

The Taking into Account of
Te Ao Maori
in Relation to Reform
of the Law of Succession

A working paper by
Professor Pat Hohepa
and
Dr David V Williams



LAW·COMMISSION
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Introduction

Professor Pat Hohepa and Dr David V Williams, from the University of Auckland, were asked by the Law Commission to act as consultants in the preparation of a working paper to identify those parts of the law of succession which are likely to be of major concern to Maori, to make some suggestions as to how they may be tackled and to offer comment on the process of consultation with Maori which may be appropriate.

Professor Hohepa was nominated by the NZ Maori Council to be their representative in advising the Law Commission on these issues. Dr Williams was contacted directly by the Law Commission. Professor Hohepa and Dr Williams met and agreed to collaborate with each other as co-consultants on this project. The Law Commission contracted with them on that basis. Meanwhile, the Law Commission had established a Maori Advisory Committee. That Committee advised and assisted in outlining general parameters for this important project. Law Commission staff provided feedback on a Work in Progress working paper.

The authors wish to emphasise that this is a working paper. It is intended to provide a basis for going forward to consultations with iwi and with relevant pan-Maori organisations. It is mainly devoted to raising issues rather than seeking to settle them. It is not to be used or quoted except in that context.

The working paper is in two Parts so that the individual written contributions of Professor Hohepa and Dr Williams may be identified, whilst the authors accept joint responsibility for the overall contents of the working paper.

Professor Hohepa and Dr Williams are of the view that the consultation process will be crucial in providing answers to questions of the future direction of the law of succession as it affects Maori.

PART I

[This Part has been prepared by Professor Pat Hohepa.]

Succession and the Treaty of Waitangi

1 The earlier draft of this paper was presented to members of the Law Commission and the Maori Advisory Committee of the Commission on 4 August 1994. This revision has been assisted by comments made at that meeting and by the detailed written commentary of the Law Commissioner, Professor Richard Sutton which were then discussed with my co-researcher Dr David Williams. As with previous drafts I am responsible for this draft.

2 The focus is still identifying principles, policies and practices which govern Maori thinking regarding succession. The target audience are two disparate groups. While this is being prepared ultimately for Maori discussion, consideration and reaction, it also has to be transparent, understandable and persuasive to Commission members. This draft is for the Commission, and to identify for the Commissioners "those parts of the present law of succession which are likely to be of major concern to Maori, and making some suggestions how they might be tackled".

3 The law of succession and its relevant Acts and effects have been discussed elsewhere. These are not listed here but a fact sheet will need to be collated for Maori consumption, including a summary of their intents and effects. This is David Williams' and not my professional field.

4 There is the problem of sorting out Maori succession issues. There are some laws that apply to Maori with which Maori are not happy. There are also general laws which also affect Maori with which Maori are also not happy. There is a need to revisit these statutes from a Maori perspective, firstly to clarify what these statutes are and what their effect on Maori are, then to suggest some proposals for meaningful consultations with Maori which would lead to changes in the law.

5 Some Acts are of major concern to Maori because they conflict or interfere with Maori cultural processes and laws. The Family Protection Act, Matrimonial Property Act and the Administration Act are some which cause concern. There are other Acts, such as Te Ture Whenua Act 1993 and its predecessors, written specifically for Maori, that impact on succession or have left a legacy of succession problems for Maori. Our task of initially identifying those parts of the present law of succession likely to be of major concern to Maori and how they might be tackled, and *inter alia* what process of consultation may be appropriate, has led us into these diverse areas.

6 Many non-Maori are not aware that Maori have different perspectives concerning succession. These are not superficial; they are from different cultural and societal roots. The first objective is to give clear evidence that Maori are different. The second objective is to show that within the orbit of being Maori, there are also fundamental internal differences between tribal nations and between confederations of tribal nations. Without that information the attitude of Maori to succession issues cannot be properly accessed or processed, and the varying reactions of Maori groups cannot be understood.

7 For Maori, the Treaty of Waitangi is the arbiter of all relationships between Maori and the Crown. The two key terms of *rangatiratanga* and *kawanatanga*, chieftainship (or *mana*)

and governorship (not government), have been the indicators of that power relationship. Many politicians, and perhaps some Law Commissioners, have for a long time believed that a single standardised set of laws for all New Zealanders came within the ambit of **kawanatanga**. Maori believe that **rangatiratanga** and other words in the Treaty directed the Crown to respect Maori autonomy and control which would include the continuation of their set of laws which were already in place before European settlement.

8 A single set of laws was and is seen by many Pakeha as a virtue because it would bring equality as well as modernity. But confusing equality with uniformity, and also treating unlike people alike can lead to further injustices and hardships and does have racist implications.

9 Some of the early comments of Law Commissioners that certain aspects of Maori succession should not be the business of the Commission does foreshadow implications of Maori Treaty Rights. Article 2 of the Treaty of Waitangi confirmed and guaranteed to Maori chiefs, tribes, families and individuals "the full exclusive and undisturbed possession of Maori lands and estates, forests fisheries and other properties which they may collectively and individually possess so long it is their desire to retain the same in their possession". The Maori version guaranteed "**te tino rangatiratanga o raatou whenua o raatou kaainga me o raatou taonga katoa**" which added **taonga** to that list of "lands, estates, forests fisheries [villages and homes] and other properties". Biggs subsumes under **taonga**

"...a wide range of valuable possessions and attributes, concrete or abstract".

10 Biggs drew thirty or so examples from early texts and found **taonga** referred to "inalienable" wealth such as weapons and ornaments and greenstone and fine woven cloaks, pieces of land, social and cultural features such as carving, dance and (interestingly) warfare; personal attributes such as attractive eyebrows¹.

11 The right to legal autonomy and to control of succession can be said to be a collective possession as well as **taonga**.

12 The New Zealand Maori Council has been aware for over a generation that a plethora of laws contravene the Treaty. The Council's support for a review of the Law of Succession is based on that awareness. The Treaty is central to Maori succession issues in that Article 1 and 2 confirms Maori rights to maintain and support **tikanga**.

13 The imposition of the Law of Succession without understanding or allowing for **tikanga** and Maori autonomy can be seen by Maori as a breach of the Treaty. So far as the principles of the Treaty adopted by Crown are concerned, there are still profound disagreements with that approach. Maori would still prefer the actual Maori text and this in itself is subject to interpretation. As a Maori linguist it is my considered opinion that the definitive analysis of the Maori text has yet to be written. As a Maori it is also my impression that the principle of *contra proferentem* which allows for the indigenous interpretation to prevail, has never been tested.

14 The problem of the status of new property rights acquired because of current Treaty claims was raised. To transmissibility of fishing quotas can be added a whole range of other property from railways and railway stations to forestry and crown lands. The possibility that these could be transferred to Trusts or Trust Boards or Runanga because it is the easy way, may

1 Biggs, Bruce Humpty-Dumpty and the Treaty of Waitangi in I H Kawharu *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press 1989: 300-312)

violate the succession rights of those individuals or families or subtribes who are more directly relevant or whose rights had been extinguished previously.

15 This brief incursion into the Treaty in no way exhausts its implications for succession. It is an area fraught with difficulties and requires much wider treatment than I have given.

Understanding Maori

16 The term **Maori** identifies the **tangata whenua** of **Aotearoa**. Who is Maori is legally defined; any individual can access that definition as a matter of choice. There is no coercion on any person to declare themselves to be Maori in terms of general law. There are occasions that a person has to identify themselves as fitting the legal definition and these range from deciding to vote in a Maori electorate to applying for Maori scholarships and funds. That is the present situation.

17 The use of the term **Maori** to name a distinctive race came after contact with Europe. The term **maori** before that was normally used as a modifier and not as a noun. Used after nouns it indicated "normal, usual, ordinary". A **tangata maori** was an ordinary or normal human being as opposed to a supernatural being. Used as a modifier to verbs **maori** meant "freely, or without restraint or ceremony". Thus, **ka haere maori** was to go unrestrained and freely). For 70 years after James Cook voyages, early Europeans used the terms natives or New Zealanders. **Maori** as a people designation replaced these two terms about 1850 and seemed to be self designated by Maori to distinguish themselves from **Pakeha** or **Tauivi**².

18 For a considerable time introduced law focused on blood and a Maori was legally defined as being a person who was either full-blooded, or half or more Maori. There is wide rejection of the view that blood count is acceptable as a definition, even if there was a scientific way of genetic measurement. But that remained the crucial definition until the 1970s.

19 Today the law recognises any person who is a descendant of a Maori as Maori. That reflects the widely held Maori viewpoint of the primacy of genealogy (**whakapapa**) as a crucial marker which determines and connects one with **whaanau** ("family") and other descent groups. To that is added the ideology of a widespread genealogical net that reaches from Sky to Earth and encompasses all Maori so that all are ultimately related to each other and to all visible and non visible phenomena. **Whakapapa** satisfies Maori definitionally in that genealogical and ancestral link is important to being Maori in terms of Maori cultural beliefs. That genealogical principle is objective in the sense that there are family and non-family members who can check the authenticity of any claimant³. Persistence overrode legislation; in 1974 the law began recognising descent as a legal requirement to being Maori.

20 The principle of **whakapapa** (descent) underpins family and therefore affects succession. Of importance is the fundamental primacy of kinship or **whanaungatanga** which determines and connects one to chosen descent groups from immediate to extended family, to subtribal and tribal nations. The **whanau** as the crucial social group for Maori and its part in succession issues is expanded below.

21 The principles and cultural practices and beliefs have developed in Aotearoa for over 1,000 years, and its origins were from an oceanic cultural lifestyle which existed in the Pacific

2 Williams, H W *A Dictionary of the Maori Language*, (Government Printer, Wellington 1971: 179)

3 I refer to the above paper by Joan Metge which implies that ancestry can be a subjective issue. It is not. Charlatans, eg those who try and become Maori for scholarship purposes etc, are quickly found out.

for over 10,000 years which originated in south-east Asia at least 20,000 years before that. Linguistically Maori belongs to the Austronesian or Malayo-Polynesian family of languages which covers over one-third of the earth's surface, from the hills of Cambodia and Vietnam, north to the Philippines and Hawaii, south to Madagascar and Aotearoa-New Zealand and east to Easter Island, excluding most of Papua New Guinea and Australia. Neither Maori, nor its related family of languages and cultures, have language or culture origins or links with those of the Indo-European family. Aotearoa was the last of the larger inhabited land masses to be reached by European voyagers, and the last to be colonised. The errors, misinformation and difficulties in comparing, translating or codifying Maori into English are due partly to that lack of common origin linguistically, culturally and historically. The lack of clearly defined and recognised body of Maori law from the Maori pre-contact past is due to the view of settler lawmakers and their descendants that their laws are superior, universal and fair and are buttressed by tradition and Divine Right.

22 That Maori has been able to change the definition of who is Maori from a blood definition to a descent definition is more a matter of continuing Maori persistence affecting legislation. Such legislative changes occurred through amendments to the Maori Affairs Act 1953.

23 However, who can be Maori continues to be a matter of debate. A suggestion had been made by Professor Dame Joan Metge that those who want to be Maori can or should be as a matter of personal choice⁴. It is important to clarify whether or not we are discussing the same thing. As anthropologists we are able to separate cultural factors from biological or genetic and define a society (ie Maori society) as having a range of distinctive cultural features. Others can also learn those features. Maori argue that biological features define Maori and that is inherited through descent. In those terms, orientation or interest, or knowledge of **tikanga Maori**, or growing up in a Maori community or Maori **whaanau**, or even being married to a Maori does not make one a Maori. "A kitten born in a banana plantation is not a banana" is a modern Fiji Indian proverb that seems relevant here. If interest in **tikanga Maori** is a critical qualification then that Kikuyu from Kenya on the Clapham Omnibus can define herself as English because of her interest in and knowledge of English language and culture, and her belief in Westminster and the Monarchy.

