Making submissions to Resource Management Act consent authorities and to the Environment Court, are amongst the means by which tangata whenua ensure that the fires do not go out on their symbolic rights and their rights of identification with ancestral lands.

7. THE PLACE OF TIKANGA MAORI IN NEW ZEALAND LAW TODAY

7.1 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. They comprised the law in force prior to colonial rule and they continue to contain values around which Maori wish to live their lives in Aotearoa. Ngata, again, was eloquent on this point in 1940:

> *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". ... [T]his elder's injunction signalised 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.*[33]

That 'conscious movement' has gained great momentum in recent years. Maori feel aggrieved when the values and practices of tikanga Maori are treated by New Zealand law, the New Zealand constitution and New Zealand politics as if they were some sort of jural black market which is tolerated by the mainstream in some instances but generally is frowned upon.

7.2 The legal and constitutional argument

The moral argument secures significant 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

[33] Ngata in Sutherland (1940), p.176. It is instructive to observe that Ngata was making a point with such modern applicability nearly 60 years ago.

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 customs and having regard to their own cultural preferences.'[34] Professor Sir Hugh Kawharu's translation of Article II of the Maori text of the Treaty, which has been frequently relied upon in the superior courts and in the Tribunal, is 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 emphasize to a chief the Queen's intention to give them complete control according to <u>thei</u>**r** customs.*[35] (emphasis in original)

The aboriginal title exercised by Maori over land was solemnly asserted by Supreme Court judges as 'entitled to be respected' in 1847 in *R. v Symonds* [36]- albeit in a judgment primarily concerned with the validity of competing modes for extinguishing aboriginal title. This was therefore an early example of the pattern of recognition for tikanga Maori in colonial law in order to extinguish its application. However, that recognition was too much of a concession of Maori rights for the judges in *Wi Parata V Bishop of Wellington* decided in 1877. The judgment of Prendergast CJ not only dismissed the Treaty of Waitangi as 'a simple nullity' but also stated that 'a phrase in a statute' - the Native Rights Act 1865 - 'giving cognizance to the Supreme Court, in a very peculiar way, of Maori rights to land' could not 'call what is non-existent into being.'[37] The ratio decidendi of *Wi Parata*, holding that courts would not go behind a Crown grant to ascertain whether or not Maori customary title had been properly extinguished, continued to be applied by superior courts and was incorporated into statute law in 1909. Indeed, *Wi Parata* was described as 'weighty authority' in a Court of Appeal judgment as late as 1963.[38] The observations of the Chief Justice on the non-existence of

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[34] Waitangi Tribunal, *Motunui-Waitara Report*, (1983), p 51. This phrase has been directly or indirectly quoted in numerous later Tribunal reports including: *Orakei Report* (1987), pp 134-135; *Ngai Tahu Report* (1991), p 824; *Mohaka River Report* (1992), p 63

[35] I H Kawharu, 'Translation of Maori text' in Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, Auckland, Oxford University Press, 1989, pp 319-320

[36] (1847) NZPCC 387. This is a Supreme Court judgment included in a volume of reports of Privy Council opinions.

[37] (1877) 3 NZJur NS (SC) 72, pp 77-79

[38] *In re the Ninety-Mile Beach* [1963] NZLR 461, p 467 (North J)

Maori custom were directly criticised, however, by the Privy Council in 1901: *Nireaha Tamaki v. Baker*. The law lords opined that it was rather late in the day for New Zealand courts to be taking that approach in view of legislative recognition for the customary law of Maori.[39]

Moreover, there are a few reported cases where Maori custom law has been directly enforced in superior court decisions. In *Public Trustee v Loasby* the Supreme Court allowed the costs of tangi expenses for an important chief to be paid out of the personal estate of the deceased 'in accordance with Maori custom' because the tangi was part of the obsequies of the deceased. The approach taken by Cooper J was important:

> *In considering a question of this nature, dealing with the ancient customs still followed by a race like the Maori people, no decisions in the English Courts can be directly in point. One has to consider, I think, three things, - 1. The question of fact whether such custom exists as a general custom of that particular class of the inhabitants of this Dominion who constitute the Maori race; and this I find to be proved. 2. Is the custom contrary to any statute law of the Dominion? The answer is, No statute has forbidden it. 3. Is it reasonable, taking the whole of the circumstances into consideration?*[40]

The judge's second point is particularly important. Authors such as McHugh have assumed that apart from unextinguished aboriginal title rights 'Maori custom obtains legal status in the Pakeha legal system by grace of statute.' He urges that Maori custom should be explicitly recognised by Parliament as viable law in certain situations but until then it 'lies hidden behind various statutory schemes and discretions.'[41] Whilst it is clear that to a large extent indigenous rights have been abrogated by inconsistent legislation, the *Public Trustee v Loasby* approach, allowing for recognition of custom law proved as fact unless that is forbidden by statute, obviously permits wider recognition of tikanga Maori than an approach requiring explicit recognition by Parliament.

