

CHAPTER EIGHT

MAORI DISPUTES AND THEIR RESOLUTION*

Pakeha societies were not alone in their history of conflict and violence. Disputes were, and still remain, an endemic part of Maori society. Part one of this chapter covers the nature of disputes within Maori society before colonisation, the principles and rules which were used to resolve disputes, and the people and forums that were central to that process. Part two outlines changes that have occurred in Maori society and the effects that these changes have had on Maori dispute resolution processes. Part three explores the principles and processes that should underpin a modern Maori system of dispute resolution.

I. RESOLVING DISPUTES IN TE AO KOHATU (TRADITIONAL MAORI SOCIETY)

According to one version of Creation, Papatuanuku and Ranginui, the primordial parents, lay together, closely entwined. Trapped in darkness between them were their numerous offspring, becoming increasingly dissatisfied with their cramped existence. Tane, who had glimpsed light, proposed that they separate their parents. Whiro disagreed. Others were undecided. Eons passed and disputes arose amongst the children. Gradually it became apparent that in order to improve their own existence they must permanently separate their parents. It was Tane who, with the assistance of Io-Matua-Kore, forced his parents apart. After the separation, physical existence as we know it came into being. Yet the burden of Tane's action remains with us forever. Papatuanuku still grieves for Ranginui and he for her. The dispute between the Atua that preceded the separation, continues. Tawhirimatea, God of winds and storms, rages against Tane, God of the forests and creator of humans. Humans, in their realm, are constantly reminded of the animosity which is between their Gods and which is also reflected in their own, human being. They must continually strive to overcome this internal conflict if they are to live in harmony with each other.

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- By Khylee Quince. In writing this chapter I have relied heavily on early Maori writings and information provided by kaumatua and kuia (elders) of the Tai Tokerau region. Whanau, hapu and iwi throughout Aotearoa have dealt with disputes in ways that have reflected their own particular experiences and customs. I have focused on Northland as it is the area with which I am most familiar. However, much of what is conveyed in this chapter reflects general themes that will be understood, if not shared, by all Maori.

Metaphysics deals with the nature of reality, and is the sum total of one's beliefs, basic convictions, and assumptions through which we direct our lives. The very nature of this being and existence is connected to these concepts. Descending from these broader principles are the ethical systems defining the nature of right and wrong, and also the epistemology of the theory of knowledge and the grounds of valid belief. In the Maori world these branches of philosophy are illustrated in the traditional creation stories and the general principles of tikanga Maori (Maori custom).¹

A. He Tangata Maori - Being Maori

Ancient Maori seers viewed the universe and all that it contained as a single, ongoing process. Within this process everything was inter-connected. A universal genealogy extended from the cosmos which has always existed, to Io - the original spiritual source of all being, to Ranginui and Papatuanuku the primordial parents, to their atua (god) children, and then finally to physical matter, including human beings. From the Atua, humans derived both physical form and spiritual being. Tane created the first human. Io breathed life into her and gave her sexuality, identity and spirituality.² Her martial characteristics were drawn from Tumatauenga. Her knowledge was drawn from the cosmos. Her mana (authority) and her tapu (sacredness) were inherited from the atua. These things were passed down from one generation of humans to the next.

Ancient Maori identified several different aspects, which combined to form the human condition. The tinana is the name by which the physical and biological aspects of a person, the physical self, are known. The wairua is the name given to the spiritual aspect. It is functional in nature. The wairua accompanies the physical body throughout its lifetime, protecting it, regulating its bodily functions and keeping it alive. An important aspect of the wairua is the ngakau, the emotional source from which our feelings derive. Through engaging our emotions, we are able to share our feelings and interact with others.

Mauri is the life-force which bonds the tinana and the wairua together. When the mauri is strong the tinana and wairua are also strong and healthy. When the mauri is weakened, vitality diminishes and the tinana and wairua become susceptible to illness and death.³

¹ Reverend Maori Marsden, 'The Natural World and Natural Resources: Maori Value Systems and Perspectives' in Resource Management Law Reform, volume 29A, Ministry for the Environment, 1988, p 13.

² Manuscripts of Wiremu Mahupuku of the Wairarapa Region, written in 1860. Held at the Maori and Pacific Collection, University of Auckland Library.

³ Marsden, p 20.

Maori Disputes and Their Resolution 3

Imminent within all creation is 'mauri' - the life-force which generates, regenerates and upholds creation. It is the bonding element that knits all the diverse elements within the Universal 'Procession' giving creation its unity in diversity. It is the bonding element that holds the fabric of the universe together.

The fourth element is the hinengaro, the source of our creative and intellectual perception. The knowledge with which we are born is believed to be drawn from the consciousness of the wider universe. It is placed in humans at birth and develops throughout their life. Maori believed that the intuitive mind (our 'silent companion') absorbs and processes information at a subconscious level, reasoning and reaching conclusions that are then made known to us, often through dreams and flashes of insight.

Together, these various aspects combine to form a complete person who is a composite physical, spiritual, emotional and intellectual being, a 'human' being.

Because the Maori of te ao kohatu believed that the ultimate source of all being is spiritual, the idea of kinship can, and ultimately does, extend to all things. However, in human society, the composite nature of the human person was part of the wider framework of Maori social structures based on human whakapapa (genealogy). Iwi (tribes), hapu (subtribes) and whanau (extended families) are specific human groupings, the members of whom are related to each other through ancestry. Within each group shared identity born of blood relationships was the basis of a 'collective identity'. Individual identity was subsumed by group identity, the group being viewed as a single, living body of which everyone was an essential part. Tai Tokerau kaumatua, Maori Marsden, describes it thus:

[Maori] Society provides its members with psychological security. For this provision, members are expected to reciprocate by contributing their skills, labour or goods to contribute to the social pool. Because the members were united on the basis of kinship ties the whanau or hapu group was regarded as organism rather than organisation. That is, that the group shared a corporate life and each individual an integral member of that body or organism performing a particular function and role. Therefore, to serve others is to serve the corporate self. Thus, loyalty, generosity, caring, sharing, fulfilling one's obligations to the group, was to serve one's extended self.⁴

In order to maintain its cohesiveness, Maori society was reliant on strong family affiliations. Whakapapa provided the organising principle for the establishment and perpetual continuation of physical relationships between past, present and future generations of Maori.

⁴ Marsden, p 18.

While whakapapa provided the structural framework within which Maori society existed, whanaungatanga (kinship) provided the moral and ethical framework within which daily interaction occurred between people who were related to each other. Whanaungatanga acted as the overriding principle by which 'right' and 'wrong' actions toward relatives were determined. Whanaungatanga practices were those that encouraged the members of a group to uphold family relationships and maximise the welfare of the group.

Living according to the principles of whanaungatanga produced a state of ora (wellbeing) in which the physical, mental, spiritual and emotional aspects of an individual were balanced and in harmony. This state of harmony and equilibrium within the individual radiated outwards to affect other members of the whanau. It resulted in unity of purpose, and peace and harmony amongst the members of the group. This was the state that one set out to achieve in all aspects of life, both as an individual and as part of a group. In these conditions the corporate body thrived.

B. Mana and Tapu

The concepts of mana (authority) and tapu (sacredness) were universally known throughout Aotearoa. The institutions of mana and tapu were closely related. They were used to regulate the actions of the members of a group. They were also used to regulate inter-hapu activities. Together they formed the basis of the normative and prescriptive rules under which Maori society operated. Mana was the source of human authority over the actions of others. Tapu was the condition or state of an object that could be altered by using that authority.

The source of mana Maori was the atua. Each deity known to Maori possessed mana over particular activities. Maori believed that Mana tangata (human authority) was derived directly from the Gods. Each person possessed inherent mana by virtue of his or her whakapapa descent from the Gods. However, some individuals possessed more than others did. This enabled them to excel in certain activities.⁵ Diverse actions, some of which may at first appear contradictory, were attributed to mana. Mana could be used in a way that benefited people. The ability of rangatira (leaders) to protect their people through benevolent actions and careful guardianship was considered evidence of mana. In this instance mana is equated with human kindness and is drawn from the peaceful atua, Rongo. Mana could also be used in ways that were extremely detrimental to humans. The assertion of power over non-related groups and their annihilation in warfare was also considered evidence of mana. In this example mana is attributed to physical prowess and is derived

⁵ Mana could be enhanced through ritualised appeals to the Gods. It could also diminish if not used correctly.

