F W Guest Memorial Lecture 1996

Will the Settlers Settle?
Cultural Conciliation and Law

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It is humbling to follow so many prestigious lawyers who have given the F W Guest Memorial Lecture, and it is a privilege to add another to the record. The Professor's inaugural lecture in this university, on "Freedom and Status",[2] traced the relationships between law and people, status and contract, and the progression of rights and duties through ancient and modern societies. It was an essay in legal philosophy.

This address adds a little on legal anthropology, and on the interplay of Maori and English law. It is intituled "Will the Settlers Settle?". Were Professor Guest to review the progress of the law today, he would note that its former compilation as a New Zealand edition to the Laws of England, is now emerging in a stand alone compendium called the Laws of New Zealand. It is no longer an appendage to somewhere else. To an impartial observer it may suggest the settlers have come to settle. The thought in this address however, is that the successful settlement of another country requires an appropriate respect for the pre-existing law and people, and if recognition is chary or tardy cultural conciliation will be delayed. As a test for cultural conciliation I am using mutual comprehension and respect.

By "Maori law" I do not mean modern Maori land law. The Maori land law in Te Ture Whenua Maori Act 1993 derives from historical policies for reform which imposed sweeping changes to an ancient system. This address is about the ancestral law, as it was, and about the underlying values that are extant.

For reasons of space and time it is necessary to focus on aspects of Maori law and here the emphasis is on land - Maori land tenure, the English doctrine of tenure and the conciliation of competing world views. It is also necessary to generalise about some key elements of Maori law, and of the society that animates it.

The first is that political power was vested at the basic community or hapu level. Power flowed from the people up and not from the top down. Control from a centralised or super-ordinate authority was antithetical to the Maori system. Indeed, it is probably an understatement to say that Maori did not develop a central political agency, and more correct to assert that Maori ethic was averse to it. Where Europeans saw progress in the aggregation of principalities to form national states, and the world followed suit, for the indigenous societies of Australasia and the Americas local autonomy was more

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[2] F W Guest *Freedom and Status* 4 July 1961, 1 Otago Law Review 265.

prized. If I understood correctly certain opinions that came from the World Council of Indigenous People, tribal societies do not see themselves as an undeveloped embryo but as maintaining a way of life independent of the state as a matter of positive policy.

Consider then Lord Normanby's instruction to Captain Hobson, as he then was, for the recognition of the sovereignty of New Zealand. He observed that following the Declaration of Independence of 1835, Great Britain had acknowledged New Zealand as a sovereign and independent state, but then he added

> ... so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even deliberate, in concert.[3]

Modern Maori debate on fish allocation is not evidence in support of Normanby's opinion, in my view. Agreements at a national level have not been regular although they have been achieved. I would caution against a value judgment however. Many tribes still argue against the formation of a national Maori authority even now. There are also those whose opposition to state control is not anarchical but is founded on genuine beliefs about aboriginal autonomy. For other reasons, there are also modern jurists who question the efficacy of state sovereignties in the management of global affairs.

Political power in Maori society was probably located in the descent groups called hapu. It is to "hapu" that the Treaty of Waitangi refers where the English text mentions "tribes". These were groups large enough to be effective for such purposes as war, gift exchange, hosting and harvesting resources. There were several hundred hapu, most of them free and independent. In terms of structure they were remarkably fluid, constantly changing, dividing as numbers increased or fusing if due to war or famine numbers were reduced. In the result there were generally many hapu in any natural geographic region, which, through historic genealogies reinforced by continuing inter-marriage, were all related. It was characteristic of these hapu to be self-managing, but to federate in varying combinations for specific purposes, from war to entertaining, or fishing to long distance travel. They were independent yet inter-dependent, and related through a complex web of kin networks.

The people of several hapu when together, were called simply "the people", or "iwi", a compendious and neutral term that has since grown to a proper noun. A focus on regional operations through European influences, led to corporate functions vesting increasingly in "iwi", as a cultural equivalent for "tribe".[4] There is presently some tension as to whether aboriginal autonomy is to be located at hapu or iwi levels, but either way the principle of localised political autonomy remains.

3 *British Parliamentary Papers* vol 3 1840 [238] No 16 pp37-42.

