

# *Coming Ready or Not! The Emergence of Maori Hapu and Iwi as a Unique Order of Governance in Aotearoa New Zealand*

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## I INTRODUCTION

This article examines the emergence of Maori Hapu and Iwi as modern Maori governing entities in Aotearoa New Zealand. It argues that two major Maori Hapu and Iwi have, through the application of Maori custom law principles<sup>1</sup> and legislation, become part of the official constitutional framework of Aotearoa New Zealand government. It further asserts that these two Maori Hapu and Iwi have, by reconstituting themselves within a protective legislative framework, ensured that they will continue to have a strong influence in the national framework of government in the future. They will sit alongside central and local government as a form of “tangata whenua” governance that is unique to Aotearoa New Zealand.

Within a wider context that is framed by custom law and New Zealand legislation, the article explores three seminal questions that inevitably arise in debates about Maori governing systems. They are: (1) Maori Identity – How does one determine who is Maori and a Hapu or Iwi member? While in the past “Maoriness” has been legislatively determined by non-Maori, today Maori assert control over the process of determining who is and is not “Maori” and a Hapu and Iwi member according to Maori custom law principles and seek to have their definitions protected by legislation and interpreted in line with their own views;<sup>2</sup> (2) How is a “Maori” system of Hapu and Iwi governance different from the system of government already operating in Aotearoa New Zealand? Again, Maori are now re-asserting traditional principles of Maori custom law as the institutional basis for providing a level of self-government that is legally protected by legislation;<sup>3</sup> (3) What examples exist of modern Maori Hapu and Iwi governance in operation and how successful are they in achieving what Maori want? This part of the article focuses on the legislatively protected outcomes of two major Treaty Settlements and how Maori are

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<sup>1</sup> The principles of Maori custom law are discussed in Section II of this Article. Recognition as an official source of law in Aotearoa New Zealand was affirmed in *The Public Trustee v Loasby* (1908) 27 NZLR 801 and reaffirmed by the Court of Appeal in *Ngati Apa v AG* [2003] 3 NZLR 643. The Waitangi Tribunal has also relied on Maori custom law values, concepts and principles in its deliberations over Maori interpretations of the Te Tiriti o Waitangi/Treaty of Waitangi, since its inception in 1975.

<sup>2</sup> Notably, the delivery of Maori education in Kura Kaupapa (Maori Language Schools) is now protected by a statutory kaitiaki (guardian) body established to ensure its Maori philosophical base, principles and content are not changed to the detriment of Maori. See s155 of the Education Act 1989, as amended by the Education (Te Aho Matua) Amendment Act 1999. The Act has strengthened the control Maori exercise over processes associated with determining Maori identity by focusing on educating the young.

<sup>3</sup> The Waikato Raupatu Claims Settlement Act 1995 and the Ngai Tahu Claims Settlement Act 1998, discussed later, are both examples of Treaty Legislation that have strengthened Maori Hapu and Iwi self-government considerably.

implementing the new regime of limited self-governance according to principles derived from Maori custom law.

Focusing on Hapu and Iwi governance does not mean that national Maori governance, and a good relationship with the Crown and central government, is not important. Quite the opposite. Some of the issues that arise when discussing Hapu and Iwi governing entities are also relevant to discussions about national Maori representation.<sup>4</sup> However, the new ground that this article breaks is in highlighting the effective use of statute law and Maori custom law working together to achieve political, cultural, social and economic goals that benefit Maori society, and Aotearoa New Zealand as a whole, by constructing strong and durable Hapu and Iwi governance systems.

Under Maori custom law, Maori society operated a system of localised group government based upon kinship links. After the signing of Te Tiriti o Waitangi in 1840, a Westminster system of central and local government based on different values and ideals was introduced by the British.<sup>5</sup> As it extended its legal and political dominance, existing Maori systems based on Maori custom law were marginalised and treated as being social institutions without legal status.<sup>6</sup> In consequence, Hapu and Iwi had to compete with other “local interest” groups for recognition and protection of their interests by political and legal institutions based on English ideals of good governance<sup>7</sup> and whose purpose was to acquire Maori lands for British settlers. During this period, statutory provisions that protected Maori rights were restrictively interpreted to justify their non-recognition in the face of competing non-Maori interests.<sup>8</sup>

The world-wide indigenous cultural renaissance that began in the 1970s and 1980s has been reflected in the Treaty of Waitangi Settlement Process in Aotearoa New Zealand, notably in the work of the Waitangi Tribunal,<sup>9</sup> and has spurred Hapu and Iwi into creating modern governance institutions to serve the corporate and individual interests of their members. The passage of the Declaration on the Rights of

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<sup>4</sup> For discussion see M. Durie, *Nga Kahui Pou - Launching Maori Futures*, Huia Publications, Wellington, 2003, 209-211. See also C James, *Building the Constitution*, Institute of Policy Studies, Victoria University, Wellington, 2000.

<sup>5</sup> The Treaty of Waitangi is the foundation on which British-based constitutional government in Aotearoa New Zealand has been established and justified. Signed in 1840, it provided for the establishment of British government in Aotearoa (Article 1), while at the same time guaranteeing that the “tino rangatiratanga” of Maori over their “taonga” would be preserved (Article 2). Written in English and then translated into Maori, over 500 Maori rangatira signed the Treaty, most signing the Maori text. There has been ongoing dispute over the terms of the Treaty and Te Tiriti, particularly the usurpation of political authority and Maori resources by the Crown, since 1840. See Appendix 1.

<sup>6</sup> Although Section 71 of the New Zealand Constitution Act 1852 provided for Districts to be set apart in which Maori could govern themselves according to their “Laws, Customs and Usages”, it was never implemented and was repealed by the New Zealand Constitution Act 1986.

<sup>7</sup> The introduction of 4 Maori seats into the national parliamentary structure under the Maori Representation Act 1867 guaranteed a voice for Maori in national politics. However, Hapu and Iwi interests, as such, have never been officially recognised in the setting of national policy goals.

<sup>8</sup> Discussed in *Ngati Apa judgment*, supra n 1, per Elias J. A clear example is Fisheries legislation which, though it had specifically protected Maori fishing rights since 1877, was not successfully invoked until over 100 years later in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, when it was raised as a defence to the unlawful taking of paua (abalone) in the New Zealand High Court.

<sup>9</sup> The Waitangi Tribunal was established under the Treaty of Waitangi Act 1975. It is a forum for hearing Maori claims that Crown actions, policies and legislation since 1840 have breached the principles of the Treaty of Waitangi. The Tribunal produces a report at the end of each inquiry and has the power to recommend redress if it considers claims to be well founded. Claimant groups then enter into negotiation with the Crown to determine the final outcome, details of which may be set out in legislation.

Indigenous Peoples in 2007<sup>10</sup> has also given international recognition to the legitimacy of establishing indigenous forms of government throughout the world.

The re-establishment of governing institutions as constitutional entities in Aotearoa New Zealand is contested in academic and political fora. In 2003, academic Elizabeth Rata (surname derived from marriage), described the Maori cultural revival as having been “derailed” by a Maori elite who had used it “to acquire political and economic capital from the political regulation of culture and the creation of ethnic boundaries”, in a way that could destabilise New Zealand’s constitutional democracy.<sup>11</sup> In 2004, the (then) Leader of the (then) Opposition, National Party, Dr Don Brash, stated that Maori were claiming “a birthright to the upper hand” in Aotearoa New Zealand,<sup>12</sup> and “greater civil, political or democratic rights than other New Zealanders”<sup>13</sup> on the basis of race. These statements, made by influential New Zealanders, do not give serious consideration to whether the current governing system adequately represents the aspirations of Maori, or whether there is a valid basis for an independent system of Maori governance that draws upon the principles of Maori custom law at Hapu and Iwi level. They start from the premise that the state and its present governing institutions are adequate to the task, and perceive Maori as a threat to the status quo. By exploring the three questions set out above within a legislative and custom law framework, this article will show why this is not so, and how Maori are using both sets of law to overcome the deficiency.

## II WHO ARE MAORI? – ENGLISH COMMON LAW-BASED CITIZENSHIP AND MAORI CUSTOM LAW-BASED TANGATA WHENUA STATUS

British imperial expansion into Aotearoa has led to conflicting views of identity and “citizenship” within New Zealand society. The debate is fueled by the fact that Maori society and English-based New Zealand settler society derive their identities and citizenship from different historical foundations. While most other New Zealanders’ identity and citizenship is English-based and legislatively determined, Maori identity and group citizenship is based on rules and principles derived from Maori custom law.

### **English common law notions of British Nationality and New Zealand Citizenship**

The debate about New Zealand identity is underpinned by a legislative history that many younger New Zealanders (i.e. aged under 50) are not aware of. Under British and New Zealand constitutional law, independent New Zealand citizenship has a short-lived history, tracing its ancestry back only 60 years to the British Nationality and New Zealand Citizenship Act passed by the New Zealand Parliament in 1948.

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<sup>10</sup> Article 4 of the Declaration of the Rights of Indigenous Peoples states: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs as well as ways and means for financing their autonomous functions”. Article 4, United Nations Declaration on the Rights of Indigenous Peoples adopted by the United Nations General Assembly on 2 October 2007. A/RES/61/295. ) Although New Zealand was one of only 4 former British colonial states that voted against the Declaration (the others being the former British colonial states of Australia, Canada and the United States) it can be read consistently with other international documents to which New Zealand is a signatory, to give added force to arguments made under those documents.

<sup>11</sup> E. Rata, “An overview of Neotribal Capitalism”, <http://recherche.univ-montp3.fr/mambo/cerce/r6/e.r.htm>, 2003, 2. (last accessed 21 January 2010)

<sup>12</sup> Address by the Hon. Don Brash, National Party Leader, to the Orewa Rotary Club on 27 January 2004, 1.

<sup>13</sup> Ibid at 6.

Section 3 of this Act restates section 1 of the British Nationality Act, passed by the British Parliament in 1948, which acknowledged that any person born in the United Kingdom and or its former Colonies has the status of “British subject” or “Commonwealth citizen”. Additionally, sections 6 and 7 of the New Zealand Citizenship Act established an officially independent New Zealand citizenship by birth and descent.

Before the enactment of this dual legislation, colonial settlers and their descendants were reliant on their “natural born British subject” status under the English common law to protect their rights as British subjects. According to Blackstone, the origin of this status was that:<sup>14</sup>

Natural-born subjects are persons born within the allegiance, power, or protection of the crown of England, which terms embrace ... persons born within the dominions of his majesty ...

Sourced in historical allegiance binding the subject to the king in return for his protection, Blackstone held that while “the thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors”.<sup>15</sup> Tied to the practicalities of vassal and lord under the “feudal system” it produced a complex system of loyalty and allegiance to the ruling sovereign. The idea of loyalty to the sovereign was transplanted wholesale into Aotearoa New Zealand after 1840 and underpins the Westminster system of government that exists in New Zealand today.

## **Maori custom law principles relating to Group Identity**

In contrast to the descendants of the British colonials, Maori citizenship as Hapu and Iwi members has existed within the territory of Aotearoa New Zealand for centuries. While also being primarily determined by customary rules of descent, its nature, form and history are vastly different to those of the English, being derived instead from Maori custom law.

Maori custom law recognises two main relationships in determining Hapu and Iwi membership. The first is the relationship an individual has to their ancestors through physical whakapapa (genealogy) connections. The second is the attachment of that ancestral human relationship to specific territories. While loose analogies can be drawn to the “birth” and “descent” (and residence and occupation) requirements under the English-based law and statutes mentioned above, there are also some significant differences. While English law highlights a politically-based legal relationship existing between “the people” and “the sovereign” and invests the sovereign with supreme authority, Maori custom law highlights a spiritually-based relationship existing between “the people”, “their ancestors” and “the land” as concurrent living entities.<sup>16</sup> Territoriality is literally a matter of life and death within Maori society, with group territorial links strengthening over time as more and more descendants join their ancestors and become one with the land.<sup>17</sup> Local territorial boundaries between different Hapu and Iwi throughout Aotearoa New Zealand were

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<sup>14</sup> W. Blackstone, *Commentaries on the laws of England*, Vol 1, Philadelphia, 1902-1915. 366.

<sup>15</sup> Blackstone, *ibid* at 366.

<sup>16</sup> The fundamental principles of Maori custom law that underpin this relationship are discussed in section III of this article.

<sup>17</sup> This is one reference for the term “mana whenua” which underpins Hapu and Iwi assertions of “owning” their territories.

once reliant on agreement between leaders and practically evidenced by birth, occupation, and burial within those boundaries.<sup>18</sup> Since 1840, territorial boundaries have become less fluid, being defined largely through Hapu and Iwi interactions with the Crown.<sup>19</sup> Boundary disputes still sometimes occur, however, between neighbouring groups who continue to justify their claims according to traditional criteria.<sup>20</sup>

### The creation of a new group category of “Urban Maori”

That changes in Maori custom can occur was acknowledged by the Native Appellate Court in *Hineiti Rirerire Arani v Public Trustee of New Zealand*.<sup>21</sup>

Native custom ... is not a fixed thing. It 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.”

The Privy Council upheld this, noting the different sources of Maori and English law:<sup>22</sup>

It may well be that this is a sound view of the law, that [Maori] as a race may have some internal power of self-government enabling the tribe or tribes 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, seeing that there is no quasi-legislative internal authority which can modify it.

While this case related to the adoption of a Pakeha child by Maori parents, its rationale is equally applicable to the adoption of new practices and forms of observance that uphold fundamental principles of Maori custom law. Two observations can be made about this case. The first is that the judges recognised the existence of Maori custom law as being cognisable by the Courts. The second is that at the Privy Council level, although the judges did not really understand that unlike English law which ties custom to practices, Maori custom law operates via a system of recognised principles whose application changes to suit different occasions, they were prepared to countenance that some mechanism existed that enabled change to occur.

A more salient point for the purposes of this article, however, is that Maori custom law does not need judicial recognition in order to operate effectively within the Maori community. Once the “internal power of self-government” has produced a new form that is widely agreed upon<sup>23</sup> by the people, that will be sufficient to qualify

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<sup>18</sup> Discussed fully in N. Tomas, *Key concepts of Tikanga Maori (Maori Custom Law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present*, PhD Thesis, University of Auckland, 2006, 67-103.

