



**BLAIR ANTE KEOWN**

I was born and raised in Auckland. My background represents a fusion of cultures. My mother is of Croatian descent. Her father was originally from Drvenik, a small village on Dalmatia's Adriatic Coast. He came to New Zealand in 1926, eventually settling in Thames where he raised a family with my Nana, originally of Swiss heritage. My father's family has been in New Zealand for well over a century after emigrating from County Antrim in Northern Ireland. My great-grandfather was a decorated soldier of the New Zealand Expeditionary Force having served in the Boer War. I have one older brother who is currently making his way through Europe having completed a two year stint in London.

I was educated at Sacred Heart College. I have just completed my BCom/LLB (Hons) degree, and am currently in the middle of a two year position as a Judges' Clerk at the Auckland High Court. Criminal law is my particular area of interest and it is in this area that I intend to practice upon completing my clerkship.

My five years at university were immensely enjoyable. At Law School I was a member of the Auckland University Law Students' Society Executive in 2005 and editor of Verbatim. I was also given the opportunity to represent the University of Auckland in Negotiation at both the New Zealand and Australian Law Students' Association conferences.

Outside of university I am a keen sportsman. I play premier club cricket for Auckland University. I also enjoy running, fishing and golf, albeit only when time permits.

In 2004 I took Maori Land Law in order to broaden the scope of my law degree. It was a course that took me well outside my comfort zone. This article, initially written for Maori Land Law, is the revised product of my efforts in that course.

## OWNERSHIP, KAITIAKITANGA AND RANGATIRATANGA IN AOTEAROA/NEW ZEALAND

BLAIR KEOWN

*“The land and the people” is an evocative phrase that has strong connections with many periods of New Zealand’s cultural history. We can no longer afford to use such a phrase innocently; we need to be aware of the various conceptual battles that have preceded its present comfortable sense of timelessness and shared reality.<sup>1</sup>*

### INTRODUCTION

The concepts of “ownership” on the one hand and “kaitiakitanga” and “rangatiratanga” on the other come from fundamentally different philosophical and jurisprudential bases. It is thus, hardly surprising that there is tension and conflict between them. In terms of New Zealand law, there is an ongoing struggle taking place between the two distinct ideologies. It is being resolved by a legal system that asserts an overall and general Pakeha dominance with Maori concepts and values filling the gaps. This paper attempts to explore why Maori can only be a “gap-filler” under New Zealand law. The emphasis will be on the development of the principle of ownership as a product of Christian doctrine. A contrast will be drawn to the fundamentally different Maori worldview and the principles of rangatiratanga and kaitiakitanga that stem from it. Finally I will consider the extent to which these two competing ideologies find reflection under the current legal framework in New Zealand and suggest means for progress into an integrated system of law.

### PART 1 - PAKEHA AND MAORI CONCEPTS

The Pakeha system of ownership and real property rights can be seen as a blanket with the Maori concepts of kaitiakitanga and rangatiratanga only operating in those areas where there are holes or where the blanket simply provides no cover. The difficulty lies in the fact that two fundamentally different worldviews are trying to be resolved within a framework that has been developed in accordance with one worldview that is now widely prevalent and has the power to enforce its ideology.

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<sup>1</sup> R Horrocks, “A History of Competing Meanings”, J Phillips ed., *Te Whenua Te Iwi: The Land and the People*, Port Nicholson Press, Wellington, 1987, 73.

When two systems collide<sup>2</sup> and one has to yield, under New Zealand law this yielding party is Maori. Orthodox formalism dictates that custom law is trumped by the common law and by statutory power. Contemporary political developments have done little to alter this.

The crucial difference for the purposes of this paper is that Western conceptions of land and particularly “ownership” hail from a heavily Christian indoctrinated mindset while Maori concepts of land are firmly rooted in a Maori worldview. The question is one of emphasis: independence or interdependence? In this sense, the Western mindset can be described as a fusion of theocentric and anthropocentric views<sup>3</sup> where “individual” identity is central to the perception of humans as the dominant beings of the natural world. By contrast, Maori ideals of “collective” identity dictate that humans are but one aspect of an environment that exists in a natural balance. The mechanics of this fundamental philosophical difference have been articulated by the Hon. Justice Durie writing extra-curially:<sup>4</sup>

Our society is basically secular and individualistic. We believe humankind has authority over nature which entitles us to make large-scale modifications to the natural environment for personal and corporate gain...Traditional Maori society would seek development from the opposite approach. People do not have authority over nature because they are part of it. They belong to it.

