

# KO NGAA TAKE TURE MAORI

## Editor's note

This year, Ko Ngaa Take Ture presents three very different articles. Pierre Tohe offers a jurisprudential discussion of Tapu as Maori Law, the first of its kind in this section. Selwyn Hayes critiques the Resource Management Amendment Act 1997 and its impact on Kaitiakitanga. As both these notes use and discuss complex Maori terms, the reader may wish to refer to Williams, *A Dictionary of the Maori Language* (7<sup>th</sup> ed 1971) for further clarification. The third note is an analysis of the Maori Fisheries case, the most important case for Maori this year.

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## Maori Jurisprudence: The Neglect of Tapu <sup>1</sup>

Tuatahi me wehi ki te Atua i runga rawa  
Me honore te Arikinui Te Atairangikahu  
Nga tini mate kua wehe atu ki tua i te arai  
Haere e nga mate haere atu ki te po oti atu  
Tatou te hunga ora kua mahue mai nei  
Nga mana, nga tapu, nga reo, nga waka  
He mihi nui tenei, a, tena ra tatou katoa.

*E kore hoki e wareware te ngaakau, ko taana whakaaro tonu teena he tapu. Ko aana mea pai e kore hoki e wareware. E mea ana hoki, ko toona mea nui he tapu...*<sup>2</sup>

*Let us not forget in our hearts that a person must always think of his tapu. He does not forget the good thing he has. His greatest possession is tapu...*

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1 Ehara ahau i te tohunga ki nga ahuatanga e pa ana ki tenei mea e kia nei 'te tapu'. Ehara tenei i te korero whakahihi, he korero whakamarama noa iho, hei awahina te whakamohio o nga tikanga Maori me te putake o ena mea.

2 Shirres quoting Manuscript GNZMMSS 31: 8-9, in *Tapu being with potentiality for power* (unpublished thesis, University of Auckland, 1979).

Social control in Maori society is determined at its most fundamental level by reference to tapu. Tapu acts in many ways like law. It is the starting point for arguing the existence, maintenance and continuance of Maori law,<sup>3</sup> which includes Maori systems of regulation and Maori worldviews. Traditional Maori society had no judiciary, legislature or “settled system of law”<sup>4</sup> recognisable by Europeans. A very narrow definition of law, which encompassed the view that “there is no law until there are Courts”,<sup>5</sup> made it easy for Europeans to discount ‘Maori law’ as quaint custom. A working definition given by Durie recognised law as it applied to Maori people to be:<sup>6</sup>

[T]he values, standards, principles or norms to which the Maori community generally subscribed for the determination of appropriate conduct.

This wider definition of law allows us to draw significant comparisons between law and tapu. However, legal articles concerned with comparisons between law and Maori concepts, and the identification of Maori frameworks and systems of regulation, have tended to overlook tapu, the overarching concept upon which Maori society is based. This article seeks to help redress this imbalance by explaining that tapu is the pre-eminent concept in Maori society. It is the basis upon which all other concepts subsist; and is the closest concept that Maori have to a concept of law.

A critique of Maori legal writing is offered, considering possible reasons why the concept of tapu may be omitted, and the ways in which it has been included. The article will then demonstrate why tapu is a pre-eminent concept and the foundation of Maori law.

## Omission of Tapu

Maori practising in and commenting on the law have tended to overlook the importance of tapu.<sup>7</sup> The writer is aware of only five articles from legal journals and law reviews that made specific reference to tapu.<sup>8</sup> Many of the articles written by Maori could have accommodated tapu, or further developed the

3 Law or lore. It does not matter. The terms are not ours but we have used them as we would. For some lore is sub-ordinate to law. However Maori have used the term ‘lore’ to signify customs and tikanga which were binding and real functioning as law. I thank Moana Jackson for clarifying this distinction.

4 *Wi Parata v Bishop of Wellington and the Attorney-General* (1877) 3 NZ Jur (NS) SC 72, 77 per Pendergast CJ.