24 Lacking a strong sense of Maori affiliation or self identification is not a counter argument. Cultural loss is more a consequence of colonisation and geography, with each biological Maori individual having her own history of assimilation, conditioning, education and the like. On a personal note, I dread the effects of Sydney and Australia on the Maori identification and **tikanga** of my older sisters' children and grandchildren. But they are Maori, and **whaanau**.

25 It is my contention that while numerous boundaries can be drawn on social, political, cultural and personal identification lines, the major ethnic boundary to being Maori is biological descent.

4 See the Commission Seminar paper by A Joan Metge, "Succession Law : Background Issues Relating to Tikanga Maori" nd.

Traditional Origins

26 Maori traditional origins track back through genealogies from the present, through human generations to the demigod Maui, and further back to guardians, gods and goddesses, and finally to the Skyfather and Earthmother. There is the belief of a single ancestor who became earth and sky from whom all things descend biologically and genealogically.

"Kotahi anoo te tupuna o te tangata maaori,
ko Rangi-nui e tuu iho nei, ko Papa-tuu-aa-nuku
e takoto nei, ki eenei koorero. Ki ta te
Paakehaa, ki taana tikanga, na Te Atua anake
te tangata, me Rangi, me Papa, me nga mea katoa
i hanga..."

(Te Rangikaake, Grey mss 43)

(There is but one ancestor of the ordinary human, Great Sky Standing Above Here and Earth Spread Surface lying here, according to these accounts {of creation}. To the Pakeha or European, according to their belief, it was God alone who created people, Sky, Earth, and all things ... [my translation of above])

27 Some other writers add an ultimate creator, **Io-matua-kore** (**Io** the parentless) also known as **Io-taketake** (**Io** the origin) and **Io-mata-ngaro** (**Io** of the hidden face) and other names which define his attributes. **Io** is credited with fathering or mothering Space and that single entity divided to become Sky and Earth. After that **Io** had no further dealings with the affairs of creation, living in splendid isolation just above the topknot of **Rangi**. Maori theologians have merged **Io** with God in a seamless manner.

28 There were some 34 generations between **Rangi** and **Papa** and the generation who became guardians of various sectors of the universe. **Taanenuiarangi** is one such child. The Hikawera Mahupuku manuscript gives the best account which I summarise here:

Rangi(t) = Papatuaanuku(w)

34 generations later came the following

Ioiowhenua, Aituaa, Paianuiarangi Rehua, Taanenuiarangi, Tuumatauenga, Taawhirimatea, Tangaroa, Pawa, Rongomaraeroa, Tangaroawhaiariki (and a further 130+ others)

29 **Taanenuiarangi** and over 23 of his brothers created the first woman, **Hinehuone** (Woman of the living sand) also called **Hineahuone** (Woman formed from sand) from the sands of **Kurawaka**, a lagoon in **Hawaiki**, the home of gods, guardians and humans, and the ultimate heaven for the spirits of Maori humans.

30 **Hinehuone** gave birth to **Taanenuiarangi**'s daughter, **Hine-tiitama** (First Hine) with whom **Taanenuiarangi** began an incestuous relation. When **Hine-tiitama** found out that her father was her lover she fled in anger into the depths of the Earth Mother, to **Te Poo** (the Night)

to become **Hinenuitepoo** (Woman of the Darkness). She married **Tuuteamoamo**; **Maui** arrived 13 generations later from that union.

31 From the second daughter, **Hinewhaarangi**, was born **Hinehauone 11**, whose descendants by intermarriage also included **Maui**. 37 generations from **Hinehauone 11** came **Ngatoroirangi**, priestly navigator of the Te Arawa canoe and other ancestors of the Te Arawa Confederation of Tribal Nations. 26 generations after **Maui** came **Tamateamaitawhiti** also called **Tamateaurehaea** and **Tamateapokaiwhenua**, whose son **Kahungunu** is a well known ancestor of Ngati Kahu and Ngati Kahungunu. **Kupe** is 13 generations after **Maui** and he is an important ancestor of the western tribes from Northland to the South Island. Important therefore to succession principles is the recognition that every Maori share descent lines from these primal parents, goddesses, gods, guardians, superhumans and human ancestors.

32 **Papatuaanuku**, Earth Mother or Planet Earth, is the ancestress of all things. She and her children are the guardians or the progenitors of everything on and under the earth, sea and skies. The two grandchildren of **Papatuaanuku**, **Hinehauone** (**Hineahuone** to some) and **Hinerauwhaarangi** were the first to receive human form and were empowered by the guardians and gods to be the receptacles of all knowledge which they then transferred genealogically and genetically through demigods and demigoddesses to Maori. All this encapsulates the holistic connection between **whenua**, humans, gods, guardians and everything in the universe. It underlies the relationship between Maori people and all things. It impacts directly on succession principles and laws.

33 All this also gives deeper meanings to the word **whenua**. For Maori, **whenua** has an added meaning, being the human placenta or afterbirth. Through various birth ceremonies the placenta is returned to the land, and that results in each Maori person having personal, spiritual, symbolic and sacred link to the land where their **whenua** (placenta) is part of the **whenua** (land). The words "**nooku teenei whenua**" (This is my land) is given a much stronger meaning because of the above extensions. Having ancestral and birth connections the above is also translated as "I belong to this land, so do my ancestors, and when I die I join them so I too will be totally part of this land" This cultural understanding underpins the importance of land succession passing through kinship lines and I revisit this later.

34 Maori tradition also describes how **Maui** fished up the North Island. Leaving his brothers here with strict instructions to wait for his return, he returned to Hawaiki to fetch the appropriate **tohunga** (priest) to bless his catch. His brothers began to flense the giant catch and it writhed in agony. *Rigor mortis* occurred, giving this land its present terrain, and **Maui's** canoe eventually ended up on Mt Hikurangi (according to Tai Rawhiti traditions) or became the South Island.

35 **Kupe** rediscovered this Fish of **Maui** generations later. Almost all tribes have traditions of **Kupe** including numerous place names attributed to him or to his exploits. He is said to have left most of his family and crew here when he returned to Hawaiki after spending over two generations exploring the North and South Islands. Of linguistic interest is that the name **Kupe** means navigator in many of the Eastern Polynesian languages while his canoe, **Matahourua**, means double hull canoe.

36 Various **Iwi** (Tribal) and **Waka** (Confederation) traditions describe migrant canoes arriving. Some ancestral canoes with intersecting traditions (Tainui and Te Arawa, Mamari and Ngatokimatawhaorua) were probably names of each hull of large double hull canoes. But while a few canoes are said to have travelled together, most arrived separately over a time span from

400 - 1300 AD. Some areas along the eastern seaboard were landing sites for a number of canoes; some canoes are said to have done a series of stops before final landfall.

37 What Maori and scientists face is an orthodox, well known and respected view of a "fleet" of canoes, coming from a single Hawaiki, settling various demarcated areas, and dispossessing the unrelated Moriori, the first and only **tangata whenua**. That orthodoxy came from wrong and spurious analyses of Maori traditions by enthusiastic 19th century amateurs and has been difficult to put to rest.

38 Traditional, archaeological, linguistic and cultural evidence all pinpoint the islands in the triangle from Marquesas to Tahiti to the Cook Islands as being the most likely last homeland Hawaiki of all Maori including Moriori. Neither Moriori, nor other peoples were pre-Maori, nor were they genetically and linguistically disparate. That too is a non-Maori myth. The evidence from the above disciplines generally share the view of migrations over time from various islands in eastern Polynesia, with waves of canoe people arriving and intermarrying with earlier peoples and they all became the **tangata whenua**. Every Maori can trace descent from **Maui, Kupe** as well as from their traditional canoe ancestor who arrived later. The cultural explanations of the origins of land, the genealogy from Sky and Earth to every Maori, the traditions of discovery and occupation colours all Maori law (**tikanga Maori**), and Maori deep concerns regarding succession of land.

Tikanga Maori

39 There are a number of key principles overarching and guiding the formalities and practices in Maori society which we call Maori culture. The major principle is **tika**.

40 **Tika** can cover a range of meaning from right and proper, true, honest, just, personally and culturally correct or proper to upright. From **tika** comes the term **tikanga** - customary, traditional and cultural aspects which are true and honest and just. **Nga Tikanga Whenua** links all those meanings of **tikanga** to the meaning of **whenua**, so that the meaning goes beyond Land to the right and proper customary ways of dealing with land. In a similar vein **Tikanga Maori** goes beyond Maori Culture, or Maori Custom, to mean also the true honest and proper cultural ways. **Tikanga Maori** encapsulates all accepted Maori principles. The opposite of **tika** is **hee**.

41 **Tikanga** is not a relic of the past; it has authority in the present. Besides its moral and ancestral authority, **tikanga** adds rationale, authoritativeness and control which is timeless. In that sense **tikanga** can be defined as **law** in its widest sense, while **kaupapa** and **kawa** is the process and ritual of **tikanga**. The Western perception of **law** does not have that, hence Maori coined the term **ture** (Hebraic "Torah") as the introduced law which came with the church, colonial government and the institutionalised Maori land law. Early colonial administrators saw and interpreted **tikanga** in westernised legal terms, and while that interpretation provided some understanding, the reality of **tikanga** was distorted. **Tikanga**, or Maori law, has to be placed in its own cultural context.

42 During our 1000 years of occupation, Maori operated a system of law which was based on principles which were different from those of introduced law. The principles in fact were the guiding static commandments underlying behaviour according to **tikanga** and had existed over the millenium and covering all inhabitants of these islands.

43 With new colonists arriving from Europe close to two hundred years ago, they introduced a new concept of law not based on **tikanga** and therefore **tikanga** could not be used as the term for that introduced law. It was thereby displaced by some other borrowed term. Missionary influence and Christian conversion resulted in the term for the introduced law coming from the Hebraic word **Torah**. Because its normal Maorified version was deemed indelicate, vowel replacement changed it to **ture**.

44 **Ture** has been in operation for 190 years now. That **ture** has either replaced, impeded, codified or ignored **Tikanga Maori** in a manner which subverted its power and efficacy for Maori. **Tikanga Maori** has to be revisited in order that its part in succession law reform is understood.

45 The place of **tikanga** is crucial also because of its centrality in Maori feeling.

"E kore e whakawaia
E whakangaro i te **tikanga**
Kei hiiritia e te **ture**
Waiho ki te **ture tangata**"

wrote a composer some 50 years ago, stating that **tikanga** should never be watered down or lost, otherwise it would be codified in law and left to languish in human created laws.

46 Like grammatical laws, deep cultural principles have the greatest resistance to change because they are the underpinnings of cultural strength and continuity. While changes in more surface things such as land tenure, social and political structures or religion happened, they did so without sacrificing the deeper principles outlined above. That is why **tikanga Maori** has persisted.

Tikanga Controls

47 As well as **tika**, there were a number of principles which supported, guided and often overarched **tikanga**. The more important of these were **tapu**, **mana**, **pono**, **whanaungatanga**, **aroha** and **utu**.

