

NINETEENTH-CENTURY DISCUSSIONS OF MAORI LAND TENURE

8.1 Introductory Notes

This section reviews examples from writings about Maori society by the nineteenth-century Pakeha commentators Edward Shortland, George Clarke, and William Martin. An anthropological study of Maori economics by Raymond Firth will be also be commented on, albeit in a cursory manner.

There are a number of reasons for this review. Firstly, it can be argued that the early nineteenth-century commentators formed an intellectual background for the judges of the Maori Land Court (we have already seen how Smith later makes frequent use of certain texts) and in various ways influenced the judges work in both individual cases and with the formulation of court practice and legal precedent. Maning and Fenton were themselves prolific scribes, and their comments have been published in collections of ‘learned’ texts on Maori land tenure.¹

Secondly, nineteenth-century Pakeha writers are an important source from which we can construct an understanding of mid-nineteenth-century Maori land tenure.² As such, they provided a point from which the decisions of the Maori Land Court can be assessed. Indeed, it will be useful to see if the court’s understanding of the main ‘take’ or ‘principles’ of Maori land tenure, as illustrated in Smith’s work, differed greatly from the understanding evidenced by these writers.

Writings of the three authors – Shortland, Clarke and Martin – have been selected from material published in the *Appendices to the Journals of the House of Representatives* and from collections assembled by H Turton. The writers are commonly acknowledged for their sympathetic view of Maori interests. It is felt that this sympathy is likely to strengthen their observations – they were keenly interested in the nature of Maori society and spent much time talking to Maori, not obscuring them. Nevertheless, due to the limitations of time only certain aspects of Maori land tenure have been commented on. These are as follows:

- (a) the question of individual rights and communal rights;

1. See, among others, the collection of texts in AJHR, 1890, g-1

2. It should be expected that various Maori language sources such as Newspapers can also provide such data. However, the author lacks the qualifications to use these sources and, as yet, there is no comprehensive work that has both made use of these sources and has commented extensively upon questions of Maori land tenure. Of course the minute book record of the Maori Land Court is itself a vital source, and some of these minutes have been examined in section 3 of this report.

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- (b) how rights were claimed or maintained; and
- (c) boundaries, conflicting rights, and the resolution of disputes over rights.

As will be shown, the texts appear to display quite a degree of consistency on aspects of these three points, although some key differences will be noted. These texts will then be compared to Raymond Firth's work on Maori economics. A further comparison will be made between all these texts, Smith's account of the 'principles' of Maori land tenure discussed in the previous section, and the way that the Maori Land Court interpreted that tenure. A number of issues will be raised.

It should also be noted that a sharp distinction appears between writing completed prior to 1860 and those published in the period from 1860 to 1880.³ The earlier writings were generally written as a contribution to the debate over early land sales or the very existence of Maori rights, whereas many of the later writings are influenced in some way or another by escalating conflicts between Maori and the Crown, particularly in Taranaki. There is, therefore, a political context to these writings.

8.2 The Cultural Prejudice of Nineteenth-Century Pakeha Writers – Some Main Points

It is well understood that nineteenth-century Europeans operated within a cultural framework and that to a great extent their world was viewed through a 'cultural lens'. This framework simultaneously included ideas of Christianity, 'Enlightenment' ideas of objectivity, a concern for material wealth, a moral emphasis on the goodness of labour (the Protestant work ethic), and a belief in the superiority of western civilisation. It was a framework that influenced much of New Zealand's colonial history, such as the operation of Government officials, the types of agriculture that were practiced, and the establishment of the Maori Land Court.

As a specific example, Brian Gillling has argued convincingly that the 1840 rule used by the Maori Land Court has an intellectual genealogy – that its genesis can be found in official correspondence and practice prior to the establishment of the Maori Land Court.⁴ Indeed, Gillling has shown how widespread concerns among colonial officialdom in relation to ideas about 'Pax Britannica', or the sovereignty of the Crown, foreshadowed the court's formulation of the rule. Similarly, Gillling has argued that the court was preoccupied with ideas of force, conquest, and the like, and that this preoccupation coloured its decisions. This preoccupation has been illustrated immediately above in Smith in relation to the court's predisposition towards more material rights such as those based on occupation or labour. Clear historical examples exist, therefore, of a cultural 'bias' in the work of the Maori Land Court.

Nonetheless, many of the writers discussed below exhibit a strong sense of empirical observation. That is, Enlightenment ideals of 'scientific' observation

3. See the substantial collection of texts in AJHR, 1890, g-1

4. See Gillling, pp 5–20

were often practiced which may mean that many of the ‘facts’ (as distinct from analysis) recorded by these writers is of considerable value to modern analysis. Furthermore, it should be stressed that a number of these writers were at least capable Maori speakers, spent a significant amount of time with Maori communities, and had contact with various influential Maori leaders. While it may be argued that Maori did not give away their knowledge freely, it should also be noted that many of the writers discussed below retained a certain confidence among their ‘informers’. Finally, it should be assumed that the participation of these writers in Maori society (as distinct from our observation of it 120 years later) gives certain credence to their work. Thus while we should acknowledge the strong criticisms that can be made of these texts, a positive perspective can be taken of many of their writings, and a degree of accuracy may be assumed.⁵

8.3 Edward Shortland (1843, 1847, and 1882)

Edward Shortland toured the Waikato in 1842 and, as one biographer comments, ‘in a mere 28 days [he] acquired an unusually mature grasp of tribal politics and an affection for Maori people which set the tone of his subsequent career’.⁶ Shortland was appointed sub-protector of aborigines in the ‘Eastern District’ later that year. In 1843, he toured the South Island, and it was from Akaroa that he submitted a summary of what he considered to be the nature of land tenure. In it Shortland outlined how various areas of population in the Maori tribal landscape were separated from one another by their connection to different *waka*, or original voyaging canoes. Shortland also wrote that within these districts smaller distinctions between different hapu and families could be found:

The territory claimed by a *waka* is subdivided again into districts, each of which is claimed by an *iwi*. These are again variously apportioned among the different hapu and families of chiefs.⁷

Shortland’s schema, although convenient, is partly back to front. The treatment of *waka* as primary social organisations, rather than being derived from hapu is problematic. Hapu and *iwi* formations do not appear to have worked this way.

