Discretion in the Maori Land Court

by

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I. INTRODUCTION

In any discussion concerning the presence of discretion in a legal system, it seems appropriate to use as an anchor the concept of the rule of law against which to assess the "legitimacy" of discretionary powers falling within the definition of "law". Opposition to the presence of discretionary powers is modernly associated with the "extravagant version" of the rule of law[1] requiring all decision-making to be governed by predetermined rules of law. The antithesis of this, it is said, is the arbitrary, and hence unpredictable, decision.

However, increasing governmental involvement with social matters, and individual liberties, has required the delegation by Parliament of much of its decision-making function, because of the obvious time factor and also the increasingly complex nature of matters to be regulated. This delegation of decision-making authority in the form of greater or lesser discretionary powers to subordinate authorities has required a reassessment of these powers as a concept of law.

In its defence, the modern approach demands that "arbitrary" not be confused with "discretionary" authority, for as long as discretionary powers are in some way confined by the legislature, they will necessarily be something less than arbitrary. Judicial "policing" of these powers will be a safeguard for the individual against abuse of his rights due to unauthorised decision-making, such safeguard being only realistic to the extent the legislature confines and defines the delegated decision-making power. Also with the increasing fusion and confusion between legislative and administrative function, the doctrine of the separation of powers assumes a new and greater importance insofar as control over abuse of powers can only be assured by a

[1] K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969).

judiciary free from legislative and administrative interference. Perhaps the greatest modern threat to an independent judiciary is the rise of specialised courts, or tribunals, to which are entrusted many issues vitally affecting personal and property rights of individuals. The value of an independent judiciary may become meaningless if many justiciable issues are entrusted to administrative authorities, for in the exercise of its judicial task, the court is also performing a policy function. The very minimum requirements would therefore be that tribunals observe the rules of natural justice in their judicial function, even if at the point of decision-making, they may exercise their judgment according to policy considerations.

This very general introduction is intended to serve as a reminder of some fundamental precepts underlying our concept of justice, and to prepare ground for a discussion of discretion in the Maori Land Court. What it is intended to show is that this judicial body, a court of record, may exercise its judicial function in a manner unparalleled with any other court, as well as performing its administrative functions with a greater breadth of discretion than would usually be seen as legitimate in an administrative task. It has been suggested that discretionary powers which are in some way limited are thereby able to be controlled to a certain extent. It would appear that powers which appear to be unlimited, and hence out of the reach of judicial control, may indeed be seen as arbitrary powers. The concern is that they are capable of abuse. Furthermore, the usual judicial methods of controlling inferior tribunals are rendered largely ineffective as regards the Maori Land Court. While there is a judicial presumption against parliamentary exclusion of judicial control, and while privative clauses are strictly construed, the very wide privative clause contained in section 64 of the Maori Affairs Act 1953 has become effective owing to the fact that the "record" of the Maori Land Court orders do not constitute a "record" for the purpose of possible review for an error on the record's face, as will be discussed. Nor will an order be invalidated if it contains an error or is irregular in form. Nor is the court bound by the rules of evidence normally associated with a fair trial. Some of this Court's more unusual features include its power to instigate actions of its own motion.

But perhaps the most questionable aspect, relating to the need for judicial independence of a court of law, is that the Maori Land Court appears not to be free from executive pressures, and that it has in fact an important policy function. In this sense, what appears in the guise of a court, with all the traditional powers and privileges of a court, seems to resemble, in many of its functions, something more in the nature of an administrative tribunal.

II. The Maori Land Court: An Historical Perspective

That the Maori Land Court has unusually wide powers has already been mentioned. The justification for these powers, in relation to the policy and purpose of native lands legislation, will be discernable from the judgments of the Supreme Court and the Court of Appeal examined in this section.

The aim here is to provide an overview of the historical emergence and development of this Court, and to combine this perspective with an examination of the Court's wide powers.

A consideration of the Court's historical origins will largely explain its peculiar functions. In the climax of the heated Maori land problems, culminating with the Waitara purchase in 1860, the need for an independent tribunal to sort out the issue of native land ownership was recognised as the only means whereby land purchases could be facilitated peacefully, and the settlement of New Zealand continue.

A highly volatile situation developed between the Crown and the Maori vendors of land. In exercising its pre-emptive rights under the Treaty of Waitangi, the Crown found itself in the position of being the sole judge of the rights of tribes to land which was being offered for sale, and constantly risked being faced with competing claims from other tribes based on customary title, many of which seemed to be well founded. The Crown thus risked incurring the wrath of the vendor tribe if, in the cause of justice, it showed reluctance to proceed with a doubtful purchase, and the wrath of a competing claimant if it did not. A very invidious position to say the least, not lending itself to an easy introduction of European law. As it became more apparent to the native owners that land was a valuable commodity, more of these competing claims emerged. The Government's embarrassment at finding itself in this dilemma, for which it was largely responsible, was acute, and while obviously having a direct concern in sorting out the title to lands as between Maori owners themselves, the Crown's main interest was in promoting alienation, aimed towards the settlement of the immigrant population. Serious questions of policy were at stake. Aside from the problem of the Crown vis-à-vis the Maori, there was also the fierce inter-tribal warfare to be reckoned with, both situations being directly or indirectly caused through land disputes as opposing claimants were determined to assert their respective rights.