Attempts to bring together these two widely different ideologies about land into a single coherent legal framework can lead to either equal consideration being given to both ideologies or one ideology assuming precedence over the other. In the present case, I think that the Western individualistic concept of “ownership” has assumed a position of dominance in the wake of a process of colonisation that reinforced preconceived notions of settlers. As the Ministry of Maori Affairs noted in the early 1990s:<sup>5</sup>

Immigrants brought with them attitudes that were part of and stemmed from a host of assumptions about their racial and

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<sup>2</sup> See further K Bosselmann, *When Two Worlds Collide*, RSVP Publishing, Auckland, 1995.

<sup>3</sup> Ibid at 4.

<sup>4</sup> E Durie, “The Law and the Land”, supra n1 at 7.

<sup>5</sup> Manatu Maori, *Customary Maori Land and Sea Tenure*, Ministry of Maori Affairs, Wellington, 1991, 12.

cultural superiority which in turn produced feelings of antagonism and prejudice towards Maori customs and the laws of land tenure.

This superiority has strong parallels with the European philosophy towards land that prevailed at the time. Often described as an “anthropocentric view”, it is suggested that the current legal framework for the protection of property rights in New Zealand represents a tangible representation of a world that is designed to suit humanity. Early western scholarship supports this:<sup>6</sup>

God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being.

This attitude manifested itself in the work of a number of then contemporary scholars. John Locke’s labour theory provided an illustration of the idea that working the land invested one with “rights to it”:<sup>7</sup>

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right.

Accepted biblical dogma provided authority for the view that ownership of land was a God given right with humans actually required to assert dominance over the land and “subdue” it in order to establish any rights to it:<sup>8</sup>

Na ka manaakitia raua e te Atua, a ka meaa te Atua ki a raua,  
Kia hua, kia tini, kia kapi hoki te whenua i a korua, kia mate

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<sup>6</sup> J Locke, *Two Treatises of Civil Government*, G Routledge, London, 1887, 129.

<sup>7</sup> Ibid at 130.

<sup>8</sup> Genesis 1:28

hoki ona tara I a korua: ko korua hei rangatira mo te ika o te monana, mo te manu hoki o te rangi, mo nga mea ora katoa ano hoki o te rangi, mo nga mea ora katoa ano hoki e ngokingoki ana I runga i te whenua.

And God blessed them, and God said unto them, be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

In this requirement of Western ownership can be seen strong influences of the work ethic of the Puritan branch of Christianity.<sup>9</sup> Land was not thought of as common to all. It had to be set apart by individuals who through labour, toil and exploitation could subsequently lay claim to it. Scriptural doctrine commanded that ownership be a strictly individual and private construct. Ownership evolved into a synonym for the product of one bringing an object within one's own private dominion. This philosophy continues to find legal recognition through the concept of ownership to the present day.

By comparison, Maori attitudes to land and the natural environment stem from a diametrically opposite starting point. This has occurred on two levels. First, the concepts of whanaungatanga and whakapapa which form the basis of tikanga emphasise collective organisation over individual importance. Second, the relationship that Maori enjoy with the land is based on an idea of balance and reciprocity that is plainly absent from Western thinking.

Papatuanuku te matua o te tangata  
Mother Earth is man's parent.<sup>10</sup>

The above proverb succinctly captures the relationship with land that Maori enjoy. Maori attitudes toward land are not influenced by Christian ideas of individual subjugation but by an intricate Maori worldview that has strong associations with their own cosmology and creation stories.<sup>11</sup>

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<sup>9</sup> For a general treatise on the Puritan tradition see J Ball, *A short treatise, contayning all the principall grounds of Christian religion*, 11 edn, R Bishop, London, 1637.

<sup>10</sup> PM Ryan, *Reed Dictionary of Modern Maori*, 2nd edn, Reed Books, Auckland, 1997, 18.

<sup>11</sup> R Walker, "Maori Myth, Tradition and Philosophic Beliefs", supra n1 at 42.

The sons of Rangi and Papa separate the earth and sky to establish the third state of existence known as Te ao marama (the world of light). It is in this period that the first human was created out of the earth mother by Tane to establish Te ira Tangata (the life principle), the descent of man, and the world as we understand it today...Maori myths, prohibitions, and taboos relating to nature establish the Maori world view that man is not above nature. He is expected to interact with and relate to nature in a meaningful way.

