The recommendation of the Ministry of Justice seems to have similar intentions: Issues are addressed to family members, who shall negotiate until a consensual solution is found.581 Thereby, the police, meanwhile in possession of the body, could act as a negotiator between the parties. Yet, as the Takamore case proves, it might take a while before the family achieve consent. Accordingly, the additional issue emerges as to where the body should be stored during this period. Moreover, who should be allowed to stay near the body during that time? The latter question could be addressed to the police Māori Liaison Officer, but it still remains difficult to solve related problems that arise at an early stage.

Since the police are not especially trained in tasks arising from the Coroners Act, doubts about whether police officers are experienced enough to carry them out have been expressed.582 The Law Commission agreed that special training was required for police officers who work within the coronial system in order to perform their job. The Commission, however, relinquished the organisation and co-ordination of training to the police themselves,583 so that currently, police officers working for the coronial system generally do not

578 Coroners Act 2006, s18. This exclusive right to custody lasts until the death is reported to the designated.
579 Superintendent and District Commander for the Bay of Plenty.
581 Tony Garing is of a different opinion, namely that it is not helpful for the process if family members are directly involved in the conflict resolution (The Press, supra n 11).
582 Report 62, supra n 207 at para 116-120
583 Ibid, at 38.
receive specific training in tikanga relating to burial. Therefore, without appropriate training, it is debatable whether power should be made available to the police in “body snatching” cases.

Police officers who participate in coronial inquests seem to be experienced (but not trained) in dealing with families who are in deep mourning. The Ministry of Justice’s intention is that in situations where family disputes over the disposal of the body arise, the police should have the right to seize the body and bring it to a mortuary. According to the Ministry of Justice, this would “freeze the situation,” giving family members time to solve their conflicts. The Ministry of Justice, however, overlooks one fundamental problem: police cannot intervene if at the tangihanga mourners decide to stand against the law. In its report on coroners, the Law Commission noted that such an attempt to seize a corpse from a tangihanga has failed at least once already. Perhaps Dr Pita Sharples was referring to this occurrence when mentioning that “[t]here are a few negative barriers in some areas between the police and Māori.” He criticised that many of the police officers were unfamiliar with the Māori custom of mourning, and therefore were not capable of seizing the body from a tangihanga or a Māori family in general without acting indiscreetly. Furthermore, he is pessimistic about the suggestions of the Commission because of the lack of Māori consultation. In a similar way, the Takamore whānau lawyer questioned whether the Ministry’s recommendation addresses the issue of family rights in accordance with tikanga. According to Sharples, an agency other than the police should be involved in cases of family feuds between Māori and non-Māori people over burial.

Providing more information about Māori burial custom to “funeral directors, police [and] bereaved families” could be an alternative to the “police model” because of the existing lack of understanding for the Māori tangihanga would be compensated. Considering the majority of cases, it seems inopportune to give the police new powers because if “you give the Police this power there will be demand for it to be used, which may create extra dis-

584 NZ Herald staff, supra n 5; for a recent example of this conflict see D. Keenan (editor) Terror in Our Midst?: searching for Terror in Aotearoa New Zealand (Wellington: Huia Publishers, 2008).
585 Report 62, supra n 207 at para 221.
586 Current Co-Leader of the Māori Party.
587 NZ herald staff, supra n 5.
588 This argument, however, must be seen against the backdrop of police structure, because 11 % of New Zealand’s police officers are Māori, and, consequently, familiar with tikanga in relation to burial.
589 He was concerned whether “there would be a legitimate mediation process for family once police had exercised their power”; see Ihaka, supra n 7.
590 The Press, supra n 11.
Police should not act as a buffer between Pākeha and Māori family members as this would eventually arouse the anger of both parties.

Funeral directors also questioned whether making power available to police would be an appropriate way to handle these difficult situations. They suggested that above all, “there has to be an impartial agency or person who families can call for support.” Setting up a new agency is complex, and it is unclear who else is capable of dealing with the issue. Eventually, more state funding would be needed to create those new positions. It seems that this proposal is more difficult to transcribe than the Ministry’s recommendation. But the Ministry of Justice’s approach, provided in a briefing paper released under the Official Information Act 1982, may not be the most ideal solution to the dilemma in constitutional design either.

A new criminal offence under the Crimes Act 1961 might be needed as a deterrent. It is doubtful whether the Ministry’s recommendation is practicable, since the Takamore case has proven that families in dispute are often incapable of reaching an amicable agreement within appropriate time frames. For another thing, the police, due to their limited capacity, are often unable to act whenever a large crowd like in the Marshall-McMenamin case protect the body from being seized. But principally, it is doubtful whether augmenting police power will actually deter people who are willing to take a body from actually doing so.

2. Amendments to the Coroners Act 2006

In March 2008, the former Chief Coroner, Dr Wallace Bain, presented his “ready made solution,” which in his opinion would put an end to family disputes over dead bodies, and clarify the situation once and for all. In his concept, members of public, funeral directors, and the police should all be empowered to report a death to the coroner at any time, especially when there appears to be dispute over custody or burial. This solution would involve an amendment to the Coroners Act 2006 to close possible loopholes, as coronial orders would have to be followed strictly. Coroners would have custody over the dead body in all kinds of death. Dealing with issues over dead bodies and grieving family on a
daily basis qualifies coroners to deal with these issues, over all other professions. Moreover, since the corpse would be in the coroner’s custody, the media would not have the chance to interrupt or broadcast the family issue. The consulted Māori leaders thus provided support for Dr Bain’s proposal.  

In stark contrast, the Ministry of Justice stated that any recommendation proposing amendments to the Coroners Act 2006 is undesirable, because it would neglect the purpose of the Act which is to help prevent deaths, and to promote justice through investigations and recommendations that may reduce the likelihood of similar deaths. The Ministry’s statement comprises three concerns: authorisation of the coroner, the masses of people appealing executor’s decisions, and the general suitability of amendments to the Coroners Act 2006. In order to be able to comprehend this critique, it is helpful to focus on the coroner’s role in the current law system first.

\textit{a) The Coroners Role}

Under current New Zealand law, either a doctor must give a certificate as to the cause of death, or a coroner must make a burial order, before a body can be buried. The rationale behind this is the avoidance of unexplained deaths. Presently, only deaths which fall under s13-16 of the Coroners Act must be reported to a coroner, whereas family disputes are not mentioned in this section, or anywhere else in the Act itself.

Coroners are independent bodies, appointed by the Governor General, acting in accordance with the Coroners Act 2006. Until the amendment to the Coroners Act in 2006, coroners needed to be independent and not necessarily trained in law or political theory. After several amendments were accumulated to make a new version of the Coroners Act, coroners today need to possess not only moral, but also legal qualities. Additional modifications of the Coroners Act created the position of a Chief Coroner, and reduced the number of Coroners from nearly 55 to 20 legally qualified coroners. In the course of this major amendment the Law Commission deliberated on whether Māori Coroners should be ap-

\begin{itemize}
  \item \textit{Idem.}
  \item MoJ-Briefing Paper, supra n 414 at 4.
  \item Coroners Act 2006, s103(1).
  \item Operational by July 2007.
  \item Coroners Act 2006, s103(2).
\end{itemize}
pointed in addition to the ordinary coroners, to represent Māori culture.\textsuperscript{600} Ethnic diversity in the coronial community would make it possible for non-Māori coroners to seek assistance from a Māori coroner in matters of tikanga Māori.\textsuperscript{601} However, the position of a Māori Coroner was not included in the Coroners Act 2006.

\textit{b) Is Tikanga Incorporated in the Coroners Act 2006?}

It is questionable whether tikanga Māori, especially on burial, has to be recognised in a coroner’s decision. By recognising tikanga, the Treaty was the only source supporting Māori in coronial inquests, since the Coroners Act 1988 did not take into account cultural beliefs and values of the Māori whānau. The Law Commission became aware of Māori complaints about coroners during consultation with Māori on succession law in 1995/96, finding that, most coroners did not have any experience with Māori customs. As a result, the Commission addressed concerns that the coronial practice was “culturally insensitive”\textsuperscript{602} and recommended that coroners should be trained in Māori culture. Eventually, in a final report in 2000, the Law Commission proposed to pay attention to cultural sensitivity concerning the dignity of the deceased’s body,\textsuperscript{603} and to establish uniformity in coronial practice throughout New Zealand. As a consequence, these recommendations were integrated in the amendments to the Coroners Act in 2006. Section 3(2)(b)(i) states that the Act recognises “the cultural and spiritual needs of family, and of others who were in a close relationship to a person who has died.” On top of this, the term “immediate family”, which is used in regard to several privileges, was introduced to the Coroners Act. Immediate family is broadly defined as “the person’s …whānau; or iwi; or other culturally recognised family group.”\textsuperscript{604} In this context, some submissions expressed the concern that the definition does not clearly indicate whether the blood or the cultural relationship takes priority.\textsuperscript{605}

\begin{footnotes}
\item[600] Report 62, supra n 207 at para 44.
\item[601] Submission COR48 on the Coroners Bill, Dunedin Community Law Centre, p 8 [hereinafter: Submission COR48]; Submission COR49w on the Coroners Bill, New Zealand Māori Law Society (Te Hunga Roia Māori o Aotearoa p 1 [hereinafter: Submission COR49w].
\item[602] Coroners Bill, Government Bill, Explanatory note 228-1, p 1.
\item[603] Ibid, at 224.
\item[604] Coroners Act 2006, s9(a).
\item[605] For example, Submission COR4 on the Coroners Bill, Funeral Directors Association of New Zealand (Inc.) p 4.
\end{footnotes}
This takes relates to the question of where the responsibility to arrange the funeral lies. The Funeral Directors Association (FDANZ) considers the spouse to be first in line, followed by the children, parents, siblings and so on. Raising the problem of cultural conventions by quoting the Billy T. James case, the FDANZ shows that it is aware of the variance within family wishes. Nevertheless, this does not mean they deviate from the mentioned chronology. In a submission, they requested that the Commission should clarify the hierarchy within the family in the Coroners Act, by following their provided concept. They put forward the concept of having police or security guards present on request at “a funeral to keep the peace between extended family members” as an interim solution. Although there is an increasing understanding of the FDANZ’s critique, one should not lose sight of the fact that the majority of submissions on the definition of “immediate family” supported the proposed extended version. Some organisations even say that the definition does not go far enough. For instance, the New Zealand Māori Law Society recommended that whāngai (foster-child, foster-parent) should be included in the definition, as a deceased might have belonged to a much wider group than the immediate family (for example hapū). Even so, the Ministry of Justice finally made no change in its last report, and commented on the submissions that:

[the definition of immediate family in the Bill is not an exclusive definition; it provides examples of who might be considered immediate family. The immediate family will be defined by who is notified of the death by family members, and who contacts the coroner. A hapū falls under the definition of a ‘culturally recognised family group’. Greater clarification or prescription of immediate family would reduce the flexibility to respond to individual family circumstances.]

Actually, the incorporation of “immediate family” into the Coroners Act is not the only element strengthening tikanga. As mentioned earlier, being close to the body while mourning over it is of crucial importance to Māori family members. This principle is now guaranteed in s25 of the Coroners Act 2006, allowing family members to “view, touch or remain near or with the body,” with the permission of the coroner. Even though an appointed ambassador is allowed near the corpse all the time, the Dunedin Community Law

606 Idem.
607 Ibid, at 5.
608 Submission COR49w, supra n 601 at 2.
610 See, above p 32.
Centre argues that maintaining access to the corpse is often complicated, and that the coro-
ner often makes use of his right to refuse access because of lack of staff and space.611

In terms of accelerating the release of corpses, s34(1)(b) of the Coroners Act 2006 states
that a corpse should be released after 24 hours if possible. Moreover, family members have
to be notified at significant steps of the procedure. In order to ensure this, a representative
for liaison with the immediate family should be appointed to facilitate communication be-
tween the family and the coroner.612 Although this approach was principally supported,
some complainants objected that it could bring delay.613 Further proposals contained the
demand to attach a research roopu (group) to the coroner’s offices in order to give more
than one person the opportunity to have the liaison role, and to supply a list to the Māori
community so as to nominate people who are qualified for this position.614 In the end, the
Ministry of Justice waived those scruples. However, it recorded that “the intention of the
bill is to address the distinct spiritual and cultural needs of Māori as far as possible in keep-
ing with the purpose and function of the coronial regime.”615 At first glance the new Coro-
ners Act 2006 appears to recognise the significance of tikanga relating to burial. But ap-
pearances can be deceiving.

c) Enforcement Issues

It is doubtful whether the rather small number of coroners have the capacity to answer the
increasing number of family inquiries. Māori, especially are concerned that reducing the
number of coroners could perhaps decelerate inquiries, and with them the releasing proc-
есс. With more full-time working coroners there is a higher chance that they can build rela-
tionships with local iwi by making frequent visits to Māori areas. This idea arose from the
former Court Minister Rick Baker’s willingness to accommodate Māori custom and values.
Before the passing of the Coroners Act, he promised “legislation will ensure that the coro-
nial system takes better account of the different cultural and spiritual needs of fami-

611 Submission COR48, supra n 601 at 4.
612 Coroners Act 2006, s22.
613 Submission COR4, supra n 609 at 3.
614 Report COR4, supra n 609 at 32.
lies.\textsuperscript{616} But some concerns were expressed that coroners could be overextended by the growing quantity of inquiries.\textsuperscript{617}

Others concerns deal with the term "property" as used in the Coroners Act. Since, according to Māori belief, no one can lawfully be in possession of a dead body, Māori struggled for a replacement of the word "possession" to the phrase "guardianship" in the Coroners Act. This major concern\textsuperscript{618} expressed by Māori leaders was eventually not incorporated into the Coroners Act because it is incompatible with New Zealand common law. Nevertheless, consulted Māori leaders are still supportive of Dr Bain's proposal, which favours an amendment to the Coroners Act because Māori can also profit from the proposal. Urgent family meetings, for example, during which the location of the burial ground can be discussed, could be held in the presence of the coroner on a marae. Furthermore, coroners have the ability and experience to reconcile emerging disputes between the parties. If, at worst, the parties cannot come to an agreement, the coroner would be able to make the final determination. The heart of this idea seems to go back to Māori custom where disputes and discussions between different iwi over a person's burial place are common and natural.