48 **Tapu** could be defined as the essence of sanctity, cultural protection, sacredness, set apartness. It is not only a possible source of protection for all things, it also has a "potential for power". It was an empowering and a controlling mechanism which involved esoteric and supernatural support or withdrawal. Some Maori theorists push this too far to include its origins in and the involvement of the Christian God. The whole notion of **tapu** was from pre-Christian Maori and Oceanic eras.

49 Offenders of **tapu** or breaches of **tapu** caused a range of effects. The offender could lose his protective **tapu** or alternatively be subjected to more dangerous **tapu**. The effect could range from sickness, bad luck, injury, death to the offender or to a relative or relatives, or to the whole family or tribe. The offender(s) could be ostracised, or forced to comply to certain ceremonies to remove the dangerous **tapu**. As an extreme measure the offender, or a relative, or else an enemy was killed. A manuscript concerning Te Huaki of Ngati Rangi tells of an unwanted suitor from a neighbouring subtribe hiding with his young sweetheart in a burial cave of a family. They were discovered but escaped. Such caves are intensely **tapu** and that single event caused a series of devastating wars and killings covering the area from Maketu to Rotorua to Tauranga.

50 **Tikanga** by its very nature, was **tapu**. That **tapu** was extrahuman, derived from the world of **tuupuna** (ancestors) and **wairua** (spirit), and these sources added to the power and control of **tikanga** as well as to its persistence.

51 **Waahi Tapu** (Sacred Places) refer to lands set apart for various reasons -these range from burial caves, cemeteries, ancient fortifications, skeleton-drying trees, and where ancient schools of learning were located.

52 **Mana** is a personal non-visible measure of all things visible and nonvisible. This measure is gathered from ancestral and spiritual inheritance, prestige, power, recognition, efficacy, influence, authority and personal ability. **Mana** can increase or decrease depending on the actions, or the inaction of the recipient. **Mana** can also be removed by others through their actions or inaction. **Mana** applies to both sexes, and the unpublished manuscript resources also identify women as **tohunga** and **rangatira**.

One can speak of a highly successful **tohunga** (or expert) having much **mana**. One can also speak of a chief(**rangatira**) who has been enslaved as having lost her **mana**.

53 **Mana** can be inherited and can also be acquired. It can be enhanced and it can be decreased and it can be lost. **Mana** can be transferred through genealogical lines, or by personal handing on to another. **Mana** is not self-imposed. To try and give yourself **mana** diminishes what you have, and that is referred to as **whakamanamana**. If **tapu** is the "potential for power",

mana is the realisation of that power. In a narrow sense, **mana** can be defined as the integrity of a person or object.

54 **Pono** means true, honest, and intersects with just and correct. **Pono** is a requirement of all who are the protectors of **tikanga**, or custom; **pono** is a requirement of all who have **mana** and **tapu**. Again, there are spiritual and human sanctions against those who do not honour the principles of **pono**.

55 **Whanaungatanga** means kin relationship, implying that one has to show elements of **tika**, **pono** and **aroha** in dealings with others who are kindred and also extends to non-kin who are in a friendly reciprocal relationship. **Aroha** covers a wide range of meaning from compassion and love to concern and sorrow. Life was kept in a careful balance in all these areas and any deviation required **utu** or reciprocal payment. Such **utu** could come from the gods or from humans. If an error came from within the **whanau hapu**, **murū** or the plundering of goods, took place. Outside the group would occasionally lead to warfare.

56 The principles I have underlined above are important in understanding Maori concerns with the current law of succession. **Tikanga** is central, relying on a collective sharing of decision making, tied to the community, and differs from the law which exists today which is tied to a world of individualism.

Understanding Whaanau and Whanaungatanga

57 The current law of succession is closely associated with family relationships and family law, with the **nuclear** or **elementary family** consisting of parents and (mainly) dependent children being the crucial social unit. Maori recognise nuclear and elementary families as well as denuded and single parent and reconstituted families. But the crucial social unit for Maori is the **whaanau**, the cluster of families and individuals descended from a fairly recent ancestor⁵. Its members have close personal, familial and reciprocal contacts, decision making and relationships with each other. Its importance for discussing and settling familial issues ranging from child upbringing to succession but across a larger kin range gives it an almost identical function to that of the legally recognised nuclear family, except that it is not recognised in the law of succession. Whether or not it should be recognised and defined is a crucial issue. If **whaanau** is to be defined it should be kept within **Tikanga Maori**; and **tikanga Maori** should also be ring fenced deliberately.

58 The problem for Maori is that the term **whaanau** has been commodified, often wrongly, in education, social welfare and other areas. There are arguments for a legal definition as well as legal recognition of **whaanau** for succession and other purposes.

59 I have qualms in raising this matter of legally defining **whaanau**. The arguments against would include commodifying Maori concepts into a western legal system, removing **whaanau** from the ambit of Maori intellectual property as well as from the area of taonga in terms of the Treaty. The arguments for would include the fact that **whaanau** is already used wrongly in other areas (**whaanau** classrooms, housing, dispute resolution) etc. The strongest argument is based on the proposition that if Maori does not define **whaanau** it will be done in a detrimental way by others, as has happened with **whenua tupuna** (ancestral land), **whenua tuku** (gifted lands), and **whaangai** (adopted child) and **kaitiakitanga** as stated above. History has shown that when Maori legal concepts are used within general law, they become redefined and lose their meaning and power. eg the use of **kaitiakitanga** in the Resource Management Act has been defined by non-Maori judges in a non-Maori sense.

60 However, defining **whaanau** at this stage is premature since the argument should be whether or not it should be defined. That has to be the prerogative of Maori and it will be a long process to reach some consensus.

61 Under **Tikanga Maori**, **whanaungatanga** refers to the close relationship engendered between members of the **whanau** or extended family as a consequence of working together. All members must ideally share compassion (**aroha**), trust (**pono**), truthfulness (**tika**) with each other. That feeling of **whanaungatanga** must also extend to others to whom one develops a close familial, friendship or reciprocal relationship.

62 The other social groups, **hapuu**, **iwi** and **waka** are too diverse and complex in structure, size, controls and area to tolerate defining, and there is still no unanimity among Maori as to

5 See Firth, Metge *op cit* for further description of the makeup and functions of **whanau**

what are the salient characteristics which separate one from the other. But their existence will still be relevant for succession purposes because of **taonga**, **whenua** and **moana** (eg Fisheries Quota) considerations.

Implementing Tikanga

63 There is insufficient time for defining in detail how **tikanga Maori** would operate in the contemporary context. The central issue is that Maori and Western based legal systems are not compatible. Maori law is bound to cultural and political systems and admits it. It is overtly driven by those systems. It is part of the magico religious or spiritual system because its origins are from the primal creation where the principles of explanation, inspiration and control, fairness and justice began. The legal system was also human, aware of human frailties, and therefore it was not static or sterile.

"Maori law was an evolving process that punished wrongdoers, comforted victims, protected resources and sought harmony with and among Iwi... People [were not seen as] isolated individuals but as interrelated parts of a communal whole, and that whole was the body politic"⁶.

64 Precedence came from the time of Creation and from the ancestors and was linked to obligations to the collective (**iwi**, **hapuu** or **whaanau**) and the **mana** (prestige) loss of the victim and her **whaanau**. The remedy sought had to satisfy the victim and her **whaanau**, that the **hara** (wrongdoing) has been requited and harmony (**rangimaarie**) restored.

65 This was not an adversarial process; it was not a matter of winners and losers. It was a search for consensus that justice had been done and seen to be done and all parties were satisfied as to the outcome so that the collective can once again live in harmony. But it was more than this. Overarching the formalities and procedures were the four cultural concepts of **tapu**, **mana**, **tika** and **pono**, which had to be satisfied.

66 All matters raised by the parties in this kind of legal system are regarded as relevant and substantive until a consensus is reached balancing all considerations. The scope of the law is unlimited. It is aimed at achieving fair results and harmony for all parties. There is no division between procedural and substantive justice. The merits of an issue are always dealt with. The offender or offenders wrongdoing is related directly to the communality, and the settlement is directed to the victim or victims and their **whaanau** and this is overtly linked to a formal cultural presentation and acceptance of **taonga** in order to restore the wrongdoer back within the communality. Sometimes because of the gravity of the offence, or because it may be between disparate communalities, a mediator, peacemaker or mediating team is selected by both parties. But there is finally a face-to-face resolution at the end so that the four requirements are seen to have been satisfied and the **hara** removed.

67 The above summaries in no sense covers all the areas of **tikanga** and dispute resolution based on the dictates of **tikanga**. There is obviously a need for further research on the implementation of **tikanga**.

6 Jackson, M *The Treaty and the Word: The Colonisation of Maori Philosophy*, nd, (Conference of the Australian Association of Philosophy 1990).

Understanding Hapuu/iwi and Waka Diversity

68 Despite sharing distant common ancestry such as Rangi and Papa, Maui and Kupe, as well as sharing **tikanga** as well as the key guiding principles explained above, **waka**, **iwi** and **hapuu** differ radically because of different histories, historical accidents, divergences in political development and other factors.

69 Some **iwi** belong to a single **waka**; some belong to several. Having a **waka** is not a prerequisite to being an **iwi**.

70 Some **iwi** and **hapuu** have pyramid hierarchies based on a senior male **ariki** lineage and that person's family has a paramount role in the control and leadership of that group. Such an **iwi** would be Ngati Tuwharetoa. Other **iwi** or **waka** have their own **distinctive political cultures**. Some have a number of co-equal **iwi** or **hapu** with their own leadership patterns. Some have male leaders only. Others have women as founding ancestresses and leaders as were **Hinepare**, **Hinematiaro**, **Hinerupe** and **Tapuhi** of Ngati Porou⁷. Some groups such as Ngapuhi have interlocking **hapuu** or **iwi**, with leadership based on a mixture of descent and deeds and group support.

71 There are variations between **hapuu** and between **iwi** and the question is whether or not a common definition can be devised. Each is unique. Each exists as a communality because it is self defined, self regulated and is recognised by other similar communalities. Given the increasing importance of **hapuu** because of Treaty recognition and the importance also of **iwi** because of present claims and positioning in relation to forests and fisheries, there is a need for wide Maori discussion on whether these can be part of a unified or dual law of succession with **tikanga** ring-fenced within the ambit of an autonomous system of Maori control.

72 The issue of having a separate Maori law of succession has been raised here and elsewhere and always triggers claims of apartheid, separatism and the claim that the present system is superior, fair and culture free. There has been legal recognition of Maori customary law in the past (eg marriage, adoption, etc) but these were removed at the convenience of non Maori legislators. Many other nations do operate a dual legal framework to accommodate cultural and other differences which allow real choices rather than administrative legal convenience.

7 A T Mahuika, "Nga Wahine Kai-hautu o Ngati Porou : The Female Leaders of Ngati Porou", unpublished MA thesis, University of Sydney, 1973)

Range of Cultural Commitment and Practice

73 One argument raised against having a Maori legal system is that integration and assimilation has already reached a point where Maori are no longer disadvantaged by the introduced legal system. However, the fact remains that Maori principles and practices are not part of that system except cosmetically. The initial assertion is not accurate. We know that there are variations in the knowledge and commitment of Maori to Maori language and Maori cultural practices⁸. Such a variation neither negates or repudiates the need for special Maori succession **tikanga** or law. In any case the life history of many individuals do show changes in commitment to Maori **tikanga** with the increase in commitment occurring usually during adulthood. A stronger counter-argument is the current renaissance of Maori language and culture and the rising numbers of young attending **kohanga reo** (language nests).

