Changing Realities : Unchanging Truths*

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Introduction

An English missionary preaching to the 19th century Maori, and the current political break-up of the former Soviet Union may appear to have little in common. And a paint-bedaubed anthropologist immersing himself in the cultural mores of the 20th century Yoruba and the behaviour of a New Zealand judge may appear to be even less related.

Yet all are reflections of the same process of legal and political thinking which has shaped human history for centuries and which in fact defines the philosophical underpinnings of this Conference. For from that process have arisen both the new found fascination with legal and cultural pluralism in western Legal thinking, and the older divination of who (or what) can exercise sovereignty or be a nation-state in terms of international law.

Together these ideas seem at odds. The concept of sovereignty and the nation-state has long been regarded by many people as an immutable given, as evidence of conservative entrenchment, and an international status quo that preserves an imperial order of dismissal and domination. Legal pluralism on the other hand is proclaimed to be a new age of liberal sensitivity to, and acknowledgment of, the laws, norms and lore of those who are dominated by

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the extant sovereign order. The latter in fact appear to seek a belated acknowledgment of the norms and rights of those whom the former has oppressed.

Yet the reality is quite different and paradoxical. For while the apparently entrenched and inviolable ideals of sovereignty are being redefined in international fora such as the United Nations Working Group on Indigenous Populations, and reshaped by the often bloody redrawing of Eastern Europe's borders, the self-styled liberalism of legal pluralism is actually seeking to reaffirm the imperialist notions of control over others. In a sense the politics of painful reality is forcing a change in the perceptions of sovereignty and state, but the myopia of academic idealism is reinforcing the older legal order of subordination and repression.

It is this paradox which this paper seeks to explore. In doing so it considers three main issues

First, it illustrates that legal pluralism, as a concept, is inherently assimilative and racist.

Second, it illustrates how that process has developed in the Pakeha jurisprudence of Aotearoa/New Zealand with particular reference to the Maori politico/legal concept of rangatiratanga.

Third, it outlines the practical, spiritual, and philosophical, consequences of that process for Maori

Legal Pluralism and Colonisation

When Pakeha lawyers and law-makers travelled to Aotearoa and other parts of the world-to-be-colonised they did so, like the missionaries, as people who sought not to record what they encountered, but to destroy it.

A racist arrogance allowed them to proclaim that if an Englishman (always a man) travelled to another White country he would accept its jurisdiction, but if he travelled to a non-White country then he would surely carry his law with him. The law of the indigenous peoples he met was in some cases regarded as a set of barbaric and heathen customs which could not extend its writ over an Englishman; in fact it needed to be replaced by the civilising influences of the common law. In other instances it was simply not

recognised at all, so that there was no jurisdiction for an Englishman to be subject to, except his own.

In Aotearoa, Maori people were held to have no law, and therefore no authority, because the early settlers could not discern in Maori society the things they identified as "legal" - the courts, the Police, the written reports. So Maori society, while not "law-less", was possessed only of lore and custom, which needed to be suppressed and destroyed in order that the monist ideas of "one (English) law for all" could be imposed. And of course with the imposition of that law came the imposition of English law-making institutions and the paraphernalia of the Victorian nation-state. The denial of the existence and validity of Maori law therefore necessarily entailed more than the rejection of a centuries old jurisprudence:it denied the political reality of Iwi-based Maori nationhood.

The sovereign status of Maori had enabled them to make and enforce law which the people would accept:the law in turn had defined the parameters, power and validity of the nation. The dismissal of recognised Maori "lore" as allegedly barbaric was therefore due to more than offended missionary sensibility. It was in fact necessary for the creation of a new legal and political regime in this land.

The establishment of the "New Zealand" nation-state thus required the dismissal of the interwoven legal and political processes of the Maori. The rejection of the former was a necessary step in the constitutional subjugation which colonisation seeks. But to mask the oppression of this process, a new and culturally different symbiosis between politics and law had to be made acceptable:the writ of a newly deified and "better" process had henceforth to run.