It was clear that without some means of determining title, the bitterness and hostilities surrounding alienation would continue.

The first "court" was therefore established in 1862 under the first Native Lands Act. It was to function primarily as a tribunal to investigate and define the proprietary rights to customary lands as between Maori tribes, proceeding on the basis of Maori customs con-

cerning ownership rights. It was soon obvious that many of these customary claims could be traced back *ad infinitum,* and therefore, as one of its first working principles, the Court laid down that Maori customary title was deemed to have been stabilised in 1840, the year of the Treaty of Waitangi. Though this must undoubtedly have caused real injustice to some claimants, it seemed preferable to have a starting point. Although the Court was also charged with facilitating dealings with Maori land and peaceful settlement of the country, its only real powers related to ascertaining ownership of land and issuing certificates of title therefor. The Court had no control at this point over alienation, nor the terms of alienation. The 1862 Act prohibited any alienation of native land that did not have a certificate of title attached, and such a certificate initially permitted as free an alienation as any freehold title could.

Very little land was investigated under this Act, except in the north of New Zealand. The task did not begin seriously until 1865 when the Native Lands Act 1865 repealed the former Act, and reconstituted the Native Land Court as a court of record, presided over by qualified judges. It assumed the powers of the former tribunal, and in addition, was given powers to determine succession to deceased owners, and powers to partition. It was also given power to recommend restrictions on alienation, such restrictions with the approval of the Governor, to be embodied in the title. There followed a flurry of intricate legislation designed to protect the interest of the Maori, while not impeding the alienation of his land. For the convenience of dealing, the first certificates of title contained only the names of ten owners, the effect of which was to permit legal dealings with the land by those named in the certificate with complete disregard of all of the remaining equitable owners. This was remedied by the 1867 Native Land Act which, though still issuing certificates in the names of ten nominal owners, required the names of the actual beneficial owners to be registered. However, so as not to hamper settlement, the nominal owners still had powers to lease the land for not more than 21 years. There was very little control as to the revenue distribution among those beneficially entitled to it. Nor was any mention made of the fraudulent dispositions that occurred between these Acts. Fraud was rife at this time, and so in 1870 the legislature saw the necessity of enacting the Native Lands Frauds Prevention Act, to protect the Maori in their dealings with Europeans with land. The Act invalidated all alienations made by natives which were contrary to equity and good conscience, or in consideration of liquor or arms and ammunition, or which left insufficient land remaining for the support of the vendor natives. Trust Commissioners were appointed to ensure that all alienations conformed to the Act, and no alienation was valid unless so endorsed.

This function was transferred to the Native Land Court in 1894 under the Native Land Court Act 1894.

The 1873 Native Land Act introduced to the natives for the first time the notion of individual ownership, a notion quite foreign to their customary collective ownership, by exchanging for the previous certificate of title a memorial of ownership, containing a record of the name of every individual member of a tribe or *hapu*, and prohibiting any dealing with land unless executed by every member named therein. This proved unworkable and was repealed by the 1880 Native Land Court Act, which restored the former certificates of title, and of course the accompanying drawbacks of revenue distribution control. However, by this Act, the Native Land Court was empowered to impose restrictions on alienation of customary land to which title was ascertained. In 1886 the Native Equitable Owners Act was passed to inquire whether the nominal owners in previous certificates of title held the land beneficially, or were trustees for a larger number of owners. The Court was to include in the title the names of those beneficially entitled. In the same year, the Native Land Court Act 1886 abolished this intermediary step of issuing a certificate of title, and provided instead, that the Court should make an order determining the title, which automatically entitled the owners to a Land Transfer title. Such an order immediately transferred the land into freehold land subject to the Land Transfer Act, and registrable thereunder. It is to be noted that this provides an inroad into the doctrine of indefeasibility of the Land Transfer Act, which provides that it is by registration that title arises. The fact that such a Court order is registrable under the Land Transfer Act does not remove the obstacle that title arises simply through the order.[2]

This has been only a brief summary of the complex native land legislation. The protectionist policy of the various laws gradually imposed upon the Court a guardian role, accompanied by a discretion to be exercised in accordance with the protective spirit of the laws.

In 1931 a final Native Land Act consolidated 34 statutes relating to native lands, and established a basis for the present Maori Affairs Act 1953.

III. Discretion In The Maori Land Court

As has been seen, the early Native Land Courts were established to investigate customary title to native land. They were given exclusive jurisdiction for this task, and were empowered to issue orders vesting the freehold in possession of the owners, such orders to specify the

[2] *Re Hinewaki No. 3 Block* [1922] G.L.R. 591. Although this related to a partition order, it was made clear that the order itself created title in the land concerned.

relative interests of those entitled to the land.