Overall Dr Bain's proposal seems to be the perfect solution on paper, given that it would only require an amendment to the Coroners Act 2006. Yet, the recommendation is not void of criticism. Giving coroners the power to make decisions about who the body should be released to would, according to the Ministry of Justice, contrast their current role as described in the Coroners Act 2006. Disputes over the release of the deceased's body are currently dealt with by the High Court rather than the coroners themselves.\textsuperscript{619} The Ministry of Justice is also concerned that a "floodgate"\textsuperscript{620} of appealing decisions would cause delays and additional stress on bereaved families. Thus, it posits that s19 and s42 of the Coroners Act 2006 could form obstacles to Dr Bain's solution. Under s19, the coroner only has custody of the corpse until he/she releases the body, which must be authorised once it is no longer necessary to withhold it from the family (Coroners Act 2006, s42).\textsuperscript{621} Based on this,

\textsuperscript{617} MOJ-briefing Paper, supra n 414 at 4.
\textsuperscript{618} Study Paper 9, supra n 74 at para 216.
\textsuperscript{619} MoJ Briefing Paper, supra n 414 at 4.
\textsuperscript{620} Idem.
\textsuperscript{621} Idem.
the Ministry states that there is still no mechanism to determine who the body should be released to. It suggests that:

[s]ome sort of legislative framework would be necessary to guide the Coroner in how the dispute should be handled, or who the body should be released to. A Coroner would not necessarily have any advantage over the Police who already have expert negotiators, Iwi Liaison Officers and Inquest Officers used to dealing with grieving families. 622

This argument is inconsistent for two reasons: First of all, when arguing against amendments to the Coroners Act, the Ministry of Justice opposed this solution because it does not clarify who the corpse should be released to but then made this contradictory utterance about their own recommendation. Secondly, coroners who already work with the police could still contact police experts without a problem. It is therefore contradictory to assume that the very same facts could also provide for a constructive dismissal of amendments to the Coroners Act 2006.

Further, questions about the practicalities may still cause difficulty. For instance, the police have already had to interrupt a tangihanga on a marae to retrieve the body of a deceased. The need for retrieval, in this case, resulted from an omission in procedure on the part of an official. 623 An action by the police was not possible at all because they were outnum­bered against hundreds of angry family members. A more effective approach to deal with this issue would be to incorporate offences in the Coroners Act 2006 that make family members who are not in lawful custody of the body liable to prosecution. As the law stands now, the offence of resisting police, prison, or traffic officer 624 is applicable in this cases.

622 Ibid, at 4-5.
623 Report 62, supra n 207 para 221.
624 Summary Offences Act 1981, s23(a), which is read: “Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $2,000 who resists or intentionally obstructs, or incites or encourages any other person to resist or obstruct, (a) Any constable or any authorised officer, or any prison officer, or any traffic officer, acting in the execution of his duty.” For an interesting current case, see D. Porteous Campus arrests follow marijuana complaints (News: Dunedin, 11/07/2008) Otago Daily Times. There an Otago University student was charged with obstruction, resisting police.
3. Signing Declarations

Hon Jim Anderton,\(^{625}\) who was personally involved in the *Takamore* issue, proposes that it is time to make “tougher decisions.”\(^{626}\) Anderton agreed that protocols for dealing with dead bodies need to be established in order to make cultural practices better known and understood. He forcefully criticised John Hayes’ statement that “the existing law is more than adequate.”\(^{627}\) In his opinion, the taking of bodies could happen again in the future,\(^{628}\) and it is indisputable that the executor is in charge of the disposal of the body. Although admitting that there can be disputes within the family that need to be settled by clarifying the situation in law beforehand, he deems it to be obvious that the next of kin is responsible for the funeral arrangements in the absence of a will.\(^{629}\) As mentioned above, it is highly controversial whether the spouse or the next of kin should have the right to decide what happens to the body in intestacy. Anderton proposes that:

...someone should have to sign a declaration asserting they are lawfully entitled to authorise the disposal of a body. And anyone who makes a declaration without authority should face legal consequences.\(^{630}\)

Yet, this suggestion is impracticable as long as it is not clarified by law who has the right to disposal of the body if a person dies intestate. Furthermore, other questions have been left unanswered. It is not quite clear if Anderton intends the person lawfully in possession to sign either a standard declaration or a declaration on oath, and which institution (e.g. police station, court) should be incorporated in this declaration system. Besides, signing a declaration would be unnecessary if a law would make it a punishable offence for a person who is not responsible for the funeral to make burial arrangements.

4. The Property Solution

After the examination of more or less “soft” solutions, this thesis will explore whether a tougher and greater law change, such as a modification in property law, could bring clarifi-
cation once and for all. The approach to accept the possibility of ownership in human remains is not innovative, but has "lingered at the edge of the law for several centuries." For this purpose, the "no property" rule, which is a solid element of common law, would have to be abolished. The issue can be reduced to one crucial question: Should the "no property" rule be rejected, or at least, modified? At this stage, four of the above mentioned facts indicate the possibility of endorsing property in corpses: First, the rule itself was established on shaky ground. Secondly, the principle can be confined to obiter dicta. Thirdly, the principle is highly controversial in the contemporary academic world, and, fourthly, New Zealand’s High Court is not bound to the rule and, hence, is free to reject it. Furthermore, the recognition of a possessory interest in a deceased’s body indicates that proprietary interests are not fixed or static but can instead "shift with societal terms."

The benefit of rejecting the "no property" rule is that corpses would become legally protected. From a succession point of view, for example, the corpse would become hereditable since it would form part of the estate. The person responsible for the burial could show that he/she has an enforceable title in the corpse, and, consequently, take action in conversion or trespass based on dominion. Additionally, human remains would become the subject of theft, and, subsequently, the person responsible for the burial could bring theft charges against the "snatcher".

On the other hand, the rejection of the "no property" rule would involve ethical law enforcement considerations. The thought of bodies as property has generated ethical concerns because it is hard to accept that the body of a deceased could now be treated at the same level as other chattels. In order for someone to acquire property in a corpse, the deceased’s body needs to turn from personhood into "thinghood". Therefore, the law would have to deal with some of the more complex issues like the transferability of ownership in corpses. It is debatable whether a person converts directly into property after death, or whether intermediate steps are required.

631 Magnusson, supra n 276 at 26.
632 See, above p 43-46; Mason & Laurie supra n 308 at 714.
633 See, above p 47; for a valuable discussion, see Matthews (1983), supra n 276 at 208-214.
634 Judicature, eg Williams v Williams, supra n 300; R v Fox, supra n 397; Legislation, eg Coroners Act 2006, s19; Human Tissue Act 2008, s56(3).
635 Grubb (1998) above 348 at 312.
The settled law defines rights in property as "a bundle of rights" that embraces all rights including human rights creating, a set of legal relations. These rights are determined by statutes and judges’ interpretations that mesh the statutes with common law. Besides, the philosophical literature on the nature and origin of property is immensely rich. Four main philosophical theories have been developed over the years to legitimate property rights: natural rights, utilitarianism, libertarianism, and personhood.

Naturalists believe property to be created when individuals gain control over natural resources in a variety of ways, some of them creating a relationship between the resources and the individual. Justified on the belief that "the right to own property is an individual right derived from the law of God, Naturc, or Reason", John Locke believed in a natural right to property. He mentioned that "...every Man has Property in his own person; this nobody has any right to but himself." It is pivotal for the understanding of the natural rights justification of property, that all property presumably derives from bodily property. By the end of the 18th century the fear of superiority of public force was widespread; expropriations being common practice. Locke proposed that laws be made as guards of personal property, and as a fence against rebellion of society. Morally, it seems to be logical that if one’s body represents one’s self, law must protect one’s relationship with it.

Property as a form of utilitarianism postulates that individuals would consume objects of value immediately unless they have the right to use, control, or dispose of the valued material. Utilitarians, such as John Mill, believe that:

the total or average happiness of society will be greater, or that the general welfare...will be better served, if material resources...are owned and controlled by
private individuals and firms rather than the state or the community as a whole.\(^{645}\)

Especially in times where organ donors run low, the human body arguably has monetary value. As a result granting proprietary interest in the body of a deceased is a legitimate subject of debates based on utilitarianism. Nevertheless, although Mill, one of the founding fathers of utilitarianism, considerer the human body to have monetary value, he firmly refused to recognise property in human remains.\(^{646}\)

Libertarian approaches imply that property is based on freedom, by increasing an individual’s liberty in freeing individuals from social and natural restrictions.\(^{647}\) With this in mind, granting property rights in a human body may be justified through the direction of wills or advance directives.\(^{648}\) Yet, Daniel Sperling states that:

... it does not follow that one may have the same interest in the body of another, whether dead or alive. In the post-mortem context, it is a dubious argument that a proprietary interest in the body of the deceased fulfils the freedom and autonomy of the next-of-kin, executor or the hospital where the body lies.\(^{649}\)

The Personhood theory, which was advanced by Georg W. F. Hegel and Max Radin, defines property as a relation between persons and things which differ from each other, because persons are able to develop personal identity. The ability to possess objects turns an abstract person into a moral and sophisticated person.\(^{650}\) Personhood describes the way individuals view and describe their belongings. Contrary to Locke, Hegel does not believe that individuals have absolute property rights over their body, but possess them as long as they intend to. He argues: “I possess the members of my body, my life, only as long as I will to possess them.”\(^{651}\) Consequently, persons are only permitted to acquire property in their body while alive. Radin reaches a similar conclusion in declaring that no one can be separated from his/her body and so no one can have any property in it.\(^{652}\) Nevertheless,

\(^{645}\) Waldron, supra n 639 at 6.
\(^{646}\) J.S. Mill *Principles of Politician Economy, with some of their Application to Social Philosophy* (London: J.W. Parker, 1848) p 144.
\(^{648}\) Sperling, supra n 308 at 132.
\(^{649}\) Idem.
\(^{651}\) Hegel, supra n 639 at § 47.
upon death an individual becomes separated from the person who he/she was. It may therefore be arguable that another person can gain property in his/her own body once he/she is dead. But such support can neither be found in Radin’s nor Hegel’s theories of property.653

Pre-Treaty Māori philosophical approaches had no concept of ownership.654 Interests pertained to resources, for example an interest to cultivate crops in a particular area, or to hunt a particular animal. However, generally they were not exclusive rights.655

Most rationales do not endorse the existence of property in dead bodies, but it is not impossible to underpin proprietary interests by means of the Natural Right Theory. Therefore, the models for acquiring property in a deceased’s body will now be discussed explicitly.

b) Theoretical Models of Acquiring Property in a Corpse

In order to gain property in human remains, New Zealand Parliament would need to create a law that introduces property rights in unburied corpses.656 Four variants come into mind: property vesting in the public, transfer of property under private law, abandonment and res nullius.

An ownerless (bona vacantia) deceased’s body could be deemed as res ommunes omnium: things that by natural law are the common property of all humans.657 This theory has been approved by several judgments, for example, Funk Bros. Seed Co. v Kalo Inoculant Co.,658 where it was held that unmodified cell lines found in nature are free for all to use. This classification is buttressed by two basic principles: The need to avoid conflicts that would have resulted had the first possible person taken possession of the thing; and that state occupancy guarantees the provision of revenue.659 The first rationale surely applies to the case of property in a deceased’s body, especially if one considers family disputes between...

