COMMENTARY ON CHIEF JUDGE DURIE'S CUSTOM LAW PAPER FROM THE PERSPECTIVE OF A PAKEHA POLITICAL SCIENTIST*

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i. CONCEPTS OF LAW

The test for the existence of tikanga is regularity sufficient to provoke a predictable response whereas, for Pakeha, law also requires a specified form of institutional recognition, eg by parliamentary statute or judicial decision, and a specified form of institutional enforcement, eg by police and courts. Similarly, the source of tikanga is social acceptance whereas the source of Pakeha law is institutional, through parliament and the courts.

Comment

There are problems in defining 'law'. Pakeha 'law' tends to be defined in institutional terms, as the rules or norms enforced by the legal system. But societies differ in the extent to which they have legal institutions differentiated from the rest of society. In Maori society, there appear to be no clearly recognisable legal institutions specialising in social norm enforcement and distinct from other institutions of social control, eg the family and the political community as a whole. In Pakeha society, on the other hand, there is a distinct legal system, associated with courts, police, prisons and under the authority of Parliament. Norm enforcement is shared between the legal system and other institutions in a pluralist society, such as families, schools, workplaces, churches, clubs and so on. In this respect, if 'law' is defined institutionally as those norms which are enforced by specialised legal institutions, there is no Maori equivalent for law, as such. Tikanga (custom law) covers all social norms and is wider in connotation than the Pakeha 'law'.

On the other hand, to describe Maori society as 'lawless' is clearly mistaken if that is taken to mean that Maori society was anarchic or without order. Maori were certainly law-abiding (within the normal limits of human weakness and selfishness

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* References to the Chief Judge's paper are cited as, eg, 'D 21'; cross-references within the commentary are cited as, eg, 'p 21'.

which provide the rationale for law in the first place). However, law is now being understood more broadly in terms of social order, as equivalent to the norms regularly and predictably enforced in a society (ie as tikanga or custom). In this sense, the law enforced by the New Zealand legal system is only one aspect of Pakeha law understood as Pakeha custom or tikanga Pakeha.

It is important to recall this broader meaning of law, not only as a means of understanding tikanga Maori but also in order to recall the role of law and the legal system in Pakeha society. Though law may be defined institutionally, as the rules and norms enforced by a distinguishable the legal system, its function is broader, to enforce public order and social norms. All law, Pakeha as well as Maori, arises out of social norms and the need to enforce these norms within society. The ultimate source of Pakeha law is not the courts or statutes but the social values reflected by Parliament in statutes and by judges in their decisions. This connection is most visible historically, in the origins of the English common law (D 4), but it continues into the present. It may be less obvious to legal practitioners who operate within the legal system. For them, the source of law is usually statute and written precedent. They are not encouraged to consult the community's values directly, as would Maori elders operating tikanga Maori. However, coincidence between the substance of the law and community values is the main reason for public acceptance of the law's authority and is indeed 'no coincidence', being the product of political enactment and judicial adjustment. Moreover, there are occasions when the legal system does recognise the need directly to reflect community views, for instance in extending precedents to fit new situations, in sentencing, in the use of juries and so on.

Thus, while the institutional definition of Pakeha and New Zealand law is to be retained as the definition in most common currency, we need to remember that the law, institutionally understood, derives its purpose and authority from the fact that it incorporates and reinforces values shared in the wider community. Given that the New Zealand community includes both Pakeha and Maori with distinctive values it is appropriate that New Zealand law should incorporate tikanga Maori as well as tikanga Pakeha.

In the absence of a distinctive legal system, Maori expected the main functions Pakeha associate with law enforcement to be performed by the community and its members. Thus, the initiation of proceedings was in the hands of aggrieved parties or

victims and their families, as was the enforcement of remedies and penalties (see p 18). The determination of decisions was in the hands of the community as a whole or its leaders. From this point of view, the whole role of the police as specialised law enforcers is anomalous - they have no counterpart in Maori society. The judiciary, too, as specialised interpreters and applicators of the community's laws, do not have direct parallels in Maori society. Certainly, Maori often made use of skilled adjudicators in the settling of disputes but such people played the role of mediators between disputing parties (cf D 55, 75) rather than that of determiners or enforcers of the law. The body which determined the law and sanctioned its enforcement was the community itself, not any judicial specialist.

Admittedly, Maori kaumatua and rangatira were often seen to represent and personify their groups as a whole (see p 22). They could therefore be expected to pronounce justice on behalf of the community as a whole. In this respect, they are similar to judges who claim to be embodying the community when they make their judicial decisions and one might expect present-day Maori to recognise judges as such embodiments and therefore to extend their decisions respect. No doubt this happens. But the specialised nature of the legal system and the judiciary separate them from Maori experience. Maori were and are much more at home with justice being pronounced by community leaders, such as kaumatua and rangatira. They would probably accept Pakeha justice from the local mayor or the Prime Minister, or even better from the Governor-General or the Queen, more readily than from a judge. The nearest parallel in the history of English/New Zealand law is the use of local dignitaries as lay magistrates. There may be a case for resuscitating their use in dealing with Maori offenders. The relevant principle of customary law is that the community determines the law in general and its application to particular cases. In so far as Maori offenders are dealt with by Maori authorities under principles of customary law, then judicial decisions need to be delegated to the community or its leaders. Legal experts could play the role of expert advisers but they should not be allowed the final decision. By way of contrast, while the Pakeha practice may be to let a jury of ordinary citizens determine the facts but not the law, the Maori point of view would be to let a jury determine both the facts *and* the law.

We note that under Pakeha assumptions, the law, institutionally defined, does not incorporate all social norms nor does the legal system set it itself up as the sole enforcer of social values. The legal system is one institution of control among many

and it remains an open question which aspects of tikanga, Pakeha or Maori, should be covered by it. One of the distinguishing marks of the western liberal tradition has been to attempt to set limits to the sphere of law and therefore to the authority of the state. Citizens are seen as having the right to follow their own conception of the good within limits set by the need to respect the similar rights of others. This requires a distinction between law and morality - in a liberal society, the law covers a part of morality but not all of morality. Not all sins are crimes, as was argued during the Hart/Devlin debate on law and morality which accompanied the liberalisation of laws on homosexuality and prostitution. This distinction appears to be not easily made in Maori terms where all sins, in principle at least, are also crimes. We can expect therefore that the legal application of tikanga Maori could lead to greater incursion of the state or state-based authorities into the lives of citizens than might be acceptable to Pakeha. This may be a price which Maori are prepared to pay in order to protect the values of their culture and to avoid what they may perceive as the demoralising permissiveness of Pakeha societies. At the same time, it may be necessary to recognise that many Maori now value liberal values more than in their original society and that they will expect greater respect for individual freedom than appears to have been evident in traditional Maori society. This issue is returned to below (p 32).

Tikanga is based on values and principles (cf Christian law) whereas Pakeha law is rule-like.

Comment:

The difference is one of degree rather than kind. Maori custom/law has some rule-like features, eg a certain general predictability (D 4) and comparative rigidity in parts, ie kawa (D 4) (taking kawa to be a part of tikanga rather than distinct from it). Moreover, principles can be seen as rules, though at a high level of generality, and, to the extent that tikanga involves principles, it is rule-like. On the other hand, Pakeha law is not entirely rule-based but involves values and ideals, such as justice, order, equality, mercy etc. These values are more likely to be explicit at the margins of the law, in preambles to legislation, in the discursive reasoning of judges or in the exercise of judicial discretion, rather than in the 'black-letter' substance of law. But they are essential to the effective functioning of the legal system and provide the underlying rationale for the public acceptance of the law's authority.