5 Seagle, *The Quest for Law* (1941) 46, as quoted by Jackson, “Criminality and the Exclusion of Maori” (1990) 20 VUWLR Monograph 3, 27.

6 Durie, E, “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 Otago L Rev 449, 452.

7 This comment is based on legal periodicals in New Zealand.

8 The meaning of tapu when used in combination with other words is not referred to, as in wahi tapu, which has a very specific meaning. The common use of this term helps to perpetuate the misconception that tapu means only sacred.

concept, but did not. The following rationale is offered for the omission or limited development of this important concept.

### *It is Implied*

Many Maori writers refer to concepts such as mana, utu, mauri, kaitiakitanga, aroha and wairua without explicitly referring to tapu. This is possibly because the author assumes that the audience is well versed in Maori concepts, thus excusing the author from performing a closer inspection of tapu. It is contended that this assumption is not valid when the audience is predominantly non-Maori. On the other hand, some writers refrain from using the word tapu so as to better facilitate the discussion in a manner, and with terms and language, familiar to the Pakeha mind.<sup>9</sup> For example, in considering Maori environmental ethics, Tunks does not formally introduce the concept of tapu.<sup>10</sup> However, on close inspection the concept of tapu is implied, especially in reference to mana, mauri and the primeval parents Rangi and Papa.<sup>11</sup>

### *Complexity*

Tapu is not an easy concept to grasp. Efforts to explain it may confuse the reader rather than clarify his or her understanding. Such confusion is exacerbated if the reader has pre-conceived ideas as to what tapu means for example, sacred, when this is not the sense in which the word is used. Furthermore, word limits in legal publications hamper writers from explaining tapu correctly and meaningfully, especially in relation to legal concepts.

Maori Land Court Chief Judge Durie has written two articles concerning Maori law,<sup>12</sup> in which he discusses some major concepts upon which a system of law operated in traditional Maori society is based. He introduces concepts such as utu, aroha, manakitanga and whakapapa, focusing on principles as opposed to rules and relationships between people and the land. Tapu is not discussed, but in one of his articles he explicitly states that he is addressing a non-Maori audience, and that the explanation of Maori concepts is no easy task.<sup>13</sup>

A further example is Lenihan's discussion of Maori intellectual property rights. The concept of tapu is briefly introduced in respect of protection of Maori knowledge, clearly implying knowledge of the role of tapu in Maori intellectual

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9 This results from the exposure of Maori terms such as mana, kaitiakitanga and so on.

10 Tunks, "Tangata Whenua Ethics and Climate Change" (1997) 1 NZELR 67.

11 Ibid, 73. Explicit reference to the word tapu is made on page 81.

12 Durie, E, "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy" (1994) 24 VUWLR 325 and Durie, E, "Will the Settlers Settle?" supra at note 6.

13 Supra at note 6, at 456. He also states that there are no doubt other alternative views on the nature of Maori law.

property.<sup>14</sup> However, due to the complex nature of the concept, he refrains from more detailed consideration.

### *Synonyms*

There are many manifestations of, and synonyms for, the term “tapu”. For example, the words tapu and mana have been used interchangeably by both Maori and non-Maori.<sup>15</sup> The relationship between mauri and tapu is also close, and the terms are often interchangeable. To illustrate, Barlow defines mauri as “the power of the gods”<sup>16</sup> and tapu as “the power and influence of the gods”.<sup>17</sup> The distinction is slight and, in many circumstances, immaterial. Thus, whether deliberate or not, in many cases words such as mana and mauri are synonymous with the concept of tapu.

Tomas, in discussing the implementation of kaitiakitanga under the Resource Management Act 1991, does not refer specifically to tapu, but makes numerous references to mana and tikanga.<sup>18</sup> She quotes the New Zealand Coastal Policy Statement, which states that “an interpretation of kaitiakitanga based on this explanation must of necessity incorporate the spiritual as well as physical responsibility of tangata whenua.”<sup>19</sup> She states further that it relates to “the mana not only of the tangata whenua, but also of the gods, the land and the sea.”<sup>20</sup> The relevance of this statement to the present argument may be illustrated by the following quote, describing the relationship between mana and tapu:<sup>21</sup>

Ko te tapu te mana o nga atua.