The idea is that Maori see themselves as part of the land. Land is their metaphysical relative through the intricate web of whakapapa (genealogical connections) that connect them to the land and the corresponding whanaungatanga (familial) obligations that regulate their relationships with it. Within this ideological framework Maori did not own the land, they simply belonged to it. There was no widespread belief that man was to tame the land. Instead man was to live in harmony with it. Ownership in a Maori sense can therefore be seen as a dichotomy:<sup>12</sup>

In the beginning land was not something that could be owned or traded. Maoris did not seek to own or possess anything, but to belong. One belonged to a family that belonged to a hapu that belonged to a tribe. One did not own land. One belonged to the land.

This begs the question as to what constitutes ownership in the Maori sense of the word. One of the great problems of articulating Maori concepts in terms of European understandings is the associated loss of context when Maori concepts are divorced from their philosophical base.<sup>13</sup> This is exacerbated further when transposed into an English thinking and/or speaking context that is part of a totally different worldview. By the time a concept as broad as ownership has manifested itself in a legal framework it has already been reduced from a multidimensional concept to a series of outputs or incidents. In Maori however, such similarly broad concepts are allowed to retain their initial integrity. The inevitable difficulty becomes one of trying to compare two fundamentally different concepts that have been subjected to differing degrees of distillation into component parts. It is this complexity that goes to the very heart of the relationship between ownership in the European sense and rangatiratanga and kaitiakitanga.

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<sup>12</sup> *Durie*, supra n4 at 78.

<sup>13</sup> N Tomas, "Implementing Kaitiakitanga under the RMA", (1994) 1 NZELR 39.

It is against this philosophical, cultural and social background that the current legal framework as it reflects ownership, rangatiratanga and kaitiakitanga falls to be determined. In keeping with this paper's general theme of Maori as a "gap filler" under New Zealand law, ownership as a blanket legal principle will be examined first in its own right. Consideration will then be given to the extent to which the blanket of legal ownership provides for the operation, promotion and protection of rangatiratanga and kaitiakitanga.

## **PART II – EXAMINING “OWNERSHIP”, “RANGATIRATANGA” AND “KAITIAKITANGA”**

### ***Ownership***

Ownership in a strict Western sense is the product of a lengthy development from custom that can be traced over many centuries.<sup>14</sup>

The concept itself has been defined as, “the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others”.<sup>15</sup> In New Zealand this has translated into the “bundle of rights” that ownership of an estate in land is said to combine under the doctrines of tenure and estates that are an inherent and inherited part of New Zealand land law.<sup>16</sup> However this definition is functionally unsatisfactory. Isolating core ideas and the principles to which they give rise, and creating a hierarchy amongst those principles is essential to the proper workings of a western legal system. In fact the concept of law itself is built upon such a process.<sup>17</sup> In the interests of clearer analysis, ownership is better examined in terms of the actual incidents to which it gives rise. This is essentially the approach that has been adopted by Honore in his jurisprudential discussion on ownership<sup>18</sup> and it is this approach that will form the analytical framework for the discussion to follow.

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<sup>14</sup> A Erueti, “Maori Customary Law and Land Tenure: an analysis”, *Maori Land Law*, Boast et al ed., Butterworths, Wellington, 1999, 27.

<sup>15</sup> *Blacks Law Dictionary*, 8th edn, B Garner ed., Thompson-West, St Paul, 2004, 1138.

<sup>16</sup> *Veale v Brown* (1868) 1 NZCA 153; *Rural Banking and Finance Corp of NZ Ltd v Official Assignee* [1991] 2 NZLR 356.

<sup>17</sup> For further discussion on the role of the term “ownership” as a link between “conditioning facts” and a set of “legal consequences” see A Ross, *Tutu* (1957) 70 HLR 812, 819.

<sup>18</sup> A Honore, “Ownership”, *Oxford Essays in Jurisprudence*, AG Guest ed., Oxford University Press, London, 1961, 107.

In defining ownership as the “greatest possible interest in a thing which a mature system of law recognises”,<sup>19</sup> Honore acknowledges that it is fashionable to speak of ownership as if it were just a bundle of rights.<sup>20</sup> However, maybe for the same reasons that I have previously offered, the author then proceeds to examine the legal incidents of ownership that are common to many different western systems of law and which tend to remain constant across time.<sup>21</sup> At the centre of these incidents is the right to exclusive possession. This provides the foundation upon which the superstructure of ownership rests. From this cornerstone of ownership flow various “rights”, including the rights to “use” and “manage”, the “right to the income” of the thing and the “right to the capital”. “Transmissibility” is another important incident as is the corresponding “prohibition of avoiding harmful use”. On this basis ownership can be seen as a set of isolated and well-defined “rights” that can be given legal protection.