On the subject of land tenure, however, Shortland believed that the ‘chiefs are the principal landholders’ (note that he did not say ‘landowners’).⁸ He commented:

5. See, for example, Layton, pp 429–432

6. Atholl Anderson in Oliver, ed., *The New Zealand Dictionary of Biography*, vol 1, pp 395

7. ‘On the Tenure of Native Lands: Edward Shortland, Sub-Protector to the Chief Protector’, 15 August 1843, in H H Turton, *An Epitome of Official Documents relative to Native Affairs and Land Purchases in the North Island*, Wellington, 1883, f-1

8. This passage is also printed in AJHR, 1890, g-1, p 11, with the footnote ‘That is not in accordance with facts’ placed immediately after. In this respect, Shortland may have confused the right to veto the disposal of land held by chiefs with individual interests. He may also have been influenced by the important social role that chiefs played in organising labour. Alternatively, Shortland may have been closer to the truth, and the 1890 footnote may reflect the history of the Maori Land Court and the prejudice in Government circles against the name of *rangatira* being significant for the ownership of land.

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that [every] individual person, so far as I have been able to learn, has his own estate which he has inherited from his branch of the family, and which he cultivates as he pleases.

This statement reflected the fact that individuals held 'interests' in land which were other than freehold. Similarly, Shortland observed that:

In the immediate vicinity of a pa the land is more minutely subdivided amongst its inmates, nearly every person having his own small cultivation-ground or holding some spot in common with other members of his family.⁹

Maori land tenure, Shortland informed us, was established by a reference either to ancestry or conquest:

A chief, when speaking of the title by which he holds his lands, never fails to make a distinction between those which he has inherited from his ancestors and those which he or his ancestors have obtained by conquest. Over the former his right is universally recognised. The latter appear to be tenable only so long as the party in possession is the more powerful. The claim which he advances is, however, quite characteristic of the people – viz, that they are the *utu*, or compensation for the death of his relatives who perished in the fight.¹⁰

It would appear, therefore, that Shortland recognised the importance of chiefs, but perhaps overestimated their individual use rights to land. Indeed, he saw the strength of rights that were maintained by individual members of the tribe.

His further observation of conflicts over land are worth noting. Firstly, Shortland felt that it was :

from purchasing lands the right to which is thus contested by two hostile parties, either of whom will gladly avail himself of an opportunity to sell independently of the other, that Europeans have unwarily fallen into so many difficulties.¹¹

Secondly, he made a distinction between lands which were extensively cultivated and in which the title was clearly determined, as mentioned above, and lands that formed borders between groups:

Besides the lands thus held there are large districts on the borders of different tribes which remain uncultivated. These 'kaianga [kainga] tautohe', or debatable lands, are a never-failing cause of war till one party has lost its principal men. The remnant then cease to have any political importance, and are reduced to the condition of mere cultivators of the soil, being contemptuously styled 'toenga-kai,' or offal.

Furthermore, Shortland outlined the kinds of evidence presented to secure contested rights. His comments are strongly reminiscent of Smith's exposition of the

9. 'On the Tenure of Native Lands: Edward Shortland, Sub-Protector to the Chief Protector', 15 August 1843', in Turton, 1883, f-1

10. Ibid

11. Ibid

principal ‘take’ and the need for occupation, although he appears to have exaggerated the importance of occupation alone:

When a dispute arises between members of the same tribe as to who is the rightful owner of a piece of land, the principal persons on both sides meet together to discuss the affair. Their pedigrees are traced, and the ancestor from whom either party claims is declared. Any proof that an act of ownership (such as cultivating, building a house, setting pit-falls for rats, or erecting eel-weirs) was once exercised without opposition by one of these ancestors, is considered sufficient evidence of the right of his descendants to the land.¹²

In another text, written in 1847, Shortland again talked of the specificity of certain rights. It is clear that Shortland observed a process of negotiation or general consensus through which groups awarded more individual rights:

In considering the modes by which land becomes distributed amongst the different members of a tribe, it must not be imagined that an individual is at liberty to cultivate at his pleasure any unappropriated spot within the limits of the district claimed by his tribe. He must confine himself to those parts of that district to which he and other members of his family have a joint right, and then his selection should be made with the consent of those interested. The non-compliance with this usage by turbulent fellows is a frequent cause of dispute.¹³

Later in his life, Shortland published a number of books on Maori subjects. One such work, *Maori Religion and Mythology*, included a section on land tenure. Here Shortland responded to the question of communal ownership with the following observation:

It has been affirmed by many, on presumed good authority, that no member of a tribe has an individual right in any portion of the land included within the boundaries of his tribe. Such, however, is not the case, for individuals do sometimes possess exclusive rights to land, though more generally members of families more or less numerous have rights in common, to the exclusion of the tribe, over those portions of land which have been appropriated to their ancestors. Their proverbs touching those who wrongfully remove boundary-marks show this if other evidence were wanting.¹⁴

While Shortland may have confused the difference between an exclusive right (in the full English sense), an exclusive use-right, and the right of the tribe to control the disposal of the land, his point is interesting as it stresses the clarity with which various portions of the tribal estate were divided. A final observation is similarly valuable as it follows the distinction mentioned above between lands that were held by specific groups and lands that retained a more ‘tribal’ title:

The lands of a tribe in respect to the title by which they are held may be conveniently distinguished under two comprehensive divisions – (1) Those portions which

12. Ibid

13. AJHR, 1890, g-1, p 23

14. AJHR, 1890, g-1, p 15, note that *Maori Religion and Mythology* was published in 1882.

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have been appropriated from time to time to individuals and families; (2) the tribal land remaining unappropriated.¹⁵

8.4 George Clarke (1843 and 1844)

George Clarke, gunsmith and Christian Missionary Society missionary, arrived in the Bay of Islands in 1824. There he had a long association with local Maori, farming, working as a missionary, and eventually taking the post of chief protector of aborigines in 1840. Later in life, in 1861, he was appointed civil commissioner in the Bay of Islands, and in 1865 he became a judge of the Native (Maori) Land Court. In 1843 and 1844, Clarke reported to the Colonial Secretary on the question of Maori land tenure. A biographer has commented that Clarke's 'descriptions of Maori landholding are authoritative and cogently expressed'.¹⁶

Like Shortland, Clarke observed the existence of tribal districts, and the precise way in which these districts were defined by Maori. Unfortunately, Clarke paints too neat a picture of the tribal landscape, and gives the impression of nation-state like boundaries between tribal groups. It may be, of course, that certain boundaries could be accurately defined at any one time, but these were likely to change. Similarly, Clarke over-estimated the powers of chiefs, powers which typically waxed and waned:

From a very early period the whole of New Zealand seems to have been divided into districts accurately defined generally by mountain-ranges or rivers, and must have been well known by the accurate description they have given to every little creek, valley, promontory, and bay throughout the Island, the names of which have been handed down by tradition from generation to generation, and which will continue to define the territorial rights of the chiefs descended from the early proprietors.¹⁷

However, Clarke was well aware that within these tribal regions smaller groups held rights to particular areas. Moreover, Clarke was quite adamant that Maori had a thorough understanding of property rights, and he gave numerous examples of such rights. Like Shortland, Clarke believed that the degree to which individuals could maintain rights varied in Maori culture, and that this variation depended on whether the rights in question were for labour-intensive cultivations or more general tribal lands. The following passage relating to particular rights is extremely cogent:

It is then, I think, evident that the chiefs of every tribe and hapu, as well as the head of every family belonging to the tribe or hapu, have distinct claims and titles to lands within their respective districts. At the same time it must be remembered that they have joint interests in many of the lands. The particular claims of the chiefs, hapus,

15. AJHR, 1890, g-1, p 15

16. Oliver (ed), *The New Zealand Dictionary of Biography*, vol 1, p 83

17. *Ibid*, p 2

and families are to lands either subdued or brought into cultivation, or upon which they have exercised some act of ownership – lands where they been (sic) accustomed to procure flax or erect their weirs for catching eels, or where they have built a substantial house: in such cases they claim a particular property; none but the person so claiming can give a title to the land, nor can he be dispossessed thereof. He may forfeit his right by accidentally killing a neighbour, by adultery, or by migrating to a different tribe or district. In either of the former cases the land is taken possession of by the injured party, whose title is recognised as good by the tribe in general; in the latter case the possession reverts to the relatives of the emigrant.¹⁸

In contrast to these areas where particular rights are granted are the lands that are held by the wider group:

In other respects their claims and titles become more general, the hapus and families claiming in common with the principal chiefs what may very properly be termed their waste lands;¹⁹ but even here they must be able to substantiate some sort of title which is considered equitable such as having been the first discoverers, having kindled their ovens, built canoes, or exercised some such other act of ownership which gives them the preference over these lands. The families have, in common with the chiefs, the right of keeping pigs, gathering flax, shooting or snaring pigeons, catching rats, ducks, kiwi, digging fern-root, &c, or of gathering the natural productions of the woods and open country for the purpose of food, &c; every individual of the tribe having and exercising these privileges in common, but still acknowledging the rights of some family, or chief of the tribe or hapu, to make the first proposal for such an alienation – yet they would not consider the purchase valid without the consent of the majority of the principal men of the tribe and of the payment for the same every individual would expect to receive his appropriate share. Lands that are thus possessed in common, involving the interests of so many claimants, are exceedingly difficult to purchase, and may be reckoned as among the most fruitful sources of quarrels and disturbances. It frequently happens that two Natives, equally interested in the same lands, disagree on the question of its disposal: one is willing and anxious to sell, the other is not, and numberless animosities originate from this source.²⁰

Three aspects of Maori tenure have thus been expressed. Firstly, there is the expression of a ‘take’ or principle of ownership, as in the case of being the first discoverers, in combination with proof of acts of occupation. Indeed, Clarke recorded that:

To obtain a specific title to lands which are held in common, there must be . . . some additional circumstances to support such pretensions, as subduing and appropriating, or exercising any particular act of ownership upon the land in question: the first

18. Ibid, p 3

19. In fact, they may very properly not be termed ‘wastelands’. The idea of wastelands follows very much from the perception that lands which were not directly cultivated or used as pasture were wasted. This was an English and not Maori perception.

20. Ibid, p 3

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discovery of a tree, the shooting of a pigeon . . . making a Native path or foot road, the accidental loss of a friend on such spot.

Secondly, there are the range of different uses that such lands could be put to, and thus the range of different rights that could be distributed across such lands. Thirdly, there is the role of chiefs who, as Clarke described, had the power to administer the disposal of that land, yet simultaneously were reliant on a relationship with the wider group to maintain and sustain that power.