<sup>19</sup> A. Ballara, *The Dynamics of Maori Tribal Organisation*, Victoria University Press, Wellington, 1998.

<sup>20</sup> Boundary disputes are now legally determined by the Maori Appellate Court, see for example *Re a claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board*, 12/11/90, Maori Appellate Court, Te Waipounamu District, Case Stated 1/89, 4 South Island Appellate Court Minute Book, folio 673, 1.

<sup>21</sup> [1920] AC 198 at 204.

<sup>22</sup> *Ibid* at 204-205.

<sup>23</sup> It is generalised Maori agreement, given in accordance with their custom law principles, that is the basis of Maori consent. While practices that Maori have been forced to accept through the enactment of unfriendly

it as being based on “Maori custom”. The emergence and recognition of “Urban Maori” since the 1960s, as a corporate reference to people living outside their traditional territories demonstrates this point.

“Urban Maori” are the result of a population dynamic in which loss of traditional lands, much of it due to legislative processes,<sup>24</sup> and the lure of potentially higher incomes in cities, caused individuals to move from their rural homes to urban centres. Once in the city, estrangement from the Hapu and Iwi territorial base and a lack of venues such as marae,<sup>25</sup> weakened the ability to constantly reaffirm identity by direct interaction with one’s relatives.<sup>26</sup> In this vacuum, a broad sense of shared culture united unrelated Hapu and Iwi members living away from home<sup>27</sup> and led to the emergence of a distinctive “urban” identity. These new groupings were often criticised by community leaders because they used traditional conceptions to justify the adoption of novel practices within new forums outside the tuturu (permanent) homeland. John Rangihau, an elder from the Tuhoe Iwi of the central North Island, saw the emergence of distinct urban and national Maori identities as a political ploy aimed at controlling Maori:<sup>28</sup>

I have a faint suspicion that Maoritanga is a term coined by the Pakeha to bring the tribes together. Because if you cannot divide and rule, then for tribal people all you can do is unite them and rule. Because then they lose everything by losing their own tribal histories and traditions that give them their identity.

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Rangihau feared that successful adoption of “urban” or “Maori” identities could, in time, replace existing Hapu and Iwi identity. The strength of his home people and their distinctive existence mai raano (from time immemorial) would disappear and be replaced by a new, modern Maori identity that only stretched back as far as settler contact. He advocated the optimum conditions for perpetuating the understanding of Maori custom law concepts, principles and practices amongst youth as being to relocate them back on to their traditional marae, where they would be “amidst people who have passed on” and whose ancestral voices were still “echoing through the meeting house”. The pride and groundedness thus provided would enable the young to stand tall in any new situation, secure in their Hapu and Iwi identity.<sup>29</sup> In his view, this would avert the danger of second and third generation youth, who were living divorced from their traditional lands in cities, becoming Hapu and Iwi nonentities. However, even Rangihau accepted that when it came to taking a stand on broader cultural matters and defending the need to outsiders, for cultural institutions to support them, emphasising his “Maoriness” was important.<sup>30</sup>

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legislation will never qualify as Maori custom, there are other practices that Maori have willingly adopted and adapted to their own use because they strengthen Maori processes.

<sup>24</sup> Loss of land under the Native Land Act 1862 and its antecedents is discussed in depth in: Waitangi Tribunal, *Report of the Waitangi Tribunal in the Orakei Claim - Wai-9*, 1987. For further academic commentary see DV Williams, *Te Kooti Tango Whenua - The Native Land Court 1864-1909*, Huia Publishers, Wellington, 1999.

<sup>25</sup> Marae are traditional communal meeting places where important community issues are discussed and provide a focal point of Hapu and Iwi endeavours.

<sup>26</sup> R. Walker, *Ka Whawhai Tonu Matou - Struggle without End*, Penguin Books, 1990, 200-201.

<sup>27</sup> Ibid at 197-201; see also J Lee, “The Second Great Migration” at <http://www.scholars.nus.edu.sg/post/n/maorijlg5.html>. (accessed 21 January 2008).

<sup>28</sup> J. Rangihau, “Being Maori”, in King ed, *Te Ao Hurihuri*, Longman Paul, Auckland, 1975, 174-175.

<sup>29</sup> Rangihau, *ibid* at 170.

<sup>30</sup> Ibid at 173.

What's more, I don't want to be a Pakeha. There are a lot of things in the Pakeha world which I do not like, compared with those things which I do like in the Maori world. ... I am a New Zealander, a Maori New Zealander and I can't see that it should create such a fuss every time I talk about retention of my culture and setting up Maori institutions like marae and everything else.

The tension between the acceptance of Urban Maori as a distinctive group and traditional Maori who see their principle allegiance as being to Hapu and Iwi is most obvious in the distribution of funding for social services and other resources.<sup>31</sup> It can be said however, that Maori society now generally accepts that urban groups are the product of historical processes and necessity and would agree that pragmatic ways of reconciling the two so that they do not undermine each other is a good thing. It is this widespread acceptance, based on acknowledgement of the principles of whakapapa (ancestral connection) and whanaungatanga (acknowledged kin-ship) that secures the link between "urban" and "traditional" groups under Maori custom law and evidences the change the Privy Council alluded to in *Hineiti Rirerire Arani* above.

### Defining Maoriness by legislation

Rangihau's fears have a historical and legislative basis. For although Maori identify themselves primarily through Hapu and Iwi affiliations, most other New Zealanders usually see things the other way round, with "Maori" being the principal group from which Hapu and Iwi are derived. The term "Maori" (normal or ordinary) was originally used by tangata whenua (people of the land) to differentiate themselves from the newcomer "Pakeha" or foreigners when Aotearoa was first colonised by the British.<sup>32</sup> Although "Maori" identity has come under siege in recent years, the identification of individuals as members of Hapu and Iwi has also only recently regained its wider public integrity and been adopted by the courts and the legislature.<sup>33</sup>

"Maori" is defined in section 2 of the Maori Affairs Act 1953 as "a person belonging to the aboriginal race of New Zealand: and includes a half-caste and a person intermediate in blood between half-castes and persons of pure descent from that race". The same Act defines "European" as "any person other than a Maori and includes a body corporate".<sup>34</sup>

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<sup>31</sup> Discussed further in Section III.

<sup>32</sup> HW Williams, *Dictionary of the Maori Language*, GP Publications, Wellington, 1992: Definitions of "Maori" are at 179, and "Pakeha" at 252. The terms have since taken on generalised usage and are now commonly used to distinguish the descendants of tangata whenua from the descendants of the early European (mainly British) settlers.

<sup>33</sup> In *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17, the Court of Appeal held that "Iwi" meant traditional tribes and not "Maori society generally". Hapu and Iwi are also recognised in legislation containing Treaty references. At present there are 14 New Zealand Acts "requiring action in respect of the Treaty" and 18 "with Treaty references not amounting to a direction to Act". Te Puni Kokiri, *He Tirohanga a Kawa ki te Tiriti o Waitangi*, Wellington, 2001, 111. While the process is not without its dangers, (see N Tomas, 'Implementing Kaitiakitanga under the Resource Management Act 1991'. *New Zealand Environmental Law Review*, 1, 39-42, 1994), it has enabled Maori custom law concepts and principles to be considered under the New Zealand legal system.

<sup>34</sup> The definition of "Maori" has since been streamlined to "a person of the Maori race of New Zealand; and includes a descendant of any such person" in Te Ture Whenua Maori Act 1993. Blood quantum as the standard for determining "Maoriness" was repealed by the Maori Affairs Amendment Act 1974.

The categorisation of “Maori” as “half-caste” or more, had the effect of re-entrenching the stereo-type of being more of something that was already diminished in both race and class terms. That “European” was the counterpoint to being “Maori”, and included all other racial groups, added an extra racist element that many Maori children carried into adulthood. The sense of inferiority these individuals felt as parents, and passed on to their children, was highlighted in the *Te Reo Maori Claim*,<sup>35</sup> brought by Maori against the Crown under The Treaty of Waitangi Act 1975. The *Te Reo claim* details how the Department of Education practice of banning Maori language and culture from New Zealand school grounds in the 1900s created a pervasive feeling amongst many Maori, that being Maori was a burden that made one less valuable than members of other races, particularly the Pakeha who controlled most of the institutions of authority within New Zealand.<sup>36</sup>

This attitude continues to be perpetuated by writers and politicians who still assert blood quantum as being the measure of who is legitimately entitled to call him or herself “Maori”. In 2006, Dr Don Brash responded to a High Court judge’s concern at the shortage of Maori lawyers in Aotearoa New Zealand by saying, “He continues to speak as if the Maori remain a distinct indigenous people. There are clearly many New Zealanders who do see themselves as distinctly and distinctively Maori but it is also clear there are few, if any, fully Maori left here”.<sup>37</sup> The direct inference is that blood quantum as per the 1953 legislation remains the correct criteria for assessing “Maoriness” and that most people who assert it do not meet the criteria. His comments re-ignited the “paranoia politics”<sup>38</sup> sparked when he delivered a Rotary Club speech in 2004 asserting that Maori enjoyed “special legislative privileges” which should be revoked because we are “all New Zealanders” and there should be equality for all.<sup>39</sup> In 2007, these views were still resonating within Aotearoa New Zealand politics. Catherine Delahunty, from the Green Party, countered them by saying that Pakeha New Zealand was in denial that they practiced “democratheid” ie. control by apartheid by the majority, which meant “equality for the assimilated and fairplay for everyone who acts like a Pakeha”.<sup>40</sup>

## Modern “Maori” and “Hapu and Iwi” Identities

The recent hostility towards “being Maori” shown by important non-Maori public figures makes retaining a positive Maori identity difficult in the broader Public arena. At the same time, however, it has also strengthened reliance on Maori custom law principles within the Maori community in order to maintain a strong and resilient identity.

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<sup>35</sup> Widespread testimony from elders from throughout Aotearoa New Zealand who were prohibited from using Maori language and culture while at school and punished if they did so was heard by the Waitangi Tribunal in 1985. see Waitangi Tribunal, *Te Reo Maori Report* - Wai 11, Department of Justice, Wellington, 1986, 34. The claim evidence is also discussed in M. Durie, *Te Mana, Te Kawanatanga - The Politics of Maori Self-Determination*, Oxford University Press, Auckland, 1998, 59-61.

<sup>36</sup> In order to remedy the negative impact of these policies, the Maori Language Act 1987, Education Act Amendment Act 1989, and the Maori Television Act 2004 have since been enacted to protect the status of te reo Maori and to promote its use in education and the media.

<sup>37</sup> This response to Justice David Baragwanath’s earlier address to the Law Commission was reported in the New Zealand Herald on 26 September 2006.

<sup>38</sup> A term used by the Hon. Trevor Mallard to describe Don Brash’s politics in his, “We are all New Zealanders now”, Speech to the Stout Research Centre for NZ Studies, Victoria University, Wellington, on 28 July 2004.

<sup>39</sup> Address by the Hon. Don Brash, National Party Leader, to the Orewa Rotary Club on 27 January 2004, 1.

<sup>40</sup> Catherine Delahunty, “State of the Pakeha Nation Waitangi Day Speech”, 6 February 2006. <http://www.scoop.co.nz/stories/PO0702/S00068.htm> (accessed 21 January 2010).



Defining identity according to Maori custom law principles is complicated further by the use of “ethnicity” as an extra criterion by some, in addition to the traditional requirement for “ancestry”.<sup>41</sup> “Ethnicity” is an anthropological definition that allows for inclusion of multiple factors such as customs, language, participatory practices, residence, ancestry and place of origin to determine identity. An important feature of ethnicity is that it allows for choice. A person *chooses* their ethnicity – they are not born into it – and they can change it at will.<sup>42</sup> Under Maori custom law, however, identity as Maori still requires proof of whakapapa or “ancestry” to one’s forebears and limits membership of the corporate group. Sometimes proof of specific, lineal, ancestry may be required to distinguish between different Hapu and Iwi members, at other times evidence of “any” Maori ancestry will suffice to distinguish Maori from other ethnic groups.<sup>43</sup>

Maori custom law is community driven and requires a strong Maori language base to perpetuate the cultural norms that ensure its continued existence. In the 1980s, the Kohanga Reo (Maori Language Nest) movement was instigated by Maori as a desperate attempt to prevent Maori language from dying out. During this period, the Department of Maori Affairs, headed by visionary Taranaki rangatira, Kara Puketapu, encouraged and funded those who could speak the language to open Kohanga Reo (Maori language nests) in garages, sheds, halls and lounges, and to instil the language and customary practices of collectivity into pre-schoolers in the area, irrespective of their Hapu and Iwi origins. Since their initiation in 1982, kohanga reo have played a major role in educating Maori children in Maori culture and values.<sup>44</sup> The success of the movement is such that legislation was introduced to formally recognise it as part of the New Zealand education system. Primary, secondary<sup>45</sup> and tertiary Maori language-based institutions<sup>46</sup> have also received statutory protection and funding as a result.

The positive outcome of the above within Maori communities, particularly in urban centres, has resulted in a strong sense of dual identity and group membership. Large groups of younger Maori particularly, now consider themselves “urban-based Maori” for matters affecting their daily lives and employment, and territorially based “Hapu and Iwi members” for matters concerning their longer-term wellbeing as part of a whakapapa-based group.

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<sup>41</sup> T. Moeke-Pickering, *Maori Identity within Whanau: A Review of Literature*, Hamilton, University of Waikato, 1996. T Kukutai, “The Problem of Defining an Ethnic Group for Public Policy: Who is Maori and Why does it Matter?” *Social Policy Journal of New Zealand*, Issue 23, December 2004, 86-108.

<sup>42</sup> Kukutai, *ibid*.

<sup>43</sup> The number of people identifying as Hapu and Iwi has increased. In the period 1991 to 2006, Ngapuhi, the largest iwi group increased from 92,976 to 122,211; Ngati Porou, the second largest iwi group increased from 48,525 to 71,910; Ngati Kahungunu the third largest iwi group increased from 41,778 to 59,946, and Ngai Tahu increased from 20,304 to 49,185. International support for the right of Maori to define themselves according to their own criteria and to have that criteria respected by the state is found in Articles 3,4,9,1,1,12,13,14,15,18,19, and 20 of the Declaration on the Rights of Indigenous Peoples adopted by the United Nations General Assembly in September 2007.