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653 Sperling, supra n 308 at 134.
654 Boast, supra n 232 at 42 (in regard to land).
655 Idem.
656 Although Parliament is the supreme law-making body, independent courts may also change property rights by novel rulings that overturn earlier precedents or views about property in human remains.
658 333 U.S. 127 (1948).
Māori and Pākehā. But, such a classification would allow human tissue to be freely commercialised as no state revenue is estimated in these cases. Thus, the interest of public welfare would override the concept of free will which differentiates human beings from mere objects. Therefore ownership in the body of a deceased should not vest in the public.

Usually, when a person dies testate or has legal heirs, possessory interest vests in the executor, next-of-kin or the deceased’s spouse. Yet, transfer of property in a body seems to be legally impossible according to some American cases\(^{660}\) that state that a corpse cannot be part of the estate. However, in New Zealand there is no such jurisdiction, and this restriction does not apply.

According to the abandonment model\(^{661}\) people can have property in their body while alive but when they abandon their body upon death, ownership can be acquired by the first person who takes possession after death. Again, two American cases\(^{662}\) applied the abandonment model to body parts. The major difficulty with this approach is that the person’s intention to abandon his/her body is not normally present. Vice versa in the cited cases, both Venner and Moore had good reasons not to abandon their property interest in their bodily materials.\(^{663}\)

Equally, it could be argued that corpses are a *res nullius* (property of no one), and ownership could be acquired by the first person who takes possession of the body.\(^{664}\) This theory is, however, heavily criticised.\(^{665}\) For one thing it seems to be mere coincidence who finds the corpse first. Further, from a legal perspective there is always someone who is entitled to possess the body for the purpose of disposal and, as a consequence, has a custodial interest.

In order to allow ownership in corpses, New Zealand would need to reject existing ownership models that conceptualise proprietary interest, and instead develop innovative models.

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660 See, eg *Enos v Snyder*, supra n 380 at 69; *Snyder v Holy Cross Hospital*, 30 Md.App. 317, 317, 328 (ND N.Y. 2002).
661 Sperling, supra n 308 at 119; Grubb (1998), supra n 348 at 305-306.
663 See also *R v X* (supra n 329) discussed above on page 50.
664 For example the vesting of property in wild animals or wild flowers that are picked; see Swain & Marusky, supra n 657 at 13.
665 *Haynes’ Case*, supra n 302 at 1389; Sperling, supra n 308 at 121.
for acquiring property. The following section will discuss the advantages and disadvantages a property model.

c) Should the “No Property” Rule Be Rejected?

An argument in favour of the recognition of property rights is that “physically, there is nothing about a human corpse which precludes its being regarded as the subject of property.”666 This shallow argument has the benefit of being neutral, since it equally affects Māori and other ethnic groups. The possibility of acquiring property in corpses could provide protection against the abuse of one’s body,667 making the corpse amenable to legal control.668

To bring more certainty to the post-mortem context,669 some academics have strongly favoured a property regime. Concentrating on Scottish law in which a deceased’s body might be regarded as the subject of property until such time it is disposed of it was argued that:

It would be desirable for the English Courts to go further than Scots authority yet does, and take the view that it is only while corpse or the remains of corpse are buried, or dispersed following cremation, that they are not the subject of property. This would enable the courts to extend more effective legal control, not only over corpses awaiting burial and cremation, but also over ashes which had not been buried or dispersed, and human remains which had been disinterred.670

In fact in the past not only Scottish, but also English and Australian authorities developed the law relating to corpses. Williams v Williams and R v Fox, for example, recognised a right to custody prior to the disposal of the body, R v Lynn prohibited interference with a corpse after burial in developing a common law crime, and Doodeward v Spence allowed a claim for ownership over a preserved still-born baby in a bottle. These court decisions point towards the recognition of possessory and proprietary rights in human corpses. Some

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666 Skegg (1992), supra n 16 at 314.
667 Nwabueze (Biotechnology), supra n 352 at 93; Skegg (1992), supra n 16 at 315.
668 Kennedy & Grubb, supra n 437 at 2236.
669 Sperling (supra n 308 at 136) suggest is that this seems to be the only advantage of rejecting the “no property rule”.
670 Skegg (1975), supra n 281 at 420. Later, Skegg abandoned this theory, see Skegg (1992), supra n 16 at 315.
common law academics suggested that retaining the “no property” rule is antiquated and inadequate for today’s task.671

Mention must again be made of Moore, when we seek to illustrate some of the more challenging questions of proprietary interests in human bodies. In fact, the recognition of property interests in a deceased’s body would have been advantageous to John Moore, the plaintiff of the Moore case.672 The case portrays a reputable example of new, innovative perspectives on individual entitlements to human bodily material. Moore’s lawsuit was dismissed because the judges feared causing obstacles for biological researchers.673 Nevertheless, the court did not hold that removed cells could not at some time be the subject of property. Assuming for the moment that Moore’s removed spleen was his property, he would have stood the chance to win the case.674 Then, with Moore as precedent, one could decide what happens to his/her own bodily material for he/she would still hold control over that material after the removal.675 As a result, medical research on extracted bodily material could only be carried out with the consent of the owner. Many academics welcome this approach since it would overall strengthen a patient’s autonomy in his/her own bodily material.676

Similar to this approach a persistent minority opinion argues that a deceased’s body should be regarded “property belonging to the formerly alive person. It is his or hers to control to the medium of consent.”677 This reasoning proceeds on the assumption that people have ownership in their body while alive that will be transferred to another person appointed by the deceased on death.678 Some draw a comparison between a person’s body and material objects in marking similarities and differences. The similarity is that people own their body. The difference on the other hand is that “people’s bodies are First Property, whereas everything else that they own - their houses, typewriters, and shoes - is their Second Property.”679

671 Matthews (1983), supra n 276 at 256.
672 Moore, supra n 313.
673 Sperling, supra n 308 at 120.
674 In the end, an out of court settlement ranging somewhere between $200,000 and $400,000 was achieved.
675 Thomas (phd), supra n 449.
676 See, eg Thomas, idem; Hoppe, supra n 319 at 15; Lawrence, supra n 25 at 130-133.
679 Idem.
Another argument is based on the fact that there is no sufficient physical difference between human and animal remains. Since the latter is clearly within the scope of property we should ask ourselves whether human corpses should be treated similarly. However, there is a moral difference between humans and animals: human remains are treated reverently whereas animal remains are predominantly thought of as food or waste.

Based on a point of criticism (discussed below) that by recognising ownership in human remains they could become purchasable, another pro-argument arises, that it is unethical to place human remains on the market. The crux is that Parliament would have to put restrictions on the use of property in order to prohibit a certain use, i.e. tradability. It appears, for instance, that people can give away some things, but not sell them, for example alcohol without a license. And on the other hand, individuals can sell some things, but not give them away, for example the property of the bankrupted. Furthermore, some things cannot be voluntarily alienated at all, for example peerages and other titles of honour. Therefore, restrictions need to be imposed to prevent human corpses from becoming tradable objects.

As the rejection of property rights in corpses has done little to prevent “body snatching” so far, the abovementioned deliberations support to the argument that the recognition of property in corpses could bring clarification. The owner of the body could then be given a remedy against the “snatcher”. Regardless of remedies in tort, the police would have to intervene in “body snatching” cases since corpses would be the subject of theft. This property paradigm, however, is frequently subject to different kinds of criticism.

d) Should the “No Property” Rule Be Retained?

Before examining arguments against a property principle in human remains, it has to be pointed out that as far as unburied corpses are concerned, New Zealand courts are free to overrule any case in which the “no property” rule was reason for dismissal. Although New Zealand law recognises possessory rights over unburied corpses under certain circum-


\[\text{\textsuperscript{681}}\text{See, eg Crimes Act 1961, s221 (Theft of animals).}\]

\[\text{\textsuperscript{682}}\text{See, eg the Human Tissue Act 2008, the Resource Management Act 1991 (planning permissions), or Traffic Regulations (1976).}\]

\[\text{\textsuperscript{683}}\text{Price (2007), supra n 677 at 207.}\]
stances, it is a very different matter to ask whether such exceptions should extend to the recognition of property in human corpses. Wrongful exploitation and commercialisation of the human body seem to be two of the greatest concerns in rejecting the "no property" principle. As discussion will show, the fear of commercial dealings with human bodies is the most decisive argument for retaining this principle. But this section will firstly focus on the Moore case again.

i) The Moore Case Revisited

The previous section focused on benefits that Moore would see if he "owned" his spleen. This section will now concentrate on the advantages not only for people like Moore, but the health care system in general, on the supposition that Moore does not have a proprietary interest in his bodily material. To begin with, a lot of people would have benefited from the pharmaceuticals developed from Moore's cell line, including the university, drug makers, the researchers themselves, and the people whose lives were enhanced or even saved. Furthermore, it is doubtful whether Moore was harmed by the consensual removal of his spleen, or at least made worse off by the unauthorised, follow-up extractions of cells and other bodily material. In fact, there was some therapeutic benefit from the following examinations to see whether any cancer cells had been harmed. The Kaldor-Hicks efficiency seems to be a natural way out of this conflict. By using the principle of Kaldor-Hicks, John Moore:

could have been compensated for any slight harm with still a huge surplus left over for the gainers. Of course, compensation need not even be paid to him to meet the Kaldor-Hicks standard.

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685 Conway (supra n 446 at 430) however resists the idea that the executor's right to possession is an exception to the "no property" rule. She thinks, in fact, that it has nothing to do with property at all.
686 S. Wilkinson, supra n 386 at 27. More precisely, Wilkinson refers to wrongful use of exploitation and commodification, which are particular types of objectification. He describes "exploitation" as using another person as a (mere) means (33), and "commodification" as treating other people as commodities (45).
687 Grubb (1998), supra n 348 at 313; Skegg (1992), supra n 16 at 315.
688 The Kaldor-Hicks efficiency describes an economical efficiency. Under Kaldor-Hicks efficiency, a political measure makes sense, if improvement is brought to at least one person, and compensation can arranged from the gainers to those that are made worse off, in other words if the measure benefits welfare in total. The compensation thereby must be theoretically possible.
Overall, even though the information in Moore’s cells was used without authorisation, the advantage for a wide range of diseased people seems to outweigh the wrongful treatment Moore had to endure.690

**ii) Commercial Dealings**

It reflects the spirit of the times that granting proprietary rights in human bodies inevitably draws them into the area of commercial dealings, as the value of dominion lies in the ability to transfer the object for reward. Although self-ownership is not the core of this discussion, there is still a dramatic difference between having property rights in one’s own body and the body being property of another.691 The crucial question is whether people want their bodies to become the subject of commercial transactions, as John Moore thought they should. The fallout could be that living human beings would be threatened as objects rather than subjects of our legal system.692 A property framework would also import the language of ownership:

> [I]f my relative’s body is *mine*... I may do with my property as I wish. I may elect to sell her component parts in public auction. I may donate her for display as a plastinated exhibit.693

This statement has been objected to vigorously by others, who argued that “a property framework could be structured to eliminate a market in body parts and cadavers.”694 However, a property regime would also allow people to do morally questionable things. For example, government would grant full legal protection to women who hire their uteruses for money.695 Corpses might be regarded as part of the estate, with the consequences that the body of a deceased person “would have to be valued for a capital transfer tax and even

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690 *Moore*, supra n 313 at 496.
691 See, eg *Moore*, supra n 313 at 504.
693 *Idem.*
694 Nwabueze (Biotechnology), supra n 352 at 49; In this book Nwabueze provides an analysis of various property models. In the end he favours a limited marked-inalienable type of property.
sold ... under a trust for sale of his property."\textsuperscript{696} This practice would clearly and entirely reduce the dead human body from being a subject rather than an object.

