"Maori Customary Law: from Extinguishment to Enduring Recognition"

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Chief Judge Durie's preliminary review of Maori jurisprudence and customary law provides an opportunity for finding a basis for a renewed and practical recognition of customary law over a century and a half since it was explicitly recognised in the Treaty of Waitangi.[1] The questions raised are not new. Attempts to clarify the nature of Maori customary law within a European legal framework have not been uncommon. In the nineteenth century there were frequent European explorations between the 1840s to the 1870s of the nature of Maori customary law. Most of these discussions were centred on the nature of tribal and individual rights to land. Even in the twentieth century there have been a number of times when European legal notice has been taken of traditional Maori systems of rights, perhaps most notably in the drawn-out inquiries into the ownership of the Whanganui River.[2] More recently, an understanding of the nature of customary law has become a matter of growing urgency, as Maori have asserted renewed demands for recognition of te tino rangatiratanga under article two of the Treaty of Waitangi. Recent references to Maori customary concepts in legislation require some practical definition in the courts. The return of land and resources need structures for Maori ownership and management. All these developments are associated with a Maori determination to use structures and processes that are essentially Maori in managing things Maori.

This paper provides a framework for understanding the historical status of Maori customary law in relation to the British legal system introduced to New Zealand in 1840. Maori customary law has coexisted with a European based legal system since that time. The discussion here is historical rather than legal, concerned to explore the political, cultural and economic relationships between the two

[1] E.T. Durie, 'Custom Law', Draft of January 1994.
[2] *In re the Bed of the Wanganui River*, [1962] NZLR 600.

systems. The intention is to go beyond the question of legal recognition of Maori customary law by the courts and by Parliament. Maori customary law has been denied, recognised, extinguished and modified as part of an ongoing relationship between indigenous Maori society and Pakeha society. The relationship is political, economic and cultural. It is political because the power to exercise customary law has been circumscribed by dominant Pakeha political processes. It is economic because debates over the nature of customary rights have centred on who should own and control resources. Finally the relationship is cultural because it is about the ability of an indigenous culture to manage it own affairs according to its own cultural preferences.

This paper is concerned primarily with the context of Crown recognition of Maori customary law. Particular attention is paid to the period between the Treaty of Waitangi and the decision of Chief Judge Prendergast in 1877 in *Wi Parata* v. *The Bishop of Wellington*.[3] It is in this period that the New Zealand State sets down its relationship with Maori customary law, and it is from a reassessment of this period, by both Maori and the Crown, that renewed recognition will emerge. The aims here are to:

- provide a context for understanding historical sources on Maori customary law;
- examine the extent that debates over the nature of Maori custom have been influenced by specific conflicts between Maori and the Crown over resources or constitutional issues;
- review the nature of Crown recognition of Maori customary law since 1840;
- consider the extent that the Maori customary law needs to be seen as dynamic and continually being applied to new circumstances, new constraints and new opportunities;
- provides an understanding of the extent that formal recognition by the Crown was skewed by the social and economic objectives of settler society in the nineteenth century;

[3] (1877) 3 N.Z. Jur. (N.S.) 72 (S.C.).

- explore the extent that Crown determination to extinguish Maori customary law has made it difficult to shift into a new environment where Crown recognition aims at active protection of Maori customary law and its enduring role within the New Zealand legal system.

No attempt is made here to define the nature of Maori custom or to comment on the detail in the Chief Judge's paper (referred to as the Customary Law Paper). The Customary Law Paper discusses a wide range of examples of customary law, within a jurisprudential framework. The paper relies on a range of unsourced examples from a disparate array of sources. There is no attempt to codify individual incidence of customary law. Instead the emphasis is on identifying the principles on which customary law can be determined in a contemporary context, given the kinds of situations in which the courts may find themselves.

Maori customary law has always been flexible to need and circumstances. While there may be basic principles underpinning debates on custom, customary law is the application of these principles to particular situations by specific groups of people. Maori customary law has often been defined as using the authority of the past for current conduct. Because of the influence of colonisation, there is a tendency to try and look past the period of European influence, devaluing the custom of the period of contact because it may have been contaminated by European influences. This quest for a 'true' custom was also a result of European influences, as is explained later. Maori continued, and continue, to use customary law to explain and develop principles for dealing with life in Aotearoa after contact and for regulating conduct. Customary law has developed as a result, as new influences, changes in the environment, new knowledge and new technology have always needed to be incorporated into custom. It is important therefore to maintain a distinction between the principles on which particular aspects of custom may develop and the laws themselves.

Whether it is appropriate to turn Maori custom into a kind of Maori common law is a decision that will need to be made by Maori. To some extent this is precisely what the Native Land Court attempted to do in the nineteenth century. In many areas it can be seen as successful, as many of the interpretations of custom have become generally accepted. However, as the transforming nature of the Court is recognised in recent scholarship and in popular Maori debate, there has been an increasing attempt to see through the Court to the original principles and practice beyond.

To achieve a balanced assessment of what may be pre-1840 custom and what were the adaptations which were the result of colonialism is still necessary. To achieve a modern Maori consensus on the nature of customary law that is workable in the present, it is necessary to appreciate the extent that colonisation was more than simply a catalyst for the modification of customary law. That at different times Maori customary law was denied, acknowledged, defined, modified and extinguished according to a non-Maori agenda casts a long shadow that cannot be ignored.

There are four parts to the paper. The first is a brief examination of the response of Maori customary law to contact with Europe and colonisation. The emphasis on flexibility and accommodation outlined in the Customary Law Paper is underlined. This is followed by a review of the conceptual frameworks used by Europeans to understand culture, drawing in particular on the writing of Emmerich De Vattel and the judgments of Chief John Marshall of Supreme Court of the United States of America, both common reference points in debates in New Zealand. The third section reviews the extent of institutional recognition accorded Maori customary law. The four section reviews how these ideas are applied in New Zealand, within a political context. This includes the debate over whether Maori custom should be recognised at all, and the extent that government policy to extinguish aboriginal title determined the kind of custom which was given official recognition.

Maori Customary Law and European Colonisation

Maori adaptation of traditional customary practice and the adoption of new forms and practices needs to be accepted as one of the major aspects of customary law. The Custom Law paper rightly emphasises the period of dramatic change following European contact but over emphasises the degree of stability preceding it.[4] Changes in climate, in population and in resource availability and political relationships made dramatic impacts on Maori communities producing substantial social change throughout Maori habitation of Aotearoa. The main difference was that from the late eighteenth century there were alternative social, technological and legal models accessible beyond the core Polynesian experience.

In 1840 Maori customary law was the law of New Zealand With its roots in Eastern Polynesia, Maori custom developed though centuries of settlement in the varied environments of Aotearoa. While there was a consistency in the overall principles governing relationships, rights and obligations within tribes, there were substantial variations and each group jealously preserved their own customs and the traditions on which these differences were based. These variations were seen as essential to the identity of the group itself. Nonetheless there was extensiye intertribal discourse and considerable commercial relationships between tribes extending throughout the entire country. By the time of the Treaty, however, and as a direct result of contact with the European world, Maori customary law was responding in very significant ways to the monumental social changes being experienced throughout Aotearoa.

Events during the contact period from 1769 to 1840 had a dramatic impact on Maori society. Changes in customary law were perhaps less marked than changes in economic and social life. Certainly customary law had to incorporate new situations, once they had become common. Because these new circumstances did not affect all tribes in the same way and at the same time,

[4] Customary Law Paper, p.8.

there was ample opportunity for accentuating regional differences. Changes in group formation and identity, in individual status and in spatial location were significant in the period 1800 to 1840. In the most populous areas of the North and in the central North Island, people remained largely in the territories occupied by their ancestors for several generations. In many other areas, however, the tribes which claimed territorial rights under the Treaty of Waitangi had not been living there in 1820.[5] Other tribes had in the years immediately preceding Waitangi, been forced to leave their villages and join kin elsewhere for mutual protection. Few anywhere had been unaffected by the warring years of the 1820s and early 1830s. New crops, new foodstuffs and European technology were widely adopted and Christianity and literacy became commonplace in Maori communities. Such change took time to be assimilated into Maori legal thinking. Relationships between winners and losers and between allies were yet to be formalised by a sense of permanence when the uncertainties of the period were fixed artificially in time by the coming of British law.

The Treaty of Waitangi and the recognition of Maori customary law

The Treaty of Waitangi was for Maori signatories both a confirmation of Maori authority and an experiment in a new form of law. Conversion to Christianity, a dramatic decline in warfare, and the need to deal with increasing European encroachment through trade: all these contributed to a sense of accommodation between Maori custom and the introduced law of Queen Victoria.

Most recent attention has focused on Article II of the Treaty and its confirmation of te tino rangatiratanga.[6] Commentators are generally agreed that the agreement

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[5] The level of tribal migration is discussed in a series of papers prepared for the Waitangi Tribunal as part of the *Rangahaua Whanui* programme. These papers are to be released in coming months.

[6] Claudia Orange, *The Treaty of Waitangi*, Oxford/Port Nicholson Press, Wellington, 1988; I.H. Kawharu (ed.), Oxford, Auckland, 1989; and Waitangi Tribunal reports; Ranginui Walker, *Ka Whawha Tonu Matou. Struggle without end*, Penguin, Auckland, 1990. McHugh, Paul (1991) *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Oxford

preserved Maori chiefly authority over Maori resources as it was understood by Maori themselves. Certainly the Treaty had different meanings for the different tribes who signed it and again for those who did not. Some tribes considered they had no need of a governor, while others sought some control over the land trade and even a force to mediate between tribes, conscious of what appeared to be limitations in existing Maori customary law. Generally those tribes who had faced more intrusions from Pakeha trade and settlement were most accepting of a governor.

There is considerable disagreement over the extent that the Treaty transferred sovereignty to the Crown. Modern linguistic analysis of the text of the Treaty and a renewed emphasis on the *contra preferentum* rule have demonstrated that both in terms of legal interpretation and historical analysis the Treaty conveyed less sovereignty that assumed by the Crown.[7] Just how much less remains a matter of debate.

Normanby's instructions to Hobson allowed for the recognition of Maori tribal law, so long as this was not contrary to humanity. Although not part of the written text, the so called `fourth article' of the Treaty also confirmed the Crown's recognition of customary law. Bishop Pompallier asked Hobson if religious freedom would be guaranteed, and under the churlish recommendation of Henry Williams, Hobson also agreed to protect `the native religion'.[8] Article III of the Treaty, in granting Maori British citizenship, created an unresolved tension between the Maori tribal jurisdiction acknowledged in Article II and the

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University Press, Auckland.