<sup>44</sup> In 1996, kohanga reo was the single largest provider for Maori with 46.3 % of Maori children enrolled in early childhood education attending one of 767 kohanga located throughout New Zealand. Education Counts: Schooling: Maori Medium Education; <http://www.edcounts.edcentre.govt.nz/statistic/s/schooling/maori> (accessed 21 January 2010).

<sup>45</sup> At 1 July 2004, the number of Maori students involved in Maori-medium education was 29,579, or 16.9% of all Maori students. The number of students attending Kura Kaupapa Maori, where the main language, culture and values are Maori has also increased. Education Counts: Schooling: Maori Medium Education; <http://www.edcounts.edcentre.govt.nz/statistic/s/schooling/maori> (accessed 21 January 2010).

<sup>46</sup> The Waitangi Tribunal process has assisted Maori in gaining equal treatment and access to resources that other tertiary institutions already enjoy - see section 181(b) Education Act 1987 and Waitangi Tribunal, *Wananga Capital Establishment Report* - Wai 718, 1999.

In contrast to Maori endeavours to preserve their uniqueness, the touchiness concerning Maori identity and citizenship in the wider community masks the uncertainty Pakeha feel about their own place in Aotearoa New Zealand. Identification as “Maori” with a distinct and unique language, culture and ancestral links to defined territorial spaces, is a counterpoint to a “Pakeha” identity that has now been set adrift by Britain and which is still struggling to establish itself in the same territory. In this development, “New Zealander” is the first point of cultural attachment to the territory that their ancestors made home less than 200 years ago and to which citizenship was given full legislative recognition only 60 years ago. While some Pakeha refer to themselves as “Tangata Tiriti” in recognition that the Treaty of Waitangi signed in 1840 gave them a legitimate “shared” home in Aotearoa New Zealand,<sup>47</sup> others see themselves as a second indigenous group that has turned its attention away from its former homeland and refocused its identity on commitment to this land. For this group, the assertion of being “indigenous New Zealanders” can be seen as an act of will, that, together with residence, is sufficient to establish indigeneity without any reference at all to Maori. According to Labour Party politician, Trevor Mallard, “Indigeneity” is a multi-cultural term describing “the diversity of ways in which we belong and identify with our country”, which includes “Chinese and Indian New Zealanders who have become deeply indigenous too, just like other kiwis whose forbears come from a huge range of other countries”.<sup>48</sup>

It is a strange, upside-down mentality that seeks acceptance and equality with Maori who have been displaced, dislocated from their lands, removed from power, and against whom it is now claimed “just because one group has been here longer than another does not make its members more New Zealand than later arrivals, nor does it give them the right to exclude others from full participation in national life”.<sup>49</sup> This turning of the tables to put Maori on the defensive for practicing exclusionary politics in defining themselves can be offset against Delahunty’s view of Pakeha practicing control by apartheid in New Zealand. This being so, her (then) fellow Green Party member, Nandor Tanczos may have a point when he says the “Maori Rights” debate is not really about Maori, it is about the place of Pakeha in Aotearoa New Zealand, and their increasing anxiety as their dominance of political and cultural affairs is now lessening which highlights the tenuousness of their position in Aotearoa.<sup>50</sup>

## Conclusion

The foregoing discussion establishes Maori custom law as living law, being based on widely accepted concepts and principles whose application can change and develop over time to incorporate new ideas and forms. Its existence as a legitimate form of law practiced within Maori communities that speak through their mandated leaders, has, for many years been masked by the operation of the formal New Zealand legal system and its political-legal processes introduced after 1840.

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<sup>47</sup> Green Party Member of Parliament, Nandor Tanczos, *Tangata Whenua, Tangata Tiriti*, Opinion Piece, 12 March 2004, <http://www.greens.org.nz/searchdocs/other7291.html> (accessed 21 January 2010).

<sup>48</sup> Hon. Trevor Mallard, “We are all New Zealanders Now”, Speech to the Stout Research Centre for New Zealand Studies, Victoria University, Wellington, 28 July 2004, 2. Also see discussion in M. Bennett, “Indigeneity” as Self-Determination”, *Indigenous Law Journal*, Faculty of Law, University of Toronto, Volume 4, 2005 at 71-115.

<sup>49</sup> Hon. Trevor Mallard, “We are all New Zealanders Now”, Speech to the Stout Research Centre for New Zealand Studies, Victoria University, Wellington, 28 July 2004, 2.

<sup>50</sup> Green Party Member of Parliament, Nandor Tanczos, *Tangata Whenua, Tangata Tiriti*, Opinion Piece, 12 March 2004, <http://www.greens.org.nz/searchdocs/other7291.html> (accessed 21 January 2010).

New Zealand legislation has, since the mid 1980s, provided some protection to Maori custom law processes by promoting education that highlights Maori language and cultural transfer through the enactment of the Maori Language Act, and through legislation establishing Maori Television.

When supportive legislation has been passed Maori have fleshed out these frameworks by applying traditional custom law principles and adapting their application to suit modern lifestyles. The fundamental criterion for recognition as Maori and Hapu and Iwi member is still the traditional one of proving whakapapa to a known Maori ancestor. While this provides entry into the process of “being Maori” it does not guarantee a positive outcome in any competition for resources amongst members of the group. Other criteria decided on by the group will determine that. It is possible to be “Urban” for some purposes, and “Hapu” or “Iwi-based” for others. There may be other variants that arise in response to changed circumstances in the future. Identification as a New Zealander is generally a third identity, drawn from an amalgam of Maori custom law principles and New Zealand legislation, that is employed by Maori and others in foreign jurisdictions to differentiate themselves as visitors to other peoples’ territories. Its practical manifestation is shared haka.

While the Pakeha search for a unique identity within Aotearoa New Zealand continues, it can no longer undermine the existence of an independent Maori identity. That ability has been eroded by the work of the Waitangi Tribunal in hearing and making recommendations in the Te Reo Maori claim, the establishment of Kohanga Reo, Kura Kaupapa and Wananga, and the legislation passed to protect Maori language and culture as a result of the Te Reo Claim.

### **III WHAT IS DIFFERENT ABOUT A MAORI SYSTEM OF GOVERNANCE?**

Briefly stated, a Maori system of governance is based on principles that are drawn from Maori custom law. In this part of the article I examine the value base and principles of Maori custom law that drive Maori governance.

In 2005, a national gathering of Chief Executive Officers of Maori organisations met in Whanganui-a-Tara (Wellington) to discuss Maori governance for the next 20 years. They identified four aspects of governance as being important. They were: the inclusion of Maori governance values; flexibility of structure to accommodate those values; possession of the relevant skills, and accountability.<sup>51</sup> The participants in the 2005 Hui Taumata all agreed that modern, Pakeha-based management systems and processes of accountability are important tools for Maori to adapt and use in implementing Maori governance, to ensure that finite resources are not lost through mismanagement and lack of accountability by individuals acting in responsible positions.<sup>52</sup> The more difficult task for them, however, was working out the strategic direction that the group should take. Not only did it require the inclusion of unique Maori values and principles but they had to be durable enough to serve the

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<sup>51</sup> “Hui Taumata” are held annually to discuss shared issues of importance to Maori and to create pathways forward. These points are taken from a discussion amongst Chief Executive Officers of Maori organisations to debate the question “What do we need to do to build effective Maori Governance by 2025?” at the National Hui Taumata held in Wellington in 2005.

<sup>52</sup> This is a classic example of Maori updating their customary practices by incorporating external ideas to better achieve the outcomes the group desire.

collective, inter-generational needs of the group rather than being simply short-term and profit-oriented.<sup>53</sup>

### **Maori custom as a source of law**

The discussions conducted in the 2005 hui pre-suppose the existence of a unique and coherent Maori system of values and principles. A widely accepted definition of Maori custom law was provided by the, then, Chief Judge of the Maori Land Court and Chairperson of the Waitangi Tribunal, ET Durie, as being:<sup>54</sup>

law generated by social practice and acceptance as distinct from 'institutional law' which is generated from the organs of a super-ordinate authority. Custom was a significant source of English law but has since been mainly replaced by common law (case law) and statutory regulation.

Maori society did not possess a formal legal system with independent courts and supporting bureaucracy, as was developed over centuries in England and then transplanted into Aotearoa New Zealand. In the absence of such a system, Maori custom law has developed in the Maori community through hui held on marae and discussions involving wide sections of the community which are guided by kaumatua and kuia (elders) and rangatira (leaders). Group discussions highlight a series of fundamental principles that form the agreed standards and guidelines necessary to protect the welfare of individuals, whanau and Hapu and Iwi. Appeals to these principles result in decisions that are agreed to, or at least accepted, by members of the community, rather than being imposed by an independent and superior person sitting as judge. The setting and reviewing of normative standards and actions necessary to uphold these principles is an ongoing process that occurs at successive gatherings.

The absence of the threat of any official coercive back-up and direct punishment for not complying with a decision means that Maori society must rely on voluntary compliance and involvement as an active member of the community for enforcement. Thus, maintaining a strong sense of identity, community and belonging between individuals and the group is an essential part of developing and perpetuating Maori custom law as a coherent system. Leaders are not judges and do not have the power to impose their will on their people. They are servants who must carry the wishes of the people in order to retain their mana (status) as leaders. Regular meetings within communities and between Hapu and Iwi leaders facilitates the establishment of common standards at local and national levels, keeps Maori society in touch with itself, and aligns Hapu and Iwi on shared issues.

A distinction needs to be made between genuine Maori custom law, ie. law that is drawn from within the Maori community, and English-law-based Maori customary law that has been imposed on Maori society as being customary. Two examples will suffice to demonstrate the difference. The first is the succession rule

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<sup>53</sup> per Temuera Hall, Chief Executive Officer of Ngati Tuwharetoa Iwi.

<sup>54</sup> E.T. Durie, *Custom Law*, (Unpublished Paper for Waitangi Tribunal Members and later referred to the NZ Law Commission), January, 1994.

imposed by Chief Judge Fenton in the *Papakura Claim of Succession*.<sup>55</sup> The case concerned the inheritance of land held by a sole grantee to an entire block of land situated in Papakura near Auckland. His widow and children claimed succession to the entire estate. The claim was challenged by his nephew and other relatives espousing Maori custom law principles. Fenton CJ held:<sup>56</sup>

It would be highly prejudicial to allow the tribal tenure to grow up and affect land that has once been clothed with a lawful title, recognised and understood by the ordinary law of the country. Instead of subordinating the English tenures to Maori customs it will be the duty of the Court, ... to cause as rapid an introduction amongst the Maoris, not only of English tenures, but of the English rules of descent, as can be secured without violently shocking Maori prejudices.

Fenton adopted and imposed a hybrid system of inheritance based on English rules favouring the wife and children and excluding the claims of other Hapu members to land that had formerly been collectively held. This rule of inheritance is still part of Maori Land Law today and governs inheritance of Maori land on intestacy.<sup>57</sup>

A more insidious inroad into genuine Maori custom has been made by the adoption of the seemingly benevolent doctrine of Aboriginal title, another construct of English-based law, which provides for recognition of Maori custom by the New Zealand legal system but circumscribes it with so many legal restrictions that it is effectively rendered toothless.<sup>58</sup>

Despite the above, Maori society continues to exist, and Maori custom law continues to be practiced within Maori society with the knowledge that it does so under an English-based legal system that has not always been respectful or benevolent. When the courts and/or the legislature have breached Maori custom by denying Maori rights or by confiscating resources without Maori consent the injustice is keenly felt.<sup>59</sup> Law has never been a one-side only process. Maori society has always possessed its own standards for assessing Crown behaviour according to Maori custom law principles. The inter-generational memory is a long one, and predates the Doctrine of Precedent and Parliamentary sovereignty that are the hallmarks of English-based laws.

Two separate but related sources of Maori custom law can be identified as relevant to governance. One is a set of “constitutional” principles that are included in

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<sup>55</sup> *Important Judgments Delivered in the Compensation Court and the Native Land Court, 1866-1879*, Auckland Native Land Court, 1879, Auckland Southern Reprints 1994, 19-20. Discussed in *DV Williams*, supra note 24 at 179-180.

<sup>56</sup> *Ibid.*

<sup>57</sup> see section 109 Te Ture Whenua Maori Act 2003.

<sup>58</sup> See detailed discussion in *Ngati Apa* supra note 1, which reinforces extinguishment by legislation. The fact that the Labour Government passed the Foreshore and Seabed Act 2003 extinguishing Maori customary ownership of the foreshore and revesting title in itself, ignoring the Court of Appeal and overwhelming Maori rejection, shows conclusively that reliance on the constitutional principles of the Honour of the Crown and acting in Good Faith, and trusting to the influence they might exert within the legislature is sometimes misplaced. Maori have no choice but to strengthen their own political structures to guard against the negative ramifications of such betrayals of faith.

<sup>59</sup> The protest shown by Maori before the passing of the Foreshore and Seabed Act 2003, included rejection of the Crowns proposal by Hapu and Iwi in their home territories, an urgent Waitangi Tribunal Hearing and a Hiko to Parliament of 15,000 people.

the Maori text of te Tiriti o Waitangi, the other a series of fundamental principles that are drawn directly from Maori society.

## Maori Constitutional Principles underpinning Maori Governance

Maori governance aspirations draw upon three basic “constitutional” principles, two seemingly being derived from Te Tiriti o Waitangi but actually drawn from Maori custom law, and one from International law. They are: taonga, tino rangatiratanga and self-determination.

“Taonga” (treasures or precious things) is a generic term used in Article 2 of te Tiriti o Waitangi<sup>60</sup> to incorporate Maori culture, practices and physical resources that were not specifically named but which were considered important to Maori Hapu and Iwi in 1840. The term extends beyond physical things to also include essential aspects of the Maori worldview and Maori conceptualisations of law that arise from within that worldview.<sup>61</sup> While the term can refer to discrete objects, it is the *value* attributed to the object by the group, rather than the object itself, that makes it taonga. What is considered to be taonga is the result of ongoing evaluation by Maori and can change according to the perceived needs of the group. The principle of “taonga” guides us to acknowledge that there are valuable aspects of the Maori world that require recognition and protection in any governance system. What they are and how they are protected are matters of detail to be decided by the group over time.