4 See Peter Cleave *Tribal and State like Political Formations in New Zealand Society* Journal of the Polynesian Society Volume 92 No. 1 (1983).

The second assertion I would make is that generally, Maori custom law was common. As mentioned, hapu autonomy was no barrier to the formation of either single purpose combinations or enduring alliances. Maori history is replete with such arrangements. In the post-contact period there were several pan tribal runanga to oppose land sales. They were perceived by settlers as illegal combinations in restraint of trade.[5] Even after the substantial and effective Maori aggregations for the purposes of the New Zealand wars however, Lord Normanby's opinion that Maori could not act in concert was taken a stage further. It was said that Maori not only lacked a central polity, but were also without law. There was thus this judicial opinion, in 1877, on a matter presumed so notorious that no evidence was required, that

> On the foundation of this colony, the Aborigines were found without any civil government, or any settled system of law. There is no doubt that during a series of years the British government desired and endeavoured to recognise the independent nationality of New Zealand. But the thing neither existed nor at that time could be established. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community.[6]

There followed the well-known references to Maori as "primitive barbarians" and "savages" without law. The court could only have been referring to institutional law however. Not all law is generated from a super-ordinate authority. Quite a deal, even English law, finds its source in social practice and acceptance, or custom, and that in itself may constitute a settled system of law. Thus in 1846 Bishop Hadfield described Maori customs as so regular that one "tribe" could predict accurately the conduct of another in any given circumstance. Although it was his view that the rules were starting to fall apart, the likely tribal rejoinder to particular stimulations is still predictable today.

Nor did this grass roots management of law without some centralised laundering lead to a multiplicity of local laws. While Maori law is subject to regional variations, it is more remarkable for the large areas of commonality. The developers of the common law of England may have found the same.[7] It is important to note that the philosophy that underlies Maori law is germaine to most parts of the Pacific. In New Zealand the areas of commonality were such that they applied not only to internal hapu management but to inter-tribal relationships as well and the protocols were "settled". There is as much a "Maori law" as there is a "Maori" language.

But can custom be called law? The question of whether Maori behavioural norms constituted "law" is an issue of definition, in my view, and I should here

5 See Waitangi Tribunal *Taranaki Report* 1996.

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

7 See P G McHugh *A Tribal Encounter: The Presence and Properties of Common Law Language in the Discourse of Colonisation During the Early-Modern Period*, Sidney Sussex College, Cambridge, to be reworked in his awaited book Aboriginal Societies and the Common Law.

explain more clearly the sense in which I am using "law". I have assumed the proper question to be whether there were values, standards, principles or norms to which the Maori community generally subscribed for the determination of appropriate conduct. Most contributors to the International Commission on Folk Lore and Legal Pluralism appear to abide a definition along those lines.[8]

The next general proposition or construction, is that while individuals or particular families had use rights of various kinds at several places, the underlying or radical title was vested in the hapu. This served to prevent transfer of use rights outside the descent group without a general hapu approval. In addition the allocation of use rights within the group was regularly adjusted by the rangatira (chiefs). The essential point however is that the land of an area remained in the control and authority of an associated ancestral descent group and, like fee tail, neither the land as a whole, nor a use right within it, could pass permanently outside the bloodline. Land and ancestors were fused.

The Maori feeling for the land has often been remarked on, and, following New Zealand Maori Council submissions on town planning to a Parliamentary Select Committee in 1976, the sentiment eventually found statutory expression. Section 3(1)(g) of the Town & Country Planning Act 1977 provided that in preparing planning schemes, regard was to be had to "the relationship of the Maori people and their culture and traditions with their ancestral land". Ironically, this cultural value was imported into town planning even before it found a place in Maori land law in what was then the Maori Affairs Act 1953.[9] Although the full import of the town planning amendment was not apparent until ten years after its enactment, in *Royal Forest & Bird Protection Society Inc v W A Habgood*[10], the Maori feeling for land probably requires no other elaboration today than to describe the philosophical underpinning of land related values.

In terms of cultural expression, life derives from mother earth. The land is her placenta or "whenua", and the word "whenua" means both land and placenta. Those who belong to the land, the tangata whenua, are those who trace descent from the original peoples, by whakapapa, or from meticulously preserved genealogies that generally extend over a minimum of 25 generations. The philosophy admits of migrants by incorporation. It admits the children of those who, by marrying into the local community, have sown their seed in the whenua.

