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TIKANGA MAORI & THE MEDIATION PROCESS

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ABSTRACT

This paper highlights some of the assumptions, including cultural assumptions, which are inherent in popular processes of dispute resolution, such as mediation. A standard model of mediation has been compared to tikanga Maori which relates to dispute resolution. This paper shows that this model is not fully suited to dispute resolution in a Maori context. The argument which is made throughout this paper is that dispute resolution processes more suited to a Maori context already exist. The challenge for researchers in the field is to identify these processes and develop them for the modern setting. Additionally, this paper provides insights which can be drawn on to construct a 'conceptual framework' from which processes of dispute resolution indigenous to New Zealand may be developed.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16250 words.

¹ EG Goldberg, ED Unger, and TEA Sander in *Dispute Resolution* (L.Ris. Brown & Co Ltd, Canada, 1982), 7.

² A fuller explanation of how I have used the term is provided in Part IV.

INTRODUCTION

This research paper seeks to challenge some of the assumptions inherent in popular 'alternative dispute resolution' processes that are commonly applied in New Zealand. In this context, 'alternative dispute resolution' has been defined as "all forms of dispute resolution other than court adjudication".¹ Implicit in this definition, however, is one of the fundamental assumptions of the dispute resolution process which this paper seeks to address. The *Concise Oxford Dictionary (9 ed)* defines 'alternative' as "of or relating to practices that offer a substitute for conventional ones". When these two definitions are read together, the impression which is conveyed is that 'court adjudication is the convention to which alternatives must be sought'. These definitions do not make proper sense, therefore, if one's perception of court adjudication is that *it* is the alternative. This, it is submitted, is the case for Maori.

Prior to the arrival of British colonists to New Zealand during the nineteenth century, the social order in Aotearoa was guided by the concepts of custom law. Custom law is described here as the norms and values to which Maori society generally subscribed. The effect of subscribing to these norms and values was that action could, in most cases, be predicted which, in turn, established general patterns of accepted behaviour. Custom law, it is submitted, was flexible, pragmatic, and open-ended, and was influenced more by values as opposed to rights. This can be contrasted with the rigidity of statute law. The term which I use often throughout this paper when referring to concepts of custom law is 'tikanga Maori'.² Therefore, the imposition of the British system of law within Aotearoa, was the alternative for Maori. Maori custom law was the convention. It is submitted that this approach of conceiving

¹ SB Goldberg, ED Green and FEA Sander in *Dispute Resolution* (Little, Brown & Co Ltd, Canada, 1985), 3.

² A fuller explanation of how I have used this term is provided in Part IV.

the 'conventional' and the 'alternative' provides a totally different conceptual framework for discussing popular processes of dispute resolution. This paper, therefore, proceeds upon the assumption that Maori custom law is the 'convention' and all other forms of resolving disputes not sourced in tikanga Maori are the 'alternatives'.

As stated earlier, the aim of this paper challenges some of the assumptions, especially cultural assumptions, which are inherent in popular processes of dispute resolution. Mediation is the particular process focussed on. In order to highlight some of these assumptions, an outline is given of the origins and basic characteristics of popular dispute resolution processes, particularly mediation. Part I of this paper identifies some of the theoretical assumptions inherent in these processes. Emerging theory concerning cross-cultural dispute resolution and the 'transformative approach' to resolving disputes is discussed Part II. The proposition underpinning this part of the paper is that popular models of dispute resolution are in themselves 'cultural constructions' sourced from a particular world-view and based upon norms and values unique to that world-view.

Part III provides an outline of some of the concepts which have been drawn from, and which underpin, Maori jurisprudence. This outline is required in order to gain some insight into the 'Maori world-view' and also to promote a better understanding of the processes which have been constructed from this view. This part of the paper also describes some of the customary processes employed by Maori for purposes such as dispute resolution. Some of these processes, such as muru, are not as commonly used today as they used to be. Others, however, such as the pohiri, are widely employed in most hui in which Maori are involved. It is submitted that the problem, to date, has been the failure of researchers to appreciate the intrinsic worth of these processes. Rather the tendency of researchers is often to perceive such processes as 'mere formalities' or 'outdated customs'.

Finally, Part IV reflects on the discussion in the previous chapters and seeks to highlight some of the concerns which some Maori have with popular processes of dispute resolution. These shortfalls relate to both the theory which underlie these processes, as well as the processes themselves. The assumption is that these shortfalls may be investigated further in order to contribute to the jurisprudence which is constantly evolving in the field of dispute resolution.

I have only attempted to highlight some of the shortfalls of popular processes of dispute resolution as they apply to Maori. I have not gone as far as designing what I believe to be a 'Maori approach'. The points that I have discussed in this paper relate to 'intracultural' dispute resolution, rather than intercultural cross-cultural dispute resolution. I have merely attempted to proffer a series of generalisations in order to initiate further research, discussion and debate concerning the Eurocentric assumptions inherent in popular dispute resolution processes and their suitability for Maori. This paper does not proclaim to be, nor should it be treated as, a comprehensive work on the theory and practices involved with dispute resolution in the Maori context.

Some final comments in regard to some of the terminology used throughout this paper. A perusal of dispute resolution literature reveals that the terminology that dominates a field or discipline evolves with the changing conceptual processes of its practitioners. New terms are introduced in order to highlight the often subtle distinction which is intended by the use of that term. Researchers, therefore, refer to 'dispute resolution', 'conflict resolution', 'conflict management' and, more recently, 'conflict transformation'. This paper adopts the term 'dispute resolution' for no other reason than because it seems to be one of the more common terms used. In regard to the parties involved with dispute resolution processes, I have used the term 'participants' to refer to all those involved in the process, including the mediator. The term 'disputants', as word suggests, refers to the disputing parties within the process.

In regard to the use of te reo Maori within this paper, I have consciously omitted English translations of kupu Maori within the text. This is merely out of personal preference. However, I have appended a glossary to this paper which provides the English translations to these words. The definitions included in the glossary have been taken from the Williams *Dictionary of Maori* (7th ed).

A The Practice of Analysing Culture

This paper has been prepared according to my perception of 'culture', and my perception of the extent to which culture influences behaviour during dispute resolution. I note, however, that the practice of describing, and further explaining, how 'my culture' goes about resolving disputes, does not sit too comfortably with me - rare is the individual who sits down to ponder the exact reason why he or she has acted in a particular way.³ However, the result of the policies of colonisation and assimilation imposed on Maori in the post-contact period of New Zealand history requires this practice to be undertaken by many Maori researchers.

The *Concise Oxford Dictionary* gives a definition of culture as "the customs, civilisation, and achievements of a particular time or people". Another definition describes culture and nationality as "the set of attitudes and behaviours that are broadly generalisable across a national or cultural grouping, and which tend to persist over time".⁴ The impression that one gets of 'culture' from reading these definitions will suffice for the purposes of this paper. I would add, however, that I also perceive culture as a fluid and dynamic concept, rather than a static and set one. Although the members of the same culture will observe common cultural norms and share the same cultural beliefs, there is

³ I have paraphrased Rubin and Sander here from JZ Rubin and FEA Sander "Culture, Negotiation, and the Eye of the Beholder" (1991) *Negotiation Journal* 249, 250. The statement in that article reads "...rare is the individual who sits down to ponder the exact reason why his or her counterpart has made a particular negotiating move."

⁴ Ibid, 249.

also variation and, at times, polarity within that culture. Rangihau discusses the differences within Maori culture and posits the following in respect to his 'cultural uniqueness'.⁵

"Although these feelings are Maori, for me they are my Tuhoetanga rather than my Maoritanga. Because my being Maori is absolutely dependent on my history as a Tuhoetanga person as against being a Maori person. It seems to me there is no such thing as Maoritanga because Maoritanga is an all-inclusive term which embraces all Maoris. And there are so many different aspects about every tribal person. Each tribe has its own history. And its not a history which can be shared among others."

Consequently, this paper has been prepared with these notions of culture in mind.

There is a range of approaches which may be taken when analysing culture and, in particular, the influence of culture on dispute resolution processes. Janosik examines the approaches taken in literature concerning dispute resolution.⁶ He further describes the level of sophistication of each approach in analysing culture. For example, one approach to analysing dispute resolution between different cultures involves researchers searching for patterns of behaviour of individuals or groups from a common culture. This information is subsequently gathered and analysed in order to be used in the future to better manage negotiations with that culture. This approach is problematic in that it fails to consider other factors which may have just as much influence on an individual's actions within a dispute resolution process as culture. For example, that individual's gender, religion, age or class.

⁵ J Rangihau "Being Maori" in M King (ed) *Te Ao Hurihuri* (Hicks Smith & Sons Ltd, Wellington, 1975), 232.

⁶ R Janosik "Rethinking the Culture-Negotiation Link" (1987) *Negotiation Journal* 385.

The approach which I have taken in analysing the effect of culture within dispute resolution draws on 'systems theory'. It is my assertion that understanding human behaviour cannot rest on single cause explanations. Rather, interdependent sources must be accounted for to achieve a relatively complete understanding - that is - analysis must involve a multicausal approach. In addition to the culture of the disputant, an analysis of dispute resolution must also consider factors such as the personal characteristics of the individuals involved, gender, generation and the socio-political environment in which the individual acts.

B Methodology

The information used for this paper has been drawn from personal experiences, oral sources and written references.

The personal experiences to which I refer are in regard to my life experiences while growing up. I have been fortunate enough to have been raised in the rohe of the hapu to which I affiliate, and where tikanga Maori is widely understood and implemented, often unconsciously, in everyday activity.⁷ Hui which are held on local marae, and whanau gatherings provide 'hands-on' experience with tikanga Maori concerning dispute resolution. More recently, I have been able to observe hui, including a mediation, amongst hapu which have been facilitated by the Waitangi Tribunal.

Information drawn from oral sources has, primarily, resulted from a week of interviews which I conducted with kaumatua, kuia, and rangatahi in the rohe of Mataatua, Te Arawa and Te Whanau A Apanui. I was primarily interested in hearing descriptive accounts of disputes in which the interviewees had been personally involved and the manner in which these disputes were treated. I was also interested to hear accounts of dispute resolution processes which may

⁷ This is the area within the customary boundaries of Ngati Awa and Ngai Tuhoe.

have been told to them by their tipuna. And I was equally keen to hear of accounts of contemporary experiences in which they have been involved. To this end, I was fortunate to have been able to gather korero from interviews which were held 'one-to-one' and, more commonly, korero which resulted from hui that were held specifically to discuss dispute resolution processes. Several comments can be made in respect of the information which I finally gathered.

Firstly, in most cases, the matauranga of the kaumatua and kuia was not imparted in a casual manner. As one koroua stated:⁸

"These things, he taonga tapu enei taonga na nga pakeke, ehara i te mea hei tuku noa iho...he taonga katoa enei taonga hohonu, taonga tapu"

During several hui held to discuss these matters, the tapu of the matauranga was further indicated by tikanga Maori which was observed. For example, karakia were recited for almost every hui. And in most cases, I avoided using the dictaphone which I had taken with me to record each hui. The quotations which I have given throughout this paper have been from the recordings which I made with the expressed permission of all those who were present at each hui recorded.

