# CONSTITUTIONAL CENTENARY FOUNDATION AND COUNCIL FOR ABORIGINAL RECONCILIATION

Conference on **"The Position of Indigenous People in National Constitutions"**
Session on **"Self-Determination"**
Canberra 4-5 June 1993
Address - Chief Judge Durie, New Zealand

Mr Dodson

Honourable members of the federal and state governments

Chief Justice Malcolm and the judiciary

Madam Erica Daes

Leaders of the aboriginal groups of Australia and the Torres Strait Islands

Visitors from Canada and the United States

tena koutou. Tena tatou katoa.

I put to the conference four propositions, as a personal view from the New Zealand experience, and although some may seem self-evident to you.

> The advancement of aboriginal interests depends upon on a social climate in which there is the political, legal and administrative will for reform. I understand the Constitutional Centenary Foundation and the Council for Aboriginal Reconciliation have important functions in climatic control.
>
> By way of corrollary, there can be no dependence on one branch of Government alone. The courts for example, have demonstrated an important role in developing aboriginal interests within the frame-work of human rights law, as Mabo did, but justice in its broadest sense requires not just legal reform, but political, economic and administrative adjustment as well.
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> This does not minimise the legal function. Each judicial assertion of human rights principles forces the elected representatives back to the debating chamber for public deliberation of the issues. As such it stands as a valuable lesson in democracy.
>
> While constitutional reform is an important part of any national process, it is not achieved over-night, and we ought not to minimise the importance of developing conventions and significant statements of principle, in some appropriate way, that acquire constitutional significance over time. New Zealand's Treaty of Waitangi is one such statement of principle.
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> Economic reform, especially through the re-allocation of natural resources, ought not to depend on a claims process alone - if at all. Where there is a will or the acceptance of the need for some greater resource re-distribution, the process is best achieved by planned political strategies. These should consider:
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> - that resource re-allocation must be politically empowering of the Aboriginal groups - social welfare benefits are disempowering;
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> - that resource re-allocation should achieve equity amongst them - one group should not be more advantaged than another;
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> - despite the magnitude of some historic claims, reparation should be sustainable in terms of national and regional economies, and should have regard to the interests of the wider community.
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> While political reform envisages structural provisions for aboriginal group autonomy, it may also require special accommodation for indigenous people in the national democratic processes.

To elaborate on some of those points. One cannot depend on legal process alone. The main significance of Mabo, from my perspective in New Zealand, is its recognition of aboriginal status; but the determination of who might get what according to whether there has been an extinguishment, seems somewhat arbitrary, benefiting some but not others; and not addressing some major historic grievances.

It leaves open two issues of social justice:

- the extent to which aboriginal peoples ought reasonably to have maintained or should now recover a sufficiency of land and other resources for the management of their own affairs; and

- whether adjustment is needed in political representation to reflect the unique aboriginal position in the country.

Those issues are profoundly constitutional. Aboriginal peoples are not mere cultural minorities but constitutional entities. From the moment of first settlement, whether by fair means or foul, the regime was created for a constitutional duality, of settlers on the one hand, of whatever race or creed, and aboriginals on the other, each with interests distinctive and competing.

Constitutions do not all come from England or elsewhere abroad. Each must arise from those parts of the earth to which they are to apply, reflecting local circumstances and historical realities. It seems to me no Canadian, Australian, United States or New Zealand constitution would be valid that does not reflect the reality that our countries were settled on lands already owned, and that as part of the natural order, there were pre-existing rights of property and society that existed, and still exist, amongst the original people. Those rights cannot in justice be removed, and thus the status of the indigenous peoples as special constitutional entities. The question is not whether they should be recognised as such, for that is what they are. The question is how formal recognition should be given.

Constitutions as we well know are not all written. They also develop by conventions and judicial determinations over time. That point is important in the New Zealand circumstance because of some public aversion to an entrenched Bill of Rights and especially one that incorporates the Treaty. It appears New Zealand Maori are not overly perturbed by the consequential uncertainty however and it is instructive to consider why. The Maori have a Treaty, now 150 years old, that remains as it has always been, the talisman of their cause. Important statements of principle do have influence, in the New Zealand experience, with or without formal parliamentary ratification or entrenchment.