Other 'take', such as 'take tuku', the gifting of land under certain conditions and with particular limitations, were observed by Clarke. In the following example, Clarke comments on the way that tribes who reside in 'border' areas sometimes intermarry with both neighbours. Such tribes may be treated as neutral in disputes, perhaps acting as negotiators or sheltering refugees from either side. Then:

in gratitude for services performed, a piece of land might be presented by such parties to their protectors, who would thenceforth claim in virtue of the gift; but, on the other hand, land allotted by the protectors to those who fled to them for protection for the purposes of cultivation would not be considered as alienated . . . In the event of such cultivation being abandoned it would revert to the person who granted it, unless he married and resumed it as the dowry of his wife; it would then be hers and descend to her lawful heirs, but in default of issue of her body it would revert to his family. . . . Possession of land, even for a number of years, does not give a right to alienate such property to Europeans without consent of the original donor of the land; but it may be continued in the possession of the descendants of the grantee to the latest generation.²¹

Clarke also explains that 'common' rights extend to chattels:

A canoe generally belongs to a family, and sometimes to a hapu, in consequence of each individual assisting in its formation or advancing a portion of his property for its payment . . . A blanket, bought with the proceeds of a child's farm, would be recognised as the property of the child, although appropriated to the use of the parents, and any attempt to alienate such property without the concurrence of all concerned would be resisted as unjust and oppressive; and the buyer, even supposing him to have given double the value of the property, would be considered equally culpable with the other.²²

In many ways, Clarke appeared surprised to discover such vigorously maintained rights. He had, perhaps, found that the reality of Maori social and economic organisation contradicted popular European ideas about the absence of property in 'primitive' society. To further strengthen his argument, however, Clarke discussed the demarcation of boundaries. This is an issue that we will return to:

No people in the world are more particular than the Natives on these subjects, and more especially in regard to their lands; and, in order to avoid quarrelling, furrows or

21. Ibid, p 4

22. Ibid

watercourses are usually formed in their family cultivations, in order to divide and designate particular property; and on the same principle, and for the same reason, if a little more distantly related, and these cultivations are adjacent to each other, a dividing lot of uncultivated land will be left, or a small patch of wooded land, to which both parties have an equal claim, but which neither dare destroy for fear of exciting suspicion of encroachment, and thereby generating a quarrel. Between distant tribes there is universally a much larger space of common unoccupied property left for the same purpose, and but very few tribes are neighbourly enough to venture to cultivate on the opposite banks of the same river unless they are desirous of collision . . . it is no uncommon thing to find a space of some miles of uninhabited and uncultivated country forming the grand division of the district.

Finally, Clarke stressed the enduring nature of these rights:

A tribe never ceases to maintain its claim to the land of its fathers, nor could a purchase be considered complete and valid without the concurrence of the original proprietors. If a conqueror spare the lives of the conquered, and they thenceforth become amalgamated with his own tribe, he infallibly secures his own title, uniting the claims of the original possessors with his own.²³

8.5 William Martin (1846 and 1862)

William Martin was New Zealand's first chief justice and a close friend of George Selwyn, the first Anglican Bishop of New Zealand. In 1846, he criticised the British Government's disregard of the Treaty of Waitangi, and in 1860, he published a strong attack on the New Zealand Government's behaviour in Taranaki. Both of the texts discussed below thus come from a context of criticism. A later work by Martin in 1871 is of some interest also.²⁴

Like Shortland and Clarke, Martin was impressed with the breadth and complexity of Maori land tenure. Moreover, his legal training led him to compare Maori and English tenure, and, in 1846, he stated that:

In this Northern Island, at least, it may now be regarded as absolutely certain that, with the exception of lands already purchased from the Natives, there is not an acre of land available for purposes of colonisation but has an owner amongst the Natives according to their own customs.²⁵

The title to old cultivations were, Martin reminds us, 'remembered and maintained by their descendants'. If an area was contested:

[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

23. Ibid, p 5

24. Sir William Martin, 'Memorandum on the Operation of the Native Lands Court', AJHR, 1871, a-2

25. AJHR, 1890, g-1, p 3

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house or catching rats on the land, . . . cutting down a totara tree in the forest for a canoe, &c.²⁶

Here Martin appeared to have referred to a combination of 'take tupuna', or rights that are derived from ancestors, and rights based on occupation. Moreover, Martin observed that:

These claims in the ordinary course of things become sufficiently complicated, but are rendered much more so by the introduction of another set of claims which arise out of rights of conquest, enforced in very different degrees in different cases.²⁷

In a later text, published in 1861 at the height of the conflict in Taranaki, Martin listed a number of characteristics of Maori land tenure.²⁸ Some of these are summarised below (others repeat comments already made or matters outside of the scope of this report):

- (a) That land is held communally but individual rights can be exercised over particular parts of the communal land, especially when such parts are cultivated. For Martin the community thus has 'a right like what we should call a reversionary right over every part of the land of the community' ('community' including iwi, hapu, or whanau). This means that every 'cultivator' is a member of the community, and is 'not free to deal with his land independently of that community or society'.²⁹
- (b) That chiefs, while holding personal interests, represent the interests of their people. This representation is conducted in consultation with the members of the tribe.
- (c) That land could be gifted from one tribe to another for a number of reasons.
- (d) That 'The holdings of individual cultivators are their own as against other individuals of the community. No other individual – not even the chief – can lawfully occupy or use any part of such holding without the permission of the owner; but they are not their own as against the community'.
- (e) That force was used in many instances, but that this did not mean that 'rules' did not exist: 'the Natives have no difficulty in distinguishing between the cases in which the land passed according to their custom and those in which it was taken by mere force'.³⁰
- (f) That because of common ancestry shared in Maori groups all could claim an interest in matters that concerned the whole tribe.

Many of Martin's later comments appear to reply to a suggestion that Maori held their land without recourse to a coherent system or that the only law in Maori society was that of force. Of course such comments were being made at that particular time, and Martin's exposition constitutes a damning refutation of these

26. Ibid

27. Ibid

28. The debate that was conducted at this time was quite complex. Suffice it to say that this report is not able to offer a sufficient background to Martin's comments.

