

THE RESISTANCE OF THE NEW ZEALAND LEGAL SYSTEM TO RECOGNITION OF MAORI CUSTOMARY LAW

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This paper offers some thoughts on the way legal systems are reshaped during the process of decolonisation that has been occurring, in different ways, through much of the Pacific since the 1960s and 70s. The general question I want to consider is: why does this decolonisation process leave a particular legal system, in a particular country, in a particular shape, and not in some other shape? Decolonisation seems to have left our Pacific legal systems in many different shapes. Why one shape in Vanuatu, another in Fiji, a different one in New Zealand, and so on?

The shape a legal system assumes following colonisation and decolonisation obviously depends on many factors, and to make convincing statements about causes and effects will often be difficult. But some important factors surely are:

- the character of the pre-existing legal system of the people (or peoples) who were colonised;
- the intensity of that colonisation process, and particularly the extent to which an indigenous system of customary law was displaced by introduced legal norms;
- the strength with which the formerly colonised people pursue an agenda of decolonisation, within the legal system, when independence is eventually achieved; and
- the balance established, within the population of the independent nation, between the indigenous people and the descendants of the colonists, which will be critical in any subsequent democratic process, like a general election, based on one person: one vote principles.¹

A further factor will be the degree of resistance to the decolonisation process put up by those who occupy positions of influence within the state legal system that was established during the colonial era. This state legal system is likely to continue in some form in the newly-independent nation, and those who exercise influence within it may be strongly opposed to legal change, especially when the descendants of the colonists have become the majority of the population, as has occurred in New Zealand (NZ).

Much of this resistance will take place in the domain of ideas. Members of the legal profession who work within the state legal order are bound to have very firm ideas about its

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¹ The current balance in New Zealand is that roughly 15% of the population are Maori and 85% non-Maori, of whom the great majority are of European descent. This puts Maori, the indigenous people, in a very difficult position within the majoritarian political process.

proper shape. Their ideas will have their own intellectual history and may strongly resist the notion that there should be widespread re-recognition of indigenous customary law.

MAORI ASPIRATIONS SINCE THE 1970S

In the case of NZ, one might say that the aspirations of Maori for decolonisation of our legal system, and for greater recognition within it of Maori values, culture and rights, have been of two main kinds. One aspiration has been for change in the substance of our law, the other for change in the sources of our law: that is, for change in the form in which Maori rights are expressed within the NZ legal order.

With regard to the substance of their rights, Maori have often demanded:

- official recognition of the Maori language;
- return to Maori collectives of land, fish, forests, rivers, mountains, and other resources over which particular indigenous groups traditionally exercised control;
- greater representation and consultation in public decision-making, at all levels, starting with Parliament and moving down through the different levels and agencies of the public sector as a whole;
- incorporation of Maori values into statutory schemes governing the use of land and water, the marine environment, minerals, the delivery of health and education services, and so on.

This is a very extensive political agenda, virtually all of it requiring law reform. Some of this reform has now occurred. The Maori language has been officially recognised, and Maori language television has finally been established, with state support. Some land of special significance to Maori has been returned, and more will be returned, along with substantial forestry assets. In addition, half of NZ's commercial fishing assets have found their way into Maori hands.

Maori representation in the NZ Parliament has roughly trebled in the last 15 years, following reform of our electoral laws. It has reached the level of about 21 Maori MPs, out of a total of 121 members of the House, which is a slightly larger proportion than the representation of Maori in the general population. The Maori Affairs select committee that considers the most directly relevant legislation is now comprised almost entirely of Maori persons. In recent governments there have been 3 or 4 Maori Cabinet Ministers. There is no guarantee this will continue, but, at this level of representation, Maori are able to make a much greater impact on the political and legislative process than was the case when there were 4 or 5 Maori MPs, as was typically the case under prior electoral law.

In addition, Maori concerns have been weakly incorporated into many statutory schemes, especially those concerning resource management. These concerns have the status of "mandatory relevant considerations" that statutory decision-makers must take into account, alongside the other considerations listed in the statute. This does not mean, however, that Maori interests will necessarily prevail when the final decision is made.

As the great Maori jurist, Eddie Durie, puts it, we have put ‘a bit of Maori into particular laws’.² There has been some movement, therefore, on the substance of Maori legal demands.