Like all theories there were exceptions, but a claim by conquest was probably exaggerated by colonial administrators. The retention of land by the strength of one's arm was a common expression but described a defensive position. A conqueror's right to land was more regularly claimed by marriages with the conquered.[11]

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8 See Commission on Folk Lore and Legal Pluralism, papers to the Congress at Victoria University of Wellington, 1992 (two volumes).

9 But compare now Te Ture Whenua Maori Act 1993.

10 (1987) 12 NZTPA 76, adopted by the Court of Appeal in *Environmental Defence Society v Mangonui County* [1989] 3 NZLR 257.

11 The Maori Land Court minute books record many accounts of wars but this reflects the court's opinion that conquest was a source of title. The evidence given for the court and the evidence on the marae is not the same.

The essential Maori value with regard to land, I suggest, is that lands are associated with particular communities and, save for violence, do not pass outside the descent group. That land derives from ancestors and passes to blood descendants, is pivotal to understanding the Maori land tenure system. Such was the association between land and particular kin groups that to establish a claim to land, in Maori law, persons had only to say who they were. While that is not the statutory legal position today, the ethic is still remembered and is given effect on marae.

The next major proposition I suggest, is that individual land rights accrued from a combination of ascription and subscription, from belonging to the community and from subscribing to it on a regular basis. While the community's right to land, in pure terms, was by descent from the earth of that place, the individual's right required both membership and contribution. Descent alone was not enough. Descent gave a right of entry, but since Maori had links with many hapu and could enter any one, use rights depended as well on residence, participation in the community, contribution to its wealth and the observance of its norms.

In addition, persons obtained land rights by incorporation into descent groups. The incorporation of outsiders, as practised throughout the Pacific, was seen as a characteristic of competitive societies. It involved the inclusion of persons within the hapu who might otherwise have stood outside but who appeared to have a particular contribution to make. These came in on the same terms as all members, that they should contribute to the community and abide its norms. The purpose was to build hapu strengths and keep rival hapu at bay.

Incorporation applied to descent group members as well as to outsiders. As individuals were mobile and could join several hapu through their extensive genealogies, there was competition to keep them. The competition continues today as tribal leaders recall old relationships to recruit or maintain adherents for their particular hapu.

Incorporation was usually effected by marriage and the allocation of use rights. It appears however, there was more interest in the children who held the blood line, for in a sense the spouse was always an outsider. Adoption was another method, although a blood relationship with the adopted person was usual and preferred. The naming of a child at birth, or the adoption of a new name by an adult were further methods for securing ongoing connections.

Land rights were thus inseparable from duties to the associated community, from being part of it, contributing to it, and abiding its authority and law. There was no room for absentee ownership, only the right of absentees to return. Similarly no land interest existed independent of the local community or which was freely transferable outside of it. Probably the nearest cultural equivalent to the Maori use right arrangement was an entailed licence to the use of a particular resource, without prescribed rent but with obligations to return benefits to the community to the fullest, practicable extent. Moreover the right was to a particular resource. There were no exclusive rights to all types of use of a defined parcel, or no exclusive right to a prescribed land block.

Unsurprisingly, the practice developed in the Pacific of incorporating the early European traders and seamen. Land allocations to these persons should not be

seen as the sale of land but the acquisition of people. A rangatira who allocated land to an individual did not augment the receiver but the community, for it was the receiver who was most obliged. The purpose in all things, was not to elevate the individual but to build the community. Thus some settlers complained of being virtually bled to death. Others fitted into the Maori law. Those who stored wealth for themselves were subjected to muru, or plunder, for it was central to the Maori way that wealth should not be individually aggregated but distributed through the community.

