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1. HE AHA TE TIKANGA MAORI

*"Finally, one would have to step out of New Zealand to read the lesson of wider experience elsewhere. As the writer reads current history, notwithstanding revolutions, political upheavals, occupations, wars and the clashes of nations, the social systems associated with races are most persistent. They have an almost infinite capacity for absorbing intrusive elements, when the initial wonder of these has passed. And so the social system of the Maori branch of the Polynesian race remains, beneath the surface of a predominant British civilisation, still a very vital and potent factor in the life of the Maori, something that statesmen, religious leaders, economists and others must always reckon with."*¹

Customary Law means law generated by social practice and acceptance as distinct from Institutional Law which is generated from the organs of a superordinate authority.

*"But how do we know a legal system, or a legal process, when we find one? Is it because there is a clear and codified (if not written) set of 'laws'? No, says Pospisil (1968), a leading specialist. He argues that such abstract rules are rare and specialised in human societies, mainly limited to western societies since the codification of Roman law. Legal principles are more often implicit, flexible, and constantly changing."*²

Custom Law is neither judge nor parliament made. Custom Law is made by the community through long standing practice and precedent. It is interesting to note that the word law comes from the old english or anglo saxon *lagu* which almost certainly referred to law in its custom form.

There is no Maori word or phrase which accurately conveys either law or custom law. *Ture* is the generally used term for law today but that is a transliteration of the hebrew Torah. *Kawa* is the term used for the procedures associated with ritual - usually related to the marae but not always. No Maori word properly conveys "rule".

The closest Maori equivalent to these concepts is *tikanga*. *Tikanga* derives from *tika* meaning correct or just or proper. The addition of the suffix *nga* renders it a system, value or principle which is correct, just or proper. It might be said to include rules or laws in some circumstances but

¹ A.T. Ngata in Sutherland ed. *The Maori People Today: A General Survey* (Whitcombe & Thombs 1940) p181.

² Keesing *Cultural Anthropology: A Contemporary Perspective* (1976) Holt Rineheart & Winstone.

- The ambit of tikanga is wider than that;
- The focus of tikanga is in the values or fundamental precepts of Maori systems of control not the prescriptive rules or laws with which western trained lawyers are familiar;
- Tikanga Maori makes no distinction between civil and criminal jurisdiction or between the spiritual and the profane;
- Tikanga Maori is both law and religion³.

Tikanga includes principles approaches or ways of doing things which might be considered to be morally appropriate, courteous or advisable but which are not rules the breaking of which carries punitive sanctions. Thus it is tikanga to purify ones self through cleansing with fresh water following proximity to death, but it is not a law that this should be done - it carries no sanction if it is not done.

Thus Tikanga Maori is essentially the **Maori way of doing things** - from the very mundane to the most sacred or important fields of human endeavour. All of these are Tikanga Maori. All might be said to be custom. Not all would fit the description *law* and very few involve rules. The right way and the Maori way are synonymous in Tikanga Maori. The right way is in accordance with the teaching of the ancestors. Thus:

*To do the right thing is to follow the ancestors ... there is true continuity in the concept of tipuna, for this most unites in it all the generations which have set up and still set up the standards by which the kinship group lives"*⁴

That underscores the second difference between Pakeha Law and Tikanga Maori. Pakeha Law is prescriptive and has the advantage of having a high degree of certainty. Certainty is seen by western law as a clear advantage. Tikanga Maori are not at all prescriptive. The focus of Tikanga Maori is the values underlying the conduct or approach required in a given situation. Thus tikanga was traditionally and remains today pragmatic and open ended. Tikanga are subject to reinterpretation according to particular circumstances. It is compliance

³ Jackson *He Whaipaanga Hou* p.42.

⁴ Johansen *The Maori and his Religion*. Ejnar, Copenhagen 1954 p.172.

with the fundamental underlying value base which takes priority. A practitioner of Tikanga Maori focuses on these rather than the rules which may express them. As Metge says, contact with other cultures produces outward change but very rarely produces a change in the fundamental value system which belongs to the contacted culture. This is certainly true of Tikanga Maori.