The manner in which the hui were held also provided insights which are relevant to this paper. I discuss aspects concerning the 'hui' process later in this paper. The point which I make now, however, is that tikanga Maori was observed in all circumstances, regardless of whether the hui was held on a marae or in a hall. Each hui proceeded naturally and in a manner which all

⁸ Personal communication during a hui held in Opotiki, 27 August 1996. This statement refers to the information which is being imparted as a treasure passed down from their ancestors, and is not information which is imparted lightly.

those participating accepted and, more importantly, expected. The process did not have to be explained nor prescribed to those who were present.

In regard to the written sources to which I referred, a review of the literature from the field of dispute resolution, showed that very little, if any, commentary exists on Maori processes of dispute resolution.⁹ The few articles and publications which address issues of resolving disputes within a Maori context, appear to do so upon the implicit acceptance of the validity of popular processes of resolving disputes.¹⁰ The approach of culture as 'learned behaviour' is often adopted whereby characteristics of Maori are identified and suggestions made in order to predict how Maori may conduct themselves in such processes.¹¹ And while some commentators recognise the need for a more sophisticated approach towards 'Maori dispute resolution', the analysis of tikanga Maori which they provide is often too generalised or limited to be of much practical use.¹² It should be recognised, however, that the purpose for which researchers have provided commentary concerning dispute resolution

⁹ In making this statement I am specifically referring to journals and texts which are common sources for researchers in the field of dispute resolution. Such journals include the *Negotiation Journal* and *Mediation Quarterly*. There is, of course, substantial information concerning Maori dispute resolution from other fields of study, such as history, social anthropology and psychology. For example, see A Salmond *Hui* (Reed Methuen Publishers Ltd, Auckland, 1987); Metge *New Growth From Old: The whanau in the modern world* (Victoria University Press, Wellington, 1995); and M Gilgen *Te Roopu O Te Whanau Rangimarie O Taamaki Makaurau: A Maori model for non-violence*, a thesis in partial fulfilment of the requirement for the degree of Masters of Arts in Psychology.

¹⁰ M Palmer "Maori Dispute Resolution" in a newsletter for the Arbitrators and Mediators Institute of New Zealand, March 1996.

¹¹ For example, see C Blackford and A Smith *Cross cultural mediation: guidelines for those who interface with Iwi* Information Paper No 46 (Centre for Resource Management, Lincoln University, 1993).

¹² For example, see W Parker *The Negotiation of Justice: The hidden hegemony in state legal system incorporation of ADR processes and Maori perspectives* LLM Research Paper, Victoria University of Wellington, 1992.

has not been to challenge some of the assumptions which are inherent in the processes. Their respective works, therefore, should be viewed in that light.

A Origins

Researchers involved in dispute resolution have sourced the origins of 'the movement' to North America and, more recently, Harvard University.¹⁹ Researchers have attributed the impetus for developing alternative processes to litigation to the increase in disputes during the 1980's which in turn occurred as a result of 'the waning role of some of society's traditional mediating institutions - the family, the church, and the community.'²⁰ The 'increase' in disputes since this period saw disputants resorting more often to litigation. Consequently, the judicial system experienced growing congestion in the court rooms and increasing delays in attending to cases. The greater focus on litigation also highlighted some of the disadvantages of the process, such as 'unrestrained adversariness' and high costs associated with legal fees.

Another contributing factor to the development of dispute resolution theory has been the study of anthropology, particularly comparative studies of dispute resolution processes from non-Western cultures. Processes employed by non-Western cultures provided insights by which to critique the existing, predominant process of litigation. Researchers, therefore, challenged the inherent 'formalism' and 'prolongation' of the litigation process. From critical analyses of the law emerged the 'ideology of informality' which provided alternative insights into dealing with conflict and resolving disputes.

Four broad goals which alternative dispute resolution processes seek to achieve have been identified by researchers as being: (1) the relief of court congestion as well as of dispute cost and delay; (2) the attainment of

¹⁹ See discussion in R Fisher and W Ury *Going to the Heart* (New Books Limited, London, 1987), 162.

²⁰ S.S. Goldberg, ED Green and PEA Sander *Dispute Resolution* (Little, Brown & Co Ltd, Canada, 1985), 3.

I THE ALTERNATIVE DISPUTE RESOLUTION 'MOVEMENT'

A *Origins*

Researchers involved in dispute resolution have sourced the origins of 'the movement' to North America and, more recently, Harvard University.¹³ Researchers have attributed the impetus for developing alternative processes to litigation to the increase in disputes during the 1960's which in turn occurred as a result of "the waning role of some of society's traditional mediating institutions - the family, the church, and the community."¹⁴ The 'increase' in disputes since this period saw disputants resorting more often to litigation. Consequently, the judicial system experienced growing congestion in the court rooms and increasing delays in attending to cases. The greater focus on litigation also highlighted some of the disadvantages of the process, such as 'unrestrained adversariness' and high costs associated with legal fees.

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Four broad goals which alternative dispute resolution processes seek to achieve have been identified by researchers as being: (1) the relief of court congestion as well as of undue cost and delay; (2) the enhancement of

¹³ See discussion in R Fisher and W Ury *Getting to Yes* (Arrow Books Limited, London, 1987), 162.

¹⁴ SB Goldberg, ED Green and FEA Sander *Dispute Resolution* (Little, Brown & Co Ltd, Canada, 1985), 3.

community involvement in the dispute resolution process; (3) the facilitation of access to justice; and (4) the provision of more effective dispute resolution.¹⁵

With these goals in mind, a taxonomy of processes has developed in an attempt to provide 'tailor-made' models to resolve the variety of disputes which often arise. Such processes include negotiation, mediation, arbitration and 'mini-trials'.

These processes share some common elements. Firstly, they are consensus based with the onus being on the disputants to design an 'outcome' which fits their unique circumstances. This is unlike litigation where a decision is imposed on the disputants. These processes are also seen to be interest-based, rather than rights-based. Further, in most circumstances, the parties have a choice as to whether or not to participate in the process.

Factors which usually determine which process is resorted to include the relationship, if any, between the disputants; the nature of the dispute; the speed and cost perceived in determining the dispute; and issues of power imbalances which may exist between the parties.

The purported advantages of the alternative processes of resolving dispute include the preservation or even enhancement of on-going relationships which may be threatened by the dispute; overcoming any evidentiary difficulties of a rights-based process; flexibility and scope for more creative solutions than those which may be awarded in litigation; and participation in the decision-making process. In theory, the more involvement that the disputants have in deciding an outcome, the more satisfied they are likely to be with it and will, therefore, be more willing to uphold it in the future.

¹⁵ Ibid, 4.

B Mediation

1 Definitions

The primary focus of this paper is on the process of mediation. Mediation has been defined as:¹⁶

"the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."

A popular model of mediation, commonly upheld to be a "generic" one,¹⁷ involves six broad stages. I have coined this model 'the 6-step approach'. The stages of the 6-step approach may be outlined thus:

1 Opening statement of the mediator

The mediator will generally welcome and introduce the disputants and find out how each would like to be addressed. He or she will then 'open' the mediation with some sort of statement explaining the mediation process, its features and objectives, the mediator's role in the process and what the participants can expect to happen during the course of the mediation.

2 Opening statements of the disputants

The mediator will usually ask each party in turn what it is that has brought them to the mediation. From these disputants' statements, the mediator will identify the issues which are in dispute and any common ground there may be between the parties. Additionally, the mediator may write those issues and areas of commonality on a board in order to set and agenda for the exploration of those issues.

¹⁶ Moore *The Mediation Process* (Jossey-Bass Publishers, San Francisco, 1991), 14.

¹⁷ Hurley "Mediation - Threat or Opportunity for the Legal Profession", paper presented at the New Zealand Law Society Conference, August 1993, 7.

3 *Information exchange*

The issues, and any options for their resolution, will then be explored in a joint session with the mediator facilitating discussion directly between the parties.

4 *Caucusing*

At times, and with prior agreement by all all involved to do so, the mediator or the disputants may decide that the mediation occur in private sessions or caucuses whereby the mediator adopts a type of 'shuttle-mediation'. The aim of these private sessions is to enable the mediator to explore whether there is anything a disputant may wish to tell the mediator in confidence.

5 *Building (and possibly writing down) the agreement*

Once agreement is reached, the mediator will asked one of the parties or their lawyer (as can often be the case) to write down the agreement, with the other party given the opportunity to review it afterwards. The role of lawyers in this process can include 'preparing' clients and assisting or advising them, providing advice on the 'legality' of proposed settlement options, and possibly assist parties in drafting the mediated agreement. The agreement is then usually signed by both disputants.

6 *Closing statement*

In some, cases the mediator will opt to make some sort of closing statement to formally 'end' the mediation. This can involve a recap of procedure which was followed for that particular mediation session, or the mediation in general (if there have been more than one session) and reflecting on the disputants participation in it; outlining the positive and negative aspects, both procedural and substantive, of the mediation; and possibly offering comment on the agreement which has been met by the parties.

As the theory underpinning mediation has developed, this standard model of mediation has undergone a variety of changes. These changes have resulted, primarily, from the recognition that mediation models need to be more flexible and adaptive to respond to the variety of situations in which mediation can be applied.

Each new model can be analysed in terms of whether it is a more 'open' or more 'closed' model. An open model, for example, allows the participants to choose the ground rules of the process, the mediator who will facilitate the

process and the limits on the outcomes which may eventuate from that process. In contrast, a closed mediation may have such set routines that the process rules are fixed and often dictated by the mediator. Norms are prescribed for these types of mediations, and the process is influenced by them accordingly.

Examples of variations to the 6-step approach are described below.

i Evaluative mediation

The evaluative approach to mediating is very similar to the standard 6-step approach. The facilitator, however, is often able to provide 'evaluative' information, suggest possible outcomes or solutions, or, in some cases, render a binding decision on the parties, should they request it.

ii Transformative Mediation

This approach seeks to transform the dispute. This can involve transforming the participants' perceptions of the dispute, their perceptions of others directly or indirectly involved with the dispute, or perceptions of the structures and settings within which the dispute is being mediated. The dispute, or aspects of it, can be transformed at various conceptual and practical levels. A more detailed analysis of this approach will be provided later in the paper.

iii Bureaucratic mediation

Mediations of this type generally occur in court or other institutional settings. The process by which the mediation is facilitated is already prescribed, together with the potential outcomes which may eventuate from that process. Bureaucratic mediations are, therefore, seen to be more rigid and formal than other models. Two examples of the provision of institutionalised mediation in

New Zealand are those instigated by the Human Rights Commission and the Office of the Privacy Commissioner.¹⁸

iv Pragmatic mediation

This is basically where mediators will do almost anything to reach agreement. A very instrumentalist and agreement-oriented form of mediation, it is often employed in hostile situations, such as international terrorist disputes, and can be described as 'on-the-spot peacemaking'. Procedural issues are not the primary concern during such mediations.

