

Time-capsule: Explorations of Concepts of Time and Law in Colonial New Zealand

Jonathan Barrett and Luke Strongman, The Open Polytechnic of New Zealand¹

‘Law organizes and reproduces an essentially temporal myth.’ (Greenhouse 1989: 1631)

Introduction

The history of relations between Māori and Pākehā² casts a shadow over contemporary politics and lawmaking in Aotearoa New Zealand. For example, when in opposition, the centre-right National Party sought to reduce the 2005 general election debate to a ‘Kiwi/iwi’ duality,³ effectively demonising the Labour-led government for its alleged privileging of Māori over Pākehā interests. Paradoxically, the extinguishment of indigenous customary rights via the Foreshore and Seabed Act 2004⁴ led to a schism in

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² ‘Pākehā’ means ‘a non-Polynesian New Zealand-born New Zealander especially if pale-skinned’ (Orsman 1997: 567). King (1999: 10) argues that the term ‘simply denotes people and influences that derive originally from Europe but which are no longer “European.” Pakeha is an indigenous expression to describe New Zealand people and expressions of culture that are not Maori.’ In this article, the term will be restricted to the meaning contemplated by King.

³ ‘Kiwi’ denotes a New Zealander and ‘probably originally applied to white males’ (Orsman 1997: 414). While noting the possibility of Eurocentric categorising, *iwi* is usually translated as ‘people’ (Belgrave et al 2005: 394), ‘tribe’ or ‘a people recognising a common eponymous ancestor’ (Orsman 1997: 375). Māori may also be referred to as *tangata whenua* (people of the land or a given place) and Pākehā as *tangata tiriti* (people of the Treaty).

⁴ In *Attorney-General v Ngāti Apa* (2003), the Court of Appeal (the then highest domestic court) held that the jurisdiction of the Māori Land Court (*Te Kooti Whenua Māori*), which hears matters relating to Māori land, extended to the foreshore and seabed. This decision indicated that some customary rights could trump the Crown’s assumption of radical title to all land in New Zealand. In reaction, the Labour-led government (1999-2008) enacted the Foreshore and Seabed Act that vested in the Crown full legal and beneficial ownership of the public foreshore and seabed, to preserve it in perpetuity for the people of New Zealand. See Boast (2005) for an analysis of the case and the legislative reaction. As part of the *Relationship and Confidence and Supply Agreement* between the Māori Party and the National Party,

left politics with the creation of the Māori Party. Issues of inter-cultural conflict linger despite—or, perhaps, because of—the Treaty of Waitangi (‘the Treaty’), which in 1840 appeared to establish equitable grounds for relations between the British Crown and the indigenous population by granting all rights of British subjects to Māori and guaranteeing their ‘full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties’ (the Treaty 1840: art 2).⁵ The settlers’ means of acquiring land is an obvious root cause of tension; but, we argue, concepts of time and law in colonial New Zealand, particularly in relation to land, may also contribute to an understanding of the contemporary relevance of persistent problems.⁶

Opening the ‘time-capsule’ throws light on why the equitable engagement promised by the Treaty did not eventuate as the colonists failed to recognise *tikanga* Māori (customary rights and duties) as part of New Zealand law. Eurocentric notions of time were inextricably implicated in the process of colonisation and the complex relationships involving the inhabitancy of space. The recognition of such an ‘originary moment’ continues to provoke questions about understandings of time in contemporary politics and lawmaking. Thus, rather than a balancing of minority indigenous rights with Pākehā expectations, the Foreshore and Seabed Act can be read as an example of how the continuing influence of European modernity signifies the absorption of the indigenous culture into the same legal and temporal framework as the coloniser at the same time as it re-inscribes political domination in terms of space.

Rather than trace lines of power structures implicit in such a discourse in the Foucaultian sense, this article explores how colonial law and notions of time congruent with tenets of Victorian anthropology could occlude indigenous interests. As Jonathan Friedman notes, ‘[A]nthropology is born out of the ideological representation of the center/periphery/margins structure of our civilization as an evolutionary relation

which was elected as the lead party of government in 2008, the Foreshore and Seabed Act has been subject to a Ministerial Review. The review panel has recommended that ‘the Act must be repealed’ (Durie et al 2009: 152) but no decision has been made by the government.