### ***Incidents of Ownership under Current New Zealand Law***

#### ***1. Exclusive Possession***

Exclusive possession provides that an owner of a fee simple estate has the unqualified right to exclusive physical control over the land. The underlying rationale is clear. Exclusive possession is essential for the establishment of ownership in a western sense because it is a strictly individual construct. It reflects the very notion of exclusion from the commons that has been the traditional hallmark of ownership. Honore argues that protection of the right to possess can be achieved only when there are other rules allotting exclusive physical control to one person rather than another.<sup>22</sup> Such rules appear in the indefeasibility provisions of the Land Transfer Act 1952<sup>23</sup> which provide a registered proprietor of a fee simple estate with a title that is guaranteed against all adverse claims. There are numerous other examples in the common law, of legal rules that determine who has rights to exclusive physical control and in what circumstances.<sup>24</sup>

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<sup>19</sup> Ibid 108.

<sup>20</sup> Ibid 113.

<sup>21</sup> Ibid 108-109.

<sup>22</sup> Ibid 114.

<sup>23</sup> Land Transfer Act 1952, sections 62 and 63.

<sup>24</sup> See for example the finder's cases: *Parker v British Airways Board* [1982] 1 All ER 834; *Tamworth Industries v Attorney General* [1991] 3 NZLR 616 and also relativity of title and adverse possession: *McDonnell v Giblin* (1904) 23 NZLR 660.



## **2. *Rights to Income and Capital***

This incident recognises the economic and exploitative value of land as a transferable commodity. It is the result of “subduing” the land that permits one to enjoy the income that is derived from foregoing personal use of the land. It also recognises the authority and power of the “subduer” to alienate the thing, destroy, consume or waste it. The power of alienation is important as it allows the complete extinguishment of any obligations or rights over the land upon sale. Alienation is final. It severs all legally protectable links between the seller and the land. An enduring relationship with the land is only possible to the extent that commercial ties to that land remain.

## **3. *Transmissibility***

The final incident worthy of mention is what Honore defines as the process by which the tenant in fee simple acquired a heritable right.<sup>25</sup> This characteristic of ownership allows for land to be passed from generation to generation. Honore notes that ownership is characterised by indefinite transmissibility.<sup>26</sup> While in theory this is clearly the case, experience indicates that the state can alter this through legislation. Honore’s pure system of ownership does not seem to take account of the existence of the positivist state and its powers of intervention that form the backdrop for any discussion of legal principles in a Westminster modelled democracy.

## **4. *Prohibition of Harmful Use***

As with all rights and privileges there are associated obligations. In the case of ownership there is the prohibition against using land in a manner that is injurious to a neighbour. The modern law of nuisance and other similar duties in negligence cover this area adequately under New Zealand law. It is worth noting that the prohibition is not one of injuring the land but of using the land in a manner that is injurious to a fellow human. The consideration here is the avoidance of interfering in the private dominion of another. Sustainability and conservation only enter the equation to the extent that conduct contrary to these two ideas interferes with the personal autonomy of another landowner.

A mixture of statutory provisions and common law doctrines and rules provides a settled legal framework in New Zealand that satisfies the

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<sup>25</sup> *Honore*, supra n18 at 120.

<sup>26</sup> *Ibid*.

criteria provided by Honore. This leads me to the irresistible conclusion that traditional European conceptions of ownership, founded on the dominance of mankind over nature, are strongly supported under New Zealand law. Exclusive possession is protected, owners of a fee simple estate are entitled to its use and enjoyment, succession laws and powers of sale allow the transmissibility of land, while the law of negligence and nuisance places restrictions on the extent to which exclusive possession is exercised. Hence the concept of ownership is firmly entrenched in the western mindset and provides the backbone of real property rights in New Zealand.

### *Analogous Maori Concepts*

Having established the centrality of ownership in legal thinking, it becomes necessary to determine what room if any, there is for Maori concepts of land. My discussion emphasised rangatiratanga and kaitiakitanga as analogous principles, with the focus on the position and protection each enjoys within the existing legal framework that operates in Aotearoa.

#### *1. Rangatiratanga*

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua. (Maori Text)

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession... (English Text)<sup>27</sup>

The English version of Article Two of the Treaty of Waitangi purportedly provided for the undisturbed use and possession of Maori land by Maori. The words “te tino rangatiratanga” were used in the Maori version to convey the meaning of undisturbed possession of

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<sup>27</sup> Te Tiriti o Waitangi / The Treaty of Waitangi. See Appendix 1 of this Section for the the full text of both versions and commentary. In this article “Te Tiriti” is used as a general reference to both texts and specific references to either text will be clearly indicated.

properties.<sup>28</sup> The consistency of the two versions of te Tiriti hinged upon the phrase “undisturbed use and possession” as being an accurate description of rangatiratanga.