Today this has meant at one level the continued subjection of Maori to legal processes that are systematically biased. At another level it has led to an equation of the concept of justice with the operations of the new law (the only system available), and the acceptance of the necessary myth that the new law is not subject to political power. The terrible colonisation of the soul and mind which leads to this acceptance in turn causes many Maori to define justice only in terms of what the foreign legal system might grant, and not in the belief of what their own political power could deliver.

Too often this also leads to the spiritually debilitating necessity of having to justify the need for, say, Maori justice systems or juridical concepts, not on

the basis of their role as part of a political process, but on the basis of their validity as diversions from an allegedly politically-neutral and pluralistic staus quo.

Maori are compelled into either unquestioningly accepting the values of the imposed law, or of seeking a culturally sensitive" process within an ideological framework that actually forces them into adopting the very consciousness which they wish to transform, and which maintains the illusion that law (and hence justice) is isolated from issues of political power.

It is this unspoken reality which underpins the often violent Pakeha opposition to any specific discussion of Maori legal processes and which ultimately motivates the newly discovered "Treaty" jurisprudence of legal pluralism in this country. For to acknowledge the right of Maori to reestablish their own legal system and hence validate their legal concepts on their own terms is to acknowledge, in the end, their right to make laws. To do that is, of course, to acknowledge their sovereign nationhood and that remains anathema. Legal pluralism enables the imposed status quo to mask that anathema in a guise of sensitivity and good faith.

The colonial certainty of overt dismissal has been replaced by a new-age legalism. Legal monism has become plural, heathen custom has become anthropological validity, and racist superiority has been transformed into cultural awareness. Just as many adherents of new-age philosophies in the West seek salvation in the "indigenous experience" by plundering and interpreting its spirituality to suit their own ends, so Pakeha legal pluralism seeks now to incorporate and redefine indigenous legal concepts to maintain the overall control of its own processes. It thus perpetuates the same assimilative and racist base of colonisation which it purports to abhor, and denies Maori the very justice which it proclaims to be its aim.

A Case Study: The Redefinition and Control of Rangatiratanga

Prior to the imposition of the common law, Maori law was an evolving process that punished wrongdoers, comforted victims, protected resources, and sought harmony within and among Iwi. If the personal is political to modern feminists, so the personal was legal and the legal personal to Maori. That relationship saw people not as isolated individuals but as interrelated parts of a communal whole - and that whole was a body politic.

As such, the authority it wielded, its mana or rangatiratanga, was a political power. Shaped by cultural norms, it was circumscribed by law. At its most basic level it was power legally enforceable only within the Iwi. Maori could not "carry" their law into the land of another, nor seek to impose it beyond acknowledged boundaries. To attempt to do so would lead to war. And if Iwi could not impose their authority, neither could they give it away.

Indeed, the idea that mana or rangatiratanga could be ceded to some other authority was impossible, illegal in fact, because it was culturally incomprehensible. No matter how powerful leaders were, they could not give away the authority which had been handed down from ancestors in trust for the future.

Yet in the persistent Crown need to justify its authority, that is exactly what Maori are alleged to have done. Using the English text of the Treaty of Waitangi the Crown claims that Maori ceded sovereignty, even though the Maori text says no such thing.

Using that legal legerdemain, colonisation was imposed on Maori through the Crown's might and right. If Maori were to have any political power, it was to be on terms, and within institutions established by Pakeha might. If they were to have justice, it was to be defined by the Pakeha sense of right. Rangatiratanga and the means by which Maori could pursue their own dread of self-determination and sovereign nationhood were to be no more.

In the first 140 years of colonisation those dreams were overtly denied. It was denial laced with inconsistency, illogicality and incongruity. On some occasions the Crown claimed that Maori had ceded their rights to rangatiratanga in the Treaty, while on others its rejection of Maori law (and therefore the rangatiratanqa which shaped and was shaped by it) implied that in its view there was no rangatiratanga to cede anyway. On yet other occasions it justified the dismissal of Maori rights on the Treaty cession of sovereignty while also holding in judicial decisions that the Treaty itself was a "nullity".