⁵ In accordance with orthodox legal doctrine, the Treaty is an international treaty concluded between two sovereign nations. While the principles of customary public international law are incorporated into the common law, the provisions of a treaty only apply domestically (as opposed to between the countries themselves) when the provisions are legislated (Joseph 2001: 61).

⁶ There is some evidence that this problem exists forward in time as well as retrospectively. In 2009 a national debate ensued over the value of historic forestry settlements to some Māori iwi which are challenged by the new requirements of the environmental Emissions Trading Scheme. The scheme has the effect of imposing penalties and circumscriptions over future land use (See ‘Ngāi Tahu Settlement Could Unravel Over ETS Restrictions’ 2009).

between civilization and its less developed forerunners, a mistranslation of space into time' (Friedman 1994: 5). In a secondary sense, this exploration delineates how the pathway to alternative histories from the postcolonial present might be redrawn by revealing the mechanism of historical appropriation as based on the concept of spatio-temporal occlusion. J.G.A. Pocock argues, 'If we look at the paradigm of appropriation from the state of nature, the two things we ought to notice are that it was constructed by jurists and that the technology it presupposes is the heavy plough' (2001: 42). But Pocock omits the fourth dimension from the paradigm of appropriation in the colonies—the 'technologies of time'—which separated the appropriators and the dispossessed in terms of spatio-temporal dislocation.

This article first outlines the dissonance between European and Māori conceptions of time, revealing a disconnection 'between the old ways and the new' (Pearce 2003: 13). Second, we consider the relationship between time and law. Third, we apply the interlinked concepts of law and time to land. Finally, we consider how postcolonial jurisprudence seeks to engage with historical problems in New Zealand, and air the possibility of a counter history.

Conceptions of time

Henri Bergson recognised that notions of time are culturally specific. Developing Kant's (1781) idea that space is endowed with an existence independent of its content, he postulated that time is a social construction involving the manipulation of the phenomenality and materiality of space. Time and space are malleable because the empirical experience of the physical world and abstract ideas coincide: 'The empirical or genetic explanations have thus taken up the problem of space at the very point where Kant left it: Kant separated space from its contents: the empiricists ask how these contents, which are taken out of space by thought, manage to get back again' (Bergson 1889: 93). Bergson (95) further proposed that, given human differences and the interpretation of culture-specific 'local signs,' simultaneous experiences of time are never identical. Such dissonance arises from the 'diversity of the organic elements which they effect' and brings into question the idea of time as a clear homogeneous medium. Thus, the experience of time and space for the individual and in the social sense are no more located 'within human consciousness than without it' and are themselves a work of time and space.

The application of English law to colonial contexts reflects externalised Eurocentric concepts of time that are implicit in the regulation of physical culture and social relations. Bergson (1889: 236) suggested how this function is achieved: ‘On the one hand by getting everything ready for language, and on the other by showing us an external world, quite distinct from ourselves, in the perception of which all minds have a common share, [foreshadowing and preparing] the way for social life.’ Crucially, law and time are conjoined inasmuch as the law satisfies the two criteria of being ‘language based’ and ‘preparing the way for social life.’ Furthermore, by creating actionable title and records (deeds or registries) that link specific parcels of land to specific individuals, who then enjoy a comprehensive and permanent set of rights over that land, positive law constructs a framework for spatio-temporal transaction and ownership.

At the time of initial engagement, like other indigenous peoples, Māori held different conceptions of time to Europeans. Linda Tuhiwai Smith observes how ‘Western observers were struck by the contrast in the way time was used (or rather, not used or organized) by indigenous peoples’ (1999: 53). For example, a European trader in the early colonial period, Joel Polack, reported ‘time was not accounted by a native as any importance’ (1840: 104). Māori developed compendious, oral *whakapapa* (genealogies), and so the ever presence of ancestors would have had the effect of compressing time and constantly recycling and renewing distant events. Indeed, Michael Jackson observes that pre-colonisation, ‘the Maori lived in a world in which the past was continually recreated, in myth, ritual and art’ (2003: 46). But it is cyclical time—‘the times of reproduction’ and ‘the unfolding cycle of the seasons, the turning of the earth; the time in which our daily lives are set’ (Massey 1993: 144)—that would have principally informed Māori practices and customs. In contrast, the Europeans had developed the awesome cultural weapon of linear time. Contemplating this development in the context of early colonial Australia, Stephen Muecke argues that ‘[T]he European settlement of Australia occurred at precisely the time in history when the European Enlightenment in the late eighteenth century created a new temporality via a major philosophical rupture to usher in an age of European modernity and scientific rationalism that would put all “primitive” superstition behind it’ (2004: 9).