2 Advantages of mediation

The involvement of a third-party distinguishes mediation from other dyadic, bipolar forms of dispute resolution, such as negotiation. Processes such as negotiation can often create an argumentative and reactive environment which can further polarise the disputants - especially if the dispute involves finite or scarce resources which are required to be distributed. Mediation, therefore, is promoted as more proactive and creative.

Mediation can be more productive as the mediator is able to expand, rather than narrow, the issues involved in the dispute. The presumption is that the disputants may be too focussed on the specific dispute at hand and therefore may be less likely to identify other options. Related to this point is the assertion that the mediator can more easily explore underlying interests and needs that cause disputants to adopt their respective, often rigid, positions. Therefore, a wider picture of the dispute is seen providing the opportunity to develop additional and more creative options to resolve the dispute. With the respective interests of the disputants identified, complementary interests can be 'traded' as the disputants may not value the same items equivalently.

¹⁸ For further detail on functions of these two institutions, see the Human Rights Act 1993 and the Privacy Act 1993 respectively.

Mediation can be seen as a more efficient process as the third-party mediator is able to discover more information and learn more about the disputants' underlying needs which can assist in reducing the inefficiency often experienced during negotiations. Exploring underlying issues can also be facilitated by the shuttle approach. Disputants may wish to impart information to the mediator in confidence. The mediator can, therefore use this information to determine whether there are any hidden agendas which need to be addressed throughout the process.

Finally, the consensual nature of mediation is attractive as it avoids resolution without the perception that one of the disputants has been defeated - that is, mediation promotes a "win-win" situation. In mediation, 'I' needs can be converted to 'we' needs and, consequently, the interests and needs of the otherside can be used as clues for a possible solution.

A common factor apparent with much of the emerging commentary, however, is implied acceptance of the fundamental principles and norms upon which these processes were based at the time of their inception. With the continuing contributions from disciplines such as anthropology, sociology and psychology, critical analyses are emerging which challenge some of the assumptions concerning dispute resolution which were made by early researchers in the field. More commentary is emerging which focuses on the paradigms, ideologies and philosophies which inform the practice of dispute resolution.

A - Cross Cultural Dispute Resolution and the Transformative Approach

Developments in communication technology and the emergence of large multinational corporations have prompted the need for different nations and cultures to communicate with each other than was once possible or required.

See also p. 13 for discussion concerning the shortfall perceived with current negotiating practice and, in particular, the discussion of "soft" and "hard" negotiating.

II EMERGING TRENDS

Popular processes of resolving disputes have been in place long enough now to enable researchers to reflect on and critique their efficacy and suitability. There is considerable commentary available which analyses the original goals and benefits of these processes in light of the practical experiences of participants who have been involved with them.¹⁹ Issues arise, therefore, as to whether alternative dispute resolution processes *are* less expensive when compared to litigation; whether the disputants *do* have control of the outcome, and are genuinely satisfied with it; and whether the procedures *are* less informal and less legalistic as compared to litigation. The critical analyses of some "arm chair theorists" have contributed to the growing jurisprudence which underpins alternative processes of dispute resolution.

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A Cross Cultural Dispute Resolution and the Transformative Approach

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¹⁹ See above n 13, for discussion concerning the shortfalls perceived with current negotiating practices and, in particular, their discussion of "soft" and "hard" negotiating.

Researchers of dispute resolution have, therefore, focussed research on the manner in which such communication ought to be undertaken to provide insights as to how disputes between nations and cultures may be better resolved.

There has also been increased international recognition of the relationship between nation states and indigenous peoples, particularly due to the efforts of the United Nations Working Group on Indigenous Populations.²⁰ Wickliffe refers to the efforts of this group where she states:²¹

"[t]he movement towards the recognition of indigenous rights has occurred because the countries concerned have been encouraged to change their approach since the establishment of the United Nations and the alignment of indigenous rights with human rights and equality."

An aspect of the relationship between states and indigenous peoples is the awareness of the limits to which the earth's natural resources can be exploited. Research is continually being undertaken concerning the sustainable management of these resources. Such research involves issues such as the ownership of these resources, the 'value' attributed to them, and the rights relating to their management and utilisation.²² Furthermore, this research must be conducted within the context of ethnic self-determination, the sustainable economic development of indigenous peoples, and "the movement of ethnic groups towards greater autonomy or independence from existing nation

²⁰ For example, see the Draft Declaration on the Rights of Indigenous People which received its first reading before the Sub-Commission in August 1994.

²¹ C Wickliffe "Issues for Indigenous Claims Settlement Policies Arising in Other Jurisdictions" in G McLay (ed) *Treaty Settlements: The Unfinished Business* (New Zealand Institute of Advanced Legal Studies and Victoria University of Wellington Law Review, Wellington, 1995), 114.

²² See C McKenzie and M Sandler "Culture Resources and Conflict" (1995) *Cultural Survival Quarterly* 3, for further discussion.

states".²³ Informed processes concerning cross-cultural dispute resolution are therefore required to contribute to the debate concerning rights to natural resources and cultural autonomy.

The study of cross-cultural dispute resolution principally seeks to challenge the cultural assumptions inherent in popular dispute resolution processes, and the theory which underpins them. There has been a recognition that these processes have been based upon Western values and methodologies of resolving disputes. The eurocentric nature of these processes has continued unchecked due to assumptions that they are "universal" processes which can be applied in any setting. A related assumption is that all those who participate in these processes share the same, world-view, with common values and perceptions of identity. Where obvious cultural differences may be apparent, it is assumed that these models are transferable once certain adjustments have been made to either the process or the participants upon whom the process has been imposed.

A useful approach to adopt when analysing cross-cultural dispute resolution is the 'transformative approach'. This approach promotes a more holistic understanding of conflict and the relationships in which conflict is inherent and generated from. Ledarach opines that "the idea of transformation does not suggest we simply eliminate or control conflict, but rather points descriptively towards its inherent dialectic nature...[s]ocial conflict is a phenomenon of human creation, lodged naturally in relationships."²⁴ Transformation suggests that social conflict moves through certain predictable phases and has the potential to transform relationships and social organisation.

²³ Ibid.

²⁴ JP Ledarach *Preparing for Peace: Conflict Transformation across cultures* (Syracuse University Press, New York, 1995), 17.

The transformative approach, therefore, promotes a wider perspective from which to view dispute resolution and seeks to examine disputes within the various contexts in which they can be viewed, such as social, political and historical contexts. This is particularly useful when developing dispute resolution processes for states and indigenous peoples where vast power imbalances exist between the disputants. For example, an analysis which considers how the present relationship between the disputants came into existence will, presumably, provide further insights into how that relationship ought to continue in a more equitable manner.

Some of the assumptions inherent in popular processes and theory of dispute resolution, including cultural assumptions, are outlined in the next chapter of this paper. Alternative approaches are suggested in light of some of the emerging theories concerning the transformative approach.

B Traditional Assumptions

1 Traditional Analyses of Dispute Resolution Processes

The development of dispute resolution theories and practices, is dependent upon accounts and analyses of participants and researchers in the dispute resolution field. Traditional accounts, however, have often been too limited and only concerned with the details of the dispute and the techniques which the mediator in the process employed to bring about some form of resolution. Putman develops this point and refers to popular models of bargaining which "blind us" to aspects of the process.²⁵ The "pure" models, she submits, fail to capture the fluidity, ambiguity and unpredictability that is often associated with processes such as mediation. Gulliver discusses this 'limited' approach, in reference to traditional analyses of negotiations, and discusses the "artificiality"

²⁵ L. Putman "Challenging the Assumptions of Traditional Approaches to Negotiation" (1994) *Negotiation Journal* 337

of treating particular negotiations as separate processual entities, rather than developing an understanding from the deliberate use of a wider focus.²⁶

A transformative analysis would not focus solely on the specific disputes but, rather, would recognise and acknowledge that social orders, institutions and organisations are in, and are the product of, a continual state of negotiation and that the identified mediation is part of that continual state. Putman proffers an interdisciplinary approach whereby alternatives can be generated to develop "a field in which multiple paradigms flourish and inform one another" rather than simply drawing on a common set of assumptions about conflict and human nature; assumptions which in themselves need to be questioned.²⁷

A 'wider approach' to analysing mediation would also identify the significance that social relationships and interactions have on what is normally perceived to be the mediation process. Rosen states that:²⁸

"anything that bears on the establishment or servicing of human relationships is regarded as subject to human negotiation [by those involved because] the concepts that bear on known relationships are essentially negotiable".

The idea here is that 'social relationships' in themselves can be usefully regarded and analysed as problem solving processes of negotiation. It is submitted that such an approach promotes greater attention to the social interaction which precedes, and eventually sets up, the 'formal' mediation. Therefore, the potential exists to generate further information from such a wider analysis of mediation - information which may otherwise not have been

²⁶ Gulliver "Anthropological Contributions to the Study of Negotiations" (1988) *Negotiation Journal* 247, 249.

²⁷ Above n 25, 337.

²⁸ Rosen, as cited in Gulliver, above n 26, 250.

apparent - which can then be analysed to provide a better picture of the gradual accumulative process which leads to a mediated settlement.

2 *Traditional conceptions of 'culture'*

Ledarach discusses traditional analyses of culture which tend to treat culture as an 'advanced' level of the study of conflict resolution.²⁹ Once the 'fundamentals' of dispute resolution theory have been learnt, such as those outlined in chapter 1 of this paper, the mediator can then focus on the characteristics of other cultures in order to determine how prescribed models of dispute resolution can be 'altered' so as to fit within that culture. Janosik provides a useful overview of the historical approaches to analysing culture as provided in literature.³⁰ An account he gives is of culture as 'learned behaviour'. This approach involves researchers searching for patterns of behaviour of individuals or groups from a common culture so as to gather information for others to use in the future to better manage negotiations with that culture.

A alternative approach would be to recognise that the very process of negotiating is a 'cultural process' and matters concerning culture and identity are inherent in that process. Rather than negotiating over the substantive issues of a dispute, therefore, a transformative approach would promote negotiating the relevant norms and values which influence the process by which the substantive issues will be dealt with. This approach to conceiving culture therefore places cultural matters at the centre of a conflict resolution process rather than as an added feature of it. Ross cautions, however, that disputes involving core cultural values and identity concerns may not be as negotiable, if at all, as disputes concerning more distributional matters.³¹

²⁹ Above n 24, 5.

³⁰ Above n 6, 385.

³¹ MH Ross "Interests and Identities in Natural Resources Conflicts Involving Indigenous Peoples" (1995) *Cultural Survival Quarterly* 74.

Nonetheless, promoting a fundamental shift in the way in which culture is perceived provides an entirely different conceptual framework from which to develop more appropriate theories and processes concerning dispute resolution.