Pakeha morality, on which law depends, has often been seen as law-like, requiring adherence to moral rules, from the Ten Commandments to Kant's categorical imperatives. However, it may be worth noting that an important recent strand of western moral philosophy has moved away from such an approach as being too rigid and ethically impoverished. An alternative approach has been developed known as 'virtue ethics' in which the aims of morality are concerned less with adherence to moral precepts and more with the cultivation of certain desirable dispositions and states of character. Another departure from the categorical nature of western morality, traditionally conceived, has been the development of 'situational ethics' whereby ethical values are context-dependent and there are no universally ethical rules. These trends might be said to mark a convergence between Maori and Pakeha views of morality, if not of law.

Both Maori and Pakeha law make use of precedent, Maori through the use of historical tradition and Pakeha through the use of judicial precedents. Both also adapt precedent to new situations. However, Maori decision-makers were able to adopt a much more flexible attitude towards past tradition and precedents than judges. Maori communities accepted the political necessity of adapting to new situations and also accepted that the manipulation of tradition was a proper way of keeping a balance between past experience and new challenges. They readily accepted those historical exempla that suited their present case and discarded those that did not (D 8-9). In part this was because Maori traditions were not written down and were therefore less susceptible to quotation by chapter and verse. More important, perhaps, it was because most important decisions were made by, or with, the active consent of the whole community. Because there were no specialist courts, there was no need to limit the discretion of such courts in the name of protecting the wishes or interests of the community as a whole. In a complex modern society with a specialised legal system, however, there is a need to limit the power of the courts in order to safeguard the superior authority of the democratically elected Parliament. Indeed, in this respect it is the political forum of Parliament rather than the courts which provides the more fitting Pakeha analogy for the law-making function. The political argument which surrounds the making of law and policy in Parliament often includes selective and tendentious use of history (eg New Zealand's priority in women's suffrage; M. J. Savage and the welfare state) which is not unlike the Maori use of tradition and myth.

Pakeha authorities have a history of being over-rigid in their attempts to codify customary law (D 93) (see, for instance, the over-strict three-generations rule for ahi ka (D 82-3)). This will need to be guarded against in future applications of customary law (see below p 32). On the other hand, while the flexibility and pragmatism of tikanga Maori has much to commend it as a way ordering small communities, the democratic and liberal rationales for the more rigid, rule-based nature of law should not be forgotten. Codified, rule-based law reduces the scope for self-interested partiality by legal authorities and protects the overriding authority of the elected legislature. By making the law more predictable, rule-based law helps citizens to live freely within the law. The liberal ideal of the 'rule of law' thus requires a rule-based law.

Kinship linkages are the determiners of action and identity

Comment

In most legal and political contexts, Pakeha society does not consider kinship to be formally significant. The formal recognition of kinship is associated with the legal entrenchment of aristocratic privilege whereby certain citizens were entitled to special titles and positions of power granted to them or their ancestors by the monarchy (itself both the source and prime specimen of inherited privilege). The development of British democracy involved the gradual erosion of inherited privilege, through the reduction of the powers of the monarch and then of the House of Lords (the hereditary basis of which was not exported to the colonies). Citizens were to be judged on their own merits regardless of their ancestry. The concept of political equality was gradually extended from men of property to all adult men and then to all adults, men and women. New Zealand citizens are legally identified by occupation and home address ('stockbroker of Remuera'; 'unemployed of no fixed abode') rather than by family connections. In so far as people deal with each other as fellow citizens, and come under community-wide laws they are treated as individuals entitled to equal consideration regardless of family background. The same blindness to family connections is expected to apply to the distribution of publicly-funded benefits, such as access to university, or appointment to public offices, such as the judiciary (see p 13). Thus any attempt to use tikanga Maori to justify differential treatment by the legal authorities on the basis of kinship could be seen as contrary to the deeply held

democratic principles of equality before the law and equality of opportunity.

However, kinship relationships remain important in many areas of Pakeha social life. The family is the main institution of material and emotional sustenance and the source of much private wealth. Pakeha agriculture, the main raison d'etre of colonial settlement and the cause of so much expropriation of Maori land, is an essentially dynastic occupation in which farmers aim to bequeath their farms to their descendants and in which inheritance has become the main source of acquiring a farm (see p 24). What would be objected to as nepotism in public office (eg the Chief Justice securing the appointment of his son or daughter to the bench) is treated as thoroughly appropriate in the private sector (eg New Zealand's richest and arguably most powerful man, Douglas Myers, inheriting the basis of his wealth from a prosperous Auckland family). Even where kinship is in principle irrelevant, as in entry to the educated professions, family background is one of the main determinants of success and following in parental footsteps is often looked on benignly by the community. Though the law may be required to be blind to kinship considerations in public matters affecting the community as a whole, it does recognise the relevance of family relationships in matters which are assumed to concern people's personal family affairs, eg in matters of family law and property inheritance. In these areas there should be less inherent difficulty in recognising tikanga Maori.

The manipulation of kinship made possible by the complexity of whakapapa appears to be a feature of societies in which kinship counts. If claims are to be made, and conflicts resolved, in the currency of kinship, there are strong incentives to allow kinship to adjust accordingly to meet the political needs of the occasion. This was certainly the case in Maori society. In present-day Pakeha society, however, there is much less room for manoeuvre over kinship. The same pressure for legal certainty which has driven the system of accurate land registration has also led to the public registration of births, deaths and marriages. It is also leading to the public registration of iwi membership. When questions of kinship can be resolved by reference to an indisputable public record then there is little opportunity for political and legal authorities to adjust the ties of kinship of contesting parties in order to meet a desired result. This is one reason why caution must be exercised in relying too explicitly on kinship criteria in the modern application of Maori customary law. If there is a loss

of flexibility in the interpretation of ancestry, there is a danger of becoming more descent-driven than traditional Maori society was.

ii CONCEPTS OF IDENTITY

The group was the individual's point of reference

Comment

Maori are defined in terms of groups, especially whanau and hapu (later iwi). These groups have associations with particular whakapapa and territory. There is an implied difference with Pakeha society in which individuals are conceived of in isolation and, by inference, not through group identification. There are important differences here but there is also danger of overdrawing the distinctions.

Western liberal theory has tended to justify the value of individual freedom and individual rights in terms of contract theories in which isolated individuals living in a pre-social 'state of nature' are imagined as joining together voluntarily to form a political community under a legal authority which protects their rights in return for their respecting the rights of others. Thus, society exists for individuals and is justified in terms of its benefits to individuals. Such theories support the view that western liberalism conceives of people as isolated individuals and as logically and morally prior to society. Under the influence of anthropological and sociological theory, this 'atomistic' or 'individualistic' view of society was seen as characteristic of western capitalist societies and contrasted with a more 'communal' view, typical of pre-capitalist 'tribal' societies in which the group was prior to the individual and individuals acquired their significance through service to the group rather than vice versa. This distinction has been immensely influential in the self-perceptions of Maori intellectuals derived from what they learned about themselves in university anthropology departments.