[7] The idea that treaties should be interpreted in the way they were understood in indigenous language and custom was accepted prior to 1840, see Associate Justice John McLean's concurring opinion in *Worcester* v. *The State of Georgia*, 315 U.S. 515 (1832). The initial paper on the meaning of the two texts was Ruth Ross, 'Te Tiriti o Waitangi: Texts and Translations', NZJH, VI, 2 (1972) pp. 129-57. Ross's analysis has become the standard interpretation, see Orange and Walker. Slightly different approaches are taken by Ann Salmond, evidence in the Muriwhenua claim, Wai 45, and Binney, Judith (1989) 'The Maori and the signing of the Treaty of Waitangi', *Towards 1990*, GP Books, Wellington.

[8] Orange, *The Treaty of Waitangi*.

expectation that Maori would be subject to the same laws as the European settlers.

The period between the signing of the Treaty of Waitangi and the wars of the 1860s were for Maori a time of ongoing debate about the nature of law in the new society. In a recent unpublished paper, Lyndsay Head has drawn attention to the dramatic change in language in Maori letters to the government as a consequence of the wars.[9] She argues that Maori were attempting to accommodate the new governors and find a constitutional place where they could influence the colony's affairs. Their emphasis is on accepting the authority of the governor, but of locating their own authority in alliance with that of the British Crown. Maori attempts to find a say in the government of the colony were thwarted by settler determination to control their own affairs, as independent as possible from the influence of either London or Maori tribes.

For the most part Maori customary law prevailed in Maori communities, untouched by European institutions. The handing over of Maketu, accused of murder, to be tried, found guilty of murder and hung, in 1842 displayed an isolated acceptance of European courts, despite Maori concern at the barbarity of imprisonment and form of capital punishment.[10] While before the wars of the 1860s Maori interest was directed towards the constitutional relationship between the Queen and her governor and rangatira, there were still attempts by Maori tribes to introduce aspects of European judicial practice to settle disputes among Maori and even to control the activities of non-Maori. In the late 1850s the Kingitanga established its own courts and police force, for instance. The killing and cannibalism of the Reverend Volkner in Opotiki in 1865 was seen by Europeans as a reversion to savagery, but tribal tradition has it that Volkner was found guilty of spying and was hung, combining both European and Maori forms of justice.

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[9] Paper to the New Zealand Historical Association Conference, Victoria University of Wellington, February 1996.
[10] Orange, *The Treaty of Waitangi*, pp.107-8.

After the wars, many of the more dramatic attempts to find new systems of legal thinking were to be found in what European's described as `prophet movements'. The discussion of the `law', as it was undertaken by such figures as Te Whiti O Rongomai and Tohu, Te Maiharoa, Tawhiao, Te Kooti and Rua Kenana, aimed at providing viable Maori communities that could meet the challenge of the Pakeha onslaught.[11] Alongside these figures were many other men and women who in their own communities were adopting aspects of the European law as they saw them to their own customary systems. The sayings and interpretations of tradition of these leaders have been incorporated into the custom of their communities and these communities' descendants.

Constitutionally Maori adopted parliamentary forms as a means of providing a unified cross-tribal source of authority in dealing with government. Maori parliaments continued the model of the Kohimarama conference of 1860, although they received no sanction from the Crown[12] Maori also participated in the European parliamentary and legal system, sending hundreds of petitions to Parliament, attending dozens of Royal Commissions and Commissions of Inquiry, filing cases with the ordinary courts and with the Native Land Court to assert customary rights.[13] Tribes attempted without success personally to petition Queen Victoria and the Imperial Government.[14] Many rangatira sat in Parliament, in both the upper and lower house.

Given that there was no other channel in dealings with government, it is difficult to argue that Maori tribes were rejecting their own customary law in such

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[11] Mikaere; Ward; Judith Binney, *Redemption songs. A life of Te Kooti Arikirangi Te Turuki*, Auckland University Press and Bridget Williams Books, Wellington, 1995; Judith Binney and Gillian Chaplin, *Nga Morehu. The Survivors*, Oxford University Press, Auckland, 1986; Judith Binney, Gillian Chapman, and Craig Wallace, *Mihaia. The prophet Rua Kenana and his community at Maungapohatu*, Auckland University Press/Oxford University Press, Auckland, 1979.

[12] Orange, p. 221-231; `The Covenant of Kohimarama: A ratification of the Treaty of Waitangi, *New Zealand Journal of History*, XIV, 1 (1980); Lindsay Cox, *Kotahitanga: The Search for Maori Political Unity*, Auckland University Press, Auckland, 1993.

[13] There were more than 1000 petitions in the decade 1880 to 1890, AJHR, 1891, G1, xi.

[14] Orange, *The Treaty of Waitangi*.

activities. The dilemma facing Maori communities is aptly illustrated in the internal conflicts within Ngai Tahu in the 1870s, as they tried to reassert their mana over the majority of the South Island, lost to them in a series of extremely one side land transactions in the 1840s and 1850s.[15] One group led by Te Maiharoa aimed at using custom to assert ownership of land they believed had never been sold in the Kemp purchase of 1848. Leading a heke to Omarama, Te Maiharoa and his followers asserted their traditional rights by direct occupation. At the same time H.K. Taiaroa, a member of Parliament, urged the use of the courts and parliamentary commissions of inquiry. Taiaroa's commissions provided limited success in the short terms, they kept the claim alive, and provided some relief in parcels over the following century. Te Maiharoa's heke, in contrast, ended in starvation and ejection.[16]

A means for uniting tribes to achieve common objectives was a major objective, most successful in the Kingitanga between 1857 and 1864[17], but also in the Kotahitanga movement later in the century.[18] Constitutional forms of pan-Maori government had the potential to limit Maori customary law, to the extent that customary jurisdiction was handed to a new constitutional Maori authority. This process proved somewhat difficult, because of the traditional independence accorded individual rangatira and the communities they represented. In the twentieth century, Maori authorities, legally recognised by the State, have represented Maori interests, sometimes for very specific purposes, and sometimes very broadly. Trusts boards, established from the 1920s to the 1980s for the task of managing claim settlement resources, often achieved a wider

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[15] The Waitangi Tribunal, *The Ngai Tahu Report 1991*, Brooker and Friend, Wellington, 1991.

[16] Buddy Mikaere, *Te Maiharoa and the Promised Land*, Heinemann, Wellington, 1988; Harry Evison, *Te Wai Pounamu. The Greenstone Island. A History of the Southern Maori during the European Colonisation of New Zealand*, Aoraki Press, Wellington, 1993.

[17] Belich, James (1986) *The New Zealand Wars and the Victorian Interpretations of Racial Conflict*, Auckland University Press, Auckland.

[18] See articles by M.P.K. Sorrenson and Ann Parsonson in Geoffrey W. Rice ed., (W.H. Oliver and Bridget Williams eds, 1st edition) *The Oxford History of New Zealand*, 2nd edition, OUP Wellington, 1992. And Judith Bassett, Judith Binney and Erik Olssen, *The People and the Land. Te Tangata me to Whenua*, Allen and Unwin, Wellington, 1990.

mandate to represent tribal interests in other areas. These authorities have had to exploit what limited space was available within the legislation which created them to recognise Maori custom. These limitations have proved increasingly problematic resulting in declining support for many such authorities. There are attempts to recreate more traditional institutions and give them cultural control over more commercial Maori structures.

Arguing that Maori customary law proved flexible to withstand the challenges of colonisation, and should be seen not as fixed at some time before 1840, does not mean that colonisation did not have a detrimental effect. As European power grew and settler society was able to overwhelm Maori, government adopted measures deliberately aimed at undermining Maori customary law and drawing Maori under the 'Queen's writ'.[19] The ability of Maori to exercise customary law was restricted by loss of resources, by lack of recognition by the courts and by Parliament and by persistent and prolonged promotion of individualism and assimilation.

Conclusion

Maori customary law then can be seen as inherited lore built on Polynesian foundations and developed over time in Aotearoa prior to the arrival of Cook in 1769, and modified by contact and even by the experience of colonisation. This traditional core of law was tribally specific and had a long history of accommodating new circumstances and new problems. Following contact, custom continued to develop to deal with the challenges of new technology and new cultural practices brought in by Europeans. Maori adaptation included the incorporation of Christianity by many tribes and many of the forms of European law.

Modern attempts to recognise customary law have to go beyond the reconstruction of pre-European Maori law, which was after all, applied in a pre-

[19] This is the essential theme of Alan Ward, *A Show of Justice, racial 'amalgamation' in nineteenth century New Zealand*, AUP/Oxford, Auckland, 1974 (2nd edition 1995).

European context. These attempts must also examine the way that Maori customary law has developed since contact. But to do this it is necessary to examine the constraints placed upon this development by the colonial legal system and its more recent inheritors. This is not so much to weed out the 'foreign' influences, but to place those influences within the context within which they were adopted. The fact that Maori customary law was so often defined in contexts which aimed at extinguishing it overlays the way it was perceived and the way that it was recorded. Because many written sources being used to relocate early Maori customary practices are products of this colonising process, they need to be examined in the light of the political conflicts which created them.

European sources for debate over the status of Maori customary law

Maori customary law has since 1840 had a particularly ambiguous status within the New Zealand legal system. The possibility of giving formal recognition was a matter of government debate, however half heartedly, for much of the nineteenth century. Certainly in 1840 it was expected that some form of Maori customary law would be recognised within Maori areas. In practice, given the limits of British government and European settlement, toleration, rather than formal recognition, was the rule. It was not until the 1880s at the earliest that the government could enforce European law throughout the country, even in serious criminal matters. As part of the colonial government's policies to acquire land and manage Maori, there were significant European discussions of the nature of aboriginal law and the status it could be accorded within a colonial society, based on a number of European writers. These theorists did not determine outcomes, but they provided a range of ideas which European's brought to bear in attempting to resolve associated with Maori customary law. They also influenced the way that Europeans perceived the Maori world and defined customary law. The way Europeans interpreted customary law relating to land was crucial,

because it was European officials, lawyers and judges rather than Maori who were given the power to determine customary rights.