The Reed Dictionary of Modern Maori<sup>29</sup> and the Ngata English-Maori Dictionary<sup>30</sup> both define the term “rangatiratanga”, as “ownership”. By contrast the Williams Dictionary<sup>31</sup> suggests a broader notion of “breeding and greatness”. Instinctively, I am left with the feeling that the concept of rangatiratanga is far broader than that of simple ownership. Moreover “te tino rangatiratanga” denotes a concept more akin to “sovereignty” than to the ideas of “kawanatanga” or “governorship” expressed in Article One or the idea of “undisturbed use and possession” articulated in the English version of Article Two. This view is confirmed by Keith Sorrenson who maintains:<sup>32</sup>

To the Maori chiefs who signed the Treaty rangatiratanga was far more than a guarantee of their possession of land and other properties; it was also a guarantee of their autonomy and authority, above all their mana, as chiefs; even in some recent interpretations a guarantee of Maori sovereignty.

The Waitangi Tribunal had narrowed its initial view of “te tino rangatiratanga” as the sovereignty of lands and now considers it in terms of tribal self-management. It has also been suggested that what should be included in the concept of rangatiratanga remains unsettled.<sup>33</sup> Regardless, recent developments have made it clear that kawanatanga, under Article Two, was viewed as transferring absolute political and legal authority to the British Crown with rangatiratanga surviving merely as a protection of Maori customary practices. This protection would continue over land only as long as it remained legally under Maori

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<sup>28</sup> M McDowell and D Webb, “Treaty of Waitangi”, *The New Zealand Legal System: Structures processes and legal theory*, 2<sup>nd</sup> edn, Butterworths, Wellington, 1998, 197.

<sup>29</sup> Ryan, supra n10 at 608

<sup>30</sup> H Ngata, *English-Maori Dictionary*, Learning Media, Wellington, 1993, 31.

<sup>31</sup> H Williams, *A Dictionary of the Maori Language*, 7<sup>th</sup> edn, Government Printer, Wellington, 1971, 323.

<sup>32</sup> MPK Sorrenson, *25 Years of C.A.R.E.*, Citizens Association for Racial Equality, Auckland, 1989, 159.

<sup>33</sup> *Towards a Better Democracy: Report of the Royal Commission on the Electoral System*, Government Printer, Wellington, 1986, para 3.101. See also P Joseph, *Constitutional and Administrative Law in New Zealand*, 2<sup>nd</sup> edn, Brookers, Wellington, 2001, 47-48.

control. As Tomas states, in the context of the British guarantee of the full and undisturbed possession of Maori lands, forests and fisheries, from the Crown's point of view:<sup>34</sup>

It reserved to Maori a form of diminished property right which, though deserving of respect, could not stand in the way of Parliament's right to pass laws with regard to land or any other resources.

The extent of this parliamentary right to pass laws was neither conveyed nor explained to the Maori who signed te Tiriti. Likewise the full implications of the Crown's exclusive rights were never fully communicated either by the text itself or by subsequent explanations of its intended meaning.<sup>35</sup> In this regard rangatiratanga, although a concept far broader than the European construct of ownership, has been confined to applying only where the land is legally under the control of Maori. Furthermore, rangatiratanga has effectively been defined in terms of a limited sub-set of the incidents that are recognised as making up "ownership", by Honore. This is conceptually inconsistent as it is rangatiratanga by definition that should dictate when land is legally under Maori control. Instead it is legal control, a concept sufficiently analogous to ownership that dictates when rangatiratanga can be exercised.

In terms of the overarching theme of this paper legal ownership represents the blanket, which permits rangatiratanga to operate only where the blanket has holes. What in essence should be the situation and was in accordance with Maori customary understandings at the time of the signing of te Tiriti has been reversed to reflect English understandings of their own superior position.

It is undeniable that rangatiratanga posed a threat to the European concept of ownership. Rangatiratanga after all embraced the concept of Maori ownership within its ambit. Indeed Maori ownership seems to be a contradiction in terms of the European sense of the word. Maori ownership was based on the communality of Maori society and therefore provided for a host of use, management, occupation and access rights to reflect the multiplicity of uses land could be put to and the multiplicity

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<sup>34</sup> N Tomas, "Land, Sovereignty and Tino Rangatiratanga" in Greenwood et al ed., *Work in Flux*, University of Melbourne: Department of History, Melbourne, 1995, 34.

