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 NationsÕs 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 Òdiscriminationó is cast widely to mean Òany 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?ó

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.

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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.

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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:

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

- á rights related to religious traditions, languages and educational access;

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

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

- á the right to autonomy in internal management;

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

- á 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 Principlesó. 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.

CONFERENCE: South Pacific Human Rights Seminar

AT: Rarotonga, Cook Islands
ON: 21 November 1990

CIVIL RIGHTS AND DISCRIMINATION

E Taihakurei Durie

I have been asked to address

? The International Covenant on Civil and Political Rights

And

? The Convention on the Elimination of Racial Discrimination

I am first by custom bound to acknowledge this land, which is important to me as a Maori, and to convey my respects to the people of this place and to their leaders. In doing so, I will briefly mention, by way of introduction,

A Pacific Perspective on Human Rights

Whakarongo te taringa ki te hau raki e pupuhi nei, I takea mai I Hawaiki nui...

Listen to the north wind blowing from the great Hawaiki?

Like many others of similar kind, this saying reminds the New Zealand Maori of their descent from the ancient voyagers who peopled the pacific some 3,500 years ago, spreading across as many miles of ocean until in the last millennium, Aotearoa (New Zealand) was settled too.

My own tribe, Ngati Raukawa, speaks more specifically of our origins

E kore au e ngaro; he kakano I ruia mai I Rangiatea.

I will never be lost; I am the seed sown from Rangiatea.

The Maori penchant for history and genealogy has fashioned a strong sense of identity and destiny as a people. We recount the voyages as though they were yesteryear, recalling to mind that the winds that took the Maori to Aotearoa made that country part of the Polynesian homeland. Polynesia, or "many islands" belies the Maori customary view that conceptualises the islands as one home, Hawaiki, and the people as belonging to one family, the family of Hawaiki – or Hawaii, Savaii or Havaiki, as it is variously called.

Thus have Maori developed a sense of place and belonging, encapsulated in our description of ourselves as the tangata whenua, the people of the land. I am not surprised to find that Maori have no monopoly on that opinion. Only the dialects changes. Whenua is vanua in Vanuatu, while tangata is kanaka, for the Kanaks of New Caledonia. This feel for an historical belonging to the land of one's birth, is emplasised in the metaphorical manner of our speaking. For Maori, whenua, or land, means also after-birth, or that which one is born out of.

So it is I pay my respects to this place and to these people, to those who stand at the beginning of my life.

So too I am reminded that the families of Hawaiki, as Maori would call them, or of the South Pacific as they are more generally known, share a similar heritage and many common concepts. Most especially we bring to the family of peoples that comprise human-kind, the experience of the group ethic that so few in the West comprehend, let alone enjoy.

Whether it be in land, commerce, or family law, we are inheritors of a distinctive world view in which the rights of the individual are conditioned by respect for our kin, a respect imposing obligations of a social kind, so that our performance determines our individual status.

This is something much more than the individual right to collectivise as one wishes. Those who think that way, usually have not lived the life-style endemic to Pacific peoples.

And those who see an individual-right / group-right conflict, generally miss the point. The Pacific way establishes, rather, how one embellishes the other. Even in this nuclear age, we have the potential to reinforce the value of family and kin connections in world norm-setting.

I await with great interest, then, the suggestions to this seminar for a draft Pacific charter of human rights.

International Covenant on Civil & Political Rights

Dr Quisumbing brings to this seminar the inspiring record of the United Nations's achievements in the human rights field over the last 45 years. There is now an impressive code of human rights standards, valid for all states, and to which all states are expected to adhere. That code, comprised of more than fifty international instruments, covers the range of human endeavour – civil, political, economic, social and cultural. Yet four instruments stand out, collectively comprising an International Bill of Human Rights – the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the associated Optional Protocol. From these four instruments a whole body of international human rights law has evolved. In the words of U Thant, the first Secretary-General of the United Nations, they have provided a "Magna Charta for Man Kind". I thought it rather gracious of him to so elevate the Magna Charta.

Dr Quisumbing has already described the Universal Declaration of Human Rights and the International Covenant of Economic, Social and Cultural Rights. I will now consider the twin International Covenant on Civil and Political Rights.

Both Covenants were adopted by the same General Assembly resolution of 16 December 1966. It was an historical feat, that after some 17 years debate, the resolution was unanimous; and politically significant too, for that unanimity gives the Covenants much greater force.

Many of the provisions have since been incorporated into customary international law, and thus binding even on states that have not formally ratified them.

The unanimous resolution is also a tribute to the care and sensitivity of the drafters in taking into account the major concerns of the developing world. Thus the right to self-determination, not mentioned in the Universal Declaration, is explicitly provided for in both Covenants, along with the associated right of all peoples freely to dispose of their natural wealth and resources, and not to be deprived of their own means of subsistence.

In the preamble of both Covenants, and subsequent United Nations resolutions, the "interdependence and indivisibility" of the two sets of rights in the respective Covenants is explicitly recognised. However, as Dr Quisumbing has made clear, they are also distinct.

Economic, social and cultural rights contain the necessary ingredients for the survival and well-being of the individual and one's group, that which is necessary for body and soul. At the heart of the International Covenant on Civil and Political Rights however, is the notion that the individual will not be unduly imposed upon by the State. It is a view of human rights that owes much to western history, a story associated with famous milestones like Magna Charta, the United Kingdom Bill of Rights and Habeas Corpus Acts, the American Declaration of Independence and the French Declaration of the Rights of Man. We in Polynesia were spared the crises that spawned those monumental declarations, but it must not be imagined we did not reach similar conclusions. Despite the common western view of Maori for example, as bound by tribes under hereditary chiefly control, I know of few other people of such republican persuasion, where the seat of real authority vests in the individual and the kin groups at the village level.

The modern state however, imposes uncustomary circumstances on us, and Maori know well enough, from their own colonisation experience, the need for constraints on state power by assuring to the citizen recourse to fundamental and agreed principles.

To that end, Maori placed much score on our national founding document, the Treaty of Waitangi. Time was to prove however, the fragility of that Treaty without entrenched constitutional support or external sanctions.

Other countries have adopted domestic controls – constitutions, Bills of Rights, Charters of Rights, and Freedoms. That New Zealand has not done so in any comparable way, underlines the significance of the world order for New Zealanders, and of the New Zealand Government's recent ratification of the Optional Protocol.

The other main difference between the two Covenants concerns their nature and scope. Civil rights may be readily accommodated in state legislative or administrative action. One can provide immediately for a right to trial for example. Social rights however, must be worked to progressively. The right to food and housing for all is a goal, and only the plans for getting there can be prescribed. Accordingly, the obligation on ratifying states in this case is to do all that is reasonably practicable, and much value judgement is involved in monitoring the state's performance.

The Covenant on Civil and Political Rights recognises the right of every person:

- to life;
- to protection from torture, or cruel, inhumane or degrading treatment or punishment;
- to freedom from slavery and forced labour;
- to liberty and security of person and to protection from arbitrary unrest or detention;
- to humane and dignified treatment when lawfully detained;

· to protection from imprisonment for inability to fulfil a contract;

· to liberty of movement including the right to emigrate and to return to one's own country;

· to protection, as an alien, from arbitrary expulsion;

· to a fair and public trial, presumption of innocence and procedural guarantees;

· to immunity from retroactive sentences;

· to be recognised as a person before the law;

· to protection of privacy, family, home, correspondence, honour and reputation;

· to freedom of thought, conscience and religion;

· to freedom of opinion and expression and to seek, receive and impart information;

· to peaceful assembly;

· to freedom of association and to form and join trade unions;

· to marriage, and equality within a marriage, to found a family and enjoy protection of the family;

· to take part in public affairs, to vote and to have access to public office;

· to equality before the law and to the equal protection of the law.

The Covenant further provides, as I have noted earlier, for the right of peoples to self-determination and to dispose of their natural wealth and resources.

It provides further

· for the rights of the child to protection by its family, society and the state, a name and to a nationality;

· for the rights of ethnic, religious or linguistic minorities to their own culture, religion and language;

and it

· prohibits war, propaganda and the advocacy of racial or religious hatred.

The rights are then to be applied on the basis of equality and non-discrimination, with effective judicial remedies for any breach.

It must of course be noted that no such rights and freedoms can be absolute. There are no prefect answers no matter how much we may need them. The rights are, however, limited only by those things necessary for national security, public order, public health or morals, or to protect the rights and freedoms of others. You may appreciate at once that in our exposition of human rights we must have more regard to ostensible purpose than obtuse arrangements of law, and that human rights norms, like many eastern transactions, must be founded more on a philosophy of good faith than undue legalism.

I now turn to the mechanisms in the International Covenant that are meant to ensure that states toe the line.

Monitoring

The ICCPR, like its twin Covenant, provides for a system of international review. States must submit reports each five years detailing the steps taken to ensure compliance with the Covenant in state law and practice; and the ICCPR has a supervisory body – the Human Rights Committee – to make appraisals. The Committee comprises 18 independent experts, not all of legal background, elected by the covenanting states to serve in a personal capacity, freed of political influence or control.

