THE MAORI LAND COURT – A SEPARATE LEGAL SYSTEM?

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I INTRODUCTION

In these comments I will describe the extent to which the Maori Land Court has (or has not) become a separate legal system as well as raising some issues in that regard for the future. This is about whether there is or was a discernible different Maori system of law and whether it continues to have life. I chose this as a topic because it is, I think, inherently interesting as a concept as well as being controversial. The topic also raises some serious practical and "hard law" issues which no doubt will need to be grappled with by Maori and the legislators in the not too distant future.

II THE COURT – A BRIEF HISTORY

Histories of the Native Land Court have been written by Richard Boast and others[1] and David Williams.[2] It has been the subject of extensive discussion by the Waitangi Tribunal both in reports,[3] and in the Rangahaua Whanui series.[4] (Brookers, Wellington, 1992) Chapters 3 and 4.

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* Chief Judge Maori Land Court. This address was given to the Faculty of Law and the New Zealand Centre for Public Law, Victoria University of Wellington, 10 July 2001.

1 Richard Boast, Andrew Erueti, Doug McPhail, and Norman Smith *Maori Land Law* (Butterworths, Wellington, 1999).

2 David Williams *Te Kooti Tango Whenua: The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999).

3 See generally Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: Wai 9* (Brookers, Wellington, 1987) Chapters 4 and 5; and Waitangi Tribunal *The Te Roroa Report 1992: Wai 38* (Brookers, Wellington, 1992) Chapters 3 and 4.

4 Tom Bennion *The Maori Land Court and Land Boards, 1909 to 1952* (Waitangi Tribunal, Wellington, 1997).

I do not propose to repeat what is to be found there. Suffice it to say for the decade or two following the enactment of the first implemented Native Land Act of 1865, the task of the Court as directed in the Act was to assimilate native title into an individualised form of English tenure and thereby to facilitate rapid transfer of land out of Maori hands into Crown and settler hands.

Thus the Court facilitated the introduction of English law or as James Belich would describe it "tight empire" as opposed to the virtual sovereignty which pre-dated the arrival of the Land Court into any particular district.[5]Far from being a separate legal system, the original intention of the Native Land Court was to be a conduit through which the pre-existing separate legal system known as tikanga Maori could be assimilated into the imported system of English law. I note that tikanga Maori lasted in practical operative form at least till the end of the 19th century and in some areas beyond.

Thus while the Court was instructed by the Native Land Act 1865 to ascertain as accurately as possible those entitled to lands in accordance with Native Custom – or tikanga Maori – the purpose of such ascertainment was to freeze those entitlements and then to destroy them by converting them into individualised interests held in fee as against the Crown.[6] Far from being a separate system of law, the Native Land Court was one of the key means by which the separate system of law which then existed could be destroyed.

How did the Court treat tikanga Maori as a jurisprudential issue? Much has also been written about that issue.[7] The orthodoxy today is that the reduction of extraordinarily complicated tikanga whenua or customs in relation to land to four

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[5] James Belich *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Penguin Press, Auckland, 1996) 249, 259.

[6] Native Land Act 1865, Preamble and s 13.

[7] See for example Richard Boast, Andrew Erueti, Doug McPhail, and Norman Smith *Maori Land Law* (Butterworths, Wellington, 1999); David Williams *Te Kooti Tango Whenua: The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999); Norman Smith *Maori Land Law* (Reed, Wellington, 1960); Peter Spiller, Jeremy Finn, and Richard Boast *New Zealand Legal History* (Brookers, Wellington, 1995); and New Zealand Law Commission *Maori Custom and Values in New Zealand Law* (New Zealand Law Commission SP 9, Wellington, 2001).

sources of title – take raupatu, take tupuna, take taunaha, and take tuku – vastly over simplified matters. The Waitangi Tribunal recently said for example:[8]

> But the Court was not an adequate agency for the task [of resolving inter-tribal conflict in respect of ownership]. Its terms of reference were too narrow, its rules were too simplistic, and it elevated conquest to an uncustomary degree at the expense of ancestral right holders.