Unlike cyclical time, the concept of linear time is independent of natural processes and permits ideas of history as sequestered intervals (Greenhouse 1989: 1637). Linear time

is an intellectual construct that enables measurement in noncyclical ways and also contains ideas of singularity, uniqueness and supremacy. As Carol Greenhouse (1989) suggests, in borrowing the notion of time in relation to eternity from the church, secular temporal discourse located time as something independent from individual experience. This experience also made the regulation of space, as well as of social order, possible by the union of time and place. Similarly, notions of time facilitated the creation of institutions by locating regularised temporal contractions in symbolic form. Thus, secular institutions became timekeepers in society, regulating the social relationship between law, time and space. Linear time is embodied in institutions, industrial workshops, the state, courts and contracts, schools, even the church. Each becomes an independent arbiter, keeper and regulator of time juxtaposed in contiguous social landscapes. Time itself, like law, becomes a central construct of legitimacy.

Linear time also permits ideas of universal progress. Thus, Māori, because of their pre-modern lifestyle, could be consigned to a ‘fictitious’ past—a ‘denial of coevalness,’ which Johannes Fabian refers to as the ‘allochronism of anthropology’ (2002: 32). Conceiving global history in terms of universal progress, this allochronic logic identified and constituted nineteenth-century ‘savages’ as ‘survivals,’ inhabitants of more or less ancient stages of cultural development. Victorian colonial discourse, which incorporated, inter alia, notions of time and religious doctrine, effectively relegated Māori to a pre-modern past, and thereby justified European cultural ascendancy through a claim to spatio-temporal legitimacy. This discourse was based on the excentric agency of modernity and the rule of law. Linear time also acted to ‘seal off’ or separate the ‘object’ of Māori from the time of observation, rendering Māori culture as ‘frozen’ or ‘taken out of time’ (Thomas 1996: 2). At the same time, allochronism established a ‘civilised’ West as the pinnacle of universal human progress, an argument that helped legitimise various imperialist projects (Bunzl 2002: xi-xii).

Allochronism arose from the hegemonic way in which Victorian anthropology viewed its subject and consigned the myths of indigenous races to a temporal ahistoricity. This narrative continuity irrupted between the different cultural typologies of Māori and European cultures. Māori adapted their worldview to accommodate aspects of Christianity and settler culture. For example, Ngāti Rangiwewehi *iwi* member Wiremu Te Rangikaheke’s *Nga Tama a Rangi (The Sons of Heaven)*, published in 1849, sought

to record Māori creation myths, but did so with recognition of aspects and terminologies borrowed from Christianity that demonstrate an adaptation to the settler worldview. Conversely, European migrants sought to sanitise and commodify the epistemological view of Māori myths and legends in publications such as George Grey's *Polynesian Mythology* (1854). Grey's book was based on Te Rangikaheke's writings, and, while preserving Māori narratives for posterity, did so in the mode of Victorian ethnography that accorded the narratives ahistorical status in contrast to the Christian historical view. Christianity was thus co-opted as the discourse enabling Māori access to modernity, and Christianity, in turn, became a sub-text of historical loss and occlusion. Furthermore, pre- and post-conversion practices could be compared in a way that revealed traditions as 'uncivilised,' if not 'diabolical.' Thus Richard Boast quotes Nopera Te Ngiha, a *rangatira* (chief) of the Nga Toa *iwi*, admitting in 1868 'that before the advent of Christianity Maori had kept slaves, but stressed that this was "in Satan's time," before the coming of the Gospel' (1998: 11).

Western temporal structures inevitably became the pre-eminent rationales of social organisation in European colonies. Indeed, as Polack (1840: 105) observed, the extent to which Māori adopted European time usage determined their level of incorporation into the cash economy. The advent of literacy also played an important role. 'Literacy enabled legends to be "frozen," to assume the authenticity of European-style history' (Jackson 2003: 46) but in 'freezing the past, literacy makes it more difficult to assimilate the present into the past. Changes or recital become more obvious and are less easy to mask. Literacy introduced new ideas to the Maori and produced an hiatus in the continuity of traditional time' (46). This also had an impact on customary law. As David Williams notes, 'Of course *tikanga* [customary law] had developed since the time of European contact and, if allowed would continue to do so' (2005: 375).