Translated, this means that “tapu is the mana of the atua.” In atua or spiritual powers, tapu and mana are almost one and the same. This interpretation of tapu and mana allows for tapu to be concealed behind closely related terms. Furthermore, some writers choose not to apply a pure concept of tapu, preferring to use secondary concepts such as utu and mana. The use of these terms in most cases may imply an underlying system of tapu.

14 Lenihan, “A Time for Change: Intellectual Property Law and Maori” (1996) 8 Auckland U L Rev 211, 213.

15 *Supra* at note 2.

16 Barlow, *Tikanga Whakaaro: Key Concepts in Maori Culture* (Auckland: Oxford University Press, 1996) 83.

17 *Ibid.*, 128.

18 Tomas, “Implementing Kaitiakitanga under the Resource Management Act” (1994) 1 NZELR 39.

19 *Ibid.*, 40.

20 *Ibid.*

21 Jackson, *Maori and the Criminal Justice System, A New Zealand Perspective: He Whaingā Hou Part 2* (Wellington: Policy and Research Division, Department of Justice, 1987-1988).

## Inclusion of Tapu

One author who has used the concept of tapu in a legal context is Moana Jackson.<sup>22</sup> Jackson speaks of tapu as an inherent quality or state which all people possess, and which regulates how people in Maori society are treated. Recognition of the tapu of a person requires others to act in a way not adverse to, or in conflict with, that tapu.

Pakeha philosopher John Patterson has also referred to tapu in his discussion on the concept of utu.<sup>23</sup> He contends that the generally accepted meaning of utu fails to capture two ideas. The first is the idea of balance and reciprocity upon which the concept is based. The second is the relationship of utu to mana. He distinguishes between the concepts of utu and punishment. His treatment of tapu extends as far as distinguishing the difference between hara, an offence against a tapu sanction which does not require utu, and offences in Maori society which do require utu.<sup>24</sup> He submits that “Maori legal prohibitions are largely matters of tapu”.<sup>25</sup>

Consideration of tapu is paramount when discussing Maori concepts, frameworks and systems of regulation. That there has not been explicit reference by Maori writers is of particular concern. It is hoped that the other Maori concepts incorporated in legal writing can now be said to at least imply the idea of tapu. However, the implication of tapu is not sufficient. It is necessary to explicitly state and explain the concept of tapu. The basis of this claim rests upon the fact that tapu is pre-eminent amongst all the Maori concepts, indeed, it is the prime concept, as the following discussion of tapu illustrates.

## Tapu

All systems of regulation in Maori society recognise the pre-eminent, overarching concept of tapu. This concept pervades all levels of Maori society, from matauranga, whenua, taonga and tangata to aroha and manakitanga. In recent years, concepts such as kaitiakitanga and taonga have been in the legal limelight, while tapu has played a minor, supporting role. However, the influence of tapu in Maori society is far-reaching<sup>26</sup> and more important than any other concept. It is the foundation upon which these other secondary concepts

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22 See supra at note 21 and Jackson, supra at note 5, at 25.

23 Patterson, “Utu and Punishment” (1991) 21 VUWLR 239.

24 Utu is the balance of relationships between people, tribes and nature. Utu is not solely the redress of negative actions. It also applies to positive acts, for example, the giving of a gift requires the receiver to reciprocate to reset the balance.

25 Supra at note 23, at 245.

26 Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland: Penguin, 1990) 68.

thrive. Its role and application in Maori society will be briefly considered.<sup>27</sup>

The pre-eminence of tapu relies upon three basic facts:

- (i) It is the central concept in the creation and ordering of the world;
- (ii) It has universal application to all things in creation, both inherently and in its ability to be invested in any subject, tangible or intangible; and
- (iii) All other Maori concepts rely on, link to, or are derived from tapu.

