Telling the Unknown Story

"Te Kooti Tango Whenua" The Native Land Court 1864 – 1909,
by David V Williams, Huia Publishers, Wellington, 1999

Injustice! Disparity between Maori and Pakeha! Breach of the Treaty! Although the cries are familiar, the stories behind them often remain unknown or ignored. *"Te Kooti tango whenua" The Native Land Court 1864 – 1909* not only tells the story, but also forces a compelling argument nearly one and a half centuries after the cries were first raised. Dr David V Williams attempts not only to offer conclusive evidence for claims relating to the dealings of the Native Land Court, but also drives further for an unarguable conclusion. An independent researcher specialising in legal history relevant to Treaty of Waitangi claims, his detailed academic knowledge of the history of colonial rule[1] allows Williams to conclude that historically, disparities did exist between Maori and Pakeha. That these disparities continue to exist profoundly contradicts the long held view that New Zealand is a country united as one people.

Williams, previously a full-time law teacher at the University of Dar es Salaam, Tanzania, where he obtained his PhD, and presently lecturing part-time at the University of Auckland, was brought up to identify himself as a British subject in a loyal Dominion of the Empire.[2] He now sees himself as a Pakeha citizen of Aotearoa New Zealand.[3] In *Te Kooti tango whenua*, which is commissioned by the Crown Forestry Rental Trust, the author assesses the history of the Native Land Court from the perspective of a partner to the Treaty of Waitangi. Williams defines himself as a "lego-historian",[4] that is, a legally qualified historian. He feeds a collection of events into arguments, underscoring the disparity between Maori and Pakeha. Professor Sir Hugh Kawharu's foreword commends Williams for introducing the vital dimension for understanding the causal connections between government policy, judicial practice and tribal integrity.[5] He warns, however, that while Williams has indicated the direction in which those with grievances orientate, it is up to the claimants themselves to add their own stories.

Contrary to what the title suggests, the book does not restrict itself to the years 1864 to 1909. Williams hopes to influence the way in which grievances are addressed in the future. He begins by explaining the tools used in his study of the Native Land Court, "Treaty jurisprudence". Treaty jurisprudence requires that obligations agreed to in the Treaty of Waitangi apply consistently in both past and future relations between the Crown and Maori; that all dealings undertaken between the parties be judged in consideration of these continuing obligations. The key obligation is that of good faith.

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1 Williams, *Te Kooti tango whenu, The Native Land Court 1864 – 1909* (1999) vi.
2 Ibid v.
3 Ibid.
4 Ibid 8.
5 Ibid v-vii.

The use of Treaty jurisprudence allows the degree of good faith to be gauged regardless of when dealings were undertaken and avoids locking into any one particular point in time. Dimension is contingent on circumstances contemporary to the dealing and allows application of decisions in one period that would not necessarily be appropriate in another. Where, for example, this study shows it would have been prudent under certain circumstances for the Government to relinquish all power to determine Maori land sales, under separate circumstances the Government would be obliged to act to enforce strict control on dispositions. An attack is also launched on the Crown's position for what Williams sees as inconsistency with the guarantees of the Treaty. Williams is critical of the Government as it succumbed to pressure from non-Maori settlers and the Crown to alienate millions of acres of land during the early years of the Native Land Court. Meanwhile, the future interests of Maori were neglected and consultation intentionally avoided.

Williams presents the image of a newly fledged British colony, poised to develop but lacking in expertise; a colonial government with conflicting goals in need of revenue and disgruntled indigenous people faced with an emergent settler population demanding land.

Arising from the close association between the Crown and Native Land Court is a correlation between the alienation of land to the Crown and demand for that land by settler investors and developers. Though often incomplete, statistics provide an illustration in real terms of the quantity of land conveyed from Maori hands into those of the new settlers. Williams examines the Native Land Court's role in the facilitation of the process. He describes how through legislation and direct intervention with Native Land Court dealings the Crown, through the Government, uses the individualisation of land title and innovative rules of succession to deconstruct Maori communal ownership. The Crown is permitted to nibble at, and eventually devour, Maori land resources in systematic colonisation.

The policy to purchase wasteland was stretched to its limits to encompass and validate Crown goals. The Treaty was given a unique and one-sided interpretation in efforts to silence it. Williams develops the claim that the Crown continually failed to meet its obligations under the Treaty, both in contrived interpretation and in disregard of tikanga Maori. He looks under the blanket of paternalistic idealism used to place settlers exclusively on land previously occupied solely by Maori.

The Native Land Court was constructed from the mass of legislation that emerged through the late 1800s and early 1900s. Embedded in that legislation, a number of mechanisms were created that, on their face, appear to be attempts to restrict land sales and preserve remaining areas occupied exclusively by Maori. By running a parallel systematic examination of legislation against land sales figures, Williams evaluates the effectiveness of these mechanisms. Exposed is the intensity and determination of the forces working towards meeting the continuing and increasing demand for new land to be settled. For each mechanism examined, Williams identifies its flaws. In examining the profiles of some of the key judges active during the early days of the Native Land Court, Williams questions the selective enforcement of legislation that occurred. He provides a harsh assessment of the reasoning and

objectives of these individuals.