But Maori have also argued for changes in the recognised sources of our law. Here their aspirations have again been of two main kinds:

- for the rights of Maori to be accorded an entrenched constitutional status, as a form of supreme law that could not be set aside by ordinary legislation; and
- for greater recognition within the state legal system of Maori customary law, or Maori customary property rights, that have not been recognised in this manner, in many cases, for more than 100 years.

So, Maori customary property rights might be recognised in fish, and in water in rivers, and in the foreshore and seabed, and in other resources not already in private hands; and customary elements might be reintroduced to family law, including the law of adoption, or be applied to minor criminal offending between Maori persons, and be introduced to a greater extent into planning laws, by giving Maori tribal authorities greater authority, for instance, over the allocation of water rights or marine farming licences.

What I find particularly striking about the current shape of the NZ legal system is that on this second major law reform agenda – reform of the sources of our law – there has been virtually no movement at all. We might say there has been *some* movement on substance but there has been virtually *no* movement on form. The sources of NZ law remain virtually the same as they were in 1900: based almost entirely on NZ legislation and English common law, with no entrenched constitutional rights recognised of any kind and virtually no recognition within the state legal order of Maori customary law.

THE DISPLACEMENT OF MAORI CUSTOMARY LAW

One reason why the NZ legal system has taken this particular shape is the intensity of the colonisation process that occurred. Maori customary law was displaced almost entirely from the state legal system, by 1900, through several routes:³

- By failure to recognise the *Treaty of Waitangi* (the foundational agreement reached in 1840 between Maori leaders and the British Crown) as an enforceable source of NZ law, when the Treaty might have been used as an umbrella under which the NZ courts could recognise Maori customary law. Instead, the Treaty has been consistently viewed by the NZ courts as operating on the plane of international law,⁴ even though Maori are now clearly incorporated within the NZ state and governed by its laws;

² Eddie Durie, ‘Maori custom and the law’ at 32 (unfortunately I have not been able to locate the origins of this typed manuscript that is in my possession); but see Eddie Durie, ‘Will the settlers settle? Cultural conciliation and law’ (1996) 8(4) *Otago Law Review* 449; Eddie Durie, ‘Custom law’ (1994) 24 *Victoria University of Wellington Law Review* 325; and New Zealand Law Commission, *Maori Custom and Values in New Zealand Law*, Study Paper 9 (2001).

³ See New Zealand Law Commission, *Maori Custom and Values in New Zealand Law*, Study Paper 9 (2001) chapter 3.

⁴ *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308.

- By denial of the existence among Maori of any settled customs that could be viewed as laws. In *Wi Parata v Bishop of Wellington* in 1877 it was said by the Chief Justice, in the wake of the land wars, that Maori were ‘savage barbarians’, with ‘no settled customs’, and ‘no organised system of government’ from which laws could emanate.⁵
- By the introduction of conflicting rules of English common law, such as the rule that the Crown (or state) owned the beaches, and the rule that some resources, like fish, and water in rivers, and the sea itself, had no owner, so could be freely exploited by Europeans;
- By statutory regimes enacted by the NZ Parliament that extended to all citizens within the state, and therefore set aside any distinct rules of Maori law: the introduction, for example, of a general criminal code and general statutory principles of family law;
- Above all, by the rapid alienation from Maori of their lands that had previously been held in customary tenure: via direct purchase by the state; by confiscation, authorised by Parliament, following the land wars; and through the workings of the Native (or Maori) Land Court, which would, firstly, investigate the land holdings of the customary Maori owners; then change the status of that land into a new form of statutory “Maori land” title; and then, finally, divide the land between some of the customary owners, individualising the titles, thereby facilitating its sale into European hands, whereupon its status would again change to that of private, freehold land. This was a multi-faceted land acquisition strategy, on the part of the colonists, through which Maori were separated, by 1900, from most of their lands.⁶

There were exceptions to the state’s failure to recognise customary law. There were some favourable decisions recognising Maori customary interests in the Privy Council, in London in the early 1900s,⁷ but these were reversed by statute in NZ.⁸ And there was a decision of Chief Justice Stout in 1910 which accepted that Maori could claim customary ownership of dead whales, washed up on the beaches. The King of England, said the Chief Justice, did not assert any right to dead whales.⁹

What we mostly see in this saga, however, is the use of law as an explicit instrument of colonisation, as in so many other parts of the world. The effect on Maori society, and the Maori asset base, was drastic. It contributed to rapid decline in the Maori population in the 19th century, and to mass internal migration and urbanisation of Maori in the 20th century, as, deprived of their rural asset base, they flocked to the towns and cities of NZ (and Australia) in search of work. Today, roughly 90% of Maori people live in cities or towns, and mostly they live outside their traditional tribal areas, no longer governed directly in most of their life by the social mechanisms that are so central to the operation of customary law.