The legislative policy was to convert the native concept of ownership into a title cognisable under English law. In this task, the Court was performing a judicial function, and was statutorily charged to determine title according to native customs, or "customary law", whatever that "law" might be. It was a matter of necessity that the Court adopted as one of its first principles, the fixing of customary title at 1840, and refusing to recognise any claims to possession based on inter-tribal warfare after that date, although this necessity was founded on policy considerations. In spite of this, it was clear that the Court was anxious to maintain its traditional independence and impartiality. In one of the early investigations of the Orakei Block in 1869, Judge Fenton stated:[3]

> . . . the Court has not been 'overshadowed by the Crown', yet I cannot conceal from myself that the Court is not in the position it ought to occupy with reference to the Executive government; and intimately concerned as its proceedings are, and unavoidably must be, with the peace of the country, my present mind is that I . . . shall decline to proceed with any case in which the Crown's officer appears . . . as assisting either of the suitors.

Although the Court encountered much difficulty in ascertaining what the ruling customs were in particular cases, which resulted in some real conflicts in earlier judgments, there was theoretically no room for discretion as such. Its task was to discover what these customary laws were which they were to apply. But it was also clear that if their investigations were to be successful, they were not to be bound by the ordinary rules of evidence. The vague and confused nature of the evidence given by parties, the exaggerated description of events, the omission of relevant material, all had to be resolved by judges, often according to their own experience and knowledge of the matters. The power exercised by the presiding judge in estimating the value and truth of conflicting testimonies, was necessarily of a discretionary nature. He was permitted to act upon any evidence whatsoever, sworn or unsworn, and to receive any statements, documents or information that might be of some assistance. This included hearsay evidence.[4]

In addition to discovering these customary "laws", the Court also found it necessary to make some modifications where custom was uncertain or inapplicable. It soon became apparent to those investigating such customs, that there was very little uniformity in what constituted a tribal right of ownership, except perhaps that

[3] *Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879* (1879), 57.

[4] This unusual judicial liberty is still contained in the current Maori Affairs Act 1953 s.54, which makes the application of the Evidence Act 1908 subject to any kind of information which, in the opinion of the Court, will assist in dealing with the matters before it. The Court can therefore still accept any evidence, whether legally admissable or not, in the exercise of its vast range of powers.

"might is right". There had never been any general government of the country, and there was no general inter-tribal polity. However, in support of their claims, natives did rely on certain *take* or rights as to their *papatipu* land. These *take* were mainly based on discovery, ancestry, conquest or gift, and had to be accompanied by evidence of occupation: either actual occupation, or the right to occupation by having "kept the home fires burning".

The Court proceeded on the basis of an English common law presumption, "possession is prima facie evidence of title", the strength or weakness of this presumption being dependent upon duration of possession, and the extent thereof. The rules which the Court laid down for its own guidance could not really be said to have formed part of the native customs, but by using the English common law rules as to title to guide them, the Courts were able to replace the native "might is right" custom.

This illustrates that the element of judicial discretion at play was certainly larger than appeared in the development of the English common law. From one point of view it might be said that the Courts were charged with discovering the native "common law". The idea of "custom becomes law" is not new, and was recognised as the initial basis of common law in medieval times, although this has long since been embodied in judicial decisions. Reference to customary law has for the most part become obsolete in English common law because of the judicially created system of precedent. But it was also recognised by the early Native Land Courts that no decisions of the English Courts could be directly in point when it came to determining what native customs were. For example, in *Public Trustee* v. *Loasby*[5] it was stated that one had to consider three things: (i) the question of fact whether such custom exists as a general custom of the Maori race; (ii) whether the custom is contrary to any statute law of the Dominion; and (iii) whether it is a reasonable custom, taking the whole of the circumstances into consideration. While the second consideration presented no problem, the first and third obviously did. There was very little custom that was common to all of the Maori tribes concerning land ownership. Furthermore, what appeared "reasonable" to a native may not have been regarded so by a European judge.

However, it appears that the judges did attempt to familiarise themselves as far as possible with customary practices and where there were inconsistent claims of customary practice, made modifications according to the "dictates of equity and good conscience". The inconsistent nature of early decisions soon became more clearly defined through judgments of the Court, and these basic rules were adhered to

[5] (1908) 27 N.Z.L.R. 801.

as far as possible, even though in some respects they may have differed from the actual customs practised by the Maori before the coming of the settlers.

But whatever the merits of the Court's judgment may be in discerning ownership disputes based on custom, it appears that the Court has the final say over the matter. The Supreme Court has made it clear that it will recognise whatever the Maori Land Court holds to be native custom.

What the Maori Land Court states to be "customary law" will not be interfered with by the Supreme Court[6] — it has the final say over whether a parcel of land is customary land,[7] and it may also decide conclusively whether or not any customary practices exist to govern a particular situation.[8] This means, in effect, that such a determination by the Court becomes unchallengable.

Having settled the ownership problems, the Court's next task was to ascertain the individual owners of the land, so as to insert the names of successful claimants into the freehold order. This was followed by determining the relative interests of those entitled. The difficulty here was that Maori custom knows nothing of individual ownership, let alone of reducing such a concept to a share value. Chief Judge Seth-Smith was heard to say in one of his early judgments:

> The question as to what principles are to guide the Court in determining relative interests is one of the most difficult with which the Court has had to deal. The Legislature has imposed upon the Court the duty, but has failed to give any assistance in providing the means of discharging the duty. 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 the tribal property, and it is not surprising that no customary rule was ever established.