Williams makes the leap from historian to lego-historian in offering the advice and direction Kawharu speaks of in the Foreword. Purposes for presenting the history are made clear and given meaning in practical application. This is not just a history of colonial rule; it is evidence for, and the basis on which, claims of the aggrieved are substantiated. Within the 15 appendices, Williams provides details on the processes and definitions of certain key terms as they transform and are rewritten in the confusion of legislation passed during the first 45 years of the Native Land Court. His Endnotes provide additional clarification and perspective on much of the evidence incorporated in his argument.

Williams hopes that his study "will assist the Crown to develop a generic policy which acknowledges the injustices caused to Maori by the Native Land Court and establishes numerous claims without the necessity for all of them to be heard by the Tribunal in lengthy and expensive proceedings".[6] Williams seeks to increase the efficiency with which claims are processed. He looks for acceptance of the validity of claims founded in grievances with the Native Land Court. By linking claims to land that passed through the Native Land Court with the Treaty of Waitangi, and by identifying these claims as Treaty issues, Williams looks to acceptance that as breaches of the Treaty the alleged injustices will receive redress. The aim of the book is, therefore, is not only to provide proof of injustice, but also to ensure these injustices are recognised.

This is not a complete and definitive study of the Native Land Court. Rather, Williams is attempting to establish and identify solid ground on which a mode of thinking can be built; a mode of thinking prepared to deal with grievances. The aim is to set a method in which grievances can be documented, presented and addressed by decision-making bodies so that legitimate claims may be heard efficiently. The book, therefore, is not only designed to provide content and support for claims but, by example, set a model on which the claims may be constructed.

Prepared as a tool for claimants and the Crown to facilitate the speedy resolution of grievances relating to the Native Land Court, Kawharu also recommends the book to general readership. Williams has proposed that his book be used to encourage politicians, Crown officials and informed observers of the Waitangi Tribunal process, to consider seriously the impact of the Native Land Court dealings on Maori. He has limited his study to an intense period of New Zealand's history, focusing largely on a single institution, the Native Land Court. By limiting the focus, some detail on events leading to decisions has been sacrificed. Greater discussion of the economic environment, for example, may have revealed some justification for the methods adopted, and incentives behind government policy. Having said this, it is important to remember the purpose of the work. Again, this is not simply an historical study. It is a study into the dealings of the Native Land Court, and the merits of particular decisions become irrelevant when measured against Treaty obligations. It is the Treaty that supplies perspective. By eliminating all but the most necessary detail, Williams

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6 Ibid 7.

has presented a concise history of this explosive period, certainly to the degree that his purposes demand.

The evidence, neither new nor revolutionary on the facts, is such that it does promote reconsideration when held up against Treaty guarantees. Coupled with Treaty obligations, it becomes a significant work suggesting that responsibilities run far deeper than many were aware. The book is a launching ground. Much of what has been presented remains dependent on recognition of the Treaty of Waitangi as a continually binding agreement between Maori and the Crown, with breaches demanding redress.

The title of the book fills one with expectations of new discoveries, something hidden and now unearthed, something that would shatter the standing of the Native Land Court and expose it as a land-grabbing demon. *Te Kooti tango whenua*, the land-taking court, is an exciting title but fails to reveal many new secrets. The Native Land Court comes across as more a victim of the times: New Zealand's embryonic government was struggling to establish itself and was faced with increasing numbers of new settlers. Maori were eager for the new settler trade, and were prepared to part with huge areas of land to bring the market within reach. In between was the Native Land Court, with a scarcity of qualified judges, created to speed the flow of land between willing seller and willing buyer. By examining Native Land Court dealings, however, attention is drawn to the bigger picture and prompts enquiry into government procedure and Crown policy. The workings of the Native Land Court are exposed as just another example of a Treaty breach.

Williams provides a model of how information should be gathered, prepared and presented by claimants. The material orientates its intention to assist the Crown in developing a generic policy acknowledging injustices caused to Maori. More an adjunct to research, the book furnishes a comprehensive collection of salient data on the early years of the Native Land Court. The book is revealing not only in its detail of prominent figures in New Zealand's colonial history, but in the understanding it provides of the struggles, frustration and despair that are played out not only on the battlefields of war, but within the courts of law.

There is, however, a feeling of incompleteness in the book. Williams' enthusiasm and passion colour provoking arguments although they occasionally fall short. As a study, *"Te Kooti tango whenua" The Native Land Court 1864 – 1909* does make welcome sense of the legislative chaos surrounding the formation of the Native Land Court. Williams has courageously questioned significant events in New Zealand's past. Although it is limited as an historical reference, as a guide for both the decision-makers and those seeking redress this book promises to have significant impact on grievance claims associated with early Native Land Court dealings.

