

BERNADETTE ARAPERE



Ko Rangitikei te awa
Ko Ngati Raukawa te au ki te tonga
Ko Ngati Pikiahuaewae te hapu
Ko Poupatate te marae kainga
Ko Bernadette Roka Arapere ahau.

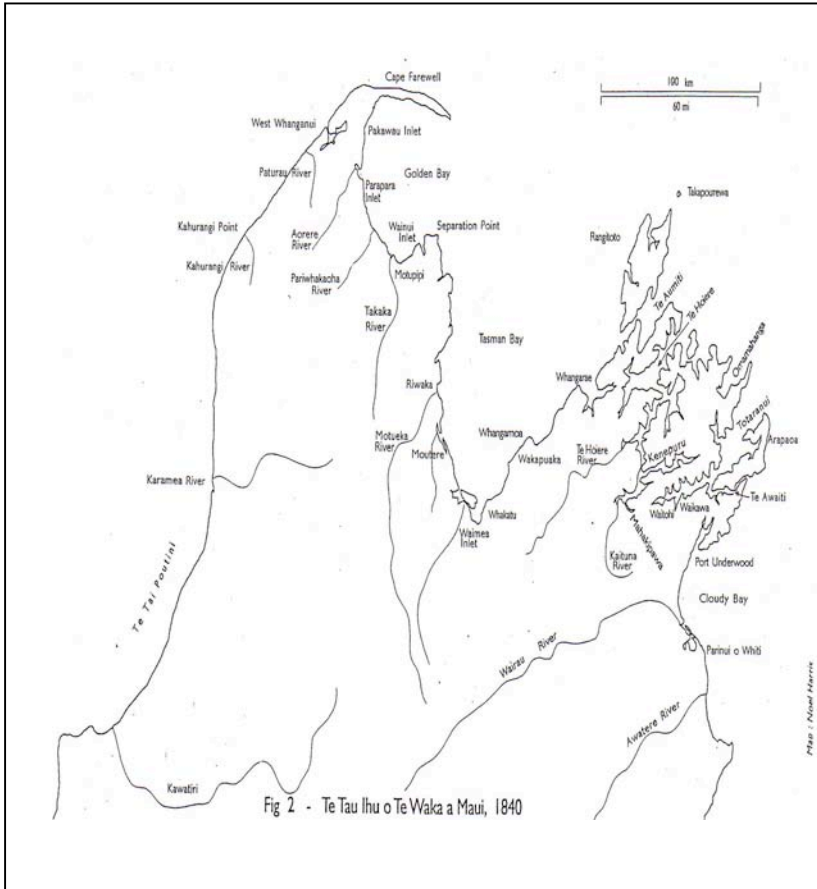
My primary iwi is Ngati Raukawa. I am also affiliated to Ngati Maniapoto and Ngati Tuwharetoa. I am uri of the Whakatere, Parewahawaha, Herangi and Anihana whanau through my father, and Wackrow and McLennan families through my mother. I was raised in the Bay of Plenty, Manawatu and Auckland.

I have a BA in history and Maori Studies and a Master of Arts degree with first class honours in History from the University of Auckland. My Masters thesis focused on hapu relationships within Ngati Raukawa from the heke (migrations) of the 1830s through to the Crown acquisition of the Rangitikei-Manawatu block in 1866-7.

I have worked in the areas of policy, negotiations and historical research into te Tiriti o Waitangi/the Treaty of Waitangi for six years. During this period I have been engaged as a Policy Analyst at the Office of Treaty Settlements, a Research Officer at the Waitangi Tribunal and an independent contract researcher. I have researched and written reports for the Gisborne, Wairarapa and Urewera district inquiries and was Claims Facilitator at the Tribunal for the Tau Ihu (northern South Island) hearings. Most recently I have completed research commissions for Te Whanau o Waipareira and Ngati Ruanui Group Management Ltd.

Some of my influences are Rihi Puhiwahine Te Rangihirawea, Roka Arapere Nathan, Piki Kereama, Professor Mason Durie, Te Kenehi Teira and Te Ahukaramu Charles Royal. My work continues to be informed by my interest in Maori history and law, and the whakapapa and korero handed down by my tipuna. I will complete my law degree in 2004.

LOCATION MAP TE TAU IHU O TE WAKA A MAUI



Source: Dr G.A. Phillipson, *The Northern South Island: Rangahaua Whanui District 13*, Waitangi Tribunal, 1995, 224.