<sup>35</sup> *McDowell and Webb*, supra n28 at 198.

of persons that may require such uses. This is clearly at odds with the notion of exclusive individual possession around which the superstructure of European ownership was built.<sup>36</sup>

The connotations of the word ownership in English usage and particularly the notion of exclusive right needs emphasis because it is so much at variance with Maori custom.

Not only was the notion of exclusive possession missing from the Maori concept of ownership, but the finality of alienation, the exploitative value of land and the individual ownership unit was similarly absent. This proposed inherent difficulties for land hungry settlers.<sup>37</sup>

In that sort of climate there was very little tolerance for the complexities of Maori land laws and so, among the Pakeha officials, there were few who saw any point in allowing Maori to continue operating under traditional Maori rules of land use and control.

Arguably, this mentality has continued down to the present day.<sup>38</sup>

Starting from the proposition that the title to all land in a British possession vested in the Crown, and that a subject could hold land only by or through a grant from the Crown, it seemed to follow that the only source of Maori property rights over land in the absence of a specific grant was legislation.

Matters are obviously more complex than this. However, the general theme has remained consistent: rangatiratanga and implicitly Maori ownership operate only to the extent allowed by the legislature. As McHugh states.<sup>39</sup>

There is an old Maori adage which says: “‘Let’s assimilate’ is what the shark said to the kahawai before he ate him for breakfast”. That saying is a graphic metaphor for the legislation

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<sup>36</sup> Manatu Maori, *Customary Maori Land and Sea Tenure*, Ministry of Maori Affairs, Wellington, 1991, 16.

<sup>37</sup> Ibid 12.

<sup>38</sup> New Zealand Law Commission, *The Treaty of Waitangi and Maori Fisheries. Maitaitai: Na Tikanga Maori me te Tiriti o Waitangi: Preliminary Paper No.9*, NZLC PP9, March 1989, 54.

<sup>39</sup> P McHugh, *Maori Land Laws in New Zealand*, University of Saskatchewan Native Law Centre, Saskatoon, 1983, 39.

affecting the land of New Zealand's native people, the Maori. In the legislation we see an ongoing battle between the shark and its prey.

The principle piece of legislation affecting Maori land in the present day is the Te Ture Whenua Maori Act 1993 ("the Act"). While the preamble indicates the desirability of reaffirming the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in te Tiriti, the Act itself reduces the incidents of rangatiratanga and Maori ownership to palatable portions. The Act does give a degree of recognition to a separate system of Maori land ownership but this is merely a diluted form of rangatiratanga. While section 129 of the Act provides for the various statuses of land in New Zealand and section 131 empowers the Maori Land Court to determine the status of any parcel of land, these provisions rarely give rise to any practical consequences that equate with Maori ideas of rangatiratanga. Hinde, McMorland and Sim record that:<sup>40</sup>

The investigation and ascertainment of the title to Maori customary land, and its conversion into freehold land, took perhaps longer than was anticipated, but is now practically complete.

There is little Maori customary land remaining in Aotearoa.<sup>41</sup> All other land has been converted into freehold title under European concepts of ownership. It is highly doubtful then, that the Act has the practical ability to undo the past, particularly given the retention of the inherent jurisdiction of the High Court to review decisions of the lower courts.<sup>42</sup>

We are left with a legal framework, therefore, that in theory recognises a limited concept of rangatiratanga with regard to Maori land but which in actual practice defers to the dominant concept of ownership. This too is hardly extraordinary for the current situation as Tomas explains is one of two competing sovereign peoples:<sup>43</sup>

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<sup>40</sup> G Hinde et al, *Land Law in New Zealand*, Butterworths, Wellington, 1997, 25.

<sup>41</sup> Conversely, some Maori would argue that the whole of Aotearoa will remain Maori land until Maori choose to give it away. For a contemporary illustration of legislation aimed at reducing Maori rangatiratanga see the Foreshore and Seabed Act 2004 which vests ownership of the last potential bastion of Maori customary land in the Crown.

<sup>42</sup> See *Grace v Grace* [1995] 1 NZLR 1 where it was held that the Court would not be justified in reading into Te Ture Whenua Maori Act 1993 an exclusion, in relation to Maori freehold land, of the inherent jurisdiction of the High Court.

<sup>43</sup> *Tomas*, supra n34 at 39.

Each holds title to land according to its own set of ideas, each draws on the land as the basis of a different and often competing identity. The relationship between the two peoples and the relationship between Maori title and Crown title to land cannot be resolved in isolation of each other.