In practice, I understand, the reporting system has worked well establishing a constructive dialogue between individual states and the Committee. The reports are publicly examined before the state's representatives, the procedure is more cooperative than adversarial, and hostile cross-examination and condemnations give way to discussions identifying shortcomings and suggesting improvements.

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.

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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 Durie1

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 ÔimprovementÕ, 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

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ETHICS AND VALUES

E T Durie

This paper is about values and ethics in Maori research.

Maori Values

Background to 1994 paper on Ôcustom lawÕ

In 1994 I assembled some notes on Maori custom law based on readings and experience as a Judge of the Maori Land Court for 20 years and as chair of the Waitangi Tribunal for 14. The intention was to better the understanding of Maori values and law in historical research and judicial decisions. It was not a scholastic work but arose this way.

Conflicting Assumptions on Maori society

Submissions to the Waitangi Tribunal from Maori and academics, and decisions of the courts, the Maori Land Court included, showed conflicting assumptions on the nature of Maori society. There were different approaches amongst Tribunal members as well.

Perception of Maori agendas in history

In addition some histories assessed Maori from a western standpoint only, as though Maori were cardboard figures with blank minds awaiting intelligence. Many modern histories made real attempts to get inside the Maori value system but even so there was some tendency to see history in terms of the colonisersÕ precepts and to assess change in terms of the coloniserÕs agenda. There was no adequate reference to the agenda that Maori already had or to the depth of the ancestral opinions that influenced Maori thinking. Even setting aside any modern cultural renaissance, in assessing change small reference was made to the extent to which Maori values survived, or of the extent to which these values had continued to influence Maori action at different points in time. The dynamics of cultural inter-action were subsumed by an assumption of a stronger and weaker society with an inevitable osmotic pull. In brief Maori were often judged in European contexts and not on terms of their own. It seemed a better balance could be sought.

Distortion of custom in litigation

In the meantime, more cases than formerly, with Maori issues at heart, were before the general courts, from resource management to family protection or fish allocation. There was a risk that the litigantsÕ constructions of Maori society to advance their cases would become embalmed in judicial precedent, leaving a distorted view. This might influence in turn, scholastic studies, Maori and public opinion, and public officers in policy formulation and administration. Judicial decisions, last century and this, may have had these impacts, not least the decisions of the Maori Land Court.

Part of the problem even today, is that the judges, through no fault of their own, are being called upon to assess the mores of a society still largely foreign to them. This leaves scope for those who would profit from the situation with dubious but compellingly presented evidence to pull the wool over the judgesÕ eyes.1 The number of statutes with Maori words now falling for judicial interpretation, compounds the problem. Iwi, manawhenua, takiwa and kaitiakitanga are examples.

Objectives of the 1994 paper

For my part it seemed important that the Maori Land Court and Waitangi Tribunal should try to get it right, and the sooner the better as decisions and reports come out continually. Acxcordingly the custom law paper was put together, in three weeks over a summer holiday. Scholastic imperfections might be obvious from something done so quickly. However its purpose was no

more than to start a more considered debate within the Tribunal and Maori Land Court, and by sending it out to a selected group, to attract Maori and academic comment. The Waitangi Tribunal in particular has an inquisitorial and research function that enables and indeed requires it to undertake broad inquiries.

The paper went to Judge Fote Trolue, the first and only Kanak judge of New Caledonia trained in both French and Kanak law. On the outer islands of his country Kanaka custom is still the predominant law and applies in both village and court proceedings. Judge Trolue was to address Tribunal members at Rotorua along with certain leaders of Te Arawa.

The paper served its purpose. While it has been taken no further towards publication standards, it shifted the TribunalÕs internal debate beyond assertion. It taught that while there are different views, and there is no perfect answer, we can at least do better than assumptions or advocacy provides. It showed too, the room for more scholarly research.

The dynamics of custom and change
From the discussions, and from subsequent evidence and arguments before the Tribunal, several lessons became apparent. The first is so obvious as to need stating - that society changes. The norms and standards that constitute the custom of a society change with it, and Maori society and custom are no exception. There have been considerable changes since European contact. In brief it is necessary to set aside a popular opinion that custom is static, or at least the custom of native peoples, or that native custom ceases to exist when the people abandon grass skirts or no longer travel in dug out logs. Western custom is no different. Customary practice is still a good source of law, especially in the rapidly changing field of commerce. It is still appropriate to consider what good merchants do today and to establish the current mercantile custom.

A static view of custom in the courts
The static view of custom has not assisted Maori in litigation. In the Tainui case it was thought Maori had an interest in coal because there was evidence that they used it, but they did not have an interest in hydro dams, in the Ikawhenua case. With respect the question was really whether they possessed the land where the coal is or the river where the dams are, but the point here is that the static view took away the devolpment right.

Custom and iwi authorities
There is compelling evidence that custom did not constrain Maori adaptation and development either. On the contrary it left much room for enterprise, and still does. Consider for example current Maori desires to establish iwi authorities, as in response to official devolution strategies. These exercise corporate functions of a kind not previously known and substantially change the traditional focus on hapu autonomy.

However they are not invalidated by arguments that while there may once have been inter-hapu discussions or runanga, a regular iwi runanga exercising corporate functions had no true counterpart in custom. If a current Maori need is met and popular demand is satisfied, that is a source of validity in itself. Modern iwi authorities, even if barely recognizable in old custom, can still be part of the custom of today.

However the converse applies. An iwi authority may not be able to claim support simply on an argument that it is in fact the legitimate successor to an ancient institution. Reference to antiquity may help the case but a question still remains of whether it is effective and satisfies todayÕs community. There is some parallel in the current Monarchy - Republic debate. Recourse to custom and tradition may be persuasive but not determinative.

The need to look to the value system
This is not to say that Maori live in a society where anything goes. Maori society, probably like most others, is conservative with regard to its fundamental values. The point is that it has been receptive to change while

maintaining conformity with its basic beliefs. Archival records evidence how Maori searched for ancestral opinions to establish what was right, often challenging officials to heed Maori precedent to maintain that which the translators called a proper line of action.

Lawyers should understand this. The common law of England began from recording local customs and practices seen as common to all England. It was in effect, a compilation of the values of that society as shown in practice. It has developed to a situation today where cases are won or lost according to whether one can establish a precedent for a particular course of conduct. Accordingly for Maori or Pakeha, antiquity may give a measure of validity. For both societies recourse to precedence provides evidence of stability.

However in following precedent, ancestral or legal, custom may not just be maintained but changed. In selecting what to recall and applying the principles to new situations we may discard that which has become unpalatable, outmoded or inconvenient. Judges, applying precedent to different situations, may establish a new principle and yet will say that the opinion has always been in the law but has been discovered only now. Similarly, Maori will refer to what the old people said to consider what to do on matters beyond the old peoplesÕ experience. The important thing about this process is that it makes neither the law nor custom moribund, but dynamic.

The point is that in resorting to the past to determine a future course of action in new situations one must look for the principle involved. More particularly one must seek the underlying value for it is the values that establish the enduring cultural norms of a society.

Tikanga and value cf rules

Here Maori custom has been known to step ahead of an English law that became largely codified as rules. Rules can be inflexible while principles require a search for the true justice of a case. There is a modern tendency to see Maori custom in terms of rigid rules, and there were rules for matters like karakia and the word perfect transmission of songs and stories. However Maori were generally successful in keeping their values to the fore.

To illustrate the point, adultery was once a punishable crime in English law. Despite some depiction of sexual freedom amongst Polynesians, Maori adulterers were liable to punishment too. Nonetheless in A Show of Justice, Alan Ward writes of a Maori case where a wife committed adultery. Neither the wife nor the lover was punished however but the husband, for not giving the wife the attention she required.

For the English there was an inflexible rule. For Maori there was a value, about maintaining family integrity, or possibly avoiding a war; but Maori considered the whole circumstances to reach a decision that was honed to the facts of the case.

That is not an isolated example. Early manuscripts evidence a pragmatism in Maori decision making. Decisions appearing inconsistent at first may be rationalised by reference to the facts and the underlying values involved.

Thus the word for custom is tikanga, which does not denote a static set of rules. WilliamsÕs dictionary gives tikanga as a derivative of tika - that which is fair, true or just, or a proper line of action as some translators have put it.

Recognition of core values

The value system has been described in terms of criteria like whanaungatanga, the primacy of kinship bonds, manaakitanga, caring for others, rangatiratanga, the attributes of rangatira, or utu, the maintenance of harmony and balance. Whatever the criteria might be, writers of different disciplines and places have seen the importance of value concepts in Maori culture. It is sufficient to mention Cleve Barlow a psychologist from Auckland University, Jim Ritchie a psychologist from Waikato University,

John Paterson a philosopher from Massey and Dame Joan Metge, a social anthropologist formerly stationed at Victoria. 2 Patterson considers not only the key values, but the virtue ethics of Maori society. He compares the behavioural rules of western law with the Maori ideal of emulating the characteristics of renowned forbears.