The judge went on to say that in the absence of any rule of either law or custom, the decision must necessarily be arbitrary, although some of the analogies of custom might usefully guide them, and that it was unavoidable that some degree of inconsistency would appear in different decisions. That is not to say that the Court did not develop any principles to guide such distribution, but the principles that were evolved were the result of unfettered judicial discretion seeking to work "justice". Initially the relative interests were settled by the Maori owners themselves, but as the value of land became more apparent, disputes arose. It was recognised that not all individuals had equal rights. The chief principles adopted by the Courts were: (a) the strength of occupation, (b) the "heads of family" rule, and (c) the measurement of duration of occupation, though this last method was

[6] *Willoughby* v. *Panapa Waihopi* (1910) 29 N.Z.L.R. 1123.
[7] *Tamihana Korokai* v. *Solicitor-General* (1913) 32 N.Z.L.R. 321.
[8] *Re the Bed of the Wanganui River* [1962] N.Z.L.R. 600, 618.

used less frequently. The disputes were further complicated by claimants whose claims were based on *aroha,* their names having been included because of marriage relationships, or a personal contribution or through friendship. The Courts refused to recognise a claim based on *aroha* alone, and required the unanimous consent of all co-owners as to these claims. Nor would the Courts recognise the claim for special considerations based on *mana*, as forwarded by chiefs due to their prestige, power and influence. There appears to be some confusion as to whether *mana* should have been a relevant consideration, since, while the Maoris themselves seemed to recognise the powers of a chief to control the land and its distribution to sub-tribes, or *hapus*, the Court doubted whether this power in fact entitled them to some greater title.

Whether real justice could ever have been achieved by introducing any method of ownership into a communal system is a moot point. However, it was legislative policy to attempt detribalisation of the Maori, to be partly achieved through introducing the individual titles system. The Court's discretion was confined to deciding what method, in its own view of justice, might best achieve this end.

In discerning native customs regarding ownership of land, it has already been suggested that the process was somewhat analogous to the development of the common law system. It is true that in discovering these customs, wide powers were conferred upon the Court to a much greater extent than is usual, but the conferment of the wide powers was not an invitation to the Court to exercise its discretion arbitrarily. The Court's dilemma was not merely confined to discovering and applying customs to native land title, but extended to producing something cognisable under English law in the result. In many instances, as has been seen, these tasks were basically incompatible. In defining the relative interest of the Maori owners, the Court was clearly creating law where none had existed before. Even in determining inter-tribal disputes over land, the deficiency of a common customary law necessarily found the Court making modifications or creating substitutes. In its task, then, the Court often walked a thin line between discovery and invention.

The English common law experience has already been mentioned, where judges have been in the position to declare what the general custom of the realm was, such custom becoming law by virtue of *stare decisis.* Such practice is not notably present in the method of the Maori Land Court. There is no official publication of the Court's decisions and hence no available data as to what the Court has declared the law to be. The practice of issuing orders orally from the bench has presented reporting problems. The only available data comes from Supreme Court reports, but these account for com-

paratively few cases. In any event, the chances of succeeding in challenging a court's decision on customary law seems to be non-existent. Much, then, would appear to depend on the individual judge, either to apply a previous decision where it is applicable, or depart from it. Related to this is the more urgent problem of the unfettered admission or rejection of evidence which claimants may bring to support a case. The exercise of such discretion will vary between judges, presenting perhaps even a greater danger to uniform decision-making.

IV. Discretion In The Maori Land Court's Administrative Function

Much of the previous discussion is mainly of historic interest, since although the Court retains the jurisdiction to determine disputes over customary land and to define relative interests in Part XIV of the Maori Affairs Act, most native titles today have been ascertained. But its importance remains as the precursor of the modern problems concerning Maori lands, and also in justifying the extension of the Court's powers in dealing with these resultant problems. That the Court gradually assumed a protective role over Maori affairs concerning land has been illustrated. This reflected the need for Maori affairs to be protected in a legal system with which they were quite unfamiliar. But the degree of protection, extending to a paternalistic, or *parens patriae* role, was the consequence largely of legislative "errors" which had provided for opportunities of immense frauds over land deals. The result of this protective policy has been to confer upon the Maori Land Court powers of an unprecedented nature in controlling Maori affairs concerning land. It has also resulted in placing into the hands of a judicial body, an executive function, thus mocking the traditional independence associated with a court.

Various facets of the Court's protective function emerge from the judgments. In *Aotea District Maori Land Board* v. *State Advances Superintendent*[9] it was stated:

> The policy of our Native land legislation is pre-eminently for the protection of the native owners of land . . . .