Mark Baker

The Environmental Justice Debate

***Environmental Justice And Market Mechanisms: Key Challenges For Environmental Law And Policy*, Edited By Klaus Bosselmann & Benjamin J Richardson, Kluwer Law International, 1999.**

Arising out of the 1998 Environmental Law Conference and hosted by the Auckland University Law Faculty, this book is the first to explore links between the market and environmental justice. The conference attracted 175 law practitioners and academics from the United States, the European Union, Central and Eastern Europe, South Africa, Australia and New Zealand. The collection of articles thus reports on a diverse range of experiences, as these countries try to balance the demands of economic deregulation with environmental justice and determine how concepts of sustainable management and neo-liberal economics may co-exist.

Forty speakers presented at the conference and 20 papers are published. Key themes include:

1. Defining environmental justice;
2. defining market mechanisms;
3. experiences from overseas jurisdictions.

The introductory chapter of Bosselmann and Richardson provides a background to the worldwide economic reforms of the 1990s, which have seen the divergence of the state, the market and the environment. While the state seems further removed from environmental law and policy, the market has acquired a greater role. In the absence of any historic examples to suggest that the market can provide appropriate mechanisms for social justice, it is seen as essential that the state determines the extent to which market mechanisms can be employed to meet environmental needs. Questions regarding how economic instruments should be used to serve the aims of environmental justice are raised, and there is discussion about whether an incentive-based approach may be more effective than a punitive one.

The first chapter stresses that a variety of definitions and approaches toward "environmental justice" and "market mechanisms" exist, complicating the task of resolving the tensions between the two. Governments have different approaches to the questions these concepts raise, and chapters covering experiences in various regions are included. A commonality between the regions is that despite their different approaches, all have been struggling to reconcile their environmental policies between the challenges of deregulation and environmental justice.

Reviewing "Environmental Justice in a Post-Modern World", Dinah Shelton identifies solidarity, or a concern for the well-being of all, as the main challenge for the twenty-first century. She challenges us to extend notions of environmental justice to protect entities other than human beings. Chapters two, three and four all consider

environmental justice. While no universally accepted definition emerges, the fundamental importance of fairness and equity for environmental policy is a common theme.

The book then moves to defining market mechanisms, a discussion that proves equally complex. These sections discuss how economic instruments can be more easily identified and how their use is determined. Eckhart Rehbinder discusses "States Between Economic Deregulation and Environmental Responsibility", and he stresses that all economic instruments are indicative of a form of deregulation or increased reliance on market forces and, therefore, need to be carefully monitored. In his view, the overall success of market mechanisms depends on the extent to which the state maintains control over the implementation of environmental objectives.

Chapters eight and nine are well juxtaposed. Alexandre Kiss argues that globalisation has provoked the emergence of a common concern for humanity, and that international law is the main device by which to protect human rights and the environment. Jane Kelsey, on the other hand, is sceptical about whether legal instruments are a means by which economic globalisation can be controlled. She argues that there is little room in the current climate of trade deregulation and investment liberalisation for social and environmental justice, yet at the same time the current regime is becoming unsustainable. In her view, international instruments are monopolised by Western governments and ideologies and provide little justice for those opposing this paradigm.

The third section looks at comparative perspectives from overseas jurisdictions. Here, environmental law scholars discuss the importance of environmental justice and market mechanisms in individual states. This section has four parts:

1. Australia and New Zealand;
2. Europe;
3. the United States;
4. transitional economies.

Benjamin Richardson discusses ways in which market mechanisms have transformed the regulatory space of environmental law in New Zealand; the regulatory space being the institutions and processes by which environmental policies are developed and executed. It is within these spaces that environmental justice considerations are permeated. The privatisation of environmental law signifies the erosion of public decision processes under the influence of commercial imperatives. The chapter discusses the tension that is prevalent in New Zealand between economic deregulation and the maintenance of our current resource management system, and considers the effectiveness of voluntary agreements as a means of addressing environmental concerns. It is Richardson's view that the current environmental law system in New Zealand is not sustainable, and that reforms are necessary to integrate ecological principles into the core structures of economic policy. At the same time, New Zealand needs to explore ways of bringing matters currently shrouded from public

discourse into the open to allow discussion on the ethical issues they raise. Richardson stresses the need to establish a framework for rational dialogue, mutual education and joint problem-solving.

The final part of this section that discusses the situation in transitional economies is particularly interesting. It is not surprising that the environment is not given prominence in most struggling economies. However, the experiences of developing nations are still varied. The Russian experience suggests that establishing the rule of law and a related regulatory framework are necessary before economic instruments promoting sustainable development could be introduced. In South Africa, however, although the constitutional and legal framework for environmental protection exists, with social justice still being the main concern, there is little room at present for a systematic application of market mechanisms in environmental policy.

The book provokes thought on what the state role should be in facilitating a change from the currently unsustainable system to a more sustainable one. It is an invaluable resource for practitioners and students alike, as the information is presented in a highly accessible manner. It provides good background to the environmental justice debate, varied opinions and analysis, and leaves the reader considering the future of environmental law.

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