Significantly also, the Treaty does not extend Maori rights beyond those due to aboriginals generally. It guaranteed the 'rangatiratanga' (authority) of the Maori as a people, and thus guaranteed all those things peoples ordinarily have, the right to their own capital resources and their own society and laws so long as they wish to keep them; and citizenship in the new state.

There was nothing novel in this. These things were seen to be at the time, and remain today, the minimum rights of indigenous people everywhere. The principles of this New Zealand treaty are thus transportable. The Treaty did not create rights but evidenced them.

The received New Zealand law in fact gives the Treaty little standing. It does not form part of the domestic law save to the extent Parliament has provided. Again however this has caused little anxiety amongst certain modern Maori to the extent that some opposed the incorporation of the Treaty into a Bill of Rights that was unsuccessfully mooted in New Zealand a few years ago. The Treaty had acquired such status, in their minds, that it stood above Parliament and the need for Parliamentary sanction. At best, Parliament could merely acknowledge an existing state of affairs.

Thus the importance of statements of principle made by appropriate people at significant times.

The strength of the Treaty therefore is simply that it exists; and though not ratified by Parliament or recognised by past courts, there is no amount of legal piety or parliamentary wit that can lure it back to cancel out one line of it. Its constitutional status exists in fact, if not in law.

The strict legal position could change however. The President of the New Zealand Court of Appeal has stated, obiter, but on more than one occasion, that the received law on the standing of the Treaty in the New Zealand constitution may need to be re-visited.

This opinion ought also put paid to some popular view that the Treaty is too brief, or its language too uncertain. It is the spirit of constitutional instruments that matters most, leaving room for flexibility. Undue prolixity or prescription destroys the spirit, and there is no uncertainty that cannot be cured by judicious interpretation. If the Treaty's brevity is evidence of anything, it is only of the fact that it was not written by a lawyer; and if we err in that respect, then at least we err in the good company of God, who reduced the whole of his commandments to a mere ten.

It may not mean much today that the Treaty imposed a duty on the state to protect the properties of aboriginals when most of the property has already passed from them. In the modern situation, the former duty to protect becomes a duty to restore where earlier dispossession was unjust. Once more however reparation cannot depend on proof of wrong and on legal process alone. We would need a vast economy to make full amends in accordance with law. And it is too late to hand the country back again.

There are further impediments to the legal process. Why should one tribe get more than another because of some greater wrong, in the manner of taking, when the outcome for all tribes was largely the same, a disproportionate landlessness? Why should one get more than another because land rights were extinguished here, but not there?

The reality is also that white settlers are here to stay, and by their industry have created an economy that all enjoy. They too have rights and property interests that must be respected, and it is not good principle in a just society that the resolution of one injustice should be seen to create another.

The issue then is not legal reparation when an exact equivalence cannot be given. The issue is the fair re-allocation of the country's

resources between aboriginals and the country at large, according to strategies that provide equitably between the two contenders and between the aboriginal groups themselves.

The issue is not who did what to whom and when and why, whose rights were extinguished and whose were not, or who may now bring an action and who is out of time. Nor should the matter depend on who can now prove a case after this lapse of time, where the lawyers profit more than the litigants and the delay, anxiety and uncertainty simply compounds the injustice for aboriginal peoples. The issue is how to resolve more quickly and more fairly the legacy of competing equities.

It is not in the interest of anyone in my view, to bankrupt the country or create new economic uncerncertainties; but by the same token, it ot too late to begin again, and promote national strategies for the re-arrangement of political and economic power in our countries that reflect the constitutional status of the aboriginal people.

It seems important in this context that resource re-allocation must be politically empowering of aboriginal groups. Self-determination is mere words without the wherewithall to achieve it. In this context, welfare benefits provide the least preferred alternative, in the Maori experience, creating at best an unwholesome condition of state dependency. The process must be resolved by direct Government to aboriginal negotiations, where one is not a supplicant to the other but both sit at the table as equals.

