Custom Law: Address to the New Zealand Society for Legal and Social Philosophy

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It is not a simple task to introduce the laws of the Maori to a non-Maori audience. There is no text or study that casts our knowledge of Maori custom in jurisprudential terms.

Norman Smith's important text on Maori land law should be distinguished.[1] It is primarily concerned with the statute laws that replaced customary tenure. An early chapter describes original determination of Native title, purportedly according to custom, but there are doubts about the anthropological accuracy of the early judicial opinion on which that chapter relies. There was no science of anthropology in those days and the Native Land Court decisions may be seen as representing a euro-centric view of Maori evidence. The evidence itself may have been tailored to suit certain pre-conceptions, such as those in the opinions on Maori tenure collated by the colonial administration in the 1850s.

Most especially it may fairly be said that there was little willingness to consider the belief system by which the Maori evidence should properly have been assessed. It is the beliefs and values of a society that furnish its legal norms.

No criticism of the early judges is intended. It may be thought, for example, that Chief Justice Martin approached the topic with sensitivity.

Even for a judge of the Maori Land Court it is not simple task to introduce Maori custom law. As a judge of that court for the last 20 years, I can say that in that time there has been no course of instruction or training for the judges on customary tenure and ancestral law.

The general courts have assumed, however, that the judges of the Maori Land Court have a specialist knowledge of Maori custom. This is probably because there is

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1 *Maori Land Law* (AH & AW Reed, Wellington, 1960).

statutory provision for the courts to state a case to the Maori Appellate Court when a question of custom arises. In fact, however, the specialist knowledge that the Maori Land Court possesses, is not a knowledge of custom but of the complex laws introduced to replace customary tenure. Some knowledge of customary preference inevitably rubs off through the judges' long association with Maori people; but the experience so gained is anecdotal and not founded in scholarship.

It is proposed to discuss the need for a study of custom law, past constraints on research in this area and the tenets on which such a study may be founded.

Knowledge of the laws of the Maori may be more important now than it was at the beginning of the century. The policy then was to incorporate Maori into a legal system that was partly autochthonous but founded mainly on English norms. Under the earlier amalgamation scheme Aboriginal law would have ceased to be relevant.

The current wisdom is to allow more consideration of cultural difference. Some knowledge of Maori law today would assist the judges of the Planning Tribunal, Family Court and the lawyers that service them. There are also more provisions for customary preference in Maori land law; in the Waitangi Tribunal it is essential to an understanding of historic issues of cultural conflict.

Maori issues are also more regularly raised in the courts generally. Tribal litigants now feature in many cases. A comprehension of tribal structures alone would assist in understanding the issues and the status of various parties.

Those who draft laws or promote Maori policy should have a particular interest in the subject. Currently there are vexed issues of representation, tribal structure, Government services delivery to Maori groups and the apportionment of claims settlement benefits that might not be satisfactorily resolved without more informed lego-anthropological opinions.

I THERE HAVE BEEN CONSTRAINTS ON THE DEVELOPMENT OF A CUSTOM LAW STUDY

One is the opinion that the existence of a custom, if it needs to be established, is discoverable by expert evidence. While logical in terms, it is the experience of the Waitangi Tribunal that reliance on expert witnesses in ad hoc situations can produce uneven results. The presentation of generalised opinions by Maori elders and scholars not experienced in legal analysis also leaves the ultimate interpretation to untrained adjudicators without access to a coherent lego-anthropological text.

An historic constraint on the discovery of Maori law has been the opinion that Maori did not have one. Studies in such places as Africa, Asia and New Guinea, and the transactions of the Commission on Folklore and Legal Pluralism, have changed international thinking. In New Zealand however, scholars may be over-awed by the complexity of Native Land laws, by the Native Land Court opinion that the Maori law was 'might is right' and weighty views from the general courts at about the turn of the century which did not conceive of any Maori polity or law. Modern scholarship

suggests that the question of whether Maori behavioural norms constituted law is mainly a question of definition. Maori speaking English in the early 19th century appear generally to have referred to "our laws", not "our customs".

A further constraint has been the presentation of custom as static and therefore, as past law. In reality, custom is no less static than the ever changing society it represents. The vibrancy of the common law is not diminished by its customary origins.

Contributing to the opinion that customary law is static, has been the association of Maori law with a religious belief system. The Maori divinity, however, does not reduce the significance of the resultant value system as the determiner of preferred Maori action.

