

## SMITH'S GENERAL PRINCIPLES OF MAORI LAND TENURE

### 7.1 Introductory Notes

This section reviews the important work by Norman Smith, titled *Native Custom and Law Affecting Native Land*.<sup>1</sup> Smith acted as judge of the Maori Land Court and brought his considerable experience to the task of collecting the 'facts', and discussing the way that the court interpreted Maori land tenure. Smith's exposition displayed quite a sophisticated, albeit limited, understanding of Maori land tenure and it is worth considering in full.

Following Smith, this section will suggest that although certain principles of Maori land tenure can be revealed, and these principles are widely recognised today, they need to be treated with care as they are in part the product of a historical process. Indeed, Smith explained that the Maori Land Court both interpreted and codified Maori land tenure. Smith believed that this process of interpretation derived from the court's need both to rule on what were complex and contested systems of tenure, and to facilitate the individualisation of title.

This section will therefore look at what Smith understood the court's interpretations or misinterpretations to have been. Of specific concern is the following question: did the court have an accurate understanding of what constituted Maori land tenure and did its operation reflect this understanding? With a degree of caution it will be suggested that this question should be approached in two places:

- (a) the court's understanding and interpretation of evidence which was presented in court sittings and was meant primarily to establish what 'general group', or in particular circumstances what 'general groups' owned the land under investigation;<sup>2</sup> and
- (b) the subsequent award by the court of 'relative interests' in land.

Smith appeared to have believed that the court took a radical departure from Maori custom only in the latter of the two areas. That is, Smith's comments suggest that the court had a good understanding of the 'rules' of Maori land tenure, but that it departed from Maori custom when freehold or individual title was actually awarded. How accurate Smith was in this respect will be discussed in subsequent sections.

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1. Norman Smith, *Native Custom and Law Affecting Maori Land*, Wellington, 1942

2. The term 'group' is used to cover sometimes problematic distinctions between whanau, hapu, and iwi.

## 7.2 The Crown's Engagement with Customary Tenure

It must be noted, however, that Smith's analysis remained uncritical and strongly Anglocentric. Broadly speaking, Smith saw Maori tenure as being of a lesser nature when compared to English tenure, and supported the moral imperative of the court to act as an instrument of civilisation. In this respect, Smith glossed over injustices that the court may have perpetrated, suggesting that they were an unfortunate aspect of an otherwise worthwhile process. For example, Smith acknowledged that Maori 'are not now rich in landed property when one compares their possessions today with those of years ago', and that the operation of the Maori land laws 'are largely responsible for this'.<sup>3</sup> But, for Smith:

a close study of those laws from the time New Zealand became part of the Empire appears to reveal the underlying principle that the interests of the Natives were to be given adequate protection.<sup>4</sup>

Moreover, Smith blamed the failure of Crown's good intentions on the:

complexities of Native tenure of land, based as it was and is on complicated customs, [that] conspired to render the efforts of the Legislature somewhat nugatory, and to force it to seek remedies for the ills, which practical application of its measures had revealed, by the introduction of further legislation which in many cases only aggravated the evil it was intended to remove or prevent.<sup>5</sup>

This argument is deeply flawed.

Where possible, therefore, this section shall offer an exposition of, and critically reflect upon, Smith's comments. Much of the criticism will be covered in subsequent sections, though. Subsidiary questions such as the court's treatment of evidence shall also be mentioned. This section will conclude with a summary of Smith's discussion and suggest certain problems and insights. It will lead into the following section, a discussion of pre-Maori Land Court writing by Pakeha about Maori land tenure.

## 7.2 The Question of Interpretation and Codification

Smith believed that Maori land tenure had not been a uniform system. He also believed that the operation of the Maori Land Court had itself affected the state of Maori tenure, and that in its earliest years the court had been known to make conflicting rulings:

Notwithstanding the fact that the custom in relation to claims for *papatipu* land has become codified to a very great extent by the judgements of the Native Land Court, . . . it is nevertheless somewhat difficult to elaborate the rules governing that question in the same manner and to the same extent to which it has been done with respect to

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3. Smith (1942) pp 24–25

4. Ibid, pp 24–25

5. Ibid, p 25

European law. As the customs amongst European nations varied in different communities and localities, so it was with the ancient Maori people. It is also found that what may be termed generally recognised customs, more or less common to all tribes in New Zealand, were subject to gradual changes brought about principally by the influence of conditions and demands of advancing civilization and pakeha ideas. For those reasons, if for no other, the earliest Courts experienced considerable difficulty in ascertaining in particular cases what the ruling customs really were, and this difficulty has doubtless been responsible for an apparent, if not altogether a real conflict in some of the earlier judgements of the Native Land Court.<sup>6</sup>

As will be detailed later, Smith's comments appear to be accurate. Smith also conceded that:

On occasions the customs as so defined and laid down by the Courts differed in some respects from the actual custom practiced by the Maoris prior to the coming of the law.

