

impeded accepted practices of dealing with an individual in processes of notification, compensation, and offering back the land. The process of public works takings assured the assimilation of customary usage into Crown grant land which accommodated further alienation to third parties should the land become surplus or when too much land was taken at the outset.

In the Turangi Report the Waitangi Tribunal has recommended that the Crown revamp the present Public Works Act, in particular so that effect be given to the principles of the Treaty of Waitangi.²⁷

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Maori Land in Maori Hands

Broadly speaking, the kaupapa of this note is Manawhenua. Specifically, Manawhenua in its traditional sense is examined and compared with the principles employed by the Native and Maori Land Courts that determined title and ownership to Maori land. Of the mechanisms that the Crown employed to alienate Maori land, the role of the Maori Land Court was perhaps one of the most significant.

Many grievances that are processed through the Waitangi Tribunal refer to cases that were decided by the Court, and it is acknowledged that the practices of the Maori Land Court contributed to the breakdown of traditional Maori society.¹

The latest piece of Maori land legislation, Te Ture Whenua Maori Act 1993, introduces a new era in the Crown relationship with Maori. It is suggested that the damage to Maori society has already been done and this latest statute will merely ensure that whatever land is left in Maori hands will remain so.

²⁷ *Supra* at note 20, at 382 and 383.

¹ Lyne, *Ownership and Control of Maori Land: Some lessons for South Africa* (1994).

Te Whenua: Maori Relationship to the Land

Whenua

With respect to land, it is the Maori belief that we, as humans, are descended from Papatuanuku - our earth mother. According to tradition, that is, according to whakapapa, te ira taangata (humankind) was created from the liaison between Papatuanuku and Ranginui - the sky father. Upon their separation, the night was traversed and the children of Rangi and Papa entered into Te Ao Marama - the world of enlightenment. Subsequently, one of these children, Tane-nui-a-Rangi, formed the te ira waahine (females) from the earth at kura waka. Her name was Hine-ahu-one, and together with Tane, the human genealogical descent line was initiated. It is said that all Maori can whakapapa back to this liaison.

As to the other forms of life - the fish, the trees, the stars, the insects, etc - these all descend from Tane's siblings, and indeed from previous liaisons of either Rangi or Papa. Together, they constitute the entire environment of which Maori view te ira taangata as but one related element.

This perspective of life led Maori to hold certain beliefs which dictated our relationship with the environment and which led to a distinct way of dealing with the land. It meant, for example, that Maori took what is now termed an "ecocentric" approach to caring for the natural world. This translates essentially as viewing the environment or ecology holistically, and not from an individualistic, anthropocentric perspective which characterises western (industrial) societies.

Iho Whenua

The word *whenua* refers to land. It also has another meaning, referring to the placenta or afterbirth of the human mother and child. Maori traditionally took the afterbirth and buried it in the land - preferably land of one's own whanau, hapu, or iwi. This process is called iho whenua or whenua ki te whenua. Afterwards a tree was planted which served as evidence in establishing territorial boundaries.

The use of the one word *whenua* to describe both the placenta and the earth is recognition of the essential life giving nature of Papatuanuku.

Turangawaewae

Complementing iho whenua is the concept of turangawaewae. Literally speaking, this means "a place for the legs to stand". Culturally speaking, however, turangawaewae refers to the ancestral land where one's whanau, hapu, or iwi maintain manawhenua. It is therefore a place where one belongs (not a place which belongs to one), and is where members of that whanau, hapu, or iwi have the right to speak and be heard on issues affecting the wider body. A famous illustration of this concept is the national marae established by Te Puea in

Ngaaruawaahia named Turangawaewae. The impetus behind this “unconventional” move was the extreme loss of land which Maori had experienced over the preceding years. Accordingly, Turangawaewae was intended to be a “standing place” for all Maori, not just Tainui, where they could gather and identify as tangata whenua of Aotearoa.²

The concept of turangawaewae was also a mark of identity. Living in a communal society, identity with a particular whanau or hapu was important to Maori for support and survival. Identity, however, came not so much from one’s individual exploits, as in the Pakeha world, but rather, from the land.