\textit{iii) The Slavery Issue}\textsuperscript{697}

The recognition of a property interest in human bodies could have the unwanted side effect of slavery. In fact, the first context in which the property question in human bodies arose was slavery under Roman law.\textsuperscript{698} Slaves were considered to be chattels not legal persons but this was rejected in 1772 when the English slavery epoch ended with the \textit{Sommersett’s} case.\textsuperscript{699} From that point on, ownership in a living body was not permitted in England and its colonies.\textsuperscript{700} It is unlikely that property in human remains would give rise to slavery in today’s First World.\textsuperscript{701} Yet, a selection of cogent articles on property in human remains focus on slavery. By putting the value of autonomy into practice, some rejected a property approach in both living and dead bodies. It was stated that:

\begin{quote}
[r]ights of autonomy and self-determination and responsibilities towards other human beings or potential human beings can be adequately realised through branches of the law other than the law of property. The concept of one human being owning another is one which the Anglo-American courts rejected two centuries ago. It is not one which needs reviving.\textsuperscript{702}
\end{quote}

To combat this argument, others observed that the “no property” rule and the abolition of slavery in England “do not seem to have been connected.”\textsuperscript{703} With respect, this is unconvincing. There are similarities between treating human bodies as property (and, by implication, as things too), and the rejection of the “no property” rule. In both cases, the focus is driven on the “thing-ness” of the body, instead of on the “subject-ness” of the former hu-

\begin{footnotes}
\footnotetext[697]{For a valuable discussion on the origin of slavery, see Garnsey, supra n 637 at 209-211.}
\footnotetext[698]{R. Campell \textit{Austin’s Lectures on Jurisprudence or the Philosophy of Positive Law} (London: Murray, 1902) 5\textsuperscript{th} ed. vol 1p 387.}
\footnotetext[699]{98 E.R. 499 (1772).}
\footnotetext[700]{Hardcastle, supra n 283 at 64.}
\footnotetext[701]{Although slavery may seem as a historical relict to most of us, servitude remains prevalent in many parts of the world. The United Nations estimates that there are 27 million slaves in the world; United Nations-Secretary General (Department of Public Information) \textit{Slavery Prohibited, but 27 Million Victim of ‘Atrocity’ today} (SG/SM11957; HR/4970/OBV752); available to view at: <http://www.un.org/News/Press/docs/2008/sgsm11957.doc.htm> (accessed 20/05/09).}
\footnotetext[702]{Mortimer, supra n 309 at 255.}
\footnotetext[703]{Matthews (1995), supra n 680 at 262.}
\end{footnotes}
man being. Using the words of Rosalind Croucher: \[704\] “The body is a person, the corpse is a person.” \[705\] By allowing ownership in human remains, corpses legally assume the form of things, although the people attached to the dead person would conceive them as the remnant of a living person, or, from a religious point of view, as a sacred symbol of a real person. \[706\] To illustrate this by way of example, it may be said that in the event one’s father died we would not cease to regard to him as father. We would also still perceive the body lying in the grave as our father’s body, not just an object. This expectation that in death a deceased’s body will be respected as a symbol of the formerly living person has been demonstrated throughout history. \[707\] In Janicki v Hospital of St Raphael, \[708\] Blue J expressed this fact in making reference to ancient war rituals:

In 1993, during the Battle of Mogadishu in Somalia, American servicemen repeatedly risked their lives to rescue the bodies of their slain comrades... This is an ancient military tradition, going back to the battle fought over the body of Patroklos on the plains of Troy. It is also a powerful illustration of the symbolic importance that the bodies of the dead have for the hearts and minds of the living. \[709\]

Those words suggest that it is not correct to waive the connection between the “no property” principle and the abolition of slavery in England. Yet, Blue J’s statement also demonstrates the fear of commercial dealings with the human body to be quite unsubstantiated. Aside from the fact that human remains could easily be rated as market-inalienable, \[710\] most people would consider selling the body of their loved one’s as a crime against humanity.

\[704\] Formerly Rosalind Atherton.
\[705\] Atherton (ALJ 2003), supra n 276 at 193.
\[707\] McGuinness & Brazier, supra n 31 at 205.
\[708\] 744 A.2d 963 (Conn.Super.Ct. 1999); The case discusses the issue of whether a stillborn, nonviable fetus should be autopsied and dissected despite its mother’s express orders to the contrary.
\[709\] Ibid, at 964; Patroklos was said to have saved the day in this battle, but he died in the fight. The surviving soldiers formed a circle around the corpse to protect it. The Greek soldiers, having fended off the Trojans, carried the body of Patroklos back to the Greek ships he had saved. In relation to the incident in Mogadishu Blue J cites M. Bowden Black Hawk Down: A Story of Modern War (Berkeley: Atlantic Monthly Press, 1999) para 282-85.
\[710\] Bray, supra n 322 at 244; Nwabueze (Biotechnology), supra n 352 at 49.
iv) Removing Pressure from the Rule itself

Although the strongest argument for rejecting the “no property” rule, i.e. the development of exceptions to the “no property” principle, might appear paradoxical, Skegg\textsuperscript{711} enters the discussion from a well-chosen starting point, namely the “no property” rule itself. He refers to Glanville Williams’s assumption that:

[i]t would seem that the rule is too embedded in the law for this course [meaning a legislative reform in order to reject the “no property” rule] to be possible. Overturning the rule would deprive the Common Law and statutory exceptions of their raison d’être and make nonsense of them.\textsuperscript{712}

The court’s sudden repudiation of the “no property” rule could start a knock-on effect, at which established case law would collapse and cause a state of uncertainty. Moreover, judgments granting certain property rights in human bodies such as the Doodeward case\textsuperscript{713}, seem to have the effect of strengthening the rule itself, because they removed some of the pressure, for a change towards recognising property rights in corpses.

On the basis of these, by no means, fully convincing lines of reasoning, Skegg\textsuperscript{714} suggests that the silver bullet would be to modify or refine the rule rather than to completely retain or reject it. He posits that “[s]uch an approach is more in keeping with the common law tradition than is the complete rejection of a long-accepted rule.”\textsuperscript{715} According to Skegg one of the many possible modifications that differs between buried and unburied corpses, would involve excluding the latter from the scope of the rule. Consequently, corpses, or cremated remains of corpses, that are not buried could become capable of being property. This would permit more effective legal control over corpses awaiting burial or cremation, while leaving the long accepted “no property” principle untouched. Although, this differentiation does not, as Skegg acknowledges,\textsuperscript{716} find support in any common law case, other academics similarly questioned whether the property question needs to be answered in the sense of either property or person.\textsuperscript{717} One of the consequences of avoiding a yes or no an-

\textsuperscript{711}Skegg (2003), supra n 328 at 428–429; Skegg (1992), supra n 16 at 315.
\textsuperscript{712}G. Williams, supra n 696 at 680 cited by Skegg, idem.
\textsuperscript{713}Skegg (2003), supra n 328 at 428.
\textsuperscript{714}Skegg (1992), supra n 16 at 316.
\textsuperscript{715}Ibid, at 315.
\textsuperscript{716}Idem.
\textsuperscript{717}Atherton (ALJ 2003), supra n 276 at 193.
swer is that human remains can be property as long as this idea “does not overtake the essential person-ness of the object in question.”

*e) Interim Conclusion*

After exploring various arguments, it remains ambiguous whether regarding the corpse as the subject of property would outweigh the disadvantages a rejection might bring. The above listed jurisdiction and legal doctrine however indicate that the idea of property in human corpses is predominantly repudiated. Namely, instrumentalisation, commercialisation, and the awareness of the subject-ness of a person outweigh opposing arguments. Nonetheless, the *Moore* case has proven to be a case that supports the rejection of property in human remains. Essentially, the rule is so deeply embedded in the jurisprudence of common law that rejecting it might possibly cause less clarification. Ethical permissibility aside, given the above effects of granting property in corpse, it is undesirable to reject the “no property” rule. Fortunately there are other possibilities to effectively prevent “body snatching”. In this context, the question of whether there should be property in a human corpse might not be the most suitable starting point. Equally, it has been criticised that “[b]y asking are persons property, we are putting a construct - legal, theoretical, solid-in the way of the real question or the real issue.” By observing that property rights in human remains leads to uncomfortable outcomes, it is suggested that the better question is, “Who should have control in and regulation of the body of a deceased person?”

*5. Amendment to Criminal Law*

After dismissing the question of whether corpses should be regarded as the subjects of property, it is prudent to ask if Parliament should outlaw “body snatching”. Section 219 of the Crimes Act 1961, which requires a taking, using or dealing of property belonging to another for theft, is a useful place to start. The Crimes Act 1961 defines property as “real and personal property, and any estate or interest in any real or personal property, money, electricity, and any debt, and any thing in action, and any other right or interest.” At present corpses neither fall within the definition of property, nor are they a part of a person’s

718 Idem.
720 Crimes Act 1961, s2.
estate passing to the executor on the testator's death. A simple statutory amendment\textsuperscript{721} to s2 of the Crimes Act to modify the scope of property to include (unburied) corpses could provide redress in “body snatching” cases, while also retaining the overall definition of property. Further, matching German criminal offences to New Zealand’s legal system could give a similar effect, as two criminal offences within German criminal law could possibly penalise “body snatching”.

\textit{a) Modifying Current Sections of the Crimes Act}

Including the term “human body” or “corpse” into the Crimes Act’s definition of property is not an innovative idea, since it was discussed by the Law Reform Commission of Canada in 1992.\textsuperscript{722} The Commission did not, however, recommend granting property rights in corpses, but proposed that possessory interests should survive death, and could subsequently be harmed or violated.\textsuperscript{723} Other proponents of criminal law changes call for an amendment to the Crimes Act 1961 with the intention to criminalise “body snatching” in order to allow police to intervene. In fact, the statutory gap in New Zealand law could be filled by regarding corpses as property for the purpose of protection from theft, damage and the like.\textsuperscript{724} Accordingly, it has been alleged that:

\begin{quote}
[I]n situations involving criminal actions, such as the stealing of a corpse or body parts previously extracted from the deceased, it is advisable to expand the definition of theft also to include dead bodies and body parts.\textsuperscript{725}
\end{quote}

Likewise, it was plausibly stated that “the civil law recognizes and protects rights to possession, there is no reason why the criminal law should not do likewise.”\textsuperscript{726} In fact, there appears to be no reason in principle why legislation should not extend the definition of property in s2 of the Crimes Act 1961. Admittedly, upon closer examination the proposal faces two difficulties. Firstly, an amendment to s2 of the Crimes Act would entail that

\textsuperscript{721} Skegg (1975), supra n 281 at 422; Skegg (1992), supra n 16 at 53.
\textsuperscript{723} Ibid, at 45, 57; in the same context, the Commission points out that that the recognition of property interest in human tissue would be dehumanisation of human existence.
\textsuperscript{724} G. Williams, supra n 696 at 679.
\textsuperscript{725} Sperling, supra n 308 at 140.
\textsuperscript{726} Hammond, supra n 215 at 99.
every single crime against rights of property\textsuperscript{727} would apply to dead bodies too. Secondly, as has already been indicated, the Ministry of Justice’s recommendation explicitly excludes changes in criminal law.\textsuperscript{728}

The idea that property in corpses should only apply to the law of theft\textsuperscript{729} in order to avoid the mentioned issues was considered recently. In support of this statement the paper considers amendments to s219(1), 220, 222 of the Crimes Act 1961, such as adding the words “unburied corpses” or wider “unburied human remains” in addition to the phrase “property”. After these amendments, s219(1)(a) would be read as “[T]heft or stealing is the act of dishonestly and without claim of right, taking any property or unburied corpses with intent to deprive any owner permanently of that property or of any interest in that property.” Being in the scope of theft, this approach is arguably preferable to the former one.\textsuperscript{730}

Furthermore, some academics pointed out the advantage of protecting body parts on the organ donor market under the law of theft.\textsuperscript{731} However, this proposal is questionable, since it just regroups problems, and does not provide an answer to the question of who is in rightful possession of the corpse. Like all other recommendations, this one cannot ease the cultural conflict between two cultures that view death in markedly different ways.

\textit{b) Amendments to the Crimes Act 1961 Based on German Criminal Law}

A comparative analysis of foreign legal systems suggest that an alternative solution may be available. For instance, German law (§ 168 I StGB – Störung der Totenruhe)\textsuperscript{732} criminalises the unauthorised removal of a deceased’s body or his/her remains out of the custody of the person entitled. Furthermore, a person who deliberately and knowingly interferes with a committal service will be punished under § 167a StGB.\textsuperscript{733} Everyone who commits either one of these criminal offences is liable to imprisonment for a term not exceeding three years (§§ 167a and 168 I StGB). The thesis will examine these criminal offences from the point of view of modern “body snatching” cases.