It remains to be added that this is not a plea for a new system of apartheid. There is unity in diversity, as the Maori case well shows, and commitment to tribes, kith, kin and loved ones, does not derogate from the commitment aboriginal people all share to the nation and to common national goals. Aboriginal people should not be submitted to an election between the tribe and the state when the state accommodates both.

High on the reform agenda therefore is the adequate accommodation of indigenous people in the national democratic process. Electoral reform is therefore important to Maori. New Zealanders are soon to vote on a proposed system of proportional representation that it is said, would give more weight to minority opinion. Recent gatherings give evidence however, that Maori will not give away their existing Maori seats. Like the Treaty of Waitangi, the Maori Parliamentary seats stand as an enduring symbol of their constitutional status - and historic statements of principle, like symbols, are essential tools in re-building our national identity.

What then of the Waitangi Tribunal? Taking a broad view it may be seen as directed to achieving those ends. It seeks to achieve those ends through a bi-cultural composition, acknowledging that no one party has a monopoly on truth. Also it is not assumed that lawyers know it all. There is a mixture of legal and lay personnel. Most importantly the Tribunal's process is bi-cultural, the Maori party being heard in approximate accordance with Maori law, the great litany of lawyers in western legal style. In a phrase, the Tribunal might be seen as establishing within itself that which it would establish in the country, a partnership of peoples in both process and endeavour.

Mr Dodson, I thank the Foundation and the Council for this valuable chance to be together.

Thus are states encouraged, or goaded, to maintain human rights objectives in framing new policy knowing that such policy will eventually fall to independent scrutiny.

The Human Rights Committee has also a further role. It hears cases under the Optional Protocol, a separate treaty by which consenting states may permit complaints to be brought by individuals within their jurisdiction. Domestic remedies must first have been exhausted of course, but the international avenue remains most significant. While the findings of the Committee are not strictly enforceable, yet they wield an enormous moral pressure. For so long as a recommendatory body exhibits competence and skill and its deliberations attract world respect, only the imprudent would under-estimate its power of recommendation.

**The Eliminatuion of Racism**

I turn now to the United Nations's efforts to combat racism and racial discrimination.

Since its inception, in its Charter and subsequent covenants and resolutions, the United Nations has affirmed principles of equality and non-discrimination. In both the Covenants earlier referred to, discrimination based on race is expressly prohibited. Following an earlier Declaration, the International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the General Assembly in December 1965. This one was sponsored primarily by third world countries. It gained whole-hearted support and enjoyed swift progress.

Over three-quarters of the United Nations membership is now a party to it, including several of the states represented here today.

Central to the Convention is the opinion that any doctrine of discrimination and racial superiority is totally wrong; and "discrimination" is cast widely to mean "any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms?"

Those words have been most carefully chosen. Sometimes equality means treating people the same, despite the differences, and sometimes it means treating them as equals by accommodating their differences. Formerly, we thought equality meant nothing but sameness, and that treating persons as equals meant treating everyone the same. We now know that to treat everyone the same may offend the notion of equality. Ignoring differences and refusing to accommodate them, may represent a denial of equal equality of opportunity for example we may have to do different things for different people.

For Maori in New Zealand for example, equality has required the recognition of special needs and preferences, a greater say in the design of programmes established for Maori benefit, meaningful support systems, and the delivery of services through Maori institutions.

I pay tribute to the Convention drafters, that such nuances more apparent to us now, appear to have been within their contemplation then.

The Convention requires state action, not mere passivity. Those who promote racism must be brought to heel, and states are called upon to condemn racial segregation and apartheid.

Once more there is a supervisory body, the Committee on the Elimination of Racial Discrimination (CERD), which functions like the Human Rights Committee, and like it, has 18 independent members. It also audits state reports and appraises individual complaints.

The Convention has proved an effective weapon in the struggle against racism, and a useful tool in the promotion of worldwide understanding. We are especially aware of the high profile the United Nations has taken on South African apartheid, though it yet remains an enduring challenge, despite the hopeful signals of recent times.