Taunaha Whenua / Tapatapa Whenua / Takahi Whenua

The general sentiment of Maori for the land is reflected in the association of the names of natural features with the memories of bygone years, the arrival of eponymous ancestors, the linkage with tribal fights, burial grounds of ancestors, and in the knowledge held by members of a hapu, of the landscape.

Ultimately, the importance of, and respect for one’s tribal or ancestral land was acknowledged by all Maori, and even led enemies to concede to the wishes of those they were about to put to death. Firth gives some examples:³

It happened on occasions that a prisoner, when about to be slain, asked to be conducted first to the border of his tribal lands that he might look upon them once again before death. This was sometimes done for him. Or he might ask that he should be allowed to drink of the waters of some stream which flowed through the borders of his home.

When Maori looked at the land they did not see an area of so many hectares which could be divided, subdivided, rented, leased, or sold. Instead, they saw certain resources which could be used to feed, house, clothe, and equip them, as well as the many places where births, lives, and deaths of their people had occurred. Appreciating this connection to the land helps one to understand more clearly the value put upon the system of ownership under which the land was held.

The land of the tribe was not only a source of economic wellbeing, but represented one of the realms of the various Maori deities. For each Maori it was also the burial ground of the placenta and bones of ancestors. Ancestral lands were therefore regarded with veneration and not merely as economic resources. The very identity of every Maori attached to the land, the loss of which brought about not only deprivation and disgrace, but spiritual anguish. Ultimately, the land provided Maori with a sense of identity, belonging, and continuity.

2 This is illustrated in the waiata *E noho e ata* which originally said, “E hoe to waka ki Ngaaruawaahia, Turangawaewae mo te Kingitanga”, but which was amended by Te Puea to end “... mo te Ao Katoa”.

3 Firth, *Economics of the New Zealand Maori* (1959) 372.

Manawhenua

There are two aspects to the concepts of manawhenua which should not be considered in isolation of each other. On the one hand, manawhenua represented the political authority possessed by a given group over a given piece of land, while on the other, it was the embodiment of a series of cultural concepts such as wairua, tapu, mauri, whakapapa, utu, muru, rahui, kaitiakitanga, and so on. In its political sense, manawhenua represented superior power (ringa kaha), while in the spiritual sense, it reflected the intimacy of association between Maori and the land. Here, manawhenua was the power that the land itself held. Together, each aspect provided the “physical” and “metaphysical” balance to manawhenua.

Manawhenua and Land Tenure

A possible definition of manawhenua (in its political sense) has been given as “traditional or customary authority or title over a particular area, usually defined by natural resources; and the rights of control of the usage of resources on the land, forests, rivers etc in question.”⁴ In a sense, this notion of manawhenua can be compared to what English refer to as “land tenure”; that is, the categorisation of productive resources into classes of property, each of which is subject to different forms of control and that in turn are defined by the unequivocal distribution of proprietary rights among members of that society or community.⁵

There may be no exact native equivalents for traditional Anglo-Saxon land tenure categories or any separate cultural concepts which parallel the western system.⁶ The similarities between land tenure and manawhenua are close enough to regard them in similar light. Perhaps the only major distinction that Lundsgaarde observes, is that the social and legal organisation which evolved among the native peoples of the Pacific precluded understanding land tenure as a *separate* element of each culture. Rather, land tenure in the Pacific was a multitude of reciprocal rights and duties that arose in relation to land.

Maori Land Tenure

It is important to realise that Maori did not view interests in land in terms of “ownership” as understood by English law. Rather, the land owned them and the chiefs merely exercised tino rangatiratanga or manawhenua over it. In determining who held manawhenua over ancestral land the Waitangi Tribunal has recognised that it is proper to use Maori determinants. At the top of this hierarchy

4 See glossary in Evison, *Te Wai Pounamu: The Greenstone Island* (1993); and Tau, et al, *Te Whakatau Kaupapa: the Ngai Tahu Resource Management Strategy for the Canterbury Region* (1990).