In 1840, recent decisions by Chief Justice John Marshall in the Supreme Court of the United States provided a model for recognition of Maori customary law, based on the notion of `domestic dependent nations'.[20] However qualified this sovereign independence later became, it provided the basis of the recognition of Native American law for much of the nineteenth century and has allowed the re-emergence of tribal courts and tribal jurisdictions since the 1950s.[21] The Marshall decisions involved questions of the nature of Indian rights to the soil, Indian sovereignty, pre-emption, and Indian rights to a separate jurisdiction based on their customary laws. All these issues were mutually dependent in mid-nineteenth century British and American thinking on international law.

The other major reference point in any discussion of these questions was Emmerich de Vattel, an eighteenth century Swiss jurist, whose treatise on the `Laws of Nations' was frequently referred to as an authority by governors, colonial office officials, and lobbyists.[22] Vattel's principles and phrases are also common in the key United States Supreme Court decisions involving Indian rights in America.

Emmerich De Vattel

Vattel argued that states could only be recognised if they based their *dominion*, their ownership of land, on cultivation of the soil. Originally, all men had a common right to the lands of the earth to work the soil and provide cultivated sustenance and trade.

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[20] *Cherokee Nation* v. *The State of Georgia*, 30 U.S.1 (1831)
[21] Charles F. Wilkinson, *American Indians Time, and the Law. Native Societies in Modern Constitutional Democracy*, Yale University Press, New Haven, 1987.
[22] The first edition was *Le droit des gens, ou, Principes de la loi naturelle appliques a la conduite et au affairs des nations et des souverains*, London, 1758. English translations were readily available, although like most authorities, it is difficult to know if those using him had ever read the original or its translation, see: *The Law of Nations; Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns*, 3 vols, J. Newbery et al, London, 1760.

> The earth belonged to all men in general; destined by the Creator to be their common habitation, and nursing-mother, all derived from nature the right of inhabiting it, and drawing from it the things necessary for their subsistance, [sic] and those suitable to their wants. But the human race being extremely multiplied, the earth became no longer capable of furnishing spontaneously, and without culture, support for its inhabitants; and could not receive a proper cultivation from the itinerant nations who possessed it in common. It then became necessary that these people should fix themselves on some part of it, and that they should appropriate to themselves portions of land, in order that not being disturbed in their labour, nor disappointed in obtaining the fruits of their industry, they might apply themselves to render their lands fertile, that they may draw their subsistance [sic] from them. This must have introduced the rights of *property* and *dominion*, and this fully justifies their establishment. Since their introduction, the common right of all mankind is restrained to what each lawfully possesses. The country inhabited by one nation, whether it has transported itself thither, or whether the families of which it was composed, finding themselves spread over the country, had formed themselves into the body of a political society; this country, I say, is the settlement of the nation, and it has the proper and exclusive right to it (emphasis in original).[23]

Sovereignty and the right to exercise laws rested not just on political union based on contract, but on an economic system. For those societies whose economies were based on hunting and gathering, there was a much more limited right to statehood. Certainly their rights to retain title to land uncultivated did not hold against a society prepared to work the land with agriculture.

Using the American colonies for his examples, Vattel argued that civilised agricultural societies had the right to take possession of the unused lands of those peoples discovered in new lands who but thinly populated their territories.

> It is asked if a nation may lawfully take possession of a part a vast country in which there are found none but erratic nations, incapable, by the smallness of their numbers to people the whole?.... Their removing their habitations through these immense regions, cannot be taken for a true and legal possession; and the people of Europe, too closely pent up, finding land of these nations are in no particular want, and of which they make no actual and constant use, may lawfully posses it and establish colonies there.[24]

Vattel praised the colonists of Virginia and Pennsylvania for purchasing land from the Indians, although he considered such a process unnecessary. `People

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[23] Ibid., Book 1, p.89.
[24] Ibid., Book 1, p.91.

have not then deviated from the views of nature in confining the Indians within narrower limits'.[25] These views also echoed those of John Locke and has been taken up of Dr Thomas Arnold, the headmaster of Rugby, in and 1831 article.[26]

Sovereignty and the ability to make laws were intertwined in European thinking. While each were different parts of statehood, they could only exist in common. The question of a level of `civilisation' based on economic practice was often, but not always, used as a qualifier of sovereignty. A society that tilled the soil had the ability to make laws over it and as long as it retained its independence of any other power, it possessed sovereignty. This sovereignty could still be retained if the state accepted the protection of a more powerful state. Europeans would argue in New Zealand, often from self interest, that Maori did not possess law, ownership of the soil or sovereignty. The New Zealand Company made such a claim after November 1840 when its land claims rested on an agreement with the Colonial Secretary, Lord John Russell. Up until this time it had defended the idea that Maori had property rights in the soil, since its claims to 20 million acres of land rested on sales from Maori.

In the New South Wales legislature, Governor George Gipps came close to arguing that Maori as a savage society possessed no law of property at all and could not be regarded as sovereign. Although relying on American texts extensively, he downplayed Maori sovereignty more than Marshall[27] It was an argument that Prendergast revived in 1877. The necessary expedient of entering into a treaty with Maori was at the time a practical denial of this position. The acknowledgement of the 1835 Declaration of Independence, questions over the validity of Cook's then distant discovery as a basis for title, Maori strength and the political weight of missionaries and humanitarians prevailed. Lord John Russell's retrospective interpretation of the recognition of Maori sovereignty was based on two premises. First, that Maori were not `mere wanders over and

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[25] Ibid.
[26] Frederika Hackshaw, `Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi', I.H. Kawharu (ed.) `Waitangi. Maori and Pakeha Perspectives of the Treaty of Waitangi', Oxford, Auckland, 1989, p.104.

extended surface, in search of a precarious subsistence; nor tribes of hunters, or of herdsmen; but and people whom the arts of government have made some progress'.[28] Secondly, Britain had already recognised them as an independent state. Even so Hobson was prepared to claim the South Island on the basis of discovery, because of the belief that South Island Maori were nomads, bereft of agriculture and thence of government. South Island Maori overcame this slight by their signing of the Treaty.

In contrast to Vattel, Chief Justice John Marshall's applied no test of material civilisation to locate a right to sovereignty and self-government. Marshall was far less comfortable with denying Indian rights to property on the basis of a lack of comprehensive agriculture. That Indian societies had laws and governments was self-evident, as was their title to the soil. Marshall's conceptualisation of the relationship between aboriginal nations and colonial powers drew less on Vattel and on natural law than did his fellow justices on the Supreme Court. Vattel made a distinction between natural law and the law of nations. The law of nations was not simply the application to states of the laws of nature as they relate to individuals. Marshall rejected `natural law' completely. International law rested on practice, on enduring accommodations between powers.

Marshall explored the common strands, as he saw them, of British colonial practice in America, and established its continuing relevance to the newly independent United States. There was an original reality:

> America ... was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of others.[29]

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[27] Speech of His Excellency Sir George Gipps, in Council, 9 July 1840, BPP, Irish University Press, vol 3, p.185.
[28] GBB, 1841, vol. 17, p.523.
[29] *Worcester* v. *The State of Georgia*, 315 U.S. 515 (1832)

He belittled the suggestion that `adventurers sailing along the coast, and occasionally landing on it' were able to acquire title to the soil from the `Atlantic to the Pacific' or dominion over the many peoples living there. But he is equally dismissive of the idea that `nature of the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers'.[30] It was `power' that determined international legal practice. In the practice of European states and the United States as great powers, rather than Vattel's land use arguments, on which Indian rights to sovereignty, property and independent legal jurisdiction lie.

Marshall's decisions were in the United States part of an ongoing political conflict between advocates of State autonomy and Federalist who argued for a strong Federal powers. Marshall was a strong Federalist advocate. In the late 1830s and throughout the 1840s all debates over the nature of Maori sovereignty, land rights and other aspects of customary law used either Marshall or Vattel as the benchmark. In 1847, in *R.* v. *Symonds*, the New Zealand supreme court accepted Marshall's position and acknowledged the existence of Maori sovereignty prior to the Treaty and the persistence of their title.

Marshall recognised the autonomy of aboriginal peoples to hold their own lands and to govern their territories, providing a basis for the recognition of Native American tribal jurisdictions and tribal sovereignty. His decisions, though, were still compromises. They recognised the reality of United States hegemony. Indian tribes were nations, recognised by Treaty, but this did not give them the same sovereignty as European states. Indian nations:

> ...occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[31]

Marshall argued that Indian nations were not foreign states on no great principle other than the fact of inclusion within the territorial claims of the United States. Indian nations' sovereignty was constrained only by the inability to engage in

[30] Ibid.

relations with any `other European potentate than the first discover of the coast of the particular region claimed'. This inability was not part of a natural law or based on any principle, it was `imposed by irresistible power'.[32] In a dissenting opinion, Justice Smith Thompson maintained that Indian nations were `foreign'[33] states and that while they had entered into a protective relationship with the United States, they had not ceded their sovereign independence to lands they had not sold. Both options were available in New Zealand, particularly given Britain's long denial of any interest in New Zealand following Cook's arrival in 1769.

By the right of discovery European powers had the exclusive right to extinguish aboriginal title in vacant lands or land inhabited by Indians.[34] Britain, in colonial American, and then the United States had the exclusive right to extinguish aboriginal title over lands where Indian custom prevailed, even though those actual tribes were unknown to the Crown and had ceded no such right.

> At no time has the sovereignty of the country been recognised as existing in the Indians, but they have always admitted to possess many of the attributes of sovereignty. All the rights which belong to self government have been recognized as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have the present right of possession.[35]

Aboriginal sovereignty did allow for Indians to maintain their customary laws within their own territories, because this right had never been ceded in Treaties with European powers or with the United States. In the last of Marshall's trilogy of decisions, *Worcester* v. *The State of Georgia*, he denied Georgia's claim to legal jurisdiction in Cherokee territory. This case remains the key rationale for

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[31] *The Cherokee Nation* v. *The State of Georgia*, 30 U.S. 1 (1831)
[32] *Worcester* v. *The State of Georgia*.
[33] The *Cherokee Nation* case rested on whether the Supreme Court had the jurisdiction to here a case brought by the Cherokee against the United States. Section 2, Article 3 of the United States Constitution allowed the court to hear "controversies...between a state or the citizens thereof, and foreign states, citizens or subjects'. The Cherokee were trying to prevent the State of Georgia from seizing lands guaranteed by Treaty with the U.S. On the basis of a majority decision the application to constrain the State of Georgia was declined.
[34] *Johnson and Graham's Lessee* v. *M'Intosh*, 8 Wheat. 543 (1823)
[35] *Worcester* v. *The State of Georgia*.

separate Indian legal systems. Legal success did not protect Cherokee rights however. Marshall's decision was ignored and the Cherokee were removed from Georgia in the `trail of tears'. The Supreme Court has maintained that Congress still has the power to abrogate treaties with Indians,[36] and for most of the period between the 1870s and the 1950s the courts whittled down recognition of independent Indian jurisdictions. In the 1950s, under the innocuously named Public Law 280, many Indian tribes forcibly terminated and their assets dispersed to tribal members. Since 1959, however, the Supreme Court has given new vitality to separate Indian governments and separate Indian courts, although the recent decade has proved less supportive.