MANA WHENUA AND TUKU WHENUA: NGATI KOATA KI TE TAU IHU

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INTRODUCTION

This essay demonstrates the practical application of the principle of mana whenua by discussing Ngati Koata mana whenua at Te Tau Ihu. It discusses tuku whenua (exchange or gifting of land) as an incident of mana whenua. Ngati Koata is part of the Tainui waka confederation of iwi. Since the 1820s Ngati Koata has resided in various places at Te Tau Ihu o te Waka a Maui (the northern part of the South Island). Ngati Koata currently has a claim (Wai 566) before the Waitangi Tribunal to lands and resources in the area around Tasman Bay from Te Matau (Farewell Spit) to Wakatu (Nelson) and Te Hoiere (Pelorus Sound), including Rangitoto (D'Urville Island).¹ Evidence relating to Ngati Koata's claim was heard by the Waitangi Tribunal in February 2001. This essay draws upon historical and legal submissions heard in evidence at that hearing, as well as other material on the Record of Documents for the Tau Ihu District Inquiry (Wai 785).

Part I of this essay considers judicial and academic views of Maori custom law or tikanga. The principles of mana whenua and tuku whenua, alongside other related concepts such as ahi kaa (continued occupation), and takahia te whenua (walking the land), are discussed. Part II is a case study of Ngati Koata mana whenua at Te Tau Ihu. I argue that Ngati Koata's claim to mana whenua in this region stems from an important legal event: a tuku whenua. The tuku whenua was confirmed by significant acts with legal implications such as takahia te whenua and ahi kaa as well as intermarriage and strategic peacemaking. The essay concludes with a comment on the present significance of mana whenua for Ngati Koata, in light of the Treaty of Waitangi claims process, the fisheries allocations, and the foreshore and seabed litigation.

¹ See attached Location Map.

PART I - TIKANGA MAORI (MAORI CUSTOM LAW) AND THE PRINCIPLE OF “MANA WHENUA”

Maori Custom Law

The term “custom law” is used to describe the body of rules developed by indigenous societies to govern themselves.² The closest equivalent to the phrase “custom law” in the Maori language is “tikanga”. Tikanga has been described as the obligation to do things in the “right” way and as “the Maori way of doing things”.³ Tikanga, therefore, is not law in the legal positivist sense but law that is shaped by praxis or custom. Tikanga is pragmatic, open-ended and subject to reinterpretation according to changing circumstances.⁴ Therefore, contextualisation is important in the interpretation and application of tikanga.

Various writers have emphasised different aspects of mana whenua. Justice Durie has referred to Maori custom law as “the values, standards, principles or norms to which the Maori community generally subscribed for the determination of appropriate conduct.”⁵ Durie has also observed that custom law means law generated by social practice and acceptance, as distinct from institutional law that derives from the organs of a super-ordinate authority such as the British Crown.⁶

Paul McHugh’s definition of custom law emphasises the flexible and informal nature of tikanga as compared to Western models of law. McHugh defines Maori custom law as:⁷

... a body of rules backed by sanctions and ... a set of dispute resolution mechanisms. At a more informal level it was also a series of accepted behaviours which allowed daily life to proceed. The formal rules are backed by sanctions

² New Zealand Law Commission, *Maori Custom and Values in New Zealand Law: Study Paper 9*, Wellington, 2001, 15.

³ Ibid at 16.

⁴ E Durie, *Custom Law*, (unpublished discussion paper), 1994, 4; A Erueti, “Maori Customary Law and Land Tenure: An Analysis” in R Boast et al ed., *Maori Land Law*, Butterworths, Wellington, 1989, 26.

⁵ NZ Law Commission, supra n2 at 16.

⁶ Durie, supra n4 at 4.

⁷ P McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Oxford University Press, Auckland, 1991, 74.

and are clearly articulated in terms of what one should do and why.

The Privy Council identified the flexible and developing nature of tikanga in *Hineiti Rirerire Arani v Public Trustee of New Zealand*.⁸ In that case, the Court observed that the custom relating to adoption and title to land was not fixed but was “based upon the old custom as it existed before the arrival of the Europeans, but it has developed, and become adapted to the changing circumstances of the Maori race of today.”⁹ Thus, the Court accepted that change and development are part of tikanga.

In summary, Durie emphasises the content and realities of Maori custom law and discusses law against a Maori context. McHugh stresses the flexible nature of Maori custom law as compared to western law. The Privy Council has commented on the ability of mana whenua, as part of tikanga, to change and develop according to new exigencies.

