**CONFIDENTIAL: REVISED DRAFT AS AT 10TH NOVEMBER, 1998**

# HE AHA TE TIKANGA MAORI

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## 1. TIKANGA MAORI TODAY

In 1940 Sir Apirana Ngata wrote:

> *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 civilization, 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]

1940 was a year in which this 'loyal Dominion' celebrated 100 years of British civilization. Despite a century of policies designed to achieve the amalgamation, assimilation or integration of Maori into a British way of life there continued to be, as Ngata noted, a vitality and potency in the social system of Maori. Assimilationist government policies continued until very recent times as epitomised, for example, by the Hunn Report 1960 and the Maori Affairs Amendment Act 1967. Yet in 1999 it still remains true that there is a Maori social system which is 'a very vital and potent factor' in the lives of Maori people.

This paper considers the question: He aha te tikanga Maori? What is Maori custom law? We do not attempt to ascertain what tikanga Maori was prior to contact with Pakeha (pre-1769), or at the date of the Treaty of Waitangi being first signed in 1840, or at any other more recent date in the past. We do not inquire into the peculiar version of Maori custom created by the Native Land Court when it found individual 'owners' of Maori customary land from 1864 onwards. The Chairperson of the Waitangi Tribunal in the 1996 Guest Memorial Lecture asked a pertinent question: 'Will the settlers settle?' For him the laws of New Zealand can only represent the circumstances of this country if it is recognised that our law

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[1] A T Ngata in ILG Sutherland (ed) *The Maori People Today: A General Survey*, Auckland, Whitcombe & Tombs, 1940, p 181

comes from two distinct streams. This is not a plea for a dual system of law but for law and cultural conciliation.[2]

It must also be clearly acknowledged that both streams of law have developed and evolved over time. There has long been a tendency to insist that 'genuine' Maori thinking must be that of tikanga Maori prior to contact with Pakeha. Thus judges of the Native Appellate Court in 1906 complained that:

> *In dealing with questions of Maori custom, the difficulty is becoming daily more pronounced of disentangling genuine custom from the incrustations which have grown round it under the influence of Pakeha ideas.*[3]

Yet judges in the ordinary courts have never sought to preserve English common law from 'incrustations' derived from non-English sources such as Roman law, canon law, the law merchant, international law, etc.

The lingering tendency to believe that pre-contact Maori custom was rigidly constraining, obeyed without question, fixed and unchanging may lead to the conclusion that 'genuine' custom must indeed be pre-contact custom. Anthropological fieldwork has long since dispelled such misunderstandings about pre-contact Maori society.[4] The custom law of Maori is whatever the customs are at the time of the inquiry. In a 1996 judgment, Blanchard J did not disagree with the contention of counsel that 'tikanga Maori is a dynamic, continually evolving concept, not locked in a time warp.'[5] This is not to say that Maori live in a society where anything goes. Maori society, probably like most others, is conservative with regard to its fundamental values. The point is that it has been receptive to change while maintaining conformity with its basic beliefs.

Our target audience in writing this work includes judges, decision-makers and policy-makers who are responsible for shaping the future of New Zealand laws. An historical inquiry into what tikanga Maori may have been at some time in the past is not necessary, interesting though that may be to some. What is required is information concerning the principles and

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[2] E T Durie, 'Will the Settlers Settle? Cultural Conciliation and Law', (1996) 8 *Otago Law Review* 449, at p 462

[3] *Re Roera Rangi*, Native Appellate Court, New Plymouth, 28 October 1906 – quoted in *Customary Maori Land and Sea Tenure: Nga Tikanga Tiaki Taonga o Nehera*, Wellington, Manatu Maori, 1991, p 2

[4] J Davidson, *The Prehistory of New Zealand*, Auckland, Longman Paul, 1984

[5] *Faulkner v Tauranga District Council* [1996] 1 NZLR 357, at pp 365-366

fundamental values of tikanga Maori which continue to operate in today's environment. There is a need, perhaps, to discuss the problems inherent in state legal system officials deciding upon custom law issues. The desirability of permitting, or encouraging, an autonomous evolution of Maori custom law so that it is compatible with modern circumstances is also important. A point made by R Crocombe should be borne in mind:

> *A common problem following European contact is that the colonizing group grasps the ideal pattern but does not fully understand (or consciously ignores) all the subsidiary processes which are concurrently at work in the system. Then the ideal becomes ossified by law or administrative practice and becomes dysfunctional and unrelated to needs.*[6]

In nineteenth century New Zealand there were some Pakeha who became tolerably well informed of the nature of Maori societies - judges of the Native Land Court, missionaries and writers such as Elsdon Best would be examples. A possible way of dealing with any Maori custom law issue which arises might be to seek 'authoritative recorded information'. One might, for example, refer back to the writings of Best, Maning or Colenso[7]; or peruse the 26 opinions of old-time settlers, missionaries and Land Court judges published as an appendix to the journals of the House of Representatives in 1890.[8] The practice, even of Maori Land Court judges, is that merely looking up Smith's *Maori Land Law* [9] should suffice in most circumstances.

