Te Take Maori:
A Maori Perspective of Legislation and its Interpretation with an Emphasis on Planning Law

by

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Any discussion of legislation affecting Maori land must take account of the emotion intertwined in that land. One must come to terms with the significance of the land and how it is inextricably bound to the Maori ethos. The following paper argues that many of the legal problems facing the Maori today turn on the drafting and implementation of legislation and policy directives which give little if any parlance to Maori cultural values. In legislative and judicial terms Maori rights and values have not been recognised. A summary of legislation and case law will follow. First, a brief foray into the meaning of the land to the Maori must be made.

Maori culture, in all its forms, emanates from Papatuanuku, the mother earth. Traditionally, the child's afterbirth was buried to establish an iho-whenua (connection with the land). Thereafter mother earth provides for man's sustenance with the food that springs from her breast. She shelters him and in his final resting place hugs him close to her bosom. The rivers, the forests, the mountains, the lakes, the sea shores, the sea itself Te Moana Nui a Kiwa, all are held in great reverence.

The way in which the Maori views the land is echoed in an eloquent summary given by another indigenous person. The following summary applies equally to the Maori world view and how he perceives the Pakeha in relation to it. The Indian Chief Seattle stated in 1855:

> Our dead never forget this beautiful earth. It is their mother. They always love and remember her rivers, her great mountains, her valleys. They long for the living who are lonely too and who long for the dead. And their spirits often return to visit us. Every

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> part of this earth is sacred to my people. . . . Even those unspeaking stones along the shore are loud with events and memories in the life of the people. The ground beneath your feet responds more lovingly to our steps than yours because it is the ashes of our grandfathers. Our bare feet know the kindred touch.[1]

It will become evident in the following paper that policy makers and planners have consciously and unconsciously strived for cultural uniformity in this country and in so doing have relegated things Maori into non-issues. Perhaps this has been carried out under the false presumption that equality means "sameness".

Counsel for the Ministry of Works and Development stated in his submissions to the Waitangi Tribunal:

> Planning statutes apply to all — Maori and Pakeha — as has been said "we are one people".[2]

Perhaps it is this presumption that is the cause of a substantial problem.

The premise, "we are one people" was voiced by Captain Hobson on the signing of the Treaty of Waitangi 144 years ago. It was voiced again by the Governor General on Waitangi Day 1977[3] and in many letters to the editors over the He Taua Party incident in 1979. We might have hoped to have heard its death knell in Pakeha terms, on Waitangi day 1981 — Sir David Beattie stated:

> I am of the opinion that we are not one people, despite Hobson's oft quoted words, nor should we try to be. We do not need to be.[4]

The Maori people might understandably be sceptical about the effect of Beattie's view given that the framework of our society has been firmly established through the adoption of British social, economic, philsophic and legal institutions — the following case law will show how Maori custom and tradition has been denied.

It has been argued that Maori custom does not exist. In the case of *Wi Parata* v *Bishop of Wellington*[5] the Court of Appeal stated:

> On the foundation of this colony the Aborigines were found without any kind of civil government or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognise the independent nationality of New Zealand. But the thing neither existed nor at the time could be established.[6]

Maori were "Primitive barbarians".[7] Furthermore statutory recognition of Maori custom was expressly denied by Prendergast CJ:

[1] Walker, R. Korero *NZ Listener* 1975, from a speech of Chief Seattle, January 9 1855 (translated by Wm Arrowsmith from the Victorian English of Dr Henry Smith of Seattle, as published in the *Seattle Star* on October 29, 1877).
[2] Waitangi Tribunal report on Motonui 1983 23 Para 5,6.
[3] Sir Keith Holyoake *NZ Herald* 6 February 1977.
[4] *NZ Herald* 7 February 1981 12.
[5] (1877) 3 NZ Jur 72.
[6] *Ibid, per* Prendegast CJ, 77.
[7] *Ibid*, 78 — see views to the contrary expressed by Carter [1980] AULR 1; Frame [1981] NZLJ 105.