Although Marshall's description of Indian sovereignty included the terms `domestic' and `dependent', he denied that this was a lesser form of sovereignty. The right to make laws was completely retained, subject only to dealing with other powers. The pre-emptive rights, the exclusive right to extinguish aboriginal title, was not, he tried to argue a restriction on Indian sovereignty. It was accepted constraint on *European powers* and on their citizens. Pre-emption was:

> an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.[37]

This was a hollow claim and reflects Marshall's attempt to effect a political compromise rather than sound reasoning.

Recognising Customary Law in New Zealand

While Marshall's statements on aboriginal title and aboriginal sovereignty were touch stones of policy and legal interpretation in New Zealand in the 1840s, they

[36] *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903)
[37] *Worcester* v. *The State of Georgia*.

were applied differently. The political context of Marshall's conflict with President Andrew Jackson was replaced by equally bitter disputes between the Colonial Office and the New Zealand Company, between settlers and Maori, and between Sydney speculators in Maori land and Governor Gipps of New South Wales. The whole issue also became embroiled in Governor George Grey's vituperation of his predecessor and his attempts to undermine missionary influence with Maori and on British public opinion.

From the European perspective, the Treaty of Waitangi extinguished Maori sovereignty, but what was the nature of this sovereignty? Were Maori completely independent or were they by Cook's discovery, `domestic dependent nations' even before the Treaty of Waitangi? This issue was far from academic. If Marshall's definition held, then the Crown would have a monopoly over land, something the New Zealand Company required for its commercial success, and essential if the Crown was to prevent friction between Maori and settlers. If Maori were completely independent then sales of land made to Europeans prior to British sovereignty would be valid and Sydney speculators and other holders of Maori land sale deeds would have titles the Crown would have had to honour. France and the United States tended to see the Treaty as between independent foreign powers, and not based on discovery.[38]

Not surprisingly, Governor Gipps and the Colonial Office insisted on the `right of discovery'. Grey also used the Crown pre-emptive right essential in Marshall's theory of aboriginal title to vilify the actions of Governor Robert FitzRoy in waiving pre-emption. From 1847 he used pre-emption as a convenient device for Crown land purchases. Apparently successful purchases based on pre-emption countered the New Zealand Company's political pressure on the Colonial Office to rescind the Treaty's recognition of Maori title to the soil. In *R.* v. *Symonds*, the New Zealand Supreme Court used Marshall to uphold Maori claims to aboriginal title to the whole country.

[38] Benedict Kingsbury, 'The Treaty of Waitangi. Some international law aspects', *Waitangi. Maori and Pakeha Perspectives of the Treaty of Waitangi*, I.H. Kawharu (ed.), Oxford, Auckland, 1989, pp.121-2.

On the ability of Maori to exercise their customary law through an independent jurisdiction, the situation was much more ambiguous. Paul McHugh accepts, as do most modern scholars, that article II's confirmation of te tino rangatiratanga allowed Maori the right to continue to exercise their own laws.[39] While this understanding can form the basis for contemporary recognition of Maori customary law, this was not how the Treaty or the transfer of sovereignty was seen by any government in the nineteenth-century. Marshall did not consider a situation where territorial claims and sovereignty were not linked. American treaties used land purchases to extinguish sovereignty over ceded land and retained it on the reservations they created. This is the major contrast between the American cases and New Zealand cases. The New Zealand cases tested aboriginal title and the Crown's powers to extinguish it, they always assumed that the Crown's acquisition of sovereignty was absolute.

In contrast to the pattern of nineteenth century treaties with Native Americans, Britain maintained that the Treaty of Waitangi had extinguished Maori sovereignty, whatever that may have been, and that Maori were henceforth British citizens, despite retaining ownership of their rights to land and any other property they owned. As such the Marshall decision in *Worcester* v. *The State of Georgia* did not apply. Therefore while the possibility of allowing Maori a separate jurisdiction was always there in the background, there was nothing in international law to require it, and it was more a matter of expediency on the part of government. In colonial practice in New Zealand land purchases were deliberated used to bring Maori under the jurisdiction of the Queen.

In Australia and the United States, despite their very different recognition of indigenous rights and customary law, the nineteenth century settler governments aimed at segregating indigenous peoples from white society. In New Zealand while every attempt was made to prevent Maori from hindering settlement, the official policy was amalgamation. Maori were accepted as citizens and expected

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[39] 'Constitutional Theory and Maori Claims', I.H. Kawharu (ed.), *Waitangi. Maori and Pakeha Perspectives of the Treaty of Waitangi*, Oxford, Auckland, 1989.

to became part of the mainstream European culture. The models for self-government or Maori legal jurisdiction that were considered were not aimed at recognising Maori customary law, but at deputising Maori to implement European law in their own communities.

In the 1840s and 1850s Maori adaptation to European contact was itself a major excuse for non recognition of Maori customary law. Adoption of Christianity, of literacy, and of European technology, gave many Europeans the mistaken impression that Maori were uniformly rejecting their cultural identity and rapidly being assimilated. Sir George Grey was happy to exploit these impressions to argue that Maori could be governed using European institutions, since Maori custom was being so universally abandoned. Where any recognition of Maori customary law was considered it was always seen only as a temporary expedient, soon to be replaced by complete and final amalgamation. While the Resident Magistrates Courts Ordinance 1846 allowed for separate treatment of Maori, this was seen as temporary and the pattern of inclusion was clear.

Marshall's model for recognising indigenous sovereignty was suited to a federal system, and the Imperial Parliament's New Zealand Constitution Act 1852 reopened the possibility of recognising Maori legal and political authority. Section 71 allowed for Maori districts to be proclaimed which recognise `the laws of the Natives'. Colonial governments ignored Maori requests for districts to be created and none were. In the late 1850s and early 1860s, the government did develop plans for what was called by Henry Sewell, `self-government'.[40] Governor Browne called the conference of chiefs at Kohimarama and floated the idea of creating a council of chiefs to advise government. This may have given some limited substance to Maori customary law. Browne's replacement by Grey shelved the idea. Under the *runanga* or `new institutions' Grey proposed in 1861, government in Maori areas was to be conducted by Pakeha Civil Commissioners and Maori runanaga, supported by a Maori police force. This was not a recognition of Maori customary law, but a means of using Maori leaders to implement the European law. The policy naively assumed that Maori

[40] AJHR, 1862, E2; Alan Ward, p.162.

customary law had been dramatically undermined by contact. New Maori experiments in government, such as the King Movement, had been established to ape British forms. A legal vacuum needed to be filled by British legal and political institutions, not by a recogniton of what Europeans saw as an outmoded and barbaric system, if they even acknowledged that Maori had a system of law at all.

Later attempts to recognise tribal structures in the Rohe Potae and in the Urewera were but temporary expedients until the introduction of the Land Court did its job of breaking down tribal authority and individualising rights to land. In the Maori Councils Act 1900 there was further potential for Maori local government, but the intention was to use elected Maori committees to introduce health reform, make bylaws and produce official statistics. They also had a limited power to institution a property tax, which took precedence over local body rates. In that these were to be completely Maori committees, they had a potential to allow European law to be touched with custom, but there was a clear intent, supported by Maori Members of Parliament, that committees would suppress what was called `injurious' Maori custom. This latter intention was reinforced by the Tohunga Suppression Act 1907. Apirana Ngata and Peter Buck supported the legislation, but their aim was suppress what they saw as the debased practices of Maori `quacks' rather than `traditional' custom. The creation of Maori committees opened the door to self-government only a crack. The power of these institutions was rapidly reduced, and their ability to produce regulations at variance with European dominated local bodies was extremely limited.

The same constraints applied to attempts to make the Department of Native Affairs more attune to Maori customary practices. Under Ngata's influence in the 1920s and 1930s the Department built up working relationships with Maori communities resting on the customary leadership of those communities, without aiming to displace that leadership.[41] Ngata's reliance on personal relationships with key individuals and his attempts to ensure their authority over the Pakeha

[41] G.V. Butterworth and H.R. Young, *Maori Affairs/Nga Take Maori*, Iwi Transition Agency/GP Books, Wellington; Graham Butterworth, *End of and Era. The Departments of*

supervisors of the land development schemes ran foul of the rules of the civil service, reformed in 1912. After a commission of inquiry Ngata resigned on an issue of Cabinet responsibility. It was not until the 1970s that the Department of Maori Affairs was again able to incorporate significant elements of Maori custom in its operations.

From the late nineteenth century settlement of grievances against the Crown, even if those grievances were based on the denial and extinguishment of tribal rights was on the basis on individual rather than tribal entitlements. Landless Natives Acts identified a population not according to custom but according to residency and descent determined in European terms. Later settlements with Tuwharetoa, Te Arawa, Tainui, Taranaki, Tai Tokerau and Tauranga tribes paralleled the practice of the Native Land Court. An injustice to a customary group was acknowledged by the Crown and a trust fund was made available to individuals who were descendant from that group. The right to be a member of the trust was determined by beneficiary roles of individuals. Customary accountability was a matter of informal practice, hindered more than promoted by legislation and regulation.

The very persistence of Maori customary practices has been seen as evidence of Maori failure. As the terminology of Maori policy changed from amalgamation in the nineteenth-century to assimilation and integration in the twentieth, Maori attempts to retain distinct cultural identities were regarded by many Europeans as evidence of Maori incapacity to live in the modern world. Recognition of custom, even to the limited and greatly modified extent acceptable to Pakeha politicians and courts, was therefore reluctant, and usually dependant on some degree of Maori political leverage. The New Zealand courts and parliament have been reluctant to recognise Maori customary law, usually bowing to political pressure, as in the 1840s, or through achieving some legal leverage in the courts, as with fishing rights in the 1980s.

Extinguishment as the cost of recognition

Maori Affairs 1840-1989, Department of Maori Affairs, Wellington, 1989.