Apart from serious questions as to whether any of these are fully reliable sources of information on tikanga Maori as it once was, none of these options would ascertain tikanga Maori as it now is. All of them run the risk, adverted to by Crocombe, of not fully understanding the subsidiary processes at work within the Maori social system. Maori processes will always contextualise disputed issues within the framework of fundamental values rather than merely announce the application of a rule. Smith's rigid formulation of *take* entitling individuals to ownership of customary land, based on rulings by the Native Land Court last century, is a striking and unfortunate example of the power of judge made

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[6] R G Crocombe, 'An Approach to the Analysis of Land Tenure Systems' in H P Lundesgaarde (ed), *Land Tenure in Oceania*, Honolulu, University Press of Hawaii, 1974, n 7, pp 16-17

[7] E Best, *Spiritual and Mental Concepts of the Maori*, Wellington, Government Printer, 1922; E Best, *The Maori*, 2 vols, Wellington, Tombs, 1924; E Best, *The Maori as he was*, Wellington, Dominion Museum, 1924; F E Maning, *Maori Traditions*, Auckland, J D Wickham, 1885; W Colenso, 'On the Maori Races of New Zealand', *Transactions of the New Zealand Institute*, vol 1, Wellington, J Hughes, 1868

[8] 'Opinions of Various Authorities on Native Tenure', 1890, AJHR, G-1

[9] N Smith, *Maori Land Law*, Wellington, A H & A W Reed, 1960

law. His rule-based analysis of Maori custom continues to be imposed upon Maori litigants appearing before courts today, even in cases stated to the Maori Appellate Court by the Waitangi Tribunal under section 6A of the Treaty of Waitangi Act 1975 (as amended in 1988).[10] All of this points to the necessity of finding appropriate mechanisms for ascertaining the contemporary understandings of the Maori communities whose custom law is under scrutiny.

This paper briefly outlines, therefore, some underlying values and significant concepts of the tikanga Maori stream of our law. We are aware that this task is fraught with difficulties. A paramount lesson from the legal history of this nation is the pattern that Maori custom law has been identified in formal institutional law only in order to extinguish its application. We seek now to enhance the application of tikanga Maori in appropriate situations. There was an explicit guarantee of tikanga in article 3 of the Treaty of Waitangi. Tikanga Maori is a taonga entitled to active protection under the principles of the Treaty of Waitangi.

The Law Commission in its work is required by its founding Act to take into account 'te ao Maori (the Maori dimension)'. This does not mean that we expect this publication to be relied upon by judges and decision-makers as a codification of 'rules' of tikanga Maori. Once 'rules' of custom are incorporated into the mainstream of the state legal system as precedents they may then be treated in the same way as all other legal norms. They can be modified, distinguished or even over-ruled. This would be an assimilation or absorption of Maori custom into New Zealand law, rather than a recognition of tikanga values.

The well-known story of the shark and the kahawai is apposite - when the shark met the kahawai, the shark suggested that they should join together and be as one. Perceiving that this would occur by the shark swallowing the kahawai, the kahawai demurred - preferring a continuing existence as a kahawai rather than 'assimilation' into unity with the larger fish.

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[10] *In re Tau and Ngai Tahu Trust Board*, Maori Appellate Court, Case Stated 1989/1, 15 November 1990 [printed as app 4 in Waitangi Tribunal, *Ngai Tahu Report 1991*, pp 1122-1145]; *In re Minhinnick and Ngati Te Ata,* Maori Appellate Court, Case Stated 1990/1,12 September 1994. The Waitangi Tribunal is now on record as doubting whether section 6A is itself consonant with Maori custom because it assumes that 'take' and occupation or use exclusively determine 'rights of ownership': Memoranda of Waitangi Tribunal, 17 December 1993 & 11 November 1994, Wai 46: docs 2.26 & 2.59. A recent decision by Judge Spencer on customary ownership of islands in the environs of Aotea (Great Barrier Island) is much more reflective of tikanga principles: *Re da Silva & others*, Maori Land Court, Taitokerau District, 23 February 1998.

A delicate balance is required of law-makers and decision-makers. If tikanga Maori is ignored altogether, except when it needs to be ascertained for the purpose of extinguishment, then the monoculturalism of the past will be perpetuated. On the other hand, if custom law is entirely removed from the community context whence it arose then it will rapidly lose its authenticity. The selective application of aspects of custom law by cultural outsiders (however well-meaning) who operate within the state legal system may turn out to be just as subversive for the ongoing vitality and potency of tikanga Maori as attempts in the past at direct suppression or extinguishment. It is important not to codify and ossify 'rules' and interpret them in the future without any further reference to the checks and balances of community decision-making as understood by those who are cultural insiders sharing a holistic Maori world view.

The requirement for this delicate balance and a sense of wariness arises from the nature of tikanga Maori. We have insisted that Maori custom law has never been static. It has always been flexible to need and circumstances and capable of adaptation, including adopting new forms and practices. At the same time, flexibility and a willingness to adapt should not be confused with such fluidity or malleability as to enable changes to take place without regard to underlying values and fundamental principles. Part of the problem today is that judges, through no fault of their own, are being called upon to assess the mores of a society still largely foreign to them. This leaves scope for those who would seek to profit from the situation with dubious but compellingly presented evidence to pull the wool over the judges' eyes.