Maori Disputes and Their Resolution 5

from Tumatauenga, the God of war. The ability to sway others from a violent course of action was another means by which mana was evidenced. Mana in this sense refers to charismatic appeal and is drawn from Papatuanuku, the primordial parent and nurturer of life. Meri Ngaroto of Te Aupouri demonstrated this mana when she composed the following whakatauki (proverb). The strength of her message was such that it saved the lives of visitors her people were planning to kill:

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|------------------------------------|--|
| Hutia te rito o te harakeke | Pluck out the heart of the flax |
| Kei hea te ko'mako e ko | Where will the bellbird sing |
| Ki mai ki au | Ask me |
| e aha te mea nui o tenei ao | What is the most important thing of this world |
| Maku e ki atu | I will respond |
| He tangata, he tangata, he tangata | People, people, people ⁶ |

There were other practical applications of mana. It was the basis of the authority of the rangatira to allocate land to individual members of a group. It was also the accepted basis from which individuals were able to establish group territory, enter into negotiations with other hapu and iwi and make binding agreements on behalf of their own people, with other groups.

The Maori of te ao kohatu believed that everything had an inherent tapu by virtue of whakapapa descent from Ranginui and Papatuanuku. Personal tapu was an extremely important attribute of an individual. Recognition of personal tapu and recognition of the integrity of the wairua were inseparable. Violations of personal tapu endangered the individual by weakening the mauri, thereby reducing the protective capacity of the wairua. This internal disruption adversely affected an individual's ability to fulfil their whanau obligations. The sanctity of the wairua had to be protected if the welfare of the person, and those to whom he/she was related, was to be maintained.

Personal mana also protected the spiritual integrity of the individual. It provided the authority by which one established private dominion over oneself and then asserted it to protect against spiritual and physical violation by others. Together, mana and tapu enabled the individual to act autonomously, so long as they did not interfere unnecessarily with others, and continued to uphold their obligations to the group as a corporate body.

In day-to-day life, mana supported the institution of tapu as the basis of property entitlements. Personal property rights were acquired through the extension of personal tapu to objects. The degree of tapu signified the degree

⁶ This whakatauki (proverb) was composed by Te Aupouri Rangatira, Meri Ngaroto, in order to prevent the massacre of a group who were visiting Ohaki Marae in Ahipara. The exact date is unknown but thought to be around the early 1800s.

of entitlement to one person and the degree of prohibition against others. Mana was the means by which an individual could do this.

Groups used the institution of tapu to establish rahui (restricted areas) to reserve, preserve and conserve their resources by extending their tapu to natural resources. The pou rahui (rahui pole) served as a warning to others who might trespass to keep out. The institution of mana enabled them to maintain control of territory by having others recognise their authority.

C. Disputes within Maori Society

Disputes arose when outsiders challenged the mana of a group. There were two ways this could occur. First, by flouting the authority of a group to exclude others from economic resources or territory. Second, there could be an interference with the personal tapu of a member of the group. An intention to offend was not essential. It was sufficient that the actions and words had the effect of offending, insulting or denigrating members of the group. This is because tikanga advocated a normative state of wellbeing or balance between all aspects of the human, natural and spiritual worlds. A dispute or offence that breached tapu upset this balance, and utu (recompense) was required to rectify the balance, irrespective of intentions or lack of malice.

The actions and words that lead to breaches of mana and tapu were many and various. The Pootaka-Tawhiti, Kupe and Turi narrations, traditional accounts of the disputes which lead to Maori leaving Hawaiki and voyaging to Aotearoa include examples of adultery, violence, competition for resources, theft, insults, deception and the killing and eating of revered pets. Accounts drawn from the Hokianga region show that after arrival in Aotearoa the pattern of disputes continued.⁷ Recorded incidents include the robbing of titi holes, insults between brothers-in-law, wearing the clothing of a high-born woman, adultery, elopements, trespassing into the territory of another hapu, accusations of wrongful behaviour, arson, eating kumara (sweet potatoes) belonging to another, boasting, breaches of fishing rahui, rape, and murder.

In all these instances it is the breach of human integrity and authority that was considered important. The spiritual violation of the individual and the

⁷ In 1903, thirteen Rangatira of the Waihou/Whakarapa region of Hokianga related the history of the region to a panel of four Maori rangatira who were from the region but were not claimants to the particular area. The information recorded is amongst the most reliable available to modern scholars. Thirteen separate accounts are provided. Each rangatira comments on the whakapapa provided by the others. Disagreements when they arise are as to 'who' has an entitlement to land based on factual events. What is consistent throughout is the process by which entitlements arise and the use of the terms such as mana, tapu and rahui as the determining entitlements. (Pa Henare Tate, Motuti Community Trust (ed), *Karanga Hokianga*, Allied Graphics Ltd, Hokianga, 1986).

Maori Disputes and Their Resolution 7

ensuing damage to the mana and tapu of the group were major reasons for disputes amongst individuals and groups.

The collective nature of Maori society, and the close bonds of loyalty amongst kin meant that disputes between individuals could escalate rapidly into inter-hapu battles and sometimes, open warfare. For example, an idle boast about cultivated crops lead to the speaker being stabbed in the leg by one of his listeners from a neighbouring hapu. In retaliation, the speaker's relative abducted the daughter of the rangatira of the neighbouring hapu. In reprisal a taua (war party) was despatched to pull up all the kumara grown by the abductor. Matters continued to deteriorate until a rangatira who was related to both groups intervened.⁸ An example with far more serious consequences occurred when a woman related to the rangatira Tarutaru was abducted, raped and then murdered by members of a Southern iwi. His children, with the help of Ngapuhi, annihilated two Southern marae, desecrating and burning the taonga (highly tapu possessions) of the people who lived there, thereby earning them the name Te Rarawa (people without extreme). By this process Te Rarawa not only restored its mana but enhanced it as well.⁹

D. Resolving Disputes

1. Utu - reciprocal actions and settling disputes

In the Maori mind, the world existed in a natural state of balance. Mana and tapu were the institutions by which interactions were negotiable between different parts of the universe. Offences committed by one human towards another upset the balance within the community. Thus, in most instances, reciprocal actions and/or words were required to restore the equilibrium.

Mana and Tapu dictated both the origins of disputes and their consequences, irrespective of whether they were within a group, or between different groups. When Te Pekatahi, once a great warrior but at the time old, burnt the food resources of his village in a fit of rage at being left behind to tend the fires while others went to war, the recorded response of the returning warriors was:

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|-------------------------------------|-------------------------------------|
| Kaore I ahua ki aua kai I tahuna ra | To disregard the burning of the kai |
| I te mea, | Because |
| Koiana to ratou tupuna | He is their ancestor |
| Me to ratou mana | And their authority ¹⁰ |

⁸ Pa Tate, p 13.

⁹ Pa Tate, p126.

¹⁰ Pa Tate, p 34.

Therefore, any action that diminished him would diminish them. Conversely, a brother-in-law who insulted the work of his sister's husband from another hapu was evicted and thereafter forbidden to visit his sister. He died without seeing her again.¹¹

Those who breached rules associated with mana and tapu attracted a variety of spiritual and temporal consequences, including death. Penalties passed to living relatives through whanaungatanga and extended to ensuing generations via whakapapa. In traditional society therefore, liability for disputes was both collective and inter-generational, due to the requirement for utu, which could be delayed, but not forgone. The lasting settlement of any dispute depended on a number of factors, including the extent to which actions and words were accepted as violations of the mana and tapu of a group by the 'violator', the ability of the parties to reach a peaceful settlement and adherence to any course of action decided upon. If these measures failed, physical force was the last resort by which a group could enforce their 'rights'.

The despatching of a taua to exact utu for an acknowledged breach of mana or tapu was always an option. In some instances the two parties involved would agree in advance on the extent of the utu due for an offence. If the taua muru (group exacting reparation) took more than the agreed utu it could precipitate further animosity between the rival groups, necessitating a marriage or act of humility at a later date to end the hostility.

Hostility between groups who had been engaged in protracted disputes was sometimes settled through a public marriage ceremony that united the mana and tapu of the two groups by combining their whakapapa.¹² The withdrawal of an entire hapu from disputed territory was another means of ending fighting, as when Moetara removed his iwi to South Hokianga, leaving North Hokianga to Ngati Manawa. This was considered an act of mana rather than evidence of weakness and cowardice.¹³

2. The Importance of Rangatira

Within the group the central role of the rangatira in the settlement of disputes was crucial to the success and permanence of any decision reached. The mana of rangatira could be inherited or earned during one's lifetime. Most rangatira were born into the role of leadership.¹⁴ Trained from youth to guard the

¹¹ Pa Tate, p 61. In light of the extremely close family ties between siblings in Maori society at the time, this was a very harsh penalty.

¹² Pa Tate, p 74.

¹³ Pa Tate, pp 92-96 and 111-116.