Here Smith believed that the court acted as best as it could, and with an eye to 'equity and good conscience'. This is also a point that we will return to:

It can be said, however, that much of the original custom remained with a grafting upon it of such subsidiaries as were necessary to *meet the equities of each case* as well as the demands of a changing society. Where a custom was uncertain or appeared to be inapplicable then the Court had to make modifications to fit as nearly as the basic custom would permit, consistent of course with Maori idea and *the dictates of equity and good conscience*. For instance individual ownership as we know it was practically unknown to the Maori, and his land customs certainly made no provision for the allocation of aliquot shares to the owners of tribal lands, nor *a fortiori*, laid down any definite principle upon which such an allocation might be based. [Emphasis added.]<sup>7</sup>

Unfortunately though, Smith's recognition of the 'the influence of conditions and demands of advancing civilization and pakeha ideas', is not fully explored by him. With the exception of questions of succession (a question that is not discussed in this report), and the apportionment of 'relative interests', we are given little indication as to what these conditions and demands were in respect to customary tenure.<sup>8</sup> Nor are we given many examples of how customary tenure was modified by them.

Nonetheless, Smith argued that most of the court's inconsistent decisions had disappeared by 1895, when 'the rules of Native custom, with proper regard to any exceptions prevalent in different parts of the country became more or less clearly defined.'<sup>9</sup> This statement can, perhaps, serve as testimony to the effectiveness of the court in creating coherence where there allegedly was none.

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6. Ibid, pp 47–48

7. Ibid, p 48

8. Ibid, p 64; ch iv

9. Ibid, p 48

### 7.3 The 'Four Main Take' and the Question of Occupation

As noted immediately above, Smith believed that over time the operation of the Maori Land Court had itself affected the state of Maori tenure. However, Smith felt that a certain cohesion did exist in Maori land tenure. He believed that certain principles or structures could be perceived, and that these principles would apply across different tribal regions. Smith summarised these principles as follows:

It is . . . possible to indicate clearly, the types and nature of the rights upon which the Natives relied, and still rely, in establishing their claims to *papatipu* land. These rights or *take* are, and always have been subject, if proved, to the further proof that they have been accompanied and strengthened by actual use and possession, generally called occupation, or the exercise of some acts or acts indicative of ownership in order that the claims made might be deemed well grounded and effectual. It would, however, be going too far to say that a claimant must be able to show continued and uninterrupted physical possession by himself and his ancestors though if he could do so his claim became much stronger. It would be sufficient if he could prove that he had *kept his fires burning on the land*, that is, protected his rights, by the exercise of some periodical or regular act of [use] consistent with ownership such as fishing, hunting, bird snaring, cultivation and so on, in addition of course to his ever readiness to safeguard it against intruders.<sup>10</sup>

The principle rights or 'take' were the following:

- discovery (such as when the first canoes arrived);
- ancestry or 'take tupuna';
- conquest or 'take raupatu'; and
- gift or 'take tuku'.

The situation as Smith saw it, therefore, was that Maori land tenure had a dual nature: rights to land were based upon certain 'take' or principles, which in turn were reinforced by possession or occupation. Occupation was, for Smith, 'the necessary ingredient, common to all *take*'.<sup>11</sup> However, Smith does not always draw a clear distinction between 'owning land' and 'owning rights in land'. This distinction is important. Briefly, under customary systems of land tenure Maori did not exercise absolute or exclusive forms of individual ownership. Rather Maori individuals or groups held different rights over land. Thus, the English term 'ownership', when applied to land, does not accurately describe Maori land tenure and should be treated with caution.

Smith's discussion of occupation will now be reviewed. It is important to note that Smith makes frequent reference to judgements made by the court, especially during the 1890s, and that his discussion should therefore give us a fair representation of the court's understanding of Maori tenure at around 1940.<sup>12</sup> His discussion,

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10. Ibid, pp 48–49

11. Ibid, p 49

12. This observation may be of some use for a study of the role of the Maori Land Court in the twentieth century.

though, may not accurately reflect the court's understanding in, say, its first decade of operation.