However, the difference between traditional Maori and Pakeha society is not simply that the former was group-oriented and the latter individual-oriented. Most Pakeha live highly social lives. Though some Pakeha, for instance unemployed single men, may live relatively marginalised and isolated lives, the average Pakeha belongs to a plurality of groups with differing memberships, eg immediate family, workplace, neighbourhood,

school community, circle(s) of friends, as well as, in many cases, clubs and religious organisations. The contrast with Maori social life is partly that the latter was focussed on a very few groups, pre-eminently the whanau and the hapu (the iwi being a later development), while Pakeha society includes a wide range of groups, none of which is as all-encompassing as the Maori whanau or hapu. At the same time, the complexity and social pluralism of urban life compared with village and rural life has enabled individuals to exercise more freedom in deciding which groups to belong to, where to work, whom to live with, what leisure pursuits to follow. In this respect, individuals, while living highly social lives also have more independence from any one group and in this sense their life may be more focused on the individual than the group. Indeed, modern Maori living in urban areas and participating in the general workforce cannot be as absorbed in their Maori communities as were their ancestors at the time of contact (see pp 11-12)

If Pakeha are not totally individualistic, neither are nor were Maori totally collectivist in their orientation. Maori society placed a value on individual competition particularly in service to the community. Individuals vied aggressively with one another in the pursuit of mana and many social disputes were the result of slights to individuals and their mana. Powerful individuals took pride and sought personal mana in openly flouting the rules of custom/law (D 55). Many Maori individuals responded readily to the colonisers' individualist approach to land purchase and tenure (D 103-4). The Maori emphasis on the need for community consensus (see pp 15-16) can be partly explained as a reaction to the potentially destructive effects of individual ambition and not simply as an expression of inherent collectivism in Maori society.

The philosophical distinction between an atomised individualist and a collectivist group-centred view of society is thus clearly overdrawn when measured against actual social experience. It has also been under attack in recent years within moral philosophy. The highly influential work of the US philosopher, John Rawls (*A Theory of Justice* (1972), revived the contractarian approach to political justification, attempting to derive liberal principles from the rational choices of isolated individuals in a pre-social 'original position'. In response to the perceived inadequacies of the individualist contractarian view of human nature, a rival 'communitarian' school developed, stressing the essentially social and communal nature of human life. People's values are determined by the communities in which they are born and bred and it does not make sense to conceive of

individuals as existing outside society and choosing the type of society in which they want to live. However, communitarians were open to counter-objections that they exaggerated the claims of the community, particularly in modern capitalist societies, and placed insufficient value on individual freedom. The notion of the pre-social individual, if literally implausible, is a useful metaphor to justify the value liberals place on the right of individuals to question the values and practices of the societies in which they live. The most recent trend has been to seek a synthesis of contractarianism and communitarianism which would find room for the value of individual freedom and rights while recognising the social nature of humans and the inherent value of social and political activity (cf Kymlicka 1990).

Though the distinction between Pakeha individualism and Maori collectivism has been overstated it still points to significant differences between the two societies. In particular, the Maori sense of collective group responsibility for wrongs committed by individual members of the group (see pp 19-20) derives from a strong sense of shared identity while the Pakeha conception of individual responsibility reflects a view that individuals, however closely bound to fellow members of their family, club or firm, are still the ultimate controllers of their destinies. The Maori sense of communal identity, though inevitably weakened by their incorporation into Pakeha society, still persists, for instance, in the modern whanau which has adjusted to urban conditions. Moreover, the absence in Maori values of any strong sense of individual rights as independent standards for judging the values and behaviour of society (see pp 20-21) may also indicate a less individualistic approach to social and political theorising.

GROUP FORMATION AND GROUPS

The hapu was the most important social unit for Maori

Comment:

In the pre-contact era, the hapu was the most important economic and social group. It was also the group with the most politico-legal authority and in this respect the group most analogous to the Pakeha state. Members of the same hapu were united behind the mana of their rangatira and accepted his decisions as well as those of the hapu as a whole. Relationships within the hapu, ie within individual whanau, were subject to the

overriding authority of the hapu, as the life of Pakeha citizens may be subject to the authority of the state. Relationships with other hapu or the iwi are naturally described in terms westerners use to describe inter-state relationships, eg alliances, treaties, warfare etc.

There are other similarities between the hapu and the Pakeha state. Membership of both the hapu and the New Zealand state is primarily based on descent, with outsiders being incorporated on the basis of kinship, value to the community or traditional ties of proximity. Moreover, in both cases membership of the political community is a source of personal identify. Shared citizenship is an important bond between New Zealanders, most readily noticed when they are overseas or caught up in international competition, eg in war or sport. It is reinforced by educational institutions (eg the social studies syllabus) and through the media (eg jingoistic images and romantic landscapes on TV). For most New Zealanders, being a New Zealander is an important part of their self-image

There are also a number of differences. One is the relative size of territory and population and the relative complexity of the social structure. The Pakeha state includes many more members than the hapu and its members are organised (see pp 8-9) into a plethora of different groups and specialised institutions. The state itself implies not just the sum total of the population in a given territory but also, more commonly, refers to a set of distinct institutions specialising in authoritative control within that territory. It is thus possible to distinguish between state and citizen in a way which is not possible in a hapu where every member is part of the state. Moreover, the western sovereign state is more closely defined in terms of its territorial boundaries while the hapu was primarily identified by its people. A hapu could migrate but New Zealand could not (see p 29). Another difference is that the hapu included some people who were not full members, ie war prisoners captured from other hapu (sometimes, perhaps misleadingly, referred to as 'slaves' (see p 14)). That is, in contrast to modern states, not all adult residents enjoyed the same rights of membership (though former war prisoners might acquire them through intermarriage or the provision of public services (D 33).

For most modern Maori, the hapu is no longer the central group of their lives, because their economic life is no longer centred around a small local community and they mostly work within the larger, more complex Pakeha economy. Other groups

which are more compatible with a modern capitalist economy have taken over, particularly the smaller whanau and the larger iwi. The whanau survives because capitalist society depends on families for nurturing the workforce, while the iwi has developed as a convenient unit for owning and administering land and other resources within the larger nation state. But neither the modern whanau nor the modern iwi encompasses the individual's daily life to the extent achieved by the former hapu. Given that both the extent and flexibility of the authority of tikanga over individuals depended on the closeness of their involvement in the life of the hapu, the attenuation of hapu life must set limits to the extent to which Maori customary law is appropriate for modern urban Maori. By the same token, there may be grounds for allowing a more extensive application of tikanga Maori for those Maori who choose to live in closer, more intensely Maori communities which, like the traditional hapu, encompass their economic as well as their social life.

iii. FUNCTIONARIES AND CLASSES

Rangatira were the most significant functionaries

Comment

Rangatira were the main political and military leaders and the nearest equivalent to judicial officials, though, unlike officials in a formal legal system, their power depended largely on personal authority (mana) rather than institutional structures (D 40). The extent of their discretion in decision-making clearly varied, being most extensive in warfare (D 35), where there is particular need for speedy authoritative decisions and there is less time for extensive consultation. This acceptance of the need for military leaders to have absolute authority is a common feature of all armies, including citizen armies in democratic regimes. In more peaceful contexts, however, the rangatira were more likely to consult with other members of the hapu, leading through oratorical persuasion and influence of personal mana, rather than through any clear right of independent authority (cf D 39).

In this respect, the mana of rangatira was essentially democratic because it depended ultimately on retaining popular support. Their position can be compared to that of a leader of a modern political party in relation to his or parliamentary colleagues. The leader is accorded a certain degree of independent authority by party colleagues but may be deposed at any time for failure to perform, especially failure to deliver

victory. The extent of independent influence exercised by such political leaders, as with Maori rangatira, depends less on formal rules than on the strength of their personal mana, including their personal popularity with the electorate. Another comparison which is sometimes applied to modern political leaders and which has parallels with Maori rangatira is that of leadership in gangs. Gang leaders wield considerable authority over their members but their position depends on their displaying personal strength and courage and on retaining the respect of their colleagues.