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[39] (1901) NZPCC 371, p 382 (Lord Davey)
[40] (1908) 27 NZLR 801, p 806
[41] P McHugh, *The Maori Magna Carta*, Auckland, Oxford University Press, 1991, pp 95-96

Thus the significance of the collective entities of whanau/hapu/iwi/waka ought not and need not depend on the fact that some of them (but not all) are referred to in statutes such as the Children, Young Persons, and Their Families Act 1989 and the Resource Management Act 1991. Fortunately none of them are precisely defined in those Acts. Nor should it follow from the fact that the earlier Act has a definition of 'Iwi Social Service', which means an incorporated body approved by the Director-General, lead to the conclusion that an iwi must always have a corporate persona in order to be recognised in law. Other common law jurisdictions have recognised unincorporated entities as having juridical personality apart from the individuals constituting them.[42] We would hope that New Zealand courts would not now find it difficult to recognise whanau/hapu/iwi/waka as having juridical personality and standing in law.

In *Arani v. Public Trustee* the Privy Council in 1919 recognised Maori custom and held that it was directly enforceable in the circumstances of that case, which concerned customary 'adoption' of children. The law lords noted that Maori tribes were able 'by common consent to modify their customs' and 'that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood'. Unlike the static view of custom as a source of law in England, the Privy Council approved the reasoning of the Native Appellate Court:

> *[Native custom of adoption] is based upon the old custom as it existed before the arrival of Europeans, but it has developed, and become adapted to the changing circumstances of the Maori race today.*[43]

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. Cooke P for the Court of Appeal made this point in a 1994 judgment:

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[42] *Bonsor v Musicians' Union* [1956] AC 426 (unincorporated trade union); *Willis v Association of Universities* [1965] 1 QB 140 (Universities Central Council on Admissions). See also *Mullick v Mullick* (1925) LR Ind App 245 dealing with the position of an idol in Hindu law; L C Webb (ed), *Legal Personality and Political Pluralism*, Melbourne, Melbourne University Press, 1958

[43] [1920] AC 198, pp 204-205

[I]t is as well to underline that in recent years the Courts in various jurisdictions have increasingly recognised the justiciability of the claims of indigenous peoples - ... the New Zealand Courts in a line of cases in which it has been seen, not only that the Treaty of Waitangi has been acquiring some permeating influence in New Zealand law, but also that treaty rights and Maori customary rights tend to be partly the same in content.[44]

In 1990 two eminent Waitangi Tribunal members, Durie and Orr, wrote of the development of a 'bicultural jurisprudence'. They referred to 'steps to accommodate Maori needs within existing law ... marked by judicial enterprise'; to 'the growth of a distinctive bicultural legal regime, and one in which the Treaty will increasingly be seen as a source of law'; to 'a single jural order with bicultural capabilities as the option most expressive of the Treaty and best suited to the New Zealand milieu'; and to 'the interplay of the Waitangi Tribunal, the courts and specific legislative provisions ... [through which] a bicultural methodology in the management of law can be seen to be emerging.'[45] A question posed by Durie J (as he now is) in the 1996 F W Guest memorial lecture was this:

> *Will we hone our jurisprudence to one that represents the circumstances of the country and shows that our law comes from two streams?*[46]

Then in 1997 the President of the Law Commission has suggested that an appropriate starting point for reform of the law is the reality

> *... that our single legal system is derived from, and contains elements of, both English and Maori roots, both greatly modified over the past 157 years. The term "duadic" expresses that reality: of two bases of a single legal system.*[47]

7.3 The historical argument

It is now being recognised that in the past rather too much weight has been accorded to the written terms of the Treaty of Waitangi,[48] especially when compared with the significance