That is not to say that Tikanga Maori completely lacks rules or that western law lacks values. The point is rather that Tikanga Maori is "law" for small communities and relies for its efficacy more directly upon the active support of those communities. It must be capable of responding to community attitudes - those of the hapu, iwi or marae concerned - because they are in point of fact, the judges. It might said to be more accountable than western law is to its larger, more complex but more fractionated community. Tikanga Maori is necessarily less precise as a result. Thus while Pakeha law is also fundamentally reflective of social values, Tikanga Maori might be said to be rather more the embodiment of Maori values than merely reflective of them. For example, a fundamental tikanga of land "ownership" was the maintenance of ones link with the land. This was expressed in the term *ahikaroa* or the principle of maintenance of ones fires or hearth. The Native Land Court, whose job it was to apply Tikanga Maori in the investigation of land title, considered that *ahikaroa* was lost if the claimant had been absent for three generations or more. The imposition of the rules subverted *ahikaroa* which was fundamentally a cultural value. As we will say later, the ~~concept~~^{pt} of *Ahikaroa* ensured the maintenance of obligations to the community and to the land itself - the protection of the relationship to each. Absence did not necessarily mean that these relationships were not being nurtured. Groups secured interests in land as a result where Tikanga Maori would have concluded no right existed, while other kin groups were excluded where the connection with the land had been maintained by other means.

The effect of imposing a rules based approach on Tikanga Maori has been significant. It highlights the danger in this work of straying into an attempt to codify Tikanga Maori. Codification is the very antithesis of Tikanga Maori for it freezes those tikanga in a moment in time and prevents them from responding to the particular circumstances of particular cases. It is for this reason that the approach of the authors will be to articulate the base values of

Tikanga Maori rather than the guidelines for conduct or control which, if frozen in time, will be perceived as if they were rules.

2. THE PLACE OF TIKANGA MAORI IN NEW ZEALAND TODAY

2.1 The Moral Argument

There is a growing and articulate body within the Maori polity which seeks to order its relations *inter se* and its relations with the state in accordance with the values of Tikanga Maori. This group of Maori claims the moral and political high ground both because of its indigeneity and because of its increasing demographic significance. Put in simple terms, many Maori claim that Tikanga Maori have an important status in New Zealand because those Tikanga are indigenous and ancient; and because they continue to contain the values around which Maori wish to live their lives in Aotearoa.

*"There is no doubt as to the desire of the majority of the Maori people at the present time. It is comprised under the word Maoritanga. Speaking at a meeting at Te Kuiti in 1920, the Late Sir James Carroll laid this injunction upon the race: "Kia mau ki to koutou Maoritanga," which may be translated, "Hold fast to your Maorihood" ... this elder's injunction signalled the commencement of a more conscious movement which seeks to retain all that can be retained and to restore all that can now be restored of Maori culture."*⁵

Maori feel insulted when the values of Tikanga Maori are treated by New Zealand law, the New Zealand Constitution and New Zealand politics as if they were part of a jural black market which is tolerated by the mainstream but generally frowned upon.

2.2 The Legal and Constitutional Argument

The moral argument secures much support from the Treaty of Waitangi and the guarantee of tino rangatiratanga set out so clearly in Article II. As has been said often now by the Waitangi Tribunal, this guarantee amounted to a promise to protect the right of Maori to possess and control that which is theirs in accordance with their own

⁵ Ngata op. cit p.176. It is instructive to observe that Ngata was making a point with such modern applicability nearly 60 years ago.

cultural preferences.⁶ Professor Sir Hugh Kawharu translated Article II of the Maori text of the Treaty in these terms:

"The Queen of England arranges [and] agrees to the chiefs, to the sub tribes to people all of New Zealand the unqualified exercise of their Chieftanship over their villages and over their treasures all ...".

He adds the footnote

*"Unqualified exercise" of the Chieftanship would emphasise to a chief the Queen's intention to give them complete control according to their customs."*⁷

The protection of Maori custom was specifically confirmed at Waitangi⁸ and in Kaitia during the discussions as to whether the Muriwhenua chiefs should sign the Treaty, Willoughby Shortland said on behalf of Lieutenant Governor Hobson:

"The Queen will not interfere with your native laws or customs."