The Tribunal cut to the heart of the matter in this way:[9]

> The creation of the court was itself contrary to the Treaty principle to respect the rangatiratanga of the Maori people. An aspect of rangatiratanga was that, to the extent practicable, Maori would control their own affairs. That must have included the development of their own institutions to resolve disputes between tribes. We have seen how runanga were developed to handle disputes within the tribes, and how the Native Lands Act 1862 envisaged a panel of chiefs to resolve land rights disputes between tribes. Both envisaged a form of court under Maori control for the resolution of Maori disputes.
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> We have also seen, however, that Chief Judge Fenton drafted a new Act – the Native Lands Act 1865 – that would vest control of Maori dispute resolution in pakeha judges. This change, which was implemented by the Crown, was contrary to Treaty Principles in our view.

The Court sought to create, out of the complexities of tikanga Maori, a system which was simple to discern and cognisable to the English mind. Thus, the existence of complex and overlapping usage rights across a large area of land and sea was laundered out of tikanga in the transformation process whose end point would be straight line and undifferentiated individual undivided interests within the boundaries. Take raupatu – or right by conquest – came to take on pre-eminent importance when, as the Tribunal in the Moriori claim has indicated right by raupatu was a weak form of right. The pre-eminent right according to

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8 Waitangi Tribunal *A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands: Wai 64* (Legislation Direct, Wellington, 2001) 144.

9 Waitangi Tribunal *A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands: Wai 64* (Legislation Direct, Wellington, 2001) 144.

tikanga Maori was and remains take tupuna or ancestral right. Similarly, take tuku – often wrongly translated as right by gift – was treated by the judges as a complete transfer without condition or strings attached. Tuku was in fact an extremely complex system by which, through land transfer, relations between transferor and transferee remained and were maintained.[10] Literally a system of conditional incorporation into the host.

All take had, by tikanga Maori, to be consummated by ahikaroa – or as it is loosely translated into English – occupation. The rule developed by the Native Land Court judges was that absence from the land for three generations extinguished title. There was of course no such rule in tikanga Maori. However, the three-generation rule was easier to apply than the more sophisticated analysis of the maintenance of connection with land which tikanga Maori would have required.

Thus, the Maori Land Court simplified tikanga, froze entitlements pursuant to them and then removed them altogether.

By the 1960s, it was assumed orthodoxy that the Maori Land Court would eventually complete its task of assimilating Maori land administration systems into the mainstream whether by way of alienation or by europeanisation of the law which governed Maori land administration. The assimilation of Maori into the civil mainstream would be complete. The Court's purpose would have been achieved and it could itself be abolished. It would reflect a broader social, cultural, and even biological assimilation of Maori into the Pakeha majority.

Today, although the races are much closer together than in 1865, the assimilation never happened. In fact, it is my instinct that the reverse is happening.

III WHAT COULD HAVE BEEN?

The result was inevitable enough. The rapid transfer of the remaining areas of Maori land in the North Island into settler hands – usually but not always via the Crown.

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10 See generally the discussion on tuku in the Waitangi Tribunal *Muriwhenua Land Report: Wai 45* (GP Publications, Wellington, 1997) Chapter 3.

The second effect might not have been so predictable at the time. The Maori population began to turn a corner at the end of the century. By the time of the Royal Commission into the Maori Land Court in 1980, the problem of squeezing more and more owners onto less and less land had reached crisis point.[11] The report of the Royal Commission cites the example of the 13 owners succeeding equally to shares valued at 49 cents. The report indicates that this example was not an isolated example. The problem was caused by the decision of Chief Judge Fenton in Ihaka Takanini's case.[12] This decision emphasised the individual right of the successor and the absence of any obligation of the successor to the wider kin group. The successor took as absolute owner equally with his or her siblings not as trustee on behalf of the kin group as tikanga would have had it. This would have been bad law under a system which emphasised the rights of whanau and hapu over the interests of individuals. Once the 10 owner rule was abolished in 1873, the principle in Takanini's case was a recipe for massive fragmentation.[13]

What would have happened if the kaupapa of the Native Land Court from its inception had been then, as it is today under the Ture Whenua Maori Act 1993? For example, the preamble to the Act provides:

> ...And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau and their hapu: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles ... .

In short, what if the policy driving the Court then had been the retention of land in Maori ownership, the retention of communally based ownership, and the

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11 New Zealand Royal Commission of Inquiry "The Maori Land Courts" [1980] IV H 3.

12 F D Fenton *Important Judgments delivered in the Compensation Court and Native Land Court* (1879) *Papakura – Claim of Succession* (1867) 19-20.

13 Native Land Act 1873.

utilisation of land for the benefit of the kin group associated with it? No doubt things would have been different.