Mana Whenua

That the formalities relating to Maori land tenure formed part of Maori custom law and mana whenua is now commonly accepted as a principle of Maori customary land law. Mana whenua has been defined by Cleve Barlow, kaumatua (elder), as:¹⁰

... the power associated with the ability of the land to produce the bounties of nature By the power of mana mauri all things have the potential for growth and development towards maturity. There is another aspect to the power of land: a person who possesses land has the power to produce a livelihood for family and tribe, and every effort is made to protect those rights In addition, there were a number of other important principles associated with the mana of land ... including: inherited rights, the establishment of fortresses, the power to control and protect,

⁸ [1919] NZPCC 1 (PC) 6.

⁹ Ibid. By contrast, some years earlier Prendergast CJ had expressly denied the existence of custom law in *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 77-78.

¹⁰ C Barlow, *Tikanga Whakaaro: Maori Concepts*, Oxford University Press, Auckland, 1991, 61-62.

land confiscation, conservation, chiefly status, and sacred burial grounds.

Some doubt as to the use of mana whenua has been cast on the term by Justice Durie, who has observed that mana whenua is sometimes:¹¹

... used as a cultural equivalent for western concepts of suzerainty. The alternative proposition is that mana accrued to people not land, and that those of great mana could unite many hapu as one iwi to exert influence over a wide territory. Similarly if mana was lost, territory was lost as hapu found alternative allegiances.

The Waitangi Tribunal, in its report on Rekohu (Mori and Ngati Mutunga claims in the Chatham Islands), found that the term “mana whenua” arose from a 19th century Maori endeavour to conceptualise Maori authority in terms of the English law approach to land rights.¹² The Tribunal indicated that this was an unhelpful innovation which “does violence to cultural integrity” because the understanding of mana whenua now set out in the Reserves Act 1977, the Conservation Act 1987 and the Resource Management Act 1991, equates tangata whenua status with *exclusive* mana whenua exercised by an iwi or hapu over an area.¹³ For example, section 2 of the Resource Management Act 1991 defines mana whenua as “customary authority exercised by an iwi or hapu in an identified area”.¹⁴ The Tribunal found that this definition of mana whenua implied that only one group can speak for all in a given area or had priority of interest when there might in reality be several distinct communities of interest.¹⁵

Thus, it is clear that the meaning and ambit of the term “mana whenua” has developed over time and the term is now capable of various interpretations.

Mana whenua arose out of formal and informal rules and behaviours that were appropriate to particular places and circumstances. According to Andrew Erueti, in Maori custom law relating to land, no one individual or kinship group owned land in the sense that they

¹¹ E Durie ‘Directions, Memoranda on Procedure, Evidence and Issues’ 11 November 1994, *WAI 46*, doc # 2.59, at 18, cited in A Ward, *Te Atiawa in Te Tau Ihu, Report for the Crown Forestry Rental Trust*, August 2000, 2.

¹² See T Bennion ed., *Maori LR*, May 2001, 2.

¹³ *Ibid.*

¹⁴ T Bennion ed., *Maori LR*, December 2000/January 2001, 5.

¹⁵ *Ibid.*

held all rights to the land to the exclusion of other levels of kinship or adjacent groups.¹⁶ Rather, Maori held land in a complex tenure system where different kinds of rights could be held by hapu. The individual right to use land was derived from membership within the wider hapu community.¹⁷ Thus, it has been argued that the rights of individuals of different hapu intersected on the ground resulting in a “patchwork of use-rights” to land and resources.¹⁸ This system contrasts sharply with the English system of real property rights. The English land tenure system (as it has developed) was a body of clearly defined rules that facilitated the private and exclusive use and enjoyment of land by individuals without reference to the wider community.

The New Zealand Law Commission has accepted that mana whenua is a traditional Maori legal concept. Accordingly, it bases the exercise of mana whenua upon a set of underlying tikanga values such as whanaungatanga (the relationships with the land and between people), mana (the power or authority which hapu and iwi derive from land), utu (the reciprocal relationship with land), kaitiakitanga (the obligation to protect land) and tapu.¹⁹ These values underpinned the complex relationship between people, the natural environment, gods, ancestors and land.²⁰

The customary bases of rights to land were complex and inter-related. Rights to land and resources were transferred by a number of customary means. Transfers could occur through war or threat of war, and rights to specific resources were commonly transferred by gifting and inheritance.²¹

Maori Land Court Judge Norman Smith described four principal ways or “take” (foundations) by which rights to land were acquired. These are:²²

- Taunaha (discovery);
- Tupuna (ancestry);
- Raupatu (conquest); and

¹⁶ Erueti, supra n4 at 27.

¹⁷ Durie, supra n4 at 62.

¹⁸ A Ballara, *Iwi: The Dynamics of Maori Social Organisation from c1769 to c1945*, Victoria University Press, Wellington, 1998, 195.