3 *Perceptions of Conflict*

Cross-cultural studies have highlighted the different cultural assumptions which can be made in respect of 'conflict'.

Salem discusses the "ideology of peace".³² In his view, the concept of 'peace' is one founded in Christian ideologies whereby the category of peace is exalted to a higher status than other categories such as socio-political justice, or obedience to a strict moral code. Popular perceptions of peace, he asserts, are dissimilar to those sourced in the worldviews of ancient Greek, Babylonian, Roman, Jewish and Islamic cultures. Rupesinghe discusses dispute resolution theory which focusses on compromise and the promotion of "negative peace".³³ Negative peace, in this context, seeks to avoid conflict and "is aimed at engendering a static state, a status quo."³⁴ This approach, he asserts, is inappropriate when the issues involved in the dispute involve the protection of societal values or cultures, and concern the underlying deprivation of basic human needs, which in turn creates "conditions of protracted social conflict". He cites Featherston's conclusion that:³⁵

³² P Salem "A Critique of Western Conflict Resolution from a Non-Western Perspective" (1993) *Negotiation Journal* 361.

³³ K Rupesinghe "Multi-Track Diplomacy and the Sustainable Route of Conflict Resolution" (1995) *Cultural Survival Quarterly* 13, 15.

³⁴ *Ibid*, 15.

³⁵ AB Featherston "Putting the Peace Back into Peacekeeping: Theory Must Inform Practice" (1994) *International Peacekeeping* 9, as cited above n 33, 15.

"[t]raditional conflict management approaches cannot effectively manage these conflicts because they miss the essential causes by focussing on substantive or objective issues. In cases where a settlement may be reached it will not provide a long-term, sustainable resolution to the conflict, which will inevitably boil over again at some point in the future".

An alternative view of conflict recognises that it is not an undesirable concept which should be eliminated or reduced. Rather, a social constructionist view of conflict can be promoted which asserts that the construction of social meaning lies at the heart of how human conflict is constructed.³⁶ Conflict is, therefore, seen as a socially constructed cultural event and is a common experience inherent in all relationships and cultures; it emerges naturally through an interactive process based on the search for and creation of shared meaning. Ledarach summarises the constructionist view of culture and conflict as follows:³⁷

"...a constructionist view suggests that people act on the basis of the meaning things have for them. Meaning is created through shared and accumulated knowledge. People from different cultural settings have developed many ways of creating and expressing as well as interpreting and handling conflict. [Therefore] understanding conflict and developing appropriate models of handling it will necessarily be rooted in, and must respect and draw from, the cultural knowledge of a people."

Conflict can therefore be perceived as a phenomenon that transforms events, the relationships in which conflict occurs and the sources wherefrom it originates. Furthermore, the energy and impact of conflict can be built upon to

³⁶ For further discussion concerning 'social constructionist theory', see above n 24, 8.

³⁷ Above n 24, 10.

bring about systematic change of the structures in which the relationships are embedded.

4 *Focuss on outcome, rather than process*

A common criticism by commentators of mediation is the focus which the mediator or participants place on the outcome of the mediation. Consequently, it is the outcome of the process which often determines whether or not that process has been successful.

Putman discusses popular processes of dispute resolution within the context of "instrumental goals".³⁸ She highlights that mediations are often driven by the instrumental goals of the participants in the process. Processes are often used as "tools" to reach a certain preconceived end or outcome, the attainment of which will generally signal whether or not the process has been 'successful'.

This approach is problematic in that the preconceived outcome will often determine the process and also involvement of the participants in it. Strategies, tactics, and manoeuvres are defined through "instrumental lenses". Instrumental goals can dominate the process and alternative conceptions of the process are precluded consideration. For example, a mediator will often focus primarily on substantive issues and reframe relational and identity issues accordingly. Common ground will be sought and creative problem solving will ensue to enable the mediation to move closer toward the preconceived outcome.

A transformative approach would shift the focus from the outcome of the process to the actual communication and interaction which occurs during the process itself. As disputants present proposals, raise issues and confront each other's positions, they are simultaneously able to reflect on the issues and the

³⁸ Above n 25, 338.

nature of the dispute. By examining the statements exchanged by the participants, researchers are able to focus on how the participants define, refine and alter their perceptions of the dispute. Through communication, participants can observe and reflect on their own behaviour and construct alternative views of the conflict situation. Deliberating issues and options becomes a way of knowing and understanding the other party rather than attempting to persuade the other party to their point of view. Macduff promotes closer attention to setting an appropriate process and states that:³⁹

“it is typically useful in contentious issues, especially those where the parties are widely separated in their expectations of acceptable outcomes, to shift the debate away from the solutions and to return to thinking about the *process* - to bargain about how we will bargain in the first place. To focus on competing and preferred solutions will, in most cases, accentuate the gap between the participants.”

Storytelling is a common factor promoted in the study of cross-cultural dispute resolution whereby participants tell each other what really matters to them and thereby the dispute can be transformed from identity-based disputes into interest-based ones. Rothman opines that the goal of storytelling must, firstly, involve “the *articulation* of disputants’ organising stories and metaphors, their core values, needs and concerns in such a way that the other side can *recognise* them”.⁴⁰

³⁹ I Macduff “The Role of Negotiation: Negotiated Justice” in G McLay (ed) *Treaty Settlements: The Unfinished Business* (New Zealand Institute of Advanced Legal Studies and Victoria University of Wellington Law Review, Wellington, 1995) 54, 55.

⁴⁰ J Rothman “Pre-Negotiation in Water Disputes Where Culture is Core” (1995) *Cultural Survival Quarterly* 19.

5 *Rationality*

The rationality of the mediator is another accepted 'given' with traditional models of mediation. In this context, the rationality of the mediator refers to factors such as his or her ability to anticipate the parties' actions or reactions, select the appropriate strategy or tactic to deal with them and make a logical decision of how to continue facilitating the mediation in light of these actions or reactions. Furthermore, mediators are able to 'become' more rational by prior planning, purposeful action and improving his or her judgement processes.

A result of striving to maintain rationality in a mediation is that 'emotion' is often seen to be avoided or, at least, managed so as not to disrupt the 'natural' course of the mediation. Emotional reactions are perceived to 'cloud' the participants' clear thinking and hinder their ability to process information or to see reason. A distinction is often made between 'positive' and 'negative' emotions. Negative emotions, such as anger and bitterness, are often perceived to trigger destructive conflict within the mediation and can lead to the escalation of issues, values and motives in a dispute. Positive emotions can also be used for instrumental purposes rather than valued in their own right. For example, positive emotions are valued within a mediation as they can be used to increase cooperative behaviour and better facilitate problem-solving. Signs of positive emotions can also be used as 'clues' to enable the mediator or other participants to gauge the reaction to their response and, thereby, anticipate the participants' moves and counter-moves and provide an indication of which tactic to adopt to so deal with these responses.

Putman discusses the instrumental uses of emotions and suggests that they might instead be treated as indicators for when a critical shift in the process occurs.⁴¹ She states:⁴²

⁴¹ Above n 25, 342.

⁴² Ibid, 343.

“Through its chaotic nature, emotion lays the groundwork for periods of ambivalence in which parties can pursue different courses of action. Emotions cast routine patterns into disarray and create space for new forms of action.”

Emotions can also provide a way to learn, identify and begin to understand the differences which may be apparent amongst the parties to the mediation, including the mediator, and thereby create a “forum of effective interaction”. Therefore, the challenge is to develop new models of mediation whereby ways are sought to integrate emotions with substantive issues - “not to serve the ends of rationality or instrumentality, but to reveal how [mediators] come to understand self, the other party, and the connectedness among them”.⁴³

6 *Universality and transferability of Western models*

As mentioned earlier, another fundamental assumption made by traditional models is that they are ‘universal’ and are easily transferable across different cultures. A related issue is the extent to which participants are made aware of the alternatives to the dispute resolution process with which they have been presented.

Salem discusses Western notions of centralisation, bureaucratisation, rule-formation and rule-acceptance and refers to the “good citizen”; that is, he or she who generally accepts authority, rules, taxes and the like.⁴⁴ He further cites Weber’s description of these concepts as characteristic of modernisation. Within the context of conflict resolution, Salem attributes these characteristics of the modern Western world to the reason why participants within traditional Western of conflict resolution models are more ready to accept the role of the

⁴³ Ibid, 344.

⁴⁴ Above n 32, 367.

"anonymous mediator". Accordingly, participants within traditional Western models more easily accept "freshly devised rules" which guide such processes.

In other contexts, however, attempts by anonymous or non-traditional mediators to establish authority over a conflict resolution process, whether or not they do so intentionally, can often foster resentment. Such resentment can arise from the attempted application of non-legitimised authority and also non-legitimised rules and guidelines which seek to define the process.

An alternative approach, therefore, would be to recognise that a process best suited for a particular problem or setting is one that is ultimately sourced and developed in that setting. Lederach proposes an integrated framework for which models of conflict resolution may be developed.⁴⁵ Part of this framework involves discovering the appropriate 'technology' from resources which are local and available in that particular setting. One of the resources which he refers to are the indigenous peoples of that setting.

⁴⁵ Above n 24, 25.

III TIKANGA MAORI

An outline of tikanga Maori concerning dispute resolution is required in order to compare dispute resolution processes from the Maori context with popular Western processes. Tikanga Maori, in this context, refers to the Maori way of doing things. I have used it to describe the norms, concepts and principles associated with Maori jurisprudence, and also to describe the protocols and practices which have developed in accordance with this jurisprudence.⁴⁶ An understanding of the former is required to begin to appreciate the significance and rationale behind the latter. An aspect of tikanga Maori which will become apparent is that it is values-based, rather than rules-based; it is generated by social practice rather than a set code of rules. These characteristics explain the flexible and pragmatic nature of tikanga Maori.

Insights into both the theory and the practice involved with tikanga Maori, therefore, will assist in identifying the shortfalls perceived by Maori with popular processes of dispute resolution.

A *Nga Tikanga*

1 *Tapu and noa*

Tapu is the "potentiality for power" or the "potentiality for full realisation" and is bestowed on all things, particularly people, as an inheritance from their spiritual predecessors.⁴⁷ Tapu expresses that once a person *is*, he or she has a real potentiality for mana. Marsden refers to tapu in a religious sense, he states:⁴⁸

⁴⁶ The word 'kawa' would probably better describe the practices and protocols. For the purposes of this paper however, the distinction will not be too strictly drawn

⁴⁷ Henare "Nga Tikanga me Nga Ritenga o Te Ao Maori: Standards and Foundations of Maori Society" in *Future Directions* Wellington, Royal Commission on Social Policy, 1988, volume 3, part 1, 19.

⁴⁸ Marsden "God, Man and Universe: A Maori View" in King (ed) *Te Ao Hurihuri* (Hicks Smith & Sons Ltd, Wellington, 1975), 195.

"a person, place, or thing is dedicated to a deity and by that act it is set aside or reserved for the sole use of that deity. The person or object is removed from the sphere of the profane and put into the sphere of the sacred."