“Tino rangatiratanga” (absolute chieftainship) is the equivalent of “sovereignty” in English legal terms. It is reserved by Maori in Article 2 of te Tiriti o Waitangi. Its core meaning is taken from “rangatira” who were the leaders of Hapu and Iwi in traditional Maori society. The addition of the suffix “tanga” transforms the noun into a verb, creating the concept of “leadership” or “chieftainship” and includes the necessary authority that goes with it. “Tino” is a linguistic intensifier whose inclusion in the prefix of the phrase reinforces that rangatiratanga is an expression of the greatest authority conceivable by Maori. It is a concept bursting with potential for overt expression in any number of human institutional forms. The principle of “tino rangatiratanga” asserts the Maori right to control matters relating to the wellbeing of Hapu and Iwi.

“Self-determination” is a self-explanatory term taken from International Law, which reinforces the Maori claim to tino rangatiratanga at a global level.<sup>62</sup> Like rangatiratanga, it is a concept whose potential may be expressed in a number of different ways both personal and institutional. It is important to Maori because its universal application as a human rights norm gives international support and force to the claims by Maori for recognition of their social, economic, cultural and political rights as members of the global community. Self-determination can piggy-back rangatiratanga and its recognition will achieve many of the same outcomes desired by Maori. However, the two concepts are not the same. Regardless of how humbly it is

<sup>60</sup> Supra n5 and Appendix 1.

<sup>61</sup> This has been recognised by the Waitangi Tribunal in, Report of the Waitangi Tribunal on the *Manukau Claim*, Wai 8, Department of Justice, Wellington, 1985, by the High Court in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 and by the Court of Appeal in *NZMC v AG* [1987] 1 NZLR 641. (Lands Case) The extent of judicial recognition should not be overstated however, as what is considered to be “justiciable” varies from case to case. While concepts such as “the Crown” and “sovereignty” are unquestioningly accepted as part of New Zealand’s conceptualisation of law, concepts which serve an equivalent symbolic purpose for Maori such as “rangatiratanga” can be a challenge for practitioners and judges trained in English common law traditions.

<sup>62</sup> Draft Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly on 2 October 2007, supra n10.

conveyed, “Rangatiratanga” is about greatness and prestige and declares to the world at large, “I’m here, take me as I am” – whereas “self-determination” is humbler by comparison, expressing the hope of acceptance as being “equally” part of the human race by others. Whereas Rangatiratanga assumes and asserts an authority that is wholly Maori-derived, even in the face of overwhelming odds, self-determination, as an international law principle, is reliant on States for recognition.<sup>63</sup> Despite the New Zealand government opposing the Declaration on the Rights of Indigenous Peoples, the assertion of “tino rangatiratanga” under te Tiriti o Waitangi at domestic level, anchors the Maori claim for independent Hapu and Iwi governing systems within Aotearoa New Zealand. Adoption of the principle of “self-determination” by Maori reinforces Maori claims in the global community and states their far-reaching ambit with precision.

The Treaty of Waitangi is not an ambiguous document.<sup>64</sup> Its terms are quite clear. The problem is that there are two sets of terms, each of which clearly provides for a different sovereign authority in the one territory. Under the English text the British Crown grants itself authority over Maori people and territory in return for minimal property-saving guarantees, while in the Maori text, Maori Hapu and Iwi retain their existing absolute authority over themselves and their territory, while accommodating British law. At present the English text prevails in Aotearoa New Zealand.

Treaty settlement legislation acknowledges the Treaty as providing a constitutional place for Maori in the overall system of government for Aotearoa New Zealand and recognises that Maori and the Crown are Treaty partners for all time. Although a far cry from the absolute authority enjoyed before 1840, the resources passed to Maori as a result of Treaty settlements will enable Maori to better achieve Hapu and Iwi aspirations.

Recognition of the above three principles, ideally, would enable Maori to live their lives *as Maori*, develop their resources *as Maori*, and control the processes that impact on their identity *as Maori*. Achievement of these aspirations however, relies on the practical implementation of other Maori custom law principles and is best achieved through a system of competent Hapu and Iwi governance that promotes Maori identity, supports language vitalisation, enculturates its people through education, and enhances their quality of life through the provision of a sound economic base.

## **Fundamental Principles of Maori Custom Law**

It is not possible to reduce an entire culture to a defined set of norms because norms change over time. It is possible, however, to indicate the important principles by which that culture defines itself and which provide it with a coherent framework of existence. There is a unique mindset that underpins “being Maori” and from which principles have emerged against which human actions can be assessed. From these principles, normative and prescriptive rules can be produced as guides to behaviour in specific circumstances.

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<sup>63</sup> The primary subjects of International Law are states and not people. The Declaration sets out guidelines for states to implement the rights of indigenous peoples set out under its Articles.

<sup>64</sup> See Appendix 1, which contains copies of the English and Maori texts of the Treaty.

Maori custom law coheres around the concepts of Whakapapa, Whanaungatanga, Mana, Tapu and Mauri,<sup>65</sup> which also produce working principles for defining standards of “good” behaviour and some of the entrenched practices of Maori society. These principles form the basis of Maori custom law in that they provide a common reference point for community discussions and decision-making on matters concerning the welfare of the group as a whole, as well as acting as guidelines for monitoring the relationships between its individual members. A shortcoming of the New Zealand legal system in the past has been the inability of most of its judges to understand or accept the relevance of these principles and therefore, to give them more than minor jural effect.<sup>66</sup> The following explanations are necessary, not only to overcome that deficiency, but also in order to properly understand how the relationship between Maori custom law and legislation set out at the beginning of this article, operates.

## Whakapapa

*Whakapapa* – is often referred to in short form as “genealogy” or “ancestral connections” and is a fundamental of Maori custom law that is often asserted with rule-like rigidity. The physical fact of descent by birth provides the most durable process for anchoring individuals to territory, and guarantees acknowledgement of belonging but not necessarily actual inclusion, in group activities. Whakapapa links strengthen over time as more and more ancestors return to “te whenua” (the earth), thus consolidating the oneness members of the group feel with Papatuanuku, the earthmother of Maori creation stories. The notion of “home” being tied to ancestral lands and territories is evident in the desire Maori often express of wanting to return home for burial within their ancestral territories when they die. In a political and legal sense, the practice of returning home reinforces the territoriality that Maori Hapu and Iwi claim to particular areas and the collective nature of Hapu and Iwi identity drawn from territoriality that is discussed in Section II of this article.<sup>67</sup>

*Whakapapa* is also important in determining the way Maori think about the relationship between humans and the rest of their environment. In Maori thinking whakapapa can also be viewed as a process by which change occurs over time and in response to new conditions. As a process of incremental change it provides the flexibility for Maori society to meet new challenges as they arise by integrating them into their cultural paradigm and adjusting it to fit. Colonisation, for example, is a major ongoing event to which Maori have had to adjust. The first stage of withstanding its devastating impact has been completed and Maori are now in the process of rebuilding their institutions, taking the best of what colonisation has provided and adapting it to fit their own thinking paradigm. For Maori, this is just a natural part of developing Maori custom law by “Incorporation” in order to meet new contingencies.

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<sup>65</sup> Although writers often highlight other principles when discussing Maori culture, in my view, all principles can be logically referenced to these five fundamental “working” principles. See *Tomas*, supra n18.

<sup>66</sup> This will change over time. Inclusion of genuine Maori custom as part of the New Zealand Law School Curriculum is relatively recent in most New Zealand Law Schools and academic writing in the area is sparse.

<sup>67</sup> The advent of the Native Land Court in 1862, led to Maori Hapu and Iwi territories being defined as they stood at 1840. The “1840s Rule” is discussed in *Williams* supra n 24 at 231-233.



## Whanaungatanga

*Whanaungatanga* is a principle that encourages overt acknowledgement of whakapapa-based relationships. The idea of “being related” has expanded over time – the classic example being the way Maori defined themselves in opposition to Pakeha when settlers came to Aotearoa, thus setting a new category of “Maoriness” based on an ancestry that is proto-Polynesian as opposed to European-based. This shift in conceptualisation was not difficult because Maori have always defined themselves in relational terms. Having previously defined themselves as Hapu and Whanau, it was a small shift to add another layer to existing relationships in order to differentiate the new arrivals from the tangata whenua. Further evidence of this tendency to create new relational categories while retaining the underlying integrity of whakapapa is seen in the way Maori living in the city have aligned themselves in modern times as “urban” Maori.

In both instances the formation of new conceptual categories has provided a distinctive “Maori” voice within the national governing systems of Aotearoa New Zealand by taking up the opportunities provided under existing New Zealand legislation.

Building on their new “Urban” identity, in January 1994, Haki Wihongi and the Te Whanau o Waipareira Trust, in West Auckland, lodged a claim alleging that the Crown had failed to recognise the special status of Te Whanau o Waipareira as a Maori community organisation providing regional social services and had failed to properly consult with it in accordance with its obligations under Article 2 of the Treaty of Waitangi.<sup>68</sup> The Waitangi Tribunal accepted the claim that they were an emergent group with an independent identity that stood alongside “traditional iwi” and went further by adding that they were also covered by the guarantees under te Tiriti/the Treaty.<sup>69</sup>

The Treaty of Waitangi was signed by rangatira of hapu, on behalf of all Maori people, collectively and individually. Therefore, conversely, protective benefits and rights of autonomy in terms of the Treaty are not limited to traditional tribal communities.

A further claim to a distinct urban identity arose in 1992 when a newly established Maori Fisheries Commission began to work out a mechanism for allocating funding to Maori “Iwi” under Fisheries Settlement legislation.<sup>70</sup> Following nation-wide debate and a series of court hearings,<sup>71</sup> it was decided that disbursement should be made primarily to “traditional iwi” to whom all Maori could relate, with “urban Maori” receiving a lesser sum. The matter was finally settled with the passage of the Maori Fisheries Act 2004, which gives statutory endorsement to the allocation mechanism worked out by the Commission.

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<sup>68</sup> *Te Whanau o Waipareira Report - Wai 414*. <http://www.waitangi-tribunal.govt.nz/reports/summary>, 1. (last accessed 21 January 2010)

<sup>69</sup> *Ibid.*

<sup>70</sup> Claims that the Crown had breached Article 2 of the Treaty of Waitangi by failing to recognise Maori property rights in their fisheries were settled by the passage of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 which provided Maori with \$150 Million, and guaranteed 20% of the national fisheries quota for selected species. It also established the Maori Fisheries Commission to oversee distribution of fisheries assets to “Iwi”.

<sup>71</sup> *Te Waka Hiika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17.

The principle of whanaungatanga is flexible enough to incorporate those who are not blood-related into the corporate life of the group. The practice of including individuals without a whakapapa link is particularly common in the inclusion of non-Maori spouses who are actively engaged in Hapu and Iwi life and accepted as part of the whanau (extended family). This application of whanaungatanga highlights the underlying responsibility owed by the group to those with whom individual members have an acknowledged relationship and creates the expectation that those who are included will, in turn, also contribute as members of the group. However, this type of relationship does not provide the certainty or durability of a whakapapa link.

## Tapu

A third important principle Maori use as a guideline for discussion and decision-making is *Tapu*. Tapu denotes what is important and what is not important: things that are considered to be important by the group are often described as being “highly tapu” by its members. The Maori system of articulating value in terms of allocating relative tapu status to people, objects, categories of knowledge and resources links back to a Maori society in which everything was once imbued with a greater or lesser degree of tapu.<sup>72</sup>

In traditional Maori society, all the things that were essential to the group’s welfare were controlled by the institution of Tapu. Those with authority were able to place temporary and permanent restrictions on access to important resources by members of the group. The normative behavioural standards by which members of Maori society regulated their interactions with each other and with the environment in which they lived were based on acknowledgement of Tapu and the restrictions it carried with it. Breaches of those restrictions were often punishable by death.<sup>73</sup>

With the advent of colonial law, Tapu as a value system with attendant restrictions lost its pervasive influence as a regulator of behaviour within Maori society. Pitted against a new legal system that had its own set of normative values and system of punishing those who did not conform to the rules and principles that upheld those values, it was relegated to second place. Despite its lack of enforceability, Tapu today continues to inform the status of Taonga, and to convey the values associated with a Maori view of the world and restricted human behaviour.<sup>74</sup>

## Mana

The fourth important principle is *Mana*. Mana denotes the association of power and authority between people and between humans and the rest of the world. Maori society identified four sources of power: Mana Wairua – power derived from the spiritual source from which all things derive; Mana Atua – power derived from the gods who were known to Maori; Mana Tangata – power derived from human sources and Mana Whenua – twofold power derived first, through physical association with

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<sup>72</sup> Father Servant, a Marist Missionary who spent the years 1838-1842 in the Hokianga area of Aotearoa wrote: “Nothing is more common amongst the natives than the use of the tapou: the tapou affects people, animals, fields, houses, woods, properties, work, political and religious matters. ... There is another kind which the great chiefs impose on their inferiors. Both kinds are observed with the most scrupulous care”. C Servant, *Customs and habits of the New Zealanders 1834-42*, ed D Simmons, AH & W Reed, Wellington 1973, 34.

<sup>73</sup> A good description by a Maori writer can be found in, Makareti, *The Old Time Maori*, V Gollancz, London, 1938, 146.

<sup>74</sup> C. Barlow, *Tikanga Whakaaro, Key Concepts in Maori Culture*, OUP, Auckland, 1996.

the land, and second, as a referent to the power that is inherent in the land because it is Papatuanuku, the ancestor through whom the gods and humans gained life.<sup>75</sup>

This idea of power and authority informed Maori leadership, which centred around “rangatira”, or individual leaders whose mana was considered to be greater than others because they were either born into a senior whakapapa line or demonstrated ability in a range of activities important to the group. These might include gardening, resource administration, warfare, and spiritual pursuits and people management.<sup>76</sup> The utility of individuals in promoting the collective wellbeing of the group was acknowledged by the attribution of mana (prestige) by other members.