The social problems that underlie European expansionism may be overlooked in the vigour of cultural transplantation. The utopian ideology of 'escape' and the sanctity of new beginnings punctuate and eclipse the accommodation of social difference on the part of the coloniser. The view that the indigenous people were 'primitive' contains a double jeopardy, which brings the colonial culture fast against a past that European modernity was supposed to have left behind. The discourse of religious salvation is employed to mitigate the humanitarian effects of the changes implemented by the

imposition of European law. Under this conception, the European ethnocentric discourse held that, while the European pagan was already marked for salvation, the native was not ready for civilization. However, in the colonial Māori context this view was contradicted by prophets, such as Te Kooti Arikirangi Te Turuki and Te Whiti o Rongomai, who, despite leading early guerrilla and passive opposition, melded Māori religious views with Christianity and the bible. The subsequent teachings of the Ringatu and Ratana faiths forged the belief that Māori could be likened to the lost tribe of Israel and thus were eminently ‘civilisable.’⁷

Law and time

For current purposes, three aspects of the legal interpretation of spatio-temporal inhabitation are of pressing relevance: the first is the relationship between law and linear time; the second is the way the law’s temporality constitutes ‘the other’; and the third concerns the utopian aspects of time and law.

Law and linear time

In the Western conception, law gives linear time a path from the domain of public life to the construction and regulation of social experience. Through a succession of intersubjective, personal experiences, and public, performative functions, the individual comes to understand the temporal nature of law—reversible (since prior decisions can control present ones but also prior decisions can be reversed), infinite and linear—in contrast to the irreversible, finite temporality of her own lifetime. Law expands constantly in a linear framework, through precedent and the ordering of social events. Temporality and legality are conceptually fused in the West through their mutual implications of a total order in relation to which social life acquires meaning (Greenhouse 1989: 1631). However, indigenous time is archetypically non-linear. As Ingela Bergman suggests, for indigenous peoples, ‘[t]he revolution of the sun and moon, reappearance of the seasons, and the cyclical death and revival of plants formed the conceptualisation of time as being circular rather than linear. There was no beginning and no end’ (2006: 153). However, the very possibility of law lies in memory and the recognition of history as a linear construct. Thus, for Locke, who, like Kant, based his reasoning on the principle of transcendental deduction, individual moral and legal

⁷ From the other side of the ethnographic discursive divide, Fabian (2002: 83) has argued for the posited authenticity of a past as savage, tribal, peasant-like while serving to denounce an inauthentic present as uprooted, evolved, and/or acculturated.

accountability derives from the capacity to remember deeds of the past and to take responsibility for them (Brunner 2006: 293). The individualised ‘ought’ of positive law is no longer coterminous with the ‘is’ of the group under customary law.

For Greenhouse (1989: 1631), the law manifests a flexible symbolism as a means of social control, which is by definition complete, yet its completeness does not preclude change. Indeed, the law’s regulatory function should not be discounted from a progressive political perspective. Law can enact a restorative form of social regulation such as with bodies established to address historical grievances, for example, the Waitangi Tribunal. Greenhouse (1989: 1631) also points out that the law’s legitimacy is partly derived from an historical secularisation of the sacred quality of time that locates the end of time outside of collective experience. Law manifests timelessness in that legal systems may carry out some regulatory functions under the sign of justice. Justice, like time, is, in part, a transcending ideal. If the endpoint of law in time is neither fixed nor envisioned, symbolically it is coterminous with national life, which it interprets in temporal terms.