Then again in *Pateriki Hura* v. *Aotea District Maori Land Board*:[10]

> It must not be forgotten, however, that the Native Land Court is in effect, *parens patriae* of Native Lands, and that while as a whole the powers of the Native Land Court are chiefly designed to determine questions arising between Natives and concerning Native ownership, the legislature may have found it desirable not only to give the Court wider powers in relation to such matters than the ordinary Court enjoys in relation to European questions concerning European land, but in addition more general powers based on a supposed Native immaturity of judgment, to conserve Native lands and the profits thereof from uneconomic use and exploitation.

A *loco parentis* aspect of this role emerges from *Re Mangatu Nos 1,*

[9] [1927] G.L.R. 557, 560.
[10] [1940] G.L.R. 173, 175.

3, and 4, Blocks.[11] Although there the Supreme Court did not actually dispute counsel's contention that the Maori Land Court's protectionist policy did not extend to that of *loco parentis,* by refusing to acknowledge that that Court's guardian function was lessened by a new statutory provision extending the Native owner's control in respect of his land, it can be deduced that the spirit of the decision supported the existence of that function.

The legislative policy then, was to prevent the Maori from having full control over his property, based on his inexperience in business affairs and his improvidence. And, "[f]ar from such provisions being strictly construed, they should . . . on the contrary, be liberally construed".[12]

Some of these provisions will be examined. As a result of ascertaining individual owners of native lands, many blocks are held under multiple ownership, a problem which increases with every succession order. Part XXIII of the Maori Affairs Act gives assembled owners powers to deal with their land, subject to the provisions of the Act. The powers of assembled owners apply to Maori freehold land and also to European land owned by Maoris. An owner is defined as one beneficially entitled to the land, and "assembled owners" means those owners assembled together in a meeting held in accordance with that part of the Act. No meeting can be called except by the direction of the Court, made through the specified procedure. In making the application, the purposes of the meeting are to be specified, and where the purpose is to consider the alienation of land, the application is to be made by the Board of Maori Affairs. Except in this latter case, the Court has complete discretion as to whether a meeting shall be called or not. Furthermore, any meeting is to be held at the time or place that the Court appoints. The Act specifies the kinds of resolutions which may be made, but no resolution passed by the assembled owners is to have any effect until it is confirmed by the Court. A separate application must be made to the Court for confirmation. The Court may either confirm it absolutely or subject to conditions (to which the alienee may consent before it proceeds), or disallow the resolution. Also, the Court may refuse to consider the application for confirmation if, in its opinion, there has been undue delay in the application. No appeal from a Court order under this section shall lie to the Appellate Court, except in the case of a resolution proposing alienation to the Crown.

Perhaps the most potent element of discretion here is the Court's power in respect of calling a meeting. No appeal lies to the Appellate Court for any refusal to call a meeting, and since the application must

[11] [1954] N.Z.L.R. 624, 627.
[12] *Tiki Paaka* v. *Maclarn* [1937] G.L.R. 214, 225, per Smith J.

specify the purpose of the meeting, these powers make the subsequent provisions relating to confirmation almost superfluous.

Part XXII of the Act permits incorporation of owners of one or more areas of Maori freehold land. An incorporation order permits a large block of land which is held under multiple ownership to become a workable legal entity resembling a limited liability company. This provides an easier means of managing and developing the land. The resolution must again go through the process described above relating to assembled owners, and such resolution may, at the discretion of the Court, be approved. A Committee of Management is appointed by the Court, although here the nominations made by the owners are to be considered. However, the court does retain the power to refuse to appoint a particular person, on sufficient cause being shown. It may also appoint a non-elected person. Most of the powers which are exercisable by the body corporate are under the Court's control, and the Court may also restrict the powers of the incorporated owners, or extend them "from time to time", or remove such restrictions or extensions at any time.

An alternative means of facilitating the use, management or alienation of Maori freehold land, customary land or European land owned by Maoris, is for the Court to constitute a trust, either on its own motion during an action, or upon application. The Court may make an order vesting the land in the trustees, who must consent to act, and in a separate trust order, the Court declares the terms of the trust under section 438. Sub-section (3) permits the Court to vary the number of trustees, vary trustees or vary the terms of the trust at any time, by making a new trust order, or fully or partly terminating the trust by vesting land in those beneficially entitled thereto.

By subsection (5), the trust order may authorise or direct the trustees to use and manage the land for any purpose, to subdivide, alienate or dispose of it in any manner whatsoever. The order made by the Court may confer such powers upon the trustees as the Court thinks fit and necessary for the performance of the trust.

Further discretionary powers relate to partitioning and exchanges of Maori freehold land. As regards partitioning land, the Court is given exclusive jurisdiction, which it may exercise at its discretion. The Court may refuse to exercise its jurisdiction if it is of the opinion that the partition would be inexpedient in the public interest or in the interests of the owners or other persons interested in the land. The Court's powers regarding partitions are contained in Part XVI of the Act. There it is also given power to direct a sale of the land when a partition application order automatically constitutes title to the land. Even if the Court agrees to partitioning, it also has discretionary powers regarding the actual partitions. Furthermore, the partition

powers conferred on the Court in this section also extend to European land owned by Maoris.

The Court's powers to make exchange orders are contained in Part XVII of the Act. Again, these are discretionary. They also relate to Maoris holding European land, but not to Europeans holding Maori land, unless it is an undivided share in freehold land.