The Europeanisation of Maori matters
From this there are lessons to learn. It is important to measure Maori society in its own terms. The Maori Land Court did not do this in my view, and even today the practice of that Court still sticks. Charged with effecting tenure reform to make Maori land a commercial commodity comprehensible in English law, it did not measure Maori society by Maori criteria. It relied upon the outer facts without reference to internal beliefs, related those facts to English law, and introduced foreign concepts of social structure and boundaries. This is still done to establish property rights in western law terms, without reference to corresponding social obligations that mark the Polynesian way, the mobility of Maori hapu, or the complex genealogical patterns. The Maori Appellate Court decision on Ngai Tahu boundaries may serve as an example of how the Europeanisation of Maori matters still occurs.

The importance of seeing Maori custom in its own terms
There is no need to gild the lily, or to paint Maori in Western terms in order to make them fit. For example if Maori did not see themselves as owning land in the western sense, it does not follow that they owned nothing at English law if possession is what they had. There is no need to reinterpret Maori custom and invent a system of property rights in order to claim rights of property at English law. Conversly if Maori did not understand land sales in western terms it does not follow that they lacked comprehension, as has been assumed, for what they understood was a complex land system of their own. It was sustained by both pragmatic practice and profound philosophy.

The Maori law of relationships
An examination of custom informs Maori historical action in other ways. On the evidence many Maori went out of their way to incorporate Europeans into tribes or gave freely of their land for settlement. This does not mean they sold the land. In Maori thinking the land cannot leave its ancestral source but by placing Europeans on the tribal land, the Europeans were obliged to acknowledge the hapu that gave, and to support it. They were simply following their custom of giving liberally in order to create lasting obligations and to enhance their own mana.

This points to that which was essential to the Maori way, that life depended on mana, generosity and the relationships between all things, the relationship between people and gods, between people and everything in the universe from land to life forms, and between different groups of peoples. The essential difference between Maori and Europeans on the settlement of New Zealand was that one sought ownership and centralised control, the other sought local control and relationships. Each was simply acting according to their own customs.

Researchers must set aside the distortions of past judicial precedent and its present-day effect. They must come to a better understanding of Maori society if they are to measure past conflict and conduct in cultural context. To understand that society they must look inside its thought concepts, philosophy and underlying values and avoid interpretations from an outward appearance. They must consider the social structure not just in terms of how it looks, but with regard for the likely reasons for it. It will be important to consider the poetry, songs, legends, proverbs, idiom and forms of speech-making.

Values as ideals
Remember too that values may represent ideals. Much research evidence to the Waitangi Tribunal has sought to measure Maori opinion by copious accounts of Maori conduct, as recorded by European observers. This is a common error of

judgment. In any society there are people who are base and people who act variously but the record of conduct does not negate the existence of a higher ideal. In Exploring Maori Values John Patterson observes that Christian society is not measured by what Christians do but by that to which they aspire. Similarly one does not determine New Zealand values from the behaviour recorded by the courts.

In the Muriwhenua report the Waitangi Tribunal attempted to step inside the Maori world to assess Maori thought, expectations and conduct in the context of the alienation of Maori land. It struck the Tribunal then how little history is written with a proper understanding of Maori beliefs. Too often a history purporting to be a history of New Zealand is really just a history of the Pakeha people in it.

The Tribunal felt strongly that the dynamics of cultural interaction could not be determined by the values or assumptions of one culture only. A proper assessment of the facts required the experience of several disciplines, in psychology and social anthropology for example.

The value of oral tradition
Here a further observation is due. Archival material contains so much from a European perspective that it is likely to distort research. There is a weight of compiled prejudice to overcome and the power of the written word to entrench error makes criticism of the oral tradition seem small. Nor is oral tradition understood. While it is susceptible to manufacture its worth is in the essential messages it imparts.

The extent of cultural survival
I think too that that the extent to which Maori changed, as a result of European influence, is too much assumed. Sometimes the inference is that today we are all the same. Taking a static view of indigenous cultures, though not of their own, the logical conclusion of some writers is that Maori ceased to be Maori when their structures were dismantled, their traditional dress discarded, their language not regularly spoken and new tools and technology adopted.

An honest inquiry should at least consider the scale of the belief system that existed and the extent to which it has remained. I go back to my point that societies change in the context of their values and beliefs. If that is true it is questionable whether change was in European terms. Thus, did Christianity represent a major ideological shift or did it add to, rather than replace, generally compatible Maori ideas? Was change more in the outer forms of style? Still today the Maori churches operate in a distinctively Maori way. Maori recite Christian karakia in distinctively Maori situations. So even also in land. Judges of the Maori Land Court know that Maori still think as Maori in land administration despite the strictures of the imposed title system.

Maori incorporation of European beliefs
Then there is a reverse situation that the researcher must beware. Some Maori have adopted the opinions of the early European writers. This includes and may apply especially to Maori academics. This, and the voluminous, archival record expressing the Pakeha view, makes the truth yet harder to ascertain. The current constructs of hapu acting collectively as national states and exercising mana whenua or dominion over defined territories may owe more to European influence than we may care to admit. While significant rangatira had influence from time to time over widely dispersed hapu, it is arguable that their control depended upon their personal mana and not on political land boundaries. Their mana could come and go and arguably, their influence was over people rather than land. Again, I am not suggesting there was no sense of unity amongst the people of descent groups, but that the nature of the unity must be seen in Maori terms. It is one thing to equate this unity with dominion at English law, but quite another to reconstruct Maori society to make it fit.

It then becomes important that the researcher should not to be captured by

current ideologies that manicure a perception of the past to suit a current purpose. While political and tribal leaders may validly recall the past to support a policy, and leaders do this in any society, the academic researcher must take a more dispassionate view.

Criticism of Pakeha contribution is not justified
I add then I cannot join with those who criticise Pakeha writers on the basis of race alone, especially when there is evidence before the Tribunal that Maori too are not immune from error. One may criticise the opinion without attacking the person. One may challenge a personÕs credibility as well, through lack of qualifications or honesty of purpose, but that is not the same as an attack based on race.

Here, a considerable Pakeha contribution must be acknowledged. Valid criticisms can be made of opinions of early judges, writers and ethnologists who have left an enduring mark, but not all of these are Pakeha. Some views of Te Rangihiroa may be questioned for example, despite his outstanding scholarship, and Maori who write tribal historys rarely escape allegations of bias. More recently we have seen some outstanding research and argument from people like Eric Schwimmer, Raymond Firth, Andrew Sharp and Ron Crocombe. Some of the best material on which the Tribunal has relied has come from Pakeha like them. Some writers, like Dame Joan Metge have been adopted or incorporated into a local Maori group and Maori have honored others in other ways.

There are those too who are familiar with Maori matters from childhood experiences. Alan Ward, for example, was raised in a remote, Maori district out of Gisborne. His book, A Show of Justice, first published in 1974, opened not with the usual background of events in England that led to colonisation. It began with a chapter on the custom of the people already here, that the reader might understand more fully the cultural conflicts involved. It is a chapter that has stood the test of time.

Collaboration required of traditional and academic evidence
The need for expert evidence is apparent in reading the record of Maori cases in the courts - the Whanganui River case 1958 for example. Evidence from Maori steeped in their own law did not get the litigants far. They talked of spiritual matters that the Court dismissed as metapysical. What was needed was an expert witness to interpret the meaning of the evidence in European terms rather than have the Court interpret that evidence itself. Traditional and academic evidence are not in conflict. They in fact depend on each other.

Traditional focus on local autonomy
This takes me back to where I began. If one looks to the nature of the traditional hapu, one might discern a society where power was most regularly at the basic level of the community that functioned every day. Everything above is viewable as a confederation for a purpose, from fishing to war. Arguably, a combined effort did not depend upon some over-riding organ of state. One must look to the various ways that people aligned for aggression or defence and at different times. The personal magnetism of outstanding rangatira in rallying people for some common expedition is especially relevant.

If that is so, two important values are discernible. One is that in Maori society power ascends upwards from the people below as compared with western society where power is from the top down, from a sovereign body above to the people below. On this view Maori society is not to be seen as an embryo still to develop the organs of state, but is one that is antithetical to centralist control.

Traditonal value of combining
The other important value is that communities will collectivise or unite if required, rallying behind a respected leader, or out of obligation to kin or past allies.

The need for balancing the two

In now managing the interface between Maori and European societies, the issue for Maori may not be simply which way is right but how to find the balance. There is support for tribal management through iwi authorities. This provides a united approach to treating with the outside world and an economy in combining resources. However there is also support for the traditional value of empowering communities. This encourages local initiatives. Finding the balance calls for a value judgment, and if practicable, communities should make such judgments themselves. The two approaches may be reconciled however in a central structure that is truly sensitive to the needs and autonomy of the local communities.