**The Future**

It would be presumptuous of me to predict the future in the presence of such a distinguished analyst as Dr Quisumbing, but I do wish to comment on two possible developments of special interest to me, as a Maori and as a lawyer.

In New Zealand, Maori interest focuses on the draft Declaration on the Rights of Indigenous Peoples. Of course Maori have the benefit of the International Covenants referred to, but their past experience demonstrates the value of guidelines specific to their aboriginal circumstances.

For other Universal Declaration on the Rights of Indigenous Peoples will be of little moment. I would not impose on them. Suffice it to say the position is otherwise for their kindred Maori of New Zealand, who are a minority in their homeland. They seek, in significant measure, recognition as a people whose aboriginal rights spring from their prior occupation of the soil, not recognition as another culture group. In Polynesian terms, they proclaim the mana of their own tangata whenua status. They seek also, I venture to presume, dual status, as a people in their own right, and as citizens within and contributors to, a wider state ethos.

The draft Universal Declaration on the Rights of Indigenous Peoples has been emerging now over the last several years. It is being drafted in consultation with indigenous representatives throughout the world, by a United Nations Working Group in Geneva. The draft proposes minimum standards. They include:

· the right to exist as distinct peoples and to preserve and develop ethic and cultural characteristics;

· rights related to religious traditions, languages and educational access;

· land rights and the right to have indigenous land-tenure systems recognised;

· the right to maintain and develop traditional economic structures and ways of life;

· the right to autonomy in internal management;

· the right to special state measures for improved social and economic conditions; and

· the right to call on the state to honour treaties and agreements concluded with them.

This is not a forum for advocacy, yet if I may be excused one aside, I think New Zealand has made much progress in achieving these objectives in the last decade, even without promulgation of an indigenous covenant.

There is another propitious development to which I would refer. In New Zealand we have been well served by the English common law and the principles adduced buy English common lawyers over the centuries. I would not want however, that my adherence to those principles should be seen as denying the tenets of my Maori common law. Those too are cherished. Yet both have flaws and some difficulties in keeping pace with the modern world. Significant therefore, I consider, is the prospective development of an international common law, as increasingly the New Zealand Courts, and certainly the Waitangi Tribunal, turn to human rights norms in the interpretation and application of material and the performance of their functions.

The development of an international common law in England, was presaged by the Master of the Rolls in 1987. Further powerful support for the domestic application of an international human rights law was given at a colloquium of senior Commonwealth judges in 1988, in the form of the :Bangalore Principles". More recently, the matter was taken up in New Zealand by the President of the New Zealand Court of Appeal in delivering the opening paper to the 9th Commonwealth Law Conference in 1990. One appreciates the constraints on judges to implement the domestic law, but it is obvious they can no longer shut their eyes to the widely accepted international declarations and treaties. New change is moving in as surely as the tide. This movement, I conjecture, will provide the single greatest impact on domestic legal systems in our time.

But enough of the crystal ball. The United Nations, and the international standards it has defined, and is still defining, will continue to have a vital role in the creation of a universal culture of human rights. We in the South Pacific must participate in the United Nations efforts to this end by maintaining its human rights instruments and by contributing to their commitment to our own people, as well to the principles of justice, human dignity and personal freedom endemic to all societies.

# Commonwealth Law Conference, Auckland 1990

Session on Indigenous People and the Law, 18 April 1990

Opening section on Sources of Indigenous Rights

Paper No. 1

## TREATIES AND THE COMMON LAW AS SOURCE OF INDIGENOUS RIGHTS

E Taihakurei Durie

### Historical Background

It seems the first paper in a session like this, with indigenous lawyers here from many places, should provide an introduction to the local circumstance; and although it is quite severable from the main paper that follows.

Aotearoa, or New Zealand as it is also now known, traces its beginning as a modern national state to a proclamation of sovereignty in 1840 based on the Treaty of Waitangi, a treaty between Britain and the Maori tribes. It was a brief and bilingual treaty in which Maori ceded settlement rights to the Crown with a right of national governance, while the Crown guaranteed to the tribes, their traditional authority, those properties they wished to retain, and full citizenship rights for tribal members. For the British it was a treaty of cession, there being no argument then about the tribesÕ capability to effect one, for although Britain had had some doubts, it had formally acknowledged the sovereign rights and capabilities of Maori since 1835. For Maori it may have been more an ÔallianceÕ, or a ÔpartnershipÕ as it is often now described, for in accepting the authority of the Crown, they did not envisage any diminution of their own.