¹⁴ There were other ways of gaining mana. In a modern study of the institution of mana, Durie states that 'mana tupuna expressed the basic ideology that all things came from ancestors, land rights, status, authority, kinship, knowledge, ability etc. Mana was

Maori Disputes and Their Resolution 9

welfare of their people, invested with the trust of their people, they were widely recognised as carrying the mana of their people.¹⁵ They acted on behalf of their people in public forums, entering into binding agreements with the rangatira of other hapu and iwi. The authority that went with this leadership was rarely challenged.¹⁶ The word of the rangatira was binding.¹⁷ He or she had the ability to make grants of land to outsiders,¹⁸ to protect individuals from death,¹⁹ and to lay down binding rules that governed the behaviour and property of individuals.²⁰

The rangatira demonstrated his or her mana through actions and words that strengthened the cohesiveness of the group. Three principles, all deriving from the greater humane principle of whanaungatanga were employed to achieve this. The first was aroha, the emotional response stirred by feelings of empathy and kindness toward others, a recognition of the common bond of humanity shared with others. The feelings had to be genuinely held. Cautions against being duped by shallow displays of aroha were passed down in whakatauki:

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|---------------------------|---------------------------------|
| Ehara te aroha | Aroha is not |
| I te kiri moko | the tattooed face |
| Ko ia tera e pupu ake ana | It is that which burgeons forth |
| I te whatumanawa | From within ²¹ |

usually presented as ascribed but ascription was usually retrospective to validate achievement (“he is brave, caring etc for he is the descendant of so and so”) so that in practice mana was both ascribed and achieved (Eddie Durie, ‘Custom Law’ (unpublished paper) 1994, p 8 (held at Maori and Pacific Collection, University of Auckland Library). This accords with the words of the Northern rangatira at Hokianga as recorded in Pa Tate, pp 46-49 There are also instances of rangatira being appointed to lead their people who were left leaderless (Pa Tate, p 20).

¹⁵ Pa Tate, p 60. The importance of rangatira to Maori society cannot be overstated. These people epitomised the very best in humankind. They carried the honour, integrity, prestige and pride of their people. Their words were tapu and their authority was immense.

¹⁶ Pa Tate, p 60.

¹⁷ The mana which attached to the voice of the rangatira and the tapu nature of his utterances enhanced his pronouncements. Through the rangatira the group spoke and their honour and dignity were dependant on adherence to agreements made and obligations undertaken via their rangatira.

¹⁸ Pa Tate, p 60.

¹⁹ Pa Tate, p 99.

²⁰ In fact there are instances where a Rangatira sought the opinion of the persons who would be affected by his decision only to be told, [Translation] “Don’t ask me, you are the Rangatira, it’s up to you - I’ll go along with whatever you decide”. Korero between Re Te Tai with Hotene as told by Pauro Te Rangaihi. (Pa Tate, p 40).

²¹ The original speaker of these words is not known. However, they were frequently quoted to young Maori who aspired to leadership roles, accompanied by firm reminders that the

Aroha had to be evidenced in acts of benevolence toward others; words were not sufficient on their own.

The second principle was atawhai. Atawhai was the obligation passed to successive rangatira to serve others, to protect the well-being of their own people and to extend aroha to others. Humility was stressed in the traditional houses of learning.²² Thus, when Ngati Manawa rangatira, Te Hira lay dying, his words to the rangatira of the region who had gathered en masse to hear his ohaki (dying testimony) were:

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|-------------------------------------|--|
| Kia atawhai ki nga iwi | Look after the people |
| Kia tika te whakahaere i te whenua. | Ensure things remain correct on the land |
| Ta te rarangatira whenua ki a ia, | The rangatira has his land |
| Ta te mokai whenua ki a ia | Those under his care have theirs ²³ |

Later, when his brother Te Tai was dying, his words to his son were:

| | |
|---|---|
| E koro | Son |
| kotahi ano aku kupu ki a koe. | I have only one thing to say |
| I muri nei, | Afterwards |
| kia atawhai ki aku iwi mokai. | Look after my precious people |
| Kia atawhai ki te iwi i whakanuia ai au | Look after those I have raised above myself |
| kei whakaaro koe | Lest you begin to think |
| ki to taha rangatira | Of your own chiefliness ²⁴ |

An associated principle was that of manaaki, the ability to look after those who were temporarily under one's care. This referred to hosting other groups and to the degree of hospitality and safety extended to the group.

This set of principles, supported by other principles, provided the guidelines for actions amongst individuals and groups throughout Maori society.²⁵ Discussions of principles, augmented by ancestral precedent, allowed people to focus on what they ought, or ought not to do in their

most important aspect of learning to serve one's people was the ability to show humility towards others.

²² 'Kotahi te kupu o te whare wananga - whakaiti, whakaiti, whakaiti' (There is one important thing in the House of learning - humility, humility, humility). These words are attributed to Ngapuhi Rangatira, Aperahama Taonui, who was born in the late 1700/early 1800 period.

²³ Pa Tate, p 102. The term 'mokai' is commonly used in Tai Tokerau to refer to something which is treasured over which one has authority and for which one assumes responsibility.

²⁴ Pa Tate, p 105.

²⁵ Although these examples are from the Hokianga region they reflect common practices throughout Aotearoa even though specific instances may differ.

Maori Disputes and Their Resolution 11

relationships with others. When incorporated into a system of resolving disputes it provided endless flexibility as to choice of action. For this reason Maori society is often described as 'principle-based' as opposed to 'rule-bound'.²⁶ However, specific rules did attach to the various processes and practices of mana and tapu associated with various activities. Each group had its own rules concerning birth, death, burial and dealing with human remains. The planting, gathering and storing of food crops had its own attendant rules, as did fishing and hunting. The gathering of medicinal products and weaving materials, the building and carving of whare (houses) and waka (canoes) were practiced in accordance with strict rules. Preparation for warfare, the transfer of knowledge and learning, engaging in economic exchanges were governed by rules. Rules attended all matters pertaining to the person of an individual at various stages of their life. All of these rules were drawn from the institutions of mana and tapu. Violations of these rules attracted both physical and spiritual consequences with severe penalties, including death.

Together, the above were considered to be tika²⁷ (correct), and when combined were known as tikanga Maori, the principles, practices and rules which provided the normative standards for correct behaviour within Maori society. As such they were also pono (true), upholding a Maori constructed view of the world as a series of realms connected by physical and spiritual whakapapa and operating according to whanaungatanga.

Through employing these principles, rangatira were able to settle disputes amongst their own kin and with other, unrelated groups. Sometimes whole communities would come together to discuss a take (subject), at other times only the direct participants to a dispute would gather with the kaumatua (elders) and rangatira, and sometimes only kaumatua and rangatira would gather to resolve a dispute with members of a neighbouring hapu.

The ultimate aim of the rangatira was always to maintain the integrity of the whakapapa line, to keep strong the obligations of whanaungatanga amongst the individuals of the group, and to uphold and extend the mana of the group. In this way a state of ora would be retained, or restored to the group.

Disputes were a natural part of life, and as such, the main aim was to settle a situation to the extent that the participants could get on with their lives until the next dispute arose. The obligation of upholding and implementing any decision rested primarily on those who were present when it was made, and secondarily on those who were directly related to the parties at the heart of the dispute. The ultimate measure of success in resolving any dispute was

²⁶ Eddie Durie, p 3.

²⁷ The term 'tika' - "correct" should not be confused with modern definitions of 'good' or even 'humane'.

the degree of social harmony produced within the group, and between the group and others.

3. The Marae as a Forum for Settling Disputes

Maori are tribal peoples, sharing a common language but with separate ancestries and personal relationships to Papatuanuku, the land to whom we are related. Iwi, hapu and whanau often have their own meeting houses, each house representing a tribal ancestor. The front of the house is the head, the side gables represent arms spread to embrace people entering the body, the tahuhu (central ridge-pole) is the backbone, and the heke (rafters) form the ribs. Inside the house we are within the body of our ancestor, safe and protected.

The meeting house is a repository of knowledge and whakapapa. Inside the house the universal knowledge that we each carry within our hinengaro is portrayed in whakairo (carving) representing the Maori worldview - the gods are given form, each in their own domain - the ancestral pathways are laid out for us to see - the journey from birth to death, and towards wisdom and learning is captured in art form - the unbreakable linkages between gods, humans, and the rest of the world finds expression. This is an environment in which a world in balance is articulated - where the spiritual aspects of life are physically portrayed in whakairo as a series of guidelines for the actions of humans. It is an environment in which the inherent tapu of the gods can be acknowledged, in which human mana can be restored and the healing of an ailing wairua can begin. It is the doorway through which many Maori step in order to journey upon te ara tika (the correct pathway). The physical building therefore represents the ideal to which humans aspire in resolving disputes, making it the ideal forum for such activities.

4. The importance of te reo as the medium of discussion

‘Ko te reo te haa wairua o te iwi Maori’ (‘language is the spiritual breath of Maori people’) is evident when Maori gather to discuss important issues on the marae. Our language, based around the use of metaphoric narrative and imagery, is poetic in nature and highly stylised. It is both beautiful and practical - a vehicle by which spirituality finds collective expression and the whakapapa of universal knowledge finds expression in speech.