Partly because of this reluctance, official recognition has almost always been accompanied by a European demand for the extinguishment of customary law as the cost of recognition. Almost every major constitutional, political and legal debate over the nature of aboriginal law in New Zealand which has led to the recognition of Maori customary law developed into institutional or statutory mechanisms for extinguishing custom, or replacing it with something conforming to property or other rights derived from the Crown. Even where institutions were created specifically for Maori purposes, such as the Native Land Court or twentieth century Maori trust boards, they were European institutions, created by statute and subject to administrative review or legislative amendment by government.

Confidence that Maori custom could be extinguished in practice is almost a test of the Crown's preparedness to recognise Maori customary rights. In 1840 recognition of Maori rights to land was linked to a common European belief that Maori had already alienated a very significant proportion of the country's and land and were willing to continue to dispose of land at a rapid rate. When this proved incorrect extreme pressure was placed on governors in New Zealand to repudiate this recognition. Grey was able in the late 1840s again to extend the Crown's recognition of title to the whole country, but only by arguing that Maori were prepared to sell all their rights to land and settle on small Crown reserves. In the competitive tribal environment of the 1840s and 1840s, when conquered and conquerors vied for Crown recognition of their rights, selling land was the only way of having these rights recognised. The Native Land Court was also a mechanism for acknowledging customary rights, but it too did so only to turn those customary interests into a individual title which could be recognised in the European economy. In the 1992 settlement of customary claims to fisheries, the Crown was only prepared to acknowledge rights and settle, on the basis of extinguishing all Maori claims to commercial fisheries - based on Section 88 of the Fisheries Act 1993, aboriginal title, or treaty right.

Law and sovereignty

The British government was forced to accept Maori sovereignty in the treaty and Maori title to New Zealand not because Maori society had the features necessary for such recognition according to the restrictive notions of international law. The acknowledgement that Maori were sovereign peoples and that they had title to all their lands was based primarily on political necessity, both in dealing with humanitarian and missionary opinion in Britain and New Zealand and on the necessity of pacifying Maori themselves. Having made these concessions, however, government officials and the courts were until the 1870s forced to apply European criteria for sovereign societies on Maori, whether they applied or not.

This process is not unique to New Zealand and was equally common in the United States. The features of Maori society that were essential to these elements of recognition were:

- constitutional structures and a system of law;
- a defined territory over which these applied;
- a hierarchical society;
- a patriarchal society;
- the ownership of property; and
- settled agriculture.

Maori customary law did not fall neatly into these European categories. However European officials needed to identify these elements in the Maori world.

It is not difficult to draw an example from the 1840s to illustrate the extent to which these assumptions about tenure, sovereignty and political expediency came into play in the process of recognising Maori customary tenure. In his brief term of office, Governor Hobson was forced to deal with Waikato claims to Taranaki through conquest. Te Wherewhero represented a major tribal influence grouping, living close to the capital, Auckland. Hobson discussed the claims of Taranaki iwi then residing in Wellington using the following terms (with emphasis added):

> It appears to me that the Ngatiawa (Te Atiawa and other Taranaki iwi), who left this district after the fight, and sought for and obtained another locations, where they lived and *cultivated* the soil, and from fear of their enemies did not return, cannot now show any equitable claim to the land they thus abandoned; and having admitted their title at Port Nicholson, by reason of the *occupation and cultivation* of the land there, from the tome of their arrival there from this place up to the time of my decision, I could not, with the slightest regard for consistency in my awards, for one moment entertain any claim of theirs to this district. Had they returned before the sale, and with the consent of their countrymen again *cultivated* the soil, I should have held that they were necessary parties to the sale.[42]

Hobson's sole justification for acknowledging title was cultivation. However, cultivation played a very varying role in Maori land use and Maori customary law involved a variety of different claims, some spiritual, some based on ancestral association, some on a right of discover and others on conquest. None of these were relevant in Hobson's reasoning.

Turning to William Spain's discussion of the same problem, some similar issues arise. Spain also rejected Taranaki claims from Cook Straight to land and upheld the Company's purchase to the extent of 60,000 acres. Spain considered:

> ...whether slaves taken in war, and Natives driven away, and prevented by fear of their conquerors from returning, forfeit their claims to land owned by them previous to such conquest.[43]

Spain maintained that the answer to this was universally no, and that George Clarke, the Protector of Aborigines, had offered to evidence to the contrary. Spain also noted rather testily Clarke's zeal `zeal in advocating the interests of the aborigines'.[44] Spain's reasons for rejecting the claim were only partly based on his reading of custom:

> ...the admission of the right of slaves who had been absent for a long period of years, to return at any time, and claim their right to land that had belonged to them previously to their being taken prisoners of war, and to which before their return, and when they were in slavery, had been sold by the conquerors and resident Natives to third parties, would establish a most dangerous doctrine, calculated to throw doubts upon almost every

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[42] Hobson to Resident Magistrate, New Plymouth, 25 April 1842, BPP, 1846, No. 203, p.70; AJHR, E1, p.16.
[43] Final Award of Commissioner Spain, 31 March 1845, BPP, 8 April 1846; AJHR, 1861, E1, p.16.
[44] Ibid.

> European title to land in this country, not even excepting some of the purchases made by the Crown; would constantly expose every title to be questioned by any returned slave who might assert a former right to the land, let the period be ever so remote; and would prove a source of endless litigation and disagreement between the two races, a result which must soon stop the progress of civilization amongst the Natives, so essential to their amelioration. [45]

The questions of certainty of title and the cultural assimilation of Maori were equally as important to Spain as recognition of cultural practice. Even in recognition of cultural practice Spain was led by European principles of land tenure and sovereignty, at least as much as by Maori practice. Clarke himself was actually far less convinced by the claims of Waikato since they had not sustained their conquest by cultivation and habitation.[46]

Agriculture and customary rights to land

Any attempt to see agriculture as the only Maori economic activity was only possible if a whole range of activities, all essential to Maori rights to land, were ignored. Fishing, birding and other forms of hunting were as essential a part of the Maori economy as planting crops. To the extent that these activities were relied upon as evidence of rights to land, they were no less important than agriculture. In the 1840s, however, under the intellectual influence of Vattel and in the New Zealand Company's interest, agriculture was the only economic activity on which rights were acknowledged.

When negotiating for the purchase of the South Island Europeans just could not

of the sale deeds, Maori and Crown officials had very different views of what this title actually meant. Through the prices they were prepared to pay for the land and the size of the reserves that were created, Europeans were able to ensure that legal recognition did not compromise the cultural perception of Maori title as being limited indeed. As H.T. Kemp explain to Governor Eyre in 1848:

> ... I have been particularly careful in my interviews with the Natives, to impress upon them the absurdity of laying claims to large & unoccupied districts, a circumstance however, which could not remove from their minds the belief that they, & they alone, were the Proprietors of the land. I would further submit that it is ... impossible to define, & and difficult for the Natives to understand, what are the lands to which they may be supposed to have a valid claim ...[47]

Since Ngai Tahu were, as far as Kemp was concerned, prepared to sell all their interests and no other tribe had any claim, then debating the nature of Maori customary title was an unnecessary academic debate. Only those with long settlers with long experience of the nature of Maori tenure accepted Maori claims to territory more in tune with the complexities of Maori custom.

It was not really until the later 1850 and 1860s that the idea that Maori owned the land as a whole was grudgingly accepted in practice, although the Pakeha belief that Maori did not really own wilderness lands persisted, and is even evident in the present. In the Native Land Court evidence of eel weirs, rat runs, fisheries, and hunting grounds were all accepted as evidence of occupation against other Maori. The right to take lands not being utilised for agriculture remained a major justification for opening up Maori lands for settlement at the turn of the century, by compulsion if necessary.

Custom and the Alienation of Maori title

Most debates over customary rights centred on whose rights to land should be recognised and whose denied. Hobson, under instruction from Normanby,

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[47] Kemp to Eyre, 22 June 1848, L9 pp.438-449.

established the office of Protector of Aborigines and appointed the missionary George Clarke to the position. The office attempted to reconcile two incompatible objectives, to protect Maori interests and to supervise the purchase of land by the Crown. The protectors had first to identify who had ownership to the land under Maori custom before it could purchased. Clarke himself would find these two aims irreconcilable. Clarke, and many of the sub-protectors who were appointed, had a good understanding of Maori language and custom and were as able as any Europeans to understand the complexities of tenure and the variety of Maori interests which had to be taken into account. One of the best accounts of how diligent and exhaustive such inquires and negotiations could be is given by Edward Shortland in 1843 from his travels in the South Island.[48]

While European observers were separated from Maori by language and culture, by the mid-1840s there were many people who had some grasp of major aspects of Maori land tenure. The various opinions on Maori land tenure collected from the 1840s to the 1860s show an extremely complicated system of rights based on discovery, spiritual association, descent, conquest, land, cultivation and hunting rights and so on. There was general agreement that customary title extended to the whole of the country.[49] It was also accepted that whatever individual title to land existed, it was a usufruct, and that a right to alienate could only exist in the tribe.

The 1856 Board of Inquiry into Native Land Tenure also stressed the complicated nature of land ownership, overlapping and competing claims, and the complications of intermarriage on claims to lands through descent. The Board identified a number of major issues in establishing the limits of title:

- inheritance by the female line and intermarriage between tribes leading to claims of ownership rights from more than one tribe;

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[48] Edward Shortland, *The Southern Districts of New Zealand: A Journal with Passing Notices of the Aborigines*, Longman, London, 1851.
[49] Sometimes the South Island is given as a possible exception, but not by those who were familiar with Te Waipounamu and its iwi.

- gifting of land to others;
- compensation in land for a wrong done another tribe;
- the lack of any more than a usufruct in the chiefs; and
- the new status of returned slaves following the introduction of Christianity.

Such a complicated system of land ownership as illustrated by these opinions provided real problems for a government intent on extinguishing Maori title in favour of colonisation. Slow and painstaking investigation did not transfer much land, and settler impatience with the Protectorate was such that Clarke was burned in effigy, along with the hapless Governor FitzRoy in 1845.[50] Most New Zealand Company settlers themselves rejected the idea that Maori possessed any rights to land. Indigenous New Zealander were regarded as barbarous, a threat to 'civilised colonists' without their own law and beyond the normal protection of British law. Grey's abolition of the Protectorate and his iteration of a series of trumped up charges against the protectors was a popular move in the growing settler communities.

For government, the problem remained, how to recognise Maori customary ownership in order to purchase land, without getting drawn into a never ending process of buying off everyone who has a claim? What was to be done if some of those with rights refused to sell?