The customary system of Maori land holding was confirmed as legally enforceable in 1847 in *R. v. Symonds* where the Court said whatever the strength of Native Title, it is entitled to be respected by the Courts. By the time of *Wi Parata v. The Bishop of Wellington*, following the land wars, the then Chief Justice Prendergast felt able to state that a statute which required the Native Land Court to apply native custom in the apportionment of native title, could not call into being that which did not exist. But in *Nireaha Tamaki v. Baker* the Privy Council was moved to directly criticise that finding by Prendergast C.J. The law lords suggested that it was a little late in the day for the New Zealand courts to be taking that view. Finally in *Arani v. Public Trustee* the Privy Council confirmed that a body of law called native custom existed in New Zealand, that it could develop and evolve over time and that it was directly enforceable in the circumstances of that case.

⁶ See eg. Motunui Claim.

⁷ Kawharu *Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989) p.319 - emphasis added.

⁸ See Orange - The Treaty of Waitangi.

In modern times, the courts have developed a renewed interest in Maori custom and Maori customary approaches to the welfare of individual Maori, the collective interests of Maori groups and the management of resources whether Maori owned or not.⁹

Most recently, the New Zealand legal system has been described as duadic¹⁰.

Thus the terms of the Treaty, and the subsequent development of the common law indicate that there is a place for Tikanga Maori in New Zealand legal discourse.

2.3 Tikanga Maori and Statute Law

The executive and judicial branches of government are increasingly required to develop an understanding of Tikanga Maori and an ability to apply those tikanga to particular situations that confront them. They occur across the entire range of judicial and executive activity. They are not restricted to Treaty settlements, the Waitangi Tribunal and the Maori Land Court, though these areas remain important. A summary of the categories of law and policy in which Tikanga Maori must be understood and applied is set out below

(a) Administration of Maori land

The preamble to the Ture Whenua Maori Act 1993 and Section 4 of that Act make it clear that the Maori Land Court must understand the importance of Maori relationships with land and the role of whanau, hapu and iwi in Maori land administration.

(b) Treaty Claims

It is obviously important that the Crown and the Waitangi Tribunal must apply Tikanga Maori to understand both claims and claimants. Issues arise such as, what rights are claimed in the land or resource in question, who are the correct claimants and who represents them. All of these questions require a thorough going knowledge of Tikanga Maori before robust answers can be found.

⁹ See Ikawhenua.

¹⁰ See Baragwanath J., ...

(c) Representation.

In areas where law or good practice require consultation or negotiation with Maori or participation of Maori, Tikanga Maori establishes the identity of the traditional group to be consulted, the representative of that group and the process which is required to complete the consultation, participation or negotiation successfully. This is a growing source of uncertainty in most areas of government and in particular, in resource management.

(d) Allocation of Settlement Resources.

Central to the current fisheries debate is what Tikanga Maori (if any) should apply to the allocation of those assets. Section 8 of the Maori Fisheries Act 1989 requires a knowledge of and ability to apply Maori custom to the process. All other post settlement asset or benefit allocations will also require the allocator to understand and apply Tikanga Maori.

(e) The Law of Succession.

The law of succession insofar as it applies to Maori has been the subject of extensive recent litigation which has required the ordinary courts to consider the applicability of Tikanga Maori to this area. The law of succession is the subject of a separate reform proposal by the Law Commission.

(f) Environmental Management.

This is an enormous area of law in which local government, central government and the mainstream courts have been required to understand and apply Tikanga Maori. Section 6(e) of the Resource Management Act requires those with discretions under the Act to "recognise and provide for ... the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu and other taonga." This provision cannot be applied without a knowledge of Tikanga Maori. Similarly Section 7(a) of the Act requires those with discretions to "have particular regard to kaitiakitanga". Kaitiakitanga is defined in the Act, but it must take its meaning from its

cultural context. The provision cannot be applied usefully without an understanding of the tikanga in relation to kaitiakitanga. Finally Section 8 requires those with discretions to take into account the principles of the Treaty of Waitangi. As already indicated one of the principles of that Treaty is the protection of Tikanga Maori.

(g) Child Welfare.

The courts and the Director General of Social Welfare are required to understand and apply the values associated with whanau, hapu and iwi in dealing with Maori child welfare issues. The Family and Youth Courts under the Children and Young Persons and their Families Act and the Director General of Social Welfare under Section 23 of the Guardianship Act must understand and apply the tikanga relevant to kin relationships in order to exercise those powers appropriately.

(f) Delegations to Maori of Crown Functions and Allocation of Crown Funding.

In all areas of Crown delegation and funding to groups of Maori, a thorough understanding of Maori group dynamics and leadership roles is required.