Finally, the study of Maori law may be associated in people's minds with proposals for tribal courts or a separate judicial system. The issues should be seen as separate. In addressing custom law it is not necessary to consider the wisdom or otherwise of a unitary judicial structure.

II CUSTOM LAW REFLECTS THE SOCIAL AND POLITICAL ORDER OF THE PEOPLE

Maori currently present the iwi as the main governing unit - the iwi being a confederation of peoples, claiming authority over a prescribed area and possessed of corporate functions exercised through a central organ. Certain enactments establishing runanga provide examples of this. It appears, however, that the modern iwi arrangement represents the latest stage in a history of tribal restructuring. I doubt it should be seen, or represented, as having always existed.

The historical record is that previously the land was occupied by autonomous hapu - or smaller bands bound by descent from common ancestors for whom the groups were named. These regularly divided or regrouped, adopting new titles demonstrative of their changing identities.

In those days, unity depended on the leadership of rangatira and the maintenance of alliances with local hapu and distant iwi on the basis of ancient ancestral links reinforced by subsequent marriages. It may also be considered that until they reached the zenith of their ascendencies, the rangatira had need to be responsive to the will of their constituents.

In brief hapu, hapu names and allegiances changed regularly, hapu divided or fused according to the demands of the day and the extent to which individual leaders could draw several hapu about them. Some ancient names survived, the names of recent leaders in the genealogical tree were introduced and some old names were subsequently resurrected.

The hapu were also so mobile, and genealogies were so maintained, that the hapu of one place could link to others throughout the main islands of New Zealand.

From the turn of the 19th century and through to today, the need became evident for larger and more regular units according to regions. This has been attributed to the early 19th century escalation in local warfare through population growth and pressure on resources, to the later spread of warfare with fighting between regions, to the aggregation of hapu for defence, to competition between districts for trade with Europeans and to a subsequent united stand against land sales and the encroachment of a colonial authority.

As a result, in the latter part of the last century, and increasingly in this, iwi groups emerged as regular confederations of the related hapu of a region and new leaderships were seen to exist at local and regional levels. "Iwi" meant simply, "the people".

There remained problems over political boundaries. In practice they extended only so far as allegiance to the new combinations was acknowledged by the communities in several locations. This left uncertain edges and pockets of independent hapu within larger confederation territories.

Without this comprehension of the changing structure of Maori society we may not understand why it is that new groups continue to emerge on the Maori scene, or why older groups are resurrected; nor can we formulate adequate policies to settle territoriality or to accommodate the twin desires for local autonomy and regional representation. Some lack of understanding may account for the current dissension amongst Maori groups. The tension between local autonomy and regional representation may also explain the unusually high level of accountability that Maori require of their leaders.

III A STUDY OF THE LAND TENURE IS MORE LIKELY TO REVEAL A SUBSTANTIAL RELIGIOUS PHILOSOPHY

It may reveal that Maori saw themselves not as masters of the environment but as members of it. The environment owed its origins to the union of Rangi, the sky, and Papatuanuku, the earth mother, and the activities of their descendant deities who control all natural resources and phenomena. The Maori forebears are siblings to these deities. Maori thus relate by whakapapa (genealogy) to all life forms and natural resources. There are whakapapa for fish and animal species just as there are for people. The use of a resource, therefore, required permission from the associated deity. In this order, all things were seen to come from the gods and the ancestors as recorded in whakapapa.

Also in this world-view, Maori were the land. It was part of them by direct descent from the earth mother. Land, or whenua, is represented in the whenua, or placenta, of women. Maori are born out of the whenua. There are whakapapa today that trace living persons from Papatuanuku.

The whenua, or land, thus passes through the whenua, or placenta. The right to the land in an area is by descent from the gods and the original ancestors of that place. Tangata whenua were thus the descendants of the original people of a particular locality.

Migrants, conquerors and strangers came into the land by marrying into the local people. The seed was thus sown in the whenua. It is not part of Maori tradition that

canoe voyagers arrived in 1350 to wipe out the earlier inhabitants. The consistent evidence to the Waitangi Tribunal is that mana whenua derived from the original people. The Tribunal has genealogies of 23 generations of antecedents before the main canoes. From the canoes, it is said, came mana tangata, or political power and authority. The incorporation of migrants into pre-existing communities has been seen as a Pacific trait.

It appears the right to land was also established in other ways. The early voyager Kupe sacrificed his son at a spring, believed to surface at several places, to establish land rights for those from Hawaiiki.