The matter need not depend on assertions as to the true nature of customary society. The question is bigger than which is the tribe - the hapu or the iwi? It is really about management today, whether to take a bottom up or top down approach or whether one can take advantage of both. In the interim it does not help to slant research to one view. It does not assist to bend or hide facts to support current thinking, or if, in other respects, researchers are captured by the ideology most in vogue.

The need for sound scholarship

To conclude this section, there are and always will be different views of Maori society. There is no one perfect way of looking at it, but if writers are to understand the past, and the present, the attempt must be made to be better informed of Maori society than some writers before. Good scholarship provides protection against accusations of radicalism, invention, bias or even heresy. A full and honest inquiry of all relevant matters is that which most insures against unfair criticism.

Ethical Issues

A number of ethical issues have been passed on to me by Waitangi Tribunal researchers. The foregoing may shed some light on them, but otherswise the issues are listed for discussion without further comment. Tribunal researchers operate independently of the Tribunal. Tribunal members may describe the research required or may refer to particular issues and source materials that they would like to see covered. However the members must observe protocols not to influence a researcherÕs conclusions. The researchers are also appointed through the Department for Courts and not by the Tribunal.

(1) One issue raised by claimants contends that only Maori should write on Maori matters. I have already expressed a view on this but it must be open for further discussion.

(2) Another arises from a view, sometimes expressed, that the opinions or recollections of kaumatua should not be subject to cross-examination or other challenge.

(3) There is then this situation. Claimant groups who have commissioned researchers have sometimes required researchers to remove material unhelpful to the claimantsÕ case or amend their conclusions, sometimes as a condition to being paid. Are there terms that researchers should negotiate with claimant groups beforehand?

(4) Can a researcher commissioned by a tribal group publish the results of that research and even although the information is from public sources? What if the information relied as well, or exclusively, on private, oral opinions from within the tribe? Can a researcher who is not commissioned by a tribal group but who relies on information from tribal members, publish material without prior permission from them? What if the condition to publication is that certain conclusions be changed? Should the terms for giving information be settled beforehand?

(5) Should evidence to the Waitangi Tribunal be publicly available? If it should be generally available, should parts be protected from use, like

information on sacred sites, medicines, karakia to influence people or natural phenomena, or fishing grounds? Many submissions now have warnings on quoting from or otherwise using the material, sometimes even by the Tribunal itself. The Tribunal is able to restrict the publication and availability of material, but blanket restrictions give the appearance of secrecy and undermines public confidence in the TribunalÕs process. Tribunal restrictions on evidence has been the subject of adverse media comment.

The issue is not whether the information is already a matter of public record. Tribunal witnesses are reluctant to have their words made publicly available when the information came to them from their elders, and even although the information is publicly available elsewhere. They maintain that their elders restricted the persons to whom they passed on oral traditions, and in those cases the receivers should do the same and should not permit of any general broadcast. The trust reposed in them is seen to be sacred.

(6) How far can researchers go with adverse comments on living people without prior consultation with them? In illustration a researcher may feel the need to comment on the motives of living persons who sold land?

(7) How widely should one consult with tribal persons? There are sometimes complaints that the researcher consulted with only one side of the tribe. There are also complaints from researchers of instructions not to consult with certain persons, or to consult only those approved by the claimant group. Some groups prefer a Pakeha researcher to describe a tribal history to avoid a Maori bias to one view.

(8) If researchers rely entirely on public sources, the Maori Land Court records for example, are they still obliged to consult tribal members? These may wish to challenge the accuracy of those records and the opinions expressed?

(9) Should scholars rely on given translations of Maori material or consult with local people for a better contextual interpretation? If the material is not translated should scholars use local interpreters?

Tribunal members have different views on some of these questions and would welcome a wider discussion.

A Code of Ethics?

Some questions suggest the need for settled protocols, that these should be discussed with tribal groups or informants before work begins, and that the standard protocols may need to be amended in light of that which is agreed. A code of ethics may help but that can cause other problems. For example in the Delgamukw case in the Supreme Court of British Columbia, the Court considered the nature of an Indian society for the purposes of an aboriginal title claim.3 It rejected a large amount of anthropological evidence on the ground, amongst others, that the anthropologists were bound by a code of ethics that was too weighted to maintaining a current Indian view. I add that the Court was also critical of historians who, in its opinion, were captured by their Indian clientele. The result was a resounding loss for the Indian claimants, at least in that court.

I would nonetheless support a code of ethics for researchers, as a guide and a shield from criticism. There is a code of ethics in law for example. Amongst other things lawyers must advise the court of cases against their argument as well as those in support. They must show no bias in quoting from texts or previous decisions. Professional anthropologists and historians before the Tribunal generally do the same, but some claimant submissions are bad in this respect. If there is overt bias or dishonesty in submissions, the Tribunal must treat them with suspicion or discard them altogether. The Tribunal has sought to overcome problems of non-disclosure, by compiling document banks and casebooks of all known, relevant material before hearings begin. It has now also completed broad research for the main claims in each district across the country and which is available to all claimants.4

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1 Conversely, reliable evidence also may be improperly utilized or badly understood by judicial officers. See BC Studies Special Issue No.95, Autumn 1992, University of British Columbia for extensive criticism of the treatment of historical and anthropological evidence of Gitskan and WetÕsuwetÕen culture by the British Columbia Supreme Court in Delagamukw v British Columbia.
2 Cleve Barlow Tikanga Whakaaro - Key Concepts in Maori Culture, OUP 1991, James Ritchie Becoming Bicultural, Huia Publishers, Wellington, 1992, John Patterson Exploring Maori Values Dunmore Press, Palmerston North, 1992, Joan Metge New Growth From Old, The Whanau in the Modern World, Victoria University Press 1995.
3 See footnote 1.
4 See Rangahaua Whanui district reports and the National Overview completed by Professor Ward.

Noumea, October 1993

UNDOING HISTORY

Chief Judge Eddie Taihakurei Durie[1]

The Land Problem for Maori

The families of Oceania, I assume, have all been affected in some degree by colonial and other alien influences. I understand from those more knowledgeable in this area that the families of Oceania share many societal characteristics, either because of some common origin or past social intercourse, or because such characteristics are inherent features of the tribal or closely-bonded communities that generally prevail. Nonetheless, I am advised the impact of these influences has not been the same in all places, and consequently, despite comparable traditions the Pacific response to the colonial past is now various.

A feature of the New Zealand circumstance would appear to be that the indigenous Maori became a minority in their own place, losing the greater part of their land, fisheries and water resources, and thus losing their former influence in the country's political, social and economic development. This also applies to Australian Aboriginals and, I am informed, to native Hawaiians; while elsewhere in Oceania the position may not be the same.

Is seems however, the Maori world-view has not been subverted by the historic process. It has survived the rigours of recent history and may be stronger for having done so. It has survived in protest and sometimes it is represented in that form.

The historical impact may be reflected in the modern Maori response:

> the adoption of alien political tools and structures to achieve recognition for Maori and to maintain their status as constitutional entities; and
>
> the construction of political and social development bodies to advance Maori interests within current political and commercial imperatives.

Invariably these institutions purport to be based on customary concepts and values. I understand custom is seen to constrain development in some Pacific places but many Maori present custom and tradition as fundamental to the action taken, as a hedge against assimilation and as the justification for an independent political stance and commercial methodology. The issue for them is not whether custom and tradition should be maintained, but how it can be managed to uphold Maori identity and how it can be modified and capitalised upon to promote the people's material advance.

With regard to land (and associated resources) the problem is seen to be three-fold:

> insufficient Maori land remains to sustain the traditional communities, seen as essential to the maintenance of identity, on the one hand, and on the other, to enable Maori to participate fully in commercial undertakings. Maori commercialism is manifest in their involvement with large- scale farming, joint-venture fishing, iron-sands mining, milling, tourism, hotel development, equity investment, banking and most recently, in the National Maori Congress bid for the Auckland casino licence;
>
> there is insufficient recognition (in the Maori view) of the Maori interest in such 'public' natural resources as reefs, fishing grounds, foreshores, lakes, rivers, geothermal springs and water generally;
>
> the remaining Maori land so suffers from colonial tenurial rearrangement as to constitute an illusory asset for most Maori.

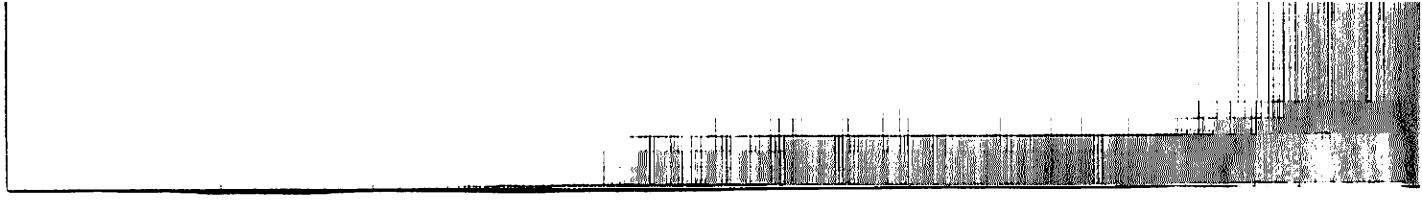
The first two of these concerns are addressed through a 'claims resolution process' whereby it is sought to preserve resources for, or to compensate, those tribes unjustly deprived of their resources and of their political and social autonomy in the past. The process is activated by claims to the Waitangi Tribunal and involves either or both direct Crown-Maori negotiations and judicial Tribunal inquiry. They are founded on the Treaty of Waitangi of 1840, a treaty between Maori hapu (tribes) and the Crown in which, as a prelude to colonisation, the Crown promised protection for Maori society and resources.