74 There is still a strong adherence to marae across Aotearoa and these are the stabilising and refocussing centres for language and culture. That they are also the centres for discussing **Tikanga Maori** rather than Courts and schools also supports the need for autonomous Maori law to be allowed to flourish, based on **tikanga** and using the marae as the court equivalent - providing they are not invaded by the present court system. **Tikanga Maori** cannot be practised, controlled or exercised in the Maori Land Court, the High Court and the Family Court because its structure and philosophy subverts or coopts and is antithetical to **tikanga** and that would be its effect in marae. For many generations the judges in fact have been the definers and in some cases the inventors of **tikanga**.

8 Richard A Benton, *The Flight of the Amokura* (NZCER 1981: 7-68), outlines the extent of the issues concerning Maori language. Numerous other books outline cultural concerns.

Property Concepts

75 The Maori view of property, as one would expect, is conceptually different from that of Pakeha. That view comes through the Maori language where the relationship between a possessor and possession is marked by particles. The particle /o/ indicates that there is either a location relationship between the possessor and the possession or that the possessor does not have a control relationship over the possession. The particle /a/, on the other hand, indicates that the possessor has a control or power relationship over the possession.

76 That land, heirlooms, intellectual property and body parts are all marked by /o/ indicate that there will be succession difficulties. In a sense the axiom "We belong to the land" rather than "the land belongs to us" is indicated by /o/ possession marking. That those possessions are also imbued with some **tapu**, **ihi**, and **mana** are also indicative of their importance not to the individual but to the group.

77 Furthermore, issues will go beyond property transfers and the primary task outlined (allocating money and property in terms of financial considerations) and can encompass other values including *mana* (eg an ancestral heirloom in hands of deceased) tapu (the cloak covering the coffin), *taonga tuku* (eg a named weapon from another tribal group) etc. These, and others, have transfer implications.

78 Land is the key to formulating a substantive and procedural Maori succession policy because of its centrality in Maori cultural practices and law. Land and its relationship with ancestors has been explained above. Fisheries should also be examined since, with the recent transfer of fisheries quotas to Maori, that property has already become a cause celebre, especially with the creation of the Maori Fisheries Commission. There is a need to investigate further the **tikanga** concerning succession to fisheries quotas, and to examine **individual**, **hapuu** and **iwi** rights and obligations.

79 **Whenua** (land) and its control thereof already have substantive and procedural Maori succession law reforms. The holistic connection between land, sky and humans underlies the cultural relationship between Maori and the universe. Continuing concerns for Maori is the principle that land succession passes through kinship lines.

80 Maori concepts have Pacific wide links. For example, the Maori word **WHENUA** (land) occurs as **banu(w)a** (Indonesia, Malaysia etc), **vanua** (Fiji and Vanuatu), **fanua** (Samoa), **fenua** or **henua**, or **'enua** (Easter Island, Marquesas, Rarotonga, Futuna, Uvea, Tikopia, Kapingamarangi, Nukuoro), **fenuua** or **henuua** (Tuamotu), **honua** (Hawaii), **fonua** (Niue and Tonga). There are place names such as **Vanua Levu** (Beautiful Land in Fiji), **'enua-manu** (or Bird land, which is **Atiu**), **Te Pito o te Henua** (Navel of the Land, another name for **Easter Island**, also called **Rapanui**), and in Aotearoa there are names such as **Horowhenua**, **Whenuakite**, **Whenuapai**.

81 In all languages, **whenua** and its cognates refers to **LAND** as a definable entity ranging from whole islands, mountains, small portions, and including land under oceans, rivers, lakes and streams. For Maori, the opposition is between the sky (**rangi**) and the land (**whenua**), and

not between land and water. Ultimately **whenua** is tied to the whole of planet earth and originates from that source.

82 **Whenua kite** refers to lands which were first discovered or first used by the ancestors. The terms

reflect the Maori concept of **terra nullius**, land which has not been occupied or owned by others, and becomes the property of the ancestor who claims this first right of discovery. The traditional record explains how **whenua kite** is customarily recognised. The **Te Arawa** account records how chiefs pointed to the various landmarks as they sailed closer to the unknown land. Hei pointed to a large area with reflected water and claimed it as **Te Wai-taha-nui-a-Hei** or Hei beside the large waters. That is now Waitaha. Tamatekapua pointed to a headland and proclaimed that was **Te Kuraetanga-o-te-ihu-o-Tamatekapua** (The Bridge of the Nose of Tamatekapua) which is now known as Te Kurae. No other persons would dare occupy the large waters of Hei or build a house on Tama's nose. That customary process was formally called **taunaha** or **tapatapa whenua**, or the Naming of the Land.

83 **Whenua kite** has been used as a justification for ownership not only in the Maori Land Courts, but also by the Waitangi Tribunal. In almost all cases that customary law has been recognised in inter-iwi discussions.

84 Discovery was one thing, living on it was another. The principle of **Ahi kaa tonu** (Permanent Fires), was used to claim permanent occupation, justify, in past, continuing occupation by present claimants/. My own family records clearly recount why we of Te Mahurehure, the descendants of the woman chief **Kuiawai**, have such permanent rights to the lands of Waima in Hokianga.⁹

"No nga uri katoa o **Kuiawai** e noho ana i runga i te poraka nei teenei ahi kaa" (p135 FB) This ahi kaa belongs to all the descendants of **Kuiawai** living on this Block.

Tiimata mai i a Kuiawai, tae mai ki au nei, te ahi kaa mo **Manawakaiaia** (p135 FB) It began with **Kuiawai**, right to me here, the ahi kaa for Heart-of-the-hawk.

85 Not only can **ahikaa** speak of occupation rights, that right can also go back to previous ancestors who made crucial decisions such as **wehewehe whenua** (dividing up the land).

"No te waa i a **Tuupoto** tooku moohiotanga ka wehewehea teenei whenua ki ana uri" (p 126 FB) To my knowledge it was from the time of **Tuupoto** that this land was divided amongst his descendants

86 Coupled with these abilities was **mana rangatira** which was the ability of their chiefs to exercise their **mana** on behalf of the people. That ability was based on **mana whakahaere i te iwi** ability to organise the people

9 The Family Book (FB) contains Native Land Court records written in Maori and countersigned by the Judge of that time (1904).

...mo te whawhai, mo nga whenua, hohourongo (p139 FB) for warfare, over land, and for making peace

The rangatira (s/he who weaves the people together) worked on the principle of **ko te iwi te rangatira o te rangatira** (the people were the chiefs of the chief) and the chief held **manawhenua** on their behalf.

"No Tuteauru te mana o eenei whenua katoa" (p50 FB). Tuteauru held the **manawhenua** over all these lands.

87 Associated with their **ahi kaa tonu** (permanent fires) was the **iwi** ability to hold the land against enemies or invaders. This was the principle of **ringa kaha** in defence of one's **ahi kaa tonu**, and if used in offensive battles to acquire others' lands, that **ringa kaha** became **raupatu** which was the invasion or confiscation principle. That word is descriptive; **rau patu** = blade of the club.

"No Raahiri mai, tae mai ki a Kaharau, te raupatutanga o teenei whenua" (p126 FB) From Raahiri on, to Kaharau, came the invasion of this land".

88 Also associated with **ahi kaa tonu** were a multitude of terms which indicated that there was permanent settlement and many terms were used as indicators:

noho kaainga (permanent village) and **noho tuuturu** (permanent settlement) were mentioned, as well as **paa** or **paa maioro** (fortified villages), **mahinga** or **maara** (gardens), **urupaa** (burials).

89 Named hunting and gathering areas also indicated **ahi kaa tonu**:

rore kiore (rat trapping areas), **tahere kuukupa** (pigeon nooses), **ara patu kiwi** (kiwi killing trails), **raakau mahi waka** (canoe construction trees) **waahi huke roi** (fernroot harvesting areas) **wai kookoowai** (ochre and clay pits) all indicated permanence.

90 We therefore have a system of land being held peacefully, protected, and also invaded. Land could also be gifted, and the gifting was always in terms of allowing others the use of the land but maintaining **manawhenua** so that the users gave the use back once its gifting had run its course or until the users had been assimilated into those who held **manawhenua**. Such gifted lands were **whenua tuku** (lands released).

"I te waa o to raatou hokinga mai i te rapu utu mo Hereure, ka tukua mai he whenua e Ngauru mo te Urikaiwhare, hei utu toa" (p141 FB) At the time of their return from seeking revenge for Hereure's death), land was given by Ngauru for Te Urikaiwhare, to pay the warriors.

Tuku is not absolute, it was subject to an obligation to maintain reciprocity. No individual had the right to transfer land to others through gifting, since it was an ancestral commodity, like **whakapapa**, and was in that sense inalienable having come from the ancestors and was in trust for generations to come.

91 Added to that system was one of conservation whereby a protective covenant called **raahui** was placed on the land. To all intents and purposes the land was under a conservation

tapu until that was lifted by either the **rangatira** or the **tohunga** who placed the boundary indicators on the **whenua raahui** (conservancy land).

92 All the above terms are relevant to the understanding of Maori Law (**Tikanga Maori**). Another term has come into vogue, again from the traditional Maori data-base. That term is **take** which refers to the source or origin or beginning , as well as the reason, the cause, and the matter under discussion. Converted into legal parlance, **take** referred to evidential information. To a host of other terms **take** was added and it expanded to include empowerment:

take tuupuna, take raupatu, take ahikaa, take ringa kaha for example, refer to ancestral, confiscation, permanence and power empowerment.

Maori Women

93 Maori law recognised ambilateral descent and ambilineal succession which contrasts with introduced law which favours primarily male seniority or primogeniture in matters of inheritance and succession and that is amply exemplified in the rural farming inheritance practices.

94 Women as individuals owned "use-rights" over land and resources. Those could be handed down by either parent and remained the property of women and not their husbands, and she could hand them on to any or all of her children. This position of Maori women property ownership was maintained through the colonising and land court eras¹⁰.

95 The gradual reduction of the mana of Maori women occurred after the Court was established and then by the long period of colonisation. In a sense their position was being reduced to that of their Pakeha women contemporaries who were under continuing male domination through the eighteenth and nineteenth centuries.

"Sexism and racism are born of the same blood brother"

is as relevant for that era as for the current one which prompted this saying from Dame Mira Szaszy¹¹.

96 The effect of sexism on Maori women has been devastating in all areas and almost invaded Maori land succession laws in the years following the establishment of the Native Land Court where customary "Maori land tenure with regard to women was progressively undermined".¹² Ballara reports unsuccessful attempts by European husbands to gain control of their Maori wives' lands by challenging clause 22 of the Native Lands Act 1869. By 1873 a clause had been added which provided that husbands be a party to all deeds executed by married Maori women. There were other efforts outlined by Ballara.

97 This meant Maori customary dealings in land were not only subject to *assimilationist* practices but also gendered views on **Mana Wahine**. Maori women's control over their land was lessened by laws such as the above. What assisted this was the fact that the Native Land Court was a colonially defined patriarchal institution both in the way it was organised and in its operations. It remains that way because, since its inception, there have been no Maori women land court judges.

98 That some Maori males have been assimilated to this view is also seen in the records from many Maori land blocks. They are either male dominated or at its extreme, assertions of women having rights are challenged. eg Waitokitoki 3 & 4 Blocks Waiariki Appeal, MB 310 (1981), the Court appointment of 5 women trustees was unsuccessfully challenged by males.