Maori now often use the term *Kaitiakitanga*, to refer to a model that combines mana and tapu in an institutional framework<sup>77</sup> that denotes how human interactions with natural resources should be managed around whakapapa and whanaungatanga relationships. Its application in resource management locates humans as an integral part of a wider existence and acknowledges our responsibility for the care of other aspects of existence because we are related.<sup>78</sup> In Hapu and Iwi terms, this collective responsibility is aimed at maximising the chances of group survival in a constantly changing world through ensuring that important Maori ways of perceiving what makes the world cohere are kept in alignment.

### Statutory Protection of Maori custom

The relationship between Maori and the Crown is littered with ironies. One of these is that the demise of Maori custom law and its survival as an independent system have both been fostered by the Crown through legislation. Another is that the Crown has, itself, created the self-flagellating mechanism that has held it accountable for its past wrongdoings against Maori. Yet another is that despite this, the Crown still sees itself as controlling Maori.

There are 4 statutes which that have had a major impact on providing statutory protection for Maori custom: The first is the Treaty of Waitangi Act 1975, which empowers the Waitangi Tribunal to hear Maori grievances against the Crown based on breaches of the principles of the Treaty of Waitangi. In the Te Reo Maori claim the Tribunal heard numerous submissions supporting te reo Maori as a taonga tuku iho (a precious inter-generational possession). The import of the statement made by Ngapuhi rangatira, Sir James Henare that “ko te reo te mauri o te mana Maori” (the language is the life force of Maori authority)<sup>79</sup> impressed upon the Tribunal the serious consequences of losing the language and the need for urgent action. The Tribunal’s recommendations gave impetus to calls from Maori to pass legislation to protect te Reo. The Maori Language Act 1987, the Education Amendment Act 1990 and the Maori Television Service Act 2003 are three important legislative interventions that followed on from the Te Reo Claim to assist with Maori language rejuvenation.

The Maori Language Act made Maori language an official language of New Zealand, giving it a status that had previously been actively denied in New Zealand’s

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<sup>75</sup> Ibid at 61-62.

<sup>76</sup> Tomas, supra n18.

<sup>77</sup> M Marsden and TA Henare, *Kaitiakitanga – a definitive introduction to the holistic worldview of the Maori*, Ministry of Environment, Wellington, 1992.

<sup>78</sup> Kaitiakitanga is one of several considerations to which decision makers “shall have particular regard to” under section 7 of the Resource Management Act 1991.

<sup>79</sup> Words spoken at both the 1979 hui and during the Te Reo Claim by Ngapuhi elder, Sir James Henare. As quoted in Durie, supra n35 at 59.

official institutions. It also established Te Taura Whiri i te Reo (the Maori Language Commission) as an institution that is primarily responsible for promoting and monitoring Maori language development and usage within the community.

The Education Act 1989 was amended in 1990 to include section 181 (b) which provides for educational institutions to “acknowledge the principles of the Treaty of Waitangi”. A new section 155 was also inserted into the Act to empower the Minister of Education to designate a state school as a Kura Kaupapa Maori by Gazette notice. Later on, the Education (Te Aho Matua) Amendment Act 1999, amended section 155, requiring Kura Kaupapa Maori to adhere to the principles of Te Aho Matua. The Amendment Act also established Te Runanganui o nga Kura Kaupapa Maori as the kaitiaki (guardians) to determine the content of Te Aho Matua and ensure it is not changed to the detriment of Maori. Te Aho Matua contains 6 compliance sections. They are: Te Ira Tangata (the human essence); Te Reo (language); Nga Iwi (people); Te Ao (the world); Ahuatanga Ako (circumstances of learning) and Nga Tino Uaratanga (essential values). Further reinforcement of Maori education occurred with the establishment of Wananga, Maori tertiary institutions that are classified as “Crown entities” or state-owned tertiary institutions under the State Sector Act 1988 and the Crown Entities Act 2004. Wananga are also subject to section 181 (b) of the Education Act 1989. The statutory protection provided to the governance mechanisms that overarch the establishment of Kohanga Reo, Kura Kaupapa and Wananga, all enable Maori customs to be reinforced in education that is based on Maori traditional principles and practices.

The provision of a Maori Television service whose purpose is to foster and promote Maori language and culture,<sup>80</sup> also facilitates transmission of te reo to a wide Maori viewing audience using audio-visual media. There is no data yet available to quantify the effect the Channel is having on improving language skills and culture retention.

## Conclusion

Maori society continues to organise itself according to traditional principles, some of which are outlined above, that have held it together for generations. Those principles govern Maori collective activities and underpin Hapu and Iwi inter-generational planning.

The preservation and perpetuation of Maori culture and language within educational institutions has been given statutory protection, alongside English-based institutional learning and through the establishment of Maori television. Within these statutory protections, Maori custom law continues to operate and determine the way that inter-generational transfer of the knowledge, values, and behaviour that Maori society consider important is conducted.

Modern Hapu and Iwi governance systems are still in their infancy. The legitimacy of these institutions is linked to the continued existence of Maori as cohesive Hapu and Iwi. The authority for their existence as independent modern entities is derived from within their own communities, the Treaty of Waitangi and International Law. Holding the whole lot together are the principles of Maori custom law.

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<sup>80</sup> Maori Television Service Act 2003.

#### IV THE PROOF IS IN THE PUDDING - CAN HAPU AND IWI GOVERNANCE ACHIEVE WHAT THE PEOPLE WANT?

In this section, I discuss the Treaty of Waitangi Settlements of two large Iwi, Waikato - Tainui and Ngai Tahu and examine the governing frameworks they have created for themselves. Although encased within the wider framework of “historical Treaty grievances”, settlement legislation has provided a framework and an economic base from which they can develop governance structures that integrate custom law principles into their operation. Although discursive, this section provides conclusive proof that Waikato-Tainui and Ngai Tahu are part of the constitutional framework of Aotearoa New Zealand government, having been overtly recognised as being in partnership with the Crown under the Treaty of Waitangi. While I do not promote either model as the way forward for all groups, they are also proof that Maori Hapu and Iwi *are able to successfully govern themselves* while not only retaining their identity as Maori but also strengthening it.

##### Working within Two different Law paradigms

The source of English-based law is the sovereign. Since at least 1701 and the Act of Settlement, notionally speaking, the English sovereign has spoken through Parliament and expressed his or her changing will in legislation.<sup>81</sup> In marked contrast, the source of Maori custom law is the people. Since time immemorial the people have expressed their will in community forums and spoken through mandated leaders. In developing modern institutional frameworks in which Maori can develop autonomously as Maori and control their own governance processes, Maori leaders have had to be mindful of the two different sources of law and have had to satisfy the requirements of both. For Maori leaders, having their status as Hapu and Iwi recognised in legislation by the central government of New Zealand, even though it does not reach the 1840 standard of “absoluteness” set out in te Tiriti and the Treaty of Waitangi, is viewed as acknowledgement of the mana and rangatiratanga of the people.<sup>82</sup> From the New Zealand government’s point of view, transferring funds and other resources to Hapu and Iwi is part of the process of settling historic Treaty of Waitangi grievances for all time, the hope being that at this point, New Zealand society will continue the “one people” aspiration espoused by Lt Governor Hobson in 1840. Despite having different goals, Maori have, nevertheless seized the opportunity of gaining an economic base that can generate revenue to provide for the general social needs of the people and bring Maori society into the 21<sup>st</sup> century. Thus, although the Treaty Settlement Process has been soundly criticised by Maori commentators,<sup>83</sup> it has also provided for the establishment of new institutional forms of Hapu and Iwi governance that suit modern living.

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<sup>81</sup> Under the Act of Union 1707 England and Scotland combined to form the Kingdom of Great Britain. Ireland was later joined via the Union with Ireland Act 1800 to form the United Kingdom of Great Britain and Ireland.

<sup>82</sup> The Waikato-Tainui claim was settled by legislation drafted by the Iwi and confirmed by the passage of the Waikato Raupatu Claims Settlement Act 1995. The Ngai Tahu Claims Settlement Act 1998 follows a similar process and was preceded by the Te Runanga o Ngai Tahu Act 1996 which establishes the membership of the Iwi, their iwi boundaries and a representative corporate governance.

<sup>83</sup> For example see Durie, *Launching Maori Futures*, supra n4 at 93-94, who criticises the process for employing an adversarial bargaining approach in the settlement of Crown grievances rather than building “trust and respect” between equal partners.

## A. WAIKATO - TAINUI

### Legislative Framework of Waikato - Tainui Treaty Settlement

#### Waikato Raupatu Claims Settlement Act 1995

The Waikato Raupatu Claims Settlement Act 1995 was passed after years of negotiation between Waikato leaders and New Zealand government officials. The Act is based on a 42 page Deed of Settlement entered into between Dame Te Atairangikaahu, the Maori Queen, on behalf of Waikato-Tainui, and the Rt Hon. James Bolger, the Prime Minister of New Zealand, on behalf of Her Majesty the Queen, on 22 May 1995. The Act is novel in that not only does its content mirror much of the originating Deed, but the process entered into resembles an agreement between two Heads of State, the main details of which are then captured in domestic legislation.

The Preamble of the Act is written in both Maori and English and contains a detailed account of the grievance and events leading up to the 1995 legislation. It records that in 1858, Pootatau Te Wherowhero was elected Maori King to “unite the iwi, and preserve their rangatiratanga and their economic and cultural integrity” in the face of increasing colonial settler encroachment.<sup>84</sup> Chiefs pledged their land to the new King giving him “ultimate authority over the land” and “ultimate responsibility for the wellbeing of the people” thus binding their communities to the Kiingitanga and resisting further alienation of their land.<sup>85</sup> The New Zealand Government of the time perceived the Kiingitanga as a challenge to the Queen’s sovereignty and a hindrance to Government land purchasing policies, and would not enter into a formal relationship with the Kiingitanga.<sup>86</sup> As a consequence, in 1863 the Government “unjustly invaded” the Waikato, initiating hostilities and forcing the people to defend their lands.<sup>87</sup> The New Zealand Settlements Act 1863 was passed, under which:<sup>88</sup>

... the Crown unjustly confiscated approximately 1.2 million acres of land from the Tainui iwi in order to punish them and gain control of the land placed by them under protection of the Kiingitanga.

The devastating result of this was:<sup>89</sup>

... widespread suffering, distress, and deprivation were caused to the Waikato iwi ... as a result of the war waged against them, the loss of life, the destruction of their taonga and property, and the confiscations of their lands, and the effects of the Raupatu have lasted for generations.

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<sup>84</sup> Clause B.

<sup>85</sup> Clause C.

<sup>86</sup> Clause D.

<sup>87</sup> Clause E.

<sup>88</sup> Clause F.

<sup>89</sup> Clause G.

A Royal Commission in 1926 (Sim Commission) recommended compensation be paid by the Crown, and the Tainui Maori Trust Board was established to administer an annual sum “for the benefit of those members of the Maori tribes in the Waikato District whose lands had been confiscated”.<sup>90</sup>

The Preamble includes two “official” statements supporting the Waikato claim. The first is a quote from the 1985 Waitangi Tribunal Report in the Manukau Claim.<sup>91</sup>

It can simply be said that from the contemporary record of Sir John Gorst in 1864, from the Report of the Royal commission sixty years after that, and from historical research almost a century removed from the event, all sources agree that the Tainui people of the Waikato never rebelled but were attacked by British troops in direct violation of Article II of the Treaty of Waitangi”.

The second quote, from the Court of Appeal in *RT Mahuta and the Tainui Maori Trust Board v Attorney General* [1989] 2 NZLR 513, states that the Sim Commission had failed to convey:<sup>92</sup>

... the crippling impact of Raupatu on the welfare, economy and potential development of Tainui” and that “Some form of more real and constructive compensation is obviously called for if the Treaty is to be honoured”.

Following Negotiations with the Crown<sup>93</sup> a Deed of Settlement was entered into in which the Crown recognised the significance of the “land for land” principle to Waikato and agreed to make full and final restitution to Waikato in respect of the Raupatu claims.<sup>94</sup> Land transferred to Waikato under the Deed would be held communally in a trust to be established by Waikato and part of that land would be registered in the name of Pootatau Te Wherowhero.<sup>95</sup>

... that name giving expression to the significance of the pledges made by the chiefs to Pootatau Te Wherowhero and of the reaffirmations of those pledges, as expressed in the kawenata, by those who have continued in support of the Kiingitanga.

The restitution provided for in the Deed is to be for the benefit of all Waikato collectively, under the mana of the Kiingitanga”.<sup>96</sup>

The final clause of the Preamble is the Crown acknowledgement that the settlement:<sup>97</sup>

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<sup>90</sup> Clauses I and J.

<sup>91</sup> Clause K.

<sup>92</sup> Clause N.

<sup>93</sup> Clauses O-Q.

<sup>94</sup> Clauses S (b) and (c).

<sup>95</sup> Clause U.

<sup>96</sup> Clause W.

<sup>97</sup> Clause X (a) and (b).

does not diminish or in any way affect the Treaty of Waitangi or any of its articles or the ongoing relationship between the Crown and Waikato in terms of the Treaty of Waitangi or undermine any rights under the Treaty of Waitangi, including rangatiratanga rights.

In return, Waikato acknowledges the settlement as “fair, final and durable”.

Part I of the Act repeats the Apology made by the Crown to Waikato-Tainui in the Deed of Settlement. Part II sets out the substantive provisions of the settlement.

Section 6 of Part I repeats part of the Preamble, acknowledging the legitimacy of the Waikato claim.

The Crown acknowledges that its representatives and advisers acted unjustly and in breach of the Treaty of Waitangi in its dealings with the Kiingitanga and Waikato in sending its forces across the Mangataawhiri in July 1863 and in unfairly labeling Waikato as rebels. Section 6(1)

The Crown acknowledges that the subsequent confiscations of land and resources under the New Zealand Settlements Act 1863 of the New Zealand Parliament were wrongful, have caused Waikato to the present time to suffer feelings in relation to their lost lands akin to those of orphans, and have had a crippling impact on the welfare, economy and development of Waikato. Section 6(3)

Accordingly, the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as this is now possible, and, with the grievance of raupatu finally settled as to the matters set out in the Deed of Settlement ... to begin the process of healing and to enter a new age of co-operation with the Kiingitanga and Waikato.” (Section 6 (6)).