Under New Zealand Company urging and drawing on a reading of Vattel and Arnold, the Colonial Office response was to deny Maori customary rights to land beyond habitations and cultivations. The 1846 Royal Instructions made it clear that Grey was to admit no new title to land by Maori other than that to their cultivations and villages. Many Maori and humanitarians saw this rightly as a repudiation of the Treaty, but the Colonial Secretary, then argued that the Treaty and his instructions were not in conflict. The Treaty had guaranteed Maori rights to land, but these did not extend to waste land, to which Maori had no legitimate claim. It was not the legal recognition of Maori title by the Supreme Court in *R*.

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[50] A.H. McLintock, *Crown Colony in New Zealand*, Government Printer, Wellington, p. 189.

v. *Symonds* which ensured that aboriginal title was recognised to the whole of New Zealand in practice, but a combination of political pressure by Maori and their supporters and creative expediency in Grey's land purchase policies.

While convenient to the New Zealand Company, the 1846 Royal Instructions remained a dead letter in New Zealand, where heavily armed and numerous Maori asserted a more all-embracing ownership of the county's territory. George Grey attempted a temporary respite by a policy which appeared successful in the South Island of purchasing very large blocks of land, often millions of acres, from a number of key tribes, and then settling the tribes themselves on small reserves. In this way Grey was able to buy out customary interests without specifying exactly what those interests were, or where they lay. Because many of these tribes were small and quickly overwhelmed by colonists, Maori complaints about this system of acquisition were ignored.

In land purchases undertaken during this Crown purchase period, before the 1865 waiver of pre-emption brought in by the Native Land Act of that year, there was an inevitable emphasis on rights gained by conquest, particularly rights gained by recent conquest. There were sound political reasons for this, the occupying forces were still present and as able to assert their interests against the Queen as against those they had driven off or assimilated. At the Wairau in 1843 it was Ngati Toa and Te Atiawa whose rights were asserted by force against the New Zealand Company. Ngati Toa's rights to the Wairau were recognised by Spain and then purchased by Grey in 1847. Of the other tribes with an interest in the area, nothing was done to recognise and appease their interests until 1853 and after.

Crown purchase policy in the 1840s, after the more principled period of the Protectorate, was essentially pragmatic. Title was recognised in those who were most able to assert it, or were most able to deliver it to the Crown. If this failed then those with other rights were recognised. By dealing with the most powerful tribes first, title to the land involved was inevitably compromised for the others.

What followed could be seen more as a process of paying compensation for rights already lost than as sales.

After Grey's departure in 1853, the difficulties of acquiring land in the more populous North Island placed more pressure on land purchase agents more precisely to identify the customary rights involved. Conflict over previous purchases and Maori resistance to sales renewed the need for a practical assessment of the nature of Maori customary tenure, so that an increasing number of conflicts over title and alienation could be resolved. Many of these conflicts led to hostilities between tribes where the government's powers to intervene just did not exist. Any suggestion that it was the demand for land which fostered these disputes was readily rejected. In discussing problems over land at the Kohimarama Conference in 1860, Donald McLean complained that current disputes were not the fault of Crown purchasing policy but extended from a deficiency within Maori customary law.

> It was true, various customs relating to Native Tenure existed, but these were not in any way permanent; and the endless complications of such customs were eventually resolved into the law of might....The European has a law to guide him on this subject; the Native had no well-defined law...

McLean argued that Maori custom had to be `simplified' so that Maori could leave the land they inherit in the quiet and undisturbed possession of their children'.[51] It was a self-serving argument. The test of a good system of recognising Maori customary interests in land for government was not accuracy or even fairness, but ease with which it assisted land transfer. By the early 1860s various government officials were leaning towards the establishment of a court which would determine Maori rights according to custom, prior to the awarding of a title.

The Native Land Court and Customary Tenure

[51] AJHR, 1861, E3, p.3.

For well over a century the Maori Land Court has been the only Crown institution with power to determine Maori customary rights to land. Its records include the testimony of thousands of Maori for every tribal group in the country. The Maori Land Court Minute Books are an extremely rich source of tribal whakapapa and debate. The authority of these Maori voices are often used to support contemporary discussions about customary law. Using these sources effectively requires an understanding of the reasons for which they were created. The Native Land Court was far from a neutral agency called into being to recognise Maori customary law. It was established to continue the process of land acquisition stalled by Maori resistance in the late 1850s at a time when the colonial government had with military force successfully contained the primary challenges to its native policy.

Any examination of the way the Court interpreted custom needs to take into account some key issues:

- its role as a means of extinguishing customary title;
- its role in encouraging individual rather than group rights;
- as a catalyst for the alienation of Maori land;
- as an instrument for the codification of Maori custom;
- the influence of European thinking on the universal nature of custom in tribal societies.

The Native Land Act 1862 established the first experiment in a Native Land Court. It investigated few titles before its repeal by the Native Land Act 1865. The accompanying Native Rights Act 1865 made it clear that in all matters except land there would be no recourse to Maori custom. Pre-emption was also waived. The Court was to investigate titles to land according to 'native custom'. However, the titles it awarded were to individuals and until 1867 no more that 10 owners could be awarded individual interests in blocks less that 5000 acres. After 1867 the names of those with an interest in the block other than the no more than 10 owners, had their names recorded on the back of the certificate.

Chief Judge Francis Dart Fenton steadfastly refused to add additional names to the title. Blocks larger than 5000 acres could be awarded to tribes, but this was done very rarely indeed.[52]

The legislation was explicitly designed to wrest the power to determine custom from Maori themselves. European judges would make final decisions about the nature of customary title to land, according to principles that recognised the overall well-being of society. While there was provision for native assessors to assist judges, they appear to have had little influence on the reasoning of the court. It is little wonder that decisions were often contradictory and confusing, given the power European judges were given to determine custom and in many cases their lack of relevant experience in the area. Chief Judge Fenton's domination of the Court created a fiction of consistency and finality, through establishing a number of major precedents, including the interpretation of succession and the 1840 rule. Fenton saw the Court as creating a Maori common law:

> This Court has no common law to direct its steps by; in fact it has by its own operations to make its common law, and to establish "year books" to which appeal may be made for guidance in deciding all questions which may come before it.

The Court's understanding of take to land

The Court soon established its own precedent, developing rules for excluding groups of claimants in favour of others. While these rules were loosely based on the evidence of custom given in evidence, they were driven as much by policy considerations. The Court's practice is best described in two sources, one which provided the key precedent making cases from the to the late 1870s, *Important Judgments Delivered in the Compensation Court and Native Land Court, 1866-1879*[53], and the more recent text on Maori Land Court Practice, Norman Smith's

[52] A list of blocks awarded by the Court in 1885 recorded only one tribal award, that of the Mahurehure 'tribe' to the 11828 acre Whakatere block in 1867, AJHR, 1885, G6a.
[53] Published under the direction of the Chief Judge of the Native Land Court, Wellington, 1879.

Native Customs and Law Affecting Maori Land.[54] In 1942 Smith was able to give a sense of cohesion to the principles of tenure enunciated by the Court, while accepting that the difficulties of interpreting custom in the nineteenth century had created many inconsistencies. Smith reviewed the various *take* recognised by the Court for claims to land.

1. Discovery (such as when the first canoes arrived).
2. Ancestry or *take tupuna.*
3. Conquest or *take raupatu.*
4. Gift or *take tuku.*[55]

Interpreting the different weights to be given to these *take* allowed for infinite variation. The Court gave primary weight to occupation, determined more as we have seen by `physical evidence' rather than by whakapapa. Possession was the first claim, and the longer that this possession could be claimed prior to 1840 the better.

Alternative interpretations of custom

In this attempt to codify custom, Fenton would channel the Court into quite specific and narrow interpretations, although at times he was prepared to recognise the specific differences as they arose. There were alternative interpretations available that drew on both Maori tradition and their mediation through interpretation for contemporary situations. In 1860 Charles Buller was sent to Kaiapoi to provide a system of subdividing the Kaiapoi reserve. Although Buller pushed a degree of individualism that went well beyond the tribe's wishes, their approach was different in key respects from that later applied by the Native Land Court. To reflect Kaiapoi's relationship with a number of Ngai Tahu hapu the reserve was divided into hapu areas. Manuhiri who had been resident there for some time were granted land and the grants were democratised. Each individual received the same amount of land. Ngai Tahu

[54] Wellington, 1942.

who did not have customary interests there were also given grants, in the expectation that in other reserves Ngaituahuriri of Kaiapoi would also have interests recognised. When Fenton reviewed later these decisions he rejected them outright, they did not conform to custom as he understood it, and he denied applications to recognised manuhiri interests in awarding title to later reserves.[56] The Tuahiwi example provides an example of how differently custom could have been interpreted.

Individualism

While allowing the Court to determine title according to customary law, the process of investigating title aimed deliberately at undermining collective interests. Much of the process established in 1865 was based on avoiding the difficulties experienced in Crown purchases in the 1850s and particularly in the Waitara purchase. There was to be no place for chiefly veto, as Wiremu Kingi had applied over the Waitara. Individuals would have the power to have their own interests determined and extracted from the tribal estate. These interests could then be traded in the free market. The ability to take lands to the Court was not customary. Any individual could apply to the Court to have title to a block determined. In this way a tribe's customary rights could be transferred to individual titles without the tribe's collective consent. While many tribes actively sought some form of Crown recognition for their collective title they resisted the individualisation of these interests. In the 1880s and 1890s the Rohe Potae and the Urewera would try without success to have tribal and hapu interests determined while resisting individualised title.[57]

Pakeha vision and Maori custom in the Court

In almost all areas of custom there were major differences between the orthodox European understanding of aboriginal rights and the Maori reality. Partly this was because of the different cultural perspectives of the two communities. For some modern scholars, culture creates such an essentially distinct vision, that

[55] Smith, p.49.
[56] Rapaki, *Important Judgments*, pp.27-30.

attempts by Europeans to understand Maori custom are doomed to failure. The descriptions and analysis which result can only be understood with reference to European ways of ordering the universe and can have no basis in the reality of Maori experience. The courts' handling of custom gives some credence to this position. This was not just an unconscious process. In determining the relative interests of different tribes to land, much of the decision making reflected European understandings of `natural law' or belief in a universal experience of progress from tribal to `modern' society. These ideas permeated British thinking about common law and Maori custom.[58] Sir William Martin, a major apologist for aboriginal title, drew distinct parallels between ancient British and Maori custom.