The Court also has a discretionary power over alienation in general. This is contained in Part XIX. It begins by stating that alienations by Maoris or of Maori land may occur in the same manner as that by Europeans and European land, but subject to the provisions of the Act. The first restriction relates to land owned by ten or more owners. In such a case, the "assembled owners" provisions apply. All alienations by Maoris of Maori land are ineffective unless confirmed by the Court. As regards a confirmation order, section 225 (2) states:

> Notwithstanding anything in subsection (1) hereof (which relates to the time in which an application for a confirmation order is to be made) the Court may, in its discretion, and subject to such terms and conditions as it thinks just, confirm any alienation by way of transfer for the confirmation of which application was not made within the time limited by that subsection, if in all the circumstances of the case, the Court is of the opinion that the alienation should be confirmed.

The conditions of confirmation of which the Court "must be satisfied" before it will confirm, include ensuring that the alienation is not contrary to equity or good faith, or to the interests of the Maori alienating.

It is to be noted that the term "alienation" includes transfer, sale, lease, gift, licence, easement, profit, mortgage, charge, encumbrance, trust, or other disposition, whether absolute or limited and whether legal or equitable. It also includes a contract to make any such alienation, and also a variation or surrender of a lease or licence. None of the restrictions on alienation apply to the Crown.

The Court's powers here are obviously very extensive. The considerations applying to confirmation are clearly protective provisions, in keeping with the Court's protective function. It is important to note that the Court may modify the terms of alienation by virtue of section 229, with the consent of the alienee. If the alienee refuses consent, the Court may withhold the confirmation. Such modifications may relate to consideration, interest, rent, or otherwise. So although it appears that, from the outset, general restrictions on alienation are removed, it is clear that the Court's protective functions remain intact.

Having presented this overview of the Court's discretionary powers, it remains to examine to what extent these very wide discretionary powers may be controlled. Under administrative law, the control of powers given to statutory tribunals is limited to declaring acts ultra vires. The real difficulties here relate to the very wide powers conferred — it becomes very difficult to determine where the boundaries

of its exercise are. Furthermore, section 64 of the Maori Affairs Act states that no proceedings shall be moved into the Supreme Court by certiorari, nor shall any Court order be invalid because of error, irregularity or defect in form, or in the practice or procedure of the court. However, these provisions are not to apply to any order which in its substance is made without, or in excess of the court's jurisdiction.[13]

Privative clauses do not deter the Supreme Court from quashing decisions made if there appears to be a jurisdictional defect, or an error of law apparent on the face of the record. However, the following illustration may show how ineffective these usual controls may be.

In *Hami Paihana* v. *Tokerau District Maori Land Board*[14], where certiorari was sought to quash a Court order after an unsuccessful appeal to the Maori Appellate Court, the limitations of this method of control in relation to the Maori Land Court were demonstrated. In this case a Court order was made but with a defect in procedure. According to the relevant section, the Court's jurisdiction was exercisable upon the application of the Maori Land Board; and here the order was made without going through the Board which should have made the application. This sort of procedural defect is usually seen as analogous to a want of jurisdiction, thereby making certiorari applicable in usual circumstances. But in the opinion of the Supreme Court, this was a matter of "form, practice or procedure" within the meaning of section 64 (2), even though it was acknowledged that, but for that section, the error would go to the jurisdiction. Consequently, the order could not be held invalid by reason of such error, and the Supreme Court would only interfere with an order that was of its nature or substance in excess of jurisdiction. Furthermore, it was said that any "excess of jurisdiction" must appear on the face of the record, and that the record of evidence in the minute book of the Maori Land Court did not constitute part of the "record" of that court.

Turning briefly to the procedure relating to the making and promulgation of orders, section 34(1) of the Maori Affairs Act 1953 states that the substance of every final order shall be pronounced orally in open court, and that a minute of that order is to be entered forthwith in the Court's records. But section 64(8) states that in the event of a variance between the order and the minute thereof, the order shall prevail. It is therefore probable that the possibility of the inconclusiveness of a minute lies behind the statement that this does not form part of the "record" of the Court, but such a conclusion

[13] Maori Affairs Act 1953, s.64(3).
[14] [1955] N.Z.L.R. 314.

leads to recognising that much of the real effectiveness of certiorari is thereby lost. In the same case, the Supreme Court also stated that it would not interfere when, in its opinion, the Maori Land Court had arrived at a wrong decision, or acted without evidence or sufficient evidence, such licence presumably applying only to actions falling within its jurisdiction.

It can only be presumed that the Supreme Court would interfere in the event of a male fide exercise of power.

Another application for certiorari to quash a Maori Land Court decision to grant an injunction also failed in *Pateriki Hura.*[15] This application was based on the ground that the Court had exceeded its jurisdiction in granting the injunction. The Supreme Court stated that the Maori Land Court's powers to interfere with the fundamental rights of land ownership exceeded those normally permitted in relation to European land, and that the Supreme Court's task was confined to determining whether the Court had jurisdiction to consider the matter brought before it. It agreed that the jurisdiction was expressed in very wide terms, but that this was consistent with the Court's *parens patriae* role.