> . . . a phrase in a statute cannot call what is non-existent into being.[8]

The Privy Council disapproved the *Parata* case in *Nireaha Tamaki* v *Baker*:

> . . . it was said in the case of *Wi Parata* v *Bishop of Wellington*, which was followed by the Court of Appeal in this case, that there is no customary law of the Maori of which the Courts can take cognizance. Their lordships think that this argument goes too far and that it is rather late in the day for such an argument to be addressed to a New Zealand Court.[9]

Yet eighty-six years later in 1963 Gresson J relied on the *Parata* judgment in *Re Ninety Mile Beach*[10] to state he was of the opinion that it was for the Crown to determine the nature of titles which it could confer. The clash between these cases, from the point of view of precedent, is obvious. Yet what is more disconcerting about the proposition put by the *Parata* case is that it runs contrary to statutes actually recognising Maori rights. Section 4 of the Native Rights Act 1865 expressly recognised Maori customs and usages. Section 8 of the Fish Protection Act 1873 showed the legislature acknowledging certain fishing rights by virtue of the Treaty of Waitangi.

A high percentage of remaining Maori land exists along coastal areas and marginal strips of lakes and rivers. Government legislation in combination with planning regulations has effectively taken much of this land out of the control of Maori people. In 1974 the Whangarei City Council announced its proposed reviewed district scheme. The scheme rezoned all the Ngati Wai[12] coastal lands as proposed public reserve and open space.

In the Ngati Wai tribal area seven eighths of the coastal strip is owned by Pakehas. Of the land zoned for public reserve and open space only 800 acres is Pakeha land — over 5500 acres was being demanded from the Maori. Included in this demand was the Whangaruru Marae and ancestral burial grounds. The failure to so designate 2000 acres of coastal land held by New Zealand Breweries and also an American owned island in the area might be seen to support those who allege discrimination in favour of vested interests.

The excesses in the Ngati Wai case have been only partly addressed by the 1977 Town and Country Planning Act and its Regulations (1978). The Regulations state that the District Maori Council concerned is to be notified should the scheme affect any known Maori land in its district. This enables objections and appeals to be made. Section 4 of the Act has relevance to "cultural" factors in planning and s6(3) gives the Regional Authority the "discretion" to co-opt a Maori representative onto the committee.

The most significant planning provision regarding the cultural and traditional relationship of Maori people to their land is contained in

[8] *Supra*, note 5 at 79.
[9] (1901) NZPCC 371, 382.
[10] [1963] NZLR 461, 475.
[12] Subtribe of Ngapuhi.

s3(1)(g) of the Town and Country Planning Act 1977 under the heading "Matters of National Importance".[13] Under this provision Maori culture must be taken into consideration when assessing uses associated with Maori ancestral land. This section has been interpreted narrowly by the Planning Tribunal.

A prime justification for this narrow view and for the taking of Maori land has been the use of a concept known as the "public interest" formula. In *Lewis* v *Minister of Works and Development*[14] the Planning Appeal Board stated that the designation of Maori coastal land was based upon "The principal object . . . to ensure that in due course there is adequate coastal land which may be used and enjoyed by the 'public at large'".

The *Lewis* case shows that planners can say "this land is in its natural state; we wish to keep it that way for the public good". Unutilised land in Maori hands is now wanted for open space and recreational reserves. Council have also won out over the re-establishment of Maori settlements arguing that it would mean the uneconomic extension of services as in *McCready* v *Marlborough County*.[15] The economic rationale once again triumphed over the spiritual or Maori wairua point of view.

In an earlier similar case *Morris* v *Hawkes Bay City Council*[16] the Appeal Board was of the opinion that the right of the Maori people to live adjacent to the marae must outweigh the potential provision of properly planned development because of the ancestral nature of the marae, and the historical relationship the Maori people have toward it. Yet the Planning Tribunal's inconsistent decisions have solidified somewhat in recent cases much to the detriment of Maori values.