It must be remembered, however, that weight was also placed on ancestry and whakapapa in the selection of rangatira. This may be seen as contrary to modern democratic principle which stresses the formal irrelevance of heredity to questions of merit, including the question of fitness for political advancement. On the other hand (D 33-4, 37), the ultimate criterion for achieving and retaining the mana of a rangatira was proven merit. The complexity and flexibility of whakapapa allowed ancestry to be adjusted to fit evidence of merit, on the assumption, presumably, that the origins of personal skills lay in the skills of one's ancestors. An analogy in Pakeha society would be for an individual's skill as a politician (or judge or rugby player) to be taken as evidence that the individual in question must have had a skilled politician (or judge or rugby player) as an ancestor. However, it must also be acknowledged that, in Maori society, recognised possession of an ancestor with mana was taken as at least a prima facie ground for claiming mana for oneself, subject to proving competence ('a combination of ascription and acquisition') (D 33). In this respect, the more appropriate Pakeha analogy is with individuals succeeding to positions of privately owned authority, for instance partnership in a law firm or management of a family farm, where children are recognised as having rights of succession provided they can demonstrate general competence. In public institutions, however, it is not appropriate for say, children of judges or cabinet ministers, to have even a prima facie case for succeeding their parents. They are expected to compete for selection on equal terms with all others (see p 6). If the application of customary law includes, as it must, some reliance on the authority of individual Maori leaders, then the selection of such leaders must allow for the appropriate Maori combination of whakapapa and proven merit and not attempt to rely on either whakapapa or merit alone.

Maori society was relatively classless

Comment

Maori society certainly had important distinctions of status and the emphasis on descent as a basis for status marks it as, to some extent, an aristocratic society. It was also intensely competitive as individuals vied for superior reputation and mana. The extent and rigidity of hierarchy, however, appears to have been exaggerated by the colonists, partly through misplaced parallels with other Polynesian societies, noted for their hierarchical social structures, and partly through a desire to identify powerful chiefs with whom deals could be struck (D 41). The fluidity and flexibility characteristic of so much Maori social life blurred the differences of status while the ultimate authority of the group restricted the degree of superiority which leaders could assume. The major social gulf was between full members of the hapu (the 'citizens') and the slaves or war prisoners who were outside the group though physically located within it. Again, it is important not to exaggerate the degree of social differentiation implied by the existence of slavery. To describe the war prisoners and their families as 'slaves' may be misleading if it suggests the subjection of peoples considered ethnically inferior which is the most common form of slavery in modern times. Slaves were simply members of other hapu who had the misfortune of being captured in war, a fate which might await anyone. They could be expected to regain their former status either through avenging and reversing their defeat or through eventual incorporation into the new hapu. They did not represent a supposedly inferior race worthy of permanent subjection as a slave caste.

LOCATION OF AUTHORITY

The local communities were anti-totalitarian and republican at least in peacetime..the accountability of rangatira was a democratic process

Comment

Of these three terms drawn from western political thought ('anti-totalitarian', 'republican' and 'democratic'), perhaps the most appropriate for describing Maori society is 'republican'. The European republican tradition developed as part of the reaction against the claims of absolute monarchy in the early modern period and drew its inspiration from the early Roman republic where political authority had rested with the citizens who made

up the army and with leaders chosen by constitutional processes. A republic was not necessarily a democracy. Republicanism was compatible with a comparatively restrictive citizenship, eg a property qualification for membership, and with important status divisions within the citizen body (eg patricians and plebeians in ancient Rome). Twentieth century republicanism, however, is usually combined with democracy. It is a branch of democratic ideology distinguished by its emphasis on an active citizenry and on the political freedom associated with active participation in collective decision-making (as distinct from the liberal democratic tradition which contents itself with the right to vote and the more 'negative' freedom of being left alone by authority). Close echoes of republicanism are found in Maori society in the emphasis on an active citizenry, if necessary called on to act as a citizen militia, in the absence of absolute authority (except in warfare), in the tolerance of aristocracy subject to constitutional limits, and in the ultimate authority of the citizens.

Democracy is the more dominant modern value, stressing the general principle of political equality. Citizens may take part directly in decision-making through voting in referendums or, in smaller communities, by participation in decision-making assemblies open to all citizens (direct democracy). More commonly, in the government of larger nation states and in other organisations where specialised leadership is needed, the people are not seen as decision-makers themselves. Rather, the principle of democratic equality is translated into the equal right of all adults to choose their leaders in regular free elections (indirect or representative democracy). Parallels with democracy in Maori society are provided by the accountability of rangatira to the community as a whole (similar to the accountability of elected politicians in a representative democracy) and the taking of decisions by assemblies of all members (a feature of direct democracy). Differences with democracy are the restrictiveness of citizenship rights (ie the exclusion of war prisoners and sometimes of women) and the (admittedly limited and qualified) acceptance of hereditary status as a basis for allocating positions of authority. Rangatira represented or personified their hapu without being formally elected by them (see p 22)

One difference sometimes alleged between democracy and Maori collective decision-making is that Maori decisions were by consensus whereas democratic decisions are by majority vote. Certainly, in Maori groups, minorities or individuals who felt their interests were being neglected were often ready to withdraw from the group. Thus, the tendency of Maori groups to

'fractionate' (D 36) placed a premium on conciliation and appeasement of all sections of the community (D 56). However, the reliance of Pakeha democracy on the majority principle is often overstated (Mulgan 1989, ch 3). Much Pakeha decision-making is by consensus, especially in small groups (the Cabinet is a leading example). Moreover, majority voting usually, and properly, takes place within a context of equal respect for everyone's basic rights. That is, it is an abuse of democratic principle ('majority tyranny') if a majority decision is allowed to override the fundamental rights of an individual or a minority. In this respect, given the lack of an articulated theory of individual rights in Maori society (see pp 20-21), the Maori insistence on consensus may be seen as an analogue of the Pakeha protection of individual rights.

Non-totalitarian implies the absence of totalitarianism, ie the absence of a government which attempts to control all important aspects of citizen's lives. That is, non-totalitarianism can be taken to imply liberalism, the principle that governments should exercise limited control over citizen's lives, leaving important areas of life as private matters of individual choice. Whether Maori society was liberal in this sense is open to doubt. There appear to have been few matters which were in principle beyond the legitimate concern of the community. As in most small village societies, everyone's business was everyone else's and privacy was very limited. There was no clear distinction between law and morality (see pp 3-4) and no clearly articulated notion of the individual's right to judge society against his or her own independent views of the good life (see p 10).

MANA RANGATIRA

This section expands on points made in the previous two sections. Comment is to be found in the commentary to those sections.

WARFARE, CONQUEST AND LAND TENURE

Conquest in war was not a source of land rights

Comment

There has been a tendency of Pakeha commentators on Maori society to exaggerate the extent of warfare and conquest in the pre-contact era. Maori were extremely sensitive to threats to

their personal status and obliged to seek recompense (utu) when slighted. Their society was also a warrior society, in that prowess in war was a valued component of status. At the same time, they were acutely aware of the potential destruction that could be caused by the unlimited pursuit of warfare. Their society therefore had a number of norms and practices which had the effect of restricting the extent of combat and bloodshed. Similar devices are found in other societies in which warfare between neighbours is endemic. In earlier European history, for instance, warfare was concentrated on pitched battles usually fought on a single day. Surrogate battles between champions chosen from each side were not unknown. However, the introduction of new military technology, in Maori society the introduction of musket warfare, has a tendency to upset the balance between opposing forces and to cause an increase in the level of casualties, at least in the short run until a new balance can be struck.