It may be seen that the difficulty lies, not with getting a case into the Supreme Court, but in getting anywhere with it. Section 67 of the Maori Affairs Act does, however, make provision for a case to be stated for the opinion of the Supreme Court, confined to any point of law that arises during proceedings. The Supreme Court's opinion may also be taken on appeal to the Court of Appeal, and the decision of the Supreme Court (or Court of Appeal, as the case may be) is binding on the Maori Land Court. A reciprocal provision is found in section 50, so that in any case stated for the Supreme Court, that Court may request the opinion of the Maori Appellate Court on questions of fact or Maori customs and usage relating to land interest. But in this case, the Maori Appellate Court's opinion is not binding on the Supreme Court.[16] However, it has already been noted that the Supreme Court will accept the Maori Land Court's statement as to what is customary native law. Nevertheless, this section could still be a useful tool for lifting a case out of the Maori Land Court, subject, again, to the problem of the enormous breadth of discretion conferred upon the Maori Land Court. This is exemplified by *Re Mangatu Nos 1, 3, and 4 Blocks.*[17] A case was stated for the opinion of the Supreme Court by the Maori Appellate Court. The argument centred around a provision equivalent to section 292(5) of the present Act, which gave the Maori Land Court power to refuse to confirm the appointment of any person

[15] Supra.
[16] Maori Affairs Act 1953, s.50(4).
[17] Supra.

elected to a management committee of a Maori Incorporation "on sufficient cause being shown". The problem was how widely this power might be subjectively interpreted by the Maori Land Court. Counsel's contention had been that the Incorporation provisions had marked a turning point in freeing the Maori owners' dealings with their land, and consequently, a restriction of the Court's powers of interference. The Supreme Court rejected this argument, stating that the words were wide and unqualified, and whether or not sufficient cause is shown is a question for the Maori Land Court. It refused to place any restrictions on the ground which the Court might hold to afford sufficient cause, in the exercise of its quasi-parental jurisdiction guarding the Maori in his ownership of land.

This is undoubtedly a very powerful statement in view of the very extensive subjective provisions contained in the Act.

Although the provisions permitting a case to be stated for the opinion of the Supreme Court appear to be one way out of the Maori Land Court's jurisdictional powers, they may be defeated by section 30(2). Section 30 sets out the general jurisdiction of the Court, and while these provisions do limit the jurisdiction of any other Court, section 30(2) states that no matter which has been heard and determined by the Maori Land Court shall thereafter be heard in any other court. A "case stated" cannot, therefore, be an effective appeal method, but must be taken before the Court has determined the matter. It should also be added that a case stated can be taken as far as the Privy Council.[18]

The Maori Affairs Act also leaves intact the application of the Declaratory Judgments Act 1908, by virtue of section 469. An originating summons was taken under the Declaratory Judgments Act in *Re Rutene deceased.*[19] This case concerned the application of the 1953 Maori Affairs Act to a will left by a testator who had died prior to that Act coming into force. Before approaching the Supreme Court, the applicants had made an application to the Chief Judge of the Maori Land Court under section 425, which gives the Chief Judge special powers with respect to orders. They had asked for an amendment or cancellation of vesting orders, and requested the Chief Judge to state a case to the Supreme Court. As to both of these matters, the Chief Judge's powers are totally discretionary. He refused to alter the vesting orders and declined to state a case on the ground, according to the minute book, that his interpretation of the applicability of the new Maori Affairs Act was adequate. In the result, the case came before the Supreme Court under section 469. Hardie Boys J. said of the

[18] *In re Whareroa 2 E Block (No. 2)* [1957] N.Z.L.R. 987.
[19] [1959] 2 N.Z.L.R. 1394.

minute book:[20]

> I regard that as a matter that has been heard and determined by the Maori Land Court and in terms of section 30(2) shall not thereafter be heard in any other Court.

He therefore refused to examine the disposition of the will.

Nor is the Declaratory Judgments Act available for deciding hypothetical points. It seems, therefore, that in real terms, it might be of very little effect as an escape route out of the Maori Land Court's discretionary powers. Furthermore, a declaratory order or judgment is not enforceable in any case, but no doubt, if it could succeed in the initial stages, the Maori Land Court would abide by its tenor.

However, these decisions should now be read in the light of the very recent *Ngatahine* decision.[21] This was an action taken under the Judicature Amendment Act 1972 by the applicant, a court-appointed trustee removed from that office by the court for refusing to agree with the remaining majority of trustees concerning the use of a block of land, the subject matter of the trust. The action succeeded in challenging the variation of a trust by the Maori Appellate Court as being, in substance, in excess of that Court's jurisdiction, a contingency not protected by the privative section (section 64). However, in his judgment, Mahon J. questioned the validity of the "historical view that members of the Maori race are incapable of managing their own affairs without supervision."[22] He noted that the original provision relating to trusts required every alienation comprised in a trust to be confirmed by the Maori Land Court, and that the Maori Affairs Amendment Act 1967 repealed and re-enacted section 438, excluding the requirement of the Court's confirmation. The ratio of the case is of course confined to acknowledging the removal of the supervisory control of court-appointed trustees acting in relation to trust land. It is still difficult to accept the validity of the challenge seriously since, even though the Court's supervisory powers are removed in such a case, the Court still remains effectively in control of appointing the trustees and controlling the terms of the trust in its creation of the trust order.