¹⁹ NZ Law Commission, supra n2 at 47-48.

²⁰ Durie, supra n4 at 62.

²¹ Erueti, supra n4 at 27.

²² N Smith, *Maori Land Law*, AH and AW Reed, Wellington, 1960, 88.

- Tuku (gift)

Joan Metge and others have added one further basis, take ahi kaa (occupation and use), to Judge Smith's standard analysis.²³ Various legal and historical commentators have argued that the Native Land Court put too much emphasis on conquest as the basis for establishing claims to land, and too little on the role of whakapapa or ancestry.²⁴ The Native Land Court's processes also resulted in a distortion and over-simplification of what were generally rather fluid arrangements.²⁵ However, most academic commentators agree that prior to colonisation these five ways were the means by which rights to land were acquired under Maori custom law and that, in practice, the five take complemented each other. A claim of right or mana whenua required a mix of different take and none was sufficient on its own.²⁶ For example, a claim based upon raupatu needed to be backed up by ahi kaa.

The principle of mana whenua and other tenets of custom law were not static. The contested arena of the Treaty claims process has shown that Maori customary rights to land and principles of Maori customary law are not as certain or as absolute as the Native Land Court and Judge Smith's analysis might suggest. Jurists and historians have questioned the meaning of terms such as mana whenua. Justice Durie cautioned counsel in the 1994 Ngati Awa raupatu hearings that:²⁷

... the use of mana whenua, or mana as applied to land as distinct from persons, may be new and arose from Maori attempts to adapt to new exigencies that land purchase operations and the Native Land Court imposed.

²³ J Metge, *Issues Arising from Pre-Treaty Land Transactions*, WAI 45, doc # K1; Erueti supra n4 at 42.

²⁴ DV Williams, *Te Kooti Tango Whenua: The Native Land Court 1864-1909*, Huia Publishers, Wellington, 1999, 187; H Riseborough and J Hutton, *Rangahaua Whanui National Theme C: The Crown's Engagement with Customary Tenure in the Nineteenth Century*, Waitangi Tribunal, Wellington, 1997, 137-138. The Native Land Court required claimants to prove ownership or land rights on the basis of ancestry (take tupuna), discovery/exploration (take taunaha), conquest (take raupatu), gift (take tuku) or occupation (take ahi kaa) or a combination of such claims to land. The '1840 rule' provided that tribal boundaries and ownership were fixed as at 1840.

²⁵ Erueti, supra n4 at 44.

²⁶ Ibid at 42.

²⁷ E Durie, "Directions, Memoranda on Procedure, Evidence and Issues", 11 November 1994, WAI 46, doc # 2.59, 18, cited in Ward, supra n11 at 2.

Thus, Justice Durie has questioned the term and whether the meanings that have been ascribed to it now actually reflect the realities of custom law prior to colonisation. He has also argued that mana accrued to people rather than to land. David V Williams, has written that, because custom was never passive, new imperatives led to a focus on mana whenua rather than mana tangata.²⁸ Alan Ward argues that custom law was changing and adapting under the new context of European contact *prior* to 1840 and that it continued to change *after* 1840.²⁹ Thus, in Ward's view, identifying the rights of a hapu or iwi about the time of the Treaty of Waitangi is complicated by the cultural change and flux occasioned by Maori contact with the wider world.

Given the lack of clarity as to the practical meaning and application of "mana whenua" it is argued here that the best approach in applying the principle is to consider all available evidence and the principles and actions that underlie the exercise of mana whenua.

Tuku Whenua – An Incident of Mana Whenua

This section discusses some of the concepts related to the principle of mana whenua. The most significant of these concepts for Ngati Koata ki Te Tau Ihu is take tuku whenua. I also address some of the means by which mana whenua was established and consolidated. These concepts are practically applied to Ngati Koata's claims in Part II of this essay.

The doctrine of take tuku whenua was a customary method of disposing of and acquiring rights to or mana over land. Margaret Mutu, in evidence before the Waitangi Tribunal in the Muriwhenua hearings, described two forms of tuku whenua.³⁰ The first is "tuku i runga i te tika" whereby rights were allocated in accordance with criteria such as take tupuna or ancestry and continuing occupation. The second type can be referred to as "tuku i runga i te aroha" where rights could be allocated to those without ancestral rights, such as through marriage.

²⁸ DV Williams, *The Crown and Ngati Tama ki te Tau Ihu: An Historical Overview Report*, February 2000, 44, cited in Ward, *supra* n11 at 3.

²⁹ *Ibid.*

³⁰ M Mutu, *Tuku Whenua or Land Sale?—WAI 45 doc # F12*, 9.