The Crown acknowledgement of their wrongful actions was a vitally important part of establishing a new, positive political relationship between Waikato-Tainui and the Crown, because for years the injustice had been denied while Waikato people continued to suffer its traumatic aftermath. It needed a dramatic, positive and durable acknowledgment to bring this to an end. The Apology was the first step. Future Crown actions will show whether “the honour of the Crown” and “good faith” are reliable constitutional principles or empty phrases.

Part II of the Act sets out the settlement provisions. The provisions include the custom law principle set out by Waikato in the Deed of Settlement and restated in Section 6 (4) of the Act as “i riro whenua atu, me hoki whenua mai” (as land was taken, land should be returned). The way that Maori perceive the land as being imbued with ancestral values and as the source of their identity, discussed in Section III of this article, informs the inclusion of this principle in the legislation. The main thrust of Part II of the Act is to provide Waikato Tainui with funding to re-acquire its land-base,<sup>98</sup> to dis-establish the Tainui Maori Trust Board as the Crown appointed body established to receive earlier compensation monies<sup>99</sup> and to provide for its

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<sup>98</sup> Sections 10-26.

<sup>99</sup> See Waikato-Maniapoto Maori Claims Settlement Act 1946.



replacement by another body,<sup>100</sup> and to ensure that the framework of other existing legislation does not impinge on the settlement terms.<sup>101</sup>

## Recognition of the Treaty of Waitangi as a constitutional starting point

Included in the Crown apology for its past actions is an acknowledgement that the terms of te Tiriti and the Treaty of Waitangi continue to exist. In doing this it acknowledges the “rangatiratanga” contained in Article 2 of the Maori text of te Tiriti o Waitangi, although notably, the “tino” is missing from the prefix, possibly to reinforce that the English Queen sits above the Maori Queen in the sovereignty rankings.<sup>102</sup> However, when this is referenced back to the 1858 aspirations of Pootatau te Wherowhero on behalf of his people as set out in Clauses B and C of the Preamble, the broad parameters of Maori understandings become clearer. One interpretation of this is that the “ultimate” authority of decision-making within the boundaries of the Kiingitanga region specified in section 7 of the Act as the “Waikato Claim Area”, and “ultimate” responsibility for the wellbeing of the people connected to the Kiingitanga within this region, in terms of fostering the group’s economic development and preserving and fostering cultural integrity. Thus, the belief that the “tino” rangatiratanga of Waikato-Tainui still exists and cannot be unilaterally extinguished in terms of Maori custom law continues within their home territory, despite its absence in the statute.

Although acknowledging that a Treaty relationship does exist, the Deed avoids the more fundamental action of actually stating that a formal constitutional relationship exists between Waikato-Tainui and the Crown, or indeed between the Kiingitanga on behalf of all Maori people and the Crown, as dual sovereigns. However, in recognising its past unjust actions the Crown has, unwittingly perhaps, re-invigorated the very structure that it sought to stamp out in 1863 and provided the funding for a parliament to sit alongside it. The existence of the Kiingitanga as a symbol of Maori unity was strongly reaffirmed when Hapu and Iwi leaders from throughout Aotearoa New Zealand came together to choose the successor to the Maori Queen in 2006. It is very likely that a formal alliance will emerge at a later date between Maori Hapu who choose unitary governance structures as a result of the Treaty Settlement process. The speed with which this happens and the success of such an alliance will depend on how successful individual Hapu and Iwi are in setting up representative governing structures that are able to echo the voices of their people. Waikato-Tainui is the first group to attempt such a feat.

Under the Deed, Waikato-Tainui received \$170 million to establish an economic base for its people and buy back land that had been confiscated. Before any assets were transferred to the group, however, a governance entity had to be established that was acceptable to the group, representative, transparent and accountable.<sup>103</sup> Waikato-Tainui used the opportunity to establish a Parliamentary structure to sit alongside the Kiingitanga and adopted a parallel role of serving the people to that which the Kiingitanga has carried since 1858.

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<sup>100</sup> Sections 27-29.

<sup>101</sup> Sections 30-37.

<sup>102</sup> In the Maori text it has been replaced by “mana” a prefix which may appear less overtly challenging than “tino” but which retains its prestige under Maori custom law.

<sup>103</sup> *Healing the past, building a future - A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, Office of Treaty Settlements, Wellington, 2004, 15.

## A New Waikato-Tainui Governance Structure

The following paragraphs discuss the structure of the new Waikato-Tainui governing body in terms of its aspirations, membership, political structure, and the social and economic development it has set in place for its members.

### i. The fundamental values driving the Waikato-Tainui

The fundamental values driving the Waikato-Tainui vision for the future are derived from Maori customs and practices that acknowledge whakapapa, strengthen whanaungatanga and preserve the mana of the people. They were espoused in the vision set by the Executive of the post-settlement governing body of Waikato-Tainui as follows:

Our generation in 2050 – “Whakatupuranga Tainui 2050” – underpins our strategic direction. In the changing global environment, the world they live in will be significantly different to ours. So our approach for moving forward is one that embraces change and focuses on developing our people. There are three critical elements fundamental to equipping succeeding generations with the capacity to shape their own future:

1. A pride and commitment to uphold their tribal identity and cultural integrity;
2. A diligence to succeed in education and beyond;
3. A self-determination for socio-economic independence.

The first element recognises the importance of our tribal history, maatauranga, tikanga and reo. With a secure sense of identity and cultural integrity, our future generations will be proud and confident in all walks of life.

Educational success generates life opportunities and choices. Hence, the focus on the second element is to promote a diligence among tribal members of all ages to pursue success in all educational and training endeavours, and beyond. This enables personal growth, contributes to building the capacity of our people, and provides opportunities to utilize that growth and capacity for the collective benefit of our Marae, hapuu and iwi.

Breeding a self-determined people capable of developing and growing our tribal assets, is the focus of the third element. This is consistent with the time-honoured vision we inherited from Kiingi Taawhiao, “Maaku anoo e hanga i tooku nei whare” – to build our own house; and including our mission “Kia tupu, kia hua, kia puaawai” – to grow, prosper and sustain.

Te Arataura – Te Kauhanganui o Waikato Inc. - 2007<sup>104</sup>

In acknowledging “change” and “development” the Executive are mindful that this is an inter-generational plan that must be durable enough to capture and serve the needs of the people over a long period of time. Knowledge and memory of who they

<sup>104</sup> The vision espoused by the Executive of the political governing body of Waikato-Tainui in *Waikato Rauapatu Lands Trust Annual Report, 2007*, 6.

once were, who they now are, and who they may be in the future – and preserving the cultural aspects that underpin that identity, are seminal to the group’s future existence as Hapu and Iwi. The perpetuation of language and tikanga (customary rules and practices) through the medium of education is vital to maintaining group identity. The aspiration for education is not limited to Maori matters. It includes “*all* educational training endeavours” that can be of “collective benefit to our Marae, Hapu and Iwi”, thus reinforcing that the main reference point throughout is Waikato-Tainui.

Linking self-determination to socio-economic independence highlights the necessity not only to foster the capacity to make independent Hapu decisions but also to be able to freely exercise that ability. The reference to the words of Kiingi Taawhio, are a reminder that this should be accomplished without undue interference from outsiders, including the Crown, even when they begin to fear Maori success.

## **ii. Hapu and Iwi Membership**

Section 7 of the Waikato Raupatu Claims Settlement Act defines “Waikato” broadly as:

the Waikato descendants of the Tainui Waka who suffered or were affected by the confiscation of their land by the New Zealand government under the New Zealand Settlements Act 1863, being members of [33 Hapu are listed].

Whakapapa and its associated rules and values set the criteria for inclusion in the benefits that arise under the legislation.

In implementing this criterion in line with current Hapu organisation, Waikato-Tainui has constructed two beneficiary lists. The first list is a register of beneficiary marae: ie. marae who signed support for the Deed of Settlement of the Raupatu claim are automatically included as beneficiaries, while those who did not sign but are within the Raupatu claim area can ask to be included. The decision to include or exclude a marae wishing to join will be made by the majority of marae who are current beneficiaries. The second list, is a register of individual beneficiaries who are able to show: (a) that they are a member of one of the 33 hapu by whakapapa; (b) that they belong to a beneficiary marae, and (c) who provide their date of birth. All individuals on the beneficiary list who are over the age of 18 are able to vote on important issues relating to the Settlement. There are currently over 49,000 registered Waikato-Tainui members.<sup>105</sup>

Benefits from the settlement may be distributed directly to individuals, or to particular marae for the provision of services to the people. While individuals who receive benefits are limited to those who whakapapa to the Hapu named in the Settlement, those who benefit via the provision of services through marae may include Pakeha and others who have married into the Iwi or who frequent the marae. Thus the broader inclusiveness that informs the principle of whanaungatanga is also being practically applied to modify the strict application of the whakapapa requirement.

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<sup>105</sup> *Waikato Raupatu Lands Trust Annual Report, 2007, 24.*

### iii. A New Political Governing Structure

The governance structure of Tainui is currently based around Te Kauhanganui, an Iwi Parliament comprising local marae representatives and an executive governing body.

The legal mechanism chosen by Waikato-Tainui for their parliamentary structure is an Incorporated Society, Te Kauhanganui o Waikato Incorporated. It is the legal umbrella for the 66 marae that are the current beneficiaries of the settlement. Each marae elects 3 representatives, who then elect an executive of 11 members that is joined by a representative of the Maori King. The role of the executive is to protect, develop and unify the collective interests of the different Hapu of the Waikato-Tainui region in accordance with the vision set out above.

Settlement assets are held by Waikato Raupatu Trustee Company, whose shareholding is the 12 member executive of Te Kauhanganui. A second company, Tainui Group Holdings Limited, exploits the assets commercially for profit. A third vehicle, Waikato Raupatu Lands Trust, whose shareholding is also the executive of Te Kauhanganui, distributes part of the income earned from the assets to local marae and individual beneficiaries each year for social development.

Within 5 years of the new governing structure being set up, a conflict arose between the relative governing powers of the Kingitanga and Te Kauhanganui. Five members of the Te Kauhanganui Executive had resigned following a lengthy dispute over financial management and this had left too few members to make up a governing quorum. Local marae, who have maintained a strong affiliation to the Kingitanga in its role of symbolising Waikato-Tainui mana and kaitiakitanga since 1858, voted for a Kingitanga appointed council to govern in the interim period between elections for new Executive members. The matter was heard in the High Court in 2000, with Hammond J, upholding the incorporated society as the agreed legal mechanism supporting the government over the socio/political institution of the Kingitanga.<sup>106</sup> While this may be seen as external interference in the politics of Waikato-Tainui and damaging to the mana of the Kingitanga, it also clearly demarcated the line between the kingitanga as spiritual guardians and advisers on Iwi matters, and as active participants in Iwi politics at a sovereign level, and indicated that it had been crossed. Having resolved their respective roles, the two bodies have since worked equably alongside each other to achieve their common goals.

### iv. Setting and Achieving Social Goals

The Waikato Raupatu Lands Trust distributes part of the income earned to the beneficiaries of the Settlement, either individually by way of scholarships, or, through marae to achieve charitable purposes for its members. Marae committees can apply for funding for educational purposes, educational facilities, scholarships and bursaries, cultural purposes associated with te reo (language), Waikatotanga (learning about being Waikato), arts and crafts, social and economic welfare and vocational training, te Kohanga Reo, Churches, Marae upkeep and improvement, farms, tourism, job creation, relief of Kaumatua (elders), the poor and disabled, health and sport, communications, radio, television and graphic design.<sup>107</sup>

<sup>106</sup> *Kingi Porima & ors v Te Kauhanganui O Waikato Inc, Te Arikiniui Dame Te Atairangikahu, Sir Robert Mahuta*, M208/00, High Court Hamilton, 22 September 2000. Hammond J.

<sup>107</sup> S. Solomon, *The Waikato Raupatu Claims Settlement Act - A Draft Users Guide to the Act as at 28 October 1995*, Beneficiary Roll office, Hopuhopu, 1995.

Education and strengthening of marae infrastructures have remained priorities of Waikato-Tainui Iwi since 1995. Immediately after the Settlement, work began on accounting training programmes and the upskilling of marae staff to enable them to control service delivery to the people. In order to achieve this quickly, a focus was placed on treasurers' roles and responsibilities, strategic planning, budget preparation, performance monitoring, internal controls, preparation of financial statements and bank loan applications.<sup>108</sup> In 2007, \$4 million was paid out in Marae grants, for upkeep, education of staff and service delivery. \$1.7 million was paid in individual education grants to those in tertiary education.<sup>109</sup>

## v. Establishing and Maintaining a Commercial and Economic Base

Waikato Raupatu Trustee Company Limited holds all the Settlement assets, which include land, fisheries quota, and tourism and managed funds. It is the sole shareholder of Tainui Group Holdings Limited, a company established in 1998 to invest and manage the assets profitably.

In the period 1995-2000, several investments entered into by Waikato-Tainui failed, resulting in a deficit of several million. However, in the last four years it has stabilized its position and posted significant returns on its investments. As a result, Tainui Group Holdings Limited showed a net operating profit of \$11 million in 2004, \$16 million in 2005, \$18 million in 2006 and \$64 million in 2007.<sup>110</sup> The total Iwi asset base has also steadily risen from \$209 million in 2004, to \$286 million in 2005, to \$375 million in 2006 and over \$468 million in 2007.<sup>111</sup>

The strong financial performance of Tainui Group Holdings Limited has allowed for greater allocation to the Waikato Raupatu Lands Trust for distribution to Hapu and Iwi beneficiaries.

In achieving its goals the Waikato Lands Trust has set its main procedural values as being the unifying principles of the Kingitanga. These are: Whakaiti (Humility); Whakapono (Trust and Faith); Aroha (Love and Respect); Rangimarie (Peace and Calm); Manaakitanga (Caring); Kotahitanga (Unity) and Mahitanga (Co-operation) – in order “grow, prosper and sustain” the people.<sup>112</sup> It has also called upon the good governance skills and requirements set out in legislation and required of prudent business practice in order to be competitive in existing markets.