29. Ibid, p 4

30. Ibid, p 5

suggestions. However, Martin also saw Maori tenure as being part of an evolutionary process. He referred to Irish and ancient German forms of tenure, and argued that English tenure arose from the ‘earlier to the more advanced state of things – from clanship to nationality’. Finally, Martin stressed that the ‘Treaty of Waitangi carefully reserved to the Natives all then existing rights of property. It recognised the existence of tribes and chiefs, and dealt with them as such’.³¹

8.6 Raymond Firth (1929 and 1959)

Raymond Firth remains perhaps the most capable writer on the question of Maori economics. Although his theoretical perspective is somewhat dated the sheer breadth and detail of his work has not yet been seriously matched. It is thus important to summarise Firth’s analysis and compare this to the writers discussed previously.

The principal conclusion that can be drawn is that Firth’s work shares many insights with the writers cited immediately above. Of course Firth, like Smith, made good use of such nineteenth-century proto-anthropologists, drawing extensively on the work of Elsdon Best, John White, George Clarke, and the like. Nonetheless, Firth came to his own conclusions, measuring different accounts against each other and conducting independent field work. Indeed, he should be treated as an independent thinker of remarkable aptitude.

A number of points about Firth’s view of Maori land tenure can be made. For convenience they are listed below.

- Firth stressed the strong ‘sentimental attachment’³² held by Maori to their land, and ‘the fundamental place which it occupied in the Maori scheme of things’.³³ Firth concluded that ‘a real value attaches to such a record of the affection of the natives for their land, since it reveals the emotional background against which economic privileges are exercised’.³⁴ Moreover, Firth was critical of the view that the only form of Maori tenure was force:

To state as Busby does, that the native knew no law but that of the strongest is incorrect. Even when meditating the acquisition of land by force a tribe was usually careful to justify its action by uncovering some old ‘take’ or cause which gave them claim to it. . . . Among the Maori, conquest takes place as but one among a number of possible major grounds of ownership.

Firth was well aware of the different levels to which rights operated in Maori society. He believed the idea of totally communal ownership in Maori society was too simplistic:

31. Ibid

32. Firth (1959), pp 368–370

33. Ibid, p 368

34. Ibid, p 372

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there is much more to be said on this point. The tribal territory was in reality made up of the lands of the various *hapu*, each jealously and exclusively maintained, while further segmentation gave private rights of many kinds to family groups and individuals.³⁵

Indeed, 'the partition of the tribal land was no empty form, but . . . the rights of the various *hapu* were maintained with exclusiveness and vigour'. We will return to this question presently.

- Like Clarke, Shortland, and Martin, Firth believed that chiefs had a special role as leaders, spokespersons, advocates, and trustees. Firth makes a clear distinction between a chief's right to areas that he claimed individually 'from his ancestors, from occupation or from some other cause', and a chief's interest in the remainder of the tribal territory which 'was of a socio-political rather than of an economic nature, ie, he exercised great influence over it in major matters of control, but received no material benefit therefrom'.³⁶ Here Firth explained that the right to dispose of land was a tribal right, that 'no action of any moment affecting it was valid unless ratified by the tribal opinion'.³⁷ Indeed, the:

same principle of tribal over-right held good for the lands of families or even *hapu*. It was only when a *hapu* was of great strength and felt itself to be practically independent of the parent tribe that it would make arrangements for any disposal of its landed property without consulting the general wishes. Conversely, any invasion of the land of a *hapu* by an extra-tribal enemy would at once bring up the remainder of the tribe to its assistance. The *hapu* sometimes fought among themselves, but a threat to the tribal land from outside closed all domestic quarrels for the time being.³⁸

- Firth lists the 'modes by which rights to land were acquired and retained'. With some important differences, this list to a great extent parallels both the comments made immediately above and the 'principles' or 'take' of Maori land tenure set out by Smith. For example, Firth places conquest and discovery under a single heading, explaining that:

When the territory was left entirely open for occupation the method of *taunaha whenua*, bespeaking of land, was sometimes followed as a means of acquiring title among the conquerors, this being a custom of the same type as the *tapatapa*.³⁹

The act of traversing and naming the land, Firth explained, was known as 'takahi'. The other main aspect of title was the ancestral right or 'take

35. Ibid, p 378

36. Ibid, p 377

37. Ibid, p 374

38. Ibid, p 375

39. Firth describes *tapatapa* as 'ritually bespeaking property'. Such an act would involve the naming of an item, or in this case a part of the land, by someone with great mana. See also *ibid*, pp 345–346.

tipuna'.⁴⁰ Such a right derived through inheritance from an ancestor (the various aspects of which will not be discussed) and were tied to the original rights established by an ancestral figure.⁴¹ Occupation acted as the shared element of tenure. Here Firth's exposition is remarkably similar to that proposed by Smith. Note also the distinction Firth made between different levels of occupation and the way that 'conquered' hapu could maintain rights:

For a title to land obtained by conquest or discovery to be valid, occupation had to be effective. If one tribe were defeated by another and their lands occupied, the original owners, if thoroughly dispossessed or enslaved, had no further claim to the land, unless in future years they could win back their territory again by intermarriage or force of arms. But invasion and driving out of the inhabitants was not sufficient to establish a title if the land were not permanently occupied. Again, even if the land were settled for a time by invaders but the dispossessed tribe still managed to maintain itself in freedom within its own borders, scattered in the forest or in hiding in the mountains, their title to the whole of the land still held good. . . . The proof of this continuity was sufficient to establish ownership in later years.⁴²

Firth also commented on the practice whereby groups made 'periodical visits' to various areas of their territory in order to keep their rights alive. Firth cited a famous Hauraki chief, Horetia te Taniwha, to illustrate this:

Our tribe was living there at that time. We did not live there as our permanent home, but were there according to our custom of living for some time on each of our blocks of land to keep our claim to each, and that our fire might be kept alight on each block so that it might not be taken from us by some other tribe.