Social behaviour and activity is, to a large degree, dictated by the observance and maintenance of tapu. An example of the influence of tapu will be given later in the paper.⁴⁹

Tapu is interrelated with the concept of noa. Noa is described as normality or freedom from tapu.⁵⁰ The relationship between noa and tapu is such that each can exist concurrently; although they may be seen as opposites, they are complimentary opposites. Aspects of tapu, for example, are such that it has the power to whakanoa, or neutralise extensions of tapu. When an object has been made noa, it is no longer restricted and is available for normal use. Noa, therefore, has connotations of freedom and safety.

2 *Mana*

A fundamental concept of Maori society is mana. Formal Maori cosmology distinguishes between the spiritual and the temporal.⁵¹ Mana is said to be sourced in the spiritual domain, and is a generative power and source of organic creation. It is in accordance with tikanga Maori that mana can be channelled and manifested in the domain of the temporal. Marsden refers to the multiple conceptions of mana and outlines the following:⁵²

⁴⁹ See discussion in Part IV.

⁵⁰ Above n 47, 19.

⁵¹ Above n 47, 17.

⁵² Marsden "Te Keehi Mo Manuwhetai Me Whangai-Arikii", a submission to the Waitangi Tribunal at the hearing for the Te Roroa Claim, 21 June 1989.

"Mana Atua is the basis upon which Maori spirituality, cultural values, norms and sanctions are founded;

Mana Tupuna is the basis upon which hereditary rights, social relationships, status, authority and social institutions are regulated;

Mana Whenua is the basis upon which our territorial rights, our claims for 'turangawaewae (a place where we can stand) and a claim our associations and our privilege of belonging is found."

Activity, in the Maori world view, is influenced by the underlying cultural force of mana and the perception that it must be maintained and enhanced. Mana is, therefore, seen to be the basis of sound social order and common good.

Mana can also refer to the personal and political dimensions of Maori authority. That is, people are recognised for the mana which they 'have'. In these instances, not only was mana bestowed, but it could be gained and enhanced by the personal achievement and ability of individuals.

3 *Utu*

Utu plays a central role in maintaining and developing social relationships. Henare describes the central thesis of utu as:⁵³

"that of reciprocal responses; obtaining equivalent value for services or gifts and the righting of injustices for the balancing of social relationships."

An understanding of utu, and its characteristics of reciprocity provides some insight into Maori perceptions of matters such as the maintenance of the cycles of nature, the maintenance of alliances and the performance of fiduciary

⁵³ Above n 47, 21.

obligations. Protocols concerning social intercourse, behavioural controls, and peace-making are formulated and developed upon the basis of utu.

A practical application of utu can be seen instances where tikanga is breached between individuals or groups resulting in one of them suffering an injustice. In order to address the breach, utu was mediated through ritualised korero and an 'appropriate' means of settling disputes was acknowledged by both parties. If an individual was identified as responsible for the conflict, the imbalance of the interrelationship, the group with which he or she identified with would accept the consequences of the behaviour, and muru⁵⁴ would be exacted. The objective of this practise is to maintain the mana and the tapu of all those involved. As Henare observes, "[i]n Maori thinking, an individual or group will reciprocate anything they receive, whether good or bad, because of the challenge such an act represents to the concept of mana."⁵⁵

4 *Whakapapa*

Whakapapa refers to the complex web of relationships which is the basis for the organisation of Maori society. The three closely bound entities of whanau, hapu and iwi are sources from which identity is derived. Although whanau maintain their own internal authority structure, recognition of the autonomy of the hapu is inherent. Alliances of hapu further provide a mutually interdependent political unit of the iwi. The concept of whanaungatanga underpins these entities and establishes a set of kinship rights and obligations, which together serve to strengthen each individual and the group. Whakapapa is a flexible system which can be used to identify links with others. In this sense, whakapapa is exemplary of the inclusiveness of the Maori world-view.

⁵⁴ See text at n 60.

⁵⁵ Above n 47, 21.

Another aspect of whakapapa is its potential to educate about the past and, simultaneously, the present. Gilgen refers to its relationship with the concept of whanaungatanga and states that:⁵⁶

"for Maori to truly understand their present behaviour and circumstance, it is imperative that they look to and return to their past..."

The interrelatedness of tangata, atua and whenua stems from whakapapa. Papatuanuku and Ranginui are seen as the source of all material and non-material aspects of Maori society, and from whom came atua, the patrons of all things tapu. Tangata are connected with Papatuanuku because they are sourced from the land.⁵⁷ In turn, atua are interrelated with tangata by whakapapa, thereby establishing a relationship of tangata with 'nature'. Whakapapa, therefore, provides a system which educates individuals about their origins which can provide explanations or understandings of the present.

5 Whanaungatanga

Whanaungatanga refers to the kinship ties and is indicative of the primacy of whakapapa. The process of establishing common bonds as Maori arise directly out of the inevitability of whakapapa. Whanaungatanga has been described thus:⁵⁸

"...[whanaungatanga] deals with the practices which bond and strengthen kinship ties of a whanau. The commitment of "aroha" is vital

⁵⁶ Gilgen, M. "Te Roopu O Te Whanau Rangimarie O Taamaki Makaurau: A Maori Model for Non-Violence", MA thesis, University of Auckland, 1991, 6.

⁵⁷ As shown from the use of "whenua" for placenta, which is eventually returned to the earth according to traditional custom.

⁵⁸ R Pere Ako: *Concepts and Learning in the Maori tradition* (University of Waikato Press, Hamilton, 1982) at 23, as cited above n 56, 7.

to whanaungatanga and survival of the group is seen as important. Loyalty, obligation, commitment, an inbuilt support system made the whanau a strong stable unit, within the hapu, and consequently the tribe."

Notions of reciprocity which are inherent in the concept of whanaungatanga have a profound influence on the dynamics involved in social relationships. Any 'anti-social' behaviour is seen as a result of an imbalance in the spiritual, physical and social well-being of an individual or group, and causes of the imbalance had to be addressed if any dispute was to be resolved.⁵⁹ The righting of the imbalance was sought through physical action or processes of mediation stemming from the need to observe and maintain kinship ties and obligations. The causes of the imbalance and process of restoration assumed more importance than the actual "offence" itself. The course of action chosen was defined by tikanga as passed down through whakapapa.

B Nga Kawa

Protocols and practices for formal communication and dispute resolution have been formulated and developed according to tikanga Maori. Specific protocols provide for the manner in which Maori formally communicate with each other, and how they resolve disputes. These protocols in themselves may provide a suitable means by which disputes may be resolved by Maori today. Alternatively, these protocols may be analysed and drawn on to construct models of resolving disputes which are more suited to Maori.

1 Muru

Muru is the process of retribution undertaken when utu is exacted. Muru is often defined to mean 'plunder'. For example, Best states that "[t]he word muru

⁵⁹ Jackson, M. *The Maori and the Criminal Justice system: He Whaipaanga Hou - A New Perspective*, Department of Justice, Policy and Research Division, Study Series 18, part 2, 39.

means to plunder, and it represents a form of punishment that consisted of robbing a person of his property.⁶⁰ This definition, however, is problematic for the negative connotations it ascribes to the process of muru. The *Concise Oxford Dictionary (9th ed)*, for example, defines 'plunder' as "the violent or dishonest acquisition of property". Therefore, to describe muru as violent or dishonest, implies a negative process and one which was involuntarily imposed on the parties involved. Such a definition fails to appreciate the tikanga involved with the process of muru and the philosophy underpinning it.

Accounts from tangata whenua in the Mataatua area, however, portray muru as an accepted and expected process when tikanga had been breached. They described muru as a process which addresses imbalances within the social order and, as one kaumatua explained it, as an appropriate way of "keeping behaviour on the straight and level".⁶¹ The procedure that was followed was set down by tikanga and implemented in a manner suitable for the circumstances of that case. One example which was outlined by several kaumatua was of a 'muru taua'. From the accounts provided, the muru taua was implemented in situations where a woman from one hapu, who was already with a partner, had 'eloped' with a man from another hapu. The woman's hapu would therefore "go and muru" the other man's hapu for retribution of this unsanctioned action.

One kaumatua was able to vividly describe his personal experience of attending a 'muru taua' as a child in 1932.⁶² He described how members of his hapu had gathered one day just outside of Whakatane to form a "taua party". A woman from his hapu had recently been "persuaded" by a man from a hapu

⁶⁰ Best, E. "The Maori As He Was" in *Customary Concepts of the Maori*, Wellington, Victoria University of Wellington: Department of Maori Studies, 1993, 45.

⁶¹ Personal communication with John Mahiti Wilson, chairman of Te Kahui Kaumatua o Ngati Awa, 26 August 1996.

⁶² Ibid.

in Waimana to return with him to his papakainga. Her hapu "demanded" that utu should be exacted and sought redress for the breach in tikanga which had occurred. The group, therefore, travelled to a marae in Waimana where the muru taua was to be held. Once they had arrived, the group prepared themselves to be welcomed onto the marae by the tangata whenua who had already assembled in anticipation of the event. Traditional haka, manawera, and waiata were carried out by both groups as the ope tuarangi approached the pae tapu. He described how whaikorero followed which provided the opportunity for the ope tuarangi to outline "the purpose of their visit" and what they were expecting and the conclusion of the hui. The tangata whenua then responded with their whaikorero.

At the conclusion of the whaikorero, the tangata whenua laid out taonga before the manuhiri, including pounamu, mere, patu, taiaha, kete, whariki, which represented "the wealth of the tribe". The ope then proceeded to choose taonga for themselves. Once the taonga were exhausted, the tangata whenua were asked to provide kai, such as pork and chickens, which were appropriated by the ope. Exhausting all the kai, the tangata whenua proceeded to provide vegetables from their gardens, such as kumara and riwai. Once compensation was deemed adequate, the hui concluded with hongiri.

A group of kaumatua from Ruatoki noted that the taonga taken during this process were not necessarily held forever.⁶³ Rather, situations often arose later in time, even generations later, which would require the hapu to return the taonga to their former owners.⁶⁴

2 *Tatau Pounamu*

⁶³ Personal communication during a hui held at Waikirikiri marae, Ruatoki, 29 August 1996.

⁶⁴ For example, the taonga may be returned to their former owners during a pohiri if the group had a hui at that particular marae.

A tatau pounamu refers to the process whereby a type of 'peace treaty' was reached between disputing hapu or iwi. Mead describes the tatau pounamu a permanent type of peace, symbolised as a "greenstone door", which is established between two "warring" parties.⁶⁵ The tatau pounamu represents, firstly, a passage-way through which fighters of one side or another pass. Mead states that "in a peace agreement the door... is closed to all those who want to draw blood."⁶⁶ A tatau pounamu also symbolises the permanence of the peace which is sought. Mead points out that achieving such a permanent solution may not be a realistic goal.⁶⁷ He states:⁶⁸

"A tatau pounamu is supposed to be a lasting peace, ideally as permanent as greenstone itself. But rarely is man able to live up to such high ideals. More than likely someone will breakdown the door and pass through it and begin another round of fighting and bickering. It is like a swinging pendulum which swings from war to peace and peace to war."