When groups of Maori visit a marae that is not their own, set rituals are followed in which te reo plays a major part in the acknowledgment of mana and tapu. As manuhiri (visitors) approach the marae they are welcomed with a karanga, a call in which their ancestry, their tapu and the purpose of their visit is articulated by the local tangata whenua (people of the land). The visitors generally respond, acknowledging the tapu and mana of the local group. The

Maori Disputes and Their Resolution 13

tapu of the two sides remains separated and they do not touch. Once inside the whare (house) tangata whenua begin the process of whaikoorero (formal speech-making) in which, through reciting ancestral events, the two sides weave their korero back and forth. When the process is complete, the two groups hongiri (press noses) thus sharing their mauri (spiritual essence) and dispelling the separating tapu and uniting the group to a common purpose. Then the subject of the meeting can be addressed as a single issue affecting the whole group.

5. The Process

A traditional dispute resolution process may have therefore combined the elements discussed above. The prescriptive rules and principles of tikanga would define the nature of the dispute, its affected parties and the process necessary to achieve an effective and binding settlement. In other words, tikanga informs us how tapu has been breached, whose mana is affected by that breach, and the utu that is required to repair the harm caused. This process could involve the use of rangatira to lead discussions, explore options and lead their people to accept one solution over another in the event that consensus is not achieved through mediation. The use of the marae as a forum, te reo Maori as the medium of discussion, and reference to precedent and the guiding principles of tikanga, were all central to a successful process and outcome.

II. CHANGES IN MAORI SOCIETY AND DISPUTE RESOLUTION PROCESSES

A. The Impact of Colonisation

Maori society was severely disrupted by the arrival and permanent settlement of Europeans in Aotearoa. Pakeha brought with them a new and different culture that centred around strongly defined notions of individuality. The principles, rules and practices that underpinned this culture were contained in institutions which differentiated the political from the legal and divided the legal into criminal and civil jurisdictions. Maori did not separate these institutions. They were all subsumed under the rules and practices of mana and tapu associated with whakapapa and whanaungatanga.

For a time Maori continued the customary and collective practices of mana and tapu without interference. Gradually, however, Pakeha cultural practices were imposed over tikanga Maori as te kooti Pakeha (the Pakeha court system), aided by the government and military, began to operate throughout Aotearoa.

The imposed new law was a direct threat to collective Maori society and the whakapapa and whanaungatanga principles on which it operated. Maori

who were once directly accountable for their actions to whanau and hapu were now also the subjects of Pakeha law. They faced dual accountability under competing systems. They were actively encouraged to put their individual interests first, particularly with regard to claims for land. In 1862 the Native Land Court was established. Its main function was to facilitate the transition of collective ownership of land, previously inalienable except by the rangatira and usually only amongst members of the group, to individualised, alienable, title.

With the promotion of individual identity and the diminution of group obligation the rangatira's role and their authority as spokesperson and guardian of group rights diminished. Money replaced mana as the currency of exchange transactions. It also replaced tapu as the basis of value transactions. In 1903 *Re Te Tai, Rangatira of Waihou and Whakarapa*, gave evidence of the failure of others to respect his mana. He told the Papatupu Committee he had set aside specific areas of land to be used as gardens by his children at Waihou. Later he found out the land was being used by another person, Tuku, who had not asked his permission. He wrote twice to Tuku's matua (uncles) instructing them to tell their son to leave his children's land. He received no reply. By chance he met Hotene, one of the uncles, and asked why no one had responded. Hotene replied, 'E kore e whakarongo ki to reta. I mua, ko koe te rangatira, i naianei he rangatira katoa nga tangata' ('No one will listen to your letter. Before you were the rangatira, now everyone is a rangatira'). According to Hotene, Tuku was advised not seek permission from Re by another uncle 'kei kore mana ratou ki runga i te whenua nei' ('in case their lack of mana over the land was raised'). Re then discussed the matter with his children. They did not want to enter into a dispute and suggested that it would be best to let te kooti whenua (the Land Court) decide who held rights in the land. This land was the subject of the present hearing before the Papatupu Committee.²⁸

The greatest damage to Maori society was the non-recognition of Maori autonomy by the colonisers. Had the institutions that had upheld Maori society for centuries been recognised they would have had time to develop, accommodate colonisation and absorb tikanga Pakeha. Instead, Maori were forced to use te kooti Pakeha in order to protect their land interests. If they did not they faced the possibility of default judgments for non-appearance and the loss of their entitlement to customary lands. When they did enter the system they found themselves pitted against each other in a foreign process whose primary purpose was to put an end to collective title. Once inside the system Maori were subjected to Pakeha rules of law they had no prior knowledge of.

²⁸ These are extracts from the statements of *Re Te Tai* to the Papatupu Komiti, on July 1903, which are included in *Karanga Hokianga* (Pa Tate, p 89).

Maori Disputes and Their Resolution 15

Forced reliance on te kooti Pakeha assisted the breakdown of traditional dispute resolution. The resolution processes of the marae were marginalised as the judicial system strengthened its hold over the actions of Maori people. Maori principles were treated as quaint custom, belittled, or ignored completely.²⁹ Aroha and atawhai as a basis for mediated settlements were replaced by strict rules of common law and statutory law. Group participation was disallowed. In this way the mana of the rangatira and the people was subsumed under that of the Pakeha judge and his civil and criminal law.

Personal wrongdoing came under the control of the Pakeha criminal and civil law. Breaches of personal mana and tapu, unless they breached a Pakeha law, went unpunished. The wearing of someone else's clothing, the killing of pets, insults, failure to uphold family obligations, breaches of oral agreements, all of which could carry severe penalties under tikanga Maori were not actionable. However, penalties for breaches of Pakeha law were often mandatory, a direct contrast to Maori processes which examined the wider context and circumstances before deciding on the best course of action. Judicial discretion in the Pakeha courts was rarely, if ever, exercised in favour of Maori charged with offences.

All of the above seriously affected Maori ideals of social harmony within a kinship based society. Hapu were torn apart by land loss. Individual rights challenged group obligations. The acquisition of individual wealth challenged the ancient obligations to Papatuanuku, whanau and whakapapa Maori.

B. Modern Maori Society

1. Twentieth Century Developments

Although the general trend in the process of colonisation has been the denigration and suppression of tikanga Maori, at times in New Zealand's post-contact era, Maori concepts and processes have had limited recognition where fiscally or politically expedient. For example, prior to the large scale urban drift of Maori after World War Two, there was legislative recognition of Maori Councils and Marae Komiti to deal with low level community

²⁹ Moana Jackson, *The Maori and the Criminal Justice System: He Whaipanga Hou*, Part II, Department of Justice, Wellington, 1988, pp 37-40 talks about the way the Pakeha law compares with tikanga Maori. The most often cited case to support this is *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jurist (NS) SC 72, 77 in which Prendergast J referred to Maori as a 'barbarians' who were incapable of entering into a Treaty. Later cases show a similar judicial attitude of treating Maori customs as of little legal relevance. (see *Mangakahia v NZ Timber Co* [1881] NZLR 2 (SC) 345, and *Re the Bed of the Wanganui River* [1962] NZLR 600).

offending and disputes in rural Maori areas.³⁰ This type of offending would have been of little concern to central government, so the limited delegation of power to members of those communities both aided in the process of assimilating tikanga Maori into the colonial legal system and was financially sensible, given the exorbitant cost and resources necessary to extend the long arm of the colonial law to reach those communities.

To some extent the traditional system of tikanga for resolving disputes still exists, generally in rural areas, where it is still more efficient and appropriate than involving agencies outside of the community. People living around marae will still deal with community level disputes on the marae, using marae kawa (protocol), in relation to issues including those involving lands and resources, mandating or negotiations for settlement of Treaty of Waitangi grievances with the Crown, or criminal offending by locals.

However, the widespread and rapid migration of Maori to urban centres from the late 1940s, resulted in most Maori moving away from their tribal areas. The impact of the urban drift and modernisation was devastating to Maori society and tikanga. The nuclear family supplanted the whanau as the core social support unit, and this resulted in changes in household structure, child raising and patterns of employment.

With city living, Maori came into more frequent contact with Pakeha, their laws and institutions than ever before, so that they could no longer slip under the radar as invisible rural citizens, beyond the reach of the legal system and its machinery. The result of this was a head-on clash between Maori and the new legal system. One of the most obvious areas of incompatibility between this system and tikanga Maori was in the treatment and processing of criminal offending.

2. Maori and the Criminal Law

For the last two decades Maori have been hugely over-represented in criminal justice statistics. Ministry of Justice figures report a prosecution rate for young Maori people aged 10-16 at 76.2 per 1000 population compared with 16.95 per 1000 population for non-Maori.³¹ Maori adults are 3.8 times more likely to be prosecuted than non-Maori and 3.9 times more likely to be convicted of an offence.³² Despite Maori constituting approximately 12% of the population of New Zealand, of all cases in 2003 where the ethnic identity

³⁰ See for example the Maori Councils Act 1900, the Maori Social and Economic Advancement Act 1945 and the later Maori Welfare Act 1962.