Firstly, Smith argued that:

Occupation was necessarily a question of degree which varied in different cases governed by changed circumstances, and the extent of the occupation necessary to support the right was a matter which the Court had to decide according to the particular case and without the assistance of any fixed rules.<sup>13</sup>

The Maori Land Court therefore 'laid down certain guiding principles of a general nature'.<sup>14</sup> For Smith, from these principles:

appear to emerge the following gradations on the scale by which the testimony put forward in support of occupation might be weighed and the importance of such occupation measured.<sup>15</sup>

The different levels of occupation are as follows:

- (a) Those who show complete and continuous occupation, for example, occupation commenced before 1840, and extending up to the time of investigation of title. Where the occupation is by virtue of ancestry it is usual to require that constructive possession was held for at least three generations. Where the occupation arises out of conquest it must be shown that the conquerors seized the land and reduced it into possession and retained it following, and by reason of, such conquest. Where the occupation is claimed under a gift, unbroken occupation by the various generations from the time of the gift should be shown.<sup>16</sup>
- (b) Those who have never personally occupied but whose near antecedents had undisputed occupation or whose rights have been kept in existence by relatives.
- (c) Those who have occupied at some former period but are not in present occupation.
- (d) Those who are in occupation by right of ancestry but whose permanent occupation is recent in its origin.

Rather than being exclusive or hierarchical principles, where persons claiming under one rule would exclude persons claiming under another, 'all four rules should, where applicable, be utilised'. Smith's understanding on this question is supported by other material.<sup>17</sup> But how the court actually used these principles in cases where it was required to decide between competing claims is difficult to assess. It could be suggested that Smith was too sanguine, and that the court would

13. Smith (1942) p 50

14. Smith quoted at length from two judgements: Chief Judge Seth-Smith, 1891, chief judge's minute book, vol 2, p 71 – Omahu block; and Judges Mackay and Scannell, 1892, chief judge's minute book, Wellington district – Mangaohane block.

15. Ibid, pp 53–54

16. Ibid, p 54

17. As is discussed through section 2 and 3 below, rights to land could be made through a number of 'take' and how each particular set of rights were worked out could vary from case to case.

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have preferred some rules over others (probably descending in order of priority from (a) to (c)). Moreover, Smith's rules of occupation do not include the common practice of including important rangatira on a title for aroha, regardless of the occupation of that land by that person.

It should also be noted that Smith emphasised the rights to land that were made through labour. This is a particularly English perception and may ignore various 'culturally-based' aspects of Maori land tenure.<sup>18</sup> Smith cited Judge Mackay:

All the authorities agree on the main point and conclude that occupancy or appropriation by labour is the only primary foundation of the individual right to landed property. An important question, however, arises of what must the labour be, should it be actual labour, in other words, must the occupation be permanent or will it suffice to be only transient.<sup>19</sup>

Nonetheless, Mackay also recognised the strength of tribal or communal rights and made the point that while Maori retained individual rights these rights were subject to tribal rights. Mackay concluded that Maori did not have a conception of 'freehold' tenure as such:

Individuals, by cultivating or erecting houses or appropriating portions of the tribal estate acquired an absolute right to the occupation and usufruct of such land as against any other individuals of their own tribe, but that was all, the portion so dealt with still remained tribal land subject to such right, but it is clear that such a thing as individual ownership of land was never in contemplation of the Native mind, and therefore there could never have been any 'usage' or 'custom' amongst them for regulating the reduction of a title a tenure of which they had no conception.

Commonly, the disposal of individual rights was particularly constrained. Individuals could dispose of their use rights within their whanau, and perhaps more widely, without other individuals necessarily becoming involved. But in the case of marriages or gifting between wider groups, entire hapu or iwi had to be consulted and certain high-ranking chiefs may have held a right to veto such actions. That this differentiation is not fully recognised by Smith will be discussed later.

For Smith, a straightforward distinction was made between 'permanent' (cultivations and kainga) and 'transient' ('waste' or uncultivated lands) areas of occupation. This distinction was based on both a difference in the kind of labour employed on the land, and the degree to which individual rights over the land were maintained:

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18. See Salmond (1991) for a discussion of a range of cultural principles. For example, Salmond lists the following: 'the unity of all phenomenal life through genealogical connection; the complementarity of male and female; the principle of primogeniture; all of which can yet be overcome by a fourth principle of competitive striving, expressed in a language of war', p 346 (1991). A number of other works could also be consulted. For example King (1989; 1992), Metge (1967). This is an area that should be further investigated, though.

19. Smith (1942) p 54. Judge Mackay, while cited at length, is not referenced.

Cultivations and *kainga* were, as the words import, those areas of tribal land that were more closely settled and constituted the places where the Maoris actually resided, either permanently or casually, and grew their crops. In those cases the expenditure of labour on the land was the necessary accompaniment of the occupation. The labour and the occupation were mutually inclusive and proof of the one usually bore out the other.

The waste lands were those more outlying areas not ordinarily used for cultivations or for residence, and where the Maoris hunted, fished, snared birds, dug fern root and so on for the purpose of food supplies and other necessities of life, many of which places were by solemn ceremony created *rahui* (reserves). Such places were rarely occupied to any great extent in the permanent physical sense for the principal reasons that the occupant could not be defended from attack, and that continued occupation would disturb the birds and other game. As the erection and care of devices for the catching of fish, birds and rats, however, involved the expenditure of some labour, such labour, coupled with the regular visits which hunting expeditions involved were sufficient, if proved, to denote occupation in the sense that there was an appropriation and use of the land by the relative tribe or *hapu*.