\textsuperscript{727} As denoted in part 10 of the Crimes Act 1961.
\textsuperscript{728} MoJ-Briefing Paper, supra n 414.
\textsuperscript{729} Skegg (1992), supra n 16 at 315; he thereby refers to the Theft Act 1968 (UK), which governs most of the general property offences in English law.
\textsuperscript{730} Similarly, quite a few sections of the Human Tissue Act 2008, such as ss22-25 and ss47-52, criminalise the handling of human tissue in a manner like theft.
\textsuperscript{731} Hammond, supra n 215 at 99.
\textsuperscript{732} § 168 StGB (German Criminal Code) – Violation of a Grave.
\textsuperscript{733} §167a StGB (German Criminal Code) – Interference of a Committal Service.
Within the *actus reus* of § 168 StGB a deceased’s body and bodily material are the subjects. The offence consists, as already mentioned, of the unauthorised removal of a deceased’s body or his/her remains out of the custody of the person entitled to them under German federal state law. Commonly, the responsibility to bury the corpse, and therewith the right to possession of the corpse, lies in the next of kin (for example § 31 Bestattungsgesetz Baden-Württemberg). Another paragraph (§ 21 Besattungsgesetz Baden-Württemberg) provides the ranking order of the next of kin, whereby the spouse, children of age, parents, grandparents, and siblings and grandchildren of age are ranking first. Custody is defined as actual custodial care, which is caused by the supervening of a virtual element, meaning that the bereaved needs to know about the deceased’s passing away, which is often a problem in cases of accidents. Since the removal is only indictable if it was unauthorised, it is questionable under which circumstances a person is justified in using force against the body. The answer to this is twofold: first of all, the person mentioned in § 21 Bestattungsgesetz Baden-Württemberg is responsible for the burial and thus is justified in the absence of a will. Secondly, if a will exists, the consent of the deceased given during his/her life is of interest (Art. 2 I Grundgesetz) thus the executor is justified. Yet, it is ambiguous which interest is legally protected by § 168 I StGB. Most German academics assume that it is a matter of reverence towards the deceased. Consequently, if a case of “body snatching” would occur in Germany, the “snatcher” could be liable under § 168 I StGB if he/she could not justify him/herself.

In addition, § 167a StGB, which also protects the reverence of public in general, and the participants of the funeral in particular, is pertinent if the committer disturbs a committal ceremony and thereby wounds or inflicts psychical harm on any other person attending the funeral. Assuming a corpse would be taken from a funeral ceremony in Germany, the “snatcher” would be liable of § 167a StGB. Meanwhile, it may be added that none of New Zealand’s “snatchers” interrupted a commitment ceremony nor has anyone in Germany been accused under § 167a StGB since the paragraph’s introduction in 1969.

At this stage, the thesis questions whether transferring those German criminal offences to law of New Zealand’s could successfully prevent “body snatching”. This matter must be answered against the backdrop of New Zealand’s criminal law system and tikanga Māori.

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735 Reputable reasons for the deceased’s consent are not required.
737 Ibid, at § 167a ml. 1.
There is one comparable offence in New Zealand (Misconduct of Human Remains, s150 of the Crimes Act 1961) for activities such as showing disrespect to human remains. But, as mentioned above, requirements of this section have not been met in modern “body snatching” cases. The interest of dignity towards a deceased person, which is similar to the interest of reverence of the public in the cited German paragraphs, is legally protected by s150 Crimes Act. Yet, we must be aware of the significant difference between Germany’s and New Zealand’s weighting of posthumous interests. This becomes all the more apparent when one considers that in New Zealand, contrary to German law, a person cannot give binding orders concerning his/her funeral arrangements in their will. Posthumous personality rights have the status of fundamental rights in Germany. Although New Zealand law has the flexibility to acknowledge posthumous rights, it holds them to be less important that achieving a balance between various different cultures whose opinions on posthumous interests differ remarkably. In stark contrast, German law has no need to harmonise two markedly different cultures.

§ 167a StGB seems to be transformable into New Zealand law because of its strict neutrality towards different cultures. In consequence, no one could disturb a tangihanga or funeral ceremony in progress no matter if it is held in a Christian, Muslim, or any other culture’s rite, without being subject to prosecution. This seems to be a reasonable solution on first glance, but problems lie in the fact that the tangihanga begins directly after death which means that within multicultural families Pākehā family members cannot stop the ceremony at all. However, this is an incorrect assumption. Indeed, after becoming aware of plans to conduct a tangihanga, family members could call the police to check if the ceremony is legal and, if it is not, bring an end to it. Since Māori relatives could proceed equally if the Pākehā side of the family were conducting a funeral without consent, the proposed offence would not lead to the victimisation of one particular cultural group. Ultimately, it is an absurdity that police lack the power to intervene in such cases of civil matter. In order to prevent further “body snatching” incidents, it might be prudent to combine § 167a StGB with the Ministry of Justice’s recommendation to give the power to the police to seize bodies.

An alternative would be the combination of the Ministry’s proposal with § 168 I StGB. Since posthumous rights are not equally protected by German and New Zealand law, it is complicated to transform this concept of protection. Further, both proposals based on Ger-
man criminal law do not resolve the issue of who has the right to determine where the body should be buried.

Fortunately, there are some other ways to handle the problem by respecting a deceased individual's autonomy. In essence, the problem cannot be eliminated by amending the Crimes Act. Thus, there seems to be no doubt that either an amendment as proposed by some New Zealand's academics, or an adaptation to German criminal law offences, can put things straight once the general issues of who should have the right to possession and if the deceased should be able to give binding instructions are settled. Applying these principles to New Zealand law would cause more uncertainty.

6. Creating a Liability in Tort

Several claims for interference with dead bodies failed because of the law's aversion to acknowledge property rights in the deceased's body.\textsuperscript{738} Basically, the law of privacy protects the living, not the dead, with the exception of dead bodies that underwent a special procedure like conservation or mummification and therefore would be considered to be the subject of property. In order to extend this exception for the purpose of "body snatching," some academics argue that a "tort of interference with a dead body" should be introduced as a separate and independent tort.\textsuperscript{739} In similar vein, others suggest that dead bodies should legally be considered to be "goods," and thus fall within the law's definition of a tortious action in conversion or trespass.\textsuperscript{740} In consequence, the "snatcher" would be obligated to return the body to the individual responsible for burial. Hence, an action in tort seems to be a very effective way to achieve the goal of regaining possession in the corpse.\textsuperscript{741} In this chapter the thesis focuses on the question of whether the person responsible for the funeral should have a remedy in tort against the "snatcher".

The thesis earlier recognised that torts are usually "claims for compensation, brought by someone who has suffered harm, against someone else who is alleged to have been respon-

\textsuperscript{738} For example see, \textit{AB v Teaching Hospital}, supra n 306; \textit{Dobson}, supra n 382. \textit{Dobson} failed only because of the claimant’s inability to prove a possessory right necessary to establish a conversion claim (at 394).

\textsuperscript{739} Nwabueze (2007), supra n 456 at 63.

\textsuperscript{740} Matthews, (1983), supra n 276 at 218.

\textsuperscript{741} So far "body snatching" is only actionable under the tort of mental injury of the bereaved; see \textit{Injury Prevention, Rehabilitation, and Compensation Act} 2001.
sible for that harm.” Some academics argue that this definition, and the fact that no precedent exists, leaves room for judicial creativity.

Some even criticise Gage J who missed the opportunity to establish a tort concerning dead bodies in *AB v Teaching Hospital*. Similarly, others evaluate Higgins J’s statement that an unburied corpse is not and cannot be “goods” within the law of torts as limited because, according to him, the definitions of goods is inclusive, meaning that the word should bear the widest possible meaning to include unburied corpses. It was outlined that:

... a plaintiff entitled to possession of such matter should be able to claim damage or specific restitution ... against the wrongdoer keeping him out of possession.

Alternatively, Remigius Nwabueze mentioned the possibility of adjusting the law of New Zealand to § 868 of the American Law Institute (2nd Restatement of the Law of Torts) that proposes a claim for interference with dead bodies:

**Interference with dead bodies**

One who intentionally, recklessly, or negligently removes, withholds, mutilates or operates upon a body or dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to dispose of the body.

This paragraph is very broad, as it applies to intentional actions but also to reckless and negligent incidents, and to events prior to and after burial. For that reason it was pointed out that this paragraph should be the starting point for any new development in the law of torts. If one accepts this as a solution to the “body snatching” problem, “body snatching” would be recognised as a tort.

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743 See, Nwabueze (2007), supra n 456 at 65.

744 Matthews (1983), supra n 276 at 216.

745 As in an English statutory context, such as the Sale of Goods Act 1979 or the Interference with Goods Act 1977.

746 Matthews (1983), supra n 276 at 216.


At the end of the scale, it is not crucial if either a new, separate law of tort should be established or if the definition of "goods" should be extended because both changes lead to effective civil protection of the corpse. It seems that there is no reason in principle why these solutions should be ineligible. Of course, this examination focuses solely on civil law rights, meaning that police still would not be vested with adequate power to seize the corpse. Again, issues concerning responsibility for the funeral are left unanswered, so that it is unclear who is able to take action in tort against the "snatcher".

7. Legally Binding Burial Instructions

Primarily based on the common law's objection to property in a deceased's body, test­mentary burial instructions of the deceased are not legally binding upon courts under current jurisdiction rules in New Zealand. Although there are certain circumstances under which an individual may make (semi-)autonomous instructions about his/her dead body, when it comes to his/her will a person is limited to choosing an executor who he/she entrusts with carrying out the burial. Unfortunately, as above-mentioned, the executor is not obligated to give effect to the deceased's specified wishes. Is this limitation of the deceased's autonomy morally and ethical justifiable? Considering that an individual has full decision making authority over his/her body while alive, should the testator's wishes not be honoured if he/she has specified exclusive intention through the will?

As discussed above, in the absence of testamentary dispositions, the spouse of the deceased or the family have the right to possession of the body for burial or other lawful disposition.

a) Taking Autonomy into Account

If a person regulates what shall happen to their body after death, then this are the instructions of a living person because the deceased made these instructions during his/her life-

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749 See, e.g., Williams v Williams, supra n 300.
750 Sperling, supra n 308 at 113; discussed in detail above in the section "The No Will Rule" p 59-61.
751 For example, posthumous reproduction or organ donation.
752 Idem.
753 See Conway, supra n 446 at 432.
754 Either as binding indications or as a veto right on the use of his/her body; see, e.g., T.M. Wilkinson "Individual and family consent to organ and tissue donation: is the current position coherent?" (2005) 31 J. Med. Ethics 587 [hereinafter: T.M. Wilkinson].
time. Hence, the deceased held a subjective belief that the surviving relatives might need to respect. Given that most religions believe in some kind of afterlife or reincarnation, a fair number of academics contemplate the possibility that religious autonomy survives death. Consequently, the conflict between the deceased’s posthumous religious rights and the cultural and religious values of the immediate family is refreshed. It is pervasive whether autonomy applies to testamentary burial instructions.

Firstly, it appears worthwhile to draw a comparison to other testamentary instructions that remain binding beyond death. At first glance it seems that an individual can ignore the family’s wishes when it comes to the distribution of his/her financial estate. But the testator also holds a moral obligation towards his/her relatives. This consideration emanates from the possibility of judicial testamentary rewriting of the will under the Family Protection Act 1955. In 1910, Edwards J introduced the need for the court to consider whether there had been a "manifest breach of that moral duty which a just, but not loving" testator might owe to claimants. Since then there exists a necessity for family courts to evaluate and weigh ethical considerations in reviewing testamentary claims. Nevertheless, this concept of family inheritance recently seems to have given way to the current thinking in favour of testamentary freedom. It is, though, questionable if the examples gathered from the Family Protection Act 1955 provide a reliable guideline for the deceased’s testamentary instructions regarding burial, rather than the financial estate. The Family Protection Act’s core statement reflects the family members’ capability to legitimately claim some moderate provision from the estate for the purpose of psychological, familial support. Pursuant to this proposition, moral duty simply consists of financial support. Accordingly, the right to self-determination in terms of non-financial instructions like funereal arrangements does not seem to be reduced by moral obligations towards the family.

756 Williams v Aucutt [2002] 2 NZLR 479; (200) NZFLR 552 para [45] [hereinafter: Williams v Aucutt]; discussed in Conway, supra n 446 at 437.
757 The purpose of the Family Protection Act 1955 is to empower judges to undertake testamentary rewriting, and this inevitably means that the court can never regard a will as anything more than a tentative disposition of property pending the ultimate decision. For a valuable discussion, see, J. Caldwell “Family protection claims by adult children: what is going on?” (2008) 6 NZFLJ 4 [hereinafter: Caldwell].
758 See, Re Allardice v Allardice [1910] 29 NZLR 959, 973 (CA), upheld on appeal by the Privy Council (1911) AC 730.
759 Williams v Aucutt, supra n 756 at para [45]. Here the Court of Appeal uttered that “there are pointers to concerns that some orders in recent years may have been out of line with current social attitudes to testamentary freedom relative to claims by adult children”.
760 Unless there has been some disentitling conduct [DSH v JMc unreported, Family Court North Shore, Fam-2005-044-1873, 11 December 2006, Ryan J para [8] or some earlier inter vivos provision.
Honouring the deceased’s instructions would not require any explicit recognition of property rights in corpses. Instead it would solely involve power to give legally enforceable burial instructions. Nonetheless, current jurisdiction goes to great lengths to uphold testamentary autonomy, yet refuses to recognise burial instructions. It seems somewhat anomalous that an individual may dispose of their financial estate according to his/her conscience, but cannot dispose of their body in the same manner. On those grounds, it is suggested that the preservation of pecuniary interests should be recognised alongside posthumous personal rights of the deceased. However, attention must also be given to the possibility of vast time delays between the grant of probate and the death of the deceased. It could indeed take more than several weeks to finally lay a body to rest. This is contradictory to Māori belief where the corpse should not be left unattended between death and burial. During the time delay, however, the deceased’s expressed wishes should be regarded indicating the burial instructions and hence relatives of the deceased should adhere to these indications.

b) Comparison to Organ Donation

The Human Tissue Act 2008 (HTA) includes a consent framework which sets out a hierarchy of decision-makers who may object or consent to the use of the deceased’s tissue, where no expressed wishes have been given by the deceased during their lifetime. The donor system is based on respect for the autonomy and dignity of the individual whose tissue is collected and used, in s3 of the HTA. The deceased may give informed consent either orally, or in written form. Informed consent may also be contained in a person’s will, s43(3) of the HTA. In the absence of directions on organ donation, the decision will be made by the immediate family, s40 of the HTA. A unique feature of the HTA is reflected in ss3(a)(ii) and (iii) which include recognition of, and respect for, the cultural and spiritual needs, and the values and beliefs of the immediate family of an individual, and the cultural, ethical and spiritual implications of collection or use of human tissue. The appointed decision-maker has to take into account all of these factors.