5 Lundsgaarde (ed), *Land Tenure in Oceania* (1974) 265.

6 Ibid.

of determinants is whakapapa, with inheritance (take tupuna) playing the principal role in determining land rights. In its 1987 Report on the Orakei Claim, the Waitangi Tribunal stated that customary land was a communal resource:⁷

All land was held tribally; there was no general right or private or individual ownership except the right of a Maori to occupy use or cultivate certain portions of the tribal lands subject to the paramount right of the tribe.

In accordance with the communal nature of Maori society, all users had to observe certain customs and rituals designed to protect and conserve the resource and its mauri. Traditionally, different aspects of mana could be held by different groups or individuals. More than one person might have mana over the same piece of land, with mana operating on different levels allowing particular individuals or whanau to utilise the land differently.

Take Tupuna

This was the preferred basis upon which to claim manawhenua and was increasingly valid, the older the connection was. Thus, to show the continuous occupation of one's people over generations with a link to a famous ancestor, put the ultimate seal to a claim to authority over the land (manawhenua).

Claims to land through this take operated on two levels: general and specific. First, a broad claim of descent could be made from the founding ancestor. Any proven link to that person was enough to create a basic right to membership of that group and therefore a right in the land. This group comprised the tangata whenua of any given rohe, and the land was their turangawaewae. Second was the right of individual whanau to a share in the land and its resources. The rights of individuals to utilise the land or access a resource existed only subsequent to the rights of their whanau (which in turn derived from the rights of the hapu and iwi).⁸ The process of allocation, therefore, was downward, from the iwi, to the hapu, to the whanau, to the individual.⁹ At the same time, a reciprocal process of obligation and loyalty operated from the bottom up.

7 Chief Judge Durie wrote: "There were at least two classes of land rights - the right of the community associated with the land, and the use rights of individuals and families. The land in an area belonged to the whole of the associated community." Cited in New Zealand Waitangi Tribunal, *Te Whanganui-a-Orotu Waitangi Tribunal Report* (1995).

8 In actual practice, such rights were allocated according to detailed examination and debate of various factors: for example, the respective mana of each whanau, the number of children, the extent of access to other food sources, the distance to be travelled to the resource, who of the whanau or hapu were living there at that particular time, were all factors taken into account.

9 It has been contended that individual rights should properly be seen as a subset of whanau rights. An individual's right to snare birds, cultivate land, trap eels etc was based on the whanau's need for access to the resource for sustenance. Individual rights were exercised on behalf of the whanau.

Through this philosophy of reciprocity, the hapu or iwi insured its solidarity in times of danger or need. Rights to the land were allocated for the benefit of the wider group and not for the personal benefit of individuals. Membership of the group and access to its rights had to be sustained by full participation in the mutual obligations. Herein lies one of the fundamental distinctions between the Maori and Pakeha land tenure systems.

Ahi Kaa

In order to assert manawhenua, the hapu or iwi claiming it had to show residence or occupation. This was expressed by the concept of ahi kaa (literally, burning fires) which was the means by which title to land was maintained in traditional Maori society. A claim to land had to be supported by continuous occupation or labour.

Ahi kaa nevertheless encompassed more than actual residence on a particular plot of land. The hunter and gatherer nature of Maori meant that each district would have its own recognised mahinga kai (food gathering places) which would constitute evidence of their occupation to support the primary whakapapa claim to the mana of the land. Most of the signs of occupation were associated with food one way or another. If those with manawhenua failed to return to the land, figuratively speaking, their fires would go cold (ahi mataotao).