Had that happened, the law would have been focused not on land transactions, as it had been right up until 1993, but on principles for land and asset administration by hapu and occasionally iwi.

The second point is the nature of the injunction in the preamble to the 1993 Act, that tikanga Maori would have had a very significant role to play in the principles that applied to that land and asset administration. More so, if along with having an Act whose framework was consistency with Maori Custom, there was also a judiciary familiar with tikanga Maori and confident in its application.

In the early days assessors sat with judges. Although there were two assessors to each judge, they could not out vote the judge. If, however, the judicial officer were to be supplemented with representative experts from the district or region who could out vote him or her, it is even more likely that tikanga would be reflected in the body of law developed by such a Court. The law would have become a mix of principles of equity relevant to trustees of the Maori race administering assets in an executive role for the benefit of their kin communities, along with an element of public law relating to determining rights to membership of the kin group, and to government like functions being exercised by the leadership of that group.[14] And, as I have noted, there would inevitably be a strong element of tikanga Maori about which more is said below.

The principles of law would need to have dealt with the following topics:

(1) Rights of membership and participation in the kin group;

(2) Selection of leaders for asset administration purposes;

(3) The obligations of leaders to the kin group in the administration of the tribal asset;

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[14] Remember the kin groups were and still are real communities identifiable on the ground, rather than the virtual shareholder communities which are the usual model in orthodox western capitalist economies. It is inevitable therefore, for the asset managers to be expected to exercise and to expect to exercise certain functions normally associated with public authorities at a localised level: provision of roading, housing, community facilities and the like.

(1) The obligations of kin group members to the asset, the leadership and to the kin group;

(2) Processes for decision making by leaders and, where applicable, the kin group community in respect of the assets and other public functions carried out by or on behalf of the kin groups;

(3) Ascertainment and maintenance of title in accordance with tikanga; and

(4) The recording of actions and transactions affecting title.

For the 130 years before 1993, the Court's work focused on (6) and (7).

IV THE MAORI LAND COURT TODAY

Some of these elements are present today in Maori Land Court jurisprudence but they are, officially at least, the exception not the rule. In particular:

- Trust principles
- Decision making processes and notice to hapu members
- Rules of succession in respect of whangai

The problem is that to the extent that tikanga are able to apply at all, they apply only in the interstices of statutory directives by and large reflective of the 130-year heritage of assimilation into English law concepts. There are relatively few examples where the statute permits or encourages the application of tikanga in any pure form.[15]

The Maori Land Court has not been a separate legal system but a fully assimilated one. The assimilation has been a disaster.

My practical experience over the past 18 months has been somewhat different. The reality in my experience is that people who are kin group members appearing before the Court do not by and large take much notice of the enforced assimilation of the statute. They come to Court, if they are in conflict, armed with

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[15] See for example, Te Ture Whenua Maori Act 1993 (Maori Land Act 1993), s 115 relating to the rights of whangai; s 30 in relation to mandate and representation; and Treaty of Waitangi Act 1975, s 6A in respect of Tribal boundaries.

the tikanga based arguments which support their position. Trustees are appointed to administer lands not for their skills, but for their seniority within the leading families. The view of kaumatua will take priority whatever the shareholding of those individuals, and sometimes whether or not those individuals own shares at all. Whatever the strict legal rights of beneficial owners as tenants in common of undivided interests in Maori freehold land, the imperatives facing the wider kin group will often prevail in a manner directly contrary to ordinary rules of beneficial entitlement according to good principles of equity. The will of non-owners will sometimes prevail. Judges will always find a way to defer to tikanga unless the statute and the tikanga are in direct conflict and even then there is often room for creativity, and sometimes that option is taken up. But it all occurs informally. Almost secretly.

V WHAT TIKANGA?

Back to our hypothetical case. What tikanga might have applied?

Let us deal with the how first. Tikanga is law by custom and tradition. Its culture is not that of precedent. It is law of kin communities by kin communities. Accordingly, to codify tikanga would be to kill it. It is the underlying values which are important not necessarily consistency of application come what may. Similarly, tikanga divined by a judge who is not a member of the kin group and handed down from on high to them would be the antithesis of tikanga. It would have been important that legal expertise in the western sense be joined in partnership by expertise in tikanga from the applicable district or region.

Which tikanga? That is a more difficult question and it is not the place of this lecture to attempt to deal comprehensively with what body of tikanga ought to have applied to Maori asset administration in the 19th and 20th centuries. In other writing I have identified five tikanga which I say provide the underlying value system for tikanga Maori generally.[16] They are:

(1) Whanaungatanga – the centrality of relationships and in particular kin relationships to tikanga.