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[44] *Te Runanganui o Te Ika Whenua v Attorney-General* [1994] 2 NZLR 20, p 27
[45] E T Durie & G S Orr, 'The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence', (1990) 14 *New Zealand Universities Law Review* 62
[46] Durie (1996), p 462
[47] Law Commission, (1997) *Te Aka Korero*, no 6, p 4

which should be attached to contemporaneous oral representations by Crown officers in response to matters raised by Maori. At hui considering whether or not to adhere to the Treaty, during the nine months that Treaty copies were taken around the New Zealand islands in 1840, key issues of debate and discussion included concerns as to the status of Maori customary law and the role of chiefs in the new colonial order. The assumption that those oral discussions should be of less weight than written material is a monocultural prejudice which we should move away from. It is rather more compelling to presume the opposite. To interpret what has gone on between outsiders and members of an indigenous society with a predominantly oral culture, greater weight should be accorded to the spoken than to the written word in seeking to ascertain the meaning and scope of any agreements reached. When an interaction occurred between an indigenous society and a European imperial government which sets great store on what is recorded in writing, the least that one would expect in terms of good faith principles is that oral representations made by European officials should be treated as matters of the utmost importance.

It should not be surprising, therefore, that Maori scholars have argued for the vital importance of a 'protocol' to the Treaty of Waitangi sometimes called the 'fourth article'. They are referring to an oral statement made on Hobson's behalf in English and Maori immediately prior to the first signings of the written form of the Treaty at Waitangi. The imperial consul explicitly guaranteed protection of ritenga Maori (Maori custom).[49] The statement was written down and recorded by missionary witnesses but was not reported on in Hobson's official despatches and it has been dismissed by the historian Orange as 'a verbal commitment given only by chance' which 'amounted to very little'.[50] There were however a number of other instances of both oral and written promises being made in the course of the Treaty's travels in 1840 which apparently guaranteed governmental respect for Maori customary rights and which were officially recorded. Ward instances some of them:

> *The officials, for their part, considered that by recognising customary Maori land claims in the Treaty they had taken all necessary measures to confirm chiefly privileges.*

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48 D F McKenzie, *Oral Culture, Literacy and Print in Early New Zealand: the Treaty of Waitangi*, Wellington, Victoria University Press, 1985

49 Te Runanga Whakawhanaunga I Nga Hahi (M Henare & H Kaa), 'Biblical Understandings of Covenants and Treaties' in A Blank, M Henare & H Wlliams (eds) *He Korero Mo Waitangi,1984,* Ngaruawahia, Te Runanga o Waitangi, 1985, pp 171-178; M Jackson, 'Criminality and the Exclusion of Maori', (1990) 20 *Victoria University of Wellington Law Review*, Monograph 3, pp 32-33

50 Orange (1987), p 53

> *Major Bunbury, Hobson's first military commander, proffering the treaty to Hapuku of Hawke's Bay, stated that 'It was not the intention of Her Majesty's Government to lower the chiefs in the estimation of their tribes, and that his signature being now attached to the treaty would only tend to increase his consequence by acknowledging his title'. In order to avert suspicion of the Treaty, Hobson also issued a circular letter repudiating suggestions that the Maori would be degraded by the advent of British authority, and telling the chiefs that 'the Governor will ever strive to assure unto you the customs and all the possessions belonging to the Maoris'. Finally, missionary George Clarke was appointed Chief Protector of Aborigines and instructed to assure the Maori 'that their native customs would not be infringed, except in cases that are opposed to the principles of humanity and morals'.*[51]

Chief Judge Durie, in extra-judicial remarks, and the Waitangi Tribunal in a 1997 report have now clearly come down in favour of the view that Crown representations in 1840 on respect for Maori custom are indeed important in bicultural jurisprudence. Hobson's 'fourth article' statement at Waitangi is one of the representations which have been highlighted. Durie said in his address:

> *In any event a mono-legal regime had not been contemplated during the execution of the Treaty of Waitangi. On the contrary, Maori were specifically concerned that their own laws would be respected. There was no lack of clarity in their position that they were not about to give away the laws of their forebears. At Waitangi the debate became mixed with a dispute amongst the representatives of the missionary churches. There the governor's response, as translated to English, was read out for him as follows:*
>
> > *The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Maori custom, shall be alike protected by him.*
>
> *This is sometimes called the fourth article. The governor had adjourned to consider the matter and had delivered a written response.*