Pat Hohepa has observed that:³¹

... gifting was always in terms of allowing others the use of the land but maintaining mana whenua so that the users gave the use back once its gifting had run its course or until the users had been assimilated into those who held manawhenua. Such gifted lands were whenua tuku (lands released).

Angela Ballara has argued that chiefs with mana had the right to make either temporary or permanent gifts of land. However, such gifted lands were not permanently alienated because “if the recipient died or moved away, abandoning the gift, it reverted to the giver.”³² She notes elsewhere that over time and long residence recipients of land gained similar rights over the land to the giver; “they could gift or allot to other kin parts of the land they had been given.”³³

A gift of land brought with it obligations between the donor and donee of the gift.³⁴ Indeed, the translation of tuku as “gift” is something of a misnomer. Tuku is more correctly translated as an “exchange” because of the obligations that it placed upon the donee and donor, and the reciprocal nature of the transaction.³⁵ In most cases the tuku would impose conditions upon the donee and a continuing relationship of reciprocity between the parties that could be passed on to their descendants. Thus, tuku whenua may be seen as an exchange of rights and obligations rather than the making over of an absolute property right.

Tuku whenua occurred for many reasons and appears to have varied according to the circumstances and intentions of the parties. Land could be gifted in gratitude for help in avenging enemies, as compensation for the destruction of property, and in times of war to ensure the survival of a vanquished or conquered people.³⁶ The ruling chiefs of conquering hapu acquired mana over defeated

³¹ P Hohepa, “Te Tiimatanga Mai, nga Kupu, me nga Tikanga Whenua”, seminar, Faculty of Law, Auckland, 3 June 1994, 8.

³² Ballara, supra n18 at 206.

³³ A Ballara, *Customary Maori Land Tenure in Te Tau Ihu (Northern South Island) 1820-1860: An Overview Report on Te Tau Ihu*, Crown Forestry Rental Trust, February 2001, WAI 785, doc # D1, 36.

³⁴ D Arapere, *An Analysis of Tuku Whenua according to Tikanga Maori, and its implications for Claimants before the Waitangi Tribunal* (LLB (Hons) Dissertation, Waikato University 2002), 25.

³⁵ Ward, supra n11 at 23.

³⁶ Ballara, supra n18 at 206; Erueti, supra n4 at 43.

peoples but the defeated peoples were often permitted to remain on the land.

The doctrine of ahi kaa cemented claims to land. Ahi kaa roa refers to long, burning fires and is a metaphor for the continuous occupation and use of the land and its resources by descendants of ancestors with mana to the land.³⁷ Those who lived elsewhere or who conquered an area but did not continuously occupy it eventually lost their rights over land because their claims to it grew cold. An example of occupation following take raupatu was when Ngati Raukawa migrated from Maungatautari to the Horowhenua and Rangitikei areas in the 1830s, defeating Ngati Apa and Rangitane in battle. Ahi kaa was established over particular areas of the land through the building of permanent kainga and the planting of cultivations.³⁸ Thus, invasion and the driving out of prior inhabitants was not sufficient to establish mana whenua if the land was not also permanently occupied by the invading hapu. The proof of this continuity of occupation was sufficient to establish ownership in later years.³⁹ However, Justice Durie also points out that the “[Native Land] Court’s conception of the ahi kaa rule, may have been more appropriately applied to individual use-rights, though even there, inchoate associational interests were maintained.”⁴⁰

There were also other customary ways by which mana whenua was established in a new territory. The customary practice of takahia te whenua (travelling the land) to name significant locations or geographical markers on the landscape was one such method.⁴¹ Tuku of land were also marked in ceremonial or symbolic ways such as through exchanges of taonga (treasures) or the composition of waiata (songs) or whakatauki (proverbs) to commemorate the event. Such peacemaking ceremonies symbolised the binding together of the two transacting parties into an ongoing and long-term relationship.⁴² Physical markers such as pou (posts) or small groups of people left to

³⁷ Ballara, supra n18 at 200.

³⁸ H Toremi, *Himatangi hearing*, 9 April 1868, Otaki Minute Book no. 1C 580 cited in B Arapere *Maku ano hei hanga i toku nei whare: Hapu Dynamics in the Rangitikei Area, 1830-1872* (MA (Hons) Thesis, University of Auckland, 1999), 55; Ballara, supra n18 at 248.

³⁹ R Firth, *Economics of the New Zealand Maori*, Government Printer, Wellington, 1959, 384-385; Erueti, supra n4 at 43.

⁴⁰ Durie, supra n4 at 73.

⁴¹ Arapere, supra n34 at 8.