Thus, for Smith, rights under Maori land tenure were not restricted to land held in 'permanent' occupation, but could be held in the larger 'uninhabited' area of land. A further complication could occur, though. Smith may have overlooked the fact that use rights could overlap, and that individuals may, for example, have exercised rights on the recognised territory of hapu other than their own. This gave an added complexity to Maori land tenure, a complexity that the court did not readily identify.

Smith did, however, understand that different kinds of usage may exist in a given block of land and these rights may be both of different nature and value. Smith again referred to the court on this point:

But where a person is entitled under the general right of the owners of the block, that person is entitled not merely to his actual occupation, but to some part of the unoccupied area which exists in every large block. . . . We must also remind parties that though persons who are in present occupation in continuation of their ancestral right, and occupation usually ought to get larger shares on that account, other things being equal, that the basis of right is ancestral occupation, and that persons who have ceased to occupy, even many years ago, if in *pakeha* times, may nevertheless have substantial rights.<sup>20</sup>

The important question of how these rights were maintained is also addressed. Again, it is worth citing Smith in full.<sup>21</sup> Many of the points raised here will be discussed immediately below:

every right to land, whether it rested upon ancestry, conquest or gift was required to be kept alive by occupation or the exercise of some act indicative of ownership or use. . . . [A] Maori was required, according to Native custom, *to keep his fires*

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20. Ibid, p 56, cited from Rotorua Appellate Court minute book 2, p 258, nd

21. Ibid, p 57

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*burning on the land*. If a Native left his tribe and went to live in another district either through marriage or otherwise, and he and his descendants remained away for three generations, they would forfeit all rights to the land so abandoned; their claims would become *ahi-mataotao*. The meaning of this term is *cold* or *extinguished fire* and, as applied to the instance just given, would signify that the rights of the claimants had become cold and their claims extinguished. The same rule applied to voluntary migrations of a whole family group or *hapu*. They may have allied themselves with some enemy and be forced to leave. If, however, the claimants who had voluntarily abandoned the land sent some of their children back at intervals to occupy the land, or to exercise some right of ownership, and there was no objection from the tribe, that would be sufficient to relight the flame and so keep their fires burning, and their rights alive. In the example just given, if the Natives remained away without exercising their rights continuously for one generation, their claims would not be materially affected, but absence for two generations would seriously weaken the claims and render them subject to some recognition by the tribe; they would not entirely cease until after an absence for three generations.

Where a group of Natives had abandoned or lost their interest in the manner just referred to, it would be possible for those rights to be restored again upon their acceptance of an invitation from the tribe to which they belonged, to return and reoccupy the land. Such an invitation, however, must emanate from the tribe as a whole, and an overture from a individual member alone would, in most cases, hardly be sufficient to effectively bring about restoration of the lapsed rights unless it could be shown he acted with the concurrence of his tribe.<sup>22</sup> This would appear to be readily understandable having in mind the system of tribal ownership and community of interest and of right, which formed the background of ancient Maori life both in peace and in war. [Emphasis in original.]

Smith then explored the situation where one of the dual aspects of Maori land tenure – ‘take’ or occupation – are not properly fulfilled. Firstly, Smith noted that:

There have been many instances where occupation has been proved, but the evidence has shown that the claimants occupied, and exercised quasi ownership with the consent, or at the invitation, or to the knowledge of, the true owners. In such circumstances, occupation, whether conclusively proved or not, is generally insufficient to affect adversely the interests of the true owners.<sup>23</sup>

Such examples would include the times when strangers living with a tribe were given rights to gather food on particular lands, or from particular trees or fish traps. Secondly, Smith noted that the Maori Land Court was extremely reluctant to support rights claimed by a ‘take’ that were not supported by occupation. Finally, Smith noted that the court encountered exceptional cases, cases which contradict the above rules. In such cases the court has been known to make allowances, but primarily for ‘occupancy rights’:

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22. Such an invitation would most probably have come from a chief whose mana was recognised by the wider group, rather than from the group itself. This is a moot point, however, as the powers of chiefs and the tribe were so interwoven.

23. Ibid, p 59

where, though the occupiers were unable to prove a *take*, yet their opponents could not prove that the occupation was only a permissive one and had no other source. The Court had presumed in such cases, that there must have been some sort of *take* and made an award accordingly.<sup>24</sup>

Again the emphasis on use or occupation is stressed.