51 Ward (1974), p 45

> *By the time the Treaty reached Kaitaia however, the debate, and the Maori insistence on respect for their own law, had crystallised. Correctly in my view, Maori identified the issue as one not just of law but authority. Nopera Panakareao, the leading rangatira of Muriwhenua, put it this way in the Treaty debate at Kaitaia that, "the shadow of the land goes to the Queen but the substance remains with us".*
>
> *Due to poor health the governor could not attend at Kaitaia but there Willoughby Shortland conveyed the Governor's explicit message:*
>
> *The Queen will not interfere with your native laws or customs.*
>
> *American precedent is undoubtedly correct in asserting that in treaties with indigenous people of oral tradition, verbal promises are as much a part of the Treaty as that subscribed to in the documentation. It cannot then be said, as a matter of fact, that the Treaty introduced the law of England if the corollary is that Maori laws then ceased to be applicable. The Treaty is rather authority for the proposition that the law of the country would have its source in two streams.*[52]

Similar arguments appear in a section of the *Muriwhenua Land Report* where the Tribunal acknowledged and gave weight to the importance of oral statements made by speakers for both partners to the Treaty debates, including Tamati Waka Nene's admonition to Hobson:

> *You must preserve our customs and never permit our lands to be wrested from us.*[53]

Thus the terms of the Treaty of Waitangi and subsequent developments of the New Zealand common law now both indicate the need for a significant role for tikanga Maori in New Zealand legal discourse.

Some would go as far as arguing for a separate Maori legal sytem.[54] Even if this view is rejected as impracticable or undesirable in contemporary New Zealand, the strength of the

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52 E T Durie, 'Will the Settlers Settle? Cultural Conciliation and Law' *Otago Law Review*, vol 8, 1996, pp 460-461. Durie's source of the 'fourth article' text is W. Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi*, Wellington, Government Printer, 1890, p 32

53 *Muriwhenua Land Report* (1997), pp 112-114. the source for Shortland's statement at Kaitaia is given as 'John Johnson's journal, 28 April 1840, Auckland Public Library'.

historical argument for it needs to be acknowledged. The fact of separate tikanga Maori systems operating in many districts for decades after the inception of colonial rule cannot be denied either. Provisions in the 1846 and 1852 constitutions allowed for Letters Patent to officially recognise such districts but they were never implemented, despite direct requests from the King movement and others.

The legal possibility to create Maori law governed districts was removed by the Constitution Act 1986. The Law Commission's preferred option now is for a duadic legal system which enables greater recognition of tikanga Maori within a single legal system so as 'to develop a united single nation proud of, and eager to protect, our differences.'[55]

7.4 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 major categories of law and policy in which tikanga Maori must be understood and applied is set out below:

- **Administration of Maori land**

The preamble to Te Ture Whenua Maori Act 1993 and section 2 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 and hapu in Maori land administration. Land is described as a taonga tuku iho of special significance and the Act is to be interpreted to facilitate and promote the retention, use and development of Maori land by Maori owners, their whanau, their hapu and their descendants.

- **Treaty claims**

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[54] M Jackson, 'Criminality and the Exclusion of Maori', (1990) 20 *Victoria University of Wellington Law Review*, Monograph 3

[55] Law Commission, (1997) *Te Aka Korero*, no 6, p 4

It is obviously important that Crown entities and the Waitangi Tribunal are thoroughly familiar with tikanga Maori in order to understand claims and to deal appropriately with claimants. Issues arise such as the nature of rights claimed in respect of land, fisheries and other natural resources; the traditional kin associations between and within whanau/hapu/iwi; the nature of overlapping resource use rights and the identification of tribal territories; the significance of Maori cosmology in presenting evidence of traditional rights. All of these questions require a thorough going knowledge of tikanga Maori before robust answers can be found to modern questions about the aims and purposes of the Treaty claims settlement process.

- **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 collective entity to be consulted, the appropriate representatives 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 many areas of governmental activities and policy-making. It is a matter of particular importance in resource management law.

- **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.

- **The law of succession**

The law of succession as it applies to Maori has been the subject of litigation which has required the ordinary courts to consider the applicability of tikanga Maori to this area. In particular, cases under the Family Protection Act 1955 have raised questions as to how ordinary courts apply tikanga principles when addressing the moral duty of a wise and just testator to provide for family members. The law of succession is the focus of reform proposals

prepared by the Law Commission and the Maori aspect of reforms are under active consideration.