Tikanga Maori can never be the personal point of view of individual Maori advocating a particular outcome for a dispute in court proceedings. A major reason for publishing these guidelines is to point to the more significant underlying values and fundamental principles of Maori custom law so that idiosyncratic or perverse attempts to rely on Maori custom law may be detected. There may also be a need for an ongoing process of regular recourse to the wisdom and knowledge held within Maori communities.

Flexibility cannot be so great that a proposition can be advanced as custom law if it is in conflict with basic principles handed down from the ancestors. Certainty cannot be so paramount that past understandings of tikanga Maori should be adopted, along the lines of common law precedents, without continually being tested by the practical jurisprudence of

Maori communal decision-making. So judges and decision-makers are invited to give due recognition to tikanga Maori as a source of law, but also to be cautious - kia tupato. They should bear in mind the need for the vitality of custom law to be replenished within the fora of te ao Maori. We will make some suggestions as to how this might be achieved.

Bearing in mind these precautionary remarks, we turn now to some definitions and descriptions.

## 2. TIKANGA MAORI IS A SYSTEM OF LAW

The view generally accepted by anthropologists and other social scientists is that custom law is law generated by social practice and acceptance. It is distinct from institutional law, which is law formally generated from the organs of a state legal system according to the criteria of that legal system, but it is law nonetheless. Thus Keesing writes:

> *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.*[11]

Arthurs has a similar view:

> *The formal or centralist paradigm fails to explain why law-like patterns of social behaviour occur even though they lack some of the apparently essential characteristics of formal law. Nor does the paradigm take account of the frequent inability of formal law to achieve the results it is designed to achieve.*
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> *Thus, social scientists have not hesitated to propose new definitions of law which at least link it to other apparently similar phenomena. For example, it has been proposed that law consists primarily of rules by which persons in society order their conduct, and only secondarily of 'norms for decision' developed by the courts and of legislation enacted by the state.*[12]

Custom law is neither made by judges nor enacted by a parliament. Custom law is made by the community through long standing practice and precedent. It is interesting to note that the word 'law' has an obselete meaning from medieval english of 'What is considered right or

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[11] R M Keesing, *Cultural Anthropology: A Contemporary Perspective*, New York, Holt, Rinehart & Winston, 1976.

proper; justice or correctness of conduct'. However its linguistic origins come from the old english *lagu* and old norse *lag* meaning something laid down or fixed. Its usual contemporary meanings concern rules of conduct imposed by secular authority or divine commandment (*The New Shorter Oxford English Dictionary*).

There is no Maori word or phrase which accurately conveys either institutional law or custom law. 'Ture' is the term for 'law' generally used today. It is a modified transliteration of the hebrew 'Torah' - the divine laws of the Old Testament's first five books (the Pentateuch).[13] Ture is used to refer to all institutional law, including the law administered in the Maori Land Court governed by Te Ture Whenua Maori Act 1993. The institutional law of New Zealand is derived from or developed from English and 'western' legal concepts and rules. With very few exceptions (most of them occurring only recently), New Zealand law has either ignored Maori custom law or has operated so as to extinguish custom law. Institutional law or ture may therefore be described accurately as Pakeha law.

No Maori word properly conveys 'rule'.The closest one might get to a word for 'rule' is 'kawa' which is a term used for the processes and procedures associated with rites of incantation and ritual. There is a modern, but not universally agreed upon, linkage of kawa with the diverse protocols for hui held on marae - as in the second schedule of the Treaty of Waitangi Act 1975. This empowers the Waitangi Tribunal to 'have regard to and adopt such aspects of te kawa o te marae as the Tribunal thinks appropriate in the particular case'.

The closest Maori equivalent to 'custom law' is 'tikanga'. Another word of similar import which might be used (and was used in the past - including during the Treaty debates at Waitangi immediately prior to the signing of the Treaty in 1840) is 'ritenga'. In modern usage, however, tikanga is the word which has prevailed to encompass the indigenous law, lore and custom of Maori handed down from the ancestors and applied to this day.

Tikanga derives from the word *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. Tikanga might be said to include rules or laws in some circumstances but more usually comprises

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[12] H W Arthurs, *Without the Law*, Toronto, University of Toronto Press, 1985

[13] *Ture* was used by missionary translators of sacred scriptures in order to avoid the sexually explicit connotations of the more obvious transliteration: *tora*.

largely idealised standards of correctness and justice - often attributed to famous ancestors. The principles of tikanga provide the base for the Maori jural order. Thus -

- The ambit of tikanga is much wider than rules or laws and includes moral and spiritual aspects of human behaviour;
- The focus of tikanga is on 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 religion.

As Jackson put it:

> *[The sanctions of Maori law] were essentially religious because religion both dominated and was a reflection of the Maori way of life. It emanated from the everyday existence of Maori people and at the same time gave their existence meaning.*[14]

Tikanga includes measures to deal firmly with actions causing a serious disequilibrium within the community. It also includes approaches or ways of doing things which would be considered to be morally appropriate, courteous or advisable, but which are not rules the breaking of which entails punitive sanctions. For example, it is tika to purify ones self through cleansing with fresh water following proximity to death, but if this is not done there is no law with a specified penal sanction for non-compliance.