No other Maori concept fulfils these roles. The closest concepts in scope and operation are mauri and mana.

### Order

The tohunga Te Matorohanga,<sup>28</sup> in explaining the importance and primacy of tapu, said:<sup>29</sup>

For the tapu is the first of all things; if there is no tapu, then all the acts of the gods become without life and force and if there are no gods, everything becomes insipid. The way of people, actions and thoughts is now one whirling around; they are confused and desperate in this country now.

According to Te Matorohanga, tapu is responsible for the ordering of the world and is fundamental to an ordered society. Without tapu, all things would lose their shape, become meaningless and ineffective. Tapu is what keeps everything in place. As Walker stated, “[t]he order of the universe rests on the perfection and purity of life or rather of different lives, and this purity of their lives is spoilt by the violation of tapu.”<sup>30</sup> This alone proves the primacy of tapu.

27 For reasons of space constraints, many aspects of tapu will not be considered in this article. For example, the literal meaning of tapu, its role in ritual and its violation and the consequences of this will not be discussed. The reader may refer to Prytz-Johansen, *The Maori and His Religion in its Non-Ritualistic Aspects* (Kobenhavn: E Munksgaard, 1954); Mead (ed), *Nga Tikanga Tuku Iho A Te Maori: Customary Concepts of the Maori* (Wellington: Department of Maori Studies, Victoria University, 2nd ed 1984); and the extensive works of Best, for example, *Maori Religion and Mythology* (Wellington: Government Printer, 1924).

28 Te Matorohanga was a tohunga or expert of tribal history, religion, genealogy, customs and practices from Ngati Kahungunu who lived last century. See infra note 31.

29 The original Maori text and English translation can be found in Smith, *The Lore of the Whare Wananga* (New Plymouth: Thomas Avery, 1913) 12, 84.

30 Supra at note 26, at 197.

### Universal Application

Tapu, unlike most other Maori concepts, is universal in scope. All things, be they material<sup>31</sup> or ethereal, are tapu and can be subjected to further tapu. People regardless of rank,<sup>32</sup> sex,<sup>33</sup> age,<sup>34</sup> or even race<sup>35</sup> are tapu. Knowledge is tapu<sup>36</sup> and words themselves can be subject to tapu.<sup>37</sup> Tapu operates and is perceived on many different levels. At the most fundamental level, all things are inherently tapu.<sup>38</sup> At another level, all objects, activities, persons and places may be made subject to tapu in the form of restrictions.<sup>39</sup>

The first view relies upon the fact that all things are tapu because all things are derived from the Supreme Being Io-taketake (Io the foundation of all things), Io-matuakore (Io the parentless one), Io-matua (Io the parent of all things).<sup>40</sup> If creation was willed into existence by Io, then all things that derive from this partake of the nature of the world in its beginning. This universal aspect of tapu lends itself to all facets of Maori life, including systems of social control. Some traditions do not acknowledge Io as the prime cause,<sup>41</sup> but the same reasoning can be applied to Rangi, Papa and their atua offspring, who were tapu and responsible for the creation of the world.

The second view, that tapu can be invested universally relies upon the fact that tapu can be transmitted to or invested within any object, person, place or activity. Such transmission or investiture may be intentional or unintentional.

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31 Malcolm, "The Tapu of the Head and Hair" in Mead, *supra* at note 28, at 94.

32 *Supra* at note 16.

33 It is contended that women are not noa, but inherently tapu, and have the ability to make something noa. There is a distinction. This ability does not in itself make them noa. See Marsden, "God, Man and Universe: A Maori View" in King (ed), *Te Ao Hurihuri: The World Moves On: Aspects of Maoritanga* (Auckland: Longman Paul, 1981) 199.

34 Although some do not view young people as tapu, it is submitted that young people are tapu, but possibly to a lesser extent than older people.