Constitution of the other

Karl Popper argued that since no society can far-predict its future states of knowledge, there can be neither a predictive science of human history nor an historical determinism. Expressed in his notion of the ‘politics of time,’ for Popper (1945; 1963), ‘society’ in the collective selects and orders the facts of history in a self-correcting manner. As Muecke (2004: 1) suggests, ‘[t]hinking of cultures synchronically, rather than in terms of competitive historical progress, means one has to consider how co-existing cultures, in the same country, are related to each other structurally and how their values are ordered.’ It follows, then, that the time-bearing notions those knowledge gains contain may be malleable to regimes of discursive authority. In the dialectical constitution of a cultural ‘other’ there is a need to recognise the concrete temporal, historical, and political conditions by which such concepts are formed. Furthermore, law becomes a body of rules in which terms of identity in space and time are rendered political. The ideology implicit in both Victorian anthropology and law served to keep ‘the other’ outside time. Just as law is capable of enacting forms of separation, be this financial or physical, in colonial New Zealand lawmaking, the empirical presence of the other turns into theoretical absence which is reinscribed into a material absence. Paradoxically, then,

the event of the Treaty's signing established a precedent for diplomatic intervention that, as Denis Walker notes, favoured the European construction of Māori as 'other' (1983).

The regulatory function of law acts as a system for temporal control by placing limits on the pace at which the traffic of commerce and human flow is carried out in society. Therefore much of colonial lawmaking served to disallow the cultural memory of the colonised, to place it out of the bounds of law, to de-temporalise it, or to reinterpret it only under the cultural system of the colonised. It may have been too difficult or troublesome to seek to comprehend the Māori view of time and its relationship to the inhabitancy of space during the process of colonisation. In their determination to occupy the present, it seems the colonisers overlooked one of the principal characteristics of law—its Lockean backward looking temporal logic—or rather they refused to acknowledge this capacity in Māori culture. By retrospectively privileging the European social system,⁸ colonial law disengaged Māori from their own spatial-temporal understanding in a revolutionary way. Law, or rather the political force that impels it, is thus sometimes one of revolution: this is true of the imposition of European law in colonies or any other situation in which one set of beliefs are swept aside by another, or in a situation whereby only one set of beliefs become legitimated when two or more are in view. In New Zealand this 'quiet revolution' was asserted over tribal norms by the Treaty of Waitangi (Brookfield 2006: 18).

Utopianism

Jonathan Lamb identifies two themes that emerge in the cultural fabric of New Zealand during the era of colonial legislation (1999: 80). One is a 'Machiavellian' theme, illustrated by certain cases heard in the late nineteenth century in which the Treaty was declared a 'nullity' in terms of 'native rights,' notably *Wi Parata v Bishop of Wellington* (1877), or invoked to waive its pre-emptive right of purchasing land from Māori. (This self-serving denial of the Treaty's status as a pact between nations was broadly accepted until a rekindling of Māori activism, exemplified by events such as the Bastion Point occupation of 1977-78). The second theme is a 'utopianism' that impels society to provide laws that idealise the relation between Pākehā and Māori in 'Godzone,'⁹

⁸ The English Laws Act 1858 deemed the laws of England to have applied to New Zealand from 14 January 1840. As Durie (1996: 459) states, '[t]he advent of English law thus in fact pre-dated the Treaty of Waitangi, the proclamation of sovereignty and effective settlement.'

⁹ The term is associated with a poem by Thomas Bracken written circa 1890, entitled 'God's Own'

premised on mutuality, fair play, and progressive social welfare legislation, which bind the nation together.

Lamb's analysis of Samuel Butler's early colonial dystopic novel *Erewhon* (1872) is illuminating in this context in the way it discusses the utopian ideas held by the originator of the New Zealand Company, Edward Gibbon Wakefield, who brought immigrants to settle in New Zealand around the time of the signing of the Treaty. As Lamb (1999: 87) explains: 'Lodged in a vista where space expands as time dwindles, and beginning to think that self-knowledge accompanied by uncoerced sociable tendencies might be preferable to the push and shove of the life-struggle, Butler is acting as the beneficiary and exponent of a theory of colonialism inaugurated by Wakefield.' Time should not be necessary in utopia but spatial relationships make it so. The Wakefieldian solution was to invest in colonies that might reproduce the social advantages of the source country, in a space large enough to alleviate the effects of competition. However, as Lamb (1999: 88) points out:

Wakefield was committing a circuit of illegal, or at least non-legal, transactions: he was issuing stock in a company that had no tradeable asset but a speculative land-purchase; he was acquiring land for trifles from Maori who were ignorant of the terms of European sale; and he was arranging for settlement on land in New Zealand, which, even if it had been fairly bought, had no basis in law, since the territory lay in a foreign country in which the British Crown had declared no interest, and with which it had not yet signed a treaty.