While this decision is significant in that it succeeds in challenging an order of the Maori Land Court, such success should be viewed in the particular circumstances of this case as an ultra vires decision. It is submitted that it does not affect the validity of the vast body of precedent previously discussed.

As in many legislative amendments relating to Maori land, the concession towards greater autonomy is more apparent than real.

[20] *Ibid.*, 1407.
[21] Supreme Court, November 1978 (unrep.).
[22] *Idem.*

V. CONCLUSION

The task of this study has been to juxtapose the extent of discretion acceptable within the legal system with the extent of discretion actually permitted in the Maori Land Court. It was suggested that the use of discretion was circumscribed anxiously enough to indicate that the rule of law is still an important part of our legal system. It has been shown that the extent of discretion permitted in the Maori Land Court's judicial function well exceeds that traditionally associated with a court. Many of the choices that the Court made in "discovering" customary law of the Maori tribes involved legislative elements, and these choices have had important consequences for the Maori people. The additional protective functions imposed upon the Court further encroached upon the impartiality that was seen as a necessary pre-requisite for maintaining the rule of law. This, in effect, forced the Court to assume the nature of a specialised court — a characteristic which we have come to associate with an administrative tribunal. The combination of a general jurisdiction with a policy function threatens one of the fundamental premises of a free society, namely, the need for a judiciary free of executive and legislative pressures. In addition, the discretionary powers enjoyed by the Court seem to well exceed those which statutory tribunals exercise. In administrative law, judicial control of administrative functions, even the judicial elements in administrative functions, are closely guarded. In such instances, the rules of natural justice are rigidly applied. Whether the Maori Land Court may abandon the application of natural justice is still not clear even now.

In *Hakopa Te Ahunga* v. *Seth-Smith*,[23] Stout C.J. said:

> So long as a Native Appellate Court is seised of a dispute between Natives and Natives affecting the title to Native lands, the Native Appellate Court may deal with it as it pleases. It may proceed contrary to what is called natural justice. It may also adopt a procedure that an English Court, or the Supreme Court . . . of this colony would not adopt, and if it does so this Court cannot interfere. The Legislature has, in fact, clothed it with more power than it has given to the Supreme Court of New Zealand and . . . the interests of Natives are left to it unhampered by appeal or by the control of the Supreme Court . . . . This, in our opinion, is the law, and it is not for this Court to inquire whether the law is wise or not.

This statement has not yet been overruled, although in an obiter comment in *Hami Paihana*[24] F.B. Adams J. said:

> . . . I reserve my opinion as to the proposition that the Maori Land Court 'may proceed contrary to what is called natural justice' . . . .

As it stands, then, the discretion is a powerful weapon in the hands of any who might wish to abuse such powers.

It has also been seen that subjective discretionary powers given to administrators are examinable to determine whether reasonable

[23] (1905) 25 N.Z.L.R. 587, 591.
[24] Supra, 320.

ground for such decision actually existed. The Supreme Court has shown its reluctance to make such an investigation into the exercise of discretion by Maori Land Court judges. The prerogative writ of certiorari does not appear to be effective against Maori Land Court orders where, in parallel administrative cases such protection would not be withheld. Earlier it was stated that discretionary powers could be saved from the dangers of arbitrariness if they were circumscribed. The Maori Land Court powers appear to be neither circumscribed in most instances, nor able to be limited by the Supreme Court employing its usual controlling methods.

It is clear that the Supreme Court's reluctance to interfere with the Maori Land Court's activities is a result of its traditional guardian functions.

In view of the deliberate legislative intention to detribalise the Maori and undermine his communal strength by interfering with the very source of his identity, it is difficult to see what alternative method to creating a body to guard the Maori interests might have been adopted. Whether this political choice was necessary is only of theoretical interest now.

The moot question remains as to what extent these wide powers which the Court still possesses can be justified today. It is difficult to imagine that the Maori of today's society is as ignorant of the European legal system, and commercial dealings, as when such law was first introduced.

It is, however, of interest to note that a Committee of Inquiry, formed to investigate these matters in 1964, concluded that the majority of submissions showed that there was still a need for the Maori Land Court's supervisory capacity to continue for some years. It was agreed that more independent decision-making ought to be given to Maori owners regarding dealing with land, but it was also recognised that, but for the Court's powers, much land presently owned would have already been lost. The general conclusion drawn was that the Maori of today, with certain exceptions, saw his land as an economic resource rather than something to be conserved and improved. This is hardly a surprising result considering the circumstances that have forced him to move into a world of cash economy. This might well explain why there was a general consensus on the part of Maoris making submissions, that the actual dealing with the land by Maoris ought to be entirely their decision, while the Court's future role should be that of a "watchdog" with respect to rents and prices.