A brief account only will be given of the history that followed, the more-so since the story is in a sense already known to most indigenous people; the action may differ in detail but the plot is substantially the same. In addition, Jane Kelsey may wish to refer further to the background, in her paper on the Treaty in the political process.

While Britain seemed genuinely concerned that the Treaty should be upheld, it was in fact put down, and due mainly to the large influx of British settlers whose purpose in coming here had nothing to do with maintaining the promises of the Crown. It was to the Treaty that Maori turned when land-loss and war threatened their physical well-being and when amalgamation policies followed to challenge the survival of their culture and institutions. The Treaty however, was not provided for in law. The courts held it did not form part of the domestic law unless Parliament provided for it, which Parliament was not minded to do; and common law rules of aboriginal rights were not recognised either, at least not before 1986.

Maori protest about land and fishing losses, the destruction of their tribal ways, the failure to provide for their culture and the status of the Treaty was continued without barely a pause, and before every forum until, in the head days of the 1960s, the protest was taken to the streets.

By that time, Maori were some 12% of the population, the race origin of the remainder being overwhelmingly British. Less than 10% of the land was Maori owned, much of it on poorer country and none of it held in the tribal ownership customarily preferred. The spread of Maori land was uneven too so that some tribes were landless. Through land-loss, most Maori (over 75%) had moved to towns and cities where new social problems had emerged. The Maori performance in terms of education, health, employment and law observance was well below par.

Maori have never had reservations but have maintained their traditional marae, or tribal assembly places. As distances in New Zealand are not great,

tribal members continue to meet frequently upon them and to identify with a tribal or home base. The Maori language and culture have therefore survived much better than the land the vicissitudes of the historic process.

Current Circumstance

(a) The Waitangi Tribunal

The Waitangi Tribunal was established in response to the rising agitation, in 1975 (though it did very little until 1982). Its task was to hear Maori complaints about current policies and practices of the Crown, to measure them against the principles of the Treaty and to recommend any changes.

The claims ranged from language concerns to sewerage schemes, covering diverse state policies in town planning, environmental management, resource use, public works, education, language promotion and fisheries control. They were generally upheld. In making recommendations the Tribunal was to propose a bicultural approach to lawmaking and administration and in the formation and delivery of public policy and services.

In the peculiar New Zealand milieu, and though Maori are a minority, the bicultural approach received some acclaim. The TribunalÕs recommendations resulted in the re-writing of many Acts, the restructuring of government departments and departmental auditing of proposed legislation for consistency with Treaty principles. Some concern with the TribunalÕs limited power to merely recommend, needs now to be weighed with the substantial changes that have since been effected.

The TribunalÕs membership was expanded, in 1985 and 1988, and is now 16 with the Chief Judge of the Maori Land Court as chairman and with seven Maori Land Court judges able to deputise as presiding officers. The Tribunal now sits in divisions.

The constitution is uniquely bicultural the Tribunal being comprised of both Maori and Pakeha personnel, demonstrating in the words of its empowering statute Òthe partnership between the two parties to the TreatyÓ (Treaty of Waitangi Act 1975, s4(2A)(a)). Few Treaties (if any) between native and settler groups fall to be interpreted by a body representative of both sides and so the constitution of the Tribunal itself reflects an important principle. So also, the TribunalÕs proceedings are bicultural, the Tribunal sitting in courtrooms, or on marae as occasion requires. Marae proceedings are under the conduct of the TribunalÕs Maori elders and follow traditional protocols. There is a special statutory authority to adopt customary modes of procedure. (ibid 2nd schedule cl 5(9)).