The third problem is addressed through the reform of Maori land laws and the operations of the Maori Land Court.

Questions of customary tenure and the nature of traditional society figure large in the claims resolution process and the operations of the Court.

Custom, Land and the Claims Resolution Process

Issues of custom and tradition arise before the Waitangi Tribunal in many ways. They are invariably crucial to the outcome. They come



mainly from the debate about:

land sales;

the operations of the Maori Land Court; and

the allocation of benefits (who should benefit from the compensation, how should benefits be distributed and who should represent such groups as may be entitled?)

Apart from the general complaint that the Crown as protector ought to have secured sufficient land for the relevant Maori groups, many hapu challenge the validity of the specific transactions by which their interests in certain territories are said to have been extinguished. It is a general contention that that which the settlers saw as land sales was differently perceived by the 'vendors'; and that in any event, the 'vendors' were insufficiently representative, or their authority did not extend to the permanent alienation of the several categories of land interests that invariably existed in Maori society. This calls for evidence of the nature of traditional land tenure and Maori political authority, and for opinions on whether Maori and settler understandings of each other had matured, at the relevant point in time, to give mutuality (and thus validity) to their contracts.

The second category of complaint, in the context of custom, concerns the operations of the Native Land Court (as it was then called), or more strictly, the legislation that governed the court's operations. In 1865 the Government legislated for the compulsory conversion of Maori holdings to statutory titles in individual ownership. The numerous hapu complaints may be reduced to these:

that the process facilitated land alienation, obscured a number of customary rights and destroyed social cohesion, tribal polity and customary authority;

by the same laws, traditional responsibility for allocation and administration was taken from the people and passed to the Native Land Court;

the whole of the hapu lands should have been vested in the hapu (in their view) with restrictions on alienation to be enforced by the associated iwi (district hapu combinations);

to resolve original land rights and the subsequent devolution of title, the court introduced rules that were inconsistent with custom;

the court vested the land in selected owners and not in all entitled;

later land development by the Crown led to enforced relocations, compulsory share acquisitions, unfair debt loadings, unapproved alienations, the migration of owners to urban centres and excessive control by Government agencies; and

the system led also to the fragmentation of titles and of ownership, and to share conversions and alienations outside of the kin-group structure.

The official rationale for the transmutation of title by judicial process was to provide certainty of ownership and to resolve conflicts over alienations. These conflicts had previously led to warfare. The Tribunal's task is to assess the impact of these changes against customary tenure, contemporary Maori preferences and the constraints of the time.

Issues of custom likewise confront the delivery of compensation. Compensation may take various forms - land, cash, rents, royalties, fish quota or any combination. The issues become who should benefit, what body should be entrusted to administer the assets for the appropriate beneficiaries and what tribal development policies are required. The latter question may be seen as the tribe's concern and not the business of the Crown or Tribunal; and yet it may arise in the proceedings, for a development policy inimical to the interests of a sub-group, may deny that group its proper dues.

In this instance questions of custom and modern management co-mingle. Maori would reclaim the laws of their ancestors and so present their case on the basis of ancestral ethic; but the vehicle proposed for advancing the policy may be a modern construct. For example there is some Maori and academic opinion that the original political unit of Maori society was the hapu, but it was practice for several hapu to join as a regional collectivity called 'iwi' for particular expeditions or occasions. The modern tendency is to elevate the iwi as the basic political unit, giving to iwi an uncustomary permanency in the tribal structure and some authority over hapu. There is now a tension between hapu and iwi as a result. Some seek the allocation of assets to institutions representative of the hapu, which gives local autonomy and control. Iwi organisations on the other hand, claim to be better able to exert a stronger political and economic influence in the wider community through the aggregation and marshalling of resources and the unification of administrative services. The proponents for each claim custom on their side, but the issue is in fact about modern political exigencies.

Indicative of the problem's size is the proliferation and revival of hapu names as the claims process and asset transfers proceed. The rival claims of alternative bodies to represent the hapu or iwi concerned, and the cross-claims of tribal groups to resources proposed for claim settlements, add to the complexities. Like custom, tribal rivalry also still thrives.

The nature of Maori philosophy has also to be considered. There are opinions on the polaric differences between the Maori and British

legal systems, the one portrayed as tending to broad values and standards epitomised in the deeds of ancestors, the other as reducing ethical principles to finite rules. If such a portrait is correct, each may now be seen to be changing with British law moving to broad norms and principles of fairness, while Maori, in seeking to promote the status of their own legal system, convert principles to rules.

Recently, Maori fishing claims were purportedly extinguished in a large national settlement following Tribunal investigations and eventually direct negotiations. A Maori commission established to apportion to the tribes the quota and other benefits arising, has become divided within itself. One group contends that each iwi should be deemed to possess the whole of the fishery from their shorelines to the distant seas with allocation to be based upon the relative catch values in the consequentially defined sea territories. In their view, each iwi controlled the inshore area traditionally fished from off its coastline, and by analogy, the 'rule' is extended to the deep-sea fishery where the greater catch-value is now found. This favours some tribes but not others. The latter contend that customarily the open seas were open. They argue further that the word 'tikanga', usually used for Maori law, means that which is fair and just; and they would apply other variables to that end. Both groups have their own interpretation of the nature of ancestral law and the way in which it should be applied in modern circumstances.

In these areas the Tribunal would benefit from expert guidance. Past failure to understand the societal differences in imposing alien regimes, was not always for want of trying. A range of opinions on the Maori tenure system, from judges, Crown agents and other 'authorities', were collated and published by the Government between 1856 and 1890. They record, in interesting detail, the observable manners and behaviour, but not one opinion commented on the underlying Maori ethos. It was like assessing christianity by what christians do, not what they believe in, or judging western law by the outcome of cases and not the jurisprudential reasoning.

Kaumatua (elder) evidence describe a complex genealogical lattice and a range of interests that makes terms like 'ownership' inadequate as equivalents. The kaumatua stress on ancestral associations gives support to academic opinion that it is the relationship to land that most matters in the Maori world-view. All things come from the ancestors, it seems, and pass on through ancestral lines. Outsiders may be admitted to the community or may enter it by force, but it is through inter-marriage with the tangata whenua (the people of the land) that their permanent occupation is secured or legitimised on the basis of ancestry.

These views could only have been unhelpful to the settlers who sought to come in by purchase, for on these Maori accounts, sales were inconceivable and some lengthy instruction would have been needed to shift the entrenched traditional opinion. It may also be that the Maori adoption of western modes was merely on the surface and was not indicative of the major mental transition that would have been required.

Kaumatua evidence presents difficulties for lawyers. Their views may reflect unconscious borrowings, may be bent to convenience, or the relationship of their testimony to the issues may not be readily apparent. There is a tendency to recite matters of genealogy, history and tradition in the rote fashion in which it was learnt, the Tribunal being left to extract from the extensive evidence, that which to the Tribunal seems relevant. The dangers are obvious. Academic intervention is needed to locate the evidence within a framework comprehensible to the European legal culture and to the questions involved.

Unfortunately lego-anthropology is not well developed in New Zealand. The Tribunal places reliance upon its own kaumatua members to sense out insensible opinions. Their advice is helpful but for a western trained lawyer, not entirely satisfactory.

Claims Resolution

Careful consideration is needed of the process and policies required for effective claims resolution. As to process, the Tribunal has, with varying success, sought to apply these principles:

that claimants must be able to engage not just legal advice, but competent research assistance from several disciplines;

researchers must have easy access to official documents and be able to consult widely within the claimant group;

general and informal claims should be received and should be made specific (with legal advice) only after the research is completed;

for the efficient despatch of business, hearings should be deferred until the research has been completed, discussed with claimants, and the reports have been filed; and until after the Crown has responded with its counter research opinions;

several disciplines and equal numbers of both cultures should be represented on the Tribunal constituted for the inquiry;

the proceeding should be inquisitorial. Reports should be received as evidence subject to cross-examination of the authors;

the inquiry must be open, transparent and accessible to all who may be affected; and

the hearings should be bicultural, the parties and public being heard in fora of their choice, marae kawa (the rules of traditional village centres) or commission protocols applying according to the venue. Court rules should govern legal

argument and motions.