The colonists were wrong to declare conquest as the primary source of title for Maori. Occupation of new territory was often initiated by force of arms but was usually consolidated by other means, such as intermarriage and the incorporation of the former occupants into a new unit (D 83). Moreover, the main reason for warfare was not so much the pursuit of conquest for its own sake so much as the rectification of perceived injustice. In this respect, the claims to land which might appear to have been gained by conquest were more properly to be based elsewhere, in the prior claims of entitlement, eg through the claims of whakapapa or previous occupation rather than in the fact of conquest itself. Thus conquest could be seen as a means of enforcing prior entitlement rather than as a source of entitlement itself. However, because entitlement could often not be enforced except by the successful use of force, conquest might often be a necessary condition of securing entitlements. It is the justice of the conqueror which tends to prevail.

Similar attitudes to conquest are found in the western tradition which has not usually looked on naked aggression as in itself a legitimate source of acquiring territory or power. For instance, for the colonisers, free consent was the normal basis of entitlement and obligation, either through treaties, in the case of governments acquiring sovereignty over new territory and peoples, or through contractual agreements, in the case of the acquisition of property. Conquest itself had become a dubious source of entitlement. Certainly, legal systems had eventually to come to terms with accepting occupation and possession based on original unjust usurpation. With the passage of time, de facto

holdings became de jure. However, this was because de facto holdings came gradually to acquire their own new legitimacy through acceptance over time. The injustice of the original usurpation itself became increasingly irrelevant. The basis of the new entitlement did not derive from the original conquest but from the subsequent acceptance.

iv SOCIAL CONTROL

The behavioural code was regulated by the ties of kinship and the laws of tapu and utu through collective responsibility.

Comment

Tapu can be understood as an aspect of the code of custom/law. Ie a breach of tapu was a breach of the law. Utu is a process of 'rectification' whereby breaches of the code, ie acts of injustice, can be recompensed and/or punished. ('Rectification' or 'reciprocity' are more appropriate equivalents than the more pejorative 'revenge' which has connotations of unjustified retaliation. Similarly, muru, the seizing of people's goods to appease offences, is better seen as legitimate 'damages' rather than the more illegitimate 'plunder'.) The general principles underlying the enforcement of custom/law were principles of equity and balance, flexibly applied. The purpose of punishment through utu and muru was to restore the status quo including the mana of those who had been offended against. In terms of modern theories of punishment, the explicit purpose of punishment was backward-looking and retributive rather than forward-looking and deterrent or reformative, though at a deeper level punishment presumably served both deterrent and reformative functions.

The assumption that all punishment is rectification may be a contrast with Pakeha jurisprudence in which rectification is sought in some civil actions, as in contract and torts, but is a less appropriate model for criminal cases or offences against the Crown (though we do say of criminals who have served their time that they 'have paid their debt to society'). Maori appear to have had no clear distinction between civil and criminal law and victims were expected to initiate proceedings in all cases. Maori clearly have difficulty in relating to a system of criminal justice in which the victims play little or no role. They would expect the victims and their family to play the role of prosecutors and

subsequently, if punishment is called for, to be the enforcers of punishment. The role of the community, and therefore the role of the community's legal officials, ie the courts and police, should be restricted to determining justice, not enforcing it (see pp 2-3).

Where legal experience was used it was more in the role of mediation rather than adjudication. This reflects an expectation that the dominant imperative in legal disputes is to reach a mutually satisfactory compromise or balance rather than to find categorically in favour of one side or the other. This attitude of mind is linked to the search for consensus as the dominant paradigm of political decision-making (see p 15). It reinforces the inappropriateness in Maori culture of adversarial styles of decision-making either in court rooms or political assemblies.

Collective responsibility meant that the group, eg whanau or hapu, paid for injustice inflicted on people outside the group (D 52). Individuals were not totally without responsibility, being subject to shame (whakama) for bringing harm upon their fellow whanau or hapu members. None the less, it was the group which assumed responsibility in the face of the wider community regardless of whether personal fault could be sheeted home to any individual (Patterson 1992). Group responsibility of this type finds a parallel, though admittedly a much more specialised and formalised one, in the treatment of companies under Pakeha law (Perrett 1992). Companies are collective entities considered capable of action and of being held liable for their actions. One consequence of this type of responsibility is that it can persist beyond the tenure of any particular member or office-holder. Maori whanau and hapu could be held responsible for acts performed by earlier generations.

Though collective responsibility is not unknown in Pakeha society, it was a much more pervasive feature of Maori society, covering most offences committed against the norms of society. This marks an important difference with Pakeha assumptions and practices. The New Zealand state would not normally accept liability for wrongs done to foreigners by its citizens. Similarly, parents and families are not usually held responsible for the crimes committed by family members, especially when these individuals are of an age to be held personally responsible. In practice, of course, many Pakeha families, particularly parents, do consider themselves responsible for their offspring's behaviour and feel liable to social stigma if their children are found delinquent. Stigma may also attach to the children of delinquent parents, though this does not usually extend to an acceptance of

responsibility. The harnessing of such social stigma attaching to groups with delinquent members may be an important means of maintaining social order. Certainly Maori values are more compatible than Pakeha values with the principle of holding parents legally liable for the children's good behaviour. There are good grounds for incorporating Maori principles of collective responsibility into the legal system, particularly when dealing with Maori offenders who are minors.

Law-breaking appears to have been accepted as a mark of personal mana provided that one could get away with it (D 55). This reflects a tension between the competitive values of a warrior society and the cooperative values needed for social order (see p 16). In Pakeha society, law-breaking is acceptable and a mark of prowess only in groups which are to some extent disaffected or marginalised from society. It is not generally acceptable in the 'respectable' sections of society. Admittedly, there are some parts of the law, notably taxation and motoring offences, where law-breaking is common among all sections of society and is not associated with serious moral disapprobation. None the less, any breach of the law is likely to be associated with some social stigma. There is no Pakeha equivalent of someone achieving public respect and enhancing their public reputation through flagrant law-breaking. Pakeha law-enforcers may need to take this into account when dealing with Maori offenders who openly defy the law. Such defiance is less reprehensible than it would be among Pakeha.

There were widely accepted rights of person and property

Comment

Rights are to be understood as claims that may legitimately made of others. Maori rights were defined and enforced within the legal/social structure of Maori society. In this sense, they were like Pakeha legal rights, which are defined within an existing legal system and which specify the legal opportunities and remedies available for those to whom the legal system applies. They did not function like 'moral' or 'human' or 'natural' rights which have been used within the modern western system as an independent and logically prior standard for assessing and justifying particular social or legal systems. In this latter sense, of moral claims logically prior to society and law, it is doubtful

whether Maori had a recognisable conception of rights (see above p 10).