Tatau pounamu appear to have been established out of hui held between the disputing hapu for the purpose of mediating their dispute. Mead, for example, describes several hui between hapu of Tuhoe and Ngati Awa in the mid-nineteenth century.⁶⁹ The hui appear to have been held in accordance with tikanga Maori applied for those situations. Unique aspects of these hui can be highlighted.

⁶⁵ HM Mead and OE Phillis "Tatau Pounamu" in *Customary Concepts of the Maori*, Wellington, Victoria University of Wellington: Department of Maori Studies, 1993, 237.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid, 238-245.

Firstly, in the account given by Mead, several hui were held before a tatau pounamu was eventually established. Each hui proceeded in accordance with the tikanga of each marae. The accounts suggest that it was accepted by the participants of the hui that a solution would not always result within the time frame initially expected.

The mana of those principally involved with the process also appears to have been a determining factor in establishing a tatau pounamu. In a particular example, Mead refers to the mana of Koura and Hatua, and their respective efforts and states that:⁷⁰

“they had to work very hard for a lasting peace and each had to draw on the reservoir of mana that was available to each of them to keep it in place. Indeed the two tribes had to follow the example set by these two outstanding leaders and build on what they had initiated.... Lesser men could not have cemented the tatau pounamu. It was tried before by Tikitu and Piki but while they were both men of mana their mana was not strong enough to hold the accord together.”

Symbolism is very apparent throughout the accounts given by Mead. One account describes how two hapu believed a tatau pounamu had been reached. Two men, one from each hapu, engaged in a “friendly duel” involving a patiti, or iron hatchet. Blood was drawn during that duel, but the incident was dismissed lightly in view of the good spirit in which both entered the activity. Mead points out, however, that “[n]onetheless, the wound was noted and wise heads regarded it as a bad omen.”⁷¹ Subsequently, the tatau pounamu which was believed to have been reached in that instance did not last.

⁷⁰ Ibid, 244.

⁷¹ Ibid, 239.

Symbolism is also apparent in the description of events immediately following the establishment of a tatau pounamu. At a hui held between Tuhoe and Ngati Awa,⁷² the tatau pounamu was promoted symbolically in that it was stated that if ever the two tribes resumed the dispute, the heat of the battle would set the bush alight so that the trees were never given a chance to regenerate and grow to maturity.⁷³ Presumably, the point was that if this occurred neither of the groups would benefit. In that particular case, it was concluded that "the thing to do was to put the fire out and not rekindle it again." Meads refers to the statement of Wiremu Tarei:⁷⁴

"I korerotia (i reira) nga korero kia tineia te ahi i runga i te pae maunga e takoto mai ra, kia kua he ahi e kaa ki tera taha, kia kua ki tenei taha"⁷⁵

A final example of symbolism concerns the permanence of a tatau pounamu which was eventually established. During a hui which was held to conclude the matter, Hatua, a member from one of the hapu, referred to the two maunga, Putauaki and Tawhiau, and exclaimed "[t]he sun shines...let our tatau pounamu be fixed...let Tawhiau and Putauaki symbolise our lasting treaty."⁷⁶

Another noticeable feature during such hui, was the ratification which occurred with the other hapu and whanau affected by it.⁷⁷ Accounts are given of hui held at different marae within the Ngati Awa and Tuhoe rohe to ratify the agreement

⁷² The account is not clear as to whether or not the hui was held at Ohui, or was held at Te Kupenga, but with orations directed towards Ohui.

⁷³ Above n 65, 242.

⁷⁴ Ibid, 243.

⁷⁵ A translation into English would read "Where the words were spoken, let the fire be extinguished and let no fire be kindled in the other side nor this side."

⁷⁶ Above n 65, 243.

⁷⁷ Ibid, 237-245.

reached. One description refers to group of Ngati Awa imparting gifts to a Tuhoë party, such as cooking pots, pipes and tobacco, following the conclusion of the hui. Other hui are noted for the symbolic gestures exchanged, such as duelling and reciting whakatauki. Presumably, such wide ratification ensured that members of the affected hapu and whanau were aware of and agreed to the tatau pounamu which had been made.

3 *Te Tikanga o te Marae*

Analyses of tikanga Maori in relation to marae can be undertaken by several approaches. One approach involves analysing tikanga Maori which underpins the construction and layout of the marae. An analysis of the wharetipuna, for example, would involve exploring the dynamics concerning the tapu and the mauri of the wharetipuna, and the impact of these dynamics on the way in which the wharetipuna is utilised. The symbolism of the wharetipuna as the body of a tipuna of a hapu or iwi could also be considered. Matters relating to the whakapapa of that tipuna, and the associated rights and obligations, can determine how matters are dealt with within the wharetipuna.⁷⁸ These approaches are proffered merely to exemplify the various conceptual levels at which the tikanga associated with the marae may be analysed. For the purposes of this paper, analysis will be limited to tikanga Maori associated with the more practical processes employed on a marae.

The marae is the focal point for whanau and hapu and remains the venue at which meetings are held to discuss hapu related matters. Metge discusses tikanga Maori of the marae, particularly the tikanga which applied when hui were held on the marae.⁷⁹ She asserts that the methods were not prescribed in a code of laws but rather were held in people's minds as a set of principles

⁷⁸ See text at n 87.

⁷⁹ J Metge *New Growth From Old: The whanau in the modern world* (Victoria University Press, Wellington, 1995), 278.

and values, which were weighed in relation to each other, and selected, organised and applied by senior members of the whanau drawing on experience and an array of precedents.⁸⁰ She further outlines a general format of how hui proceed on marae. This format includes the pohiri, the kaupapa, and the poroporoaki. The following discussion will relate to the pohiri and the kaupapa.

i The pohiri

The pohiri involves tikanga Maori when welcoming manuhiri onto the marae. The start of the pohiri will usually be marked by a karanga by a woman (or women) of the tangata whenua to signal the manuhiri to proceed onto the marae-atea. Silence will usually follow to enable both manuhiri and tangata whenua to pay their respects to matters such as those members of that marae who have passed away. Whaikorero by the tangata whenua and the manuhiri will usually proceed in accordance with the tikanga of that marae. And, finally, manuhiri and tangata whenua will hariru and hongiri. Usually manuhiri will then proceed to the wharekai to eat.⁸¹

The pohiri is an important process to address matters concerning the tapu of the two groups, the tangata whenua and the manuhiri, and the implications of the two tapu 'mixing' with each other. During pohiri, the maraeatea itself is conceptually transformed into a highly tapu area. One kaumatua, for example, referred to the tapu of the maraeatea and explained that "preferably the discussion [concerning the kaupapa of the hui] should not be conducted on the pae tapu because that is the place of Tumatauenga... it should be taken under the auspices of the tipuna whare."⁸²

⁸⁰ Ibid, 278.

⁸¹ For a more detailed account of what occurs during a pohiri see Karetu S Language and Protocol of the Marae in King (ed) *Te Ao Hurihuri* (Hicks Smith & Sons Ltd, Wellington, 1975) at 35

⁸² Quotation taken from a hui held in Opotiki, 27 August 1996.

Aspects of noa are equally significant. Appropriate tikanga Maori must be carried out to whakanoa the process. This frees the process of the associated tapu and the matters can proceed relatively freely of the constraints dictated by tapu. The act of hongiri and kai which follows the pohiri are examples of the whakanoa process.

The pohiri is important for the information which is imparted during the process. Information is conveyed during the karanga from the tangata whenua and the manuhiri; the manawera which manuhiri often perform while approaching the maraeatea; the haka pohiri which the tangata whenua will often perform while the manuhiri are approaching; the whaikorero and tauparapara given by both sides; and the waiata following each whaikorero. The decision of which haka-pohiri, manawera, waiata, and so on, to use during the pohiri is a conscious one made in light of the particular circumstances surrounding the pohiri. For example, different formats of karanga will be used according to who is included in the ope. The history of the relationship between the two meeting groups will be referred to by reciting whakapapa during a whaikorero. Or a waiata may be specifically chosen for the relevance of its contents or even in acknowledgement of the kaitito of that waiata. These factors contribute to establishing the kaupapa or the agenda of the hui and therefore should not be perceived of as 'mere formalities'.

ii te kaupapa

Metge uses the term 'kaupapa' to describe the communication which follows the pohiri. Once the 'decontamination' process of the pohiri and hakari have concluded, the hui will often continue within the wharetipuna. Discussion will proceed in accordance with the tikanga established for that wharetipuna.

The whakapapa of the wharetipuna and of those who are participating in the hui will affect how matters proceed during the hui. The inclusive nature of whakapapa, and the interrelationships of the individuals within the whakapapa,

ensures that everyone present has a direct or indirect interest in the matter being discussed. It follows, therefore, that everyone is given the opportunity to provide input during that hui. However, whakapapa also determines how this input should be provided. The concepts of tuakana and teina, for example, refer to the position of individuals within the whakapapa. The recognised mana of each position will determine when that person can speak and the matters that he or she is able to speak on. In most cases, therefore, a teina will not speak before his or her tuakana unless express or tacit approval is given beforehand. The fact that an individual can assume tuakana and teina status contemporaneously also indicates the flexibility required during hui held on a marae.

The fundamental aspect of deliberating upon a marae is that decisions are arrived at by consensus. Walker refers to this 'consensual-approach' and reasons that "because the hapu is a primary group that rests on the ideology of the unity of the kinship group, it can maintain that ideology only on the basis of decision-making by consent."⁸³ Furthermore, he discusses the marae as the most suitable meeting place where consensual decision-making can occur where he states:

"As an institution, the marae is ideally suited to allow a community to arrive at decisions by consensus... The aphorisms of the Maori stress that the democratic process is not served unless matters are discussed openly on the marae, 'kia whitingia e te ra, kia puhipuhia e te hau' - 'that they might be exposed to the bright sunlight and blown about by the wind'.

⁸³

Walker R Marae: A place to stand in King (ed) *Te Ao Hurihuri* (Hicks Smith & Sons Ltd, Wellington, 1975), 23.

An important aspect of consensual-decision making on the marae is the time allowed to enable such matters to be deliberated properly. Walker further states that:⁸⁴

“an important element in arriving at decisions by consent is the absence of a time dimension. If a conclusion cannot be arrived at on the marae then the discussion can continue in the house at night.”

Several comments acknowledging the time required for reaching consensus decisions were made at a hui in Opotiki earlier this year. One kaumatua compared the process of deliberation which is undertaken on a marae to that process undertaken by the Waitangi Tribunal, and stated:⁸⁵

“penei ano I roto I nga marae...ka korero...ka moe...ka korero...ka moe...ka korero...kare I te mutu, kia tau ra ano te kaupapa...ka hurihuri haere nga korero ne”

A kuia from that area referred to the length of time taken to deliberate matters involving domestic violence and stated:⁸⁶

“if one of those men beat up his wife they'd immediately call a hui and those two are there...now...they'd talk ...night.. morning...until they resolved what they're going to do with the husband...”