#### 7.4 'Take Tupuna' and the Right of 'Discovery'

In terms of the different 'take' listed above, Smith considered that the right to 'discovery' was closely associated with *take tupuna*, and could be used as 'a subsidiary of a claim under ancestry'.<sup>25</sup> 'Take tupuna', however, was a complex question, tied closely to Maori customs of descent and succession. Interestingly, Smith cited both William Martin and John White to explain the concept. While Martin will be discussed in the following section, two statements are of immediate interest:

(Martin) [In disputed cases each] of the claimants endeavours to prove some act of ownership exercised without opposition by one of his ancestors. Acts commonly alleged are cultivating, building a house, or catching rats on the land, setting an eel-weir, cutting down a totara tree in the forest for a canoe, etc. . . . The lands of a tribe do not form one unbroken district over which all members of the tribe may wander. On the contrary, they are divided into a number of districts appertaining to the several sub-tribes. Each sub-tribe consists of the descendants of a common ancestor (whose name it generally bears) who was, in former times, the conqueror, or in any other way the recognised owner of the district.<sup>26</sup>

(White) The claim [to hereditary tenure] was grounded on the right of the grandfather or grandmother, not of the father, mother, brother or other immediate kindred. There have been cases where a chief, on his deathbed, portioned out his land to each of his children. The son's claim is, in all instances, derived from the grandfather. . . . No matter how distant the relationship, they all, so long as they can trace their origin up to the same ancestor (provided a family war has not occurred and thereby divided the tribe) claim an equal right to the lands owned by that ancestor. The title in the female line does not expand to the same extent; the grand-daughter of a chief has an equal claim to the lands of her grandfather with that of her male cousins, and the claim continues good to her grandchild, but on the death of that grandchild the land reverts to the male line. This custom holds good for the following reason which is assigned as its origin, namely, that were it not upheld, the intermarriage of chief's daughters with members of other tribes would soon so complicate and curtail the tribal claims that an invitation would be held out to adjoining tribes to attempt by conquest to despoil them of their territory.<sup>27</sup>

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24. Ibid, p 61

25. Ibid, p 62

26. Ibid, p 63; Martin is cited from AJHR, 1890, g-1, p 3

27. Smith (1942), p 63–64. White is cited from AJHR, 1890, g-1, p 12. Note that White's comments may not apply to all tribal regions.

#### 7.4 The Crown's Engagement with Customary Tenure

Two points must be immediately made. Firstly, Martin's suggestion that the land was divided into 'a number of districts' is too simple. While tribal 'regions' certainly existed, these could overlap or be intermixed. Secondly, White's comments about the limitations of descent through female lines appear to be simply wrong.

Smith was quick to point out that the Maori Land Court modified these principles. Firstly, in questions of succession, the court refused to draw a distinction between male and female lines, and gave entitlement to all of the descendants of a rightful ancestor. This was not strictly customary because marriage connections did not give the same rights as the descent line. Children, while being able to claim through both parents, typically retained strong rights from only one parent. This depended in part on how closely the parents were related and where the child typically resided. Secondly, 'relative interests' to individual blocks of land were also awarded by the court, the apportionment of which did not necessarily follow Maori custom. In both cases, Smith explained that 'This modification necessarily followed when it became desirable to transmute the Native customary title into one cognisable according to British law'. As will be discussed in the conclusion of this section, Smith's justification is somewhat problematic.

Smith also explained how the court evaluated competing claims based on 'take tupuna'. While Smith acknowledged the depth of Maori knowledge regarding ancestry, history, land boundaries, and so on, he disliked situations where competing claims were made:

disputed whakapapa or genealogical tables are of frequent occurrence, and the credibility of the stories of traditional events brought as testimony to support an ancestral claim is often in doubt.<sup>28</sup>

Smith cited the court on the question. The significance placed on evidence of recent occupation over perhaps more complex questions of whakapapa is clear:

A tradition generally accepted and acted on, and of which the several accounts do not materially differ from one another, may, with considerable confidence, be regarded as an authentic record of actual fact. A disputed tradition on the other hand will, in the majority of cases, be entitled to very slight authority. It would not be advisable, even if it were possible, which is open to question, to attempt to lay down rules of rigid definition as to what will not be regarded as sufficient evidence of truth of an alleged traditional event. Each case must be determined by its own circumstances and by the weight of evidence which, as Lord Blackburn has pointed out, 'depends on the rules of common sense. It seems to me, however, that one unequivocal act of ownership, and *a fortiori*, a series of such acts, is of far more importance in determining on which side the balance of testimony lies, than any amount of traditional lore that may be brought forward for the purpose of leading the Court to a different conclusion.<sup>29</sup>

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28. Ibid, p 65

29. Ibid, pp 65–66 (cited from Chief Judge Seth-Smith, 1891, Chief Judge's minute book, vol 2, p 71)

## 7.5 'Take Raupatu' – Title by Conquest

'Take raupatu', or title by conquest, involved a number of questions. Firstly, Smith explained that any victory in battle had to be followed by occupation 'to the exclusion of the vanquished'. Thus military victory supported by occupation appeared to be the only way that 'take raupatu' could confer rights to land. However:

There have been many cases in which subjugation has not been complete, but where a partially vanquished tribe have been able to make peace on terms which allowed the successful tribe to acquire rights to a portion of their lands and compel the defeated tribe to join the other tribe in alliance, thereby increasing the power and fighting strength of the conquerors.<sup>30</sup>

Thus, a number of results were possible within 'take raupatu', depending upon the outcome of the conflict. These levels can be summarised as follows:

- (a) A total conquest that involved the expulsion or extermination of the defeated and which is followed by occupation.
- (b) A conquest followed by occupation but in which survivors of the defeated group were kept as 'slaves' or taurekareka.<sup>31</sup> Such taurekareka could be permitted to occupy various portions of their former lands.
- (c) A conquest followed by occupation but in which the defeat was not total and the 'defeated' group remained on the land. Such a group may become tied to the victor's by marriage, alliance, or the like, thus protecting various interests of the defeated group. This might involve the rendering of some sort of service. In this situation 'absolute serfdom' did not necessarily exist.
- (d) A conquest followed by occupation but in which survivors of the defeated party remained on part of the land, perhaps hiding in the bush. They would thus retain a portion of their rights through occupation rights or ahi kaa.

Interestingly, the Maori Land Court tended to support the rights of taurekareka or 'defeated' groups that had remained on the land. As Smith commented:

Where these bond servants became numerous, the Court would usually make some special provision for them upon investigation of title, and it was not uncommon to see such concessions advocated by the conquerors or their descendants.<sup>32</sup>

Of course by the '1840 rule' the court declined to recognise rights of 'take raupatu' that were acquired after the introduction of British sovereignty in 1840 because that would be to condone breaches of the pax Britannia.<sup>33</sup> In this case the court clearly ruled on criteria other than those of Maori custom. The court thus felt it was necessary to assess the degree of occupation held by the conquerors. Again, the court stressed the need for possession:

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30. Ibid, p 66

31. The translation of taurekareka into 'slave' is not entirely accurate and should be treated with caution.

32. Ibid, p 67

33. As has been stated in the introduction, this report owes much to the discussion of the 1840 rule by Gilling, Gould and Phillipson. I will not endeavour to add further to this discussion.

## 7.6 The Crown's Engagement with Customary Tenure

An allegation that *papatipu* land has been acquired by conquest invariably raises questions of degree of the relative conquest, and whether it had been followed up in such a manner as to justify a finding in favour of the persons who allege it, are questions of fact which, in addition to occupation, the Court has to determine according to the evidence and the peculiar circumstances.<sup>34</sup>

### 7.6 'Take Tuku' – Gift

The last 'principle' or 'take' of Maori land tenure was 'take tuku', or tenure through gift. This was perhaps the most complex of the 'take' that the court had to deal with, and Smith's discussion reflected this.

Some elementary points on gifting should be made. In terms of the anthropology of Maori society, gifting was one of the main ways that different groups interacted. Many things could be gifted. For example, food, or material items such as canoes, or the right of passage through a particular territory, or at times, land. These gifts in part formed the material expression of complex webs of reciprocity and competition. They were a means through which alliances were forged and peace made, in which mana could be gained or lost, and how the tribal landscape retained its dynamism and fluidity. Indeed, gifts were not one-way or absolute, they were tied to obligations, perhaps other gifts, and could be rejected by the group accepting the gift, for example in the case where obligations tied to the gift could not be met (although there would be implications to such a rejection).

Despite this complexity the Maori Land Court was, as Smith explained, able to distil a list of 'the ingredients necessary to constitute a complete gift of land according to Native custom'. They are as follows:

- (a) the donor must have sufficient right to make it
- (b) the gift must have been widely-known and publicly assented to, or tacitly acquiesced in, by the tribe; and
- (c) the donee or his direct descendants must have continued to occupy the portion gifted.

Thus, a piece of gifted land had certain conditions attached to it, and if those conditions were not met by the donee, the land would revert to the donors. Note again, however, the court's emphasis on continued occupation. Indeed, while occupation of gifted land was often a condition of that gift, it appears that the court made this an absolute condition.<sup>35</sup>

Furthermore, the court appeared aware of the extremely public nature of the gift:

A gift is a form of a claim easily made but it should be proved by clear and strong evidence if the fact be challenged; and this agrees more especially with Maori custom which requires publicity in matters affecting titles to land. If a chief gave land he did so as the mouthpiece and representative of the tribe, all of whom, in fact as well as in

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34. Ibid, p 68

35. This is a difficult question, and further work should be done to see how far the court pushed this requirement for occupation.

theory, had rights in the general land. Should disputes arise as to the facts of a gift, it is open to grave suspicion that these elements were wanting and that no gift passed or was made.<sup>36</sup>

Smith also explained that the court had to take particular care to understand the conditions of the gift, especially in disputed cases:

Where, therefore, a gift of land is in question, the Court has to ascertain by reference to the evidence and the particular circumstances in each case, whether or not any specific conditions were attached to the gift, and to determine the rights of the parties under it accordingly.