In no case however was land allocation a permanent alienation of the land. Nothing could alter the reality that land is held by the ancestral community, and a stranger taking land, held it only by becoming part of that community. Donees or their issue could not part with the land, and if they left it, the land remained where it had always been, with the ancestral descendants. To Maori, no other course was imaginable. In western legal terminology it might be said that when the donees vacated, the land reverted to source, but to Maori, it had never left the ancestral tenure. Again, to secure to the donees some larger right in the community, marriages were usually arranged, for lineage was central to the Maori system, and marriage gave a stake in the land by ancestry. Thus the offer of wives for settlers was not evidence of some moral turpitude as some writers have imagined but a method of securing their place in the community. Nearly all the early settlers who lived amongst Maori before 1840 took Maori wives.

The common feature then, of Maori law was that it was not in fact about property, but about arranging relationships between people. There was no equivalent to the English law where persons could hold land without concomitant duties to an associated community, or no parallel to the English social order wherein large land-holdings could influence one's status in local society. For Maori the benefits of the lands, seas and waterways accrued to all of the associated community, and an individual holding extensive rights of use, carried a commensurately larger obligation to the community. Similarly, rangatira held chiefly status but might own nothing. It was their boast that all they had was the peoples.

This was encapsulated in a Northland proverb, that the most important thing in the Maori world was not property but people:

> Unuhia te rito o te harakeke kei hea te komako e ko? Ki mai koe ki au 'He aha te mea nui o te ao?' Maku e ki atu, 'He tangata, he tangata, he tangata'.
>
> Pluck out the centre of the flax bush, and where would the bellbird be? You ask 'What is the most important thing in the world?' I would reply, 'tis people, 'tis people, 'tis people'.

Land rights, in the Maori scheme, may be defined as a privilege, a privilege to use resources as a consequence of maintaining one's obligations both to the community, and to the deities as protectors of the earth's resources. It is also expressed as a privilege in Maori divine law. There is no property right in the resources of the forests, only the privilege of taking after appropriate permission

from the forest gods, or no property in fish but a privilege of taking provided respect for Tangaroa was shown.

The management of personal relationships depended also on the directions of the rangatira or chiefs. One of the major European misconceptions concerns the role of these rangatira. Portrayed as omnipotent, in fact their authority came from the people with whom they lived in close contact. They were also regularly credited with larger powers than they had, like the right to sell land. Presumed to hold office by rules of primogeniture, in fact they more regularly led through achievement. It is just that their skills were attributed to their breeding. Considered to "own" the greater share of the tribal property, they claimed it not for themselves but the people. Status in Maori terms comes not from the personal aggregation of power and wealth, but the delivery of power and wealth to the people. Thought to have a divine authority, their mana in fact came from the exhibition of divine traits, courage, generosity, pride, humility and so on.

The maintenance of personal relationships depended also on punctilious observance of prescribed protocols in meeting, greeting, debating and even fighting. The rules and protocols, and the rituals for the propitiation of divine interests, were particular means to achieving ends, but the Maori legal system in my view, was fundamentally values based, not rules oriented.

Most Maori writers appear to agree that the regulation of Maori behaviour was governed not by rules but by concepts, like whanaungatanga, arohatanga, manaakitanga and utu, to name only some. Whanaungatanga stressed the primacy of kinship bonds in determining action and the importance of whakapapa (genealogies) to settle rights and status. Whakapapa was the basis for hapu allegiance, for establishing that all Maori are related, and for demonstrating the connection of Maori to elements of the universe. Aroha, love or empathy, was the basis for peaceful co-existence. Aroha is how Maori described the relationship they sought with settlers or the governor. Manaakitanga - generosity, care giving or compassion - was a desirable character trait but did not necessarily equate to selflessness, for it was mainly about establishing one's status and authority (or mana) by acts of kindness and caring.

Utu concerned the maintenance of harmony and balance. For everything given or taken a return of some kind was required, and whether that given or taken was love, an act of kindness, property or a life. Thus, those who give, gain mana above the receiver. Those who receive must restore the balance, by generously responding over time. It is not a case of trusting to the receivers' goodwill, for in the Maori way, no other course of action is open to them. If they do not respond appropriately, they will fall down for they will be seen to lack mana. The giver cannot leave it at that, however. If the balance (utu) is not in fact restored then utu (revenge or compensation) must be taken. Utu may be deferred but is not forgotten.