(2) Mana – the values associated with leadership.

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16 Joseph Williams "He aha te tikanga Maori" (Paper presented to the New Zealand Law Commission, Wellington, 1996).

(1) Kaitiakitanga – the obligation of stewardship.

(2) Utu – the value of balance and reciprocity.

(3) Tapu – the spiritual value in all things.

These are of course big ideas. Rather like freedom of expression and freedom of association. How might they have applied practically in Maori asset administration? One example might be found in mana. Understanding the nature of mana is to understand what tikanga would say are the limitations on the prerogative of leadership. This can be expressed in whakatauki or traditional sayings. For example:

Ko te kai a te rangatira he korero.

Literally this means that the food of chiefs is speech making. In substance the saying means that the work of leadership is persuasion. This underscores the fact that executive power according to tikanga Maori has traditionally been and remains very limited. Mandate requires continual consultation and within consultation continual persuasion.

Similarly whanaungatanga. This underscores the obligation one owes to one's kin as an overriding obligation. Because the lifeblood of whanaungatanga is whakapapa or genealogy and because genealogy is such a flexible tool, it would have been extremely difficult to exclude individuals from hapu or iwi membership and it would have been even more difficult to drive lines of division between hapu or between iwi. The ethic of whanaungatanga is inclusion and among the included, practical obligation. In my view, these concepts would have supplemented and ultimately overtaken the more limited equity concepts of trust and fiduciary responsibility. They would have spoken to the communities for which the jurisprudence would have developed in an appropriately rhetorical way for the community to "buy in" to its values. More importantly, they are ethics or values capable of simple practical application to everyday situations faced by kin groups numbering in the hundreds or even thousands seeking to administer their wealth for the benefit of the whole.

VI A SECOND CHANCE?

Why raise these issues? Put simply they are no longer historical hypotheticals or interesting academic issues at all.

Since the 1990s, successive governments have had a policy of settling Treaty grievances by calling on a pool of publicly owned cash or other assets for the purpose. There is a new kin-owned asset being created to replace (in small part at least) that which was lost following the policy underpinning the creation of the Native Land Court itself. The assets are untrammelled by the problems of individualised title and by a Court whose statutory mandate was to be *parens patriae*. Not all of the returned assets are land. Some are cash. Some may be fish quota with shares in larger companies yet the principles and the issues for management or administration will be similar.

There will inevitably be disagreements and areas of uncertainty, notably:

- Issues as to entitlement to benefit which are reflected in the fisheries litigation;
- Issues as to decision making processes and rights of participation by the membership in those processes (see the extensive litigation in the Tribunal and the High Court in relation to land claim settlements);
- Issues as to the nature of the obligations of the tribal leadership to its people in respect of asset administration and benefit distribution; and
- Issues as to the nature of benefit itself (see again the fisheries litigation).

These disputes would arise whatever the race or indeed races of the beneficiaries.

What law should apply? Whose law should apply? I note how similar the issues identified above are to the ones which were relevant in 1865.

As currently situated, there is effectively no law covering these matters. There is no specially designed process and no specially appointed adjudicator. In my view there is a significant lacuna in the law as a result.

The picture I painted of the Court supplemented by strong community representation and applying a mix of equity, public and Maori custom law to the extent that each of them remains relevant to the circumstances of Maori kin groups in the 21st century, is the vision which must be worked to. Not to ram tikanga Maori down unwilling Maori throats but first because if tikanga Maori has no place in disputes between Maori, there can be little justification for it elsewhere in the law; and second because my experience in the Maori Land Court has taught me that Maori want it. As, I suspect may be equally obvious, it is a logical extension of the Maori Land Court's role to adapt to meet that perceived need. That is because the Court already deals with a number of these sorts of dispute in relation to land in its current workload.

It seems to me therefore that there is a real argument for a new form of Maori Land Court – a judge sitting with two or more pukenga or experts – adjudicating, facilitating, and mediating through issues confronting the new tribal organisations in respect of the new tribal asset. What is genuinely exciting is that the Court would be applying and developing a separate system of law – a system which is a mix of those aspects of tikanga Maori which continue to inform the lives of Maori today and those principles of the common law which have stood the test of time. A system which, as the Treaty directed, draws on the best of both worlds.