2.4 Conclusion: The Need

[TO BE INSERTED]

3. TIKANGA MAORI - NGA PUTAKE: VALUES

3.1 Introduction

Western law is based on fundamental values but there is a clear distinction between the law, which is a series of rules, and the values underlying them. Tikanga Maori does not draw such a neat distinction. Tikanga Maori include the values themselves. In Tikanga Maori, the real challenge is to understand the values because it is these values which provide the primary guide to behaviour and not necessarily the "rules" which derive from them. Without an understanding of these values, the prescriptions appear to be contradictory. Thus, it is considered important to articulate these underlying values first before dealing with the various categories within which

Tikanga Maori applies. It is considered that there are five fundamental values which inform the body of Tikanga Maori. They are:

- Whanaungatanga - the centrality of relationships to Maori life;
- Mana - the importance of spiritually sanctioned authority and the limits on Maori leadership;
- Utu - the principle of balance and reciprocity including the accompanying values of aroha and manaakitanga requiring respect, empathy and generosity;
- Kaitiakitanga or the obligation of stewardship and protection of ones own;
- Tapu - respect for the spiritual character of all things.

As always, these five tikanga are closely interwoven.

3.2 Whanaungatanga

Of all of the values of Tikanga Maori, this value of whanaungatanga is the most pervasive. It denotes the fact that in traditional Maori thinking relationships are everything - relationships between people; between people and the physical world; and between people and the gods. The glue that held the Maori world together was whakapapa or genealogy identifying the nature of relationships between all things. That remains the position today. In traditional Maori society, the individual was far less important than the collective. The individual identity was defined through that individual's relationships with others. It followed that Tikanga Maori emphasised the responsibility owed by the individual to the collective. No "rights" enured if responsibilities were not understood and fulfilled. Thus, land transfer lasted only so long as the relationship between the transferor and transferee remained healthy. Indeed the transfer was itself designed to seal the relationship. If it failed in that purpose, the transfer was itself voided.

Similarly, failure to occupy ones land lead to its relinquishment whether ownership was based in good ancestral title or not.

These values remain strong in modern Maori society.

The corollary was that the community accepted responsibility for its members. Thus the institution of Muru provided a means of transferring goods and resources to aggrieved parties for the wrongdoing of another. It was not just the wrong doer who would suffer this sanction. His or her whanau would also be levied. In spectacular examples, Muru would be levied on a hapu basis. Nor would the aggrieved party act alone. The individual's whanau, and in some cases, entire hapu, would claim the right to Muru the relevant community. Thus, a certain degree of individual flair was encouraged, but the rugged individualism so valued by the western settler culture was frowned upon in traditional Maori culture. This is encapsulated in the perjorative term *whakahihi* or arrogant.

The importance of kin relationships, the priority accorded the collective and the responsibility of the collective for its individuals remain powerful values in Maori life today.

Whanaungatanga also means that neat lines cannot be drawn between groups or between kin groups or between humans and the physical world. The whakapapa links between Maori, the land, the sea and other physical features has traditionally been celebrated by Maori people and remains celebrated today. The familiar refrain -

*"I te timatanga, ka moe a Rangi raua ko Papa
In the beginning was the joining between the heaven and the earth"*

serves to remind Maori of the fact that humanity is directly descended from Rangi and Papa through their eldest son Tane Mahuta. The ethic of kaitiakitanga is a direct result of that genealogical relationship. Similarly, the recognition of the tapu of these resources and the responsibility to respect that tapu also results in part from the kin relationship between the human and the physical. That is that the earth and the sky are themselves ancestors.

At iwi, hapu and whanau level, whanaungatanga operates like a magnet, emphasising commonality of whakapapa and interconnectedness while down playing the separation between groups. It is accordingly extremely difficult to exclude individuals from collective membership because of the pervasiveness of the whanaungatanga ethic. Thus, the boundary between one hapu and the next or one iwi and the next is always broad and grey rather than black and white. Whanaungatanga emphasises the inclusiveness of Maori values. Whanaungatanga is opposed to exclusiveness.

3.3 Mana

Mana is the currency of historical and modern Maori leadership. It is defined in Williams Dictionary of the Maori language as authority, control, influence, prestige, power on one hand and psychic force on the other. The definition conveys the key aspects of the concept; Mana encompasses political power which is both ascribed through whakapapa and acquired through personal accomplishment. It is also a power which is spiritual or magical in nature which is received from the gods.