In 1985 the TribunalÕs jurisdiction was expanded to consider those old Maori claims against the Crown that some have likened to the contents of PandorÕs box. Three such claims have been concluded, the TribunalÕs recommendations for a scheme of tribal restoration (as distinct strict compensation) being accepted in two, and an apportionment of fish quota to Maori resulting from the third. Seven more claims are now being dealt with by either Tribunal hearings, mediation under the TribunalÕs direction, or through independent negotiations. Research is underway on many more. There are over 100 claims. Sir Kenneth Keith will cover the Waitangi Tribunal in the paper he is presenting.

(b) The Courts

Spectacular developments within the general courts since 1980, indicate the reversal of a long established trend. They are in

five categories, those that interpret Maori legislation in the context of Maori custom, those that modify established legal principles when applying them to Maori circumstances, those that incorporate Maori cultural perspectives (and even the Treaty) when considering matters of general public interest, those that re-introduce the common law doctrine of aboriginal title, and those that interpret and apply the Treaty upon some enabling statutory authority. Sir Kenneth KeithÕs paper covers both the Waitangi Tribunal and the Courts.

(c) Dispute Resolution

In a drive to settle outstanding Maori claims Government has promoted as alternative mechanisms, mediation through the Waitangi Tribunal, and a system of independent negotiations. The first is new with only one claim currently referred to mediation, the second still formative and largely untried. Accordingly there will be much New Zealand interest in the experiences of others in those and related areas, in the presentations from Thomas Berger, Harry La Forme, Tigre Bayles, Garth Nettheim and others.

New Zealand has never permitted of tribal courts however to resolve problems in the family and criminal law areas, but protests that attracted much publicity last year, demonstrate that a strong Maori interest in those courts is matched only by the Prime MinisterÕs equally strong aversion. It seems certain that Brad MorseÕs paper on tribal courts will be warmly received.

(d) Legal Systems

Three systems of law present themselves in examining the position of indigenous people -

(i) legal pluralism or separate laws for different people,

(ii) the severance of legal services, as in the provision of separate courts for different sections of the community, and

(iii) the maintenance of a unified legal structure.

In New Zealand we use mainly (iii) but have a little of (i) and (ii). There is a degree of legal pluralism in that some remnant of custom still applies in Maori land successions. A Maori Affairs Bill currently before Parliament would substantially increase the customary component in Maori land law.

There is also a small slice of (ii). The Maori Land Court maintains a separate status with its own appellate structure for the judicial administration of Maori lands, but it applies a western-based law not tikanga Maori (Maori law). Again, the Maori Affairs Bill would make some radical changes giving more weight to customary preferences and procedures.

Maori crime, family and all other matters, are dealt with in the general courts.

A singular feature of modern New Zealand law however has been the incorporation of a Maori dimension within it, either by specific statutory direction or through some innovative judicial enterprise. There is now some evidence of a fourth option that one could equally call Ôa unitary jural order with bicultural capabilitiesÕ, or more simply Ôone law for allÕ, though the latter description has lately been used in New Zealand as a euphemism for Ôa Western law aloneÕ.

Whether some greater degree of pluralism or severance is desirable is the subject of current debate, complicated by the fact that there are only some 150 Maori lawyers and 4 Maori judges, all beneath High Court level, to elucidate a Maori perspective in the general courts; but in this respect the

papers of Professor Ghai and Justice Bhagwatti on the problems of legal pluralism and the limits to separatism, respectively, will be topical for all New Zealanders.

This Paper

This paper covers treaties and the common law as sources of indigenous rights, having primary regard to the New Zealand situation. It is considered that certain legal limitations on both, point to the need for something more. There are two most prominent substitutes, both with the capacity to unshackle indigenous people from the ghosts of that old-world law by which they consider themselves to have been overly constrained. The first, through the formulation of rights in national charters and constitutions will be addressed later by Douglas Sanders. The second, to be found in the international norm setting processes of the international community, falls within the purview of Timothy Coulter.

A third alternative is mooted in this paper - the modification of the common law through recourse to a bicultural jurisprudence.