Arguably, Wakefield's utopianism is oblivious to the Hobbesian idea of law as a scientifically planned regulatory system which allows future-orientated, continuous security: Hobbes's social contract is a spatio-temporal negotiation between desires and their realisation in which future satisfactions are contracted in a trade-off between the attainment of desire and social control in the present.

When conceived of in this way, law is the instrument of utopianism. By moderating harmful desires in the present, law may produce future happiness. However, the law was also an instrument of division. Whilst a strong congruence may be claimed between the politics and lawmaking, colonial ideology and a cultural experience of time, the notion of a temporal horizon is not confined to European culture, though linear time may be distinguished from organic or circular time. For Yacouba Konaté, the division between

Country,' which referred to the sublime landscape of New Zealand and implied an element of Puritanism towards it in the settlers' minds. Richard Seddon, New Zealand's premier between 1893 and 1906, popularised the term (Orsman 1997: 300).

past and future is substantiated by an ‘asymmetrical principle’ in which time may be part of social design in which ‘it is necessary to depart from projects, from factual programs, in order to detach virtually from the real present and introduce a discontinuity while realising a series of retentions between present and past’ (1996: 149). So, thinking about time involves a conceptual divisiveness that lends itself readily to legal categorisations.

Such a mechanistic view sees law as an independent arbiter regulating human needs and desire in social space (Brunner 2006: 305). Law primarily shapes futures but also expresses historical consciousness. This is an empiricist secular temporal view that regulates human action toward the future. It is also premised on the idea that the past is equivocated; yet much of law conducted under secular time depends on reassessing past wrongs, in effect, of reinterpreting history so that a different, more just view prevails. This has been the essential task of postcolonial jurisprudence in New Zealand.

Māori land rights

The power of European nations to intercede in the temporal inhabitations of colonial space became juridified as the doctrines of an imperial common law were developed during the eighteenth century. In the *Anonymous* (1722) decision (cited by Hepburn 2005: 5), the Privy Council held that, as a ‘birthright,’ English subjects carried the English common law with them to any new and uninhabited territory they might settle, thereby limiting the Crown’s ability to make different laws in such ‘settled’ colonies. In contrast, the King could impose law by decree in any country conquered by Britain. As a matter of practice, territories occupied by tribal people became treated as ‘settled.’ This led to the paradoxical situation whereby New Zealand was treated by the Colonial Office as unoccupied, notwithstanding the Treaty having been concluded by the Crown and Māori occupiers of the land (McHugh 1991: 42). After 1840, New Zealand became part of the common law community ‘in which tribal polities hardly qualified for membership. To the extent that the common law spoke of tribal societies, it necessarily occurred within the context of this exclusion. The tribal presence in common-law speech acts was largely a passive one’ (McHugh 1999: 126-7). Any cognisance that might be taken of Māori law would thereafter be interpreted through the prism of the common law into which it was subsumed. Yet, as Edward Taihākurei Durie notes, ‘a mono-legal regime had not been contemplated during the execution of the Treaty of

Waitangi. On the contrary, Māori were specifically concerned that their own laws would be respected' (1996: 460).

The Treaty represented a watershed in legal fortunes. Before 1840, *tikanga* Māori was 'the only cognisable law in New Zealand' (Waitangi Tribunal 1997: 392), but post-Treaty indigenous customary law was either ignored by the colonists or understood in terms of the ill-fitting doctrines of the common law. Furthermore, governance was negligible. Thus, according to R. J. Walker, '[i]n the first twenty years after the Treaty, no resident magistrates were appointed in the native districts. Left out of the machinery of Government, untouched by the promised law and order of the *kāwanatanga* [governance], and finally outnumbered in their own land, the Māori turned to nationalism' (1989: 271). However, by this time, the interlocking co-ordinates of spatio-temporal relations that informed settler land law had brought Māori experience of time and place within its cartographic imprint. The Treaty effected the transition between Māori *kāwanatanga* to European sovereignty through a fork in interpretation, which saw claims to an indigenous law occluded at the same time as the instruments of a British legal revolution were symbolically and practically instantiated in New Zealand by the politics of population volume and human migration. To put the tsunami of European settlement in perspective, '[t]he Maori population equalled the European in New Zealand in 1858, but was less than a tenth of it by 1890, despite only a modest absolute decline' (Belich 2009: 553-54).