It is pertinent to note yet another dilemma faced by Maoridom. Ignorance is no excuse in the eyes of the law and for the Maori to retain, consolidate and initiate reform he must be an informed participant. This problem has been apparent in Maori input at all stages of planning. Maoridom has traditionally lacked numbers when it comes to this expertise. Maori membership of groups such as Rotary, Lions, Chambers of Commerce, Employers Federations and the politically powerful Federated Farmers has been negligible. This lack of representation in groups which perpetuate "the system" has reinforced the denial of things Maori. This has had serious consequences when it comes to objection and appeal. The Maori have been less well organised, less educated and less able to afford the expenses involved in drawn out litigation.[17] Their litigation has appealed to traditional and cultural rights and not economic rationale.

This proposition is well borne out by the case of *Auckland District*

[13] Asher *Planning for Maori Land* [1982] Town Planning Quarterly 65.
[14] (1978) NZPTD B74.
[15] (1978) NZPTD B1256.
[16] (1976–80) 6 NZTPA 219.
[17] See Moehau A4 Coromandel Mining Licences for an illustration of the effect of exorbitant legal costs.

Maori Council v *Manukau Harbour Control Authority*.[18] This was an appeal against consent granted under s102A of the Town and Country Planning Act 1977 to Liquigas Limited to construct a wharf in the Papakura channel for unloading LPG. The appellant's case was based on s3(1)(g) Town and Country Planning Act 1977 and the Treaty of Waitangi.

Counsel for the appellant appealed to:

> . . . the common thread of humanity between Maori and Pakeha . . . who now share this land called Aotearoa . . . not to reason for that [has] been tried many times, but to aroha (compassion) that noble sentiment of which only human beings who have not had it blunted by civilisation are capable.[19]

Dr Walker then chronicled the injustices meted out to Maori people, all inimical to their rights as protected under the Treaty of Waitangi.

In discussing s3(1)(g) and the implications deriving from the term "ancestral land" two previous cases were cited. In *Knuckey* v *Taranaki County Council*[20] the definition given to the ancestral land was strictly tied to that particular case. The land had to be owned by the Maori and their descendants as one entity and had to be associated with an urupa (burial ground).

The Tribunal stated the Treaty is not part of municipal law and could not be considered.[21]

This narrow interpretation was taken up again in the case of *Quilter* v *Mangonui County Council*.[22] The land in question was no longer under Maori ownership. However it included an extremely important urupa. The Appeal Board stated that because the land had been Europeanised in title it could no longer be regarded as ancestral land:

> . . . the land in question not being Maori land or Maori freehold land is no longer ancestral land . . . .[23]

Counsel for the appellant argued that the land was still ancestral within the meaning of s3(1)(g) even though ownership and occupation was held by non-Maori.[24] The tribunal found this a rather startling proposition and commented:

> But the effect of counsel's submission is to say that the provision can and should be used negatively; that it can be used to prevent non-Maori from using their land in a manner which would offend Maori sensibilities.[25]

Undoubtedly there is some currency in the Tribunal's "negative" statement. It is submitted however, that that currency relies upon monocultural value judgements; the penchant to uphold individual pro-

[18] (1983) 9 NZTPA 167.
[19] *Ibid*, 168.
[20] (1978) 6 NZTPA 609.
[21] Authority used was *Re Bed of the Wanganui River* [1958] NZLR 419.
[22] (1978) NZTPD B1275.
[23] *Ibid*, see NZ Maori Council submission on a definition for Ancestral Land (1981), unpub.
[24] *Ibid*.
[25] *Ibid*.

prietory rights for the "common good". Nowhere in the Town and Country Planning Act or any other legislation could it be construed that "ancestral land" had to be under Maori title and that land should also include an urupa (burial ground).