Property and mana belonged to groups as well as individuals and thus groups as well as individuals possessed rights in relation to the security of their property and the maintenance of their mana. Collective rights are a corollary of collective responsibility. There has been considerable academic debate about the propriety of the notion of collective rights (Kymlicka 1995, ch 3). Some liberal political philosophers have objected to the notion of group rights, either on logical grounds, ie that individuals are the only moral persons logically capable of bearing rights, or on moral grounds, that allowing rights to groups gives them unwarranted authority over their members. The logical argument, that group rights are conceptually flawed, is sufficiently rebutted by the example, already referred to, of the legal rights of corporate entities (see p 19). The moral argument may carry more force. The leading international case here is that of the Pueblo Indians in the US who require all members of their tribe to practice their tribal religion in order to be eligible for community benefits, including housing (Kymlicka 1995, 40). This is a breach of freedom of religion but one which is licensed because American Indian tribes are not subject to the US Bill of Rights. Some western liberals have thus seen tribal group rights as a serious threat to individual liberties.

It is necessary, however, to distinguish a number of different uses to which the concept of group rights may be put. For instance, groups rights may be used either 'externally', to refer to rights of the group against outsiders, or 'internally', to refer to the rights of the groups as a whole over its members (Kymlicka 1995, 35-44). It is the external sense which was paramount in Maori society as groups sought redress against other groups and individuals who threatened their property or mana. It is the external sense too which is most needed in present-day situations when the state is called on, for instance, to protect the property of iwi or to encourage the survival of Maori culture as a whole. The general concept of the rights of indigenous peoples (understood as formerly colonised and disadvantaged minorities) depends on the acceptance of the legitimacy of such group rights as claims against the wider society.

The question of what rights groups may exercise internally over their own members is logically distinct. There is no necessary connection between allowing certain groups particular external rights, eg to culture or religion, and licensing them to

coerce individual members in illiberal ways. As a matter of contingent fact, however, most tribal and village societies have been relatively illiberal by present-day Pakeha standards. In traditional Maori society, individuals were subject to pervasive group pressure which allowed little room for the development of individual privacy or for concepts of the individual's right to choose a particular life-style or values. The assumption of collective responsibility for individual actions would encourage all members of the group to take an active and self-interested concern in the behaviour of fellow members. One of the key issues in applying Maori concepts of law to Maori in a modern society is how far the application of such principles of collective responsibility is to be allowed to override the individual rights of the present-day Maori citizen (see p 32). This is a difficult issue which is to be decided by balancing conflicting principles of individual rights and group rights. It cannot be solved a priori by ruling any one set of rights out of contention on logical or moral grounds.

DECISION MAKING

Runanga decision-making generally involved the rangatira and kaumatua

Comment

Runanga appear roughly equivalent to executives or committees in which smaller groups of representatives discuss matters on behalf of the whole community. The participation of rangatira and kaumatua reflects the view that these leaders could most properly speak for their respective hapu and whanau. Indeed, such leaders commonly identified their own mana and interests with those of their respective groups and would use the personal pronoun to refer equally to themselves or their groups (D39, 101; Patterson 1992, 29). The process of representation was not democratic in form, given that representatives were not elected by their groups. However, in so far as the authority of leaders depended on maintaining the consent of their followers, the process involved a degree of responsiveness to the community as a whole similar to that sought in democratically organised communities (see p 15).

Rangatira were also able to delegate authority, at least over land. The transfer of mana over land (D 79, 96, 101) was limited to the transfer of administrative responsibilities and did not

extend to the actual transfer of ownership or ultimate authority. It was therefore analogous to the delegation of responsibility and decision-making authority within a system of public administration.

Consensus decisions were preferred to majority rule

Comment

On consensus decision-making, see above (pp 15-16).

The inference that silence from Maori indicates opposition or disagreement rather than consent is an important cultural difference between Maori and Pakeha and has been the source of much misunderstanding. Pakeha authorities have often interpreted Maori silence as an indication of concurrence when it has really signified continuing opposition. There may therefore be need for Pakeha judges and others, when dealing with Maori in legal contexts, to seek explicit acquiescence with their decisions and not to be satisfied with the mute acceptance normally expected from Pakeha. The Maori need for agreement to be explicit appears as another reminder of the naturally contentious and argumentative character of Maori society, a characteristic suppressed in some of the more romantically sentimental views of Maori society (see above pp 8-9). Disagreement was to be assumed in the absence of statements to the contrary whereas, among the more conformist Pakeha, agreement appears the norm, unless openly repudiated.

The advance definition of terms in leases was unusual

Comment

This is another example of the flexibility and pragmatism of Maori custom/law. Where law was not written down and where parties to transactions remained in relatively close contact with each other there was less need for precision in the specification of decisions. New 'terms' could be imposed if and when the need arose. The same applies to all agreements and contracts generally (see p 33).

v. CONCEPTS OF LAND

Land was an important base for group identity

Comment

The main differences with Pakeha views of land tenure would appear to be: (i) that tenure embraced past and future generations as well as present; (ii) that land was rarely, if ever, alienated permanently; (iii) that communal land tenure included political identity and was equivalent to sovereignty while individual use right was less than ownership; (iv) that land possessed cultural and religious significance.

(i) The concept of ownership by past and future generations has no literal equivalent in Pakeha society and is not recognised in Pakeha law. However, there are strong parallels in the attitude of farmers to family farms which can help Pakeha to understand the Maori point of view. Most Pakeha farmers acquire their farms through inheritance and aim to bequeath their farms to their children. Farmers who are forced off their land, eg through financial failure, have a sense of betraying a family trust, of having let down both their ancestors and their descendants. In this respect, European-style farming is an ancestral, dynastic enterprise. This is sometimes overlooked in sociological/anthropological accounts which contrast the emotive attachment of Maori to their land with a more utilitarian production-oriented approach of the European farmer. It is true that European farmers thought that land should be made as productive as possible and that the products should be sold as commodities in a capitalist market. But these more commercial attitudes coexisted with considerable non-commercial attachments to the farming life and to particular tracts of land. How else can one explain the willingness of farmers and their families to work long hours for little reward rather than sell up and move to town?

(ii) The assumption that land was not alienated permanently is one which Pakeha do not accept. The principle 'reversion to source' may be appropriate for dealing with disputes over land ownership among competing Maori groups. But it is likely to meet with strong resistance from Pakeha if applied to disputes between Maori and Pakeha (particularly if the general effect of the principle, as it probably would be, is to decide in favour of prior Maori claim!).

(iii) The coincidence of land tenure and political authority indicates a fully communal ownership. The boundaries of the land held in common are the same as the boundaries of the 'state'. Individuals and sub-groups may have use of certain parts of the lands but subject to conditions determined by the overall political authority of the community. There may be some historical parallels for this in European feudal society where all land was in some sense owned by the political authority, the feudal lord, and tenants had rights to land subject to certain conditions. English law still contains traces of such a historical relationship in that all the land is in some sense residually owned by the Crown and individual land-'owners' hold leases from the Crown. From this point of view, the parallels between Maori and English land tenure are, on the one hand, between the hapu and the Crown, as final political authorities and ultimate owners, and, on the other hand, between Maori use-right holders and Pakeha land-owners, as people entitled by the political authority to certain rights in relation to certain areas or resources. If the comparison is between traditional Maori land tenure and modern Pakeha land tenure, then we would say that, for Maori, the political authority still had a very active say in determining land use while, in the Pakeha system, political authority is very attenuated and the holders of use rights have much more freedom in how to use and dispose of their rights.