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 subject to tikanga Maori. All of tikanga might be said to be custom, but not all would come within the usual definitions of law and very little involves fixed 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. Prytz-Johansen put it this way:

> *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*.[15]

This underscores a major difference between Pakeha law and tikanga Maori. Pakeha law tends to be highly prescriptive and has the consequent advantage of ensuring a high degree of certainty as to what the rules of the legal system are. This relative certainty is seen to be a clear advantage of formal 'western' derived legal systems. Tikanga Maori are not at all prescriptive. The focus of tikanga Maori are the values underlying the conduct or approach required in a given situation. Thus tikanga Maori as a social system was traditionally pragmatic and open ended and it remains so today. For example, people may trace their descent and attach themselves to descent-groups through forebears of both sexes in each generation. Orators with a deep knowledge of whakapapa linkages may skillfully relate themselves to a wide range of descent-groups as occasion requires.

Aspects of tikanga may be subject to a particular interpretation according to certain circumstances but then reinterpreted in the light of other circumstances. It is congruence with the fundamental underlying value base which is always accorded priority. A person imbued with the understandings of tikanga Maori will focus on the value base, therefore, rather than on any 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.[16]

That is not to say that tikanga Maori completely lacks rules nor that Pakeha law lacks a value base. The point is rather that tikanga Maori is law for relatively small, homogeneous communities bound by whakapapa links and relies for its efficacy directly upon the active support of members of those communities. It must be capable of responding to community attitudes - those of the hapu or whanau, iwi or marae - because the members of the communities are, in point of fact, the 'judges' and 'lawmakers'. It has to be more directly accountable to the community from which it arises than Pakeha law is to the larger, more complex, heterogeneous and sometimes fractionated communities of people who are citizens

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[14] M Jackson, *The Maori and the Criminal Justice System. A New Perspective: He Whaipaanga Hou*, Part 2, Wellington, Department of Justice, 1988, p 42

[15] J Prytz-Johansen, *The Maori and his Religion in its Non-ritualistic Aspects*, Copenhagen, E Munksgaard, 1954, p 172

of the nation state or residents living within it. Tikanga Maori is necessarily less precise as a result. Thus while Pakeha law may claim to be fundamentally reflective of social values and may be derived historically from ascertainable religious and cultural value preferences, 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 rights and entitlements was the maintenance of one's link with the land. This was expressed in the term 'ahikaroa' or the principle of maintenance of one's fires or hearth upon an area of land. The Native Land Court, whose job it was to apply 'Native custom' in the investigation of title to land, laid it down that ahikaroa was lost irrevocably if the claimant had been absent for three generations or more. The court's imposition of such a rigid rule subverted the essence of ahikaroa which fundamentally represents a cultural value on relationship and connectedness between people and land. As we will say later, the concept of ahikaroa ensured the maintenance of obligations to the community and to the land itself - the protection of the relationship of each to the other. Absence did not necessarily mean that these relationships were not being nurtured. Land Court rules resulted in individuals of some groups securing interests in land where tikanga Maori would have concluded no right existed, while other kin groups were excluded where the connections with the land had been maintained by other means.

The effect of imposing a rules-based approach on tikanga Maori has been a significant factor in distorting a proper perception of Maori custom law. This highlights the danger that is ever-present if this work is seen to stray into an attempt to codify tikanga Maori. Codification is the very antithesis of tikanga Maori, for it freezes what is considered tika in a moment in time and prevents tikanga from responding to the special circumstances of particular cases in the future. It is for this reason that the approach of the authors is to articulate the base values of tikanga Maori rather than to prescribe guidelines for conduct or social control which, frozen in time, inevitably will be perceived as rules.

## 3. TIKANGA MAORI - NGA PUTAKE: VALUES

### 3.1 Introduction

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[16] J Metge, *New Growth From Old: The Whanau in the Modern World*, Wellington, Victoria University Press, 1995

Western law no doubt arose out of social norms which reflected fundamental values accepted in the wider community, or at least the law-makers' perception of what the shared community values were. Nevertheless there is a clear distinction in conventional Pakeha understandings between the body of the rules of law on the one hand and the underlying values on the other hand. Tikanga Maori does not draw such a clear distinction. Tikanga Maori includes the values themselves and does not differentiate between sanction-backed laws and advice concerning non-sanctioned customs. 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 any 'rules' which may be derived from them. Without an understanding of these values, the prescriptions may 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 at least five fundamental values which may be described as conceptual regulators informing the totality 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 one's own;
- Tapu - respect for the spiritual character of all things.

As always in tikanga Maori, these five fundamental values are closely interwoven. None stand alone.

As always in tikanga Māori, these five fundamental values are closely interwoven. None stand alone and this is not a definitive list. Durie in 'Custom Law' listed seven conceptual regulators whanaungatanga; mana; manaakitanga; aroha; mana tupuna; wairua; utu.[17] For Hohepa the most important principles that support, guide and often overarch tikanga were tapu, mana, pono, whanaungatanga, aroha and utu.[18] Manuka Henare's contribution to the Royal Commission on Social Policy (1988) identified whanaungatanga; wairuatanga; mana Maori (including mana, tapu and noa, tika, utu, rangatiratanga, waiora, mauriora, hauora and kotahitanga). Henare's list of nga pou mana were whanaungatanga; taonga tuku iho; te ao

[17] Durie, at 4-6.

turoa; turangawaewae. Clustered with whanaungatanga were tohatoha and manaaki.[19] Cleve Barlow gave mauri prominence in his writings on tikanga.[20]

### 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 *atua* (spiritual entities). The glue that held the Maori world together was whakapapa or genealogy identifying the nature of relationships between all things. There was no human : nature dichotomy, all things were related and all things were imbued with spirituality and power. That remains the position today. In traditional Maori society, the individual was important as a member of a collective. The individual identity was defined through that individual's relationships with others. It follows that tikanga Maori emphasised the responsibility owed by the individual to the collective. No rights enured if the mutuality and reciprocity of responsibilities were not understood and fulfilled.