³¹ Ministry of Women's Affairs, *Maori Women: Mapping Inequalities and Pointing Ways Forward*, Wellington, 2001, p 116, Table F4.

³² Ministry of Women's Affairs, p 117.

of the offender was known, 42% of all persons convicted were Maori.³³ In the decade to 2003, 50.3% of all offenders in custody identified as Maori.³⁴ Over-representation of Maori in the criminal justice system occurs at all levels, across both genders and all age groups.

The reasons for Maori over-representation in the justice system are complex, and largely beyond the purview of this chapter. Briefly however, Maori and other commentators look to a variety of intersecting factors in explanation, such as socio-economic deprivation, low education, under-employment, and a lack of access to good housing, health and welfare agencies. Maori are also heavily represented in other risk factors relating to offending, such as drug and alcohol addiction, gambling, a young population and being raised in single-parent households.³⁵ Added to this myriad of indicators is the culturally specific damage that has occurred as a result of the colonisation process and the imposition of a foreign legal paradigm outlined above. Maori offenders have little, if any, connection to the legal system due to being at the bottom of the social and economic strata of New Zealand; a situation that is both partially caused and exacerbated by the incompatibility of tikanga principles and processes with the legal system.³⁶ Many Maori also have insecure cultural identities due to contributors such as the legacy of Native schooling, the suppression of te reo and tikanga Maori, and isolation from traditional tribal areas. The resultant serious and habitual offending by Maori may therefore be attributed to both historical identity factors, as well as contemporary socio-economic profiles.

3. Modern Applications of Tikanga Maori in Dispute Resolution

The official response to the crisis posed by offending by Maori has included numerous committees and reports from the 1980s to the present, and the partial incorporation of tikanga Maori into modern dispute resolution in a number of ways. First, general law has been reformed to take account of Maori values or processes. Second, marae justice programmes have been trialled and in some instances, given official status. Third, there is a resurgence in the popularity of a restorative justice model of dispute resolution, which has features in common with tikanga Maori.

The most significant strategy employed to date has been the cooption of Maori principles and processes, either specifically for Maori or as part of a

³³ Ministry of Justice, *Conviction and Sentencing of Offenders in New Zealand: 1994-2003*, Wellington, 2004, Executive Summary.

³⁴ Ministry of Justice, p 118.

³⁵ See Mason Durie, *Nga Kahui Pou: Launching Maori Futures*, Huia Publishers, Wellington, 2003, pp 62-66 for a discussion on risk factors associated with offending.

³⁶ For a fuller discussion of reasons for over-representation of Maori in the criminal justice system, see Moana Jackson, *He Whaipanga Hou*.

general trend towards considering alternatives to traditional methods of dispute resolution for all offenders.

In 1989 the youth justice system in New Zealand was overhauled with the enactment of the Children, Young Persons and Their Families Act. A key feature of this new scheme was a philosophy of supporting extended families to take responsibility for the welfare of their children and responses to their offending. The chief mechanism to implement this philosophy was the family group conference (“FGC”), a forum for collective decision making, in which those directly affected, as well as representatives of relevant agencies, discuss options to deal with the young person in question. The FGC process and the core values of the enacting legislation aim to reflect principles found both in restorative justice and also tikanga Maori.³⁷

In relation to adult offenders, there has been adoption of restorative processes that are found in tikanga Maori in the numerous programmes that are either adjunct to district courts or independently managed in the community. The schemes attached to district courts evolved from a pilot scheme funded by the New Zealand Crime Prevention Unit in 1995, that aimed to divert offenders from the normal court process, to appear instead in front of a panel of community representatives. Such meetings aimed to be inclusive of any victims of the offender, to make amends between the offender and any victims and to make plans for the reintegration and rehabilitation of the offender within their community.

One of the three original pilot schemes, ‘Te Whanau Awhina’, operates at Hoani Waititi Marae in Oratia, Auckland, taking referrals from the Waitakere District Court. Most offenders referred to the programme are Maori, and the process incorporates marae kawa and aspects of tikanga Maori, as well as Maori community members comprising the panel. An evaluation of the Te Whanau Awhina scheme found that most participants were satisfied with the process and outcomes.³⁸ Participants were also much less likely to have reoffended in the ensuing year, than offenders who were not diverted from the courts.³⁹

Outside of the schemes attached to courts throughout the country, there were 19 other community managed restorative programmes for adult offenders in New Zealand by 2005, and some of these operated at marae or were in some way managed by Maori or focussed on Maori clients. For

³⁷ Juan Marcellus Tauri, ‘Family Group Conferencing: The Myth of Indigenous Empowerment in New Zealand’, *Justice as Healing* (1999).

³⁸ Dr Linda Smith and Dr Fiona Cram, *An Evaluation of the Community Panel Diversion Pilot Programme*, Auckland Uniservices Ltd, Auckland, 1998.

³⁹ G Maxwell, A Morris and T Anderson, *Community Panel Adult Pre-Trial Diversion: Supplementary Evaluation*, Institute of Criminology, University of Victoria, Wellington, 1999.

example, programmes such as ‘Te Korowai Aroha’ and ‘Kokona Ngakau’ utilise customary approaches to deal with whanau abuse and domestic violence within Maori families.

There has been criticism by some Maori concerning the promotion of marae justice and family group conferencing as “Maori processes”. Criticisms are generally centred on two issues – first, the derivation and authenticity of these processes and second, their subservient place in the legal system. In relation to the first criticism, Maori scholar Moana Jackson asserts that many of the purportedly “Maori” aspects to marae justice and conferencing are actually Crown imposed values and processes, stemming from the laws that enacted Maori Councils and Marae Komiti. Jackson maintains that the modern adoption of these phenomena as customary traditions sourced in tikanga Maori is part of the colonising of the Maori mind and that culturally sensitive ways of dealing with Maori offenders are all part of the colonising ethic.⁴⁰

Jackson and Maori criminologist Juan Tauri are also concerned that the adoption of so-called Maori processes or principles occurs within the confines of the overall Westminster derived legal system. Jackson asserts:

Protestations about the need for one law for all, or the ability of the common law to rise above its culturally-defined origins and become ‘bicultural’ in the end only serve to maintain the paradigm. They ensure that authority rests where colonisation always intends it to rest – in the institutions established to exercise control over the colonised.⁴¹

Tauri agrees with Jackson, and argues that processes such as the FGC are part of the process of ‘indigenisation’ of the New Zealand justice system, which rather than empowering Maori, has the effect of denying them jurisdictional autonomy.⁴² Some have argued that this is part of the reason for relatively low numbers of Maori participating in restorative justice initiatives that seem on the face of it to have common ground with traditional cultural practices and beliefs.⁴³

Aside from these developments, there has also been a general shift in criminal justice legislation to promote the interests of victims and to expand upon punishment options and the consideration of reparative and restorative

⁴⁰ Moana Jackson, ‘A Colonial Contradiction or a Rangatiratanga Reality’ in Judge FWM McElrea (ed), *Rethinking Criminal Justice: Vol 1 Justice in the Community*, Legal Research Foundation, Auckland, 1995, p 34.

⁴¹ Jackson, *Rethinking Criminal Justice*, p 34.

⁴² Tauri, p 4.

⁴³ See for example V Jantzi, *Restorative Justice in New Zealand: Current Practice and Future Possibilities*, Centre for Justice and Peace Development, Massey University Albany, 2001, p 4.

principles in sentencing. For example, section 7 of the Sentencing Act 2002 refers to numerous purposes of sentencing that coincide with analogous principles in tikanga, such as recognition of the interests of the victim, holding offenders accountable to the community, and providing for reparation for harm done.

These changes are often promoted as being akin to Maori principles and processes. Other procedural concessions include the right to speak Maori in court proceedings and the allowance for a cultural speaker at sentencing.⁴⁴ Whilst these improvements are welcome, and possibly beneficial, they are no substitute for real meaningful change in addressing the ongoing breach of the Treaty of Waitangi Article Two guarantee of the protection of tikanga Maori as a taonga.

The modern developments described above demonstrate two different approaches to involving Maori in contemporary dispute resolution processes. The first is an inclusive, bicultural approach that aims to include consideration of Maori beliefs and processes in mainstream law. This is evident in inclusive legislation, the promotion of FGCs and working alongside restorative justice initiatives. The second approach is the maintenance of traditional tikanga practices, separate to Pakeha law, in accordance with the guarantees of Article Two of the Treaty of Waitangi. This strategy is evident in the development of marae focussed Maori iwi and hapu programmes and the maintenance of kainga (village) style living in rural communities.

The proposed benefits of the Whanau Awhina initiative, and others like it, are many. The forum is different, and the accused is not isolated from their friends and whanau. The lack of physical barriers, including the bar and bench found in a Pakeha courtroom, is held to encourage participation from all the parties. Formal court dress and legal rituals are replaced by the ritual encounters of Maori processes.