Similarly, Smith was aware of the many different conditions under which gifts were made, or the many different reasons for such gifts. For example, Smith mentioned that land could be obtained as 'muru', for assistance in times of war, as satisfaction for the death suffered by a chief, or as part of a pronouncement made on an individual's deathbed. Indeed, Smith commented that 'These instances where gifts may have been made as shown above are by no means exhaustive; there are many other examples of the custom'.<sup>37</sup>

### 7.7 'Relative Interests'

Smith concluded his discussion of the Maori Land Court's interpretation of Maori land tenure and its subsequent conversion into freehold title with an examination of 'relative interests', that is, the process by which exact portions, 'shares', or parts of a block of land to which the title had been investigated, are awarded to individual Maori.

It is here that Smith believed the court has most radically departed from Maori custom.<sup>38</sup> Smith, though, did not believe that the court made this departure with malicious intent, rather he believed that such a departure was a necessary part of the conversion of Maori tenure into freehold title. Smith's analysis was extremely candid, if somewhat optimistic:

While the statute provides that every title to, and interest in, customary land shall be determined according to the ancient custom and usage of the Maori people so far as it can be ascertained, it is quite evident that no known custom existed to aid the court in defining the relative shares of the owners of 'papatipu' land, except that they were not always entitled equally. Ancient Maori custom did not contemplate or provide for an individual title to land, or the conversion of ownership of tribal lands to a share or monetary value in the manner practised according to British law. In the application of the principles of British law, which requires for tenants in common a measurement of interests, to the extinguishment of native customary titles to land, the

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36. Ibid, p 70 (cited Judges O'Brien and Von Sturmer, with no additional reference)

37. Ibid, p 72

38. Smith (1942) also believed that questions of succession constitute such a departure.

## 7.7 The Crown's Engagement with Customary Tenure

Native Land Court was faced with the necessity of dealing with the question of reducing ownership to a share value upon the basis of the estimated extent of the occupationary rights as near as could be ascertained. The court, for want of a set system, endeavoured to follow the analogies of native custom so far as such custom indicated the value and extent of individual interests according to the circumstances of each case and in the light of equity and justice.<sup>39</sup>

Comments made by Judge Seth-Smith and cited by Smith are also pertinent:

It is doubtless considered that there is some secret rule of Native custom that can be ascertained by the Court and applied to each case as it comes forward for adjudication. Such a view of the matter is not supported by the facts, for nothing could have been further from the mind of a Native in former days than the idea of attaching an exact quantitative value to his interest in tribal property, and as the necessity was never felt, it is not surprising that no customary rule was ever established. The determination, in the absence of any rule either of law or custom, although some of the analogies of custom may be followed, must be arbitrary, and the result must necessarily be a greater or less degree of inconsistency in different decisions.<sup>40</sup>

More specifically, Smith argued that in the early period (c1865–1880?) the court tended to leave the distribution of interests to the Maori themselves – the not uncommon practice of asking claimants who had ‘proven’ their claim to present the court with a list of the individuals who were to appear on the title. It should be noted, though, that such lists were a simplification of existing rights, collapsing differentiated and perhaps unequal rights into a list of names with no reference to specific rights or shares. Smith also believed that as Maori ‘became more litigious’<sup>41</sup> the court adopted three ‘general principles’ of apportionment:<sup>42</sup>

- (a) ancestry, where parcels of shares were allotted to the representatives ‘according to the strength of their occupation as disclosed by the evidence, those living at the present day sharing to a certain extent equally, with special treatment where the group was very numerous or the reverse’.<sup>43</sup>
- (b) the apportionment of shares to the heads of families ‘on the assumption that it was those owners who had saved the land for their descendants benefit’;<sup>44</sup> and
- (c) ‘to measure the value according to the occupation as under the numerals 1, 2, 3, and 4, allotting those owners without a break in their occupation 4 shares, and so on in a descending scale for those entitled to 3, 2, or 1’.<sup>45</sup>

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39. Ibid, p 75

40. Ibid, p 76 (Seth-Smith is cited but not referenced)

41. Or, as land became a rare commodity.

42. A discussion of both the 10-owner rule and the changes introduced by the Native Land Act 1873 are conspicuous by their absence. Smith does not reflect on the effects that the arbitrary inclusion of ‘trustees’ in title. It does appear, however, that Smith was aware of the massive problems the court faced at the point which Maori land tenure was transformed into individual title.