⁴² Ibid at 26; Mutu, supra n30 at 8.

reside on the land were seen as boundary markers to signify a claim or take to land.⁴³

Political associations could produce legal consequences. Strategic marriages were often arranged between the conquerors and the conquered so that the children of these alliances would acquire the rights of both groups. For example, in the 1820s Ngati Apa of Rangitikei admitted defeat by Ngati Toa but retained some of its former independence because Te Pikinga, a Ngati Apa woman, had been married to Te Rangihaeata, a Ngati Toa chief, during an earlier Ngati Toa excursion through the region.⁴⁴ However, according to Erueti, in the absence of intermarriage “the ancestral ties would come in time with sustained occupation of the land and the handing down of use-rights to successive generations of users.”⁴⁵

In summary, custom law and the Maori land tenure system were dynamic, flexible and communal in nature. It was the introduction of property rights defined and transferred according to introduced law after 1840 which has made it difficult to reconcile competing claims to land based in custom. However, it is clear that there were a variety of ways of transferring rights in land and that such transfers occurred for different reasons. Mana whenua or claims to land were reinforced by strategic acts such as intermarriage, takahia te whenua, peacemaking and continued occupation.

PART II - NGATI KOATA KI TE TAU IHU

In Ngati Koata’s hearing before the Waitangi Tribunal in 2001, Crown counsel rejected Ngati Koata mana whenua at Te Tau Ihu due to circumstances surrounding the tuku whenua. The Crown argued that Ngati Koata was a small group who, with the protection of Ngati Toa, was able to secure possession of land in the midst of a “subservient and quiescent” tangata whenua.⁴⁶ The Crown stated that its preliminary view was that Ngati Koata’s tuku arrangement was

⁴³ Ballara, *supra* n33 at 37.

⁴⁴ M Te Whiwhi, *Himatangi Hearing*, 11 March 1868, Otaki Minute Book no. 1C 198 cited in Arapere, *supra* n38 at 47.

⁴⁵ Erueti, *supra* n4 at 43.

⁴⁶ Memorandum of Crown Counsel in response to Ngati Koata Statement of Claim, 22 December 2000, Waitangi Tribunal, *WAI 785*, doc # 2.189.

“totally or substantially overtaken” by the later conquests by Ngati Toa and other allies of Ngati Koata.⁴⁷

This section demonstrates the practical application of the principle of mana whenua by assessing the claims of Ngati Koata to land and resources in Te Tau Ihu based upon tuku whenua. I argue that the tuku whenua was a significant legal and political agreement for Ngati Koata and Ngati Kuia. Moreover, far from being “subservient and quiescent”, Ngati Kuia made the agreement with Ngati Koata in response to new political exigencies and with an eye to the future. I argue that the obligations imposed by the tuku whenua created an ongoing relationship of peace and reciprocity between Ngati Koata and Ngati Kuia that subsisted beyond later conquests of the area by Ngati Toa and others. Through the tuku and other significant acts Ngati Koata established mana whenua and consolidated their rights to land and resources at Te Tau Ihu.

Ngati Koata and Ngati Toa (and other iwi) traditionally occupied Kawhia harbour but left the area in approximately 1820, travelling south with Te Rauparaha to Kapiti Island and the Wellington region.⁴⁸ In 1824 a group of southern iwi including Ngati Kuia attacked Kapiti Island. Ngati Koata managed to repel the attackers and capture Tutepourangi, the paramount chief of Ngati Kuia, Ngati Apa and Rangitane of Te Tau Ihu.⁴⁹ At the same time, Ngati Apa captured Tawhe, a Ngati Koata boy of chiefly rank.⁵⁰ Ngati Apa took Tawhe to Te Hoiere (Pelorus Sound) and were pursued across the Strait by Ngati Koata and Ngati Toa.⁵¹ They came with the intention of attacking Ngati Kuia, but when they discovered that Tawhe was still alive an exchange was arranged instead.

The essence of the tuku was that in exchange for sparing his life, Tutepourangi released Tawhe and made a gift of all his land to Ngati Koata and Ngati Toa.⁵² Ngati Toa returned to Kapiti Island but Ngati Koata chose to take up the offer of land. Tutepourangi, accompanied by Tekateka, a Ngati Koata chief, travelled to the mainland of Te Tau Ihu, where Tutepourangi named the places that marked the extent of the tuku. According to Ngati Kuia accounts, the tuku extended from

⁴⁷ Ibid.

⁴⁸ H Bassett and R Kay, *Nga Ture Kaupapa o Ngati Koata ki te Tonga*, 2000, 11, *WAI 785*, doc # A76, at 11.