> Englishmen seem often to find a difficulty in apprehending such a condition of things [tribal ancestral links to land]; yet it is, in fact, the natural and normal condition of a primitive society.[59]

Drawing on Sir Francis Palgrave and Henry Pellam, early nineteenth century mediaeval historians, Martin drew parallels between Anglo-Saxon `folcland' and customary title.[60] Palgrave himself saw common ground between ancient German and American Indian custom over the tribal ownership of property.[61] These analogies allowed for cultural misinterpretation of culture. But they were more important for the political message they conveyed: Maori custom had to give way to modern British law, in the same way that British tribal customs had been abandoned. It is argued here that the pattern of interpretation imposed by the Court was determined more by such political and economic considerations than the limitations of cross-cultural understanding.

The treatment of whakapapa by the court

The Court was also able to modify European pre-conceptions to accommodate Maori concepts, although with qualifications. Fenton's attitude to whakapapa is

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[57] John A. Williams, *Politics of the New Zealand Maori: Protest and Co-operation* ; Ward ???
[58] Michael Lobban, *The Common Law and English Jurisprudence*, Clarendon, Oxford, 1991.
[59] 1861, Cited in
[60] Francis Palgrave, *The Rise and Progress of the English Commonwealth. Anglo-Saxon Period*, 2 vols, John Murray, London, 1832 and Henry Hallam, *The Constitutional History of England*, 2 vols, John Murray, London, 1846 (reprinted Garland, New York, 1978).
[61] *The English Commonwealth*, I, 71; on the same page quoted by Martin.

extremely illuminating. Concrete evidence of occupation, land use, conquest or hunting and gathering were preferable to whakapapa in determining which tribe owned the land, but they were acceptable in deciding tribal membership.

> Now it appears to me that, if the Natives generally admit these pedigrees- and themselves largely found on them their right as members of a tribe to join in the tribal estate-it is strictly according to native custom that this court should entertain them as *aids* in discovering the owners of properties; of course; *subject in all cases to the more visible and important facts of occupation and possession* (emphasis added)[62]

Fenton was more accepting than most judges of the veracity of whakapapa, expressing amazement at the accuracy of such detailed accounts of tribal descent and history. European courts with their rejection of hearsay evidence were understandably reluctant to be persuaded by whakapapa, despite having the ability to accept tradition as evidence. Where there was no conflict in the traditional evidence there was little problem, but on what basis did the Court decide that one version was to be accepted against another?

> Such evidence is from its nature necessarily unsatisfactory. It affords scope for the play of imagination, which is too frequently taken advantage of and cannot be submitted to those tests by which the value of the evidence of alleged eye-witnesses may be ascertained. A tradition generally accepted and acted on, and of which the several accounts do not materially differ from one another, may with considerable confidence, be regarded as an authentic record of actual fact. A disputed tradition on the other hand will, in the majority of cases, be entitled to very slight authority.[63]

Chief Judge Seth-Smith's dismissal of oral evidence is significant, because it not only questioned the value of oral traditional evidence, but because when conflicts did arise in this evidence, judges were to rely on `common sense'. Occupation as understood in a European sense, although widened to include the Maori hunting and gathering economy, was the primary evidence of title.

> It seems to me, however, that one unequivocal act of ownership, and *a fortiori*, a series of such acts, is of far more importance in determining on which side the balance of testimony lies, than any amount of traditionary

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[62] *Orakei, Important Judgments Delivered in the Compensation Court and the Native Land Court, 1866-1879*, Published under the direction of the Chief Judge, Native Land Court, 1879, p. 60.
[63] Chief Judge Seth-Smith, Omahu Block, C.J.M.B., vol. 2, p.71, in Smith, p.52.

> [sic] lore that may be brought forward for the purpose of leading the Court to a different conclusion.[64]

Perhaps the custom paper credits judges even with too much sensitivity to the nuances of custom.

> The techniques of oral tradition were rarely understood and led to confusion or inferences of distortion, lying or bad memory. Most especially, the Court did not appreciate the idiom, then customary predilections for synecdoche, where ancestors are used as symbolic of their descendants and posited as living at a later period, retrospectively, where a current hapu is depicted as having always existed, and telescoping, where the outcome of drawn out warfare or migration over generations is posited on having happened in one or two battles or in a single movement.[65]

In practice, Judges in the Court had varying degrees of sympathy and familiarity with oral tradition presented as evidence. Even where Europeans in the nineteenth century began recording such traditions (as they did of European folklore) they often attempting to create linear histories, which were in themselves a substantial departure from the idiom of oral tradition.

Reducing Maori rights to discrete surveyed blocks

Under Hobson and FitzRoy, attempts to purchase Maori land were premised on the idea that tribes could claim title to discrete pieces of land with known and accepted boundaries, and that there was ample `waste land' surplus from Maori use that could be carved off the tribal estate for European settlement. These appeared reasonable assumptions because of European understandings of Maori involvement in the land trade prior to 1840. When applied in practice however, it soon became apparent that this situation was far more complex. Competing and overlapping claims confounded attempts to buy land. Grey's solution was to buy everyone's rights so long as they were prepared to sell them, without if possible defining the external boundaries. Such an idea worked, at least on paper, until the early 1850s, but then became untenable as Maori resistance to sales increased.

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[64] Ibid.
[65] p. 96.

Competition and disputes over title confirmed European views that Maori law was so confusing as to be meaningless. On what authority did one individual or one tribe claim title against another? The lack of consensus in the Maori world made it appear as if there were no definitive answers from Maori customary law. Because of the confused and unresolved consequences of the musket wars, there were rival tribal claims. Much of the appearance of dispute arose, however, because to reduce rights of ownership down to title to a discrete block for the purposes of alienation cut across the customary system of ownership. In pre-European times custom did not have any place for complete transfers of land through some equivalent of sale. Gifts of land, emigration and conquest all allowed for transfer of rights, but never all rights at a specific point in time, unless the people losing them had ceased to exist.

European purchases required clear title to specific surveyed blocks. The most convenient form for conveying land was through surveyed blocks where ownership was certain. The Native Land Acts ensured that this occurred by insisting on survey and by then awarding title to those with `customary claims' recognised by the Court. Such a process was not justified on the basis of custom, but through a universal right to individual private property. Maori taking land through the courts were forced to adopt the fiction that ownership of land was unitary, that lines could be cut through survey which divided owners on one side from owners on another.

This arbitrary division of land into blocks, although a fiction, was not entirely divorced from custom.[66] Pou whenua were used to mark agreed boundaries between groups. Fishing and planting areas could be divided by stakes or makers. Tribes often had whakatauki which described the extent of their territories. But to locate these on the ground in a form of European tenure was to distort some of the most significant aspects of Maori tenure. It was the relationship between people that defined relationships with the land. People

[66] See for instance the classic treatment of land rights in Te Rangi Hiroa, *The Coming of the Maori*, New Plymouth, 1929.

defined their relationships by networks of kinship relationship which were often far from unitary. Communities could define themselves by whakapapa in a variety of different ways depending on circumstances. Because of inter-marriage and alliances groups blended into each other. On the same pieces of land there may be a multitude of different rights, some based on ancient conquest, others on ancient discovery and long time habitations, and others on more recent events. Rights to resources may be quite different from rights to control. While most rights were held by those on the land, many rights could be held from a significant distance away. It is more accurate to regard these rights as overlapping and interconnected networks of interests, rather than the often repeated pyramid of whanau, hapu, iwi.[67] These latter systems did exist, but they were hardly fixed as groups formed an reformed according to circumstances of the time.[68]

The creation of a title in a separate block of land not only divided turned tribal control of the block into individual, transferable interests, it also broke relationship between pieces of land, reducing a tribal estate into a series of unrelated economic commodities. The individual use of resources was a part of the collective right of the tribe, but only a part. By recognising these individual interests as the basis for ownership of the tribe's resources, other aspects of the tribe's political economy was undermined. The Whanganui tribe's relationship with the river, like Ngati Pahuwera's with their section of the Mohaka, went well beyond the cultivations and eel weirs on which the Court awarded title.[69] The overall tribal relationship with these rivers was fragmented by the breaking up of the land alongside the river. In this fragmentation broader spiritual, economic and cultural aspects of customary tenure were denied legal recognition and protection.

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[67] Alan Ward evidence to the Waitangi Tribunal in Wai27, T1.
[68] Angela Ballara, 'The Origins of Ngati Kahungungu', Ph.D. Thesis, Victoria University of Wellington, 1991; 'Maori Land Tenure and Social Organisation', evidence before the Waitangi Tribunal, Wai 201, 1993.
[69] Waitangi Tribunal, *The Mohaka Report*, Brooker and Friend, Wellington, 1992.

Extinguishment of title

For European recogniton of customary the ability permanently to extinguish rights was foremost. To admit to the complexity of such interests, as to a large extent George Clarke and his Protectorate had done, was to mire land purchase in a never ending quest for interests to achieve consent to any purchase. The practice of land purchase from 1847 to 1860 tried to use the power of the state to limit the recognition of rights, with some success. What policy required and the land court provided were final tests of exclusion. The Crown aimed to ensure that once it extended recognition of title to a group of owners, it could proceed to extinguish those rights once and for all, subsequent claims by others that their interests had been ignored.

The need for this was more pressing as the difficulties of purchasing land in the 1850s increased. Negotiations for the purchase of land had been undertaken in the late 1840s and 1850s with discrete groups one at a time.[70] While they were often not the only claimants to the land, their group identify was at least recognised. Donald McLean, the Chief Land Purchase Officer, eventually began negotiating for individual interests from rangatira and then purchasing other interests from other individuals within the tribe. Group recognition gave way to the ignoring of customary group decision making in favour of recognising individual property rights in compliant chiefs and their supporters. By 1860 Maori resistance to these methods included an insistence that these individual rights could not be bought and that a right of veto existed, be it in Wiremu Kingi or Potatau, the Maori King. The Court was able to ignore such questions altogether, issuing title only to those who appeared before it.