Nevertheless, as any observer of Maori society is aware, Maori customary values remain alive outside (or alongside) the state legal system, and they continue to be followed in Maori-

⁵ (1877) 3 NZ Jur NS (SC) 72.

⁶ See Alan Ward, *A Show of Justice* (1978); Alan Ward, *An Unsettled History* (1999); David Williams, *Te Kooti Tango Whenua: The Native Land Court 1864-1909* (1999); Richard Boast, *Buying the Land: Selling the Land: Courts and Maori Land in the North Island 1865-1921* (2008).

⁷ For instance, *Nireaha Tamaki v Baker* (1900-1901) [1842-1932] NZPCC 371.

⁸ See, for instance, the *Native Land Act 1909*; and A Frame, *Salmond: Southern Jurist* (1995).

⁹ *Baldick v Jackson* (1910) 30 NZLR 343.

controlled environments, and in the use of some natural resources, like those of the forest and coastline. The underlying value system is clear, and well-expressed in Maori oratory, song, chant, haka, and in all kinds of Maori art.¹⁰

Why, then, is there still such tenacious resistance to the recognition of customary law within the state legal order? All the factors I have just mentioned seem relevant: the history of intense colonisation; the long displacement of customary concepts from NZ law; the radically changed social and economic circumstances of Maori people – urbanised, living beyond tribal boundaries, heavily intermarried with the European population, in an industrialised market economy. These are all important concerns.

Just as importantly, however, Maori aspirations encounter certain ideas that deeply resist the re-recognition of Maori customary law. These ideas are strongly endorsed by most members of the well-established NZ legal profession. Two sets of ideas seem particularly important: those of legal positivism and parliamentary sovereignty.

Legal positivism

This is undoubtedly the dominant legal philosophy among members of the NZ legal profession. It is a state-centred philosophy of law. The legal positivist views law as the product of authoritative state institutions: eg, the legislation of Parliament and the rulings of the courts, in NZ's case. Law, for the positivist, is not defined by reference to its agreement with any particular set of values or beliefs, unless those beliefs are already embedded in the authoritative sources of law. It is intended precisely to address situations in which there is disagreement over matters of value between different persons or groups within the state. The political process is used to resolve those disagreements, and at the end of that process Parliament lays down a rule, of a clear, specific kind, and that is the law.

The disagreements are resolved, at least for the time being, and the aim is to establish clear, written, publicly-available and predictable legal rules, upon which we can base settled expectations, and make investments, and plan our conduct – even in the midst of discord over values (which are not themselves law). So the pre-eminent source of law is the statute, the written code of rules, issuing from the authoritative institutions of the state. This is therefore a state-based concept of law.

When this positivist gaze encounters an indigenous people with a decentralised, kin-based social system, ordered around a common set of values and a shared religion, but without the trappings of a nation state – with nothing Europeans recognise as a legislature, or a formal system of courts, or a codified system of rules – the positivist sees no law. Long-standing customary principles and practices based on shared beliefs, ancestral connections, and oral traditions, do not count as law.

This philosophy had captured English legal thinking by the mid-19th century, which was the critical period in the colonisation of NZ. It is a legal philosophy that developed over a long period of time, in response to disagreements over matters of politics, religion and values in English society, disagreements so intense they had produced civil war. Its development coincided with the progressive emergence of a mass, urbanised, and increasingly diverse

¹⁰ According to Eddie Durie, 'the Maori legal system ... was fundamentally values based, not rules oriented': 'Will the settlers settle?' above n 2 at 455; see also J Patterson, *Exploring Maori Values* (1992); H Mead, *Tikanga Maori: Living by Maori Values* (2003).

industrialised society. London, for instance, had a million people in it by 1800, drawn from many different parts of the world.

Developed in this context, legal positivism has emerged as a jurisprudence that is deeply resistant to the recognition of any unwritten, values-based, conception of customary law.