In the post-contact situation, however, Maori communal ownership is no longer linked to political sovereignty in the sense of a community which has complete authority over its members. Certainly, the retention of Maori tribal land is associated with tino rangatiratanga and one aspect of tino rangatiratanga will be to determine the conditions under which individual iwi members can use communal iwi land. However, we now tend to use a different model of Maori land ownership and compare it differently with Pakeha land ownership. Maori communal ownership is now seen not as parallel to the residual ownership of the Crown so much as parallel to a type of collective land ownership, like that of a trust or company, which, like other forms of land tenure, is licensed and guaranteed by the Crown. That is, Maori communal tenure is now sometimes being looked on as a form of use right analogous to other use rights which prevail under Pakeha law. Conversely, whereas, on the former model, Pakeha land ownership was compared with Maori individual use right, on this model it is being compared with communal tribal ownership. Neither comparison is exact, because Pakeha landownership is both less than Maori communal ownership and more than Maori individual

use right (D 64). But it is important to note the shifting point of comparison.

From the second point of view, that which compares Maori communal ownership with Pakeha ownership, the conditional use rights which individual Maori held within their own hapu have tended to drop out of sight, at least from the perspective of Pakeha land law, because the Pakeha system is accustomed to dealing with only two parties to land tenure - the political authority, ie the Crown, and the land-holder, typically an individual owner, though collective owners can be accommodated. Maori individual use rights thus becomes, in a sense, use rights within a use right. Another way of making the point is to say that the original two-level structure of Maori land tenure (ie (1) collective, hapu/iwi, politically controlled tenure and (2) individual use right) becomes a three-level structure when incorporated within the Pakeha system: (1) Crown sovereign authority, (2) collective hapu/iwi tenure administered by (limited) rangatiratanga and (3) conditional individual use right. Customary land law must be prepared to work with all three levels.

(iv) The maintenance of symbolic Maori associations is an important principle for the state to recognise, in relation to such matters as Maori access to sites of religious significance and the use of Maori names. But the reason for honouring this principle is not that Maori are unique in having emotional attachments to place. It is that Maori symbols, along with Pakeha symbols, are a necessary part of a genuinely bicultural polity. Pakeha have sentimental attachments too, as was demonstrated for instance in Pakeha opposition to the change in name of Mt Taranaki from Mt Egmont. Misunderstanding and angry backlash is caused by the suggestion that only Maori have such feelings.

LAND AND WHAKAPAPA

Time could legitimate original violence

Comment

This underlines the point (see pp 17-18) that conquest can be a source of legitimate tenure (both of land and authority) especially through the passage of time which, in the Maori case, is marked by the accumulation of whakapapa.

Conquerors fused with the conquered

Comment

Conquerors and conquered became fused together through intermarriage and shared communal living. Both preserved their identity through their whakapapa which continued to be remembered. Though assimilation has been recently rejected as an official model for Maori/Pakeha relations, in practice many Maori have been ready to fuse with Pakeha, while keeping the memory of their ancestry alive.

LAND TENURE

Individuals had use rights though Maori had no equivalent of rights as an entitlement

Comment

It is not clear whether there was no individual entitlement in the sense of no claim which could be justly made. Granted that a right may have also been inherent in the land (ie the land had claims), individuals also presumably had claims to use the land, provided that they belonged to the right group and had met their community obligations. This is the basis for saying that the individuals had a conditional right 'by English conceptions' (D 66). It is not clear what is meant by the denial of such a right in Maori.

It is important to emphasise the fact that Maori use right was conditional on the performance of social responsibilities because this may be lost sight of in Pakeha perspectives. Recognition of such a principle would allow the legal system to deny access to land to someone who, though legally entitled under whakapapa, had not fulfilled his or her duties to whanau or iwi. But it may be going too far to say that the difference between individual tenure and communal tenure is not important. True, both Maori and Pakeha have elements of communal and individual tenure (D 67). Maori had individual use-rights and Pakeha have instances of communal tenure, eg in trusts, which have provided a good model for Maori tribal land ownership. But the fact that Maori individual use right depended on community responsibility makes better sense if the land was seen as a community resource; ie the condition appears to depend on an assumption of communal ownership or at least community interest in land. (This seems to be the implication of much of the previous section on land and whakapapa.) This may help to make the principle more

understandable to Pakeha. Where Pakeha land is held in a shared trust, the deeds of the trust may impose conditions on the individual users. It is not uncommon for families to share holiday properties, formally and informally, and to require each family member to make a contribution to the general upkeep and maintenance. There are also analogies for community-imposed conditions on individually owned Pakeha land, for instance, requirements to build houses only of a certain kind or value. The requirements to pay rates and seek planning permission are also community-imposed values. As often, the differences are more in the degree of legal formality and institutional enforcement rather than in fundamental principle.

Cultural survival may be measured by land retention

Comment

While it is true that land retention is a key element in cultural survival and one of the major objectives of indigenous leaders worldwide, its importance should not be overstated as if it were the only factor in cultural survival. For instance, the extent to which the indigenous language is in active use may be equally important.

HAPU POLITICAL RIGHTS AND EXTINGUISHMENT

Absolute ownership could not be ceded

Comment

Land ownership was determined by the ancestral past and therefore unchanging, though this clearly left plenty of room for dispute because the past itself was contestable (see p 7). How does the impossibility ceding ownership square with the earlier statement (D 78) that certain gifts of land could be treated as 'absolute conveyance'?

LAND DIVISIONS AND BOUNDARIES

Concept of hapu and iwi boundaries was a late development

Comment

The main political unit was the people rather than territory. In the modern European tradition political units, pre-eminently the state but also subsidiary units such as local bodies, are defined territorially, as an area of land under a single sovereign authority. Citizenship is then defined in terms of membership of a particular state in its territory. In the earlier western tradition, however, before the rise of the sovereign states, usage was more similar to the Maori. The ancient Greeks, for instance, had no concept of a separate state. The political unit was simply 'the Athenians' or 'the Spartans', meaning the Athenian citizens or the Spartan citizens. The Romans identified their 'state' with the Roman Senate and People. Though these ancient states had claim to ancestral territory they were not defined by that territory but by their own ancestry. In theory, a political unit defined by its citizens, such as a Maori hapu, could move to a new territory. The state of New Zealand, however, could never move.

This may appear to be a paradoxical contrast, given the usual assumption that land was much more important to Maori identity than it is to Pakeha identity. Certainly, Maori had very close connections with their ancestral land but their connection with each other, through the ancestry itself, was even more important as a determinant of political identity. For Pakeha, their citizenship is determined by their recognition as legitimate citizens by their sovereign state, not by their membership of a citizen body. Given that it was the people rather than the land that defined the Maori political unit, it is easier to understand the Maori's flexibility in relation to boundaries.

LAND SEVERABLES

Different parts of territory were distinguished for use by different group members

Comment

The fact that different groups and individuals could have different use rights over resources in the same territory makes

the Pakeha approach to mineral rights in principle compatible with Maori custom. The normal presumption would be that undiscovered minerals belonged to the hapu, ie to the community as a whole, in the same way that minerals belong to the Crown. However, in present-day New Zealand the hapu is no longer the overriding authority and so is denied control over minerals in its territory. In this respect conflicts over ownership of minerals may be seen as conflicts over political control in which the sovereignty of the New Zealand state overrides the authority (tino rangatiratanga) of the Maori hapu or iwi (see pp 25-6).

vi INTERACTION WITH COLONIALISM

Colonial authority offered peace.