Thus, the transfer a right in respect of land lasted only so long as the relationship between the transferor and transferee remained healthy. Indeed the transfer was itself designed to seal the relationship and ensure its ongoing vitality. If it failed in that purpose and the relationship terminated, then the transfer also was voided. Similarly, failure to occupy one's allocated land would lead to its reversion to others whether the source of entitlement was based in good ancestral title or not.

Although institutional law has eliminated the application of tikanga Maori to land interests under the state legal system, these whanaungatanga values remain very strong in modern Maori society and continue to inform the nature of the relationships between peoples and their ancestral lands. Numerous whakatauki (sayings), identifying the connectedness of particular mountains, rivers or lakes, tribes and people, are constantly invoked to reaffirm whanaungatanga between people and their lands.

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18 Hohepa in Hohepa and Williams, at 14.

19 M Henare, 'Ngā Tikanga me ngā Ritenga o te Ao Māori: Standards and Foundations of Māori Society' in Royal Commission on Social Policy, *The April Report* (1988), vol 3, at 3-42.

20 C Barlow, *Tikanga Whakaaro: Key Concepts in Māori Culture* (Auckland: Oxford University Press, 1991).

The corollary to the paramount importance of the collective in Maori society was that the community accepted responsibility for its members. Thus the institution of 'muru' and practices associated with it - a key element of the utu principles to maintain reciprocity and balance in society - provided a means of transferring goods and resources to aggrieved parties for the wrongdoing of another. It was certainly not just an individual wrong doer who would suffer this sanction. His or her whanau would 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 often valued by the pioneer settler culture was frowned upon in traditional Maori culture. This is encapsulated in the pejorative term 'whakahihi' (arrogant) which would be applied to those who stepped out of line.

The individualised criminal justice system now in place has undermined the scope for collective sanctions but the importance of kin relationships, the priority accorded the collective and the responsibility of the collective for its individuals remain extremely 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 for them humanity is directly descended from Rangi and Papa. The myths and legends concerning them, their eldest son Tane Mahuta and his siblings is an indigenous body of knowledge which seeks to explain the origins of the universe and the way things are in the world. This Maori cosmogony features whakapapa and the personification of natural phenomena. It would be quite wrong to dismiss these myths and legends as mere superstition or the quaint imaginings of pre-modern people. It is, as Maori Marsden put it, a matter of 'fundamental knowledge':

> *Myth and legend in the Maori cultural context are neither fables embodying primitive faith in the supernatural, nor marvellous fireside stories of ancient times. They were deliberate constructs employed by the ancient seers and sages to encapsulate and condense into easily assimilable forms their view of the World of ultimate reality and the relationship between the Creator, the universe and man.*
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> *Cultures pattern perceptions of reality into conceptualisations of what they perceive reality to be: of what is to be regarded as actual, probable, possible or impossible. These conceptualisations form what is termed the 'world view' of a culture. The World view is the central systematisation of conceptions of reality to which members of its culture assent and from which stems their value system. The world view lies at the very heart of the culture, touching, interacting with and strongly influencing every aspect of the culture.*
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> *In terms of Maori culture, the myths and legends form the central system on which their holistic view of the universe is based*.[21]

The significance for Maori of the ethic of kaitiakitanga in relation to all creatures and all natural resources is a direct consequence of the importance given to the genealogical relationships contained in Maori cosmological understandings. Similarly, the recognition of the tapu of these resources and the responsibility to respect that tapu also results in part from the kin relationships between the human, the physical and the metaphysical.

Within iwi, hapu and whanau – the collective entities of Maori society - whanaungatanga operates like a magnet. The most notable orators are always able to emphasise commonality of whakapapa and interconnectedness, thus 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 definition of membership of one hapu rather than another and of one iwi rather than another is always somewhat vague - broad and grey definitions rather than black and white distinctions. This also contributes to the difficulty Maori have in laying down territorial boundaries with the precision which might be required for the borders of a nation state. Whanaungatanga emphasises the inclusiveness which permeates Maori values – an inclusiveness which extends to whakapapa links with non-human resources and beings. Whanaungatanga is opposed to exclusiveness.

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[21] M Marsden & T A Henare, 'Kaitiakitanga: A Definitive Introduction to the Holistic World View of the Maori', paper for the Ministry for the Environment, 1992, pp 2-3

This inclusiveness is a major cause of irritation in relationships between Maori claimants and the Office of Treaty Settlements, particularly over questions of mandating Maori negotiators. The Crown's desire to ensure certainty and finality have led to laying down requirements for precision in defining iwi with a roll of beneficiaries and a marked out territory. The Crown's emphasis on iwi, to the exclusion of hapu, inevitably comes into conflict with tikanga Maori principles of whanaungatanga. The requirement of a top-down social hierarchy with a mandated leadership for iwi sits most uncomfortably with bottom-up whanaungatanga relationships.