This position is reinforced by the NZ legal profession's strong commitment to the constitutional principle of parliamentary sovereignty.

Parliamentary sovereignty

The question of sovereignty concerns where ultimate power lies within a state, particularly, in this context, the power to specify the content of the law. So where does sovereignty lie in NZ, on the orthodox legal view? It lies in Parliament, under NZ's (partly unwritten) constitution. Somers J said in passing in the *NZ Maori Council* case: 'Sovereignty in New Zealand resides in Parliament'.¹¹ We can see immediately the absolute character of this conception of sovereignty in that disarmingly simple phrase.

For 150 years this has been the preferred view within NZ's state legal culture. On a pure view of it, this sovereignty is not constrained by any system of entrenched rights, nor is it shared with any other body. There is simply no tradition of shared sovereignty within NZ legal culture. There is no federal system, wherein power is divided between the national level of government and the states or provinces, because NZ is a unitary state. All powers held by local and regional government in NZ are delegated to them by Parliament via statute. There is no equivalent of the legal pluralism found in Canada, wherein the civil law of Quebec, with French origins, operates alongside the other provinces' adoption of the common law.

In other words, NZ has a vertical set of constitutional relationships, with Parliament clearly at the top, not a horizontal set of relationships wherein law-making power is shared between various bodies of equal standing or authority, as might be said of the Constitution of the United States. Moreover, NZ has only one House of Parliament. There is no Senate. Even here, power is concentrated at a single point.

One can immediately see how hostile this philosophy is to the general recognition of a system of customary law, which is a kind of power-sharing arrangement, after all, involving the recognition of the authority of another social system, a customary decision-making system, to determine the content of the law.

To recognise customary law fully is to accept that there is a space within the state from which Parliament will withdraw, and not intervene. It is a system of shared sovereignty. This is not an approach that has found favour with many members of the NZ legal profession. It is not part of their legal culture, which supports instead a unified, centralised system of sovereignty, focused on the Parliament of a small nation state.

As long as these ideas remain dominant within the NZ legal profession, and within the state legal culture, they will continue, along with the other factors discussed, to offer deep resistance to the re-recognition of Maori customary law.

¹¹ *NZ Maori Council v A-G* [1987] 1 NZLR 641 at 690.

THE FUTURE

Any future recognition of customary law in NZ is therefore likely to take a limited form: greater delegation by Parliament, perhaps, to existing legal institutions, like the Maori Land Court, or the Family Court, of limited authority to incorporate some customary norms into the rules they apply; greater consultation, mediation, consensus-seeking, between these institutions and customary groups; and greater use of the Maori language in these processes – all taking place, however, under the general authority of the courts, and, ultimately, the authority of Parliament. This is therefore the kind of development towards which we have been slowly moving: towards partial indigenisation of specialist courts, which is only a very limited form of recognition of customary law.

To make more radical changes would require:

- significant change in the dominant legal philosophy and culture;
- a new theory of the NZ constitution;
- a different notion of sovereignty;
- greater recognition of the law-making authority of Maori collectives;
- a more horizontal, and less vertical, set of governmental relationships.

In short, it would require an expanded legal imagination and a willingness to take greater risks, on the part of the NZ legal profession and state. There is no evidence, however, that this will soon occur.

The adoption of an entrenched constitution for NZ, containing fundamental civil and political rights, alongside affirmation of indigenous rights, might be the catalyst for such an expanded legal imagination to develop, but – partly for that reason – this kind of constitutional transformation, to a culture of entrenched rights, has been strongly resisted so far by the NZ legal profession.

To end on a positive note, however: we should not underestimate the importance of the changes in the substance of NZ law that have occurred in the last 30 years, in response to Maori aspirations for decolonisation, including: the refinancing of some tribes; the return of some significant lands, half of NZ's extensive commercial fishing assets, and important forestry interests; significant state support for the Maori language; much greater Maori representation in Parliament and in public sector agencies; and the incorporation of some Maori concerns into many specific statutory schemes. These are crucial developments. Virtually all of them have required the passage of legislation, and this legislation has been passed through a Parliament that has, at all times, been dominated by European MPs. This is a considerable national achievement, and it has kept the peace.

My hope is that these thoughts help to explain why the partial decolonisation of the NZ legal system has taken this particular shape.