The Maori value system was exemplified in a distinctive manner of contracting. The standard Maori contract was not for the transfer of rights for a prescribed consideration or immediate return. The standard contract was a gift, with the expectation of a return in due course. The purpose was to establish a permanent and personal relationship with reciprocal obligations where the main benefit to both sides would come in the course of time. It led to the method of trade called

gift exchange.[12] Maori traded widely, large distances being covered to secure commodities scarce in the home area. It was common, perhaps usual, that groups depositing their goods made little point of that which might be given in return. The response was up to the receiver, especially, as was also usual, if the recipients could not respond immediately. In fact a delay in replying in whole or in part seems to have been regularly expected. Better than an immediate payment was a larger reward in time.

Since everyone adhered to the same rules, the system worked effectively. There was generosity in giving but still, with the expectation of a handsome reply in due course. Also in giving, there was absolute trust that the other party would reply, and yet, a failure to respond later could lead to a reprisal. Central to this system was the expectation that an ongoing relationship would be maintained, as necessary for trade and mutual advancement.

The concept that maintained reciprocity was mana. The more one gave the greater one's mana, and an unequal response meant loss of mana. On the other hand if the original gift was outdone, the balance of mana changed again so that obligations were kept current. Gift exchanges were thus repeated time and again until the parties were so close and accepting of one another, that each could rely on the other to be generous in times of local privation, and to expect no immediate response.

No doubt others would propose alternative views on the nature of Maori law, but little has been written in Maori lego-anthropology and if this address provokes a debate in that area, it will have been useful. These views are mainly from 22 years of judicial involvement in Maori affairs and some reading. A bibliography is appended. I doubt anyone today would dispute however that Maori had a complex belief system on land tenure that served to maintain harmony, equality and local freedom. I refer now to the mixing of legal systems.

The question has been asked at what point did Maori understand the western legal system and especially, when did they comprehend land sales. That in itself is illuminating. At times the question has been asked as if Maori had blank minds awaiting intelligence, or were willing to jettison their beliefs for an alternative regime. A study of history should dispel those opinions. Maori fought to maintain their own law and authority.

There were thus two vastly different legal systems and a value judgement as to which was better was inappropriate when each was valid in its own terms. Perhaps the question should also have been asked as to when Europeans came to understand the Maori legal system or whether European fulfilled the contracts in the way Maori had expected. The disparity between the parties' expectations was evident in the early land transactions, not only the large number before the Treaty of Waitangi, but in the government transactions that followed. In Northland, from the 1820s, the benefits from trade led to competition to incorporate traders or missionaries into tribes, and later, competition for

[12] Gift exchange as a form of trade permeated the Pacific and the Americas. The first comprehensive New Zealand study was probably by Raymond Firth in 1929; see now Firth *Economics of the New Zealand Maori*, second edition, 1959.

European settlement. Many of the Europeans secured deeds of land conveyance, but it is doubtful the paper deeds bore much relationship to events on the ground.

The same transaction could be seen in different lights. Where Maori allocated land, the settler imagined a purchase. Where vacant possession was thought to have been taken, Maori continued on the land as before. While payment was seen as final, subsequent tribute was in fact required. Where Pakeha saw friendship, Maori saw obligations. Where Pakeha presumed to sell to a further party, Maori saw a breach of obligations. Those Pakeha who left were to be plundered, having no right to take goods from the area. It was "their custom" one trader wrote after a second muru raid, "to take all the possessions of any person who forsook any tribe, considering them forfeited". Thus the deeds represented either the "purchaser's" understanding, or at least the purchaser's hopes that the deed would establish a land sale in the event of annexation. For their part, Maori were simply functioning in terms of their own law.

In reality the traders and missionaries were as tenants at will or on sufferance on Maori land. Following a brief visit to New Zealand and a meeting with the Bay of Islands' missionaries, Captain FitzRoy, later governor of New Zealand, was examined by a British Parliamentary Select Committee in 1838 as follows:

> The Church Missionaries consider that they hold their Lands purchased on Sufferance?
>
> Yes.
>
> From which you believe them to contemplate the Possibility of their being taken away?
>
> Decidedly; and I apprehend they consider that they hold their Property entirely at the Mercy of the Natives; that their Tenure in that Country depends solely on the Goodwill of the Natives.
>
> Of course it does, generally speaking, but do you suppose them to be of opinion that the New Zealanders themselves consider them to hold the Lands they have purchased on Sufferance?
>
> It is a Sort of conditional Sale, such as "we sell them to you to hold as long as we shall permit you". I apprehend it is considered that they hold those Lands under the Authority of the New Zealand Chiefs; that they settle upon them as their own Property; but under the Protection and Authority of the Chiefs, and they look up to the Chiefs as their Protectors, and, in fact, as their Masters.
>
> Do you conceive at the time that the Purchase is made there is not an Understanding between the Missionaries and the New Zealanders, that the Land is entirely given up for a positive Consideration?
>
> The Use of the Land is certainly; but as the Missionaries have never wholly taken away Ground from the natives, but always allowed them the Run of the Land, the Right of Common as it were, I do not think they at all apprehend at present that a Day will come when they will not be allowed to go about the land as they have hitherto done; they consider it their Country while it is not transferred from them to the Sovereignty of another Power.

> Are you aware that the Missionary Society in all their Arrangements speak of the Land as a Possession in Perpetuity, and that they recommend to the Missionaries to purchase such Quantities of Land as a Provision for their children?
>
> Yes, I am quite aware of that; what I have meant is that they have a Right to hold that Land, or to make any Use of it for their own Benefit; and that they may act as they please upon the land as long as they acknowledge the New Zealand Chiefs as the Authorities under whom they hold it.[13]

It is likely this situation obtained for some time in the remote areas. In the main settlement places, Auckland, New Plymouth and Wellington for example, the early Maori "vendors" were alarmed by the unforseen consequences of their actions. Thus Te Wharepouri, in Wellington:

> I thought you would have nine or 10 [Pakeha] ... I thought that I could get one placed at each pa, as a White man to barter with the people and keep us well supplied with arms and clothing; and that I should be able to keep these white men under my hand and regulate their trade myself. But I see that each ship holds 200, and I believe, now, that you have more coming. They are all well armed, and they are strong of heart, for they have begun to build their houses without talking. They will be too strong for us; my heart is dark. Remain here with your people; I will go with mine to Taranaki.[14]

Colonel Wakefield likewise noted the disparity of Maori and Pakeha views of the land transactions. He noted in his diary that Maori

> ... betrayed a notion that the sale would not affect their interests, ... [or] prevent them retaining possession of any parts they chose or even of reselling them ....[15]

In most districts Maori continued to abide their own laws long after 1840. After that date, most of the "buying" was effected by the government. In some cases government bought land from the same persons two or three times over. However, when government eventually sought to locate new settlers on the land, Maori complained that government was stealing their land. Government responded with references to Maori treachery. In truth, one side was not stealing and nor was the other treacherous. Each was simply a captive of their laws, acting honestly by their own legal standards. Such claims and counter-claims were being made by Maori and government at least until 1865 when the Native Land Court was established and the system of buying from rangatira was altered.[16]

[13] "Minutes of Evidence Before Select Committee on the State of the Islands of New Zealand". *British Parliamentary Papers*, vol 1, (1838-1840), pp173-174.

[14] E J Wakefield, *Adventure in New Zealand*, vol 1, pp202-203.

[15] Colonel William Wakefield, 2 November 1839, *Diary*, 1839-42.

[16] Particulars of several land transactions are given in the forthcoming *Muriwhenua Report* of the Waitangi Tribunal, awaiting publication.

The resilience of cultural values should therefore not be under-estimated. While it is often insisted that Maori comprehended sales in western terms by at least the middle of last century, and no doubt many did, the reality is that many other remained encased in their own world view well into the current century. From personal experience I am aware of Maori still operating by their ancestral laws in the 1970s. Some, for example, when asked as to the price for something given would reply to the transferee "ki a koe" (you decide) in the old Maori way. Mana would require a more than generous response, but unfortunately in the 1970s, mana was not as ubiquitous as before. So long as those involved applied the same rules there was no problem, but there were difficulties in cross-cultural communication. As late as 1978 Dr Dame Joan Metge and Patricia Kinloch were writing of how Maori and Pakeha were still "talking past each other".[17]

Nonetheless a legal presumption arose that when English law came in, Maori law was displaced unless it was specifically provided for. Section 71 of the New Zealand Constitution Act 1852 enabled the governor to establish districts in which Maori law would continue to prevail. In the interim the executive was gathering information on customary tenure and the Maori mode of contracting. In 1856 a Board of Inquiry was appointed for this purpose under C W Ligar. In 1865 the Native Land Court was established to determine the title to land in the context of "native custom".