Given this competition, the fact that the Crown is empowered with parliamentary sovereignty appears to be conclusive of the matter. As Nicholas Harris claims, “any co-existence of ultimate authority is considered entirely inconsistent with the Western doctrine of sovereignty”.<sup>44</sup> The swift legislative response to the decision in *Ngati Apa v Attorney-General*<sup>45</sup> is indicative of this attitude as well as the extent to which Maori concepts such as rangatiratanga routinely fall at the mercy of the legislature and judiciary.

The foregoing should not be interpreted as a *fait accompli*. The tension will continue into the future as the dialogue between Maori and the Crown continues around *te Tiriti*, its enforceability and the extent to which the New Zealand government is bound by the agreement made in 1840. Maori see this as part of an ongoing process that has been incorporated into their *whakapapa* and worldview and see the legal process as a layer over the land. This is not however the definitive word as far as their own worldview and their own recognition of rangatiratanga is concerned. They see the Crown as “partner” with an enduring *Tiriti* obligation of good faith which enables Maori to regularly reign in Crown actions.

## 2. *Kaitiakitanga*

Unlike rangatiratanga, *kaitiakitanga* does not directly conflict with the concept of ownership. Neither is it a principle directly recognised by *te Tiriti*. It is a principle whose legal recognition derives directly from inclusion in statute.

In attempting to outline the mechanics of the concept of *kaitiakitanga* one again runs the risk of removing the concept from its philosophical base. *Kaitiakitanga* is at the heart of Maori dealings with land and resources. According to the New Zealand Law Commission “*kaitiakitanga*” is:<sup>46</sup>

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<sup>44</sup> N Harris, “Ko Ngaa Take Ture Maori”, (1996) 8 AULR 205.

<sup>45</sup> [2003] 3 NZLR 643.

<sup>46</sup> New Zealand Law Commission, *Maori Custom and Values in New Zealand: Study Paper 9*, NZLC SP9, Wellington, 2001, 40.

A term coined in relatively recent times to give explicit expression to an idea which was implicit in Maori thinking but which Maori had hitherto taken for granted.

As with rangatiratanga, any attempt to rationalise kaitiakitanga in terms of European one-dimensional thinking is problematic. While kaitiakitanga is often referred to as “guardianship” it transcends this role. Kaitiakitanga is essentially derived from the interaction of whakapapa (genealogical connection to the land) and whanaungatanga (complex personal relationships on the land). At the level of land administration it defines the role-relationship that exists between certain participants who by virtue of whakapapa are destined to protect, maintain and guard particular resources. This role-relationship is not confined to individuals. Kaitiaki can be metaphysical beings such as taniwha, the spirits of dead ancestors or indeed living creatures. It thus follows that the kaitiaki relationship can exist independently of the legal ownership of the land. Kaitiaki relationships do not cease upon the passing of title under the Land Transfer Act; they are enduring.

Tied to the notion of kaitiakitanga is the concept of “mauri”, which provides that every resource has its own spiritual integrity and that the role of the kaitiaki is to protect and maintain that integrity. Imposition of rahui, or restrictions and prescriptions on the types of behaviour that were to be observed in relation to land and resources were all part and parcel of the role of the kaitiaki. Failure to observe this role would result in whakama (shame) and a diminution of the mana (authority/status) of the kaitiaki. Additionally, there would be flow-on effects within the wider community to which the kaitiaki belonged.

European attempts to define kaitiakitanga as “guardianship” or “stewardship”, two concepts arising out of feudal England as opposed to contemporary Maoridom, miss the point.<sup>47</sup> According to Metiria Turei:<sup>48</sup>

Both terms tend to cloak the concept of kaitiakitanga in Pakeha terms of lesser importance and entirely different origins. The role of the kaitiaki is considerably more significant than simply that of a guardian or steward.

“Stewardship” is essentially a term based on the Christian principle that

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<sup>47</sup> *Tomas*, supra n13.

<sup>48</sup> M Turei, “Defining Kaitiakitanga and the Resource Management Act 1991” (1997) 8 AULR 893, 898.



man should only take what is needed.<sup>49</sup> This is but a slice of what kaitiakitanga represents. “Guardianship” too, implies a sense of protection that is not completely representative of kaitiakitanga. At a functional level, the kaitiaki dynamic encapsulates ideas not just of physical sustainability and pragmatic environmental development, but broader intangible notions of spiritual integrity, restoration of mana and maintenance of sacred relationships. Despite the inadequacy of guardianship and stewardship to embody the concept of kaitiakitanga it is these “analogous” terms to which kaitiakitanga has been equated under New Zealand law.