43. Ibid, p 76

44. Ibid, p 76

45. Ibid, p 76

Smith noted that the second two systems were objectionable because large families may get a larger share than the sole child of a 'true' occupier. Smith in part suggests that these variations in court practice were regional. For example, there was a 'heads of families rule' commonly practiced in Hawke's Bay, while the 'per capita rule' was practiced north of Auckland.

Other matters compounded the problem: was the court to take note of rank, descent, or *mana*? Did a claim through two or more ancestors entitle the claimant to double rights? Should those rights be measured by occupation alone, or would occupation strengthen those rights? Should recent occupation increase a claim founded on a long-standing 'take'?

Indeed, the question of the rights of chiefs is extremely problematic.<sup>46</sup> The court generally understood that while chiefs could exercise a power of veto over the disposal of land, and while they articulated or embodied the welfare of a group, they did not have exclusive rights to a larger portion of the group's estate. In the same manner, Smith noted:

None of the earlier authorities on Native custom recognise *mana* as conferring an interest in land as of right and by virtue of the *mana* alone. . . . [T]hey were of opinion that *mana* was personal and that if unaccompanied by a right founded upon one of the recognised *take* gave the person having *mana* no interest.<sup>47</sup>

However, as Smith also noted:

the position of rangatira carried with it certain benefits and personal tributes from the tribe which those members of the tribe occupying lower rank would not enjoy. It would seem hardly just, therefore, that the coming of British law and the changes it brought with it, should operate to take away altogether without some compensation, any of the rights and privileges which a chief formerly held and enjoyed.

For Smith, there was no easy answer to these problems.

## 7.8 Concluding Comments

Smith's discussion of the apportionment of 'relative interests' is important inasmuch as it illustrated an awareness of the Maori Land Court's relationship with Maori custom. Smith was quite certain that the apportionment of interests (and the determination of succession) were the point at which the Maori Land Court radically departed from Maori custom, although he was not critical of this move.

At the same time, though, Smith appeared unaware of a radical departure by the court in terms of its assessment of the 'principles' of Maori land tenure. He did mention a certain process of codification, the reduction of regional variation, and the like, but he did not give many concrete examples of this. And while it is easy to

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46. The term 'chief' is used in an undifferentiated manner to refer to any individual of rank, or an individual who had acquired status as a rangatira, perhaps without a good genealogy.

47. Ibid, p 80

recognise the court's continual preference for claims that emphasised facts of occupation, it is also clear that the court recognised a duality in the way that Maori claimed to land – that occupation had to be supported by proof of either 'take tupuna', 'take raupatu', or 'take tuku'.

With an optimistic outlook, therefore, it could be suggested that the court, as Smith perceived it, in many ways followed 'customary' Maori land tenure when it assessed evidence and ruled on the general ownership of land (but not when it apportioned individual shares).<sup>48</sup> Other evidence perhaps supports this idea. For example, the court's recognition of local variation, the court's recognition that exceptions to the main 'take' or 'principles' of tenure could be found, or the fact that the court preferred to treat each case individually.

In this respect, it may be a mistake to over-emphasise the Anglocentricism of the court. While the court was in the business of eradicating 'communal' behaviour in Maori society, it was also designed to find the correct 'owners' or right-holders to the land. Moreover, the judges were not entirely ignorant. We should perhaps recognise that many individual judges had a long association with Maori communities, that these judges understood (even if they condemned) certain aspects of Maori culture, and that they took these aspects into account when they ruled on who the general owners of the land were. That is, we should be open to the possibility that the court was at least partially equipped to make some kind of 'interpretation' of Maori land tenure. We should, therefore, take seriously the potential accuracy of at least some of the court's rulings, especially in respect to the land over which a hapu or whanau held strong rights, such as cultivations, settlement sites, and so on. How this potential accuracy should be approached will be discussed in the conclusion of this report.

It should be again stressed, though, that such general awards of the court typically occurred before the 'apportionment of relative interests', and that this apportionment was a truly arbitrary arrangement. In this case, serious thought should be given to the way that the court dealt with a question to which it believed it could find no easy answer from within the parameters of Maori custom. In part, this problem reflects the fundamentally ill-conceived role of the Maori Land Court – the way that Maori land tenure could only fit English tenure through an arbitrary and imperious processes. Indeed, it appears that the court was in many areas unable to rule on the basis of Maori custom without taking a radical departure from Maori custom. Thus the court's need to find, as Smith explained, 'analogies of Native custom so far as such custom indicated the value and extent of individual interests' may reflect a fundamental deficiency in the legislation that established the Maori Land Court.

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48. With a word of caution, though, it can be argued that Smith is characteristic of the later judges of the court (from about 1880). These later judges were typically trained as lawyers, did not always speak Maori, and probably had less local knowledge than the initial judges.