Today the dreams of Maori are denied less overtly, but equally effectively and incongruously through the notions of legal pluralism.

This process can be seen by comparing the Maori juridical definitions of rangatiratanga with its newly expounded analysis by the Pakeha law as it performs a pluralistic retreat from its earlier dismissal.

In 1980 the Maori Council stated:

> Just as the Crown has found meaning in the concept of sovereignty, so the Maori people find meaning in the concept of rangatiratanga .... It is a dynamic not a static concept of rangatiratanga .... emphasising the reciprocity between the human, material and non-material worlds. In pragmatic terms, it means the wise administration of all the assets possessed by a group for that group's benefit: in a word, trusteeship in whatever form the Maori deemed relevant.

It's base in Maori law was, according to Professor Bruce Biggs of Ngati Maniapoto, the right to "take care of one's people". At the 1892 Maori Parliament held at Waipatu, Te Ataria of Ngati Kahungunu stated:

> This rangatiratanga is our mana .... and as the water we now see at Heretaunga is limited only by the well spring at Haukunui, so our mana is limited only by the well spring of our ancestors' wisdom and the law which they shaped.

From the well spring of that wisdom came the authority which rangatira could exercise in the interests of their Iwi. It was an authority which had both temporal and spiritual aspects; an authority to wage war and maintain peace; an authority to protect and to destroy.

It was an absolute authority over life and death; the power to make and be the law.

In 1922 Apirana Ngata defined chiefly authority as being:

> Law to (the) tribe; It was (the rangatira) who declared war and he who sued for peace. .... It was the chief who bespoke the land and gave it away. They had the power even for life and death.

The personal and tribal connotations of rangatiratanga were politically expressed in written form in the 1835 Declaration of Independence. In that document both the people-base of the authority and its illimitability by others were recognised.

The word "rangatiratanga" was used to denote independence and "mana" to express sovereign power. The inability of others to impinge upon that authority was summarised in the words:

> they (the rangatira) will not permit any legislative authority separate from themselves....

The people in their respective Iwi were therefore independent sovereign nations. Rangatiratanga in a sense was the power given to certain people to lead the nation, to be the law-makers and the law-givers. This law-making power of the Iwi and the authority of those entrusted with exercising it came from ancestors and could not therefore be transferred or ceded to another. No rangatira could give it away; no Iwi would want to do so.

As John Tangiora of Ngati Kahunaunu stated:

> if a tribe should lose its mana, its rangatiratanga it has lost its soul .... all that our tupuna gave to us we must hold.

Such a "non-cedeable" power was in reality a power, a consequence, of self government. In 1985 Hirini Mead (Ngati Awa) stated:

> te tino rangatiratanga translates .... honestly, and sensibly as self-government or as home-rule.

Such a power of government includes all the rights and powers of sovereign nations including the power to make laws and dispense justice.

Thus in 1863 Karaitiana Takamoana (Ngati Kahungunu) could speak of Iwi authority in the context of legal processes and state:

> you must know that it is by our law that we must try our own.

and in 1879 Apihai Te Kawau (Ngati Whatua) could define Iwi mana as including resources of the sea since:

> the sea belongs to me and the law lays down (that) fact.

Sir James Henare (Ngati Hine) said in an oft quoted statement:

> Because of the Treaty the Maori believe, right to this day, that they are equal partners and they know from experience that it's not so. But right to this day, and those Chiefs that I had the great privilege of being associated with, Runanga o Te Tiriti o Waitangi, and they always said that, that they had equal rights. That is why they signed the Treaty. And lots of people .... seem to infer that those Chiefs didn't know what they were signing. They knew what they were signing, reading the Maori version. But, when it came to sovereignty in the English version what in fact they did sign was giving away all their mana and everything else to the Queen of England. Which they never believed and never intended to do. And that's quite plain from signing the Maori version .... not sovereignty.