10 Ballara, Angela *Wahine Rangatira. The NZ Journal of History* (27.7 Oct 1993: 127-139)

11 Mira Szaszy, 1983 MWWL Conference Report

12 Ballara *ibid.* 134

99 There is ample evidence from time immemorial concerning the individual property rights of women as well as their succession rights to property, rank and **mana**.

"Goods, fishing rights, etc were apportioned at death among all the children, whether of a polygynous marriage or not..."

wrote Firth from anthropological and economic viewpoints¹³.

100 In the manuscript by Himiona Kaamira concerning Kupe, he writes that each of Toto's daughters had a personal canoe made for her, for which they chose the trees, and they also chose their own husbands from a selection suggestion by their father¹⁴.

101 Women also owned gardens to the extent of having power to select a successor.

"Na Kahu(matamomoe) te maara, ko Parawai, na toona whaea i tuku ki a ia"

indicating that Kahu's garden was gifted to him by his mother¹⁵. Women owned forests. Riria Ponau was a chiefly ranking woman of Whangapoua, Coromandel Peninsula, who signed the kauri cutting contracts in that area in the 1830s (MLC Minute Books, Coromandel BkI. pp 217 onwards).

102 In the manuscript by Hiitiri Te Paeraataa concerning Wairangi, an ancestor of Ngati Raukawa, his senior wife deserted him after a confrontation and took her cloaks with her¹⁶. In other words not only have women had the power of abandoning their angry husbands, they also had their own personal property including cloaks, which went with them. Unpublished Maori manuscript sources are replete with examples of women and their property and **mana**. **Waimirirangi**, whose **mana** ranged across almost all the major iwi of Northland, **Rangi Topeora** of Ngati Raukawa and Ngati Toa who also signed the Treaty of Waitangi, **Wairaka** and **Muriwai** whose names are synonymous with the Mataatua canoe, **Mihi-kotukutuku** of last century, whose leadership of Whanau a Apanui was legendary, and whose **mana** is part of the inheritance of their successors.

103 This by no means exhausts the subject of Maori women and succession law, and more research by Maori women is obviously required.

13 Firth, Raymond, *Economics of the New Zealand Maori* Polynesian Society, (Wellington (1972: 128)

14 Himiona Kaamira, *Kupe* (translated by Bruce Biggs, in JP)

15 Shortland ms Hocken Library, University of Otago

16 See Bruce Biggs, P Hohepa and S M Mead, *Selected Readings in Maori*

Ohaki

104 "...when a person was dying he usually announced to his assembled relatives his wishes regarding the disposal of his personal property, and his interests in tribal lands, so that no trouble might ensue after his death. This was done in a formal speech, and was equivalent to the last will and testament of our more civilised (sic) communities... this custom of *ohaki* (*poroporoaki*) or public speech before death may be called a part of the machinery of law in the Maori community" wrote Firth¹⁷.

Public verbal pronouncement had cultural importance. Firth cites Elsdon Best paper as authority on various aspects of inheritance.

105 That verbal pronouncement can include personal responsibility for one's corpse and its treatment thereof, after death. I give the following without comment as one of the earliest examples:

"I reira ka whakaaro a Tuhoro kia haere mai ia ki te whai mai i toona matua i a Tamatekapua. Haere katoa mai me aana tamariki, kaahore teetahi i mahue atu. Noho rawa mai i Moehau, aa, mate tonu iho ki reira raaua ko te matua, ko Tamatekapua. Ka tata te mate o Tamatekapua, kaatahi ka puta ake tana kupu ki tana tama ki a Tuhoro:

'Kia toru o tau e noho tapu ana, e noho ana i tahaki, kia toru ano ou mara e mahi ai koe ki te pakitara o te whare, hei te wha o nga tau ka whakaara i au i te moe, ta te mea e apu tonu atu ana oku ringa ki te whenua, e haupa tonu atu ana taku waha ki te kai i nga toketoke, i nga iroiro, i nga hamuti, i nga kai i raro i Te Reinga. Kia makere ra ano taku tuuta, kia taka taku upoko i runga i taku tinana, kia hoki mai aku ringaringa (ara kia makere noa iho nga ringa) ka tae ki te wha o nga tau katahi ka tahuri mai taku aroaro ki te aomarama. Hei kona ka hahu ai koe i taku papa toiake, ka maranga au, ka noa koe;

E papa nga rakau i runga i a koe
Mau ake te whakaaro ake, ae, ae.
E haere nga taua i te ao nei
Mau e patu, ae, ae."

Heoti ano ka mate a Tamatekapua, ka tanumia e tana tamaiti, kei te tihi tonu o Moehau..."¹⁸.

(It was then that Tuhoro decided to follow his father Tamatekapua. All his children came with him, not a single one was left behind. He settled permanently at Moehau [Coromandel Peninsula] and died there, he and his father Tamatekapua.

When Tamatekapua was close to death he gave his final message to his son, Tuhoro.

17 Firth *ibid* : 358.

18 Shortland *ibid* 161-2

'For three years you must remain **tapu**, and live in isolation. You must also cultivate three gardens at the entrance to the house and in the fourth year you will wake me up from sleep, because my hands will still be cupped to the earth, my mouth still open to eat the worms, maggots, refuse, and the food below there in **Te Reinga** (Spirit World). Only when my spine has freed itself, and when my head falls to my body, and when my hands retract (that is, when my hands fall off) and the fourth year arrives, then my gaze shall turn to the world of light. At that time you can exhume my skeleton, and I will wake up, and you will be **noa**'.

When the weapons resound above you
 You can deal with it, yes, yes.
 When warparties travel in this world
 You can destroy them, yes, yes."

And so died Tamatekapua, and he was buried by his son, he is at the summit of the Coromandel ranges.

106 David Williams has evidence that **ohaki** had been recognised at first as legally binding and its powers were then removed by legislation last century. **Ohaki** is an important succession concept that needs revisiting in **tikanga** discussions.

107 The issue was raised as to what happens if the person who gave her **ohaki** did not die. The gifting lapsed and the property so gifted remained with the **ohaki** giver. From oral sources I am aware that if no further subsequent public disposition was made, that which was made prematurely was binding. After all, it had been made before the **whaanau**, and it had not been revoked publicly.

Bodies and Body Parts

108 The traditional record outlines how the body and all body parts of the first human (a woman) were created by the children of Sky and Earth and therefore the body and its parts had **mana** inherited from the guardians of the universe. While every Maori person is deemed to have varying measures of **tapu** while alive, after death the person becomes a **tuupaapaku** and is intensely **tapu**.

109 That **tuupaapaku** is a **taonga** of the **whaanau**, **hapuu**, and **iwi** who will deliberate on such matters as where the body lies in state, and where and when the body is buried and by whom. The **tuupaapaku** in terms of **tikanga**, is the property (**taonga**) of the **whaanau**, **hapuu** and **iwi**. That contrasts with common law where succession to (or disposition of) the deceased is a matter for the surviving spouse and children. For Maori, if the deceased is prominent, the Confederation (**waka**) can also be involved as was the case of Billy T James being taken to Taupiri by Tainui¹⁹. For prominent people there may well be pan-Maori as well as inter-ethnic jurisdiction in Maori terms. **Tuupaapaku** must be included as a crucial part of the disposition of property.

110 There has been consternation and grief among **whaanau** members whose deceased (**tuupaapaku**) have been returned to them with body parts removed after death. Similar grief occurs when body parts are returned much later without the **whaanau** knowing that these had been removed. Cases have been widely reported in the various media, especially in **Te Karere**, TV Maori News. While there are differences in accounts, there is one unifying principle, the body parts were removed by medical personnel, sometimes by or at the behest of the pathologist or coroner, after the person died. The principles of **tapu**, of returning the whole body to **Papatuanuku**, have been violated.

111 Notwithstanding the above, there are changing attitudes to the use of body parts. There is the increasing frequency of Maori adults and children having heart or kidney transplants, or the more frequent news of those who have died through lack of suitable or available body parts, bone marrow, or tissues. Agreement of others is necessary and while there is wide acceptance of Maori donating blood or marrow, the position regarding body organs is not clear. These obviously have to come from those who have died and have agreed to their body organs being used.

112 The Sunday July 17 1994 **Waka Huia** programme showed that there are widely divergent attitudes with regard to organ transplants in relation to Maori people and in terms of cultural beliefs. Let me quote from two respected elders whose excerpts were taken from videotape:

Simon Snowden, a well known and highly respected traditional elder from Tai Tokerau:

19 Hammond R G, *Personal Property: Commentary and Materials* (Oxford University Press, Revised Edition 1992 : 347-9), discusses Pakeha and Maori conceptions of Property including the death of Billy T James.

"Etahi o nga haahi nei kaahore ke e whakaae ana kia tangohia mai te toto o teetahi atu tangata kia ora ai te mea e paangia ana e te mate.

Ki a au nei, mehemea e paangia ana taaku nei tamaiti i te mate, mehemea ma aku toto ka ora ai, pai noa iho ahau ki te tuku i aku toto, kia ora ai taku tamaiti, taku kootiro aku mokopuna, aku tamariki ranei, ahakoa me te hoatu i etahi waahi o taku tinana kia ora ai. Engari kaahore te katoa e whakaae ana ki teenei aahuatanga... Pai noa iho ki ahau te tuku atu i taku ngaakau, aku toto kia ora ai taku whaanau.."

(Some churches will not agree that blood from another person be taken to save the one who is ill. To me, if my child was ill, and if my blood is needed for survival, I readily agree to give my blood so that my child lives, or my daughter, my grandchildren, my children - and even to also give some parts of my body to ensure life. But not all agree with this principle...I agree without hesitation to give my heart, my blood, so that my whanau lives)

Taawhao Tioke, another well known and highly respected traditional elder from Tuhoe:

"Na te roa rawa e tatari ai eetahi tuuroro, no te tiimatanga o aua tikanga i waenganui i a tauwiwi, i aahua ohore nei nga Maaori. Mooku, taku moohio nei, kei hea i roto i nga waiata, i nga karakia, kei hea i roto i eenei tikanga te waahanga e tata mai ana, mo taatou kia tatari ki nga ngaakau o eetahi atu, kia whakawhitia ai ki o taatou. E kore rawa ahau e whakaae kia peeraa ahau. Ki te raruraru ooku taakihi, ate, puukahukahu, whatumanawa, kore rawa e uru mai me haere au ki nga taakuta kia whakahoutia atu ahau ki roto i nga roopuu [tatari]; e kore rawa ahau e whakaae. Mehemea kei te raruraru ka whakawhirinaki ahau ki te kaihanga, ka whakawhirinaki ki nga rongoa e tika ana...e kore ahau e whakapono ana ki nga rongoa Paakehaa...kore rawa e uru mai teeraa whakaaro ki a au"

(It is because some patients have waited too long, it was because of the beginning of that alternative among Europeans, that Maori have become concerned. To me, according to what I know, where among the ancient songs, incantations and prayers, where in our law is there a hint, for us to wait for the heart of others, to be exchanged for ours. I will never agree that such will happen to me. If my kidneys, live, lungs, or heart are affected, I will never decide to go to doctors to put me into the waiting list; I will never agree. If affected, I will put my faith in God, I will put my faith in the appropriate medicine ... I do not have faith in Pakeha cures ... that thought will not enter my mind...")