The dimensions of the wharetipuna indicates its suitability for such lengthy discussions. For example, the expansive nature of the wharetipuna, and the provision of bedding along the interior walls.

⁸⁴ Ibid.

⁸⁵ Above n 82.

⁸⁶ Ibid.

IV POPULAR DISPUTE RESOLUTION PROCESSES IN THE MAORI CONTEXT

An assessment of the appropriateness of a popular conflict resolution model, namely the traditional '6-step' mediation model, can be undertaken in light of the discussion contained in the two preceding chapters. The assessment is made in terms of its efficacy in resolving intracultural conflict, that is conflict between two or more Maori individuals or groups. The same criticisms may not apply when assessing intercultural disputes.

I should note at the outset that the following critique does not dismiss all aspects of popular mediation models. Rather, my intention is to highlight the shortfalls which I perceive to exist with the process to make argument for the development of models more suited to a Maori context.

A Prescribed Process

The prescribed nature of the mediation models, such as the 6 step model, is problematic for several reasons.

Firstly, the process may not necessarily reconcile with the tikanga already established for conducting hui for the purposes of resolving disputes. The generic 6-step process of mediation has been developed in a non-Maori setting and based on experiences of non-Maori who have their own cultural perceptions and norms.

Tikanga Maori associated with hui, however, is sourced and has been developed from a Maori setting and based upon norms and values which are inherently Maori. The fact that concepts such as tapu and mana are inherent in all things demands that, as with all other processes, they must be 'dealt with' in an appropriate manner. To illustrate this point, the initial protocols of processes from the different settings can be compared.

In the 6-step model, the mediator will generally 'open' the mediation with an "opening statement". This statement usually involves welcoming the parties, making the appropriate introductions, and outlining what the participants of the process can expect as the mediation unravels. In doing so, the mediator is not only placing himself or herself at the centre of the process, but is also defining the manner in which the process will be carried out.

Tikanga Maori would require the parties to 'open' the procedure with the customary *whaikorero* and *karakia* and other related *tikanga*. This process, firstly, enables matters concerning the *tapu* surrounding and inherent in the process to be addressed in the appropriate manner. Secondly, the participants are able to introduce themselves in the manner in which they are accustomed, and to acknowledge all other participants to the process. The *kaupapa* of the *hui* can often be negotiated during such *whaikorero*. By opening a *hui* in this manner, the *participants* are automatically positioned and recognised as being central to the process. The process itself, to a certain extent, is already dictated by *whakapapa* and precedent. Any adjustments to the procedure will be determined by those who have the *mana* to do so. In most cases, such adjustments will be at the direction of *kaumatua* or *kuia* present at the *hui*.

The differences in approach by both procedures are clear. It is also clear that the approach which is taken can 'set the stage' for the social and, it is submitted, power dynamics which will unfold throughout the remainder of the mediation. A result of transposing a process from one cultural setting into another different cultural setting, is that it will be treated by the participants as exactly that - a different process. The participants may therefore 'adjust' themselves in order to fit within the process. This can occur regardless of whether or not they initially agreed to the transposition of the process or were subsequently comfortable with it.⁸⁷ It should not automatically be presumed,

⁸⁷ This raises a related point of educating the participants of the processes available for them to mediate their disputes. This point will be discussed

therefore, that transposing a Western model into a Maori setting to be utilised by Maori participants, automatically validates that process as a 'Maori one'. Instead, the participants in that process may simply be 'experimenting' with the process. The result can be an experience with the process or an outcome from the process which is something less than that which could have potentially occurred.

Some mediators may attempt to 'co-opt' tikanga Maori into the 6-step process. This may occur, for example, by reciting a karakia *before* the first step of the '6-step' mediation process. One rationale for doing so is to 'import spirituality into the process'. This practice can be problematic. Firstly, the presumption is made that spirituality is not part of the process unless it is imported in. As has already been shown, this is clearly not the case. The practice of co-opting karakia is also problematic if it is employed for purely token reasons. This would be the case if the purpose of karakia within such hui is not fully appreciated by those participating in the process. Karakia are often treated as an 'addition' to the process of mediating rather than as an inherent part of it. If the proper appreciation is not shown, then it is questionable whether the tikanga ought to be co-opted in the first instance.

The 'shuttle diplomacy' approach to mediating can be analysed as an example of the incompatibility of some popular mediation models with tikanga Maori associated with hui. An often implied principle associated with resolving disputes in a Maori setting, is the principle of 'kanohi ki te kanohi', that is, communicating with each other 'face to face'. The process of whaikorero which is carried out on the pae tapu exemplifies this inherent principle. The expansive layout of the wharetipuna, wherein raruraru are discussed, also illustrates the practice of dealing with disputes in an open forum, rather than behind closed doors. The benefits derived from separating the parties to explore any

elsewhere in the paper.

additional, confidential information, therefore, may need to be compared with the benefits of conducting the communication in a manner which the parties are more traditionally accustomed.

B The Third Party Mediator

A seemingly unquestioned aspect of popular mediation models is the need for a neutral, objective third-party mediator. The third party mediator remains neutral on matters included in the dispute. Furthermore, if required, the mediator can provide an objective opinion on solutions which the parties may propose to enable them to judge how 'realistic' that proposal may actually be. This ideal of a mediator, however, may be inappropriate for disputes involving Maori.

The assumption of having one mediator facilitating the mediation process may need to be assessed in terms of whether it is appropriate for hui held according to tikanga Maori.

One alternative approach which is commonly employed is 'co-mediation'. As the name suggests, co-mediation involves two mediators working together to facilitate the process. Some of the benefits perceived with co-mediation include sharing the duties of facilitating, ensuring accountability within the process, and being able to support each other throughout the process, including moral support in disputes which are perceived as being "emotionally draining".

Another alternative is for several, or a group, of mediators to facilitate the process. A common feature of hui on marae, is that the kaumatua and kuia will often direct how the process is carried out. Factors relating to the whakapapa of those present at the hui, and the mana of these participants, can dictate who should direct aspects of the process, and at which points during the process they should so direct. However, this approach may be more easily implemented

in a intra-hapu dispute rather than an inter-hapu one, where the participants observe relatively similar tikanga and whakapapa.

The requirement of an 'objective' third-party mediator in a mediation process assumes, firstly, a universal perception of objectivity. Salem discusses, for example, that an objective world view cannot be assumed if not all cultures are at the same stage of areligiosity and amorality.⁸⁸ The 'objective mediator approach' fails to appreciate the cultural norms and experiences which underpin and formulate individual perceptions.

Alternatively, a more subjective approach may be better suited to resolving conflict within a Maori context. Marsden provides comment which supports such an approach.⁸⁹ When discussing the route to Maoritanga through 'abstract interpretation', he states that:⁹⁰

"The way can only lie through a passionate subjective approach...The charge of lacking objectivity some insist on is simply a form of arid abstraction, a model or a map. It is not the same thing as the taste of reality."

Further, the primacy of establishing 'whakapapa links' within social networks suggests that relational considerations are given greater priority over matters relating to objectivity. An example of the importance of identifying such links can be seen during pohiri where often whakapapa will be recited by the kaikorero to establish a link with the people to whom he is speaking. Shared whakapapa encumbers shared experiences and obligations. Therefore, once a 'link' is identified, the relationship between the individuals or groups

⁸⁸ Above n 32, 365.

⁸⁹ Above n 48, 191.

⁹⁰ Ibid.

immediately transforms. Communication can be undertaken in a less constrained manner.

It is submitted that a similar effect can result with a mediator who is inherently connected with the participants and, consequently, the conflict. The participants may develop a better sense of trust towards a mediator whom they perceive shares common interests and perceptions. The obligations incumbent on the mediator to provide for the best interests of the groups with whom he identifies, could further eliminate perceptions of bias by the participants.

C *Exchange of Information*

The 6-step mediation model provides that once respective opening statements have been made by both the mediators and the disputants, information concerning the dispute can then be exchanged. This information will provide the substance upon which the mediation will proceed.

It should be presumed, however, that this is not the only time in which information concerning the dispute will be exchanged. According to tikanga Maori, however, information is often exchanged at the preliminary stages of a hui. A prerequisite for any hui is the pohiri. The tikanga which will be applied for any pohiri will depend on the circumstances surrounding that pohiri. The karanga, for example, will often be adapted according to those who are being welcomed on to the marae. The manawera of the manuhiri may be chosen for its significance to the marae upon which they are approaching, or for its significance to the kaupapa of the hui. Throughout whaikorero, whakapapa are often recited and whakatauki recalled for its suitability for the occasion. And the waiata following each whaikorero will be chosen in light of the person for whom it is being sung.

In most cases, therefore, the tikanga which is applied will have particular relevance to the circumstances of that hui. Information conveyed in this manner

will often have direct relevance to, and will often dictate, the matters which will be discussed later on during the hui. Unfortunately, there is a tendency that the relevance of this information to the formal mediation is not understood. This may result from the perception that such tikanga are 'mere formalities', rather than inherent with the process itself. The perception is that once these formalities are completed, the matters involved with the hui can then be dealt with. Another reason why this information is not understood may be the mediator's lack of knowledge of te reo Maori, the language in which this tikanga is undertaken.

A hypothetical situation can be given of a mediation where the disputants are two groups of Maori and the mediator has no understanding of tikanga or te reo Maori. During the initial stages of the hui, information may be conveyed during whaikorero and mihi. The substance of these whaikorero will often 'set the tone' for the remainder of the hui and will be appreciated by those who have understood the information being conveyed. During certain parts of the hui, remarks may be exchanged in te reo Maori between the disputants. These exchanges may occur so frequently that it could appear as if two processes were occurring simultaneously. Firstly, a mediation which is being 'acted out' for the mediator, by the disputants, in manner which they think is expected of them. Simultaneously, there may also appear to be a separate *negotiation* occurring between the parties based upon common information which each has collected throughout the process and in a language which only they can understand. The mediator, of course, would not have understood the substance of these exchanges and, therefore, would not have been able to appreciate the impact which these exchanges were having on the process in total. Although the mediator should not 'control' the process, he or she should at least be able to gauge where shifts in the process are occurring and participate in the remainder of the hui in light of these shifts.

Mediators need to recognise and provide for the different types of information which can be exchanged throughout the mediation process, particularly information which should be handled with sensitivity by the participants of the process. This will be required, for example, in commercial disputes concerning matters of commercial sensitivity. The practice of caucusing is often implemented in response to this need for sensitivity.

Some information required during hui held with Maori can be deemed to be tapu by those imparting it. Traditional practices undertaken for dealing with sensitive information may not be suitable in such cases. The reasons why some information should be treated differently needs to be assessed to determine how to deal with it appropriately. An in most cases, tikanga will already exist that prescribes how such information should be dealt with. The process by which the dispute is being facilitated, therefore, needs to provide for this tikanga.