Dame Mira Szasy (Te Rarawa) has constantly reaffirmed this view. Three years ago she wrote that tino rangatiratanga is "self-determination" and the "power to rule over something".

She links that term with the phrase mana motuhake (mana tuku iho) which:

> implies the very essence of being, of law, of the eternal right to be, a God-given right to the individual or a people to live, to exist, to occupy the land .... These rights existed prior to 1840 and since there was no mention of (them) in the Treaty we must deduce that there was no thought in the minds of the Maori signatories to forego them .... .

These clear analyses of the legal (and political) nature of rangatiratanga, and the juridical concepts such as utu and muru which existed concomitant with it, are now being retrieved by Pakeha law from the bin of barbarism to which overt colonisation consigned them.

The retrieval, like all processes of legal pluralism, is an act of cooptation and diminution. Indeed the process can be likened to that promoted by the missionary Samuel Marsden in 1822 when he stated:

> we should recognise the impurity of the Maori language and .... interweave our understandings with theirs so that their language and its meanings may be more chaste. At present it is very unchaste and offensive.

In confronting the truth of rangatiratanga the Courts, the Legislature, and the Waitangi Tribunal have acted as new-age missionaries, redefining rangatiratanga to make it chaste, inoffensive, and subordinate to the imposed law which it once completely rejected.

The Crown approach to rangatiratanga and Maori law has never, and still does not, see it as a political/legal construct firmly grounded in Maori law. Rather it is always seen in relation to the processes and interests of Pakeha law. As such, it is always defined in a way which rejects its sovereign nature and confines its concomitant rights to areas manageable within a Pakeha constitutional status quo.

Within the belief of a cession of Maori sovereignty (a giving away of mana), some early colonial jurists did try to reserve some semblance of Maori rights according to the doctrines of imperial constitutional law.

Thus in *R v Symonds* a case between two Pakeha about who had better title to a piece of Maori land, Martin CJ stated that Maori rules of land tenure remained after the Treaty. Maori were able to:

> deal among themselves as freely as before the commencement of our intercourse with them.

The recognition of "free dealing" was not a recognition of Maori defined law or rangatiratanga. It was a common law "right" of aboriginal title granted to Maori when they ceded sovereignty in the Treaty. It was subject to the:

> exclusive right of the Queen to extinguish native title.

Within a few years even the limited aboriginal land rights were rejected by the Courts and Parliament in the inexorable process of colonisation.

By the 1970's some Pakeha lawyers began to question this judicial and legislative straying from the common law path.

Through the work of the Waitangi Tribunal, academic writing, and the Courts, there has developed a re-assertion of a aboriginal title and hence a growth of legal pluralism. It was not, of course, a Maori defined rangatiratanga which resulted from this new-found interest, but a refining of *R v Symonds* principles which led to new Pakeha definitions of

rangatiratanga: definitions which conceded certain "rights" to Maori but kept them subordinate to the Crown.

The key juridical concept in this approach has been the view evinced by the Waitangi Tribunal in the Orakei Report:

> Contemporary statements show well enough Maori accepted the Crown's higher authority and saw themselves as subjects, be it with the substantial rights reserved to them under the Treaty.

and the view of the Court of Appeal that following the Treaty and proclamations:

> the sovereignty of the Crown was beyond dispute ... . sovereignty in New Zealand resides in Parliament.

Within this constitutional limitation how exactly has rangatiratanga been defined?

The Waitangi Tribunal has spent a great deal of time considering rangatiratanga as it appears in Article 2 of the Treaty.

In the Motunui Claim the Tribunal stated that the Treaty confirms to the Chiefs and the hapu:

> 'te tino rangatiratanga' of their lands etc. This could be taken to mean 'the highest chieftainship' or indeed, 'the sovereignty of their lands'.

Unfortunately the cultural values of the legislation which established the Tribunal were Pakeha and they could not permit the true expression of rangatiratanga as a political power which Iwi still retained in spite of Crown claims of cession.