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761 Conway, supra n 446 at 432.
762 This emanates from the assumption that New Zealand jurisdiction should recognise testamentary burial instructions out of respect for the autonomy of the person, making the posited approach a very practical approach to obviate family disputes over the bodily estate in future cases.
Since organ donation and disputes regarding the funeral of a deceased are related to the same object of legal protection, namely posthumous bodily integrity, the subjects seem to be comparable. If one applies the regulations of the HTA to funeral directions, one will likely find that the system is suitable. The deceased him/herself would be first in the hierarchy of funeral instructors. This means that if the deceased expressed his/her instructions during lifetime, they need to be performed. If the deceased is silent on his/her funeral arrangements, the immediate family, not the executor of the estate, would arrange the funeral. The decisions should be made on reasonable grounds that all other family members would, or could accept. Where the immediate family is not available a “close available relative” may be approached for instructions.\textsuperscript{763}

This construct would acknowledge the individual’s autonomous control over the aspects which are connected with death, as well as complex cultural, religious and values issues, including the wellbeing of the immediate family.\textsuperscript{764} Since immediate family members often disagree when it comes to funeral arrangements, identifying the appropriate relative can be quite difficult. On the pragmatic ground that families are not capable of solving the disputes, one might reject family members as interpreters of the deceased’s wishes.\textsuperscript{765} However, such arguments are ostensibly over-stated and cannot override the moral basis of the deceased’s autonomy. Instead, questions of “proxy decisions” also need to be considered. Eventually, New Zealand should consider applying the HTA system and hierarchy to decisions on funerals. But the procedural enforcement of the deceased’s integrity could cause difficulties, because obviously the deceased is no longer in the position to insist on the observance of his/her instructions. However, the bereaved\textsuperscript{766} party could act as a trustee, and insist on their behalf and in their interest. It should be able to challenge decisions of the executor which are inconsistent with the deceased’s wish, or the immediate families’ instructions. A similar practice has been successfully tested for its practicability in the United States for several decades.

\textsuperscript{763} Cf. HTA, s41.
\textsuperscript{764} \textit{AB v Teaching Hospital}, supra n 306 at 664.
\textsuperscript{765} Giordano, supra n 413 at 473.
\textsuperscript{766} Even if not legally classified as family, such as the fiancé(e) or cohabitants.
Where the testator has expressed his/her exclusive instructions by will, American courts have consistently enforced the deceased’s wishes concerning the disposition of the deceased’s remains, regardless of whether the executor refused to follow that direction for reason of conscience. Courts even recognised less decisive documents. If an individual dies without leaving a valid will behind which includes burial instructions, courts will give effect to verifiable oral statements indicating the deceased’s wishes. Courts even allowed subsequent oral statements to alter burial instructions in an executed will. In other instances, courts have accepted and acted upon evidence (mainly declarations made by family members) indicating that the deceased’s wishes concerning the disposition of his body had changed since the execution of their will. Directions made by the deceased are insubstantial if they are “absurd, indecent or generally contrary to public policy.” The fact that the wish of the deceased is preferred over the desire of any other person, exemplifies the strong status of autonomy in the succession construct of the United States. Inconsistencies remain when considering New Zealand’s Family Protection Act however. For example, how far does autonomy go? Should the law impose restrictions on the deceased’s wishes? New Zealand courts seem reluctant to go as far as American courts do. Nevertheless, there seems to be a greater sense of acceptance towards the binding effect of burial instructions expressed in the deceased’s will.

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767 For a valuable discussion, see Foster, supra n 419.
768 Kasmer v Guardianship of Limner, 697 So2d 220 (Fla. 3d DCA 1997); Foster, supra n 419 at 1390 and the cases cited; Conway, supra n 446 at 432. The law of Belgium is very similar. There, the family cannot overrule the decision of organ donation, P. Boddington “Organ Donation After Death-Should I Decide, or Should My Family?” (1998) 15 J Appl Philo 69, 70 [hereinafter: Boddington].
769 For example, a correspondence in the deceased’s files, Fidelity Union Trust Co. v Heller, 16 N.J.Super. 285, 84 A.2d 485 (Ch. Div. 1951); eg a written directive that gave the deceased’s companion of 23 years rather than his estranged wife control over his burial, Bruning v Eckman Funeral Home, 300 N.J.Super 693 A. 2d 164 (App. Div. 1997).
770 Re Scheck’s Estate, 172 Misc. 236, 14 NYS 2d 946 (Str. 1939); Stewart v Schwarz Brothers-Jeffer Memorial Chapel Inc. and Scott, 606 NYS 2d 965 (1993) [hereinafter: Re Scheck].
771 Cohen v Cohen, 896 So2d 950, 952 (Fla. 5th DCA 2005).
772 See Re Scheck, supra n 770.
773 Conway, supra n 446 at 434 instances In the Estate of Mksras, 63 Pa D. & C. 2d 372 (C.P. Phila. County 1974) in which the court refused to uphold the deceased’s request to be buried wearing valuable jewellery on the basis that it would only encourage grave-robbing.
774 The Connecticut legislature even enacted a bill that gave individuals broad authority to specify funeral arrangements in a signed, witnessed “written document,” General Statutes of Connecticut, 2009 revision, title 45a, chapter 802b, s45a-318.
775 Conway, supra n 446 at 434.
Yet, cultural and religious values may play a greater role. One important cultural-related question remains: Should judges take into account religious and cultural values such as the Māori belief that objects to a posthumous interest of the deceased in his/her body?\footnote{By way of comparison, Article 9 of the Human Rights Act 1998 (coming into force on 2 October 2002 in England and Wales) and the Draft of the UN Declaration on Rights of Indigenous People (in particular Article 13) might force judges to take into account religious and cultural values concerning burial. However, it regards living people only. Besides, New Zealand did not sign the UN Declaration (for an explanation of the vote, see H.E. Rosmary Banks, “Declaration on the Rights of Indigenous People,” United Nations General Assembly, 12/09/2007).}

\textit{d) Ideological Discussions}

Considering the application of the principles of the HTA to funeral instructions, the Māori Party’s minority objection towards HTA principles that require individuals to be the sole decision-maker regarding human tissue needs to be defined.\footnote{(2008) 646 New Zealand Parliament Debates 15428 (Hon Tariana Turia). In the first reading of the Bill T. Turia already suggested that “many Māori are very uncomfortable with the concept of organ donation following death—the tūpāpaku is tapu, and to interfere with it in any way is abhorrent to our culture. Human tissue organ donation is a massive issue for us, and it raises huge questions about issues of protection, informed consent, tangata whenua control of information and medical processes, access to information and medical care, and, most of all, cultural respect;” Turia, supra n 374.} Although there is some consideration of the wishes of the immediate family within the HTA, it does not allow collective involvement of whānau. The Māori Party expressed this position at the third reading of the Human Tissue Bill. It was bitterly proffered that:

\begin{quote}
[i]n our [meaning Māori] world view, allowing individuals to be the sole decision-makers regarding whakapapa material is entirely contrary to our tikanga and the preference for collective involvement.\footnote{\textit{Idem.}}
\end{quote}

This critique emanates from tikanga, which signifies an individual’s self-definition through his/her ancestors. The dead body is considered tapu and belongs to the immediate family. Māori, such as other Indigenous people all over the world, who are connected by the idea that the earth is their mother and that the environment it personalised,\footnote{For example, the Native Americans and the Indigenous People of Canada. The Journal of Prophecy of Natives Peoples worldwide is even called “Earth Mother Crying;” available at: <http://www.wovoca.com/> (accessed 24/5/09).} do not recognise posthumous interests of deceased individuals. Māori belief is that the personhood dies with the person. It was long considered inappropriate to write a will, and until recently Māori
have in fact been reluctant to write wills because they think wills are “tempting fate”. Instead, the transformation of proprietary rights by way of inheritance took place according to the custom of ōhākī (public dying speech). An ōhākī can best be described as the verbal expression of the deceased’s wishes, which was made in solemn and dignified circumstances. For indicating his/her wishes, the speaker would call all his/her relatives “as well as the leading members of the tribe to” his/her side. Once spoken, the ōhākī was binding on the relatives of the deceased after his/her death. This ancient method, however, was abolished by the legislature. Besides, the custom only applied to property reverting back to the whānau and not things beyond the bounds of ownership, like corpses. In the end, next of kin who survive the individual are regarded as the sole decision-makers in terms of burial instructions. Māori do not heed the expressed wishes of an individual after he/she passed away. This, however, should not be misinterpreted as a general assumption that Māori believe the deceased’s bodies to be empty shells. They do not see the body as quite disconnected from the person who just died, but they entitle the relatives to make decisions over the body for they are the bereaved. Dr Walker, on the other hand, advised that in marriage between Pākehā and Māori, Māori should understand that in Pākehā tikanga, the spouse or next of kin has the final say over burial arrangements if the deceased dies intestate.

Other cultural objections arise from a straightforward utilitarian position, because the wishes of the decedents’ spouse or next of kin will prevail over those of the testator since a dead person cannot experience happiness or unhappiness, and “has no welfare needs”.

780 J. Ruru “Implications for Māori” in N. Peart, M. Briggs, M. Henaghan (editors) Relationship Property on Death (Wellington: Thomson/Brookers, 2004) p 449-450 [hereinafter: Ruru]; Study paper 9, supra n 74 at para B84-B87. There was no customary law of wills that the courts could recognise, see Re Hokimate Davis (Deceased) [1925] NZLR 19, 20–21 (SC). The case turned on land acquired by a written will. It was held that the ōhākī custom does not apply to such land.

781 (2007) 639 New Zealand Parliament Debates 8997 (Dr Pita Sharples) [hereinafter: Sharples]. Further he explained that “although many Māori view writing a will as bad luck, the misfortune actually occurs following the death in the whānau if deliberations about the inheritance of assets ... are up for debate”.

782 For more detailed information, see N. Smith Māori Land Law (Wellington: A.H. & A.W. Reed, 1960) p 59-60 [hereinafter: Smith].

783 Ibid, at 59.

784 Idem.

785 Study Paper 9, supra n 74 at para B82.

786 Ruru, supra n 780 at 450; Smith, supra n 782 at 59. N. Tōmas [(phd) supra n 73 at 132], however, states a case where a man’s ōhākī requesting the return to his home land was followed by his relatives.