It is incidentally assumed that ÔindigenousÕ has a particular meaning here, since none of us presumably, is extra-terrestrial and each is indigenous to somewhere. ÔIndigenousÕ I take to refer to original peoples whose lands have become dominated by persons of another kind, whether by weight of numbers or through the maintenance of effective power and influence. They are not necessarily the subjects of planned colonisation, as with the Saami of Scandinatia or Ainu of Japan, and they may even the majority as with the Kanaka of New Caledonia, or indeed as was the case with Maori until 1859. They are similar in circumstance to many cultural minorities, but conceptually distinct for their rights derive from prior occupancy, and their culture exists nowhere else.

Sources of Indigenous Rights - The Treaty

The strict legal position in New Zealand seems still t o be that the Treaty of Waitangi is not part of the domestic law save to the extent that Parliament has provided. That position, as finally made clear by the Privy Council in Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] AC 308, severely limits the perception of the Treaty of Waitangi as a source of rights independent of Parliamentary sanction.

The Treaty has had an influence nonetheless. It remains binding upon the honour of the Crown, as the Court of Appeal observed in New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, and as Dr P G McHugh has argued, it is binding upon the Crown in its executive as opposed to Parliamentary capacity (see for example, [1988] NZLJ 39 and [1990] NZLJ 16). Accordingly it is open to the courts to hold that legislation will not be read as contrary to the Treaty unless that construction is clear, for they will not impute to the Crown an intention to disregard its obligations.

Similarly, Courts may have regard to the principles of the Treaty when considering the general public interest, because of the centrality of the Treaty in Maori and national life (see for example, Auckland District Maori Council v Manukau Harbour Maritime Planning Authority and Liquigas Ltd [1983] 6 NZTPA 167 and Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188).

To the extent described the Treaty provides some source of rights, though in the general public perspective its influence may be seen as greater. The recommendations of the Waitangi Tribunal, based upon an interpretation of the Treaty, have resulted in major amendments to legislation, state policies and bureaucratic structures. The Treaty is often described therefore, as a document of constitutional importance.

The strictly legal position nonetheless remains, emphasising the need to provide for the Treaty in any formal constitutional instruments of the

state, and underlining the significance of the growing opinion in the international community that states should properly recognise their treaties with indigenous people.

Sources of Indigenous Rights - The Common Law

Judicial enterprise has characterised the treatment of Maori issues before the courts in the last decade and substantial change (or Ôimprovement Õ, from a Maori perspective) has been made. The Maori Land Court for example, for many years tied to a tightly prescriptive statutory schemes for the judicial administration of Maori lands, took the initiative to re-interpret its governing Act in the light of customary preferences, recognising traditional perceptions of group rights and kin structures for example, to substantially modify its previous approach to such things as land partitions and alienations (see Tikouma 3B2, Horowhenua 9A6B, Motukawa 2B22A, Manawatu-Kukutauaki 7E1B, Tarawera C6 and Harataunga West 3B all appearing in Tai Whati-Judicial Decisions affecting Maori and Maori land).

Particularly significant to my mind were a number of contemporaneous decisions of the general courts adjusting the normal application of legal principles when applying them to Maori peoplesÕ circumstances, as for example with Riki v Codd [1981] NZCPR 242 in relation to the rules of unfair bargain, Rogers v Rogers and Tatana (1982) High Court, Whangarei unrep. A34/81 on family protection matters, Peihopa v Peihopa (1984) High Court Whangarei unrep A37/82 with regard to constructive trusts and Estate Stirling Brothers (1988) ACAA decision 303/88 concerning funeral expenses. Similarly one may note the regard given to Maori cultural values under statutory requirements to consider the public interest in Auckland District Maori Council v Manukau Harbour Maritime Planning Authority and Liquigas Ltd (1983) 6 NZTPA 167 and Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188.

These cases illustrate the contemporary judicial mood to accommodate Maori interests and customary expectations even without some express statutory requirements to do so. Other important cases, on the interpretation of the now numerous statutory provisions referring to either Maori or the Treaty of Waitangi, demonstrate yet more forcefully the recent ethnic awareness in the courts; but since they fit more comfortably with matters in Sir Kenneth KeithÕs brief, I will not deal with them here.