These principles are thought to expedite proceedings, reduce legalism, and prevent capture of the process by any one culture or discipline.

The successful negotiation of settlements may also depend upon the acceptance of appropriate policies. Despite the uncertain status of early land transactions, it at least appears that the past rangatira (leaders) welcomed settlement, expecting continuing and mutual benefits. Large claims are tempered by the survival of that kaupapa (policy) to today, and as a result the claims are now less alarming to the public. Amongst the Maori, Government and judicial leadership there is some pragmatism and goodwill, and at least occasional adherence to four broad policy directives:

that claims should be settled, not buried;

settlements should be sustainable in terms of national and regional economies;

the validity of past 'sales' and 'expropriations' must be balanced against the founding party's objectives. Resolution depends not upon a finding for one side of the other, but the just accommodation of both Maori and Pakeha (non-Maori), and the maintenance of balance; and

to that end there should be a fairer sharing of resources and a greater Maori participation in the economic, social and political life of the country; with Maori progressing according to their own development models.

Other principles for action would appear to flow from those, but have not generally been adopted in New Zealand:

the focus should be on interests, not positions;

if full compensation is impracticable, the goal should be effective tribal restoration, and settlement may need to be in terms of goals and objectives with review provisions;

'extinguishment' and 'final settlements' should be expunged from the negotiation vocabulary. A commitment is required to the original Treaty goals of maintaining on-going and equitable relationships between the parties on the basis of equality and respect;

to the extent practicable negotiations (currently conducted privately) should be public, each party carrying their own constituencies with them as the discussion progresses, and with encouragement given to direct dialogue between Maori and third party interests (farming, mining, conservation etc); and

the negotiation process should not be unilaterally imposed but mutually agreed.

Custom, Land and the Maori Land Court

The Maori Land Court has been portrayed as the instrument for the displacement of the laws of the ancestors and the alienation of Maori from the ownership and management of their lands. It is more correct to consider that the Court has acquired its current jurisdiction over time and that its image has changed in the process. Progressively the Court has been empowered to determine customary ownership, to manage title, ownership devolution and land allocation, to prevent fraud and to supervise alienations, to promote Government land development and title reconstruction, and more recently to supervise the formation and functioning of owner controlled trusts and incorporations. In the exercise of significant parts of its jurisdiction today, the Court facilitates consensus decision making, effectuates lawful group decisions and adjudicates on particular grievances arising from disputes within the body of owners or from complaints concerning the management of the group's assets. The Court's image as a Government tool or authoritian imposition has thus shifted, and the court is now projected as a facilitator, mediator and impartial adjudicator. The court holds an extensive authority to review the administration of property for Maori under express or implied trusts at the suit of an aggrieved party, a jurisdiction that may extend to assets recovered under the claims process. It has assisted that the court is peripatetic and in touch with the people, and that half of its eight judges are now Maori.

Under recently enacted legislation the Court may also be called upon to determine appropriate representatives of Maori groups for the purposes of claims resolution, Government funding and consultation where dialogue with Maori is required of bodies charged with resource management planning. Questions of custom may also be referred for determination as an adjunct to tribunal and court proceedings. Unfortunately the court has not much dealt with custom this century. It may sit with additional members with skills in this area, like kaumatua, but again, there is a dearth of those with lego-anthropological training who may be included as members or called upon to present expert evidence.

These changes of jurisdiction and character do not address the wider Maori desire for land in tribal ownership under tribal control. Maori land is an illusory asset for many. There is much of it in some tribal areas but very little in others; and even in the land-rich areas, some Maori are not shareholders. There may be many owners in several blocks but through fragmentation, few may have substantial interests. Large scale farming techniques have alienated the majority from a direct association with their ancestral land, and the dividends accruing to many small shares may be insignificant.

The incorporations and trusts have generally farmed successfully, but they benefit their shareholders and only marginally the tribal community. It has been helpful however that from their investments, the incorporations and trusts have funded some major Maori initiatives in other commercial and industrial activities.

Many Maori would aspire to the recapture of Maori land for a tribal benefit, through land reform. It is difficult to see how that can be expeditiously achieved without an unacceptable level of expropriation of individual interests. Fragmentation however, is seen to provide some answer on the basis that the ever-dividing shares should fall into some putea (pool) for the general benefit of the local hapu, as the shares become uneconomic. The recent Ture Whenua (Maori Land) Act 1993 permits of such an event where the owners as a whole agree, but the Act also provides for a number of alternatives, the aggregation of land interests in family trusts for example. These may well detract from the tribal kaupapa. The plethora of trusts may also render the future judicial administration of Maori land even more chaotic.

In the absence of a clear policy for the tribalisation of uneconomic land holdings, land recovery under the claims process appears to provide the best opportunity for the provision of land in tribal control for a general tribal benefit. Most claims seek that result but here again, they may represent a Maori reaction to the particular impact that colonialism has had in Aotearoa (New Zealand).

Postscript

For those seeking more about the Waitangi Tribunal I have made two papers available to the New Zealand Consul-General. The first, by W L Renwick, backgrounds the Tribunal's origins and development. The second, called "The Outstanding Business", describes the current jurisdiction and progress.

[2] Chief Judge Durie is chief judge of the Maori Land Court of New Zealand and chairperson of the Waitangi Tribunal.

Ethics and Values

05 August 1999

Te Oru Rangahau Maori Research and Development Conference
Massey University 7 - 9 July 1998.

ETHICS AND VALUES

E T Durie

This paper is about values and ethics in Maori research.

Maori Values

Background to 1994 paper on 'custom law'

In 1994 I assembled some notes on Maori custom law based on readings and experience as a Judge of the Maori Land Court for 20 years and as chair of the Waitangi Tribunal for 14. The intention was to better the understanding of Maori values and law in historical research and judicial decisions. It was not a scholastic work but arose this way.

Conflicting Assumptions on Maori society

Submissions to the Waitangi Tribunal from Maori and academics, and decisions of the courts, the Maori Land Court included, showed conflicting assumptions on the nature of Maori society. There were different approaches amongst Tribunal members as well.

Perception of Maori agendas in history

In addition some histories assessed Maori from a western standpoint only, as though Maori were cardboard figures with blank minds awaiting intelligence. Many modern histories made real attempts to get inside the Maori value system but even so there was some tendency to see history in terms of the colonisers' precepts and to assess change in terms of the coloniser's agenda. There was no adequate reference to the agenda that Maori already had or to the depth of the ancestral opinions that influenced Maori thinking. Even setting aside any modern cultural renaissance, in assessing change small reference was made to the extent to which Maori values survived, or of the extent to which these values had continued to influence Maori action at different points in time. The dynamics of cultural inter-action were subsumed by an assumption of a stronger and weaker society with an inevitable osmotic pull. In brief Maori were often judged in European contexts and not on terms of their own. It seemed a better balance could be sought.

Distortion of custom in litigation

n the meantime, more cases than formerly, with Maori issues at heart, were before the general courts, from resource management to family protection or fish allocation. There was a risk that the litigants' constructions of Maori society to advance their cases would become embalmed in judicial

precedent, leaving a distorted view. This might influence in turn, scholastic studies, Maori and public opinion, and public officers in policy formulation and administration. Judicial decisions, last century and this, may have had these impacts, not least the decisions of the Maori Land Court.

Part of the problem even today, is that the judges, through no fault of their own, are being called upon to assess the mores of a society still largely foreign to them. This leaves scope for those who would profit from the situation with dubious but compellingly presented evidence to pull the wool over the judges' eyes. The number of statutes with Maori words now falling for judicial interpretation, compounds the problem. Iwi, manawhenua, takiwa and kaitiakitanga are examples.

Objectives of the 1994 paper

For my part it seemed important that the Maori Land Court and Waitangi Tribunal should try to get it right, and the sooner the better as decisions and reports come out continually. Acxcordingly the custom law paper was put together, in three weeks over a summer holiday. Scholastic imperfections might be obvious from something done so quickly. However its purpose was no more than to start a more considered debate within the Tribunal and Maori Land Court, and by sending it out to a selected group, to attract Maori and academic comment. The Waitangi Tribunal in particular has an inquisitorial and research function that enables and indeed requires it to undertake broad inquiries.

The paper went to Judge Fote Trolue, the first and only Kanak judge of New Caledonia trained in both French and Kanak law. On the outer islands of his country Kanaka custom is still the predominant law and applies in both village and court proceedings. Judge Trolue was to address Tribunal members at Rotorua along with certain leaders of Te Arawa.

The paper served its purpose. While it has been taken no further towards publication standards, it shifted the Tribunal's internal debate beyond assertion. It taught that while there are different views, and there is no perfect answer, we can at least do better than assumptions or advocacy provides. It showed too, the room for more scholarly research.