Waikato-Tainui are adamant that they will not take on the responsibilities the Crown owes to all the people of Aotearoa New Zealand, including Maori living within their territorial boundaries. However, the governance structure established under the Kauhanganui allows Waikato-Tainui to achieve specific goals and to reinforce the inter-generational transfer of knowledge necessary to sustain its people into the future. The effectiveness of Waikato-Tainui governance can be assessed by examining the foregoing discussion against the vision 2025 set by the Executive of the Te Kauhanganui at the beginning of this section and against the fundamental principles set out earlier in this article. Overall, the Hapu and Iwi of Waikato-Tainui are in a much stronger position now, culturally, politically, socially and economically than they were before 1995.

<sup>108</sup> “The Post Settlement Phase – A Tainui Special”, *Kia Hiwa Ra*, Tokomaha 31, 22 May 1995, 1.

<sup>109</sup> *Waikato Raupatu Lands Trust Annual Report*, 2007, 22.

<sup>110</sup> *Waikato Raupatu Lands Trust Annual Report* 2005 at 36 and 2007 at 9. (Figures rounded to the nearest \$1 million.)

<sup>111</sup> *Waikato Raupatu Lands Trust Annual Report* 2005 at 37 and 2007 at 47. (Figures rounded to the nearest \$1 million.)

<sup>112</sup> *Waikato Raupatu Lands Trust Annual Report* 2007, 7.

## B. NGAI TAHU SETTLEMENT

As with Waikato-Tainui, the Ngai Tahu settlement has also been negotiated against a background of grievance against the Crown for its actions in depriving Ngai Tahu of their lands and economic base during the early colonisation period.<sup>113</sup> The claim covers approximately two-thirds of the South Island of Aotearoa New Zealand and several Hapu are subsumed under the umbrella of Ngai Tahu. The Ngai Tahu claim was settled by two pieces of interlinking legislation.

### **Te Runanga o Ngai Tahu Act 1996**

In 1996, Te Runanga o Ngaitahu Act was passed which defined the Iwi membership of Ngai Tahu Whanui as being the beneficiaries of the Ngai Tahu Claim reported on by the Waitangi Tribunal in 1997. The Act also gave statutory recognition to Te Runanga o Ngai Tahu as being the official Iwi representative for all future Crown/Ngai Tahu interactions. Both Iwi membership and governance structure are discussed later in this section.

### **Ngai Tahu Claims Settlement Act 1998**

The second important statute is the Ngai Tahu Claims Settlement Act 1998. Like the Waikato Rauapatu Settlement Act, the Ngai Tahu Act contains a Preamble that sets out the background of the grievance in Maori and English, using the principles of the Treaty of Waitangi to measure past Crown behaviour. It refers to unfair purchase practices and breaches of the deeds of purchase entered into throughout the area,<sup>114</sup> ongoing Ngai Tahu protests since 1840 and a number of inquiries having been held but with little follow-through occurring,<sup>115</sup> and ends with the Crown's acceptance that it had not remedied Ngai Tahu's grievances.<sup>116</sup>

The Preamble of the Act includes the Waitangi Tribunal's findings in the following terms:<sup>117</sup>

After considering the elements of the Ngai Tahu claim, the Waitangi Tribunal found substantially in Ngai Tahu's favour, ... In particular, the Tribunal could not reconcile the Crown's enduring failure to meet its obligations to Ngai Tahu with its duty to act towards its Treaty partner reasonably and with the utmost good faith. The Tribunal also emphasised that, in acquiring some 34.5 million acres of land from Ngai Tahu for &14,750, the Crown acted unconscionably and in repeated breach of the Treaty of Waitangi. The Tribunal considered that the Crown's actions left Ngai Tahu with insufficient land to maintain its way of life, and to enable the tribe's full participation in subsequent economic development:

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<sup>113</sup> A thorough critique of the Ngai Tahu Settlement can be found in L. Carter and J. Ruru, "Freeing the Natives": The Role of Treaty of Waitangi Settlements in the Reassertion of Tikanga Maori", in ed N. Tomas, *Te Tai Haruru, Journal of Maori Legal Writing*, International Research Institute for Maori and Indigenous Education, Volume 2, 2006, 14-36.

<sup>114</sup> Preamble, Clause B.

<sup>115</sup> Preamble, Clause C.

<sup>116</sup> Preamble, Clause D.

<sup>117</sup> Preamble, Clauses K and L.

The Tribunal considered that the Crown ought to have restored to Ngai Tahu sufficient land to provide for the future economic social and cultural development of the tribe:

The Preamble details that after the Waitangi Tribunal issued its Report, negotiations were entered into with the Crown, followed by a Deed of Settlement in 1997.<sup>118</sup>

... in which the Crown acknowledged that Ngai Tahu suffered grave injustices which significantly impaired Ngai Tahu's economic, social and cultural development and which recorded the matters required to give effect to a settlement of all of Ngai Tahu's historical claims.

Section 6 of the Act contains an apology, part of which is set out below, in which:

1. ...The Crown recognises the protracted labours of the Ngai Tahu ancestors in pursuit of their claims for redress and compensation against the Crown for nearly 150 years, as alluded to in the Ngai Tahu proverb 'He mahi kai takata, he mahi kai hoaka' ('It is work that consumes people, as greenstone consumes sandstone').

2. The Crown acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngai Tahu in the purchases of Ngai Tahu land. The Crown further acknowledges that in relation to the deeds of purchase it has failed in most material respects to honour its obligations to Ngai Tahu as its Treaty partner, while it also failed to set aside adequate lands for Ngai Tahu's use, and to provide adequate economic and social resources for Ngai Tahu.

4. The Crown recognises that it has failed to act towards Ngai Tahu reasonably and with the utmost good faith in a manner consistent with the honour of the Crown. That failure is referred to in the Ngai Tahu saying 'Te Hapa o Niu Tirenī!' ('The unfulfilled promise of New Zealand'). The Crown further recognises that its failure always to act in good faith deprived Ngai Tahu of the opportunity to develop and kept the tribe for several generations in a state of poverty, a state referred to in the proverb 'Te mate o te iwi' ('The malaise of the tribe')

7. The Crown apologises to Ngai Tahu for its past failures to acknowledge Ngai Tahu rangatiratanga and mana over the South Island lands within its boundaries, and, in fulfillment of its Treaty obligations, the Crown recognises Ngai Tahu as the tangata whenua of, and as holding rangatiratanga within, the Takiwa of Ngai Tahu Whanui.

8. Accordingly, the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and, with the historical grievances finally settled as to matters set out in the Deed of Settlement signed on 21 November 1997, to begin the process of healing and to enter a new age of co-operation with Ngai Tahu.

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<sup>118</sup> Preamble, Clause U.

The rest of the Act is a comprehensive enactment aimed at giving effect to the matters agreed upon in the Deed of Settlement. Under section 15, Aoraki Mountain is handed back to Ngai Tahu in symbolic acknowledgement of their traditional Maori custom associations. Ngai Tahu would then gift it back to the Prime Minister, for the nation as a whole, under section 16. The Deed also provided for \$170 million to be paid to Ngai Tahu to repurchase a land base, revesting of titles in Ngai Tahu, recognition of Ngai Tahu mana (authority) over several outlying islands, yearly access to traditional resources, and ex officio membership on various Crown Boards governing local resources.

### **Recognition of the Treaty of Waitangi as a starting Point for Crown/Ngai Tahu relationship – setting new standards for measuring the relationship**

Clauses 2, 4, 7 and 8 set out above, all refer to the Treaty and acknowledge that a Treaty-based relationship exists between the Hapu that comprise the Iwi of Ngai Tahu and the Crown. There are several standards against which that behaviour is to be measured. Unilaterally the Crown acknowledges in Clause 4 that its behaviour must be consistent with its own standards of “reasonableness”, “utmost good faith” and “the honour of the Crown”. These are traditional English constitutional standards without which, faith in the actions of the Crown’s ability to safeguard its subjects are brought into doubt and confidence in the notion of a representative democracy is undermined within a significant portion of the population.

A second standard is that of “Treaty partnership” alluded to in Clause 2. Under the Treaty, both parties should be on their best behaviour in their dealings with each other. Against this standard, it is the Crown and not Ngai Tahu who has behaved badly and against whom reparation is sought. This aspect of the relationship has been independently assessed by the Waitangi Tribunal, whose findings and recommendations have led to a process of reconciling the wrong suffered by Ngai Tahu.

A third standard for assessing Crown activity, is that of Maori custom law principles, or the expectations of Ngai Tahu that are drawn from within Maori society as set out earlier in Section II of this article. Although not directly mentioned as such, Maori custom law principles are espoused in the Clause 7 acknowledgement of Ngai Tahu rangatiratanga and mana over the South Island lands within its boundaries, and in the recognition of Ngai Tahu as tangata whenua and as holding rangatiratanga within the Takiwa of Ngai Tahu Whanui.

Although couched in Treaty terms, it is against these three standards that the Crown/Ngai Tahu relationship will be assessed in the future “new age of co-operation” referred to in Clause 8. As with Waikato-Taimui, there is no direct admission that Maori Ngai Tahu have carved out a permanent place in the constitutional framework of Aotearoa New Zealand government. Although the legislation avoids such a direct conclusion, the mutual activity between the two parties, especially when read against a background of Maori custom law principles, and the way Ngai Tahu has conducted itself following the settlement, supports such as outcome.



## A New Ngai Tahu Governance Structure

### i. Statutory definition of Ngai Tahu – Iwi Membership

Te Runanga o Ngai Tahu Act formalises several governance matters agreed on between Ngai Tahu leaders and the Crown: First, it establishes Te Runanga o Ngai Tahu as the official representative of Ngai Tahu whanui for the future<sup>119</sup> and recognises it “for all purposes” including when consultation is required with Ngai Tahu<sup>120</sup>; second, it establishes the territory of Ngai Tahu according to an earlier Maori Appellate Court decision in *Re a claim to the Waitangi Tribunal by Henare Rakihia Tau*<sup>121</sup>; and third, it defines the criteria for membership as a beneficiary of Ngai Tahu whanui.<sup>122</sup> The members of Ngai Tahu Whanui are defined under section 7 (1) (a):

Ngai Tahu Whanui are the descendants of –

(a) ... members of Ngai Tahu iwi living in the year 1848 whose names are set out in the list ... of the book containing the minutes of the proceedings and findings of a committee (commonly known as the Ngaitahu Census Committee ) appointed in the year 1929.

The membership is linked to Ngai Tahu elders descended from the primary hapu of Ngai Tahu, Ngati Mamoe and Waitaha – Kati Kuri, Ngati Irakehu, Kati Huirapa, Ngai Tuahuriri and Ngai Te Ruahikihiki. There are currently 41,000 registered members on the whakapapa data-base for Ngai Tahu whanui, a rise of 3,500 since 2006.<sup>123</sup>

### ii. Ngai Tahu – Political Structure

Te Runanga o Ngai Tahu Act 1996 sets up a completely new centralised governing body for Ngai Tahu.<sup>124</sup> Members of Ngai Tahu Whanui must affiliate to one or more papatipu runanga as set out in the First Schedule of the Act. The runanga are regionally-based rather than Hapu-based organisations whose traditional Hapu boundaries can overlap. Therefore individuals may easily affiliate to two or more runanga. Elected representatives from each runanga form Te Runanga o Ngai Tahu.<sup>125</sup> The status of Te Runanga o Ngai Tahu is set out in section 15:

- 1) Te Runanga o Ngai Tahu shall be recognised for all purposes as the representative of Ngai Tahu Whanui.
- 2) Where any enactment requires consultation with any iwi or with any iwi authority, that consultation shall, with respect to matters affecting Ngai Tahu Whanui, be held with Te Runanga o Ngai Tahu.

<sup>119</sup> Section 6.

<sup>120</sup> Section 15 (1) and (2).

<sup>121</sup> 12 November 1990, 4 South Island Appellate Court Minute Book 672. Section 5.

<sup>122</sup> Section 13.

<sup>123</sup> *Te Runanga o Ngai Tahu Annual Report, 2007*, 26.

<sup>124</sup> See section 16. The Charter referred to was adopted by Papatipu Runanga representatives on 21 August 1993.

<sup>125</sup> See ss 8 and 9 Te Runanga o Ngai Tahu Act 1996.

The Act sets out a formal requirement for Te Runanga to carry out consultation with Papatipu Runanga. It places an obligation on Te Runanga to seek the views of Papatipu members, to “have regard” to those views and to act in the best interests of Ngai Tahu Whanui.<sup>126</sup> The executive functions of Te Runanga o Ngai Tahu are carried out by:

- The Office of Te Runanga o Ngai Tahu which manages the delivery of social and cultural programmes to its members, and
- Ngai Tahu Holdings Corporation Limited, which manages its commercial activities.

This governance structure was reviewed in 2006. According to the Kaiwhakahaere (Chairman) of Te Runanga, the review was necessary “to make sure we are a strong, strategic and coherent organisation that will be better able to serve Ngai Tahu whanau”.<sup>127</sup> The governance review found that there was a lack of alignment of goals between social and commercial activities, and between central Iwi and local Hapu interests. Te Runanga appointed an interim Board to perform the Executive Trusteeship function of providing strong corporate governance to Te Runanga until March 2007. According to Solomon, part of the Board’s role “is to ensure Te Runanga has a strong internal structure with the right skills and expertise, so we can continue our commercial growth. In turn this will allow us to deliver sustainable benefits like Whai Rawa, (financial services) the Ngai Tahu Fund and runanga distribution.”<sup>128</sup>

### **iii. Using Maori custom law principles to define future goals**

While the form of Ngai Tahu government is laid out in statute, the values that drive the Runanga are drawn from Maori custom law. Set out in the Iwi’s Annual report each year, they are collective in nature and articulate the Runanga’s obligations to the people as being the following:<sup>129</sup>

#### Vision

Tino Rangatiratanga – Mo tatou, a, mo ka uri a muri ake nei  
For us and our children after us ...

#### Values

##### Rakaitirataka

Ngai Tahu staff are committed to upholding the mana of Ngai Tahu at all times and in all that they do.