The primary piece of legislation that governs the use of land and resources in New Zealand is the Resource Management Act 1991 (“RMA”). Under section 6 of the RMA it is provided that all persons exercising functions and powers under the Act shall recognise the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. Moreover, section 7 provides that all persons exercising functions and powers under the Act shall have regard to kaitiakitanga among other things. While these provisions provide legislative recognition of the concept of kaitiakitanga, it is merely a token gesture. In both sections 6 and 7 the word “shall” is used instead of the imperative “must”. The effect of this is to reduce kaitiakitanga to one of a range of considerations that should be regarded when making decisions under the Resource Management Act. This is wholly unsatisfactory as it represents the subordination of a fundamental Maori concept to a mere consideration that in theory should be regarded but in practice is often ignored. This unfortunate reality has been acknowledged by Turei who concedes:<sup>50</sup>

The assistance of s 7 seems futile in relation to kaitiakitanga as a real chance of partnership between the treaty signatories was ignored with this intentional subordination of the central tenet of Maori resource management.

Indeed there are many examples of this in the application of the Resource Management Act in case law. One such example is *Haddon v Auckland Regional Council*<sup>51</sup> a case concerning the transfer of sand from Pakiri beach to build up the shoreline at Mission Bay in Auckland.

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<sup>49</sup> 2 Cor. 9:6: “But this I say: He who sows sparingly will also reap sparingly, and he who sows bountifully will also reap bountifully.”

<sup>50</sup> *Turei*, supra n48 at 895.

<sup>51</sup> (1993) NZRMA 49.

While the Tribunal recognised the link between the hapu and the sand as well as a limited form of kaitiakitanga, it ultimately concluded that the extraction of sand was within the overarching principle of sustainable management required by the Resource Management Act. This decision highlights a major concern of Maori in regard to ownership, kaitiakitanga and the Resource Management Act. While a particular activity may be sustainable in satisfaction of the terms of the Act there is no mechanism for ensuring that the particular activity or purpose is a good one in terms of tikanga Maori (Maori law). The overarching ethic of sustainable management simply dwarfs any practical effect that kaitiakitanga may have under the RMA.<sup>52</sup> An owner of land can do anything they wish on their land provided it is sustainable. If the activity is sustainable then that is generally the end of the inquiry with kaitiakitanga in isolation having no practical ability to regulate the activity. We are presented with a situation where ownership acts as a broad spectrum antibiotic that reduces Maori values such as kaitiakitanga to a discretionary matter that can either be given weight or ignored depending on the decision maker. The engrafting of an ethic of negotiated alternatives onto Part II of the Resource Management Act throughout the 1980s has represented only a small step in the right direction. It has however provided some hope that the avenue of social and political discourse previously mentioned will continue to remain open to Maori.

## CONCLUSION

On their face, Maori and Pakeha attitudes to land and resources seem irreconcilable. Both perspectives enjoy the historical antiquity that centuries of cultural, spiritual and social development provide. Pakeha attitudes to land are heavily influenced by their ancestral link to early Christian notions of subordination and individuality. Maori heritage has suggested the inverse approach with a worldview based on interdependence and environmental co-operation.

A truly integrated system of property rights appears problematic and perhaps unachievable. However the Tiriti obligation of good faith and the notion of partnership inherent in our nation's founding document have provided an opportunity for rigorous and potentially fruitful

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<sup>52</sup> "Sustainable Management" does not directly limit activities on the land. It focuses on the adverse effect of those activities on the physical environment and ensures that they are short term or minimal, and in compliance with existing regional and district plans.

political dialogue between Maori and the Crown. To date this is an opportunity that the Crown has failed to grasp. Parliamentary sovereignty has stripped Maori of any genuine bargaining leverage that they may have previously possessed, leaving them to rely precariously on the officious “kindness” of government. Ownership has proved decisive. It provides the glue that binds the law of real property in New Zealand together. At the same time the concepts of rangatiratanga and kaitiakitanga which can be seen as the glue that binds Maori real property together have been subordinated to a point where their recognition is merely a matter of discretion. From a continual avoidance to give effect to the recognition of rangatiratanga that Article Two of te Tiriti was to purportedly protect, to the subordination of the fundamental concept of kaitiakitanga under the Resource Management Act, the New Zealand land law experience has given real credence to the old saying “a man’s home is his castle” juxtaposed with the notion of Maori “weeping for the land” as so often noted in the korero of the great Maori leader, Sir James Henare.