Maori thus began to see clear statements of Crown supremacy appearing in the Tribunal Reports and a consequent limiting of rangatiratanga to the issues specified in Article 2 - whenua, kainga, and taonga. It was emasculated of its politico-legal status. With that limitation came the perception that rangatiratanga was merely a property right, and the judicial belief that the Crown must act in good faith in relation to that right.

The Tribunal re-inforced the supremacy of the Crown (and hence the limited nature of rangatiratanga) by developing from the Manukau Claim a fiduciary role for kawanatanga - an obligation to actively "protect" things Maori:

> The Treaty .... obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them.

Such re-affirmation of kawanatanga authority did not just flow from the restrictions in the Tribunal's statute. It was also explicitly stated in a series of court cases which the Tribunal was bound to follow.

The first, the 1987 SOE case considered the Treaty "principles" and stated the Treaty was a bargain which provided:

> the Queen was to govern and the Maoris were to be her subjects. (Cooke P)

Although Bisson and Richardson JJ also saw the need to "protect" Maori in their rangatiratanga, it was subject to the right of the Crown to make laws and "related decisions for the community as a whole."

The result of the case has been that the kawanatanga definition of rangatiratanga is now firmly enunciated as a proprietary interest subject to the Crown showing good faith in the exercise of its sovereignty.

Its other, what may be called "public relations" result, is that Pakeha law now prides itself on its progressive pluralism and its ability to act in good faith towards its Maori "partner". The Waitangi Tribunal is thus held to be the model of a fair and impartial body, (even though just one "partner" chooses its members, determines its jurisdiction and ignores its recommendations), and the law itself pursues apparently readily adaptable notions of cultural defence, reparation, and whanau (family) decision-making. Yet the rhetoric is merely the stuff of pluralistic myth-making.

By redefining the base of Maori aspiration and by seeking to co-opt Maori legal and cultural processes, the law maintains its place as a colonising leviathan that can choose which norms of the oppressed will be validated and which will be dismissed. The consequences for the Pakeha law are a growing and profitable business of "expertise in Maori law and Treaty jurisprudence. The consequences for Maori are a painful subjection to delusion and illusion.

The Cost of Pluralism for the "Other"

In Aotearoa/New Zealand, as elsewhere in the sad story of colonisation, the institutions of the indigenous people were suppressed by the imposition of an introduced law, the proselytising of a new religion, and the establishment of a different socio-political and economic structure.

Unlike the naked use of military power or the tragically debilitating effects of new disease, the process of institutional imposition was always cloaked within a subtle and high-sounding rhetoric.

Thus the need to civilise and save the natives justified the imposition of a religion and a God whose worship would provide a better existence after death. And the need to simultaneously protect the savage while alive justified the imposition of a new law which would apply equally to all. Once living under that religion and law the indigenous people would find the price of eternal peace was often a terrible living hurt, and equality under the new law was an illusory protection from the oppression of the law itself.

So it was with the Maori. Their new devotion to christianity was abused when they were taught the sanctity of the sabbath and then killed while praying at Ruapekapeka; and their acceptance of the biblical injunction to turn their swords into plough shares was seen to be of no protection when Parihaka was attacked by the militia.

And the mythic impartiality of Pakeha law cannot mask its role in the process of land alienation and cultural oppression, and not even its most profound rhetoric can disguise the overt dishonesty of laws such as the *Validation of Invalid Maori Land Sales Act.*

But the rhetoric persists. Even when the interests and power of christendom clearly demeaned the promise of christianity, and the application of law blatantly denied the pursuit of justice, their civilising and egalitarian purpose was used to mask their role as agents of colonisation.

Today the advent of legal pluralism continues to mask the truth in a way which seeks to consolidate colonial power and to teach the Maori to believe in the good faith and efficacy of Pakeha institutions. In that belief lies the key to Maori acceptance of Pakeha power and the ultimate honouring of the Crown in whose name the whole profitable horror of colonisation was being inflicted upon them.