The process used is similar to traditional Maori dispute resolution processes in allowing the victim and offender a chance to be heard. Retribution against the offender is not a primary aim of the process – rather the objective of community oriented justice is to ‘put things right’ in the community, so that its social balance and security is restored. An action plan is formulated, with input from all parties, with a view to breaking the cycle of offending. The overall aim is to restore the balance in the community as well as the mana of the victim and offender.

The utilisation of marae justice programmes is part of the wider use of what might be called the ‘restorative justice’ model of dispute resolution. This model of restorative justice is one that may benefit non-Maori, as a

⁴⁴ Maori Language Act 1987, s 4; Sentencing Act 2002, s 27,

complementary system of justice to operate alongside existing structures and processes. Such a system gives control of the process and outcomes back to the community, so that the parties affected by crime are responsible for dealing with it.

Restorative justice is a move towards the recognition of what both Maori and Pakeha identify as underlying principles of justice – the balancing of the interests of the collective against the interests of the victim and the offender. The differences outlined in this Chapter show that while Maori have traditionally identified the collective and the offender as the whanau, hapu or iwi of individuals, Pakeha identify the collective as the State and the offender as an object/subject of the law. The State has an inhuman face and justice is a mechanical process. Restorative justice is a means by which these differences are recognised and to some extent ameliorated. The community in which the transgression arises represents the collective, and the individual and/or their extended family group represents the offender.

While there is undoubted value in processes such as marae hearings and models of restorative justice, moving the Pakeha legal system to the marae is not marae justice. In fact, this model creates a number of new barriers to prevent Maori achieving justice. Foremost among these, is that it is not desirable that Maori associate the marae with conflict and punishment imposed from outside the marae community. While the resolution of conflict has always been a function of the marae in traditional communities, they are not suited to the dehumanising culture of te kooti Pakeha.

Further, conducting Pakeha court hearings on the marae is seen by many Maori to denigrate the mana of the marae, by reinforcing the notion that the mana of the community is beneath the Pakeha law. Of particular concern is that, given the urbanisation and consequent alienation of Maori from their traditional marae, young urban Maori will primarily associate the marae with punishment.⁴⁵

Reforms such as these are part of a worldwide trend towards the ‘indigenisation’ of dispute resolution forums and processes. In Canada for example, new initiatives in criminal justice system include sentencing circles and elder-assisted parole board hearings, and even the establishment of a ‘Healing Lodge’ as an alternative to a women’s prison. These, like the initiatives present in Aotearoa today, are not indigenous processes and forums. They represent colonial legal systems attempts to cope with problems created by the exclusion and marginalisation of indigenous peoples and their ways of life.

What must not be overlooked is that justice is a taonga of the Maori people. It is our mana that must prevail in the processes of defining disputes

⁴⁵ Jackson, (*He Whaipanga Hou*) pp 237-238.

and controlling their resolution among Maori people. The offences that are dealt with in the marae forum are defined within the dominant monocultural Pakeha political, social and cultural context. The input sought from Maori is limited to processes and outcomes, but excludes the definition of transgressions.

Attached to the status of Maori as *tangata whenua* is the right to preserve and develop our own dispute resolution processes, and acceptance of piecemeal reform is not consistent with that right. Maori acceptance of and participation in alternatives to the current system should not be viewed in any way as satisfying the requirement for recognition of a Maori system of justice.

III. TOWARDS A MODERN SYSTEM OF MAORI DISPUTE RESOLUTION

Any modern Maori system of dispute resolution must incorporate fundamental aspects of *tikanga*, including a Maori conception of what it means to be human, concepts of *whakapapa*, *mana*, *tapu* and collectivity. It must also establish practical processes that reflect the reality of present day Maori people.

The framework of such a system must be one which has as both its starting point and its ending a coherent and balanced world which recognises both the centrality of humans in a connected universe and that humans are *kaitiaki*⁴⁶ of each other and of all other things. This understanding of society, culture and human institutions, often called “holistic”, highlights the relationships between individuals who are part of a wider collective, and reinforces the obligations arising from those relationships.

A. Whakapapa Maori

In the earlier part of this chapter, it was shown that within pre-contact Maori society *whakapapa* provided the mechanism whereby physical connections were made between people, *atua* and the universe. The relationships and obligations amongst and between these groups was manifested in the practices associated with *whanaungatanga*. As Maori have moved away from traditional tribal areas, and the practices associated with communal living, a modern system of dispute resolution must take account of such contemporary circumstances. This reality does not however detract from the principles underlying those traditional practices, which could be applied both to Maori

⁴⁶ The role of a *kaitiaki* is to foster the relationships that link us and to protect the state of ‘*ora*’ or wellbeing of the participants. The term is now frequently used in resource management but has a much wider application. In the past, *rangatira* held the main responsibility as *kaitiaki* of their people, to look after their interests through the processes of *atawhai*.

Maori Disputes and Their Resolution 23

at a pan-tribal level, or to non-Maori if so desired. In other words, a system derived from tikanga principles could be applied to either groups of interacting Maori, on the basis of a broader Maori whakapapa, or between Maori and non-Maori, on the basis that we live in mixed communities and therefore owe obligations to fellow neighbours and citizens.

Irrespective of approach, the underlying appeal to human ethical behaviour remains strong; there are right ways and wrong ways of maintaining human welfare. Thus notions of whakapapa and whanaungatanga are reinforced in a new setting which requires us to adjust practical implementation to suit constantly changing and diverse circumstances.

B. Mana and Tapu

The two over-arching concepts of Tikanga Maori affecting law and legal processes, mana and tapu, are relevant foundational principles for dispute resolution in a modern context.

Mana is a human quality deserving of recognition and respect, as an inherent part of each person. It is the source of their personal authority. It is also the inherent authority attached to groups such as whanau, hapu and iwi. Mana enables individuals and groups to make decisions for themselves and to have those decisions respected by others. It is no less a taonga of the Maori people now than it was to those of te ao kohatu and will be to future generations of Maori.

Mana has a functional aspect. By using our mana we are able to extend our authority to others, to empower them and to disempower them. The use of our mana creates consequences for others that can be either positive or negative. Maori must always be mindful of the obligations they owe to others when exercising mana. Mana aroha, or mana derived from selfless acts which enhance others is still seen as the prevailing good of those acting on behalf of others within Maori society. The exercise of mana is also constrained by the mores of a Maori society that no longer accepts warfare, and the taking of life as appropriate sanctions for wrongdoing.

Modern processes of dispute resolution must recognise these different aspects of mana. In recognising the first, one must understand that Maori people, however they constitute themselves, are entitled to exercise their authority as peoples and as individuals. Therefore they are entitled to establish and develop legal processes which are acknowledged and respected by others, including the New Zealand Crown and the judiciary.⁴⁷

⁴⁷ This is inherent in Article 2 of the Treaty of Waitangi, which guarantees Maori 'te tino rangatiratanga o o ratou taonga katoa', which has been translated by Sir Hugh Kawharu as 'the unqualified exercise of chieftainship over all treasures.' Nga tikanga Maori is undoubtedly one of those protected treasures.

In recognising the second, one understands that the words and actions of a person can cause his/her own mana and that of others to be either enhanced or dissipated. One must be careful when using one's authority so as not to inadvertently harm others. When an offence is committed the mana and integrity of both the victim and offender are diminished, and it is necessary to have it restored. The main purpose of dispute resolution is, through exacting *utu*, to restore the mana of the parties concerned, thus clearing their pathways toward the future by stabilising the present. For this reason any sanctions imposed should focus away from punitive measures such as incarceration, which does little to lower the likelihood of future offences against others, and focus on restoring the balance of both offender and victim, and, as far as is possible in the particular circumstances, any imbalance that has been created within the wider *whanau* or collective.

The institution of *tapu* also has a functional aspect that can be adapted to modern usage. The basic premise is that *tapu* exists as part of the inherent makeup of all things, and that humans have their own *tapu*. *Tapu* provides a cloak behind which one's personal, private self is protected from spiritual and physical violation. In a legal sense, *tapu* protects things by placing them off limits and out of common use. This applies equally to people as it does to natural resources, knowledge and cultural property. Breach of *tapu* is a *takatahahi*, or transgression that requires *utu* (a reciprocal act).

Because all legal systems serve the same broad purpose of setting standards of behaviour, sanctioning some behaviours and resolving disputes, it is easy to draw parallels with other legal systems which use different processes to protect the individual from having their personal rights violated.

In a modern Maori context acts of wrongdoing are acts which violate the *tapu* of individuals and groups. The obvious examples are *kohuru* (murder), rape, sexual violation, and acts of violence towards others. Another order of wrong occurs where promises are made, relied upon and then broken. Covenants between Maori, and Maori and the Crown, fall within this group.