787 Ruru, supra n 780 at 450.

788 Letter: Walker-Anderton, supra n 50.

789 Boddington, supra n 768 at 71; J. Harris “Law and regulation of retained organs: the ethical issues” (2002) 22 Legal Studies 527, 534 argues that the dead are beyond ‘arm. They cannot be hurt; neither can they have desires or welfare interests to be denied. For a valuable discussion, see Price (2007), supra n 677 at 202-208.
Upon this, it has been stated that a deceased’s burial instructions should be challengeable by relatives or the deceased’s spouse since

... predeath wishes do not matter much, because, once deceased, the individual’s welfare cannot be affected, or greatly affected, by decisions about the use on their body.\textsuperscript{790}

Conversely, the deceased’s right of bodily integrity, which has been clearly articulated constitutionally in the context of medical treatments\textsuperscript{791} in the United States, is also crucial in New Zealand.\textsuperscript{792} While alive an individual and his/her personality are irreversibly connected. Then again, because bodily integrity basically is “closely wrapped with the health and proper function of a living organism,”\textsuperscript{793} things are crucially different after death, because the former autonomic person no longer exists. At this point, autonomy is open for a wider interpretation. At first, it should be considered that:

not all cultures are individualistic and materialistic as the mainstream Western tradition, that in some cultures, the individual’s wishes do not override the family’s, and that it would be inappropriately culturally insensitive to insist that they do.\textsuperscript{794}

This statement seems to apply to older Asian, Pacific and Māori people who take their obligation of maintaining and respecting the deceased very seriously.\textsuperscript{795} As discussed earlier, it could be regarded culturally insensitive to give an individual the authority to make legally binding, testamentary funeral instructions. This objection seems to be encouraged by New Zealand’s impersonal system of succession which is based on written wills. According to the law a will is “[t]he expression of a living person’s wishes concerning the disposition of property, to take effect after that person’s death, such expression being made in the manner prescribed by law.”\textsuperscript{796} Every individual of 18 years or over can write his/her

\textsuperscript{790} T.M. Wilkinson, supra n 754 at 588.
\textsuperscript{791} See, eg Cruzan v Director of Missouri Dep’t of Health, 497 U.S. 261 (1990).
\textsuperscript{793} Boddington, supra n 768 at 74.
\textsuperscript{794} T.M. Wilkinson, supra n 754 at 588.
\textsuperscript{795} T.M. Wilkinson, supra n 754 at 587.
\textsuperscript{796} Spiller, supra n 379 at 334. Formalities are described in the Wills Act 2007.
will, or choose an executor and trustee to write a will on your behalf, or even to fill out a printed will form.

\[797\]

\[798\]

\[e) Introducing a Less Impersonal System\]

Is there any need for a more authentic and less impersonal system? Would it not be more consistent with Māori belief if an individual could also orally express his/her burial instructions, or is it time to consider a separate Māori law of succession? The propositions are not far-fetched. The model of verifiable oral wills is well-entrenched in United States case law. As discussed above, United States courts even allowed subsequent oral statements to alter burial instructions in an executed will. Moreover, the doctrine of oral testamentary as a reflection of the deceased’s autonomy seems to be recognised by various cultures, such as the Māori custom of ōhākī. But then again, wills that were drafted by a lawyer and signed by the testator seem more reliable content wise, because a will that does not meet statutory requirements for a valid disposition of the testator’s assets or remains are invalid. Without delving more into this subject, it might be prudent if New Zealand law would allow both verifiable oral and typewritten wills. Coming back to the “tense relationship” between Māori values and autonomy, it seems more likely that Māori would recognise oral instructions rather than written instructions made by the deceased. Even though Parliament forced Māori who desired to make posthumous instructions to do so by written will, Parliament recently suggested in relation to the ōhākī custom that:

\[\text{as long as a custom continues or develops in an established customary context,}\]
\[\text{a statutory provision which enables the custom to be recognised once more would be valid.}\]

Together with the arguments that tikanga has been legally recognised by courts in the past in case of adoption, and that there are clear legal protections with regard to succession to

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\[797\] Wills Act 2007, s9(1). Exceptions for people under 18 years are found in s9(2) of the Wills Act 2007.


\[799\] The introduction of a separate Māori law of succession was suggested by the Māori Party in the second reading of the Wills Bill; see Sharples, supra n 781.

\[800\] Ranginui Walker assumes that making wishes about burial known in any kind of will is desirable; Letter from Jim Anderton to Ranginui Walker, 17 September 2007

\[801\] Study Paper 9, supra n 74 at para B87.

\[802\] BP v D-GSW, supra n 160; Arani, supra n 161. Both cases are discussed above on page 26-27; 36.
Māori land with the passage of the Te Ture Whenua Act 1993,\textsuperscript{803} this leads to the assumption that, as far as Māori are concerned, verifiable oral burial instructions should be recognised by courts. Similarly, the Māori Party suggested in the second reading of the Wills Bill that the important succession concept of ōhēkī should be revisited.\textsuperscript{804} In conclusion, the best way to preserve the testator’s autonomy and tikanga is through amendments to the Wills Act 2007 in straightforward terms. This thesis, however, questions whether New Zealand requires a separate Māori law of succession because the recognition of burial instructions written down or verbally expressed by the deceased, and not challengeable by relatives or the deceased’s spouse, would prove advantageous for both Māori and non Māori.

This, however, still leaves open the question of what happens if the deceased, like in majority of cases, does not leave any burial instructions. Should such cases not be covered by law? The thesis suggests that courts should, similar to proceedings in organ donation case, ascribe responsibility for burial to the spouse or the family member with the closest lifetime relationship with the deceased.\textsuperscript{805} This scheme is more plausible because the approach of actual relationship “would base inheritance rights on the decedents’ actual relationships with others in her life”\textsuperscript{806} and, consequently takes into account the deceased’s autonomy. Since certain promises owed to the dead person may still be capable of performance and enforcement after death,\textsuperscript{807} directions given by the executor contrary to the putative wishes of the deceased should be challengeable by the bereaved family. Nevertheless, what constitutes a proper solution in cases where relatives have all maintained contact with the deceased? In the end, it is the duty of courts to make judgments in delicate situations in which the true state of relationships is difficult to discern, and in which the deceased’s wishes are inconclusive. Yet, because court ordered exhumations are relatively uncharted legal territory too, relatives should be able to petition a judge in both situations. Coming back to the Māori concern that not a single individual should determine the corpse destiny, a notable compromise might be achieved through a synthesis of both Māori and Pākehā ideology. An amendment to the Wills Act 2007 could require that all the immediate family need to be available rather than just a single family member. The immediate family should come to a single solution during a gathering by discussing the different interests. This is, in fact, an idea adopted from the Māori custom of inter-tribal debates about where a deceased

\textsuperscript{803} Sharples, supra n 781.
\textsuperscript{804} Idem.
\textsuperscript{805} Conway, supra n 446 at 346.
\textsuperscript{806} Foster, supra n 419 at 1388, 1393-1398.
\textsuperscript{807} Price (2007), supra n 677 at 204.
should be buried.\textsuperscript{808} If this gathering is unsuccessful, a judge would have to make the decision about whom the body should be released to. In this process, the problem persists, that judges will probably consider that Pākehā custom has the backing of law as opposed to tikanga Māori. Although, given their duty to be ideologically neutral, the New Zealand courts are not likely to make thorough, considered decisions, therefore Parliament should consider incorporating the Treaty in both versions into the Wills Act 2007 and, in addition, to incorporate advisory notes that are intended to assist the Treaty’s interpretation, in order to strengthen the tikanga like the tangihanga and ēhāki. The other, less innovative technique would be to incorporate both tikanga into the Wills Act 2007. Additionally, courts need to apply the HTA related proposal in cases where the deceased did not leave burial instructions. This is an acceptable solution that is largely along the lines with the principle of legality\textsuperscript{809} as it respects the deceased’s integrity and autonomy, and takes into account cultural values.\textsuperscript{810} The derived benefit from this notion seems to be irrefutable: the number of family disputes would be reduced and disgruntled relatives would not have a remedy to challenge the deceased’s requests.\textsuperscript{811} But, in the end, the wishes of the deceased in respect of the disposal of his/her remains should be paramount to all other considerations.\textsuperscript{812}

**D Conclusion**

The chapter explored various proposals and techniques in order to clarify the law relating to “body snatching”. It came to the conclusion that none of the above alone recommendations could fully solve the problem, and that it is therefore more practicable to combine a number of proposals. First and foremost, Parliament should apply the last-mentioned technique upon which other proposals of can be built. This is of particular importance because, although tension may exist between the Māori and Pākehā relatives’ interests, effective guidelines recognising tikanga as well as the deceased’s autonomy are available and can result in improved outcomes within reasonable time frames. In cases where the body of a deceased is taken without consent police should have power to seize the body. In addition, amendments to the criminal law may be made as a deterrent for people willing to take the deceased’s body.

\textsuperscript{808} See above, chapter 1 page 9.  
\textsuperscript{809} Discussed above, chapter 2 on page 40.  
\textsuperscript{810} Having discussed this recommendation, the Law Commission of Canada (Canada-Recom. 12, supra n 722 at 187) seems to be the only common law country favouring the proposal for a dead person shall not be harmed by violating their interests.  
\textsuperscript{811} Ibid, at 434.  
\textsuperscript{812} This assumption was also made in Re Estate of Eichner, 18 NY.Super.2d 573 (1940).
Chapter 6: Conclusion- Recommendations for Reform

Two things are certain after discussing the legal aspects of "body snatching". First, "body snatching" itself is relatively uncharted legal territory. Secondly, the law's ability to condition such interfamilial disputes is limited. Since the New Zealand government has not drafted regulations governing the issue of "body snatching" as yet, my aim in this thesis has been to display its nature by reviewing recent law reform proposals. Amongst other things, the cultural diversity in New Zealand indicates the importance of introducing new rules to the law relating dead bodies.\(^{813}\) Accordingly, the core issue of this thesis was to determine how satisfactorily New Zealand law could be reformed in order to effectively prevent "body snatching" incidents. The difficulty of clarifying the recognition and importance of tikanga has been analysed in the second chapter where the question of judicial recognition of the Treaty of Waitangi was visited. It was finally concluded that for a more substantial recognition of Māori values, important tikanga such as funeral rituals should be incorporated into "body snatching" related law by statute.\(^{814}\) Based on the question that every newspaper was asking, "Why have the snatchers not been convicted?" it was central to the third chapter to clarify the law as it stands today. After this exemplification, it could not seriously be questioned whether the law relating to dead bodies awaiting burial needed an overhaul.

After dismissing non-legislative recommendations that avoided direct confrontation with the nature of rights in a dead body, and disburdened the police rather than regulating the conflict, the focus of this research turned to legislative changes that were more likely to ensure a stable framework. The Ministry of Justice recommended to the government that police be given the power to seize bodies when there are disputes over burials. Nevertheless, police, if used as a buffer between family members, usually attract criticism instead of a positive public response. Even if Parliament could provide enough police to avoid outnumbered situations, there would still be no mechanism to determine who the body should

\(^{813}\) McGuinness & Brazier, supra n 31 at 307 illustrate the cultural issue by means of Judaism and Islam.
\(^{814}\) See above chapter 2.
be released to in the end. Unfortunately, this issue applies to other recommendations as well.\textsuperscript{815}

In general, the question of who decides about whom the body should be released to is difficult to answer. Apart from the police and courts, consideration was given as to whether coroners were more eligible to regulate the situation, because coroners, although not expressly, deal with many of the most difficult aspects of death every day, on the other hand the Coroners Act 2006 takes into account cultural beliefs and values, especially those of Māori.\textsuperscript{816} But I share the concerns expressed by the Ministry of Justice regarding the decrease in the number of coroners, whilst recognising that appeals would cause considerable delays. It obviously presents lawmakers with problems, since tikanga Māori requires a chosen family member to attend the corpse after death, and because both Islam and Judaism have need of prompt burial.

Despite being too bureaucratic, declarations signed by family members asserting they are lawfully in possession of the corpse are not statutorily effective to prevent “body snatching” incidents.

A properly conceived property model could serve to address many of the issues mentioned above in a family-neutral way, but also raises the problem of how the deceased relates to his/her body for the purpose of burial. Nevertheless, the paper has demonstrated that applying a property scheme in resolving disputes over the dead body is repugnant to the subjectness of the deceased, especially in cases where it comes to medical research with bodily material. Furthermore, this thesis came to the conclusion that rejecting the “no property” rule would cause a collapse of the well-established case law, which may result in uncertainty in the outcome of morally questionable cases.

Thus, similar matters were reviewed: liability in tort, and the criminal law aspects. Notwithstanding the issue of whether crimes, such as those provided at German Criminal law, could assimilate effectively into New Zealand’s existing system, the problem remains as to whether the deceased may have posthumous interest in his/her body; in other words whether or not a person can give binding testamentary instructions about the burial.

\textsuperscript{815} Somewhat surprisingly, the Ministry of Justice (MoJ – Briefing Paper, supra n 414 at 4) referred to the very same enforcement issue in relation to other recommendations but failed to realise that it applied equally to their own proposal.

\textsuperscript{816} For example, the definition of “immediate family” has been broadened in order to better take into account the diverse family relationships in New Zealand.
This thesis has shown that neither of the mentioned recommendations encouraged consideration as to who is responsible for the burial. Unfortunately, most of those proposals were entangled with implications that revive the basic question - what interests are being capable of set back after death? Many of the mentioned proposals may never have taken into account the significance of the deceased’s autonomy. Therefore, amendments to the law of succession are preferable. The point I want to make about burial arrangements for the purpose of this thesis is that the choice must remain the deceased’s to make: the deceased’s expressed, verifiable burial instructions should be binding, and trump any wishes expressed by the deceased’s spouse or immediate family. Additionally, Parliament should create a remedy for disgruntled relatives to challenge the executor if he/she does not carry them out.