However, title was not always clearly held. Firth explained that certain lands, especially those areas lying on the borders between two tribes, could be 'hotly contested, each party endeavouring to establish ownership, though not actually occupying the land'.⁴³ For lands that were contested among members of a smaller group a public debate was commonly held. The different arguments advanced in these debates illustrates the different basis of tenure:

The question was generally thrashed out in open assembly of the people, each party endeavouring to prove his claim by the recitation of his *whakapapa* or genealogy, substantiating it by citing acts of ownership or occupation performed without opposition by his ancestors, such as cultivation, taking of game, putting a mark upon a tree or rock, or some similar deed by which priority was established. A mark or sign of this kind was termed *tohu whenua* (land token). To provide evidence of ownership sometimes the *iho* or umbilical cord of a newly born child of rank was hidden together with a small stone on the land or

40. The difference in spelling is a regional variation.

41. Firth, pp 384–385

42. Ibid, pp 384–385

43. Ibid, p 385

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the boundary thereof, so that in future years it could be referred to in case of dispute.⁴⁴

Corresponding with Smith's recognition of regional variation and exceptions to the general 'take', Firth stressed that:

conquest, occupation, and ancestral right are not mutually exclusive grounds of ownership, but may be concurrent or supplementary. In addition to these main bases of claims to land, there are a number of others, depending on special circumstances, and very often simply of individual concern.⁴⁵

- Finally, rights to land tenure could come from gifting. Again, Smith and Firth agree that such gifts could be made on a number of different occasions. However, Firth does not stress the necessity for a public presentation of the gift, although he does comment that:

In general the cession of land to another tribe seems to have been regarded as one of the most valuable of gifts, to be made only on occasions of great significance.⁴⁶

An important aspect of Firth's analysis, partially lacking in the works detailed above, is his understanding of the different levels of Maori social, political, and economic organisation and the way these relate to tenure. That is, the importance of, and distinctions that can be drawn between, the economic and political functions of and rights held by whanau, hapu, and iwi. To cite Firth at length:

The whanau functioned as the unit for ordinary social and economic affairs. . . . In matters of organisation each whanau was fairly self-reliant, the direction being taken by the head man of the group in consultation with other responsible people. As a rule it maintained its own affairs without interference, except in such cases as came within the sphere of village or tribal policy. . . .

The whanau held group ownership of certain types of property, and also as a body exercised rights to land and its products. Tasks requiring a small body of workers and co-operation of a not very complex order were performed by the whanau, and the apportionment of food was largely managed on this basis. Each family group was a cohesive, self-contained unit, managing its own affairs, both social and economic, except as these affected village or tribal policy. Members of a whanau, on the whole, worked, ate, and dwelt together in a distinct group.

The more inclusive kinship group, the *hapu*, was correlated with the major village activities. More important species of property, such as a war-canoe, a meeting-house, a large eel weir, were regarded as the property of the whole *hapu* and were used by the members as a body. All the land surrounding the village, incorporating, of course, the rights of individuals and of whanau, was under the ownership of this group, while important tasks involving considerable labour power saw a muster of all its members.

44. Ibid, pp 386–387

45. Ibid, p 387

46. Ibid, p 390

At large tribal feasts, too, and on similar occasions of ceremony the *hapu* functioned as a united body.

The economic functions of the tribe (*iwi*) were confined almost to participation in huge feasts and to an all-embracing over-right to the land within its borders; the latter was made manifest in the rallying of *hapu* to defend the tribal land at any point invaded. The *waka* was a loose political aggregation of tribes, and had no economic function.⁴⁷

Firth concluded that:

in Maori society the economic structure is to a large extent coincident with the kinship grouping; there are, for instance, no economic associations of any importance which are not based upon it.⁴⁸

There are, of course, many aspects of Firth's work not discussed here. In particular, Firth has made valuable comments as to the nature of Maori economic structures, Maori attitudes toward work, the motivations and organisation behind work, the distribution of goods, reciprocity, gifting, and feasting. Any comprehensive analysis of Maori land tenure would, of course, need to take these into consideration – it is impossible to separate, say, wider systems of reciprocity from our understanding of 'take tuku'. Unfortunately, the immediate problem addressed in this report – the interpretation of Maori land tenure by the Maori Land Court – has restricted the question of tenure to its more material, or social and political aspects.

8.7 Smith, Shortland, Clarke, Martin, Firth, and the Maori Land Court – A Discussion

When placed side by side, the works of Smith, Shortland, Clarke, Martin, and Firth reveal a number of similarities and differences. These works also relate to the problem of the Maori Land Court's interpretation of Maori land tenure and some of the issues already raised in connection with Smith.

For the sake of clarity the following discussion is made in points. As well as offering a comparison between the above writers, points (d), (e), and (f) include a discussion of the role of the Maori Land Court:

- (a) All writers agree that Maori had a system of property and land rights. Martin placed this understanding in a legalistic frame work. For Smith and others, this fact was taken almost as granted.
- (b) All writers share an understanding of the basic ways that Maori claimed rights to land. All distinguished between rights that were based on force, and those rights that derived from ancestral discovery, occupation, or gift. Most made the point that conquest had to be followed up by occupation, and

47. Ibid, pp 111, 139

48. Ibid, p 139

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all acknowledged the importance of ancestry. There is, therefore, a general agreement on the existence of certain 'principles' of claim, or 'take', of Maori land tenure. Moreover, there is a general consensus over what Smith believed was the dual nature of Maori land tenure – the necessity of deploying both a 'take' and maintaining some connection through the occupation or use of that claim. At a finer level, most writers observed that rights over land could remain after a long absence, or, in the situation where a conquest occurred, that the conquered could continue to retain rights by partial occupation (perhaps remaining hidden from the conquerors).