The Reverend Maori Marsden rendered these ideas in three forms of Mana: Mana atua - God given power; Mana tupuna - Power from the ancestors; and Mana tangata - Authority derived from personal attributes. Hence:

"Ko te mana i ahau, no oku tupuna no tua whakarere

My power and authority comes from my ancestors, from time out of mind".

The triadic nature of mana is important because it explains the dynamics of Maori leadership and the lines of accountability between leaders and their people.

Mana tupuna is ascribed mana. It meant traditionally that those with the senior whakapapa lines get a head start in the claim to leadership positions. In most iwi that remains the position today. Mana tupuna did not always traditionally win the day. In any event, as Best and others have written, the ambilineal descent systems of Maori and the ethic of whanaungatanga mean that most everyone has sufficiently strong

rangatira lines to claim a role in tribal leadership. The result is that there have always been many contenders for leadership roles.

Mana tangata or ones political acumen and leadership qualities were traditionally very important and are perhaps even more important today. The cunning, exuberance and courage of Maui Tikitiki - the youngest of Taranga's five sons - which saw him become the leader of his people - is the most famous traditional example of mana tangata (if somewhat divine) in operation. A leader (whether male or female) with impeccable whakapapa, may none the less be relegated to a minor or only token role unless the appropriate skills are shown.

The interplay between mana tupuna and mana tangata in particular have tended to accentuate the importance of accountability between rangatira and tribes people both traditionally and today. Rangatira were and are continually required to affirm the consensus of the people in public fora. Thus the institution of the hui and the runanga were and remain the real seat of power and lawmaking. A leader taking his or her people in a direction which is not supported will quickly be corrected or, at length, abandoned in favour of a contender more willing to lead to where the followers wish to go. It is this high level of accountability and relatively low level of executive discretion on matters of significance to the hapu or iwi that places a premium on skill at oratory. Hence the famous proverb

*"Ko te kai a te rangatira, he korero
The food of chiefs is speech making."*

Mana atua is also important. It emphasises the tapu nature of the leadership role and the respect which the community owes its chosen leaders. It means that, though consensus is fundamental to Maori systems of leadership, rangatira who show mana atua and mana tupuna in abundance will be treated with awe and respect.

Thus it is inherent in the triadic nature of mana itself that traditional and contemporary Maori leadership is both pragmatically consensual and mystical at the same time. This is reflected in the etymology of the term rangatira. *Ranga* is a word which means

to weave. *Tira* is a word which denotes a group of people travelling. Thus the rangatira is considered to be a weaver of his people. Hence:

*"He ranga Maomao kei te mōana e tere ana
He iwi kei te whenua
Ma wai e raranga
e puta atu ai ki te whai ao, ki te ao marama.
A school of Maomao swimming as one through the sea
A tribe on the land
Who will weave them together and lead them as one into the world of light"*

3.4 Utu

Utu is often understood in its most base form - revenge for wrong doing. This is an aspect of utu but it is not what utu means. It means literally compensation and it conveys the ethic of striving to achieve balance in all things. It is often rendered by pukenga (experts in customary matters) as tau utuutu or reciprocity. At a human level utu denoted reciprocity between individuals, between descent groups and between the living and the departed. Thus in traditional Maori terms, mana was not achieved through the acquisition of material wealth but rather by distributing that wealth to others. It was through ritual "gift" distribution that reciprocal obligations were established. The recipient would be obliged to respond in due course with a greater gift and so the cycle of gift exchange or *tuku* was initiated. Once initiated it would continue for generations.¹¹ There are many examples currently of iwi and hapu who continue to engage in exchange relationships which commenced before Pakeha colonisation. Thus the essence of the ethic of utu is the maintenance of relationships through maintaining a state of either balance or imbalance of contribution. This could be within a positive framework through gift exchange or a negative framework by insult, aggression and revenge. This ethic of tau utuutu and striving for balance is also a prevalent theme in Maori thinking. Thus the concept of tapu or sacred versus noa or profane, *taha wairua* (spiritual) versus *taha kiko kiko* (mundane - literally of the flesh) or *tika* (right) versus *he* (wrong). Key accompanying values to the principles of balance and reciprocity inherent in the term utu are *aroha* and *manaakitanga* - respect empathy and generosity. Some commentators consider that these terms have received

¹¹ See Metge - Evidence in WAI 45.

heightened profiles since the arrival of christianity but this is considered incorrect. The traditional allusions to aroha and manaakitanga make it clear that these terms were being constantly emphasised in precontact days. There are famous, and often inexplicable stories of the exercise of aroha and manaakitanga by chiefs of great mana. The giving of the chiefs son or daughter to the vanquished enemy in order to make them strong again and give them mana; the transfer of extensive areas of land to a beaten enemy in order to ensure the survival of that tribe; the engaging in massive displays of generosity through hakari or traditional feasting and hui or traditional gatherings in order to create obligations of reciprocity and confirm relationships.