Another order is that of omissions. Where an individual is obligated to act for the welfare of others, not to act in a situation that causes damage to others will violate the *tapu* of the group and may result in a loss of mana. The loss of mana, although attributable to one member, is shared by the group as a whole. Such a breach will require restorative action in order to recreate the balance within the group, and between the group and others.⁴⁸

⁴⁸ An example of this type of liability may be found in the traditional creation stories. When Tane suggested that his parents, Rangi and Papatuanuku, be separated in order to provide light and space in the world, he was opposed by his brother Tawhirimatea, who destroyed Tane's forests and used the trees to make spears, canoes and traps to catch the birds of the forest. In doing so, Tawhirimatea negated the *tapu* of all of these objects, making them 'noa' or profane and safe for use by humans. The only brother to stand up

Any breach of tapu requires treatment in order to restore the natural balance of things. Society can only function if all things physical and spiritual are in symmetry. Where breaches of mana and tapu occur, utu is necessary to restore the natural order to equilibrium and balance. The processes of restoration must highlight the sanctity of individuals, the importance of relationships between people and the moral principles inherent in these relationships. The obligation to provide reciprocal caring, to respect authority, to achieve unity through consensus, and the underlying spiritual aspects of existence are ways of achieving this.⁴⁹

C. Collectivity

The social structures of traditional Maori society meant that these concepts stemmed from naturally occurring and readily identifiable collectives - whanau, hapu and iwi. Therefore notions of collective identity and collective responsibility for actions and decision-making arose naturally. Today however, the notion of collective responsibility – that it is the collective who is the victim and the collective who is the offender must recognise the expanded notion of ‘collective’.

Although traditional groups are still in evidence, other Maori groups, based on broader criteria, have emerged as a response to the challenges of colonial New Zealand. The best example is the advent of ‘Urban Maori’, groups of people who originally came to the city to seek work and who created networks based around ‘being Maori’. For some purposes these people and their children still identify with the hapu and iwi from which they originated. For other purposes they choose to be represented by structures they have developed themselves in the cities.

With regard to disputes and their resolution there is no good reason why these people should not be able to form collectives around their ‘Maoriness’ or why they should not be treated as equivalent to, although distinct from, 1840 Hapu and Iwi. What is important is that any dispute resolution must be a collective and inclusive decision-making process, ideally based on consensus, which directs the parties toward the future. Where individuals see themselves as self-sufficient and permanently city based, or part of another hapu, commonality of purpose ought to outweigh tribal affiliation. At the least, individuals must be given the opportunity to choose one or the other.

to Tawhirimatea in Tane’s defence, was Tumatauenga, the god of war, and he was angry with all of his other brothers for leaving him to face Tawhirimatea on his own. Tumatauenga therefore sought utu from his brothers for their failure to intervene and support him.

⁴⁹ Donna Hall, ‘Restorative Justice – a Maori Perspective’, (1997) 485 LawTalk 30.

D. Building Blocks of Modern Maori Dispute Resolution

The fundamental elements of tikanga Maori that highlight responsibility for others must not be diluted in the establishment and operation of new structures. The building blocks on which to base an effective system of dispute resolution for Maori remain constant and are now described.

1. Community Input and Responsibility

As briefly outlined above, contemporary Maori participation in the present system is a negative one - predominantly as offenders and inmates.⁵⁰ The diminished mana of these people is unlikely to be restored in prison. As one person has stated 'we are just fodder for the Pakeha law - we keep going round and round in their system - we keep them in their flash jobs - they need to keep us this way'.⁵¹ On the other hand, Maori participation is not so readily apparent in positions as judges, lawyers, police, prosecutors, juries and legislative drafters.⁵²

On a cultural level, the conflicts between the principles that underpin the two systems mean that many Maori do not understand or accept the basis of the Pakeha Justice system. One criticism is that while Maori justice personalises justice and locates responsibility at community level, the Pakeha system depersonalises conflict so those disputes are dealt with by bureaucratic, hierarchical institutions that are intentionally distanced from the offender and the victim. Put simply, Maori justice works from the flax roots up, while Pakeha justice is imposed from the State down to the disputants.

In order for the mana of Maori people to be upheld, the Maori community must own the processes by which conflicts amongst its members are resolved. This raises the issue of who is the community? The whanau base that underpinned the traditional system, is, in many cases, no longer a strong affiliation of united individuals. Maori identity and social structures have been altered by the move to urban areas and away from the marae. People tend to identify more with the communities in which they live and work. Tikanga Maori is sufficiently flexible to accommodate these changed circumstances. In many situations the concept of collective responsibility is applicable to the community as it currently exists, rather than to historical connections. If the need to maintain balance within a community is the ultimate objective. Often the two will coincide.

⁵⁰ See text above at B2.

⁵¹ Recorded interview with Watara Tamati on aspects of whanau criminality at Lake Ohia on 6th June 1998.

⁵² Moana Jackson, 'Criminality and the Exclusion of Maori' (1990) 20 *Victoria University Law Review Monograph* 3, 33.

Maori Disputes and Their Resolution 27

What is important is that participants in any process have input into defining the system and its outcomes. Outcomes must be acceptable in order to be capable of implementation. The main responsibility for any community is to control the processes, ensure they uphold fundamental Maori principles, and to follow through any decisions made.

2. Reciprocity and Balance

The three aspects of the human person, tinana, wairua and mauri must be in balance to ensure a state of 'ora' or well being. Re-offending on a regular basis signal that an imbalance exists in one or more of these aspects. This in turn creates an imbalance within the whanau, hapu or community as a whole. The process of dispute resolution must seek to identify the causes of the dispute, or the reasons for offending, in order to uncover and address the source of the problem. This moves the focus away from the individual to an analysis of cause and effect.⁵³

The concept of balance also extends to punishment. In tikanga Maori, where a breach of tapu requires utu that utu must take a form appropriate to the transgression. Any action that exceeds the appropriate sanction is another breach requiring further action. While death or banishment as sanctions is not suitable in contemporary society, other forms of utu, such as muru, may be. Muru is akin to restitution or reparation, so that the agreed transfer of property between disputants could resolve a dispute.

The aim of dispute resolution must be to restore participants or disputants back into their communities. Once decisions are made, with individual and community input, all parties must work together to implement them.

3. Process

The principle of inclusiveness in participation and accountability will underpin any process of Maori dispute resolution.

All parties to a dispute must be represented and given the opportunity to be heard. In the criminal justice context, the needs of the victim are the immediate concern as the person who has suffered wrong. However, the needs of the offender are also crucial to the community whose interest is to prevent recurrences of similar behaviour that will create further victims. Within this process there are no winners, everyone is affected, and to some extent, a loser. Rules and procedures should not isolate and marginalise affected parties. The process must allow the victim to publicly place the offence before the offender and to make the effects of the offence known to the offender and the community. The offender should be encouraged to take

⁵³ Moana Jackson M, *He Whaipanga Hou*, p 39.

responsibility and articulate his remorse directly to the victim and the community.

The objective of encouraging the offender to accept responsibility and to elicit a sense of whakama or shame, is not to destroy self-esteem or encourage withdrawal from society. Accepting responsibility for one's actions is a means of re-establishing mana among the group, who are then able to decide what actions are required for utu to be established within the group. A separate concern is the actions required by the offender to establish utu with the victim and members of his/her community. In this sense, from a Maori point of view, disputes may be multi-dimensional. Take an example of adultery by a man. Even leaving aside the third party with whom the affair is conducted, these circumstances may be framed as a dispute between (1) husband and wife, (2) husband's family and wife's family, (3) husband and wife's family, (4) wife and husband's family, (5) husband and his own family. Effective dispute resolution from a Maori perspective requires that each of these levels of dispute be addressed in order for the parties involved to either repair their relationships, or to acknowledge the harm caused to mana, achieve utu, and go their separate ways.

The ultimate goal remains the restoration of mana through utu. Utu serves as both retribution and healing treatment of an offender, so that normal life and relations can resume. Once utu is exacted, the incident is incorporated into the history of the community and the disputants are absorbed back into the fabric of the community.

It is important to note that Maori place much value on the process itself, as distinct from its outcomes, as an inherent good, because it empowers the parties and the community to take responsibility for the future. Allowing time and resources for a proper airing of the grievance is, of itself, a large part of the healing process.⁵⁴ Disputes are a natural part of living together with others and resolving them should be part of the same process.

4. Appropriate Forum and Structures

Both the physical environment and the forum must reflect Maori principles. In traditional Maori society the marae fulfilled this function and in modern society it remains the most appropriate environment, for reasons which have

⁵⁴ A modern example of Maori attitudes towards the cathartic nature of the dispute resolution process was the uproar from Maori in response to the National Party's 'fiscal envelope' policy of the 1990s, which sought to place a cap on settlement of Treaty grievances, and fast-track the process by which claims were heard. See Ranginui Walker, *Ka Whawhai Tonu Matou*, Penguin Books, Auckland, 2004, pp 301-304.

stood the test of time. The Waitangi Tribunal⁵⁵ follows the practice of meeting on marae where possible and has adopted marae protocol of mihi (greeting), whaikorero (speechmaking) and karakia (prayer) during hearings. Where the marae is not suitable, or available it is not destructive of the process to use other buildings which allow for privacy and group discussion. The appointment of a Maori Chairperson and the relaxation of Court protocols has led to a gradual acceptance of the Tribunal as a forum and process by Maori.⁵⁶

In a modern context there are three different levels at which structures for Maori dispute resolution are required. There is the community level, where disputes between the members of a geographically located community must be resolved. There is the level of pan-Maori negotiations where a structure is required to settle conclusively, disputes between Maori groups, and there is also a requirement for structures to resolve disputes between Maori, whether hapu, iwi or pan-Maori, and the Crown.