This mixed bag of proposals, however, is only capable of solving issues where an individual expressed burial instructions. Otherwise, all of his/her estate and enforcement authority shall vest immediately in the executor by law, but with the exception that the immediate family should arrange the funeral. Still, there are several stages of the funeral process where disputes between family members of different cultural background may arise. These disputes often need to be settled by external observers like police, coroners, or even funeral directors, although I am inclined to think that involving the police may be counterproductive for the family to come to an understanding. When a person dies leaving no burial instructions behind, the general legal rule should be as stringent like as US law: the deceased’s immediate family should be responsible for funeral arrangements because they are most likely to be familiar with the deceased’s wishes.

In the end, the conclusion is straightforward: without changes in the law of succession, and the incorporation of tikanga relating to burial or the Treaty principles, further amendments will always be on shaky ground. Since the “body snatching” issue cuts through different kinds of law, no single solution covers the problem entirely. In an ideal world, Parliament would seek to combine the assimilation of the law of succession to the HTA, and amendments to criminal law. This idea is approximated to the HTA’s criminalisation of collecting human tissue for the purpose of genetic analysis or to perform genetic analysis on any such tissue without informed consent.\footnote{HTA 2008, s 22; for a valuable discussion, see K. Elkin “The new regulation of non-consensual genetic analysis in New Zealand” (2008) 16 Journal of Law & Medicine 246.} In a similar way, Skegg’s proposal outlines a significant advance on s219 of the Crimes Act as it stands now, and intends to protect corpses
from being taken without consent of other immediate family members. While a number of jurisdictions outside the common law sphere have introduced offences to criminalise “body snatching,” no equivalent provision appears to be more effective than an amendment to s219 of the Crimes Act. Eventually, although “body snatching” may not be preventable in theory because it lies in a highly emotionally charged area, it is hoped that the proposed amendments to the law will create a transparent and enforceable system surrounding “body snatching”.
### Appendix One: Glossary of Māori Words

<table>
<thead>
<tr>
<th>Māori Term</th>
<th>English Translation</th>
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<tbody>
<tr>
<td>Āhuatanga Māori</td>
<td>Māori traditions</td>
</tr>
<tr>
<td>Aotearoa</td>
<td>New Zealand</td>
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<tr>
<td>Iwi</td>
<td>tribe</td>
</tr>
<tr>
<td>hapū</td>
<td>subtribe, clan</td>
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<tr>
<td>karakia</td>
<td>prayer, ritual</td>
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<tr>
<td>kāwanatanga</td>
<td>governship</td>
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<tr>
<td>kiekie</td>
<td>climbing plant with leaves which contain a strong fibre</td>
</tr>
<tr>
<td>kōrero</td>
<td>speech, conversation, story</td>
</tr>
<tr>
<td>mana</td>
<td>charisma, spiritual power</td>
</tr>
<tr>
<td>mana tipuna</td>
<td>power through decent</td>
</tr>
<tr>
<td>marae</td>
<td>traditional meeting place for Māori people</td>
</tr>
<tr>
<td>mate wairua</td>
<td>spiritual sickness</td>
</tr>
<tr>
<td>mere</td>
<td>short, flat weapon of stone (often of greenstone)</td>
</tr>
<tr>
<td>moko mōkai</td>
<td>preserved Māori heads</td>
</tr>
<tr>
<td>ōhākī</td>
<td>public dying speech</td>
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<tr>
<td>pāua</td>
<td>abalone</td>
</tr>
<tr>
<td>rangatiratanga</td>
<td>sovereignty, ownership</td>
</tr>
<tr>
<td>roopu</td>
<td>group</td>
</tr>
<tr>
<td>tangata whenua</td>
<td>Indigenous People of the land</td>
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<tr>
<td>tangihanga</td>
<td>ritual for the death</td>
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<tr>
<td>taonga</td>
<td>treasure</td>
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<tr>
<td>tapu</td>
<td>sanctity, acred</td>
</tr>
<tr>
<td>Te Taha Wairua</td>
<td>immortal life force</td>
</tr>
<tr>
<td>tikanga Māori</td>
<td>the Māori way of living</td>
</tr>
<tr>
<td>tipuna</td>
<td>ancestors, grandparents</td>
</tr>
<tr>
<td>tono</td>
<td>claim, request</td>
</tr>
<tr>
<td>tūpāpaku</td>
<td>corpse, deceased</td>
</tr>
<tr>
<td>urupā</td>
<td>burial ground, cemetery</td>
</tr>
<tr>
<td>whakapapa</td>
<td>genealogy, decent</td>
</tr>
<tr>
<td>whānau</td>
<td>extended family; family term of address</td>
</tr>
<tr>
<td>whanaungatanga</td>
<td>relationship, kindship</td>
</tr>
<tr>
<td>whānau pani</td>
<td>close family, bereaved family</td>
</tr>
<tr>
<td>whāngai</td>
<td>foster child, adopted child</td>
</tr>
<tr>
<td>wairua</td>
<td>spirit, soul</td>
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</tbody>
</table>
Appendix Two: Clause 55 of the Human Tissue Bill (1st Reading: 18 April 2008)

55 Trading in human tissue generally prohibited

(1) No person may, except under an exemption under section 58 require or accept financial or other consideration for

(a) human tissue (for example, blood, or a controlled human substance) of that person; or

(b) human tissue from a body in relation to which that person is the responsible person.

(2) No person may, except under an exemption under section 58 provide financial or other consideration for the collection or use of

(a) human tissue of that person; or

(b) human tissue from a body in relation to which that person is the responsible person.
Appendix Three: Ethics Approval

Ms J Ruru
Faculty of Law
Division of Humanities

Dear Ms Ruru,

I am again writing to you concerning your proposal entitled "LLM Master of Laws thesis "Body-snatching": a legal right to a dead body?", Ethics Committee reference number 08/170.

Thank you for sending to me an email addressing the concerns of the Committee. An updated application form was received.

On the basis of this response, I am pleased to confirm that the proposal now has full ethical approval to proceed.

Approval is for up to three years. If this project has not been completed within three years from the date of this letter, re-approval must be requested. If the nature, consent, location, procedures or personnel of your approved application change, please advise me in writing.

Yours sincerely,

Mr G K (Gary) Witte
Academic Committees, Academic Services
Tel: 479-8256
Email: gary.witte@stonebow.otago.ac.nz

c.c. Professor R M Henaghan Dean Faculty of Law
Appendix Four: Ngāi Tahu Research Consultation Committee Approval

NGĀI TAHU RESEARCH CONSULTATION COMMITTEE
TE KOMITI RAKAHAU KI KĀI TAHU

30/09/2008 - 23
Tātua, 02 Whiringa-ā-nuku 2008

Ms Ruru
Faculty of Law
Dunedin

Tēnā koe Ms Ruru

Title: Master thesis Body-snatching in todays Aotearoa/ New Zealand - A conflict between cultures
(please note that title is not definite)

The Ngāi Tahu Research Consultation Committee (The Committee) met on Tuesday, 30 September 2008 to discuss your research proposition.

The Committee considers the research to be of interest and importance.

The Committee notes the researchers have identified the need for “Recognition of Tikanga Māori in New Zealand Common Law, Recognition of Tikanga Māori and the Treaty of Waitangi, The Māori funeral ceremony in comparison to the Christian funeral ceremony”.

The Committee notes that this research is based in a review of law.

The Committee would also value a copy of the research findings.

The recommendations and suggestions above are provided on your proposal submitted through the consultation website process. These recommendations and suggestions do not necessarily relate to ethical issues with the research, including methodology. Other committees may also provide feedback in these areas.

Nahaku noa, na

Mark Brunton
Kaitakawhanga Rangahau Māori
Facilitator Research Māori
Research Division
Te Whare Wānanga o Otago
Ph: +64 3 479 8738
email: mark.brunton@otago.ac.nz
Web: www.otago.ac.nz

The Ngāi Tahu Research Consultation Committee has membership from:

Te Rūnanga o Ōhuiarāki Incorporated
Kāti Huirapa Rūnanga ki Puatarekia
Te Rūnanga o Koaroāki
Appendix Five: Letter from Hon Annette King to Hon Jim Anderton
(27.02.08)

Hon Annette King, MP
Minister of Justice
Minister of Police
Minister of Transport
Minister Responsible for the Law Commission
MP for Rongotai including the Chatham Islands

25 February 2008

Hon Jim Anderton
Parliament Buildings
WELLINGTON

Dear Jim

You have enquired about media articles where police sources claim that Police would refuse to exhume the body of James Takamore if an exhumation order was obtained by his partner. The following information is based on information provided to me by Police in late January 2008.

It is important to realise that the Police have information available to them that may not be available to, or be presented by, the media. I am advised that some of what was reported in the media in relation to this matter does not accurately reflect what was in fact said, or the legal situation.

An exhumation permit has been mentioned. The permit obtained by Police is actually a Disinterment Licence issued by the Ministry of Health. It is not a court order. The licence can be used when there is agreement to exhume a body. The Police role would be to keep the peace when and if the parties involved agree to an exhumation. I am advised that no agreement has yet been reached.

Police would not be responsible for the disinterment of Mr Takamore's body. If a disinterment is contested, then one of the parties can apply for a court order to allow the exhumation and removal of the body. No such court order has been granted in Mr Takamore's case. If one was granted the Police role would only be to keep the peace during the process of exhumation. They would not be physically involved in the exhumation.

I trust my response clarifies the Police role.

Yours sincerely

Hon Annette King
MINISTER OF POLICE
Kia ora Jim,

Thank you for your letter of 17 September. Please convey my sympathy and support to Mrs Takamore and her family over the unseemly removal of her husband’s body against her wishes. Unless people know tikanga, customary practice pertaining to tangi and bereavement, it could happen again in future, notwithstanding that there was already a precedent in the case of Billy T James.

The kirimate (bereaved family) have nothing to do with the tangi. Their sole function is to remain in attendance and grieve beside the body of the deceased until burial or cremation. Throughout the tangi the kirimate are protected by their kin who take responsibility for all the funerary arrangements, preparing the marae, welcoming mourners, providing food and hospitality, arranging the undertaker, and even digging the grave. But above all they are responsible for arguing the kirimate’s case against a request for the body to be buried elsewhere. The matter is determined by negotiation as to who has the stronger case. These are the protocols that operate in marriages between Maori of different tribes.

But when the white tribe is involved, as in the Takamore case, Maori should understand that in Pakeha tikanga, the spouse or next of kin has the final say over burial arrangements. Furthermore, that custom has the backing of law. In view of the high rate of Pakeha – Maori intermarriage, these protocols need to be more widely known if we are to avoid unseemly cultural collisions involving court injunctions and exhumation orders in the future.

Heoi ano,

Ranginui Walker

PS Please feel free to make the contents of this letter public if you wish to.
17 September 2007

Dr Ranigui Walker
5 Frontolf Road
Mt Eden
Auckland

Dear Ranigui Walker,

I am just writing briefly to say how much I endorse your recently reported statements concerning the wrangle over when the late James Takamoro should be laid to rest, the general guiding principles which should apply in such circumstances, and in particular the ultimate decision resting with the bereaved spouse and immediate family.

As it happens the family in question came to see me and I was impressed by their sincerity and their genuine distress. The oldest son especially was quite firm that he had been asked what his wishes were and he had unequivocally expressed a wish for his father to be laid to rest in Christchurch, but was simply ignored.

It seems to me sometimes that across a wide spectrum of issues (and certainly not those confined to tikaanga Maori) people leap straight into entrenched positions when a good dose of common sense would work wonders. I was pleased to see statements of authority in such matters pointing it. (Your remarks on this tendency of making wishes known that will little shock me so appropriately)

With best wishes,

Yours sincerely,

Jim Anderton
MP for Wigram and Leader of the Progressive Party
Appendix Eight: Consent Form Signed by John Hayes

Reference Number 08/170 as allocated upon approval by the Ethics Committee
26/05/2009

"BODY-SNATCHING" IN TODAY'S AOTEAORA/NEW ZEALAND – A LEGAL CONFLICT BETWEEN CULTURES

PARTICIPANTS CONSENT FORM

I have read the Information Sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage.

I know that:-

1. My participation in the project is entirely voluntary;

2. I am free to withdraw from the project at any time without any disadvantage;

3. Personal identifying information [video-tapes / audio-tapes] will be destroyed at the conclusion of the project but any raw data on which the results of the project depend will be retained in secure storage for five years, after which they will be destroyed;

4. The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand) but every attempt will be made to preserve my anonymity.

I agree to take part in this project.

(Signature of participant) [Signature]

(Date) 26/05/09

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.
Appendix Nine: Consent Form Signed by Hon Jim Anderton

PARTICIPANTS CONSENT FORM

I have read the Information Sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage.

1. My participation in the project is entirely voluntary;

2. I am free to withdraw from the project at any time without any disadvantage;

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(Signature of participant)

(Date)

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