Fixing title in time

To maintain a degree of consistency in decision making Fenton found it convenient to set 1840 as the time when customary rights would be determined,

[70] Waitangi Tribunal, *Ngai Tahu Report 1991*, 3 vols, Brooker and Friend, Wellington, 1992, see vol 2.

rather than the date of application before the court. This rule was first established in the notorious Heretaunga investigation in Hawkes Bay.[71] In the *Orakei* decision, Fenton formalised it further. The Court `would recognise no titles to land acquired by intertribal violence since 1840'[72] and furthermore occupation asserted only since 1840 was denied:

> It would be a very dangerous doctrine for this Court to sanction that a title to Native lands can be created by occupation, since the establishment of English sovereignty, and professedly of English law, for we should then be declaring that those tribes who had not broken the law by using force in expelling squatters on their lands, must be deprived "pro tanto" of their rights.[73]

From the `coming of the law' in 1840 titles became fixed. Or more accurately, because of the absence of legal institutions to settle issues of customary title between 1840 and 1862, attempts by Maori to take land by force or by occupation were to be rejected. As MacKay and Scannell commented in 1892 `Native title became petrified'.[74]

This decision while based on a reasonable principle was essentially practical. It allowed for greater consistency because it fixed judges to an analysis of customary rights at a particular point in time. To some extent it also gave a clearer lead to claimants before the court. Eighteen forty was, however, a very unfortunate time to fix forever in concrete the country's customary rights to land. The unsettled consequences of invasion and counter were inevitably refought before the court. A grant of land to one tribe could give substance to an invasion repulsed or reassert rights to territories lost.

One of the simplest ways of illustrating this confusion in through another of the courts arbitrary rules, `the three generations rule'. Maori rights, so the Court determined, could be held dormant for three generations after someone had left the land, or been driven off it. Whether through migration or conquest, this

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[71] Keith Sorrenson first explored this purchase in `The purchase of Maori lands, 1865-1892', MA Thesis, University of Auckland, 1956.
[72] *Orakei*, p.86.
[73] Ibid., p.94.
[74] cited in Smith, p. 53.

offered tribes the opportunity to re-establish rights. Tribes defeated in war were able to return to lands vacated for strategic purposes in the 1830s. The invading forces had in some cases been defeated in others simply been too stretched across the landscape to assert any other form of ownership than that of a raiding party. Rights to such lands were granted to the original tangata whenua. Where some form of occupation was maintained by the invaders at 1840, even it abandoned later, then the Court often rejected the claims of the original owners, as it did in the Chatham Islands. The 1840 rule shut out any opportunity for tribes to reclaim rights under the three generational rule.

Just as problematic was the way that the 1840 rule relegated Maori custom to the past denying its flexibility and the possibility for it to develop. The rule was premised on the assumption that because European law was not available to Maori prior to the Native Land Court, no other law was in operation. The relegation of custom to the past, and to a fixed point of time, at that, was a rejection of the ability of Maori to continue to develop custom to deal with new circumstances. Instead of seeing Maori adoption of elements of European law as part of the vitality of customary law, Europeans saw it as evidence that custom had become debased. In the 1850s, highly intelligent and first hand observers of the King movement, argued that there was a legal vacuum, where custom had broken down but European legal and administrative systems had not been put in place. The Kingitanga's attempts at self-government, its election of a Maori monarch, his councils, courts and police force, were evidence of Maori determination to break away from traditional law and accept European models.

The relegation of Maori customary law to past rather than present practice was more the result of European rather than Maori practice. The failure to recognise the dynamic nature of Maori law and its continual development in the face of changing circumstances has resulted in breaking the continuity between past and present, itself one of the main principles on which custom is founded.

The Maori Land Court as a source of custom

The extend that the Maori land court modified, ignored and codified custom does not mean that its records do not have authenticity. Uncritical use of these records ignores the extent that any particular use of oral tradition had a functional dimension. Evidence presented to the Court was aimed at getting title to land, or more importantly, at ensuring that some other group did not get title. It was the collective history of the group applied at a particular point in time.

There is a need to be mindful of the distorted nature of the written record of Maori Court proceedings. The Minute Books, which record the evidence given before the Court, are one of the main depositories of oral tradition and customary law. As minutes they record the whakapapa recited not in the original Maori but interpreted into English. Perhaps more important, the oral proceedings, the context and the unstated role of other participants are not easily reconstructed. Whakapapa was presented not just to the Judge and Assessor, but to all others assembled. It needed to accommodate others, some who had rival claims, others who had no claim, but on whose land the Court stood. We need to be extremely cautious in taking incidents of custom from these proceedings and elevating them to a rule or precedent.

Maori evidence to the Court was deliberately aimed at achieving the varied agenda of the claimant, principally but far from exclusively to have land rights acknowledged and awarded. In many situations the ultimate issue, as the Custom Paper points out, was not who owned, or who would own the land, but who would be paid for it.[75] Maori had no choice but to accept the transformation of title which resulted. Claimants before the Court could be well aware of the process and the reliance on a Pakeha judge. Once the pattern of judicial decision making was clear, probably before 1870, then evidence was most likely tailored to the Court's understanding of custom. This was particularly true in cases where Maori were represented by counsel. Long before 1865 many rangatira were long experienced in presenting arguments about customary title which were attuned to Pakeha notions of aboriginal title.

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[75] Customary Law Paper, p.96.

Gender

There is one other major area the Court imposed European conceptions of society on Maori and that is in its treatment of women. Colonial society expected Maori leadership to be masculine and tended to impose that in political and economic dealings. Occasionally a more extensive role for women in the Maori world comes through the records, but more likely the silence reflects deficiencies in nineteenth century European perspectives on the place of women. Apart from the general issues of succession, where property was divided equally, where the Court used its discretion in awarding shares, in allocating owners, it tended to prefer male claimants.

Post 1865: the neglect of custom

Up until 1877, perhaps, customary law could still have the potential to be recognised before the courts through the international doctrine of aboriginal law. Following the Prendergast decision Maori recognition of Maori customary law was largely restricted to arguments that Maori customary law *equated* to English common law. This can be seen in Maori attempts to have customary rights recognised to rivers, lakes and foreshores in the twentieth century. The basis of Maori claims to these resources remained the same, Maori law, a continuity of relationships with the resource. But the legal issues, the attempt to gain negotiating leverage to have these rights recognised, based on counsel's submissions, the judgments of the Court, and the basis for any subsequent negotiation with the Crown were rarely based on custom. Agreements over the central North Island Lakes are good examples. The Taupo and Rotorua lakes were subject to legal challenge over their title and rights to fisheries in the 1920s. Maori rights to these lakes were acknowledged, compensation for in the form of an ongoing interest in fishing licenses, paid for loss of these rights and trust boards established to manage this compensation. Title went to the Crown.

By the early 1920s title to the land around the lakes has passed from customary title to Native Land Court title. Because the land surrounding the lakes was still largely in Maori ownership then title to the lake bed, under common law, could be seen as resting in the adjoining land owners. The principle was one of common law not Maori customary law.

In the drawn out attempt of the Whanganui river tribes to claim ownership of their river, there was more attention paid to the nature of Maori customary law. The action was begun in the 1920s and continued until the 1962 decision of the Supreme Court, *In re: the Bed of the Wanganui River*. The Maori Appellate Court was asked to determine the nature Maori customary rights to the river. The Court did attempt to survey a series of customary relationships with the river, but came to the conclusion that these could simply be equated with the English common law principle of *ad medium filae*. Until that point, the Supreme Court had been showing some sign of being prepared to recognise rights based on custom, following the lead of the 1950 Royal Commission on the river. The Court had little choice but to take the narrow common law approach once the Maori Appellate Court, the supposed expert body on Maori custom, had given its advice. The debate was anyway academic as to the river's title, since this had been declared Crown land from 1840 by the Coal Mines Act 1903. Both this decision and the Ninety Mile Beach decision were able to dismiss custom by

defining it entirely in English common law terms.[76] Only since *Te Weehi* v. *Regional Fisheries Officer* has the courts attempted to recognise Maori customary law as distinct from common law rights.

Some omissions

While the topics discussed in the Customary Law Paper focus on many key areas of customary law, there are others which should also be included. Family law needs particular attention in such areas as whanau responsibility of children. This necessary to ensure that the promise of the Children and Young Persons Act 1989 to acknowledge Maori customary can be honoured in practice. Many of the issues identified in the customary law paper have implications for environmental and resource management, another area where Maori customary law has received some statutory recognition. Here aspects of the paper dealing with group formation and with the complex relationship between user rights to resources and overarching tribal claims to the management of resources are particularly pertinent.

Conclusion

The attitudes and policies so far outlined are partly historical, and partly contemporary. Far from disappearing they have persisted into the present in many forms. The pattern of reluctant recognition, followed by legal leverage and a settlement based on extinguishment of customary rights has persisted in the Tainui settlement as well as in the commercial aspects of the Sealord settlement of Maori fishing rights. These attitudes have since the 1970s, however, coexisted with an increasing acceptance that Maori custom should be recognised in order to ensure its survival and to provide Maori determined alternatives to a mono-cultural government and legal system. Parliament's inclusion of specific Maori concepts in legislation, such as kawa, tikanga, and whānua is recognition of the persistence of Maori custom, despite the enduring policy of

[76] *In re the Ninety Mile Beach*, [1963] NZLR 461 (CA).

extinguishment. Clauses giving recognition to the Treaty of Waitangi or its principles, also indirectly involve a recognition of custom since they allows the courts to consider the meaning of such customary concepts as taonga, kainga and rangatiratanga. After 150 years of assuming Maori assimilation or cultural disappearance, policy makers are accepting that reliance on complete and imminent Maori assimilation has been misplaced. The tension, however, remains between these two strands, assimilation and enduring recognition.

Neither are these two streams mutually exclusive. It is possible that Maori customary law can in practice be extinguished by interpretation. Once entered into legislation, as we have seen in the early history of the Maori Land Court, terms can be interpreted in case law with meanings that have little basis in Maori custom, since these concepts are being interpreted by Pakeha counsel and judges. Another, equally difficult issue, is where determinations may be entirely appropriate according to custom for a particular community, but not appropriate according to the custom of another community, even where the facts are similar. While there may be common principles of Maori customary law, their interpretation in different tribal areas may differ considerably.

Maori have every right to be cautious about attempts to recognise customary law. The history of recognition has often been as pernicious as that of denial. Recognition has been a precursor for extinguishing customary law for much of the period since 1840. That this has persisted into the 1990s with the settlement of Maori fisheries claims is unfortunate. The debate over the nature of Maori custom in the 1850s led directly to the Native Land Court, and its codification of customary law. The transfer of resources from Maori to settlers was foremost in Pakeha thinking at the time. While the Maori fisheries settlement managed to shift a substantial resource into Maori ownership, it managed to achieve this by changing customary interests to contemporary property rights compatible with the fisheries management regime introduced by the Fisheries Amendment Act 1986.