There are structural issues that Maori must address before any Maori dispute resolution process can be established which extends beyond the interests of small community groups. While most disputes may be dealt with at a whanau or hapu level, there are other important policy issues which result in disputes amongst Maori which affect all of Maoridom. In these cases, it is appropriate to deal with the issue through a structure that represents all Maori. At present there is no such structure. The alternative is time and money spent engaging Pakeha lawyers and courts to settle disputes that ought to be settled by Maori. Scales of economy and administrative efficiency may also require a broader approach and a pan-Maori body to deal with this type of dispute.⁵⁷

Structures are required to resolve issues concerning representation, including ascertaining the mandate from the constituency to the representative body. It is fundamental to the security and acceptability of any resolution that the constituency ratifies the decision through the appropriate representative body, as formed by Maori. Until the Maori constituency is identified, located,

⁵⁵ The Waitangi Tribunal was established by the Treaty of Waitangi Act 1975 to hear grievances from Maori who have been prejudicially affected by Crown actions under the Treaty of Waitangi.

⁵⁶ Ironically, the relaxing of courtroom protocols and the change of venue to a marae setting where possible, came about largely as the result of petitioning by my Pakeha friend and colleague Professor David Williams. In 1977, shortly after the first claims to the Waitangi Tribunal, Professor Williams sent a memorandum to the Minister of Maori Affairs that was critical of the culturally inappropriate process and venue the Tribunal had adopted to date. His criticisms were taken on board three years later. See Ranginui Walker, p 235.

⁵⁷ The court hearings arising from the Maori Fisheries Commission decisions are a good example of this. *Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission* (HC Auckland, CP 395/93, CP 122/95 & CP 27/95, 4 August 1998).

and has clearly identifiable and agreed structural processes, Maori will ourselves, be unable to carry the mana of our people forward.

5. Te Reo Maori

The importance of language to any culture cannot be overstated. Historically, te reo, the whanau and whenua (the land) have been an integral part of a person and their community. In modern society the links between the three are still best articulated in te reo. This provides one reason for supporting the retention, protection and recognition of te reo in Maori dispute resolution processes. However the reality of today will almost certainly require that the English language be used if inclusion of all parties and their effective participation is to be achieved.

Te Reo Maori was not recognised as an official language of New Zealand until 1987.⁵⁸ This Act allows te reo Maori to be used in legal proceedings. Much of Pakeha law revolves around the importance of language – interpretation of statutes, precedents and the process of advocacy. Similarly, te reo Maori is of great importance to the processes of Maori dispute resolution. It is the best vehicle for articulating personal disruption within the community, describing the relationships between the participants, traditionally by way of whakapapa and the process of whaikorero. In many ways the use of te reo reflects the degree of empowerment of the process to the participants, and the degree to which Maori values, history and ways are likely to resolve a conflict.

6. Representation and Leadership

The breakdown of traditional structures of leadership within Maori society has eroded the authority of Maori leaders. Where once a rangatira was assessed by his or her ability to successfully gauge the thoughts of the people and articulate them within and outside the traditional rohe, a giant vacuum now exists. Lack of leadership has contributed to the weakening of family structures and the non-observance of obligations owed between individuals and between hapu/iwi and wider society.

The lack of unity and leadership within Maori society is best seen in the competing claims heard by the Waitangi Tribunal. The negotiation processes with the Crown that follow also demonstrate a split Maori constituency. The Waitangi Tribunal and the Courts have identified representation and mandate of Maori as two fundamental issues which must be resolved for the purpose of Treaty of Waitangi claims settlement and negotiations with the Crown and other bodies.

⁵⁸ Maori Language Act 1987.

Maori Disputes and Their Resolution 31

It is fundamental to the resolution of any dispute, particularly with respect to the enforceability and acceptability of any outcome, that those with grievances be properly represented, and that those who lead are properly mandated by their constituency. The flexibility with which pre-contact Maori identified themselves according to purpose and context has proved problematic in a modern context, as the Crown tries to settle Treaty disputes with Maori whose social organisation was constantly evolving into new membership groups which were anything but static.

The underlying problem is that the structures claiming representative status are usually permanent and static organisations that represent people who are not. Many existing structures do not even arise from Maori initiatives, such as tribal trust boards – creatures of statute which for years were perceived as the primary representative bodies for iwi, largely by default.

An example of the dynamic nature of Maori identification is the relatively recent phenomenon of the urban Maori authorities, established to represent the voice of urban Maori, some of whom do not affiliate to a ‘traditional’ tribal group as established at 1840.

The issue of representation in the Treaty Settlement Process raises several difficult questions:

- Is this a whanau, hapu or iwi dispute?
- Who is the whanau, hapu or iwi?
- Who represents the whanau, hapu or iwi?

Overlapping claims between hapu and iwi are faced by bodies such as the Waitangi Tribunal, Te Ohu Kai Moana (the Treaty of Waitangi Fisheries Commission) and the Crown Forest Rental Trust. Disputes as to mandate has resulted in applications to the Maori Land Court to determine representation for Whakatohea, Ngati Toa, Rangitane and Ngati Paoa.⁵⁹

The correct identification of tangata whenua is important, first because the settlement of claims ultimately involves distribution of the fruits of settlement, and second because the mana of the particular people is at stake and any negotiated settlement should be an exercise of tino rangatiratanga of those people.

The continuing high rate of youth crime and the dearth of initiatives to reintegrate offenders back into the community are problems for the Maori

⁵⁹ The Maori Land Court may determine the appropriate representatives for Maori in relation to any negotiations, consultations or any other matter at the request of the Chief Executive or the Chief Judge of the Waitangi Tribunal. Section 30(1)(b) Te Ture Whenua Act 1993.

community. Strong leadership is required from members within our communities willing to stand up and take responsibility for our rangatahi (youth), both in a preventative capacity and when required, to assist parties with their healing following a breakdown in their family relationships.

To place Maori in positions of power within the current system, as judges, lawyers and law makers would not cure the deeper malaise. A truly representative system would be predicated upon tikanga Maori as well as Maori people.

IV. CONCLUSION

Ka whakarereke te nuku e nga tai whati

Each wave breaking on the shore alters the landscape slightly.

The path forward for Maori is one based on affirmation of our culture, language and institutions. First and foremost, recognition of tino rangatiratanga of Maori as guaranteed by the Treaty of Waitangi places the responsibility for decision-making back in the hands of the community, whether the community is kin-based or otherwise.

The Pakeha concept of time being lineal results in the perception that what is past is past. For Maori, the way forward is modelled on the past. The past and the mana and actions of one's ancestors is the basis for action and for aims and aspirations for the future.⁶⁰ If we look again to language, there is no verbal tense in te reo Maori. As Maori Marsden articulates:

Time is a continuous stream. The temporal is subordinated under the cosmic process and denotes not time but sequences in processes and events which occur in the cosmic process.⁶¹

It is not fatal that modern Maori are not immersed or knowledgeable in tikanga Maori. It is enough that they understand and believe in the broad principles which provide the foundation for balance and symmetry between the individual, their families and the community. The process should use tikanga to access universal human norms that are innate in all humans. The emphasis must not only be on resolving the current conflict, but, more importantly, moving the parties forward on their journey through life in a way which minimises the likelihood of further disputes arising.

⁶⁰ Anne Salmond, 'Theoretical Landscapes' in D Parkin D (ed), *Semantic Anthropology* (1982) 65-87.

⁶¹ Maori Marsden, 'God, Man and Universe: A Maori View' in M King (ed), *Te Ao Hurihuri: The World Moves On*, Reed Publishing, Auckland, 1977, p 162.

Maori Disputes and Their Resolution 33

There is currently increased cognizance and recognition of Maori values and processes, although this is often at the wrong end of dispute resolution – such as with the establishment of Maori Focus Units in prisons, kaupapa Maori programming for prison inmates, and the provision of Maori-friendly architectural design for new corrections facilities. This energy and empathy needs to be channelled into the design of the process of managing and addressing disputes, through recognition and implementation of the principles and processes outlined in this chapter.

In the end, what is important is that any process of dispute resolution must allow for all aspects of the human being and their relationships to each other to be addressed. The rules and guidelines employed are simply a means of engaging the tinana, the wairua, the mauri and the hinengaro and pointing them towards te ara tika.