##### Whanaukataka

Ngai Tahu staff respect, foster and maintain important relationships within the organization, within the iwi and within the community.

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<sup>126</sup> Section 15 (3).

<sup>127</sup> *Te Runanga o Ngai Tahu Annual Report 2006*, 11.

<sup>128</sup> *Te Runanga o Ngai Tahu Annual Report 2006*, 11.

<sup>129</sup> *Te Runanga o Ngai Tahu Annual Report 2006*, 2.

#### Manakaakitaka

Ngai Tahu staff pay respect to each other, to iwi members and to all others in accordance with tikanga Maori.

#### Tohukataka

Ngai Tahu staff pursue knowledge and ideas that will strengthen and grow Ngai Tahu and our community.

#### Kaitiakitaka

Ngai Tahu staff work actively to protect the people, environment, knowledge, culture, language and resources important to Ngai Tahu for future generations.

#### Manutioriori/Kaikokiri

Ngai Tahu staff are imaginative and creative leaders who must continually break new ground.

Differences in dialect between Ngai Tahu and other Iwi, including Waikato-Tainui are apparent here, with Ngai Tahu favouring the use of “k” instead of “Ng” in most instances. However, notwithstanding this, the same customary principles are used throughout Aotearoa New Zealand, with their application in different localities changing to suit local circumstances. So for example, while Ngai Tahu place great value on their mountain, Aoraki, as their symbol of ancestral continuity of mana and tupuna, Waikato-Tainui will articulate their relationship with the Waikato River using the same principles and values.

#### **iv. Ngai Tahu – Social Goals**

Further to the broad principles set out above, Acting Chief Executive Officer of the Runanga Office, Anake Goodall, highlights the importance of constantly keeping in mind the need to:<sup>130</sup>

genuinely engage with Ngai Tahu whanui and Papatipu Runanga to develop a deeper, clearer understanding of the needs and aspiration of our communities. The challenge is then to translate the many messages into the many actions that will, in combination, truly speak to that collective vision.

The product of engaging in the process of pulling together and articulating the will of the people is “Ngai Tahu 2025”. This is an Iwi vision that identifies nine areas of importance in future iwi development. They are:<sup>131</sup>

Te Whakaariki - influencing external decision makers;  
To Tatou Ngai Tahutanga - creating a vibrant Ngai Tahu culture;  
Ko Nga Whakapapatanga - enhancing communication within the iwi;  
Te Whakatipu - supporting local regional governance and initiatives;

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<sup>130</sup> *Te Runanga o Ngai Tahu Annual Report 2007*, 16.

<sup>131</sup> *Te Runanga o Ngai Tahu Annual Report 2006*, 3.

Te Ao Turoa - preserving the natural environment for future generations to enjoy; Whanau - providing dedicated resources to enhance whanau welfare; Matauranga - focusing on the education of iwi members; Te Putea - creating secure investment planning of iwi funds, and Te Kaitiakitanga me te Tahuhu - increasing the effectiveness of their own governance.

These are not simply aspirational. Specific initiatives are linked to each of these goals.<sup>132</sup> They include the establishment of Whai Rawa, a long term matched-savings scheme for iwi members in 2006, support for early childhood and numeracy and literacy programmes for Ngai Tahu children, and working with Crown organisations to foster the inclusion of Ngai Tahu curriculum in tertiary education. Research into, and funding for, early childhood education, marae based language programmes, and web-based resources for schools, as well as the funding of individual tuition costs and grants and scholarships, also feature prominently in 2007.<sup>133</sup> Growth of the cultural capacity of Ngai Tahu has been supported through the funding of projects for whanau and marae weaving, carving, and other cultural projects.<sup>134</sup> The delivery of health and parenting services by Maori providers, including “no-sweat parenting” roadshows throughout Ngai Tahu, are other social initiatives given support in 2007.<sup>135</sup>

The establishment of Ngai Tahu Finance, provides members with finance rates that are much lower than current market rates.<sup>136</sup> Maintaining a variety of communication mechanisms is seen as vital to keep Iwi members informed and to encourage involvement in tribal activities. Tahu Communications provides a one-stop shop for iwi communication, which includes a radio station, Tahu FM, creating television programmes and regular publication of the Iwi magazines, *Te Karaka* and *Te Pamui Runaka*.<sup>137</sup>

#### v. Ngai Tahu – Commercial/Economic Assets

Ngai Tahu Holdings Corporation is responsible for commercial trading of the assets held by Ngai Tahu. These include, Property, Equities, Seafood, Tourism and other commercial ventures which provide revenue for the social aspirations of the Iwi.

With the exception of 2006, when a net loss of \$11 million occurred after the Corporation had written down \$22 million worth of assets, Ngai Tahu Holdings Corporation has steadily improved its net yearly profit margin. In 2002 it showed a net profit of \$2 million; 2003 - \$11 million; 2004 - \$13 million; 2005 – \$16 million; and 2007 - \$60 million.<sup>138</sup>

The Shareholders Equity (Total Assets less Term Debt) has also steadily risen over the years: 2002 - \$276 million; 2003 - \$300 million; 2004 - \$325; 2005 - \$379; 2006 - \$411 million and 2007 - \$480 million.<sup>139</sup> Ngai Tahu Holdings aims to become a billion dollar corporation within the next 10 years.<sup>140</sup>

<sup>132</sup> Set out in *Te Runanga o Ngai Tahu Annual Reports*, 2006 at 3 and 2007 at 6-7.

<sup>133</sup> *Ibid*, at 20.

<sup>134</sup> *Ibid*, at 22.

<sup>135</sup> *Ibid* at 26.

<sup>136</sup> *Ibid* at 27.

<sup>137</sup> *Ibid* at 27.

<sup>138</sup> *Ibid* at 10. Figures rounded to the nearest \$1 million.

<sup>139</sup> *Ibid* at 10. Figures rounded to the nearest \$1 million.

<sup>140</sup> Wally Stone, “Ngai Tahu Group Chairman’s Report”, *Te Runanga o Ngai Tahu Annual Report* 2006, 16.

## Conclusion

While several other smaller settlements exist, which provide money to assist the economic development of local Hapu and Iwi, the above examples outline the two largest Iwi, and how they are doing their utmost to support Iwi welfare and development by fleshing out a statutory framework with Maori custom law principles, and implementing them in practices that benefit Hapu and Iwi.

The proof is in the pudding. While both Iwi have experienced years in which significant financial losses have occurred through bad investments, market downturns in ventures such as tourism, and falling prices for resources such as seafood, they have survived to come back stronger. Why? To some extent this is because both institutions have double-glazing. They not only operate according to the tenets of English-based New Zealand law, but they are also held together by the principles of Maori custom law that have bound Maori communities together *mai raano*.

The balance between their money-making activities and feeding the profits back into the community to foster cultural and social goals has also caused internal dissension in both groups, thus highlighting the need for constant internal monitoring and adjustment to reflect changing Iwi needs. Both Iwi have had to balance the enduring personal passion shown by those controlling the political processes to do the right thing for the people who have passed, the present generations, and those yet to come, with the administrative skills essential for successful modern governance.

Waikato-Tainui and Ngai Tahu are the two strongest Iwi government systems in Aotearoa New Zealand. Interaction and political alignment between the two, when it occurs as it surely must, will strengthen them further and ensure that they become major players in the future government of Aotearoa New Zealand. Their experiences are a rich learning ground for the many other Hapu and Iwi, and indigenous groups, whose forms of governance are still in the embryonic stage.

## V. CONCLUSION

This article set out to prove that two major Iwi, Waikato-Tainui and Ngai Tahu, have become part of the constitutional order of New Zealand government. It argued that they have achieved this through a combination of legislation passed by the government as part of the Treaty Settlement Process, and, more importantly, by fleshing out that framework with Maori custom law principles that have held Maori society together *mai raano*.

The article examined Maori identity in some depth and from two different viewpoints. The first is as it is perceived within a wider New Zealand society that has been heavily influenced by past New Zealand legislation and Crown policies that have negatively impacted on Maori. This was then contrasted with how Maori society defines itself according to Maori custom law principles that are derived from a different cultural base. This discussion was an essential starting point because the ability to “be Maori” is still contested within Aotearoa New Zealand and without a distinctive Maori identity there can be no true system of Maori governance. The conclusion reached was rather an obvious one, i.e. that Maori have a stronger claim to their identity being linked to the territory of Aotearoa New Zealand than any other groups, including the descendants of the earliest settlers. Although past governments have tried to destroy that identity, present governments have set about remedying

their actions by supporting initiatives aimed at re-invigorating the Maori language and culture through legislation.

Section III of the paper examined some of the Principles that underpin Maori custom law. It asserted that these principles inform the Maori text of Te Tiriti o Waitangi and, therefore, the relationship between Hapu and Iwi and the Crown articulated in the Treaty of Waitangi. It also posited that the Treaty relationship links Maori and the Crown in a partnership *for all time*. While the Crown may try to control that relationship using legislation, Maori will continue to hold the Crown accountable under Maori custom law. Thus while successive governments will change their minds, the institutional memory of Hapu and Iwi will maintain remain steadfastly linked to their territories, ancestors and future generations.

Section III also set out some of the fundamental principles that hold Maori society together and used oral testimony from Maori leaders and references to the Waitangi Tribunal hearings to, first of all confirm the existence of Maori custom law, and second, demonstrate the strength and resilience of those principles in keeping Maori society united, despite long-term, adverse government activity in the past. Although some Maori principles are now included in New Zealand legislation, their impact is still strongest within the Maori community, where they continue to inform communal decision-making.

The *coup de grace* of the argument, however, rests in Section IV. The extremely long winded and official re-articulation of a Treaty relationship based on a “new partnership” in the Deeds of Settlement, Preambles and the Apologies of both the Waikato and Ngai Tahu Settlement Acts is more than sufficient evidence of a constitutional relationship being reaffirmed by legislation. In the aftermath, the Maori custom law principles that guide the actions of both sets of Iwi leaders are proudly displayed in all their official documentation. And they are not simply visionary, they are attached to concrete actions that will maximise the cultural, economic and social survival of the group inter-generationally. Although Waikato-Tainui and Ngai Tahu have chosen different types of political infrastructure, both groups are flexible enough and more than willing to alter their structures to better achieve their Iwi goals. Both groups have also struggled, but in each case their Hapu and Iwi dynamics have held firm and they have gone on to produce some outstanding outcomes for their people.

A final, comforting thought for New Zealanders who may feel that such overwhelming success will renew sovereigntist claims, is that this form of governance does not aspire to take over the role of the central government in meeting its obligations to “all New Zealanders”. It is content to be an adjunct working alongside to achieve some mutual goals for Hapu and Iwi - for us and our future generations – mai raano.

## Attachment 1

### **Te Tiriti o Waitangi and the Treaty of Waitangi** (Source: Claudia Orange, The Treaty of Waitangi, Allen and Unwin, Wellington, 1987, 257-259.)

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#### **Te Tiriti o Waitangi (Maori Text)**

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira - hei kai wakarite ki nga Tangata maori o Nu Tirani - kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu - na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanaranga kia kaua ai nga kino e puta mai ki te tangata maori ki te Pakeha e noho ture kore ana.

Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o to wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

#### *Ko te tuatahi*

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kawanatanga katoa o o ratou wenua.

#### *Ko te tuarua*

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua - ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

#### *Ko te tuatoru*

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini - Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

[signed] W. Hobson Consul & Lieutenant Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu. Ka tangohia ka wakaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

*Note: This treaty text was signed at Waitangi, 6 February 1840, and thereafter in the north and at Auckland. It is reproduced as it was written, except for the heading above the chiefs' names: ko nga Rangatira o te Wakaminenga.*



## The Treaty of Waitangi (English text)

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and secure to them the enjoyment of Peace and Good Order has deemed necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

### *Article the first*

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over the respective Territories as the sole sovereigns thereof.

### *Article the second*

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

### *Article the third*

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[signed] W. Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate

and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

*Note: This English text was signed at Waikato Heads in March or April 1840 and at Manukau on 26 April by thirty-nine chiefs only. The text became the "official" version.*

**Author's Note:** Most Maori signed the Maori text of Te Tiriti which retains "tino rangatiratanga" or "absolute authority" to Maori hapu. The English text, however, cedes "sovereignty" absolutely, to the Crown of England. The debate about how the two fit together in a constitutional democracy is ongoing and the relationship between Maori and the Crown is constantly being reviewed. Although not legally recognised, the Treaty/te Tiriti remains the hallmark by which many New Zealanders, Maori and Pakeha alike, evaluate the justice of Crown actions.

## Glossary of Terms

Hapu	Sub-tribe (economic, social and political group consisting of extended families or whanau who are related by blood and shared customary practices).
Hui	Meeting, gathering of people to discuss issues of importance
Iwi	Tribe (larger economic, social and political group related by blood and share customary practices)
Kaumatua	Elder/s
Kohanga Reo	Language nest, preschool where Maori is the language spoken.
Kura kaupapa	Primary and secondary schools where Maori language and culture are the principal modes of instruction.
Mana	Power, prestige and personal status. Institutional and collective authority.
Maori	Native of Aotearoa, descendant of pre-European occupants of Aotearoa New Zealand.
Marae	Meeting place. Collection of land and buildings that includes the meeting house, dining areas and ablution blocks. The marae is usually located on ancestral land belonging to whanau, hapu and iwi groups and serve as a focal meeting point.
Mauri	Life force, animation, vitality of people and things, identity.
Ngati	Prefix meaning “belonging to” before a hapu or iwi name.
Pakeha	Person of European (usually British) descent; white non-Maori.
Papatuanuku	Primordial female ancestor of the Maori; earthmother.
Rangatira	Chief, a person of authority within a group.
Raupatu	Confiscation without justification.
Tangata Whenua	People of the land; Maori; prior occupants of Aotearoa.
Tapu	Sacred, of value, restricted from ordinary use.
Te Reo	Maori language.
Tino Rangatiratanga	Maori authority or sovereignty - generally used in association with Article 2 of the Tiriti o Waitangi, 1840.

Whakapapa	Ancestral connections.
Whanau	Extended family.
Whanaungatanga	The principle of being connected