Comment

Maori acceptance of colonial authority on these terms arises out of their acceptance of authoritative mediators as ways of solving disputes. However, there would naturally be an expectation that the mediators would be even-handed and would be seeking to facilitate a just outcome rather to impose a solution of their own. Acceptance of their decisions, like those of any mediator, would presumably be by consent of the parties backed up by community norms, rather than through the right of the mediator to determine justice or enforce a decision (see pp 2-3).

The Native Land Court did not appreciate Maori customary land law

Comment

The work of the court represents a clash of cultures in which the judges and their law inappropriately imposed not only their own values but also their own mistaken views of Maori custom. Among their own inappropriate values were the European prejudices in favour of individual title and cultivation. Among misapprehensions about Maori custom were an over-rigid interpretation of its norms and statuses as well as exaggerated attention to the rights of conquest and occupation. Some of the misunderstandings appear to have arisen out of an inability to appreciate the intellectual subtlety and complexity of Maori political discourse. This is similar to the inability of colonial military leaders to appreciate the strategic intelligence of Maori generals, as documented by James Belich (1986).

That judges differed in the weight they gave to different factors (D 95) or different factions (D 98) is perhaps hardly surprising given the complexity of the issues with which they were dealing. It is also a cause for criticism if there was inconsistency in the application of legal principles. But do we need to be wary of a double standard in reverse, of criticising Pakeha law when it seeks to impose rigid uniformity but also criticising Pakeha judges when they exercise flexibility? This illustrates the double-edged nature of both consistent principle and pragmatic flexibility. Neither is a sure recipe for either justice or injustice. We can say, however, that judges who attempted to reach reasonable ad hoc and pragmatic solutions after listening to all the evidence were more likely to approximate to Maori conceptions of just procedure than were those who adhered to strict and precise rules.

POST-CONTACT GROUP FORMATION

Maori structures have not been fixed

Comment

Again, flexibility and pragmatism are the key factors. Maori groups have evolved, and are still evolving, to fit the needs of the time. A good example is the development of the iwi in the nineteenth century in response to the new technology of warfare and the new administrative imperatives of the colonisers. Iwi organisation has received a further stimulus through the recent process of Treaty claims. Another example is the development of non-tribal or 'pan-tribal' organisations to meet the needs of urban Maori uprooted from their traditional tribal lands. An inevitable accompaniment of such flexibility is the contestability of group legitimacy as leaders of new groups try to assert their relevance and utility while leaders of more longstanding and potentially marginalised groups insist on their traditional authority and seek to undermine the credentials of their rivals. Present-day examples are the tension between the iwi and the non-iwi organisations such as the Maori Women's Welfare League and between the Maori Congress and the Maori Council. It is important that the state authorities when dealing Maori groups recognise the fluidity of Maori organisations and do not repeat the mistake made by the colonisers of privileging one set of organisations and leaders over others for the sake of administrative convenience.

The influence of individualism on Maori culture must be recognised. Originally, this was due to the impact of Christian teaching and the incentives to individuals for individuating land title. More generally, Maori have been subject to extensive cultural influences through participation in Pakeha capitalist society, exposure to the mass media etc, which have inevitably weakened the ties of Maori culture, including the former sense of identity with the whanau and hapu, and have correspondingly strengthened commitment to more individualist values such as the importance of individual rights and free choice. One important consequence is that Maori identity itself is now to some extent a matter of personal choice and commitment. Individuals can choose to become Maori or cease to be Maori in a way which was impossible two hundred years ago. Moreover, in so far as they work and live in the Pakeha worlds, most Maori are not so immersed in specifically Maori life as they once were (see pp 11-12). These factors do not affect the genuineness of Maori identity or even necessarily weaken its personal importance to individuals but they do limit the claims that Maori groups, particularly hapu and iwi, can make on their members. Any attempt to assert the degree of social control formerly exercised through hapu and iwi and their rangatira is likely to meet with resistance from individual Maori.

The exercise of customary law must therefore strike a balance, drawing on those aspects of Maori culture which are still relevant to the experience of Maori while accepting that complete restoration of Maori law and authority is not possible. The appropriate balance, it may be noted, will vary with the extent to which individual Maori still live a Maori-centred life. At the same time, the variations in legal treatment between Maori of differing Maori acculturation and between Maori and non-Maori cannot be allowed to become too wide or too one-sided. Otherwise, they will provide incentives for the opportunistic and insincere adoption of particular cultural orientations. The application of customary law therefore requires the exercise of considerable discretion by those required to administer it. Such discretion is, of course, very much part of the tradition of Maori customary law itself. If Pakeha legal authorities wish to provide for the genuine and effective application of customary law they will need to suppress, to some extent, their normal preference for precise rules and precedents. They will need to be prepared to delegate decisions to Maori leaders who have the combination of political, social and legal authority which provides the basis for the broad pragmatic application of general values and principles to individual cases.

CONTRACTS

Contracts were defined by objectives not by detailed terms

Comment

Similar points about the lack of need to spell all terms out are made above in relation to leases (see p 23). The flexibility and continuing nature of Maori contractual arrangements would appear to follow from the greater intimacy and stability of Maori society. When both parties to a contract know each other well and are likely to remain in close contact and have further mutual dealings, there is less need to spell out the details of any one agreement. Each interchange is part of an ongoing relationship. We could compare the mutual dealing of two Pakeha farmers who are neighbours and regularly swapping favours. The fact that neither is likely to abscond and that each will have further need of the other in the future allows a much more flexible approach to any one deal. In a larger market economy, however, where deals are often 'one-off' and between relative strangers, there may be fewer incentives for the fulfilment of contracts and so terms need to be more clearly specified in advance.

LAND SALES

Maori had various motives for selling land

Comment

Though land sales eventually came to be seen as detrimental to the survival of Maori culture and independence, it is worth remembering that many Maori leaders and peoples in the early days of contact saw positive advantage in selling to the Pakeha. Most Maori and Pakeha (especially the missionaries) assumed that both the land and political authority would continue to be shared (cf Belich 1986, 302-10). The Maori would continue to own and control most of the country while the Pakeha and their legal authority would be confined to the trading ports and small areas around them. On this assumption, there was much to be gained and little to be lost by Maori who encouraged Pakeha to settle on the coasts and open up opportunities for trade.

Presumably, if Maori individuals could only own a use right, this is what they thought they were selling, especially if the

concept of full and final alienation was unknown. Even so, of course, if the use right was conditional on the consent of the hapu and reciprocal obligations, individuals had no right to sell their use right without consent of the hapu.

REFERENCES

Will Kymlicka, *Contemporary Political Philosophy* (Oxford UP, 1990), provides an up-to-date critical summary of the major schools of thought and controversies in English-speaking liberal democratic political philosophy. The same author's *Multicultural Citizenship* (Oxford UP, 1995) provides a clear exposition, from a liberal point of view, of the philosophical issues involved in incorporating the rights of ethnic minorities (including indigenous minorities) within liberal democratic societies. (Kymlicka is a Canadian and so fully alive to the complexities of ethnic diversity.) Some of the same issues are treated more superficially, though in a specifically New Zealand context, in Richard Mulgan, *Maori, Pakeha and Democracy* (Oxford UP, 1989). Useful analyses of some Maori ethical principles are proved by John Patterson, 'A Maori concept of collective responsibility' and Roy Perrett, 'Individualism, justice and the Maori view of the self', both in G. Oddie and R. W. Perrett (eds), *Justice, Ethics and New Zealand Society* (Oxford UP, 1992), 11-26, 27-40. Nineteenth-century Pakeha attitudes to Maori are well discussed by James Belich, *The New Zealand Wars* (Auckland UP, 1986)

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