Colonisation required that the institutions of Maori law were to be replaced by a mythology of Pakeha law which sought to deny the reality of its cultural bias and its political servitude through a dishonest rhetoric of impartiality and equality. They were to be supplanted by a Pakeha political authority which sought to justify its power through language sourced in the mythology of that law.

But in the realm of mythology the ultimate reality is human interest, and the mask of mythology rarely hides that truth. Colonisation still requires that Maori no longer source their right to do anything in the rules of their own law. Rather they have to have their rights defined by Pakeha; they have to seek permission from an alien process to do those things which their philosophy had permitted for centuries. They have now to see that permission clothed within their own language and purportedly sourced within their own philosophies.

Their rights as tangata whenua defined by Maori law have thus been replaced by a Pakeha concept of aboriginal rights exercised within, and limited by, the Pakeha law.

Their political status, as determined by a shared whakapapa which underlay the exercise of rangatiratanga, has been replaced by a common subordination to a foreign sovereignty.

This redefinition of basic Maori legal and philosophical concepts is part of the continuing story of colonisation. Its implementation by government, its acceptance by judicial institutions, and its presentation as an enlightened recognition of Maori rights are merely further blows in that dreadful attack to which colonisation subjects the indigenous soul.

For the process of re-definition continues the attempt by an alien process to impose its will on the beneficiaries of a different culture. It captures, redefines and uses Maori concepts to freeze Maori cultural and political expression within parameters acceptable to the state. It no longer seeks to destroy the culture through direct rejection or overt denigration, but tries instead to imprison it within a perception of its worth that is determined from the outside.

Thus while Pakeha law no longer rejects a notion of Maori rights, it redefines those rights and thereby sources them within a pluralistic common law, rather than in Maori authority. Pakeha lawyers, judges, and institutions such as the

Waitangi Tribunal no longer dismiss the concept of rangatiratanga: they capture it. And Pakeha academics frame the whole discussion of Maori rights within a pluralistic jurisprudence of the wairua that is consistent with their law.

Those who pursue such views are neo-colonists who neither understand nor respect Maori philosophy and culture. They are part of the attack on the indigenous soul.

The soul of a people, the essence of their being, exists within the warmth of their philosophy, it is nurtured and sheltered by the wisdom of their culture and their law. To oppress a people, to set in place the bloody success of colonisation,is to try to destroy the soul.

For the Maori the attack on their soul was so terrible it led to a weakening of faith in all things which had nourished it. The demeaning of the values which cherished it, the language which gave it voice, the law which gave it order, and the religion which was its strength, was an ongoing process which ultimately effected the belief of Maori in themselves.

It thereby induced an agony into the Maori soul as it sought to survive under an increasing Pakeha domination which mocked it. Maori began to develop an internalised state of alienation in which they rejected themselves because the meanings which their philosophy gave to their existence were being removed. In their place an alien philosophy was being erected, an all-pervasive foreign order which gave meaning to all that was henceforth to be regarded as good and it was all White.

The alienation and self-negation so engendered ate away at the Maori soul. Many began to feel that there was somehow an incompleteness in their humanity which only becoming Pakeha could fulfil. With their soul thus battered, they began to accept the efficacy of Pakeha institutions, and to believe that at the same time as those institutions were oppressing them, they could also somehow be turned to for salvation.

Today the ideas of legal pluralism maintain that dishonesty of illusion. By promoting its new found awareness and sensitivity, the Pakeha law deludes many Maori into believing that it will indeed protect their rights and acknowledge the validity of their law, their authority and their place in this land.

It will of course do no such thing. By re-defining and diminishing the fundamental base of Maori nationhood, rangatiratanga, the Pakeha law confirms that it is still merely an agent of colonisation. The growing realisation by Maori that this is so merely intensifies the pain of the soul. The acceptance by Maori that this is so will however inevitably lead them to reclaim their sovereign authority. At that point the changing perceptions of the nation-state will provide the context within which the Treaty, the law, and the rights of Maori can have independent life again.