Personal and Communal Property

113 For Maori in the past, personal property accumulated in one's lifetime is an issue not only for the nuclear family but for the **whaanau**. Of concern to the **whaanau** and **hapuu** and **iwi** is succession to property

- (a) that is communally owned in theory or culturally
- (b) that had been inherited from ancestors
- (c) that was, or is thought to have been acquired through **tuku**
- (d) that can be subsumed under the term **taonga**
- (e) that have some **tapu** or **mana** associations
- (f) that changes culturally after death eg body parts

Wills

114 The writing and the execution of wills is not strange for Maori - there are numerous examples of wills written during the early years of this century as the following will show.

"He wira tenei naku na Kingi Te Ngahuru o Te Ti Mangonui ka hanga nei e au i tenei ra 30 Tihema te tau o to tatou ariki kotahi mano e iwa rau ma waru hei Kawenata ki te hunga kua whakaritea nei e au a ka whai ake i raro iho nei.

Ko taku hea i roto i te puuru hea i roto i te karauna karaati i Takou ka tukua e au ki taku mokopuna ki a Tere Te Heihei. Ko taku hea i Maunganui wahi o te Rawhiti e rima eka ka tukua ano e au ki taku mokopuna ki a Tere Te Heihei. Ko taku hea i roto i te whenua a Ngatirahiri i te Waitangi ka tukua ano e au ki taku mokopuna ki a Tere Te Heihei.

Ko te Pouaka me nga mea katoa o roto me te Potomeneto (Rakati) me nga mea katoa i roto ka tukua ano e au ki taku mokopuna ki a Tere Te Heihei. Ko taku mihini tuitui kakahu ka tukua e au ki aku mokopuna wahine ki a Te Ati raua ko Te Karehu. Ko aku Omu e rua, me te kohue Maori, me te rihi, me te tikera, te piki maku, ka tukua e au ki aku tamahine ki a Koi raua ko Riana.

Ko taku peihana horoi me taku kaputi takotoranga nui ka tukua e au ki taku mokopuna ki a Tere Te Heihei. Ko nga rarururu i muri o taku ngarotanga ma Tere katoa e whakarite.

(Hainatia e ia tenei Wira i mua i o maua aroaro
30 Tihema 1908)

W T Karatini, (minita o te Waimate
Te Ti, Mangonui)
Hare Te Heihei²⁰

14.2 Such wills specifying land transfers to children or grandchildren were rarely challenged, giving them the status of *ohaki*. Those specifying a spouse could be challenged since inheritance by an "outsider" would often cause a leak of land interests outside of the *whaanau* or *hapuu*.

The Courts and Maori Succession

115 There is a continuing problem which needs further investigation concerning the legal codification of **tikanga** in the law. It comes in the guise of Legal Pluralism by reinterpreting **tikanga** to suit Pakeha legal objectives. David Williams has written a cautionary reference to this with which I agree.

116 Relevant to the above are Judge Brown's comments on the Maori Land Court and alternative dispute resolution (the two not being necessarily linked). The deeper issue is the substantive law; merely changing the rules of dispute resolution to take account of Maori processes does not deal with that deeper issue. The central issue is for an autonomous Maori succession law with **tikanga** as its core.

117 The powerful role of the Maori Land Court in the formal (land) succession procedures is now traditional but has operated according to Pakeha law. Their role in dispute resolution is dependent on that tradition. Judge Brown's comment on strengthening iwi's role has to be heeded. Alternative dispute resolution processes, such as Maori mediation, is preferable if organised on **whaanau** and **hapu** lines. Having that process outside the current court systems is posited.

118 Currently, **Te Ture Whenua Maori Act 1993** allows for the appointment of additional members who are not judges but who have knowledge of **tikanga Maori**, which partially addresses Judge Brown's concern. The problem is that while the selection can be initiated by Maori or by a judge, the decision is formally that of the Chief judge, which one can presume is done on the advice of his district judges. But even if Maori can select the additional members a Catch-22 situation still prevails -- the Court operates according to Pakeha law.

119 Concerning procedure and decision making there are two avenues extant.

- (a) the High Court has a leading role in granting administration of estates. High Court Judges do not having the expertise to deal with **Tikanga Maori**, nor would the appointment of Maori as judges ameliorate this; the law is not Maori.
- (b) the Maori Land Court has the powers summarised above as well as the powers to expand its authority where no grant of administration has occurred, or where there is no apparent reason why the estate of the deceased should be formally administered. And again, despite the Court's ability to select some Maori expertise to assist, there are obvious Maori concerns.

120 Where there is no will, and where there are no children or brothers or sisters of the deceased to succeed, the Maori Land Court can decide entitlement and who should succeed. Again the question can be raised as to whether that Court is the best body to decide this. This should be left to a **Tikanga** body to decide.

121 The Maori Land Court can also decide on **tikanga**. Both David and I agree that the Court has for over 100 years not only became the arbiter of **Tikanga Maori**, many of its former

judges also became the inventors of **Tikanga Maori**, which again supports the creation of a Maori **tikanga body**.

122 The determination of whether or not a person is a **whaangai** (adopted child) is also left to the Maori Land Court. The Court can make an order determining this as well as decide on the entitlement to that **whaangai**. Again the question is whether that should be a right exercised by the Court and whether the Court Judge(s) have that expertise.

123 It is relevant to raise at this point that the Maori Land Court is a Court of Record. The concerns raised above is precisely because the Court seems to have gone beyond that brief. Also, the Court has as its main **kaupapa** in **Te Ture Whenua Maori**, the retention of Maori land (s17). Again, the additional determinations raised above seem to expand its role beyond land to **tikanga**, **whangai**, and **succession**. The Court is supposed to act in a **Tikanga Maori** way - one can question whether that can occur when half its judges are not Maori, and the jurisprudence that has risen from the Court's deliberations is based on Pakeha legal doctrines such as administrative law.

Revisiting Some Maori Land Laws

124 Native Lands Act 1862 preamble refers to policy of defining Maori ownership of land in terms as near as possible to ownership according to British law.

Native Lands Act 1865 - s 3 all cts of law deemed to have jurisdiction over persons and property of Maori people and over titles to land held under Maori custom & usage.

- ss 30, 35 succession determined "according to law as nearly as it can be reconciled with Native Custom".

Once title has been ascertained, if 10 on title, all 10 succeeded.

All in effect removed **tikanga**.

125 The Maori Affairs Amendment Act 1967 (remembered by Maori as "(Hon) Ralph Hanan's Bill") mentioned the compulsory purchasing of "uneconomic (land) interests and shares under the rubric of "the conversion of uneconomic (land) interests". There were two implications for succession. Firstly, family members affected were denied ownership and succession to property as a consequence of Maori Trustee compulsory purchases. Secondly, this resulted in many Maori having their genealogical affiliation to land blocks terminated which also meant their rights of Succession was terminated. For those who were rendered landless, this also reduced their **mana** by removing land ownership, their crucial marker of **mana-whenua** and **turangawaewae** status in their communities, and leaving only the **marae** and **urupa** as symbols of **turangawaewae**. There should be a mechanism for the return of shares still in Trustee hands to those from whom they were compulsorily purchased.

126 That same Act also quantified quorum procedures for land alienation, including land sale. David Williams was to advise later that general law on **joint ownership of property** required 100% agreement of owners with regard to sale. Quorum procedures enabled a minority of owners to meet and a majority of that meeting can legally alienate land. That action had the same effect of denying succession rights to the descendants of those who were not at the meeting. Not only were their Treaty rights denied since they were deprived of undisturbed ownership or succession provisions. And again their **mana** was affected in terms of **turangawaewae** and **mana whenua**.

127 The imposition of the Family Protection Act 1955 on intestate property overrode Maori land succession based on descent and negated Maori cultural practices of genealogical inheritance of land and heirlooms in order that the surviving spouse accumulated \$12,000 worth of assets [**Rangi Kaata** or **Cotter Dec'd** extracted by David Williams from the **135 GISBORNE MINUTE BOOK FOLIO** is pertinent here].

128 That the above provisions were amended in the 1974 Maori Affairs Amendment Act (popularly called **Matiu Rata's Bill**) was important, but the fact that "a window opened in succession" and was not closed for 8 years has its effects today. Through the compulsory purchase of "uneconomic interests" the Maori Trustee is now a major beneficial owner or shareholder of numerous land blocks. Land formerly owned by descendants of original owners now have significant numbers of non-kin owners because of the effects of the Family Protection Act. Furthermore, as a consequence of the Hanan Bill, non-kin ownership rights have

transferred through either death, or wills. Some children of non kin owners from previous marriages have inherited lands not in their genealogical descent lines.

129 Te Ture Whenua Maori Act 1993 has limited Maori land succession to the direct line of descendants of the person making the will otherwise it will be void and of no effect, there are still some serious issues. Firstly, if there is no will the Land Court can make an order appointing an administrator, and can decide on **tikanga** on who can succeed or alternatively that no one is entitled to succeed. Again, that is a difficulty judges who are not trained in **tikanga** face.

130 The powers of judges can also extend to adoptions. The Court can determine whether or not a person is a **whangai**. I see numerous problems - does the Court judge have the expertise to decide on **tikanga** or on who and what is a **whaangai**? A Maori Land Court Judge has already decided on a definition of **whaangai**.

131 Many families or couples returning to rural areas and purchasing land can register it as Maori land. When one spouse dies, and remaining spouse is not from that community, it is not at all clear whether or not the direct line of descent does or should operate.

132 Legal separation or the breakup of a *de facto* relationships may also impact on land and **taonga** ownership. The *KM Grace v WG Grace* (CA 211/93, 24 October 1994. Cooke P, Richardson J, Tipping J) reported in the Maori Law Review 1994 Oct, p7-8, was a case before the High Court investigating whether or not one litigant can claim half of the Maori land shares of his/her spouse which went to the Court of Appeal. The Court of Appeal held that the wife obtain a monetary equivalent of part of her partner's Maori freehold interests. This is a dangerous precedent which does put pressure on Maori freehold land and also it is questionable whether the general court should have this kind of jurisdiction over Maori land issues.

Process of Consulting Maori

133 I concur wholeheartedly with David Williams that the document on Maori and the law of succession should be "user friendly". That is one of the two remaining issues on consultation.

134 The second issue devolves around consultation. For Maori, there still remains the centuries old practice of "**he kanohi i kitea**" (a face that was seen). Apart from sending drafts for comment to selected Maori experts, extensive face to face meetings and consultations with Maori are obligatory. There must be time at those meetings for involvement in marae protocol and the rituals of encounter. There must be time for free and open discussion, fair notification, and ample time for absorbing information and reflection and constant consensus seeking.

135 It is essential that the major **iwi** and **waka** are consulted. These should at least include Ngapuhi-nui-tonu, Tainui, Te Arawa, Tuwharetoa, Ngati Awa, Ngati Porou-Whanau a Apanui, Kahungunu, Aotea, Taranaki-Wanganui, Ngati Raukawa-Ngati Toa-Rangitane etc, Ngaitahu.

136 A series of meetings should also be held with the major pan-Maori groups - NZ Maori Council and its affiliates, the National Maori Congress and the Maori Womens Welfare League. Special interest groups such as the Maori Lawyers Association, MUKA (the Maori Tertiary Teachers Association), Ahikaa. Since the whole process of law reform will eventually reach Parliament, consultations should also be held with Maori members of Parliament and their networks. These consultations should culminate with a Hui Whakatauirā, where all threads can be drawn together from representatives of those consulted.

137 That will provide the feedback for the Commission on Maori and Maori Tikanga and the law of succession.

PART II

[This Part comprises material on legal history and legal analysis and has been prepared by Dr Williams.]