### 3.3 Mana

Mana is the currency of historical and modern Maori leadership. It is defined in the 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 and has a spiritual origin. It is thought of as being received from the atua – 'that which manifests the power of the gods'.[22]

For clarity of understanding Maori Marsden identified three aspects 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.[23]

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

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[22] M Marsden, 'God, Man and Universe: A Maori View' in M King (ed), *Te Ao Hurihuri: The World Moves On*, Wellington, Hicks Smith, 1975, p 194
[23] M Marsden, 'Te Mana o Te Hiku o Te Ika', 1986, Wai 45: doc A7

position today. Yet mana tupuna did not always win the day traditionally and will not inevitably prevail today. Tikanga enables a person to trace descent through both male and female lines in every generation (technically known as an ambilineal descent system). Along with the ethic of whanaungatanga, this means that almost everyone with leadership potential will be able to identify 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 one's 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 mythological example of mana tangata (if somewhat divine) in operation. A person (whether male or female) with impeccable whakapapa to claim a role as a rangatira, may none the less be relegated to a ceremonial, minor or only token role unless the appropriate skills of mana tangata are shown.

The interplay between mana tupuna and mana tangata in particular has tended to accentuate the importance of accountability between rangatira and people of a tribe 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, when people gather to discuss issues of moment, 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 people 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.*

In the modern context it is important to mention that mana tangata is not gender specific. Mana wahine has been distorted by the perceptions of officials and writers during the contact period to diminish the importance of women. Women are the eponymous ancestors of many hapu, and they were and are active leaders in all aspects of Maori endeavour. Numbers of women were among the rangatira who signed the Treaty of Waitangi. While Te Rauparaha is

remembered as a great rangatira, much of his success depended upon his brother Nohorua, a tohunga, and his sister Waitohi, a diplomat. As Maori law recognised ambilateral and ambilineal descent, it is equally as important to whakapapa through tupuna who were women and through those who were men. In Maori cosmogony female figures are not merely incidental to a patriarchal narrative as they tend to be in biblical mythology. Te reo Maori is gender inclusive in ways that the English language is not – ia for both he and she.[24] An affirmation of mana wahine is of paramount significance in order to understand the values of tikanga Maori.

Mana atua is also of the utmost importance. This emphasises the tapu nature of the leadership role and the respect which the community owes it chosen leaders. It means that, though consensus arrived at in hui or runanga is fundamental to Maori systems of decision-making and leadership, rangatira who wear the mantle of 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 the people. Hence:

> *He ranga Maomao kei te maana 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.*

[24] P Hohepa in P Hohepa & D V Williams, *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession*, Wellington, Law Commission, 1996, pp 25-26; A Mikaere, 'Collective Rights and Gender Issues: A Maori Woman's Perspective', paper to Collective Human Rights of Pacific Peoples Conference, 1998

This understanding of the role of a rangatira as a weaver of the people needs to be borne in mind when considering the nature of rangatiratanga and the Treaty guarantees of tino rangatiratanga.

### 3.4 Utu

Utu means literally compensation and it conveys the ethic of striving to achieve balance in all things. It 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 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' distributions 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.[25] There are many current examples of iwi and hapu who continue to engage in exchange relationships which commenced before Pakeha colonisation. A notable example is the Kingitanga circuit of poukai which annually re-afffirm the relationships between the King movement and many hapu of Tainui and Ngati Maniapoto, and also some hapu from further afield in the Bay of Plenty and Manawatu. Ancient links between Ngati Porou and Tainui on opposite coasts, and more recent alliances between Sir Apirana Ngata and Princess Te Puea, are symbolised in 'Nga tai e rua' marae at Tuakau. The complex weave of inter-tribal associations and relationships between ancient hapu, more recent waka alliances, and 19th century arrangements has led to the inclusion of Ngati Porou and Ngati Pukenga as iwi of Hauraki represented on the Hauraki Maori Trust Board. Ngati Whatua of Orakei, with primary links through Te Taou to Taitokerau, also remember with gratitude their sojourn at Awhitu, when in need of protection from Ngapuhi and, in appropriate circumstances, will identify themselves as te kei o Tainui. Throughout the country countless examples of continuing reciprocal relationships such as these will be found.

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 have suggested that these terms have received heightened profiles only since the arrival of Christianity but this is probably incorrect. The traditional allusions to aroha and manaakitanga make it clear that these terms were being constantly emphasised in pre-contact days. There are famous stories, which would be inexplicable apart from the importance of these principles, of the exercise of aroha and manaakitanga by chiefs of great mana:

(a) the giving of the chief's son or daughter to a vanquished enemy in order to make them strong again and restore their mana;

(b) the transfer of extensive areas of land to a beaten enemy in order to ensure the survival of that tribe;

(c) 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 modern examples of tau utuutu in action among iwi and hapu today. **[JVW example:** It is significant that Tainui's establishment of the Matiu Rata scholarships (?)is seen to be an acknowledgment and reinforcement of the ancestral links between Muriwhenua and Waikato which may be traced back to R **??]** The immense hospitality displayed by claimants to all people who attend hearings of the Waitangi Tribunal, whether they are cross-claimants, representatives of the Crown, disgruntled local Pakeha or whoever, is a modern example of aroha and manaakitanga in action.