⁴⁹ Arapere, *supra* n34 at 33; Bassett, *supra* n48 at 23.

⁵⁰ Ballara, *supra* n33 at 79.

⁵¹ Ibid.

⁵² Ibid at 95.

Anatoto at the mouth of the Pelorus estuary and included places in the Sounds and along the coast such as Rangitoto (D'Urville Island), Croiselles harbour, Cape Soucis, Wakapuaka, Wakatu (Nelson), Motueka and on to Te Matau (Separation Point).⁵³ More recently, however, the extent of the *tuku* has been the subject of a boundary dispute between Ngati Koata and Ngati Kuia. Ngati Koata argue that Te Matau refers to Farewell Spit which is further west of Separation Point.⁵⁴

Tutepourangi made the *tuku* from a position of relative fragility. He had lost people in the battle on Kapiti Island and he did not have the weapons that Ngati Koata possessed. Moreover, Ngati Koata was closely allied with Te Rauparaha and Ngati Toa who were acknowledged as “conquerors extraordinaire”.⁵⁵ However, Tutepourangi was also a man of *mana* (greater authority and leadership than others) among Ngati Kuia, Ngati Apa and Rangitane and made the *tuku* of land in order to ensure his people’s survival. Fundamentally, the *tuku* was a significant legal and political agreement that formed the basis of a new and peaceful relationship between Ngati Kuia and Ngati Koata. It also established permanent rights to the land which are alive today.

Ngati Koata assert *rangatiratanga* in Te Tau Ihu on the basis of the *tuku* whenua made by Tutepourangi around 1824. As discussed in Part I, a claim to land under *tuku* whenua required other acts to cement rights over the land. What did Ngati Koata do to consolidate their claim to *mana* whenua at Te Tau Ihu?

Intermarriage was a customary means by which Ngati Koata and Ngati Kuia established their new relationship and through which Ngati Koata established *mana* whenua. Marriages occurred between the families of Tutepourangi and Tekateka indicating that Tutepourangi was a person of *mana* and was not regarded as a slave.⁵⁶ Ballara says that an exchange of women marked the peace between Ngati Kuia and Ngati Koata.⁵⁷ Tekateka married Koruria of Ngati Kuia and Nukuhoro of Ngati Apa, Ngati Kuia and Rangitane. Intermarriage gave the descendants of both tribes a connection and relationship with the land.

⁵³ Ibid. See attached Location Map.

⁵⁴ Arapere, *supra* n34 at 35.

⁵⁵ Ballara, *supra* n33 at 81.

⁵⁶ Ibid at 81.

⁵⁷ Ibid.

Ngati Koata also travelled the area included in Tutepourangi's gift making peace with the local Ngati Kuia and Rangitane chiefs.⁵⁸ This process involved the customary practice of takahia te whenua (travelling the land) throughout the extent of the tuku, in order to claim the area. Ngati Koata saw this act as a way of taking possession of the land. For example, at Horoirangi, north of Wakapuaka, Matiu Te Mako of Ngati Koata was said to have established a claim to the land by comparing the flax that grew there to his own hair and the place was known thereafter as Ngaurukehu (the light or reddish haired).⁵⁹ Another example involved a war canoe called Te Awatea. Te Awatea was an iconic symbol for Ngati Kuia because it was named for one of the twin hulls of the Kurahaupo waka. During the peacemaking process a Ngati Kuia chief told Ngati Koata that the canoe was hidden at Motueka. Ngati Koata went to Motueka and took possession of the canoe and used it to travel throughout the region in order to take possession of the land and resources.⁶⁰

Ngati Koata occupied their new lands at Te Tau Ihu continuously after the 1824 tuku by Tutepourangi. A substantial party of Ngati Koata under Te Patete settled on Rangitoto. Tekateka and another section of Ngati Koata remained in occupation on the mainland. He was left as the kaitiaki or chief in charge of the new territories. A mixed community of people from the tangata whenua iwi, including Tutepourangi, as well as Ngati Koata lived at Wakapuaka and Wakatu.⁶¹

According to both Ngati Koata and Ngati Kuia accounts, nobody was killed in the peacemaking process. Ballara has argued that Ngati Koata's peace with Ngati Kuia indicated that they intended to share the land with the resident population or at least allow them to live on it.⁶² Ngati Koata attempts to protect Ngati Kuia from conquest by Ngati Toa and other allies in later years also indicates that the tuku was still in force between Ngati Koata and Ngati Kuia after 1824. According to Meihana Kereopa of Ngati Kuia:⁶³

⁵⁸ Evidence of Ihaka Tekateka, Nelson MB2, 255-256, 307-9, cited in Ballara, supra n33 at 95.