- (c) All writers acknowledge the existence of regional variation or the fact that exceptions could be found to the general principles. Unfortunately, while this is frequently stated it is rarely demonstrated, although Firth is better than the others.
- (d) All writers saw that occupation was a matter of degree – that it could range from close and long-standing occupation to the distinct occupation or use of land by an ancestor only. Similarly, all writers saw some kind of difference between the degree to which rights were exercised in the occupation of cultivated lands or kaainga and the use of, say, areas of bush for hunting or gathering. For Smith, this was the difference between 'permanent' or 'transient' areas of occupation. Smith, Shortland, Clarke, and Martin understood that a whanau may hold an exclusive right over their cultivations, but they tend to assume that the right to 'wastelands' was communal.

However, it was with Firth that the differences in these kinds of occupation are clearly tied to Maori social structure. Firth had been able to show that different types of economic activity mobilised different levels of the social structure. For example, while cultivation may involve only a whanau, the construction of a canoe would involve the entire hapu. In this case, the hapu could claim rights over the canoe, while the whanau would maintain an exclusive right to the produce of their cultivations.

This is an important insight and, as will be discussed, is something that the Maori Land Court did not properly appreciate. We should, furthermore, be critical of the view that rights to non-cultivated areas were only held communally. Both Firth and Clarke have noted that rights to, say, rat runs, or the right to hunt birds in a particular area, could be held by whanau or even individuals. However, these rights would typically be worked out in relation to the wider community.

So, if we accept Firth's comments about the differential rights held by whanau, hapu, and iwi, it may be important to understand that because the Maori Land Court dealt with blocks of widely different sizes (from a few acres to thousands of acres) it therefore dealt not merely with one set of rights, but with different rights held by different levels of Maori social organisation. A large block may have simultaneously included the cultivation site 'belonging' exclusively to a whanau, a wider area where members

of a hapu held rights to gather resources, and perhaps a grove of kauri, where members of an iwi could gain a right to take timber.

But rather than properly understanding these interconnected rights, it appears that the court typically set out to find the ‘communal owners’ of a block, collapsing these differentiated rights in land into a general right of tribal ownership. In some cases, of course, either the court or Maori responded to this tendency by subdividing large blocks into smaller blocks that they themselves correlated to, say, hapu or whanau divisions. However, even these subdivisions would not have adequately represented the complexity of the tribal landscape. In other cases, if the block was small enough and positioned accurately, the rights of a particular whanau may have been accurately represented.

Another solution for Maori would be to acquiesce to an arbitrary division among themselves, where rights were given up in some areas and strengthened in others. This situation will be discussed further in chapter 3. Whatever the case, in the court environment the onus was placed on Maori to take blocks of land to the court that in some possibly arbitrary way fitted with the tribal landscape. But as has been extremely well-documented, partitioning land, conducting surveys, and various court costs were prohibitively high. In fact, it is probable that these costs encouraged Maori to present blocks of a large size. Of course this presented a double bind as large blocks, especially under the 10-owner system, were vulnerable to being alienated by the legally-recognised ‘owners’.

- (e) All writers appeared to accept that while exclusive rights could be held over particular areas of land, or the use of certain resources, the disposal of these rights depended upon the consent of the wider tribal group. As Martin explained, the community had ‘a right like what we should call a reversionary right over every part of the land of the community’. Moreover, all writers agreed that chiefs expressed this reversionary right with a power of veto over the disposal of lands. Indeed, it has been explained that while a chief may have great influence over the general use of land, he or she could only claim an exclusive right to a particular part of the community estate. This is, of course, a point that Smith also recognises.

However, in our current academic arena, the thorny and complex question of communal or ‘tribal’ rights, and the right to dispose land (sometimes by ‘sale’) has not yet been settled (and this report does not attempt to do so either). In a comparatively recent debate, Brent Layton argued that we should make a distinction between an individual or small group’s right to use a resource, and their right to dispose of it. He suggests that:

the individual or group that possessed the right to use a resource, also possessed the power to decide on whether to dispose of that right voluntarily to another individual or group.⁴⁹

49. Layton, p 437

Layton's hypothesis rests on the assumption that the European understanding of Maori land tenure was gained at a time when early sales were made. Because these sales involved blocks of land over which any number of use-rights existed, a large number of Maori were subsequently involved, and the impression was given that alienation was a question dealt with communally. Layton also suggests that the Maori Land Court mirrored this situation, with hearings drawing any number of right-holders into consideration. So, for Layton, European impact in part created a 'communal' right.

Alan Ward rejected this position. Ward acknowledged that 'a multiplicity of individual rights do not, ipso facto, amount to a collective or communal right – that indeed each individual right would normally need to be negotiated for'.⁵⁰ But Ward then argued that when rights are disposed of we must consider questions such as – 'for how long, to whom, and under what conditions?' In this case, Ward makes an important distinction between a 'sale' – as the disposal of all rights in freehold land – and a gift where the gift involved a relationship and obligation.

In light of the observation made above under point 4 – that land tenure was tied to different levels of Maori social structure – it could also be said that the right to dispose of or 'gift' rights in land, and the communal right to veto such a move, depended on the relative position of the donor and donee. To explain further, there appears to be a fundamental difference between the gifting of rights to land between two whanau of the same hapu, and the gift of the same rights by a whanau to a distantly related hapu, or, in the case of pakeha, to a group that had no kinship connection to the whanau at all. A chief or hapu may not be able to veto a gift between whanau because of the specific nature of their rights in relation to the wider group. But by political, social, and perhaps economic implication, the relationship formed by the gift of land to a distant or non-related group necessarily involves the wider community. Such a relationship, while ostensibly initiated by a whanau, would involve the wider group because that whanau is connected by kinship and reciprocal rights to the wider group.