However, while the New Zealand profession equates the common law with case law, or even with Ôcourt workÕ as opposed to conveyancing, when one speaks of the common law as a source of rights, I think the reference is to the ancient laws of England, or to legal doctrine adopted from European states, as discovered, refined or developed through the British courts, and latterly, the courts of other countries whose legal systems are based on English law. For the greater part of New ZealandÕs history, mainly until 1986, the common law as thus understood, was not a fruitful source of rights for Maori. With Australia, we tended to orbit on an axis of our own largely unaware of the rule of aboriginal title as applied in the northern hemisphere. In that respect the High Court decision in Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 535 (SC) was momentous, in applying that doctrine to uphold a Maori customary right of fishing for the first time. Other Ôfishing rightÕ cases are now pending, but there has been no further progress in New Zealand in developing Maori rights based upon that important doctrine, or upon any other from the ÔoldÕ common law, at this stage.

Problems with ÔoldÕ common law and the need for a modern bicultural jurisprudence

The problem with the old common law however, is that it is not common to the laws of the indigenous people. They have had no say in its formulation and their societal norms are not provided for in it.

It must be asked how tenable it is, in this day and age, to assess the rights of one culture according to the standards and perceptions of another,

and in reliance upon maxims that may no longer cope with the crucial issues that now confront at the racial inter-face. There is need to reconsider the universality of western law, to ask how indigenous people themselves see the sources of their rights and to reflect further on the propriety of a proceeding that has no regard to the reasonable expectations of the native people on the settlement of their lands.

It needs first to be recognised that law, defined broadly as rules of conduct made obligatory by social sanctions, is endemic to all communities. Western law is not universal, and whether it has been adopted by an indigenous people or imposed upon them, they continue to cherish their indigenous law as an integral part of their cultural heritage (a point made in relation to Asian states by law professor Masaji Chiba of Japan in Asian Indigenous Law in Interaction with Received Law, 1986).

For Maori, the source of their indigenous rights is in themselves, in their own customs and beliefs and none other. Sir Monita Delamere, kaumatua of Whakatohea sees the position this way

Ko te mana kei a tatou ano - he iwi hoki tatou

> (ÔThe authority is in ourselves - we are peopleÕ quoted in Hui Manawhenua conference brochure, April 1990)

A gathering of 1000 Maori at Ngaruawahia marae in 1984 to discuss the Treaty of Waitangi, endorsed a similar conclusion in a formal resolution -

> Te mana wairua, te mana whenua, te mana tangata me tuku iho ki a tatou e nga matua, e nga tupuna. (The authority of the spirit, the land and the people comes down to us from our ancestors).

I suspect this is the same for many indigenous peoples and that, if each looks back into the spiritual dimension of their culture, they will see this fact as part of a larger design. George Manuel of Canada, an early leader in the World Council of Indigenous Peoples expressed that sentiment this way

> ... wherever I have travelled in the Aboriginal World, there been a common attachment to the land.
>
> This is not the land that can be speculated, bought, sold, mortgaged, claimed by one state, surrendered or counter-claimed by another. These are things that men do only on the land claimed by a king who rules by the grace of God, and through whose grace and favour men must make their fortunes on this earth.
>
> The land from which our culture springs is like the water and the air, one and indivisible. The land is our Mother Earth. The animals who grow on the land are our spiritual brothers. We are a part of that Creation that the Mother Earth brought forth, more complicated, more sophisticated than the other creates, but no nearer to the Creator who infused us with life (George Manuel, Michael Posluns The Fourth World: An Indian Reality 1974 p6).

Leroy Little Bear questioned the western legal opinion after referring to the Indian connection to the land

> When the courts and the government say that the IndiansÕ title is dependent on the goodwill of the sovereign, and that the IndiansÕ interest is a mere burden on the underlying title of the Crown, the question to ask is, ÒWhat did the Crown get its title from? And how?Ó (Leroy Little Bear A Concept of Native Title CASNP Bulletin Dec 1976, 34)

For indigenous people then, the source of rights cannot be the common law of the immigrant authority, for they are in every respect bound in nature to the terms of their own culture. Their rights derive from the soil, they