The courts have generally assumed that the law of England came into New Zealand as a consequence of either the Treaty, the proclamation of sovereignty or settlement. In any event it did come in and it appears Maori had no objection at the time or subsequently, provided their own laws were also respected. The difficulty was the corollary in later judicial opinions that English law came in because Maori, lacking civilisation, had no settled legal system.[18] Not only was this an assumption made without evidence, but for all practical purposes it seems to have been unnecessary. If Maori law were not geared to the needs of a national state, then one had only to legislate for English law to apply to the extent necessary.

It is arguable that this had in fact happened. The English Laws Act 1858 deemed the laws of England to have applied from 14 January 1840 at least so far as they were applicable to the circumstances in New Zealand. Presumably this was meant to relate back to the proclamation of Lt Governor Hobson prohibiting private land purchases from Maori. This came after some debate in England and New South Wales, led by London and Sydney land speculators, over the government's right to impose restrictions on private land purchases effected before the Treaty of Waitangi. The advent of English law thus in fact pre-dated the Treaty of Waitangi, the proclamation of sovereignty and effective settlement. Impliedly, as shall be seen, the doctrine of tenure was introduced from that point as well.

[17] Joan Metge and Patricia Kinloch *Talking Past Each Other: Problems of Cross-Cultural Communication* Victoria University Press, Wellington, 1978.

[18] Thus, *Wi Parata* v *Bishop of Wellington and the Attorney-General* supra.

The principle of the English Laws Act was that the laws of England appl "so far as applicable to the circumstances" of the colony. This did not expli state that only English law applied. Perhaps that was generally assumed, bu was arguable that English law did not apply if the effect was to prejudice exis Maori interests arising by Maori law. This appears to have been the view ta in *Baldick* v *Jackson*.[19] It was considered the Crown's right to whales was applicable to the circumstances of the colony in view of the Maori claim to th

> ... for they were accustomed to engage in whaling; and the Treaty of Waitang assumed that their fishing was not to be interfered with - they were to be left i undisturbed possession of their lands, estates, forests, fisheries, &c.

In any event a mono-legal regime had not been contemplated during execution of the Treaty of Waitangi. On the contrary, Maori were specifica concerned that their own laws would be respected. There was no lack of cla in their position that they were not about to give away the laws of their forebe At Waitangi the debate became mixed with a dispute amongst the representat of the missionary churches. There the governor's response, as translated English, was read out for him as follows:

> The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Maori custom, shall be alike protected by him.[20]

This is sometimes called the fourth article. The governor had adjourned consider the matter and had delivered a written response.

By the time the Treaty reached Kaitaia however, the debate, and the Ma insistence on respect for their own law, had crystallised. Correctly in my vi Maori identified the issue as one not just of law but authority. Nope Panakareao, the leading rangatira of Muriwhenua, put it this way in the Tre debate at Kaitaia that, "the shadow of the land goes to the Queen but th substance remains with us".

Due to poor health the governor could not attend at Kaitaia but the Willoughby Shortland conveyed the Governor's explicit message:

> The Queen will not interfere with your native laws or customs.

American precedent is undoubtedly correct in asserting that in treaties wi indigenous people of oral tradition, verbal promises are as much a part of t Treaty as that subscribed to in the documentation. It cannot then be said, a matter of fact, that the Treaty introduced the law of England if the corollary that Maori laws then ceased to be applicable. The Treaty is rather authority

[19] (1910) 30 NZLR 343, Stout C J, (SC).

[20] Colenso, W. 1890: *The Authentic and Genuine History of the Signing of the Trea of Waitangi* p32.

the proposition that the law of the country would have its source in two streams.