Take Raupatu

This take was a claim to the mana over land taken by conquest and followed up by occupation. Warfare over land was common amongst Maori and, once the islands had become occupied by the original explorers, breakaway whanau and hapu, and iwi who wanted more land sought to obtain authority over the other's territory via conquest. The defeat of a group was not enough by itself to entitle the victor to the conquered soil. The defeat had to be total, involving the permanent loss of mana by the enemy.¹⁰ Additionally, it had to be accompanied by the permanent expulsion or extermination of the previous owners.

Take Tuku Whenua

Maori preferred to base their claim to manawhenua on ancestral rights, that is, through inheritance. This was in fact the usual method. Another common basis to claim manawhenua was through gifting of land, or tuku whenua. Land could be gifted in order to forge an alliance with another tribe, for assistance in battle, as

¹⁰ Annihilation of a people was not common: intermarriage between the survivors and the conquering groups occurred frequently. The common descendants gained an added right to the land, first through the original take tupuna and then through the victor's take raupatu.

compensation for a serious breach of tapu, as a condition of peace, or through marriage.

Implicit in every gift of land was the notion of mana. Upon gifting of land rights, the donee was obliged to reciprocate by, for example, setting aside produce for the donor or allowing a right of way. Through these (and other) acts, the donee acknowledged and upheld the donor's mana which, importantly, continued to extend over the gifted land. If for any reason the recipients could not fulfil their obligations or died without issue, the land would revert to the donor. This point is important and is emphasised here as a precursor to discussion of how the Land Court dealt with this take.

Only a person of sufficient mana (Rangatira and Kaitiaki) could gift land to another tribe.¹¹ Even then, the support of the hapu or iwi was required. Individuals alone could only transfer their existing rights within the whanau or hapu, and could not enlarge upon those rights and give away more than they themselves were entitled to. A right to occupy and use land was not a right to alienate it.

Ringa Kaha

Ringa kaha refers to the ability of an iwi or hapu to hold the land against enemies or invaders. This principle could be used either in defence of ones ahi kaa or in acquisition of another's land (where it would be termed raupatu).¹²

The Waitangi Tribunal has described ringa kaha as a process by which rights to use, occupy, and control the lands were established.¹³

No hapu could bind themselves to the land without take tupuna and they could not hold it without ringa kaha.

Pakeha Land Law: The Native/Maori Land Court

With the signing of the Treaty in 1840, the Crown and Maori entered into a new era of land purchase and sale. The system initially employed was eventually considered to be unsatisfactory as some Maori were selling land they did not own.¹⁴ There were continual disputes as to who had the right to alienate the land. Accordingly, a Native Land Court was established. Its task was twofold: to determine ownership of land prior to sale and to apportion land to individuals as opposed to the hapu or iwi as a whole.

11 New Zealand Waitangi Tribunal, *Ngawha Geothermal Resources Report* (1993).

12 See Hohepa, *Te Timatanga Mai, nga Kupu, me nga Tikanga Whenua (The Origins, the Terms and Maori Land Law Concepts)*, Lecture Note for Maori Land Law, Auckland University, 23 June 1994.

13 Supra at note 7, at 20. This suggests that take tupuna was the paramount consideration in determining a claim to land rights; that is, manawhenua.

14 New Zealand Waitangi Tribunal, *Orakei Report: Kaupapa Tuatahi* (1987).

The Native Land Court was the primary instrument for altering Maori land tenure. It made three major changes to the way Maori land was managed. First, it determined who had land interests according to its understanding of Maori custom. Second, it allocated the land to individuals of the hapu or iwi according to defined shares, controlling the subsequent devolution of interests by transfer or succession. Finally, it supervised the lands use, management and alienation.¹⁵

The Native Land Court was constituted by the Native Lands Act of 1865. Although this statute provided the Court's jurisdiction, its procedural operation was left largely to the Chief Judge (initially F D Fenton).¹⁶

Operating in a completely novel situation, the Court began to generate its own case law and body of precedent for its own guidance.¹⁷ Additionally, it had also to establish its own principles for determining how to reach its political and social objectives. Mostly derived from statutory instructions to determine "ownership" of Maori land in accordance to Maori "customs and usages",¹⁸ the judges recognised four principal take - take kite whenua, take tupuna, take tuku whenua, and take raupatu.¹⁹