### 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

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[25] J Metge, 'Cross-cultural communication and land transfer in Western Muriwhenua, 1832-1840', Wai 45: doc

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's whanau being subjected to muru and, in some cases in the past, the offender 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, to protect sacred sites or for conservation purposes. They have been relied on as evidence in court proceedings concerning the unlawful taking of seafood resources. They have been imposed to protect wahi tapu from interference by unauthorised archeologists.

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 mana and respond to the obligations under current environmental legislation.[26] This became an issue of some significance for the Environment Court which must apply a statutory definition of kaitiakitanga. This definition, or previous applications of it, did not always conform with the understandings of tangata whenua appearing to give evidence of what

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F13, 1992

[26] M Roberts, W Norman, N Minhinnick, D Wihongi & C Kirkwood, 'Kaitiakitanga: Maori Perspectives on Conservation', University of Auckland, unpublished paper.

kaitiakitanga meant for them. Therefore a 1997 amendment to the Resource Management Act definition now specifies that ‘ “kaitiakitanga” means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship”. The nature of tikanga Maori is therefore of direct relevance to the court’s jurisdiction when considering kaitiakitanga issues.

### 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 the tapu attached to people, objects or places might be so significant 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 fear 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 purposes.[27] Tapu is connected to and reinforces personal mana. It has political purposes in terms of protecting the sanctity of certain persons, ensuring appropriate levels of respect for hapu and iwi leadership and in keeping ceremonial or special aspects of life separate from the ordinary run of the mill. The mechanism is however centred in the mystical and spiritual, and it is this aspect of both modern and traditional understandings of tapu which ensures its efficacy. The notion of wairua (spirituality) in association with tapu makes the spirit world a part of reality to be reckoned with, manipulated or accommodated with the same diplomacy as governs inter-personal relationships.

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[27] R Taylor, *Te Ika a Maui; or, New Zealand and its inhabitants* (2nd ed), London, W Macintosh, 1870, p.163

## 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. Ordinarily, whanau do not operate as political entities.

- **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.

Hapu is often incorrectly translated as sub-tribe with the connotation that the hapu is politically inferior to an iwi. The relationships between hapu and iwi are complex and are not in a vertical hierarchy of authority.

Some hapu communities, particularly on the East Coast, adopt the term 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 - often described as an eponymous ancestor because her or his name is incorporated in the iwi name.

Iwi is also the word commonly used for bones. Again this accentuates the centrality of kin links to this level of social organisation. By way of comparison, those of other districts were called 'tauiwi'. During the 19th century iwi came more regularly to mean the several hapu of a region standing under the name of a common, remote and famous ancestor.

- **Waka** - much later, probably in the post contact period and as a response to Pakeha efforts to destroy the tribal base of Maori society, 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 and hapu, claiming descent from the captain or crew of the waka and acting in concert.

Waka is the Maori word for canoe, without any explicit physical connotations of kinship. The traditions of the Te Arawa and Waikato (Tainui) confederations of tribes are the best examples of the development of a waka tradition.

Pre-contact Maori society was characterised by dynamic change with hapu frequently 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 often 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 hapu cohesion was relatively rare, being achieved for particular purposes such as off-shore fishing or warfare. This period was characterised far more by hapu autonomy and inter-hapu disputation.

The contact period through to the middle of the 19th Century was marked by unprecedented social change. There were significant migrations and relocations and an increase in large scale warfare between unrelated or distantly related groups. Prior to colonisation the balance of power in musketry became less uneven, peace broke out in most areas and some populations returned to their former villages. Nevertheless, Maori social life continued to drastically

affected by a very rapid decline in population resulting from the introduction of previously unknown diseases by traders and immigrants, for which Maori had no inherited immunity.

The second half of the 19th Century was characterised by the adoption of more regular habitation, permanent agriculture and larger aggregations at iwi or waka level. However there was also a sustained period of land and resource loss (and continuing population loss until the turn of the century) as a result of warfare, land confiscations and transactions with the Crown and settlers - most particularly in the impact of the Native Land Court.

At no stage, from the period of first arrival in these islands right through to the post contact period, could Maori social structure be accurately described as a simple pyramid of whanau, hapu, iwi, waka in ascending order. Rather, 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 collective 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 line for mana tupuna.

Changes in Maori society during the contact and early colonosation periods were dynamic, but never anarchic. In particular the changes taking place were always 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 and tikanga may be appreciated.

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

## 5.1 Rank and Mana

Rangatira lead and represent their hapu, either regularly, or sometimes for the purpose of a particular project. They are the most significant leaders in community affairs as the community organisers and representatives. They are the cement that binds and unites the various elements of the hapu. They are not necessarily older persons, but they are the leaders who sum up the views of a hui and represent hapu or iwi in relationships with others.