- **Environmental law and resource management**

This is an enormously important area of law in which local government, central government, specialist courts and the ordinary 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, waahi 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, especially as that definition is now reformulated, it must continue to take its meaning from its Maori cultural context. The provision requires an understanding of the tikanga in relation to kaitiakitanga. Furthermore section 8 requires those with discretions to take into account the principles of the Treaty of Waitangi. The Court of Appeal, as we have already noted, has observed that the principles of the Treaty overlap with the protection of Maori customary rights. The Act is replete with tikanga Maori terms – mataitai, mahinga mataitai, mana whenua, tangata whenua, taonga raranga, tauranga waka -which are not able to be encapsulated fully in English language definitions. Moreover, there may well be a lack of congruence between the English and Maori concepts in the Act. It may be impossible or difficult to reconcile the statutory definitions of bed, coastal water and river, for example, with the tikanga of mahinga mataitai.

- **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 those acting on behalf of 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.

- **Delegations to Maori and allocation of Crown-sourced 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. The Waitangi Tribunal's 1998 report on the relationships between the Community Funding Agency, the Department of Social Welfare and Te Whanau o Waipareira trust has highlighted the necessity for the Crown to acknowledge as a principle of rangatiratanga the right of Maori to control over tikanga or Maori customs and values.[56]

8. FAILURE TO RECEIVE EVIDENCE OF TIKANGA

The procedures of the adversarial mode of trial in the ordinary courts may often entail that tikanga Maori elements of cases are overlooked. This may be because a relevant issue is not even adverted to, owing to the ignorance of counsel, or because none of the parties choose to seek out clarification of tikanga for the benefit of the decision-maker. If Maori custom law really is to be restored to its rightful place as a primary source of law, then measures need to be put in place to ensure that tikanga are not overlooked.

There are cases in which judges arrive at outcomes with which they are obviously uncomfortable. By way of example, and without any intention to suggest that this area of adjudication is more problematic than other areas, two Family Protection Act cases illustrate the difficulties faced by judges. In *Re Stubbing* a woman adopted by the deceased as a baby, as a result of a decision of kaumatua in order to provide an heir for certain whanau lands, was held by Eichelbaum J (as he then was) to be owed no moral duty by the testator in respect of those lands. The judge regretted the lack of evidence on Maori custom from elders independent of the parties but made his determination anyway. The case involved one whanau deciding upon an Adoption Act adoption specifically to secure the whanau inheritance, whilst another whanau sought the same result by an adoption which may have been a legal adoption or a whangai fostering by Maori custom (the judge did not think it important to pursue the difference, which was not clear on the papers) and the respective rights of male and female children to inherit. It is evident that the judge felt the discomfort

[56] Waitangi Tribunal, *Te Whanau o Waipareira Report*, Wellington, GP Publications, 1998

of making a final order in such a case. He expressed the hope that in the light of his findings a decision could now be arrived at in a marae meeting.[57]

Re Wakarua is another case in which the judge (Doogue J) noted that there was no evidence before him of relevant aspects of Maori custom but he had to proceed to a decision anyway. Despite several repetitions of the opinion that the mother was not in any way to be blamed in the circumstances, this judgment arrives at the startling conclusion that agreeing to the whangai adoption of two children (of five born to her) amounted in law to the parent 'deserting' and 'failing to maintain' her children.[58]

Whilst the statutes in question in those cases did not make the judges' task easy, we would urge that in principle it is most unfortunate if relevant Maori custom is not available to assist courts in arriving at an appropriate outcome in disputes concerning Maori whanau.

9. CONCLUSION: BRINGING TIKANGA TO THE FORE

Students of history will be aware that there are a few, a very few examples, of legislation in the past which has permitted limited autonomy to Maori and the ability to apply tikanga Maori in restricted circumstances. The most significant instances include the committees established under the Native Committees Act 1883 – with modest powers to act as a court of arbitration and to make inquiries as to ownership of land being investigated by the Native Land Court. Papatupu block committees established under the Maori Lands Administration Act 1900 had the power to investigate ownership of blocks having due regard to Maori custom.[59] The Native Townships Acts around the turn of the century allowed limited powers of local government in certain townships.