It is difficult to determine exactly how widespread or clear cut these concepts actually were in traditional Maori society. There are two reasons for this uncertainty. First, the evidence given in the Court was arguably adapted by claimants to suit what they thought the Court wished to know, or simply to further their own objectives. Second, such customary law was liable to be squeezed into a British mould and cannot be regarded as a reliable guide to traditional Maori land customs.²⁰ This is supported by Smith, who admits that the widely accepted modern perception of Maori custom is to a great extent what has been filtered through the eurocentric preconceptions and political motives of the Native Land Court.²¹

An aggravating factor to this situation is a want of legal analysis and academic commentary on the decisions of the Court. This is due largely to the fact that these decisions were rarely reported; this led to the variations among judgments of the numerous, influential, and scattered Land Court judges.

15 New Zealand Waitangi Tribunal, *Taranaki Report* (1996).

16 Gilling, "The Queen's Sovereignty Must be Vindicated": The 1840 Rule in the Maori Land Court" (1994) 16 NZULR 136.

17 Gilling, "Engine of Destruction? An Introduction to the History of the Maori Land Court" (1994) 24 VWULR 115. Establishing a set of precedence alone proved to be nearly impossible with the isolation of Land Court Judges, the fact that no body of case law on Land Court decisions was published, and the plethora of Maori land legislation which prevented observers from ever being fully cognisant of the exact state of the law.

18 Native Lands Act 1865, ss 23 and 30.

19 Supra at note 17.

20 For further discussion see Layton, "Alienation Rights in Traditional Maori Society: A Reconsideration" (1984) 93 JPS 423, at 430.

21 Supra at note 16, at 136.

Take Raupatu and Ringa Kaha

The Court appeared to view take raupatu as the strongest of claims to manawhenua.²² However, as noted above, it was traditionally one's ancestral rights to the land (take tupuna, whakapapa) which constituted the strongest claim to manawhenua over any particular territory.

The Court's interpretation of take raupatu is indicative of its superficial understanding of Maori society which, not surprisingly, led it to make decisions which were inequitable to the Maori/Moriori claimants.²³ This logically questions the Land Court's capacity to unilaterally determine matters of Maori custom.

Take Tuku Whenua

The ingredients necessary to constitute a complete gift of land, as applied by the Native Land Courts, were little different in analysis from what appears to have been the situation under tikanga Maori.²⁴ The contrast between tikanga Maori and the reality of the Native Land Courts, however, was exemplified in *Wi Parata v The Bishop of Wellington*²⁵ where land was gifted to the church for a schoolhouse to be constructed and education provided for the youth of the tangata whenua. According to Maori land tenure, as the school was never built the land was to be returned to those who had gifted it. Notwithstanding these customary notions of tuku whenua, the Court held that the Bishop of Wellington continued to have good title to it.

Take Tupuna

Take tupuna, in Smith's view, involved a claim, by descent, from an ancestor whose right to the land was recognised. It did not matter how distant the relationship was.²⁶ In this, there again appears to be no distinction with tikanga. However, as shown above (take raupatu, ringa kaha) the Land Court generally did not prioritise claims based on take tupuna over those based on conquest. It seems that in their opinion, Maori land tenure operated under the philosophy that "might was right". Nevertheless, the true position under tikanga Maori was not so. The paramount consideration in determining manawhenua was take tupuna, which concords with the pre-eminent role of whakapapa in Maori society.

22 Supra at note 17, at 128.

23 Ibid, 129.

24 Smith, *Native Custom and Law Affecting Native Land* (1942).

25 (1877) 3 NZ Jur (NS) SC 72.

26 Supra at note 24, at 69.

Ahi Kaa

In contrast to the ability under Maori land tenure to maintain one's ahi kaa through traditional evidence of whakapapa and the use of resources alone, actual occupation of the land claimed, in the Court's view, took precedence.²⁷ Persons in possession were prima facie considered by the Native Land Court to be the owners.