D Participants with the Process

With disputes concerning groups of individuals, a common requirement of popular forms of mediation is that whoever is representing the group in the mediation has the appropriate mandate to do so. This mandate is apparently required to enable the representatives to make binding decisions during the process. This requirement for mandate, however, is based on several inappropriate assumptions.

In cases where the disputants are groups rather than individuals, the mediator will often insist that only 'representatives' of the groups take part in the mediation. The invitation can be extended, however, for other members of that group to attend and 'observe' the mediation. This has been described as the 'goldfish bowl' approach. The symbolism of this analogy presumably refers to the 'formal' mediation as being the central focus of the process while the other

members of the group remain peripheral to the process. In such cases, the mediator will often reserve the right to preclude the 'extra' members from the mediation. This might occur where the 'observers' can detrimentally affect the process. The setting is transformed into a sort of drama whereby the participants 'act out' the mediation, rather than be more relaxed with each other. Furthermore, body language or mere coughs can be interpreted by the representatives to convey different meaning.

This approach is problematic in a Maori context as it fails to appreciate the wider structures of which the 'representatives' are a part and, therefore, the obligations incumbent on those representatives. Such an approach also contradicts tikanga Maori associated with hui. Presumably, all have an interest in the dispute which is being dealt with and, according to tikanga Maori, all should have input into how that dispute is to be resolved. An alternative approach, therefore, is to perceive the group as being part of that mediation rather than drawing the distinction between the representative and the representees. Should such a distinction need to be made, then it is submitted that it would be for the disputants to decide whether or not separation. It is submitted that the control of process by which the dispute is resolved should lie primarily with the disputants. Common sense will often dictate whether or not progress is being hindered by the presence of such large numbers during the mediation. Furthermore, the fact that the process is being affected as a result of the social dynamics caused by an increased number of disputants, would suggest revisiting of the actual process to ensure that it is appropriate for that particular setting.

The goldfish bowl approach is problematic because, firstly, it can assume that the disputants are 'acting' while in the presence of a greater audience. In the event that the disputants do, in fact, act in such situations, this approach further assumes that they will subsequently cease acting once the audience is removed. These assumptions, it is submitted, illustrate the different perceptions

which cultures can have in terms of the degree of formality required in such situations. A certain level of formality or 'acting' may be required within the Maori context to enable the process to proceed effectively.

Popular models of conflict resolution can often make assumptions in respect of the roles individuals play in the process, especially roles associated with gender. Understanding the respective roles of individuals within the conflict resolution processes also need to be assessed in light of the norms and values of that culture. Differences may exist, for example, in respect of gender. The inherent assumptions in popular ADR processes concerning gender have been identified by a number of women.⁹¹ Some of these assumptions apply equally within the Maori context in respect of Maori women involved with the process. One must be careful, however, not to critique conflict resolution processes strictly by Western theories of feminism. As commentators such as Pere, Gilgen and Rawiri have identified, Western and Maori theories of feminism do not necessarily reconcile with each other.⁹²

Customary methods of resolving disputes illustrate the respective roles accorded to men and women. It is customary during the formal procedure of the pohiri, for example, for women to karanga the manuhiri onto the marae. It is also customary for men to perform whaikorero during a pohiri. The rationale for why each gender adopts these roles is sourced in tikanga Maori. This tikanga will often be specific to each geographical area from which it is developed. Popular models of resolving disputes do not necessarily appreciate

⁹¹ For example, see commentary by L Stamato "Voice, Place, and Process: Research on Gender, Negotiation, and Conflict Resolution" (1992) 4 *Mediation Quarterly* 375; J Kelly "Power Imbalances in Divorce and Interpersonal Mediation: assessment and intervention" (1996) *Negotiation Journal* 85; and S Cobb "Empowerment and Mediation: A Narrative Perspective" (1993) *Negotiation Journal* 245.

⁹² Above n 58; Above n 56; A Rawiri "Supporting Maori Legal Feminism" (1996) 4 *Feminist Law Bulletin* 4.

nor provide for these customary roles and, therefore, will not be appropriate for implementation in a Maori context.

Some of the cultural assumptions inherent in popular dispute resolution processes, and the theory underpinning them, should by now be apparent. The inappropriateness of aspects of these processes for a Maori context should be equally apparent. Therefore, it is submitted that the challenge for researchers in the field of dispute resolution is to identify, or else develop, processes within the New Zealand setting which may be more appropriate for that setting. I have deliberately used the terms 'identify' and 'develop' for the following reasons.

This paper highlights the fact that Maori currently have processes which can be applied in order to resolve disputes. *Hui* which are held *in maire* in accordance with *tikanga* Maori are examples of these processes. The benefit of having *hui in maire* is that a process, sourced in the setting in which it will be applied, is already provided. The social dynamics within the *hui* are also influenced by this process.

The alternative to identifying existing processes, is to develop new ones. These processes, it is submitted, would need to be developed from a conceptual framework which is sourced in a Maori world-view. Jackson supports this approach when he refers to the need to develop suitable programs to help prevent young Maori people from becoming *runanga* and *chick*.²⁰

Integrity of the family which underlies Maori concepts of behaviour control and social order can provide insights into possible ways of dealing with contemporary problems such as criminal offending. That those Maori have survived and are often the subject of debate in many areas points to their ability.

VI CONCLUSION

Some of the cultural assumptions inherent in popular dispute resolution processes, and the theory underpinning them, should by now be apparent. The inappropriateness of aspects of these processes for a Maori context should be equally apparent. Therefore, it is submitted that the challenge for researchers in the field of dispute resolution is to identify, or else develop, processes within the New Zealand setting which may be more appropriate for that setting. I have deliberately used the terms 'identify' and 'develop' for the following reasons.

This paper highlights the fact that Maori currently have processes which can be applied in order to resolve disputes. Hui which are held on marae in accordance with tikanga Maori are examples of these processes. The benefit of having hui on marae is that a process, sourced in the setting in which it will be applied, is already provided. The social dynamics within the hui are also influenced by this process.

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"[m]any of the beliefs which underlay Maori concepts of behaviour control and social order can provide insights into possible ways of dealing with contemporary problems such as criminal offending. That those beliefs have survived and are often the subject of debate in many circles points to their viability."

⁹³ Above n 59, 53.

Some of the concepts described earlier in this paper would be central to any conceptual framework. Furthermore, some of these concepts are useful for the potential they have to develop innovative approaches to conceptualising dispute resolution. For example, whakapapa and its lattice-like nature could be analysed to develop processes which are more focussed on relationships and the obligations associated with them.

In order for processes to be identified and/or developed, therefore, several steps need to be taken.

Firstly, substantial research needs to be undertaken in regard to dispute resolution within a Maori context. Appropriate processes can then be developed based on this research.

Secondly, education is needed within the field of dispute resolution and wider spheres. Current supporters of popular dispute resolution processes need to be educated on the perceived disadvantages of these processes. It is not expected that these supporters will automatically agree with the assertions made concerning these disadvantages. However, the hope is that discussion will ensue about dispute resolution processes and Maori needs.

Education is also required for Maori. The legacy of colonisation and assimilation has resulted in a lack, or absence, of faith in the efficacy of customary processes of resolving disputes. This lack of faith is not surprising when one considers the lack of information available which supports and reaffirms these processes. Nor is it surprising when the predominant system of law does not provide for the promotion or implementation of customary processes. Therefore, potential participants need to be 'conscientised' of the possible benefits of these processes.

Finally, processes which are eventually developed need to be applied in contemporary settings to assess their practical usefulness. The perceived advantages and disadvantages can therefore be tested in order to generate new information which can contribute to their improvement.

The strategy suggested above for developing appropriate dispute resolution processes can easily be interpreted as a practice in 'decolonisation'. Decolonisation has been defined as:⁹⁴

"[t]he stripping away of unwanted layers of another people's culture accumulated over generations to expose and rediscover the vivid colours of one's own cultural heritage and the political power and sovereignty which can give effective expression to that heritage."

In the context of this paper, 'stripping away the layers' can be analogised with identifying the eurocentric assumptions inherent in popular processes of dispute resolution which have continued unchecked since the initial application of these processes in the New Zealand setting. The political power and sovereignty to which the quotation refers can relate to the empowerment of Maori over processes employed to resolve their disputes. Accordingly, tikanga Maori relating to dispute resolution, and processes in which it is inherent, can be given practical expression within a modern setting.

⁹⁴ This definition is taken from a paper entitled "Reclaiming Mana Maori". This paper was included in a set which were available at the Hirangi Hui held at Turangi in April of this year.

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haka	secondary tribe
hapu	
hariru	to shake hands
hongi	sharing of breath, salute by pressing the noses together
hui	to meet, gathering
kal	food consumed, eat
kainga	home place
karahi	tree
karakia	religious chant, incantation, charm, spell
karanga	call, summons, welcome
kaumatua	elderly man or woman
kaupapa	basic idea, topic, plan
kawa	ritual
kete	flax basket
kuiu	elderly woman
mapawera	short
manuhiri	visitor, guest
marae	enclosed space normally in front of a whare (house), common house
marae-āra	marae space proper
matauranga	knowledge, wisdom
maunga	mountain
mauri	life force
mere	short flat weapon, usually made of stone for hand to hand combat

GLOSSARY

aroha	love, affectionate regard, show approval for.
haka	dance; posturing.
hapu	section of a large tribe, secondary tribe.
hariru	<i>to shake hands.</i>
hongī	sharing of breath; salute by pressing the noses together.
hui	to meet; gathering.
kai	food; consume; eat.
kainga	home place.
kanohi	face.
karakia	religious chant, incantation, charm, spell.
karanga	call, summon, welcome.
kaumatua	elderly man or women.
kaupapa	basic idea; topic; plan.
kawa	ritual.
kete	flax basket.
kuia	elderly woman.
manawera	chant.
manuhiri	visitor; guest.
marae	enclosed space normally in front of a whar tipuna, common house.
marae-atea	marae space proper.
matauranga	knowledge; wisdom.
maunga	mountain .
mauri	life force.
mere	short flat weapon, usually made of stone for hand to hand combat.

ope tuarangi	number of people moving together, from afar, usually guests.
pae-tapu	beam at front of the marae.
papakaiinga	customary home-place.
Paptuanuku	'Earth-Mother'.
pounamu	nephrite.
rangatahi	young person.
Ranginui	'Sky Father'.
riwai	potato.
rohe	tribal boundary.
taonga	anything considered precious.
tatau pounamu	type of peace treaty.
tauparapara	type of incantation.
te reo	the Maori language.
teina	younger of siblings (same sex).
tipuna	ancestor.
tuakana	older of siblings (same sex).
turangawaewae	'a place to stand'.
waiata	song.
whaikorero	speech.
whakanoa	to make noa, free from tapu.
whakatauaki	proverb; saying.
wharekai	place for kai on marae.
wharetipuna	ancestral house.
whariki	mats.

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