None of these initiatives flourished. The Land Court judges were unwilling to share power with Maori bodies beyond their direct control. There was a general lack of commitment in successive governments to autonomous Maori institutions unless they were perceived as likely to foster alienation of land to settlers, and Maori committees signally 'failed' in that respect. In more recent times there have been extremely limited grants of power to

[57] *Re Stubbing* (1988) 4 FRNZ 392
[58] *Re Wakarua* (1988) 4 FRNZ 459

committees under the Maori Community Development Act 1962 and official or unofficial bodies collaborating with the criminal justice system in diversion schemes based on kaupapa Maori principles.[60] None of these initiatives have enabled a significant contribution by tikanga Maori to the jurisprudence of the nation. We now seek to bring tikanga Maori values to the fore in a new way which is consistent with the principles of the Treaty of Waitangi.

If it were possible for the Law Commission to issue a code written in English to define key concepts of tikanga Maori for application in the fora of courts, tribunals, Crown agencies, etc then it might be convenient to do so. It may be that the living experts in Maori custom law would be appalled by the prospect, but it might still be convenient. However, it must be strongly emphasised that it is just not possible to do so.

As stated at the outset, tikanga Maori is a values-based system. It tends to avoid prescriptive rules and it is not static. This publication ought not to be cited as an authority for a definition of any custom or concept that we have discussed. The proper authorities are the living persons who retain the matauranga – the wisdom and knowledge - of tikanga passed down to them by their ancestors, who can explain the import of tikanga and who can apply tikanga to a situation as it arises.

If a situation arises before a judicial officer or a Crown official which necessitates an understanding of tikanga, is it possible to draw upon the knowledge of these living authorities from te ao Maori? There are at least two possible mechanisms for providing an affirmative answer to this question.

One means of raising the general level of awareness of tikanga Maori issues would be to encourage a panel of living experts to call hui, to make oral presentations and to produce position papers and commentaries on topical issues. Presently Maori members of the Waitangi Tribunal and members of the Maori Committee within the Law Commission contribute to matters as they arise. They might be augmented by other koroua and kuia who would be willing to serve in the active promotion of tikanga values. Their work would be at a level of generalisation which would assist debate and policy formulation, but would not provide rules

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[59] J McRae, 'Participation: Native Committees (1883) and Papatupu Block Committees (1900) in Tai Tokerau', MA thesis, University of Auckland, 1981

to decide specific cases. The panel of experts – pukenga – would be people of mana and their oral presentations, papers or commentaries would be treated with the respect and deference befitting persons of their mana. As time went by some pukenga might be sought out by disputants to act as mediators (or informants for mediators) in alternative dispute resolution fora, thus obviating the need to resort to official courts and ensuring a proper application of tikanga values.

In the event that a matter is before a court or tribunal a mechanism to elicit relevant information about the applicability of tikanga may be required. There is already a procedure in sections 29 and 31-33 of Te Ture Whenua Maori Act 1993 for matters to be referred to the Maori Land Court for inquiry and report. In such cases the judge of the court may sit with additional members who have specialist expertise, including knowledge and experience of tikanga Maori (section 32). There are also provisions for the High Court and District Court judges to sit with experts in valuation and other commercial skills in certain circumstances. A case may be made out for a general power to appoint additional members with tikanga Maori knowledge and experience to a court that regularly has to deal with such matters – such as the Environment Court. Further to that, all courts and tribunals may be empowered on a case by case basis to empanel an expert in tikanga on to the judicial body, or to state a case to a specialist court that includes pukenga as member(s).

For those Maori who wish to resolve their issues solely within a tikanga Maori framework, that option might be encouraged by the enhanced status accorded to pukenga. They would be able to promote tikanga Maori solutions for Maori issues.

If the national legal system does become involved, either because non-Maori are parties or because one party prefers to invoke the jurisdiction of ordinary courts, the enhanced status of pukenga fully participating in the legal process will add to the credibility of decisions made. The decisions clearly will be seen to reflect the two streams of jurisprudence which make up the New Zealand legal system.

An enhanced status or mana is not something that the law can bestow on anyone. Those who are pukenga will by their words and actions earn the approbation of iwi/hapu/whanau. Their

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[60] Judge M Brown, 'The Te Atatu Maori Tribunal: Participation and Support of the Formal Court System',

roles, both formally and informally, will evolve so that within the legal system tikanga Maori is no longer completely disregarded as irrelevant, or patronised by being taken account of only to be almost invariably disregarded in outcomes. This will require a Treaty-based relationship to develop between pukenga and judges or officials. If that can come to pass then tikanga Maori will receive the active protection it was promised at the time of the Treaty of Waitangi and the acknowledgment which it deserves as a primary source of law for the New Zealand legal system.

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unpublished paper