There are many model examples of tau utuutu in action among iwi and hapu today.

3.5 Kaitiakitanga

This is a term which denotes the obligation of stewardship and protection. These days it is most often applied to the obligation of whanau, hapu and iwi to protect the spiritual wellbeing of the natural resources within their mana. It is difficult to divorce kaitiakitanga either from mana, which provides the authority for the exercise of the stewardship or protection obligation; and tapu which recognises the special or sacred character of all things and hence the need to protect the spiritual wellbeing of those resources subject to tribal mana. It is from the ethic of kaitiakitanga that the traditional institution of rahui comes. Rahui were traditionally invoked to prohibit entry into areas affected by the tapu of death, to ensure the future abundance of food resources through proper conservation practices, or in some cases, simply as a device to affirm the mana of the iwi or hapu over the resources in question. Breach of the rahui would result in the offender being subjected to muru and in some cases being killed or injured by natural or supernatural means.

The institution of rahui persists. Many iwi impose them in recognition of the presence of death or for conservation purposes.

Kaitiakitanga also requires the observance of conduct respectful of the resources in question. Thus each hapu or iwi had and has clear prescriptions as to the manner in

which fishing activity may be undertaken. It is common for example that the first fish is returned. It is also common that no gutting of fish or shelling of shell fish is allowed to occur below high water mark. The reason is that the dumping of fish or shell fish remains into the sea would provide both a spiritual and physical pollution of the sea and hence a detraction from its tapu.

The ethic of kaitiakitanga is becoming increasingly important as iwi and hapu assert their obligation under current environmental legislation.

3.6 Tapu

The tikanga associated with tapu are very important in both the traditional and modern contexts. There is first the requirement to respect the tapu that all things carry. The traditional injunction to avoid touching, stepping over or otherwise desecrating tapu parts of the body. And the requirement to keep food related or noa things away from personal items are good examples of the persistence in modern times of traditional concepts of tapu.

In addition tapu which was very special in nature attached to people, objects or places so as to require a special degree of deference or respect. The body of high ranking chiefs, places associated with death or forbidden activities all carried this special tapu in traditional times. Again these values persist in modern Maori life. The tapu nature of the marae or wharenui (meeting house) requires that food be kept away and shoes removed before entry. The tapu related to death means that a body must never be left unattended or unprotected for ^{few} ~~far~~ that its tapu will be lost.

The tikanga of tapu underscore the indivisibility between the spiritual and the secular. Tapu was and remains a religious observance established for political purposes¹² It has political purposes in terms of protecting the sanctity of individuals, ensuring appropriate levels of respect for hapu and iwi leadership and in keeping ceremonial or special aspects of life separate from the run of the mill. The mechanism is however

¹² Taylor *Te Ika a Maui* (1870) p.163 cited in Jackson at p.41.

centred in the mystical and spiritual, and it is this aspect of both modern and traditional understandings of tapu which ensures its efficacy.

4. NGA TIKANGA MO TE WHANAU, TE HAPU ME TE IWI: MAORI SOCIAL ORGANISATION

The common thread in all Maori social organisation was whanaungatanga or kin relationships. Those kin relationships remain of central importance in modern Maori society.

The various levels of Maori social organisation may be characterised as:

- **Whanau** - or extended family. This usually included grandparents or great grandparents and their direct descendants.

Whanau also means to give birth. The name accentuates the centrality of kin links in this unit of social organisation.

- **Hapu** - this denoted the larger village community although some villages included several hapu groups. All Maori, through the whakapapa web could claim membership of several hapu at once.

Hapu also means pregnant. Again this accentuates the centrality of kin links to this level of social organisation.

Some hapu communities, particularly on the East Coast, adopted the name whanau to describe their grouping.