The land, people and life forms were thought to be governed by cycles. By the law of utu, what is given is returned or that taken is retrieved. "Utu" was not just "revenge", as popularly portrayed, it was a mechanism for the maintenance of harmony and balance. Survival depended on the maintenance of the cycles of nature, and on the maintenance of cycles in human relationships. The latter is illustrated in the careful Maori attention to reciprocal obligations, the maintenance of bloodlinks through arranged marriages and the institution of gift exchange.

There was a continuing relationship between land, environment, people, gods, ancestors and spirits. On marae, the dead are addressed as with the living.

The land was thus named for ancestors and may be seen today as an ancestral title. Ancestral place names were important signifiers of authority and identity. They recounted the relationship of the group to their land, as expressed in stories and songs.

Ancestral names could not be obliterated or ancestral fires extinguished. A displaced group did not cease to maintain its connection to the land or lose its own nomenclatures for the sacred sites and places.

The land was seen as shared between the dead, the living and the unborn. Current generations were as caretakers, holding on behalf of the ancestors for the generations still to come.

Accordingly, save for violence, land did not pass from the bloodline.

There were at least two classes of land rights - the right of the community associated with the land, and the use rights of individuals or families.

The land in an area belonged to the whole of the associated community. The right to use particular resources, at prescribed times for specific purposes, was distributed to individuals and individual families. A personal use right was lost by neglect or abandonment, but the community right necessarily remained.

Different persons held alternative rights to the same resource at different times, but use rights could change when groups relocated.

The community right may be seen as political, the right to adjust or control resource users, or the right to admit outsiders. Decisions on these matters were usually represented through rangatira.

There were other types of community rights. An individual living away from the community, for example, had certain rights to resume residence, and had important symbolic rights of association. These could confer speaking rights for example.

The use of resources were subject to the performance of obligations to the community. All had to contribute to the common good and assist in meeting the group's responsibilities to other hapu. This required participation in collective undertakings, assistance in making or repaying gifts, hosting visitors, succouring migrants and refugees, or participation in war. People were valued for their contribution to the community.

The use of land resources by outsiders was, likewise, conditional upon the maintenance of obligations to the community.

There was, consequentially, no concept of land sales, and no concept that an individual could use land freed of specific and continuing obligations to the associated ancestral group.

There was no division of the land to parcels according to metes and bounds, save for the definition of resource areas. The concept that the total use rights in a prescribed land parcel could accrue for the exclusive benefit of a few defined owners was foreign.

Absolute alienations were therefore not only unknown, but would have been contrary to the religion.

When the import of a land sale sunk in, the opinion nonetheless survived that the ancestral title remained, though occupation was denied.

Some past decisions of the Planning Tribunal illustrate the cultural gap that became apparent when, in the 1970s, the New Zealand Maori Council persuaded a Select Committee on a Town and Country Planning Amendment Bill, that planners ought properly to consider the relationship of Maori people to their ancestral lands. This proposal found expression in section 3(1)(g) of the principal Act. It was initially thought that the section must refer to the status of the land, not the relationship between the land and people, and ancestral land was thought to mean cemeteries.

IV CONCLUSION

Those, and other, aspects of customary society and philosophy not touched on in this paper, provided the framework for a distinctive set of values or norms that collectively constituted the Maori legal order. From the concept of whanaungatanga, or kinship, came several principles that assume the primacy of kinship bonds in determining personal action, responsibility, mana (or status and self-esteem) and social

rights, including the right of individuals to validate their identity within a chosen descent group.

From the law of utu came responsibilities for the regular performance of social obligations; and from the principles of manaakitanga came the need to respect and care for others, or conversely, not to advantage one self to others' detriment.

In all, the Maori legal order was values oriented - not rules based. So strongly was adherence to ancestral precedent ingrained, that disputes could be settled without the mediation of an external agency. The adherence to principles, not rules, also enabled change while maintaining cultural integrity, without the need for a superordinate authority to enact amendments. Custom does not, therefore, appear to have been lacking for vitality and flexibility. Inconvenient precedent could simply be treated as irrelevant, or unrelated to current needs, but precedent nonetheless was regularly drawn upon to determine appropriate action. Accordingly, while custom has usually been posited as finite law that has always existed, in reality customary policy was dynamic and receptive to change, but change was effected with adherence to those fundamental principles and beliefs that Maori considered appropriate to govern the relationships between persons, peoples and the environment.

As was said at the beginning, a comprehensive study of Maori law as a science has yet to be undertaken, but I suspect a careful student in this area would be rewarded with new insights on law and society.