Some Assumptions

138 The taking into account of the **te ao Maori** by the Law Commission in making its recommendations is required by section 5(2)(a) of the Law Commission Act 1985. It is insufficient, at any rate on a topic of such particular interest to Maori as the present project, for the Commission to arrive at certain tentative conclusions on the general law and then to consult with Maori as to the acceptability or relevance of those already arrived at tentative conclusions for Maori. The substance and procedures of law reform need to be scrutinised throughout the reform project in order to take into account **te ao Maori**. It may well be the case in other projects undertaken by the Commission, and it is certainly the case in relation to the Law of Succession, that recommendations on law reform as it affects Maori will be distinctly different from recommendations as to the general law.

139 The rights of **tangata whenua** as such and the rights of Maori under the Treaty of Waitangi are discrete and distinct rights. The Commission is also required by section 5(2)(a) to give consideration to the multicultural character of New Zealand society, but I have not addressed broader issues of multiculturalism.

140 A fundamental assumption of this part of the report is that **tikanga Maori** continues to exist and continues to govern the lives of many Maori people and communities, whether or not it is recognised by statute. Like all law, **tikanga Maori** is not static and it evolves to meet the needs of people in the places and circumstances in which they actually find themselves. **Tikanga Maori** today may or may not accord with the norms of tikanga Maori as understood in earlier times, and it may well have been distorted by the opinions and decisions of colonial officials, anthropologists, Maori Land Court judges and others. It may well have been further impacted upon by the incorporation of some of those extraneous opinions into current understandings within Maori communities of what tikanga Maori now is or how Maori would now have it be. An essential element of this law reform project will be to provide a forum and a process of consultation to enable the perspectives of **tikanga Maori** to be brought to bear on important issues relevant to the law of succession.

141 When taking **tikanga Maori** into account and considering the extent (if at all) to which it should be recognised and enforced by statute law, difficult questions arise as to the appropriate interface between **tikanga Maori** and the general law. There are those who will argue that there are some issues which are "purely Maori" and therefore they should not be dealt with by the Law Commission. At present, however, there are numerous examples of matters which perhaps ought to be acknowledged as "purely Maori", and thus beyond the purview of the general law, but which are nevertheless now dealt with by the general law in the ordinary Courts. A relevant example is the definition of the rights of **whaangai** children (children adopted under **tikanga Maori**) and the duties of their **kaumaatua** and parents in relation to allocation of interests in ancestral Maori land. This area of law might be thought to be "purely Maori". However, in decisions of the High Court referred to below, Judges have arrived at decisions in applications under the Family Protection Act 1955 which involve them dealing (somewhat inexpertly) with just such issues when exercising their discretions under that Act. The position of **whaangai** is now explicitly covered by statute in Te Ture Whenua Maori Act 1993 (s2). It seems inevitable, therefore, that the Law Commission in this Succession Law Reform Project must address the position of **whaangai**. To decide otherwise would leave the *staus quo* in force - discretionary

powers remaining in the hands of High Court judges to decide upon matters which vitally affect **tikanga Maori**. That specific example illustrates the need for serious thought to be given to the appropriate relationship between tikanga Maori and the general law. An important part of the consultation process for this Project ought to be, therefore, a consideration of the extent that tikanga Maori may be allowed to act on its own terms within its own frameworks and without being imposed upon by the general law. When, on the other hand, is it appropriate for Maori to be able to opt to pursue remedies in ordinary courts over matters which are intrinsically Maori? Should Maori have a choice of law/tikanga on such matters? If so, what choice of law or conflict of laws rules might emerge or might be developed? When, if at all, is it appropriate that the general law should impose constraints on the operation of **tikanga Maori**?

LEGAL HISTORY PERSPECTIVES

142 In 1909 Sir John Salmond, assisted by Sir Apirana Ngata and others, codified and reformed the complex mass of laws applicable to Maori into the Native Land Act 1909. As part of his historical introduction to that measure, Salmond wrote a section on succession which included this paragraph:

"In 1876 was passed the Intestate Native Succession Act, 1876. This dealt for the first time with succession to the personal estate of intestate Natives, and gave power to the Native Land Court to determine who were entitled to succeed to such property according to Native custom, and who was best entitled to have the administration of the estate. The certificate so granted by the Native Land Court was made a sufficient authority to the Supreme Court to grant letters of administration of the estate in favour of the successors and administrators so nominated. Until the passing of this Act the succession of Natives to personal property was governed by the ordinary law."

The last sentence of that quotation is revealing. Salmond makes the assumption that "ordinary law" governed succession of Maori to personal property prior to 1876. By "ordinary law" he meant the English common law and statutes of general application. There can be little doubt however that very little personal property of Maori was succeeded to according to those laws between 1840 and 1876. **Tikanga Maori** was the only law in force in many parts of the country in 1876 and it is hardly a wild speculation to suggest that tikanga Maori continued to apply to succession to personal property in virtually all parts of the colony at that time. The true impact of the 1876 Act was not to provide "for the first time" for intestate Maori succession to personal property. Rather, this is the first time that Native custom as determined by the Native Land Court is imposed as the applicable law in substitution for **tikanga Maori** as defined within **iwi**, **hapuu** and **whaanau**. Salmond's "reforms" in the Native Land Act 1909 included a complete rejection of custom in intestate succession to all real or personal property apart from interests in Maori freehold land. Succession was from then on to be determined in the same manner as if the deceased was a European (s 139 (1)). That provision has been carried through to the present day as section 110(1) of Te Ture Whenua Maori Act 1993 - succession being determined in accordance with the law governing succession to the estates of persons who are not Maori. Crucial to the current Project will be an assessment of the continuing appropriateness of this imposition of English-derived succession law onto Maori succession.

143 The law in action, or the living law of the people, may well have been and may well continue to be very different from the law in the 1909 and 1993 statute books. With respect to uncontested intestate succession of Maori to personal property, the applicable law might include:

- (1) **tikanga Maori** derived from pre Land Court understandings;
- (2) "Maori custom" laid down in decisions of the Land Court from 1876 to 1909;
- (3) the laws of succession applicable to "Europeans" or non-Maori; and
- (4) some combination of the above.

Clearly the history of the law of intestate succession of Maori to property (other than Maori freehold land) from 1876 to the present day is a history of forced assimilation to the norms of Pakeha law. An issue for the Law Commission now to consider is the extent to which it wishes to allow scope for the operation of the reciprocities of rights and obligations within Maori **hapuu** and **whaanau**, which will include relationships to **whenua** and **taonga** that may be quite dissimilar to the general law on real and personal property. To what extent, for example, should a reformed law either provide for or permit intestate succession to items defined by general law as "personal" property to be governed by decisions made in the course, say, of a **tangihanga** on the basis that the items are *not* the personal property of the deceased but are **taonga** of the **hapuu** for which the new **kaitiaki** may well be a person outside the immediate family of the deceased? If **tikanga Maori** is legally sanctioned to operate, then it would be up to that **tikanga** to decide upon the role of **tangihanga** in settling succession matters. I would suspect that **tikanga Maori** would be more flexible and instance-specific than the current general law rules of intestate succession.

144 Even with respect to Maori freehold land, many questions may still arise as to the appropriate law of succession. Whilst it is true that Maori custom is supposed to have been the basis for decisions of the Maori Land Court from 1865 to 1967 and 1974 to the present day, it has to be said that the "Maori custom" applied in that Court derives from rules laid down by Land Court judges which often bear but a remote resemblance to **tikanga Maori**. In the leading case - *Papakura Claim of Succession* - Chief Judge Fenton in 1867 said:

"Instead of subordinating English tenures to Maori customs, it will be the duty of the Court, in administering this Act, to cause as rapid an introduction amongst the Maoris, not only of English tenures, but of English rules of descent, as can be secured without violently shocking Maori prejudices"

In 1910 there was a frank acknowledgment by the Full Court that custom as found in the Land Court "represents the sense of justice of its Judges in dealing with a people in the course of transition from a state of tribal communism" - see *Willoughby v Waihopi* (1910) 13 GLR41, at 56 (per Chapman J). I perhaps need to add that the Native Land Court Judges were always Pakeha, seldom had any legal qualifications, and were on their own admission primarily motivated by a desire to facilitate the alienation of land from Maori for the benefit of settlers. In spite of the dubious origins of "Maori custom" in successions to individual interests in Maori land, however, the N.Z. Maori Council in its *Kaupapa: Te Wahanga Tuatahi* of February 1983 was careful not to propose the outright abolition of individual ownership in favour of communal ownership in regard to Maori freehold land and Maori Incorporation shares. The Council was concerned to promote in the laws a much stronger sense of kin association with land and to emphasize **tuurangawaewae** rights without wishing to coerce all Maori who own individual interests in Maori land to relinquish those rights. No doubt, the Council would not have wished to create a modern injustice to some Maori in order to remedy the older injustice of the compulsory transformation by Pakeha law of communal tenure in customary land to individualised tenure in Maori freehold land. Partly as a result of that Kaupapa, Te Ture Whenua Maori Act 1993 now provides a framework within which Maori land interests may be recommunalised with the use of mechanisms such as **puutea**, **whaanau** and **whenua toopu** trusts (ss 212, 214, 216). The Law Commission might well perform a signal service to law reform

by seeking to learn from Maori communities potential ways and means to reverse the undermining of **tikanga Maori** perpetrated by the Land Court. It has to be remembered that it is only comparatively recently that the Court has tried to become a court seeking to sustain Maori ownership of Maori land. To what extent may the law of succession to Maori freehold land be reformed so as to promote the use of **puutea**, **whaanau** and **whenua toopu** trusts? To what extent are ss109 - 110 of Te Ture Whenua Maori Act 1993 on the distribution of estates (mainly consolidation of old laws) consistent with the communal kaupapa of the new provisions on trusts? Could a reformed succession law make it easier for members of **whaanau** and **hapuu** to recommunalise their land interests under the new provisions of the 1993 Act rather than continuing the fragmentation of individualised **tuurangawaewae** rights? Instead of the old procedures for compulsory acquisition of "uneconomic shares", would it now be reasonable to create a device to ensure that succession to "uneconomic shares" gave all successors rights as beneficiaries of a **whaanau** or **whenua toopu** trust? The legislation for communal property in Maori land is already in place and most of the above questions relate to how those provisions might best be utilised.

145 The period from 1967 to 1974 has been adverted to. The Maori Affairs Amendment Act 1967 was a whole-hearted attempt to speed the "integration" of Maori so that the general law would apply to all things Maori as soon as possible. As to the law of succession, both by will and on an intestacy the law applicable to a European would apply to any Maori who died after the commencement of the Act (1st April 1968) - see ss 75-77. It was also provided that Maori freehold land could be available for orders of the Supreme Court under the Family Protection Act 1955 (s80). New provisions, especially s.76 A on succession to undivided interests in Maori land on intestacy, were inserted by the Maori Affairs Amendment Act 1974 and have been carried forward by Te Ture Whenua Maori Act 1993 but without any retrospective application. Issues continue to arise from the law applicable between the 1967 and 1974 Acts which add to the sense of grievance the 1967 Act gave rise to. A recent case is noted below. The Commission might seek views of Maori on how to deal with the 1967-1974 "window".