It was further stated in the *Auckland Maori Council* decision that cases involving 'ancestral land' "illustrate the difficulty which can sometimes arise in presenting intangible values in a way in which they can, by judicial process be identified, evaluated and weighed against . . . [our] . . . conflicting values".[26] Sections 3(1)(g) and 6(3) are subsections which represent the sum total of forty-seven substantive, detailed submissions which were prepared by the New Zealand Maori Council. The way in which they were written into the statute books and further interpreted clearly indicate decisions based on subjective value judgments. As stated by Sheppard J:

> Although the Act requires cultural values to be taken into consideration it does not provide that they must necessarily prevail over other considerations.[27]

The relationship of the Maori to the land transcends tenure on title boundaries as recognised by case law and statutory interpretation. Today there are highly representative skilled and articulate structures within Maoridom pressing this view. Members of the various Maori Councils set up under the Maori Welfare Act 1962 read like a who's who of Maoridom. These Councils are in strategic positions to influence policy and initiate action.

The Auckland Maori Council consists of elected representatives from thirty-nine diverse Maori Committees and organisations throughout the Council region. It covers the same area as the Auckland Regional Authority. All come under the umbrella of the New Zealand Maori Council and all work in close liaison with the Maori Affairs Department, so structures for dissemination of views Maori are available. Yet still, it is submitted, the will to take constructive action on their submissions is lacking.

The New Zealand Maori Council applauded the spirit of the Town and Country Planning Act 1977 and in particular s3(1)(g). However in retrospect it stated in its 1983 submissions to the Maori Affairs Bill:

> We deplore the reality that it has not resulted in any significant relief to Maori owners.[28]

The Council also observed that the Maori Land Court has an intimate knowledge of the complexities of Maori titles and owner groupings. It is anomalous that its jurisdiction is subject to the prior scrutiny of local authorities and Planning Tribunals with no specialist knowledge in these areas. It is anomalous that "public interest" and "Maori interest" should be weighed by those with little knowledge of the latter.

[26] *Supra*, note 18 at 172.
[27] *Ibid.*
[28] 1983 NZ Maori Council Submissions Maori Affairs Bill 24.

Maori claims have experienced a diverse treatment in their consideration. Some have been referred to the courts, others to commissions of inquiry and others have been the subject of direct negotiation. This diversity has led to unpredictability. The New Zealand Maori Council considers it of vital importance that a competent body be able to examine a variety of claims at an early date and at a non-political level. With some extensions to its functions the Waitangi Tribunal could be this body. This Tribunal's recommendations should be persuasive and not totally disregarded.[29]

In the recent *Auckland Maori Council* case it was stated:

> These proceedings are not an appropriate vehicle for redressing past grievances.[30]

The writer accepts that the redress of past grievances may be tremendously difficult. However, with respect, what courts and tribunals should not do is to reinforce grievances by wrongly believing that they are not an appropriate forum to address grievances, be they past or present.

A tremendous precedent for the above proposition was handed down by the High Court in the *Ngati Hine*[31] decision. For the good of New Zealand one hopes similar decisions will follow.

It must be noted that laws cannot alter the habits of men, they cannot eliminate fears, prejudice, pride and irrationality. It is the writer's contention that what is missing is not so much legislation but rather the will to make it operative in terms of those who argued for its inclusion in statute.[32]

[29] The Government of the day totally disregarded the Tribunal's recommendation upholding Maori Rights; however, due to massive public pressure the outfall was resited.

[30] *Supra*, note 18 at 172.

[31] *Alexander* v *Maori Appellate Court* [1979] NZLR 44. See judgment of Mahon J. In essence this case stated that Maoris were no longer incompetent to run their own affairs and stated further that all previous case law to the contrary was to be disregarded.

[32] See the narrow definition given to s 3(1)(g) as opposed to that argued by the conservative NZ Maori Council.