The 1840 Rule

By applying the above principles, the Maori Land Court concluded that while it could recognise changes in land ownership through take tupuna and take tuku whenua, it would not recognise changes made by take raupatu after the imposition of British sovereignty in 1840.²⁸

Having found it absolutely necessary to fix some point of time at which the titles as far as this Court is concerned must be regarded as settled, we have decided that that point of time must be the establishment of the British government in 1840, and all persons who are proved to have been the actual owners or possessors of land at that time must be regarded as the owners or possessors of those lands

This guiding principle became known as the "1840 Rule".²⁹

In seeking to justify the Rule, Judge Norman Smith argued that it was necessary:³⁰

[F]irstly, because the Court required to have some commencing point and secondly, changes in the ownership of land brought about by subsequent conquests could not be permitted, as this would have provoked the continuation of tribal warfare which would have been against the interests of public safety and opposed to the forms of settled government. [Finally], there was to be considered the position of fugitives, and prisoners seeking sanctuary, and those who for example [sic] sake, were exiled from communities because of plural marriages which were not consonant with Christian ethics.

Criticism may be directed at the 1840 Rule if one considers the lack of authority for its creation and application. In *Puhi Maihi v Alexander Herbert Mackay*, Edwards J stated:³¹

The Native Land Court and the Native Appellate Court are statutory Courts owing their existence and their powers wholly to the statutes creating them, and ... they have no powers save those given them by statute.

27 Supra at note 17, at 129. See the comments of Chief Judge Seth Smith.

28 The Oakura Judgment [1866] AJHR A13.

29 Supra at note 16, at 137. The Maori Appellate Court has stated its understanding of the 1840 Rule to be: "simply land could not be acquired post Treaty by conquest or take raupatu but the other incidences of title change remained intact."

30 Ibid, 146-147.

31 (1914) 33 NZLR 883, 892 and 893.

What then of any statutory authority for the “1840 Rule”?

*The “Ten Only” Rule*³²

The “ten only” rule required that blocks of land of 5,000 acres or less be vested into no more than 10 people, whose names would appear on a “certificate of title”. These ten were then, in law, absolute owners and no trust relationship existed. Unnamed tribal members were simply dispossessed of their land with no recompense except at the benevolent discretion of the ten named owners.

The implication of the “ten only” rule was that upon the initiative of one unsuspecting or unscrupulous person, tribal manawhenua could be extinguished (in the eyes of the law at least) without tribal consent. This was possible as any Maori individual could, under the 1865 Act, request an investigation of the title to a particular block of Maori land without the agreement - or even a majority consent - of his or her hapu or iwi. The Court was then able to order a certificate to the land specifying the ten named “owners” of the land. Again, this process contrasted starkly with traditional rights and obligations of hapu and whanau members’ precepts of manawhenua.

Te Ture Whenua Maori Act 1993

The 1993 Act is the first major piece of legislation affecting Maori land in forty years. Perhaps the most fundamental difference between this latest Act and its predecessors is the focus on retention of Maori land and not its alienation. Te Ture Whenua Maori Act was enacted to implement a kaupapa which recognises that land is a taonga tuku iho of special significance to Maori people and that owners of Maori freehold land (multiple owned land held under the Act) retain it for future generations. In this respect, the 1993 Act shows a major turn around in Crown philosophy over Maori land. It may, however, be no more than reflective of today’s context in which colonisation has already achieved its primary goals leaving Maori virtually landless.

Conclusion

Having briefly examined some of the principal aspects of tikanga Maori as it related to land tenure and having compared that to certain fundamental characteristics of the imported Pakeha feudal land tenure system, it is possible to comment on the role of the Native and Maori Land Courts. The Maori Land Court can be considered as one of the most influential mechanisms employed by the Crown in achieving the objectives of colonisation. Having been established to

32 Native Lands Act 1865, s 23.