35 From a Maori perspective, arguably all people are tapu. Although some authors believe that only Maori people can be tapu, it is contended that our perceptions of the universe *are* universal. A non-Maori person may become tapu from simply touching a tapu object. If one can become tapu in this way then that same person is tapu from the outset as all Maori people are.

36 McCarthy, *He Hinaki Tukutuku: Rangatiratanga, Whare Wananga and the State* (published thesis, Victoria University, 1994) 13.

37 *Supra* at note 31, at 95.

38 *Supra* at note 16, at 128.

39 Best, *The Maori As He Was* (Wellington: Dominion Museum, 1924) 90.

40 Best, *Maori Religion and Mythology Part 1* (Wellington: Government Printer, 1976) 144.

41 Some believe that Io is a post-European arrival Christian derived concept and not indigenous to the Maori people.

What is clear, however, is that any subject can be made tapu.<sup>42</sup> The ways in which this can be done are legion. They include, *inter alia*:

- (i) Whakapapa;<sup>43</sup>
- (ii) Contact;<sup>44</sup>
- (iii) Ritual;<sup>45</sup>
- (iv) Spoken word;<sup>46</sup> and
- (v) Sighting of certain objects.<sup>47</sup>

This universal application of tapu sets restrictions and prohibitions upon the objects affected by it and helps to regulate the conduct and behaviour of people towards each other and the world around them. It acts as a system of control. Upon this evidence it cannot be doubted that in both the first and second senses tapu is universally applicable.

### *All Other Concepts Rely on Tapu*

All other concepts in Maori society are linked to or derive their meaning and existence from tapu. Concepts such as utu and kaitiakitanga are founded on tapu and therefore must be treated in accordance with that tapu. For example utu ensures that balance is maintained, that the tapu is satisfied. Kaitiakitanga protects the tapu or sanctity of the land. Other Maori constructs of social order and control, such as manakitanga, aroha, rahui and muru can also be linked to the concept of tapu.

If we were to consider every Maori concept imaginable, including koha, manaki, aroha, utu, muru, whanaungatanga, matauranga and whangai, a link to tapu could be found. Although not as strong in some as in others, there would be a link. This link, the ability to strengthen such links and the importance of tapu in the ordering of reality make it pre-eminent in Maori society. It is fundamental to any description of Maori concepts or systems of regulation.

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42 Some would argue that anything noa cannot become tapu. This is not the case. The food eaten by a chief becomes tapu. A woman who can whakanoa a whare is tapu within the ceremony itself. These things are repositories of the power of noa and are capable of being made tapu.

43 Supra at note 16, at 173.

44 Hiroa, *The Coming of the Maori* (Wellington: Maori Purposes Fund Board, 2nd ed 1950) 347. Transmission through contact includes touch, breathing upon something and the touch of a person's shadow.

45 Supra at note 31, at 96. By the use of karakia or prayers.

46 Supra at note 44, at 380. Land, objects and the like may be claimed merely by the uttering of the words, especially if the words are spoken by a person of exceptional mana.

47 The very tapu adze Awhiorangi is not to be looked upon in certain circumstances.



## **Conclusion**

Tapu is the paramount concept in Maori society underpinning its systems of regulation and social control. It is the basis of the Maori system of law and as such, deserves greater attention in Maori legal writing. The fact that Maori jurisprudence has neglected tapu is a cause for concern, although the complexity of the concept, and its interrelationships with other Maori concepts, may explain why it is frequently omitted.

Mere implication of tapu in Maori legal writing is insufficient. As the primary Maori legal concept, tapu needs to be explicitly stated and recognised. Its importance as law cannot be underestimated. If we take law to mean the “pattern of behaviour deemed right by a society and the accepted methods of that society for determining its pattern of right behaviour”<sup>48</sup> we are empowered to say that Maori society was not lawless, but lawful in its own way, as with the law of tapu.

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48 Rostow, *The Ideal in Law* (Chicago: University of Chicago Press, 1978) 1.