⁵⁹ Ibid; A Ballara, *Taua: 'Musket wars', 'land wars' or tikanga? Warfare in Maori Society in the Early Nineteenth Century*, Penguin Books, Auckland, 2003, at 361.

⁶⁰ Ibid at 96.

⁶¹ Ibid at 96.

⁶² Ibid.

⁶³ M Kereopa, Nelson MB2, 17 November 1892, 310.

... because of the peaceable relationship established formerly with Ngatikuia. Ngatikoata did not take part in the attack of the original inhabitants consequently the Gift [sic] of Tutepourangi was not trodden underfoot.

Thus, Ngati Koata's claims derive from Tutepourangi's tuku, cemented by occupation and intermarriage. The obligations imposed by the tuku whenua to maintain a peaceful and ongoing relationship between Ngati Koata and Ngati Kuia were upheld despite subsequent conquests of the wider region by allies of Ngati Koata. The tuku can therefore be viewed as a significant agreement with ongoing obligations for both Ngati Koata and Ngati Kuia.

Events for Ngati Koata in later years are beyond the scope of this essay. However, to briefly summarise, it appears that the conquests of the 1830s by Ngati Toa, Ngati Tama and Ngati Rarua upset the equilibrium between Ngati Koata and Ngati Kuia to some extent. It was later contact and interactions with the New Zealand Company, the Crown and the Native Land Court that impacted most significantly upon the mana whenua of Ngati Koata. Changes in the Maori economy from hunting, fishing and cultivating to small scale farming on areas of land reserved by the New Zealand Company had detrimental economic and social outcomes. Like other hapu elsewhere in New Zealand, life on reserves restricted the land and water resources that Ngati Koata could utilise and created subsistence living, a precursor to the rural poverty of the 20th century.⁶⁴

CONCLUSION

In summary, Maori custom law and mana whenua are complex, flexible and pragmatic jural constructs. I have argued that claims to mana whenua, based upon tuku whenua, required further political and legally significant acts to cement a group's rights to land. Such acts included peacemaking, takahia te whenua, intermarriage and ahi kaa. Ngati Koata's claims in Te Tau Ihu are based upon a significant legal agreement, namely the 1824 tuku whenua between Ngati Kuia and Ngati Koata chiefs. Thereafter, a process of peacemaking,

⁶⁴ See for example, the small reserve allocations allotted to Ngati Raukawa after the Crown acquisition of the Rangitikei-Manawatu block in 1868: Arapere, supra n38 at 152.

community building and continuity of occupation was sufficient to confer land ownership or mana whenua upon Ngati Koata.

Questions of mana whenua and tangata whenua status are highly charged and contested issues in the arena of the Treaty of Waitangi claims process. The application of these principles in the Waitangi Tribunal and in the courts has been fiercely debated. Much of the problem relating to the modern application of these principles has been because of the “quasi-codified interpretations” and ideas of exclusive mana whenua developed by the Native Land Court in the 19th century and published by Judge Smith in 1960.⁶⁵ Such interpretations are likely to continue to impact on the settlement of claims taken to the Waitangi Tribunal and in direct negotiations with the Crown. Indeed, absurd situations have arisen at Tribunal hearings where claimant groups such as Ngati Koata and Ngati Kuia have been in the invidious position of having to pitch their claims to mana whenua against each other in order to establish *exclusive* mana whenua over an area. Such competition between claimant groups only serves to divert attention and resources away from the pursuit of claims against the Crown based on breaches of the principles of the Treaty of Waitangi.

The Waitangi Tribunal has not yet released its findings and recommendations relating to Maori claims at Te Tau Ihu. The preliminary view of the Crown, however, regarding Ngati Koata mana whenua at Te Tau Ihu will have important and far-reaching consequences for Ngati Koata. It is likely to impact upon the level and extent of any fiscal and cultural redress offered to Ngati Koata in future settlement negotiations with the Crown given that the Tribunal’s recommendations are not binding. It may influence the distribution of fisheries assets to Ngati Koata and any future relationships that Ngati Koata has with central and local government in its region. Ngati Koata is also a party to the foreshore and seabed litigation. Crown perceptions of Ngati Koata mana whenua may influence any potential compensation when the Crown legislates away Maori rights to have customary interests to the foreshore and seabed determined by the Maori Land Court. Undoubtedly Ngati Koata will await the Waitangi Tribunal’s report into claims at Te Tau Ihu with anticipation, if not trepidation.

⁶⁵ For further discussion see Ward, *supra* n11 at 1.