The dynamics of custom and change

From the discussions, and from subsequent evidence and arguments before the Tribunal, several lessons became apparent. The first is so obvious as to need stating - that society changes. The norms and standards that constitute the custom of a society change with it, and Maori society and custom are no exception. There have been considerable changes since European contact. In brief it is necessary to set aside a popular opinion that custom is static, or at least the custom of native peoples, or that native custom ceases to exist when the people abandon grass skirts or no longer travel in dug out logs. Western custom is no different. Customary practice is still a good source of law, especially in the rapidly changing field of commerce. It is still appropriate to consider what good merchants do today and to establish the current mercantile custom.

A static view of custom in the courts

The static view of custom has not assisted Maori in litigation. In the Tainui case it was thought Maori had an interest in coal because there was evidence that they used it, but they did not have an interest in hydro dams, in the Ikawhenua case. With respect the question was really whether they

possessed the land where the coal is or the river where the dams are, but the point here is that the static view took away the devolpment right.

Custom and iwi authorities

There is compelling evidence that custom did not constrain Maori adaptation and development either. On the contrary it left much room for enterprise, and still does. Consider for example current Maori desires to establish iwi authorities, as in response to official devolution strategies. These exercise corporate functions of a kind not previously known and substantially change the traditional focus on hapu autonomy.

However they are not invalidated by arguments that while there may once have been inter-hapu discussions or runanga, a regular iwi runanga exercising corporate functions had no true counterpart in custom. If a current Maori need is met and popular demand is satisfied, that is a source of validity in itself. Modern iwi authorities, even if barely recognizable in old custom, can still be part of the custom of today.

However the converse applies. An iwi authority may not be able to claim support simply on an argument that it is in fact the legitimate successor to an ancient institution. Reference to antiquity may help the case but a question still remains of whether it is effective and satisfies today's community. There is some parallel in the current Monarchy - Republic debate. Recourse to custom and tradition may be persuasive but not determinative.

The need to look to the value system

This is not to say that Maori live in a society where anything goes. Maori society, probably like most others, is conservative with regard to its fundamental values. The point is that it has been receptive to change while maintaining conformity with its basic beliefs. Archival records evidence how Maori searched for ancestral opinions to establish what was right, often challenging officials to heed Maori precedent to maintain that which the translators called a proper line of action.

Lawyers should understand this. The common law of England began from recording local customs and practices seen as common to all England. It was in effect, a compilation of the values of that society as shown in practice. It has developed to a situation today where cases are won or lost according to whether one can establish a precedent for a particular course of conduct. Accordingly for Maori or Pakeha, antiquity may give a measure of validity. For both societies recourse to precedence provides evidence of stability.

However in following precedent, ancestral or legal, custom may not just be maintained but changed. In selecting what to recall and applying the principles to new situations we may discard that which has become unpalatable, outmoded or inconvenient. Judges, applying precedent to different situations, may establish a new principle and yet will say that the opinion has always been in the law but has been discovered only now. Similarly, Maori will refer to what the old people said to consider what to do on matters beyond the old peoples' experience. The important thing about this process is that it makes neither the law nor custom moribund, but dynamic.

one must look for the principle involved. More particularly one must seek the underlying value for it is the values that establish the enduring cultural norms of a society.

Tikanga and value cf rules

Here Maori custom has been known to step ahead of an English law that became largely codified as rules. Rules can be inflexible while principles require a search for the true justice of a case. There is a modern tendency to see Maori custom in terms of rigid rules, and there were rules for matters like karakia and the word perfect transmission of songs and stories. However Maori were generally successful in keeping their values to the fore.

To illustrate the point, adultery was once a punishable crime in English law. Despite some depiction of sexual freedom amongst Polynesians, Maori adulterers were liable to punishment too. Nonetheless in A Show of Justice, Alan Ward writes of a Maori case where a wife committed adultery. Neither the wife nor the lover was punished however but the husband, for not giving the wife the attention she required.

For the English there was an inflexible rule. For Maori there was a value, about maintaining family integrity, or possibly avoiding a war; but Maori considered the whole circumstances to reach a decision that was honed to the facts of the case.

That is not an isolated example. Early manuscripts evidence a pragmatism in Maori decision making. Decisions appearing inconsistent at first may be rationalised by reference to the facts and the underlying values involved.

Thus the word for custom is tikanga, which does not denote a static set of rules. Williams's dictionary gives tikanga as a derivative of tika - that which is fair, true or just, or a proper line of action as some translators have put it.

Recognition of core values

The value system has been described in terms of criteria like whanaungatanga, the primacy of kinship bonds, manaakitanga, caring for others, rangatiratanga, the attributes of rangatira, or utu, the maintenance of harmony and balance. Whatever the criteria might be, writers of different disciplines and places have seen the importance of value concepts in Maori culture. It is sufficient to mention Cleve Barlow a psychologist from Auckland University, Jim Ritchie a psychologist from Waikato University, John Paterson a philosopher from Massey and Dame Joan Metge, a social anthropologist formerly stationed at Victoria. Patterson considers not only the key values, but the virtue ethics of Maori society. He compares the behavioural rules of western law with the Maori ideal of emulating the characteristics of renowned forbears.

The Europeanisation of Maori matters

From this there are lessons to learn. It is important to measure Maori society in its own terms. The Maori Land Court did not do this in my view, and even today the practice of that Court still sticks. Charged with effecting tenure reform to make Maori land a commercial commodity comprehensible in English law, it did not measure Maori society by Maori criteria. It relied upon the outer facts without reference to internal beliefs, related those facts to English law, and

introduced foreign concepts of social structure and boundaries. This is still done to establish property rights in western law terms, without reference to corresponding social obligations that mark the Polynesian way, the mobility of Maori hapu, or the complex genealogical patterns. The Maori Appellate Court decision on Ngai Tahu boundaries may serve as an example of how the Europeanisation of Maori matters still occurs.

The importance of seeing Maori custom in its own terms

There is no need to gild the lily, or to paint Maori in Western terms in order to make them fit. For example if Maori did not see themselves as owning land in the western sense, it does not follow that they owned nothing at English law if possession is what they had. There is no need to reinterpret Maori custom and invent a system of property rights in order to claim rights of property at English law. Conversly if Maori did not understand land sales in western terms it does not follow that they lacked comprehension, as has been assumed, for what they understood was a complex land system of their own. It was sustained by both pragmatic practice and profound philosophy.

The Maori law of relationships

An examination of custom informs Maori historical action in other ways. On the evidence many Maori went out of their way to incorporate Europeans into tribes or gave freely of their land for settlement. This does not mean they sold the land. In Maori thinking the land cannot leave its ancestral source but by placing Europeans on the tribal land, the Europeans were obliged to acknowledge the hapu that gave, and to support it. They were simply following their custom of giving liberally in order to create lasting obligations and to enhance their own mana.

This points to that which was essential to the Maori way, that life depended on mana, generosity and the relationships between all things, the relationship between people and gods, between people and everything in the universe from land to life forms, and between different groups of peoples. The essential difference between Maori and Europeans on the settlement of New Zealand was that one sought ownership and centralised control, the other sought local control and relationships. Each was simply acting according to their own customs.

Researchers must set aside the distortions of past judicial precedent and its present-day effect. They must come to a better understanding of Maori society if they are to measure past conflict and conduct in cultural context. To understand that society they must look inside its thought concepts, philosophy and underlying values and avoid interpretations from an outward appearance. They must consider the social structure not just in terms of how it looks, but with regard for the likely reasons for it. It will be important to consider the poetry, songs, legends, proverbs, idiom and forms of speech-making.

Values as ideals

Remember too that values may represent ideals. Much research evidence to the Waitangi Tribunal has sought to measure Maori opinion by copious accounts of Maori conduct, as recorded by European observers. This is a common error of judgment. In any society there are people who are base and people who act variously but the record of conduct does not negate the existence of a higher ideal. In Exploring Maori Values John Patterson observes that Christian society is not measured by what Christians do but by that to which they aspire. Similarly one does not determine New Zealand values from the behaviour recorded by the courts.

In the Muriwhenua report the Waitangi Tribunal attempted to step inside the Maori world to assess Maori thought, expectations and conduct in the context of the alienation of Maori land. It struck the Tribunal then how little history is written with a proper understanding of Maori beliefs. Too often a history purporting to be a history of New Zealand is really just a history of the Pakeha people in it.

The Tribunal felt strongly that the dynamics of cultural interaction could not be determined by the values or assumptions of one culture only. A proper assessment of the facts required the experience of several disciplines, in psychology and social anthropology for example.

The value of oral tradition

Here a further observation is due. Archival material contains so much from a European perspective that it is likely to distort research. There is a weight of compiled prejudice to overcome and the power of the written word to entrench error makes criticism of the oral tradition seem small. Nor is oral tradition understood. While it is susceptible to manufacture its worth is in the essential messages it imparts.

The extent of cultural survival

I think too that that the extent to which Maori changed, as a result of European influence, is too much assumed. Sometimes the inference is that today we are all the same. Taking a static view of indigenous cultures, though not of their own, the logical conclusion of some writers is that Maori ceased to be Maori when their structures were dismantled, their traditional dress discarded, their language not regularly spoken and new tools and technology adopted.