- **Iwi** - this term is generally translated tribe and identifies the wider district or sometimes regionally based kin group claiming descent from a single distant ancestor.

Iwi is also the word commonly used for bones. Again this accentuates the centrality of kin links to this level of social organisation.

- Waka - much later and probably in the post contact period, waka confederations became a unit of social organisation for some purposes. This level of social organisation delineated the descendants of one of the migration canoes, usually a collection of iwi, claiming descent from the captain or crew of the waka and acting in concert.

Waka is the Maori word for canoe.

The traditions of the Te Arawa and Waikato Confederations are the best examples of the development of a waka tradition.

Pre contact Maori society was characterised by dynamic change with hapu forming and reforming into autonomous groups as social and political exigencies required. The primary right holding group was the hapu or village community. Hapu migrated extensively throughout their traditional lands and adopted different names in order to reflect the different land or resource rights being utilised in different parts of their traditional district.

Iwi or multiple community cohesion was relatively rare, being achieved for particular purposes such as fishing or warfare. This period was characterised far more by hapu autonomy and inter-hapu disputation.

The first 50 years of the 19th Century was marked by unprecedented social change with significant migrations and relocations and an increase in large scale warfare between unrelated or distantly related groups.

The later half of the 19th Century was characterised by the adoption of more regular habitation, permanent agriculture and larger aggregations at iwi or waka level together with a sustained period of land and resource loss through warfare and transactions with the Crown and settlor community.

At no stage from the period of arrival to the post contact period can Maori social structure be considered to have been or be a simple pyramid of waka, iwi, hapu and whanau in

descending order. Instead traditional Maori society and post contact Maori society were characterised by a high level of variation in kin units and aggregations. Thus, larger hapu themselves had hapu and acted as iwi whatever formal category applied. Whanau grew and became communities properly so called, acting in all ways as if they were hapu. Hapu and iwi names came and went as political exigencies required. Whanau and hapu were subsumed through inter-marriage, land transfer or defeat in war. The only constant in the fluctuating corporate fortunes of hapu and iwi was the whakapapa which tied the individuals together and to the land. The whakapapa which gave the greatest right to resources was (and remains) the most ancient line. Thus hapu and iwi names which reflect the usurpation of earlier inhabitants were always supplemented by a continuing recollection of the inter-marriages between the original tangata whenua and later arrivals so as to confirm the strongest mana tupuna.

Thus Maori society during this period was dynamic but not anarchic. In particular the changes taking place were underpinned by the core values of whanaungatanga and utu - the centrality of relationships and the importance of reciprocity between the key social groupings. It is by understanding these underlying values that order may be discerned from apparent disorder.

5. NGA TIKANGA O TE MANA ME TE RANGATIRATANGA: MAORI LEADERSHIP

5.1 Rank and Mana

Rangatira lead and represented their hapu, either regularly, or sometimes for the purpose of a particular project (a war, migration etc.). They were the most significant leaders in community affairs as the community organisers and representatives. They were the cement that bonded the various elements of the hapu. They were not necessarily older persons.

Kaumatua were the heads of whanau who spoke for the whanau at hapu meetings. The term kaumatua was most usually synonymous with elder but kaumatua status was not necessarily conferred on attaining a certain age. Kaumatua status was, and

(unpublished draft paper prepared for the Law Commission, 1998)
remains, a leadership role which may be acquired in exceptional circumstances.

Ariki (or literally "the few" or "the fine thread") were the most senior ranking blood representatives of a collection of hapu, an iwi or even a collection of iwi. They held descent on senior lines from the leaders of significant founding canoes. In some traditions ariki status was so tapu that the incumbent did not participate in the political affairs of the hapu or iwi. In other circumstances the ariki who was an active and successful leader would acquire enormous mana. Ariki status was not institutionalised through strict rules of succession in the way that these positions were held elsewhere in Polynesia. They were sometimes chosen or appointed by consensus of the hapu or iwi groupings.

Tohunga or pukenga were specialists in a craft or discipline from carving and tattooing to the mystical arts.

Toa meant usually a warrior but was sometimes applied to individuals who were particularly skilled, brave or successful at their craft.

Ware or tutua are terms generally translated into English as commoners. This is inappropriate. The availability of manipulable whakapapa meant that there were very few who could not aspire to leadership roles if the skills were present. The hierarchical nature of most polynesian societies had not developed in any ossified way in Maori society prior to contact.