A part of Layton's argument may therefore be correct. We can not escape from the historical fact that some rights were strongly, almost exclusively maintained by whanau or even individuals. But where the disposal of such rights would affect the politics of the wider kin group, the power of a community or chiefly veto would arise.

This of course raises the further consideration of the transformation (or eradication) of such rights when individuals were given individual freehold title to land by the Maori Land Court, title that may be 'legally' disposed of without reference to, and thus circumventing the wider group's right to veto. Indeed, it can be argued that the individualisation institutionalised by the Maori Land Court fragmented wider tribal relations – where the dis-

50. Ward, p 259

posal of a block of land through gift may have involved all members of the tribal group and a set of obligations and rights for the donee, a sale under English law negated any ongoing relationship between vendor and purchaser.

Some additional comments may be made. Firstly, the court process appears to have conflated into a single concept of ‘ownership’ the question of the right to use land, often held by distinct groups in an exclusive manner, with the right of the wider group to dispose of the land. This, secondly, raises the question of the court’s statutory right to enforce such a transformation, as it clearly went against Maori custom.

- (f) All writers saw that various areas of land were contested. Indeed, Smith, with his experience as a judge, witnessed this first hand. However, it can be argued that Smith saw such contestation as a straightforward ‘working out’ of different competing claims made under various ‘take’ and degrees of occupation. While this is certainly true, Shortland, Clarke, and Firth observed that the tribal landscape included various ‘border’ areas, ‘contested’ lands, or ‘neutral’ grounds. According to Clarke, these could be as small as a patch of bush that divided different cultivations, to tracts of uninhabited land between large tribal groupings. Thus a picture evolves of the tribal landscape containing different levels of ‘right-clusters’ that ranged from more central clusters, for example at the heart of a hapu’s territory and cultivations, to the contested clusters at the boundaries between hapu.

What is important here is that these areas existed as a part of the ongoing inter-relationship between different levels of Maori social organisation. There is, therefore, a connection between inter-whanau, or inter-hapu, or inter-iwi politics, and the relative exclusiveness, security or certainty of tenure in specific parts of the tribal landscape. Indeed, the tribal landscape was covered by different claims that were at once political, social, and economic. Claims made under various ‘take’ and the exposition of historical and kin-based use of these lands would therefore be resolved in this context.

Smith (and probably other judges of the Maori Land Court) appears, therefore, to have a simplified understanding of Maori land tenure, an understanding that separates political and social aspects of that tenure from its public expression or essentialisation. That is, Smith appears to have grasped certain abstract principles of Maori land tenure (as perhaps expressed by Maori before the court), but does not link these principles to the lived experience of Maori communities.

The implications of this move are considerable. As has been argued in the previous section, we should distinguish between the court’s ability to accurately locate the group(s) who claimed rights to an area, and the court’s subsequent apportionment of ‘relative interests’ to that group. As has also been argued, Smith’s clear understanding and exposition of the ‘principles’ of Maori land tenure (and the clarity of this exposition has in part been supported by Shortland, Clarke, Martin, and Firth) may mean that the court was able to ‘get it right’ with regard to the ‘ownership’ of a general group, provided one ‘take’ was not pitted against another exclusively.

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However, if we take into consideration the connection between Smith's principles and the actual experience of the Maori communities from which these principles are distilled, the court's understanding appears somewhat crude.

We should understand, therefore, that in the process of interpreting Maori land tenure, the Maori Land Court was not simply met by a number of 'principles' (even if regional variations were understood), but that it was confronted with an entire spectrum or sliding-scale of Maori rights and social inter-relationships, within which claims could be made at different levels of certainty and different degrees of exclusivity. Indeed, in light of our discussion of Smith it would appear that the court did not appreciate (or perhaps ignored) the complexity of this system.

So, as the court appeared to understand the different 'principles' under which claims could be made (and while it believed that it could cope with regional variation) it did not take into account the degree to which these claims could be exercised in relation to other claims. In other words, the court was not able to distinguish between the different levels of ownership that existed between, say, a whanau right to cultivations and a hapu right to, for example, fish in a particular river. Indeed, the court's declared role of social engineer did not require an accurate understanding of Maori land tenure: when the investigation process was completed and the ownership of the 'general group' was determined any subtle distinctions that existed between different levels of rights were automatically collapsed into individual shares of freehold tenure.

Nonetheless, a further point could be made. If, for example, the court was to determine the title to an area of land that was located firmly at the centre of a hapu's territory – an area had been securely held for a number of generations – it is quite possible that the court could 'get it right' when determining the 'ownership' of that land. In such a case, the award may be given to a number of individual members of a tribe who may or may not act as trustees, but such an award would be to the correct group. Of course, the block itself would include a number of more finely distinguished rights, say of whanau, and these rights would be conflated into a single legal title.

If, however, the court was to determine the title to lands that formed one of the 'boundaries' between hapu, or one that had been recently occupied, or any number of other situations that created cross-claims of differentiated rights, then the court's likelihood of obtaining a successful transformation of native title into English title would be much lower. Indeed, its award is likely to have been arbitrary. In such cases the court would have required a very good understanding of Maori land tenure and would probably face problems understanding the complexities of the different interests at hand. Indeed, those interests would be tied to an ongoing political process, and the court's very presence would have an effect on the politics of that process. A further possibility existed, though: when Maori groups were willing, and were allowed by the court, to negotiate or 'exchange' on divisions between block boundaries, such conflicts may, in part, have been resolved. This problem will be further addressed in the following section.