An honest inquiry should at least consider the scale of the belief system that existed and the extent to which it has remained. I go back to my point that societies change in the context of their values and beliefs. If that is true it is questionable whether change was in European terms. Thus, did Christianity represent a major ideological shift or did it add to, rather than replace, generally compatible Maori ideas? Was change more in the outer forms of style? Still today the Maori churches operate in a distinctively Maori way. Maori recite Christian karakia in distinctively Maori situations. So even also in land. Judges of the Maori Land Court know that Maori still think as Maori in land administration despite the strictures of the imposed title system.

Maori incorporation of European beliefs Then there is a reverse situation that the researcher must beware. Some Maori have adopted the opinions of the early European writers. This includes and may apply especially to Maori academics. This, and the voluminous, archival record expressing the Pakeha view, makes the truth yet harder to ascertain. The current constructs of hapu acting collectively as national states and exercising mana whenua or dominion over defined territories may owe more to European influence than we may care to admit. While significant rangatira had influence from time to time over widely dispersed hapu, it is arguable that their control depended upon their personal mana and not on political land boundaries. Their mana could come and go and arguably, their influence was over people rather than land. Again, I am not suggesting there was no sense of unity amongst the people of descent groups, but that the nature of the unity must be seen in Maori terms. It is one thing to equate this unity with dominion at English law, but quite another to reconstruct Maori society to make it fit.

It then becomes important that the researcher should not to be captured by current ideologies that manicure a perception of the past to suit a current purpose. While political and tribal leaders may validly recall the past to support a policy, and leaders do this in any society, the academic researcher must take a more dispassionate view.

Criticism of Pakeha contribution is not justified

I add then I cannot join with those who criticise Pakeha writers on the basis of race alone, especially when there is evidence before the Tribunal that Maori too are not immune from error. One may criticise the opinion without attacking the person. One may challenge a person's credibility as well, through lack of qualifications or honesty of purpose, but that is not the same as an attack based on race.

Here, a considerable Pakeha contribution must be acknowledged. Valid criticisms can be made of opinions of early judges, writers and ethnologists who have left an enduring mark, but not all of these are Pakeha. Some views of Te Rangihiroa may be questioned for example, despite his outstanding scholarship, and Maori who write tribal historys rarely escape allegations of bias. More recently we have seen some outstanding research and argument from people like Eric Schwimmer, Raymond Firth, Andrew Sharp and Ron Crocombe. Some of the best material on which the Tribunal has relied has come from Pakeha like them. Some writers, like Dame Joan Metge have been adopted or incorporated into a local Maori group and Maori have honored others in other ways.

There are those too who are familiar with Maori matters from childhood experiences. Alan Ward, for example, was raised in a remote, Maori district out of Gisborne. His book, A Show of Justice, first published in 1974, opened not with the usual background of events in England that led to colonisation. It began with a chapter on the custom of the people already here, that the reader might understand more fully the cultural conflicts involved. It is a chapter that has stood the test of time.

Collaboration required of traditional and academic evidence

The need for expert evidence is apparent in reading the record of Maori cases in the courts - the Whanganui River case 1958 for example. Evidence from Maori steeped in their own law did not get the litigants far. They talked of spiritual matters that the Court dismissed as metapysical. What was needed was an expert witness to interpret the meaning of the evidence in European terms rather than have the Court interpret that evidence itself. Traditional and academic evidence are not in conflict. They in fact depend on each other.

Traditional focus on local autonomy

This takes me back to where I began. If one looks to the nature of the traditional hapu, one might discern a society where power was most regularly at the basic level of the community that functioned every day. Everything above is viewable as a confederation for a purpose, from fishing to war. Arguably, a combined effort did not depend upon some over-riding organ of state. One must look to the various ways that people aligned for aggression or defence and at different times. The personal magnetism of outstanding rangatira in rallying people for some common expedition is especially relevant.

If that is so, two important values are discernible. One is that in Maori society power ascends upwards from the people below as compared with western society where power is from the top down, from a sovereign body above to the people below. On this view Maori society is not to be seen as an embryo still to develop the organs of state, but is one that is antithetical to centralist control.

Traditonal value of combining The other important value is that communities will collectivise or unite if required, rallying behind a respected leader, or out of obligation to kin or past allies.

The need for balancing the two

In now managing the interface between Maori and European societies, the issue for Maori may not be simply which way is right but how to find the balance. There is support for tribal management through iwi authorities. This provides a united approach to treating with the outside world and an economy in combining resources. However there is also support for the traditional value of empowering communities. This encourages local initiatives. Finding the balance calls for a value judgment, and if practicable, communities should make such judgments themselves. The two approaches may be reconciled however in a central structure that is truly sensitive to the needs and autonomy of the local communities.

The matter need not depend on assertions as to the true nature of customary society. The question is bigger than which is the tribe - the hapu or the iwi? It is really about management today, whether to take a bottom up or top down approach or whether one can take advantage of both. In the interim it does not help to slant research to one view. It does not assist to bend or hide facts to support current thinking, or if, in other respects, researchers are captured by the ideology most in vogue.

The need for sound scholarship

To conclude this section, there are and always will be different views of Maori society. There is no one perfect way of looking at it, but if writers are to understand the past, and the present, the attempt must be made to be better informed of Maori society than some writers before. Good scholarship provides protection against accusations of radicalism, invention, bias or even heresy. A full and honest inquiry of all relevant matters is that which most insures against unfair criticism.

Ethical Issues

A number of ethical issues have been passed on to me by Waitangi Tribunal researchers. The foregoing may shed some light on them, but otherswise the issues are listed for discussion without further comment. Tribunal researchers operate independently of the Tribunal. Tribunal members may describe the research required or may refer to particular issues and source materials that they would like to see covered. However the members must observe protocols not to influence a researcher's conclusions. The researchers are also appointed through the Department for Courts and not by the Tribunal.

(1) One issue raised by claimants contends that only Maori should write on Maori matters. I have already expressed a view on this but it must be open for further discussion.

(2) Another arises from a view, sometimes expressed, that the opinions or recollections of kaumatua should not be subject to cross-examination or other challenge.

(3) There is then this situation. Claimant groups who have commissioned researchers have sometimes required researchers to remove material unhelpful to the claimants' case or amend their

conclusions, sometimes as a condition to being paid. Are there terms that researchers should negotiate with claimant groups beforehand?

(4) Can a researcher commissioned by a tribal group publish the results of that research and even although the information is from public sources? What if the information relied as well, or exclusively, on private, oral opinions from within the tribe? Can a researcher who is not commissioned by a tribal group but who relies on information from tribal members, publish material without prior permission from them? What if the condition to publication is that certain conclusions be changed? Should the terms for giving information be settled beforehand?

(5) Should evidence to the Waitangi Tribunal be publicly available? If it should be generally available, should parts be protected from use, like information on sacred sites, medicines, karakia to influence people or natural phenomena, or fishing grounds? Many submissions now have warnings on quoting from or otherwise using the material, sometimes even by the Tribunal itself. The Tribunal is able to restrict the publication and availability of material, but blanket restrictions give the appearance of secrecy and undermines public confidence in the Tribunal's process. Tribunal restrictions on evidence has been the subject of adverse media comment.

The issue is not whether the information is already a matter of public record. Tribunal witnesses are reluctant to have their words made publicly available when the information came to them from their elders, and even although the information is publicly available elsewhere. They maintain that their elders restricted the persons to whom they passed on oral traditions, and in those cases the receivers should do the same and should not permit of any general broadcast. The trust reposed in them is seen to be sacred.

(6) How far can researchers go with adverse comments on living people without prior consultation with them? In illustration a researcher may feel the need to comment on the motives of living persons who sold land?

(7) How widely should one consult with tribal persons? There are sometimes complaints that the researcher consulted with only one side of the tribe. There are also complaints from researchers of instructions not to consult with certain persons, or to consult only those approved by the claimant group. Some groups prefer a Pakeha researcher to describe a tribal history to avoid a Maori bias to one view.

(8) If researchers rely entirely on public sources, the Maori Land Court records for example, are they still obliged to consult tribal members? These may wish to challenge the accuracy of those records and the opinions expressed?

(9) Should scholars rely on given translations of Maori material or consult with local people for a better contextual interpretation? If the material is not translated should scholars use local interpreters?

Tribunal members have different views on some of these questions and would welcome a wider discussion.

A Code of Ethics?

Some questions suggest the need for settled protocols, that these should be discussed with tribal groups or informants before work begins, and that the standard protocols may need to be amended in light of that which is agreed. A code of ethics may help but that can cause other problems. For example in the Delgamukw case in the Supreme Court of British Columbia, the Court considered the nature of an Indian society for the purposes of an aboriginal title claim. It rejected a large amount of anthropological evidence on the ground, amongst others, that the anthropologists were bound by a code of ethics that was too weighted to maintaining a current Indian view. I add that the Court was also critical of historians who, in its opinion, were captured by their Indian clientele. The result was a resounding loss for the I

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