146 Two other matters referred to by Salmond in his historical notes may be of contemporary significance. The first concerns the abolition of **oohaakii** or unwritten wills as a means of passing property. In 1895 a Native Appellate Court decision found in favour of submissions by Maori that **oohaakii** were applicable to interests in what is now known as Maori freehold land. Recognition of **oohaakii** had obviously been an issue for some time. When the Native Succession Act 1881 was before the House, a Maori Member of Parliament, Ngatata, spoke strongly in favour of statutory recognition of **oohaakii** when that Act made provision for informal written wills, but not for **oohaakii**. The 1895 court decision was swiftly reversed, however, by the Native Land Laws Amendment Act 1895, s33. See also the important decision *In re Hokimate Davis* [1925] GLR 79. There are restricted circumstances in which English law recognises donatio mortis causa but that is by no means identical to **oohaakii**. It is likely that the status of **oohaakii** in the law of succession will be an important topic for this project. It would be crucial in the operation of **tikanga Maori** for provision to be made for **oohaakii**, and to identify the appropriate relationship between **oohaakii**, **tangihanga** decisions and normal ambilineal patterns of descent. Secondly, Salmond refers to the non-recognition of customary Maori adoptions. The Native Land Claims Adjustment and Laws Amendment Act 1901, s50, had rejected any claim by an adopted person to an estate unless the adoption had been registered in the Native Land Court. Salmond's 1909 Act went further in Part IX (ss161-170) so that legal recognition of adoption by Maori custom ceased entirely upon the commencement of that Act. Recent statutory changes reviving legal recognition of **whaangai** and cases concerning them mentioned below point to this as an area where there is definitely a need for law reform. For a discussion of conflicting Maori Appellate Court decisions on succession by or to **whaangai**

in relation to Maori land interests, see: *In re Pareihe Whakatomo* [1933] NZLR supp 123. Similar conflicts may well arise again in the near future when the Land Court exercises its powers to make provision for **whaangai** pursuant to s 115, Te Ture Whenua Maori Act 1993. It is a significant issue for **tikanga Maori** to weigh the succession rights of **whaangai** in relation to land and other interests of their **maatua whaangai** as compared with those of their natural parents.

RECENT CASES

147 The Law Commission has indicated that reform of the Family Protection Act 1955 may have priority within the overall framework of the Succession Project. Several reported judgments under that Act, supplied by Nicola Peart of Otago University, clearly illustrate the need for taking te ao Maori into account when making recommendations as to reform of this statute. The cases are:

- (i) *Re Stubbing* (1988) 4 FRNZ 392;
- (ii) *Re Wakarua* (1988) 4 FRNZ 650;
- (iii) *Re Smith* (1991) 8 FRNZ 459.

They are all recent High Court decisions under the 1955 Act which involve Maori and Maori land. All the judgments refer to the moral and ethical considerations that must be taken into account in such cases and cite the leading case of *Little v Angus* [1981] 1NZLR 126 on breach of moral duty as judged by the standards of a wise and just testator. Not to put too fine a point on it, it seems evident that a "wise and just testator" is definitely a Pakeha! In *Re Stubbing* Eichelbaum J (as he then was) thought claims based on Maori custom to be worthy of no greater consideration than the traditional wish of farmers to pass the family farm on to a son. A woman adopted by the deceased as a baby as a result of a decision of kaumatua in order to provide an heir for certain Takarangi **whaanau** lands was owed no moral duty by "a wise and just testator" in respect of those lands. The judge regretted the lack of evidence on Maori custom from elders independent of the parties but made his determination anyway. In the end a final order in favour of the woman was decided upon for other reasons but the hope was expressed that, in the light of the Judge's findings, a decision could now be arrived at in a **marae** meeting. Whatever the actual eventual outcome, this case highlights the need to look at alternatives to the High Court for a dispute resolution mechanism on such matters. The case involved one **whaanau** deciding upon an Adoption Act adoption specifically to secure the **whaanau** inheritance, another **whaanau** seeking the same result by an adoption which may have been a legal adoption or a **whaangai** fostering by Maori custom (the judge did not think it important to pursue the difference, which was not clear on the papers) and the respective rights of male and female children to inherit. It is evident that the judge felt the discomfort of making a final order in such a case.

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

149 *Re Smith* also involved a **whaangai** adoption. Greig J seems unaware of the history of Maori land in the Nelson area when he describes Wakatu Incorporation and South Island Tenth's

lands (which may now be commercial town properties, farmlands etc) as "other than Maori traditional land." Be that as it may, a surprising feature of this judgment is that the death of the grandparents, who were the **maatua whaangai** in this case, is recorded without any inquiry as to the disposition of their estates even though the judge observes as "interesting" that the plaintiff's uncles "seem already to have some interest or interests in these incorporations." This case suggests that the High Court in cases under the Family Protection Act 1955 is unwilling or unable to take full and proper account of the succession by all members of the **whaanau** to Maori land interests. This case, and the others discussed above, illustrate how unsatisfactory it is for court orders to be made in the absence of relevant **tikanga Maori** evidence and the judgments point to there being a significant gap between the law as it is and the law as it might be if it truly sought to take into account **te ao Maori** in relation to the law of succession.

150 Another recent case, noted in *The Maori Law Review*, is *Re Kaata or Cotter*. This 1993 decision of Deputy Chief Judge McHugh considers the "window" affecting those estates of Maori who died between 1st April 1968 and 1st January 1975. The Judge admits the strong moral claim of the applicants as blood relatives of the deceased compared with the children of the deceased's widow. He held however that "the window is shut and until opened by statutory change all estates in which letters of Administration have been granted in the relevant period are excluded." His reason for so deciding was the non-retrospective wording of what is now s.100(2) of Te Ture Whenua Maori Act 1993. The Commission may wish to investigate the possibility of recommending the statutory change needed to open that "window" so that all estates are administered in line with the **kaupapa** of which the judge speaks - that is to restrict succession rights within kinship groups set out in Te Ture Whenua Maori Act 1993 (see the statutory definition of "preferred classes of alienees" in s4). There are public policy issues as to the desirability or otherwise of retrospective legislation. However, without upsetting the administration of existing estates, the law could be changed so that the pre-1967 status of Maori freehold land is restored unless and until an interested party seeks and obtains a status order under ss 135-137, Te Ture Whenua Maori Act 1993. In other words the benefit of inertia - doing nothing - should work in favour of land retaining its pre-1967 status as Maori land rather than the European/general land status compulsorily imposed by the 1967 Amendment Act.

PAPERS ON SUCCESSION LAW REFORM 1994

151 Some of the papers presented to the Law Commission seminars on 10th February and 19th May raise issues which may be relevant to the Maori dimension on this succession law reform project. The paper by David Thorns (Sociology, Canterbury) contains data on "inheritance probabilities" which indicate the very sharp decline in home ownership as Maori migrated to urban areas. (p6, Figures 5 & 6) The lack of "wealth" to leave to one's successors is commonly a reason for or an explanation of failure to make a will. It would be interesting to know if the Justice Department can supply any recent figures on comparative rates of intestacy as between Pakeha and Maori. I would guess that there is a higher rate of intestacy amongst Maori than amongst Pakeha. It is true that the making of written wills was important to many Maori in the past. On the other hand it may be less significant now than used to be the case when a much larger proportion of Maori lived in their own homes on their own land. Some factual data on intestacy would certainly be important to obtain if it is readily available. A comparison of Maori total deaths with totals of wills of Maori probated etc. would give some hint of the level of intestacy, so that we would have a surer basis to judge whether or not it is right to focus particular attention in this aspect of the Succession Project on intestate succession.

152 The paper by Kay Saville-Smith (Social Research and Development, Wellington) suggests (p8) that as the state withdraws its social assistance from individuals and families, the importance of inherited property in determining lifestyle and opportunity may become increasingly significant. Nicola Peart (Law, Otago) makes a similar point (p21). If they are correct, then given the socio-economic profile of the Maori population and its lack of significant inheritable property (other than Maori land interests), the outlook for most Maori is not promising. I would have thought, however, that the extremely rigid state control over Maori land and other resources in the past needs to be considered if there is to be a move towards a contract model stressing individual rights in the law of succession. Even if a minimisation of state intervention occurs in the ordinary law of succession, it ought not to be assumed that the same pattern should apply to Maori. In any case, if the state is to move away from protective legislation, then Maori may well wish to hold the Crown accountable in some way for the effects of its paternalistic interventions over many years in the administration of Maori land and other resources through the Maori Land Court, Maori Land Boards, the Maori Trustee etc. Saville-Smith also notes that women in particular are likely to find their property interests neglected under a contractarian succession regime. Maori may express similar views in the consultation on this Project.

153 There is a crusading enthusiasm in the challenge by Virginia Grainer (Law, Wellington) to the notion of a "moral duty" under the Family Protection Act 1955 irrespective of need. She argues that the current social, philosophical, political and economic climate render the concept of moral duty unsatisfactory and inappropriate (p24). I would have to say that if the trend of succession law reform was to follow that path then it would become all the more important that **tikanga Maori** should be enabled to develop along lines appropriate for iwi, **hapuu** and **whaanau** because a collective sense of "moral duty" does indeed continue to prevail within **tikanga Maori**. The more cautious approach of Rosemary Tobin (Law, Auckland) would not create such difficulties. There would be major questions, however, as to how Maori concepts of **whaanau**, **hapuu** etc would be dealt with in a redefinition of the nature of a family to include step-families etc. It is important that **tikanga Maori** retains control over how Maori concepts are defined and interpreted.

OTHER MATTERS

154 In a non-exhaustive way I conclude by gathering together some further thoughts on other matters which may come up in the course of this Project:

- a) The position of non-Maori or non-iwi spouses who cannot succeed to the land interests of their partner raises difficult questions, especially if the deceased spouse left little property other than Maori land interests. Te Ture Whenua Maori Act 1993, s116 empowering the Land Court to make orders as to income derived from Maori land is an interesting provision which is also relevant to the interface between **tikanga Maori** and the High Court's jurisdiction under the Family Protection Act 1955. The rather unusual wording of subs(3) sets out the amelioration of possible injustice Parliament has in mind.
- b) Contentious issues regularly arise concerning the disposition of the body of a deceased, the definition of a "body", the role of the Coroner, etc. Maori have long held grievances about the way the law operates as it affects them and the **tikanga** of their **tangihanga**. The Law Commission has now included disposal of a deceased's remains under the list of topics for consideration in the Succession Law Reform Project. Maori are likely to have much to say on this particular topic.

- c) Over the years many Maori have completely lost any ownership link with their **tuurangawaewae** owing to the compulsory acquisition by the Maori Trustee of "uneconomic shares." For the future the new **puutea** trusts should ensure that this does not happen again. There remains the question of whether excluded Maori should have the right to re-enter the ownership interests to which they would have succeeded apart from the laws formerly in force with respect to uneconomic shares.
- d) If Saville-Smith and Peart are right in suggesting that the state will continue to withdraw social assistance from individuals and families, then Maori will be looking for long-term sustainable means of support. They are likely to seek for answers to questions as yet untested - such as the rights of beneficiaries under Maori Trust Boards and under the new Maori fisheries legal regime. Such issues may not be the immediate focus of the Law Commission Project, but there are genuine succession issues involved in the search for answers to such questions.
- e) The attention of Te Puni Kokiri, as the Department responsible for the administration of Te Ture Whenua Maori Act 1993, should be drawn to s106(2) of that Act. This concerns the Family Protection Act 1955 but I am unable to make any sense of the last phrase of the subsection. I feel certain that it does not intend to permit alienation of interests belonging to the *estate* of a child or grandchild, but rather it is intended to permit an alienation from the estate of a deceased owner to a child or grandchild. I would suggest that a future amending Bill should clarify the meaning of s106(2).