The term kaumatua ,and the gender specific terms koroua and kuia, are often treated as being synonymous with being an older person, but kaumatua status is not necessarily conferred on attaining a certain age. Kaumatua status was, and remains, an active leadership role. A kaumatua has social seniority, life experience and wisdom - which may be acquired at a relatively young age in exceptional circumstances.

Ariki 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, as continues to be the case with the arikinui of Kingitanga.

There is no neat hierarchy of kaumatua, rangatira, ariki who provide leadership of whanau, hapu and iwi respectively. The title ariki is sparingly used these days and usually applied only to the ceremonial leader of a confederation of hapu or iwi – who may be but is not necessarily the political leader of the waka or iwi. An ariki tapairu is a woman in a family of rank who is invested with special tapu. Dame Te Atairangikaahu is often spoken of as an ariki tapairu.

Tohunga or pukenga are specialists in a range of crafts and fields of knowledge, from carving, weaving and tattooing to the spiritual, mystical and healing arts. A specialist in any craft or knowledge field will know the appropriate karakia and rituals associated with their craft, as well as the relevant practical skills. Some tohunga will act in the manner of priests or shamans with a specific knowledge of religious and ritual practices. In the post-contact period the term

tohunga has been incorrectly and pejoratively applied mainly to those with an expertise in healing and knowledge of the medicinal value of indigenous flora.

**[Query: Are the terms toa, ware and tutua relevant to the tikanga Maori we are concerned with? If they are discussed, then what about the term morehu?**
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 and the ambilineal descent system 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.*[28]

## 6. NGA TIKANGA MO TE WHENUA - LAND

### 6.1 Connections to land

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:

> "*Kei raro i te tarutaru, te tuhi o nga tupuna"*

[28] Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, G P Publications, 1997, pp 29-30

> *"the signs or marks of the ancestors are embedded below the roots of the grass and the herbs"*[29]

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

The connections with land are reflected in all five of the underlying tikanga values identified above. Whanaungatanga or the relationship with land, mana or the power and authority which hapu and iwi derive from it, utu or the reciprocal relationship with it, kaitiakitanga or the obligation to protect it and tapu in its sacred character.

It is not possible to over-emphasise the fact 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.*

Hence also the affirmation in the preamble to Te Ture Whenua Maori Act 1993 that land is a taonga tuku iho of special significance to Maori people – with the key concept of taonga tuku iho to refer to ancestral links with land left untranslated even in the English text of the preamble.

### 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 convolutions peculiar to the particular case. Crocombe refers to six categories of land rights which may be paraphrased as follows:

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[29] Waitangi Tribunal, *Te Roroa Report*, Wellington, Brooker & Friend, 1992, p.49 quoting from evidence of

1. Rights of or claims to direct use, which includes the rights to plant, to harvest, to gather, or to build.
2. Rights of indirect economic gain.
3. Rights of control. Rights of use are almost invariably limited by rights of control, which are held by persons other than the user.
4. Rights of transfer, which are the effective power to transmit rights.
5. Residual rights including the reversionary interest in the event of non-compliance with specified conditions, breaches of social norms, etc.
6. Symbolic rights or rights of identification. For example the naming of particular places after parts of the body of a chief thus forming a symbolic and sacred relationship between the chief, the people and the land concerned.[30]

Different groups could hold each of these types of right at the same time and, indeed, any one type might be shared by more than one group at a time. The distinctive aspect of traditional Maori land tenure was that one's rights as an individual or whanau derived from the collective land holding unit - usually the hapu. This 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 for hapu/iwi and also at the whanau level. Each collective group 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 overright whether at iwi or hapu level, and the maintenance of one's obligations to that grouping. Hence, the values of whanaungatanga, utu and kaitiakitanga were central to maintenance of both the collective 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 allotee. 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, to cultivate, to fish, snare or hunt at certain spots. Consequently many persons and groups might have 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.

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 to any resource potential. This right of identification was, and remains, a most significant right for Maori. It describes the relationship to ancestral land and serves to remind donees, immigrants and even conquerors of their continuing responsibilities to tangata whenua, including the inherent right of recovery or reversion in cases of wrongful dispossession. Mana whenua claims and rights are not dependent upon ownership according to current law or continual occupation. Even if land has been alienated, the sacred connection to the land remains:

> *... the link between the person and the land by virtue of their history can never be erased ... "nga tapuwae o nga tupuna" ["footsteps of our ancestors"] ... remain on the land forever. The fires never go out.*[31]

A failure to understand this principle of tikanga led the Planning Tribunal into error for many years when it took a very narrow view of 'ancestral land' in section 3 (1) (g) of the Town and Country Planning Act 1977. Unless Maori still owned Maori freehold land in the area in question, the Tribunal refused to even consider issues raised by Maori under this section. In a judgment which heralded the 1987 sea-change in judicial thinking on the recognition of Maori rights by the legal system, Holland J said:

> *There may be a danger in interpreting what a European would describe as his or her ancestral land. What is required to be determined is the relationship of the Maori people and their cultures and traditions with <u>their</u> ancestral land.*[32]

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[30] Crocombe (1974), pp5-6
[31] *Te Roroa Report* (1992), p.49 quoting from evidence of Alex Nathan, Wai 38: doc D27
[32] *Royal Forest & Bird Protection Society v W A Habgood Ltd* (1987) 12 NZTPA 76, p 80 (emphasis in the original)

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