The first presumption of English law to be applied was probably the doctrine of tenure. It had an immediate deleterious impact and was in conflict with Maori law. The doctrine permeated the thinking behind the Land Claims Ordinance 1841, which followed naturally from the proclamation prohibiting private acquisitions. It provided for the ratification of private purchases before annexation, but subject to certain limits based upon the value of the goods exchanged and a maximum of 2,560 acres. This the Crown assumed it could do, despite protest from land buyers in London and Sydney, on the basis that the only legal source of private title was from or through the Crown which held the radical title to all land, and which enabled it to ratify private purchases from Maori on such terms as it chose or to refuse recognition altogether.

The pre-treaty transactions have been referred to. In Northland most of the private purchases were confirmed. In addition the governor gave grants for part only of the land said to have been acquired and the surplus was regarded as Crown land. In government's view, if the land had been acquired, the native title to the whole was extinguished.

Maori expressed their opposition from the moment the Commissioner first sat in Kaitaia, 1843. The records summarised Panakareao's address as follows:

> 1. That the sales of land around Kaitaia, already made by Nopera [Panakareao] and his party to individuals, should be acknowledged; but that any surplus lands, ie those the Government does not grant to the claimants, will be resumed by the chiefs who sold them.
> 2. That they will sell no more land either to individuals or to the Government.
> 3. That the chiefs will exercise all their ancient rights and authority, of every description, as heretofore; and will not in future allow of any claims or interference on the part of the Government.[21]

In the Maori view, the transactions with the early traders and missionaries were personal and government could not introduce a third party to the land who had not been approved by them. Not only were the transactions confirmed however, but Government retained the surplus. The debate on the surplus land continued for over 100 years. Settlement was not attempted until 1946 when government made an *ex gratia* payment.

Thus, jurists should know that the interest of northern Maori in the doctrine of tenure is not academic. It is about the right to thousands of acres, or more particularly today, to the adequacy of the compensation paid. Maori effectively argued for an allodial title system, although they did not use that term. If Maori owned the land and entered into a transaction with a particular settler, and if government declined to ratify the transaction in part, then so be it, in the Maori view. It is government's prerogative to govern. But if government wished to take the balance of the land for itself, then government, like anybody else, had to reach an agreement with the prior owners. Government could not take it on the basis of some legal magic from England, was the view that was implied. It

[21] Godfrey to Colonial Secretary 10.2.1843, Turton's Epitome p87.

could conceivably have been added that the doctrine of tenure was not applicable to the circumstances of the colony. It was arguable that it was contrary to Maori law which required a personal contract, and to the Maori legal tenure whereby the radical title was already spoken for.

The doctrine of tenure, at least as originally described in *R* v *Symonds*[22] or in *In re "The Lundon and Whittaker Claims Act 1871"*[23] was not seen by government as inimical to Maori interests for the Crown's radical title was burdened with such rights of native user as may have existed. Maori have not seen it that way however and still do not.

The view remains that all land was Maori land and should still be so until the government, burdened with the clear onus of proof, should establish its lawful acquisition by some conveyance or proclamation, enrolled and permanently memorialised in a public land register. It is regrettably the case that many Maori have no idea how land passed from them and can access no public register to obtain a ready answer. Waitangi Tribunal researchers have also been unable to tell how the Crown came to extinguish Maori interests in many cases. The process of extinguishment by executive action may leave no footprints in the sand. It is for that reason that a law requiring the Crown to produce a title to its own land with a record of the conveyance or proclamation by which the Maori interest were cleared, would provide relief in respect of such Crown land as now remains.

Was New Zealand settled, ceded, annexed or conquered? If it was settled are we to assume that Maori had no settled law? The debate on that matter is not helpful for it exists in a monocultural paradigm. I would rather ask whether the settlers will settle. Will we recognise the laws of England or the laws of New Zealand and if the latter, will we hone our jurisprudence to one that represents the circumstances of the country and shows that our law comes from two streams?

This is not a plea for a dual system of law. Nor is reform sought that would create historic causes of action or disturb current titles. It is about law and cultural conciliation, to ensure a proper provision for indigenous law in our jurisprudence and statutes.

I am not aware of a previous attempt to conceptualise Maori law in western legal terms, and I have offered but a rudimentary start. I am grateful to this faculty and university however, for the opportunity to introduce the topic to legal discourse.

[22] [1840-1932] (1847) NZPCC 387 (SC).
[23] (1872) 2 NZCA 41 (CA).

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