The Waitangi Tribunal in the Muriwhenua Land Report described Maori authority in these terms:

"The concept of mana shows how Maori authority was neither centralised nor institutionalised, and how power moved up from the people and not down from a central authority. Accordingly authority was not divorced from personal power and influence. Although the necessary leadership traits were reinforced by beliefs that mana was a divine delegation, it was unlike the English divine right of kings in that power was only partly inherited and mainly acquired."

The society was thus basically democratic and there was room for class mobility.”¹³

6. NGA TIKANGA MO TE WHENUA - LAND

- 6.1 Land was and remains integral to group identity and wellbeing. The group in reality descended from the land and the stories of the ancestors are carved in it:

*“Ka raro i te tarutaru, te tuhi o nga tupuna
The signs or marks of the ancestors are embedded below the roots of the grass
and the herbs.”¹⁴*

In Maori idiom the people are the property of the land rather than the reverse. The term whenua means both land and placenta.

The relationship with land is reflected in all five of the underlying tikanga identified here. Whanaungatanga or the relationship with it, mana or the power and authority which hapu and iwi derive from it, utu or the reciprocal relationship with it, kaitiakitanga or the obligation of protection and tapu or its sacred character.

In the end all that can be conveyed is that land had and retains a profound spiritual and emotional importance to Maori. Hence the proverb:

*“Whatungarongaro te tangata, toitu te whenua
People die, the land remains”.*

6.2 Systems of Land Tenure

“Rights” in land were traditionally complex and interlinked. They range from an iwi overright to hapu “title”, to rights of sub groupings such as whanau or individuals and even sometimes related hapu to utilise particular resources within a hapu territory, to the inherited rights of individuals within the sub groupings to participate in the exploitation of particular resources. The rights were never strictly hierarchical. They overlapped and intertwined creating convelutions peculiar to the particular case. Crocombe refers to six categories of land rights:

¹³ Te Roroa at p.29.

- (a) Rights or claims to direct use;
- (b) Rights to indirect economic gain;
- (c) Rights to transfer;
- (d) Residual or reversionary rights;\
- (e) Symbolic rights or rights of identification.

Each of these levels of right could be held by different groups and indeed each level could be shared by more than one group at a time. The distinctive aspect of traditional Maori land tenure was that ones rights as an individual or whanau derived from the collective land holding unit - usually the hapu. That meant that the right depended on full participation in the community and on the creation and maintenance of appropriate kin relationships. Thus, as is the case today, the right to land was validated by whakapapa. This was true at iwi, hapu and whanau level. Each level proved its right and maintained it by reciting the appropriate whakapapa connecting that grouping with the resource in question. All rights depended on the maintenance of the collective oversight whether at iwi or hapu level, and the maintenance of ones obligations to that grouping. Hence, the values of whanaungatanga, utu and kaitiakitanga were central to maintenance of both the corporate right and the rights of any sub groupings. On this basis conditional rights were allocated to various production centres within the hapu estate usually by ongoing consensus of the community but in some cases, if the user was long standing, by inheritance through whakapapa from the original allottee. All rights of this nature were terminable.

Proprietary interests thus pertained to resources, not to land blocks and individuals owned usufructs, not territory. The right was to use a particular resource for a settled purpose intermittently or at an agreed time or season or to cultivate or fish at some spot. Consequently many persons and groups had different and overlapping interests in any discrete area, one to collect berries, another to plant kumara, some to hunt pigeons at a certain time and others to build or reside etc. There were also subsidiary use rights to traverse the area or to take water.

¹⁴ See Te Roroa Report at p.49.

Symbolic interests were maintained in mountains, rivers, lakes, natural promontories, wahi tapu and ancestral houses. These were treasured as ancestral group symbols independently of use rights of any resource potential. This right of identification was, and remains, a significant right for Maori. It described the relationship to ancestral land and served to remind donees, immigrants and conquerors of their continuing responsibilities to tangata whenua, and the inherent right of recovery or reversion in cases of wrongful dispossession. Mana whenua is not considered to be dependent upon ownership or occupation. The sacred connection to the land remains:

*"... the link between the person and the land by virtue of their history can never be erased ... the footsteps of our ancestors remain on the land forever. The fires never go out."*¹⁵

¹⁵ See Te Roroa Report at p.49.