It seems that in early colonial New Zealand, Australia and Canada, native or aboriginal title was for many years little more than a legal nicety, referring more to identity than to any legal purchase an individual may lay claim to. This changed with the establishment of the Waitangi Tribunal in New Zealand in 1975, with *Mabo v Queensland (No 2)* (1992) in Australia, where no treaty existed, and in *R v Van der Peet* (1996) in Canada, each of which development reaffirmed some concept of native title (Walters 2001: 137).

Land and the Treaty

Article 2 of the English version of the Treaty provides:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual

Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Boast (2005: 370) explains that, ‘at the proclamation of the Crown’s sovereignty in May 1840 the Crown did not acquire full title to all land in the country; what it did acquire was, rather, the sole right to extinguish Maori title [through pre-emption] and to issue grants.’¹⁰ Māori could enjoy possession of the land they occupied, but could not alienate the land by leasing or selling it, other than to the Crown. Technically, article 2 was unnecessary as it merely confirmed imperial common law (Boast 2005: 49).

However, problematically, many Māori entered into direct transactions with Pākehā before and, indeed, after the signing of the Treaty. In response, the Land Claims Ordinance 1841 was enacted, which provided that ‘all titles to land claimed by virtue of pre-annexation purchases from Maori were null and void’ and provided for government inquiries into claims. Additionally, the Land Purchase Ordinance 1846 prescribed penalties for settlers who entered into land deals with Māori. The imperial common law position, reiterated by the Treaty and legislation, embellished the Crown’s self-perception of even-handed treatment. However, while the Treaty ostensibly granted all rights of British subjects to Māori, those formal rights were in substance inferior in so far as political sovereignty was non-justiciable except in the ‘haphazard’ incorporation in common law and statute (McHugh 1991: 45).

By guaranteeing interests in land as they existed in 1840, an allochronism was created. Whereas settlers enjoyed individual property rights and could engage in free market exchanges, Māori interests in land were preserved in legal aspic as exotic curios, despite the clear ability of customary law to evolve in order to take into account changing circumstances. The long-term effects of this approach have been significant. Thus, until recently, in aboriginal title discourse, common law courts have emphasised and recognised the ‘native title of usufruct,’¹¹ whereas ‘Government has unilaterally rejected any possibility of Māori exclusive or ownership interests’ (Williams 2005: 381). Since

¹⁰ A more important point is made by Williams (1989: 83): while commentators commonly emphasise how the Treaty affirmed the Crown’s right of pre-emption, the Treaty ‘was primarily about the *maintenance* of Māori title to their lands—not its extinguishment.’

¹¹ Justinian, the Roman jurisconsult, defined usufruct (*ususfructus*) as ‘the right to use and enjoy the things of another, their substance remaining unimpaired’ (Thomas 1976: 203). The usufruct, as such, has not been received into English land law.

Māori were obliged to sell their land to the Crown under the Treaty, a monopsony market was created in terms of which government could effectively determine the prices paid for land. By 1860, ‘Māori title to nearly two-thirds of the country was extinguished’ on this basis (Boast 2008: 26). Treatment of indigenous interests in this way was of course remarkably convenient for the colonists. Private contracts between Māori and settlers could endanger the peace of the colony because of uncertainties about title to land and the meaning of contracts. Furthermore, serious disruption of colonial development could result if Māori were permitted to lease on the open market, as they would then be unlikely to sell their lands to the Crown. The rhetoric of the civilising mission was thus pressed into service for colonial ends. As Ann Parsonson puts it, ‘what was a legitimate source of income for a colonial gentleman was a ticket to social degradation for Maori’ (2001: 177).

At the time of the New Zealand Wars¹² in the 1860s and subsequent government confiscations of land (*raupatu*), Crown policy on indigenous land holdings was reversed. Despite the doctrines of imperial common law, article 2 of the Treaty and relevant provisions of the Constitution Act 1852, the Natives Land Acts 1862-65 permitted aboriginal title to be converted to feudal tenure,¹³ once entitlement to the land was established by the Native Land Court. As Claudia Orange explains, a certificate from the Native Land Court, validated by the Governor, could be exchanged for a Crown title, whereupon customary title would be extinguished leaving Māori free to sell, lease or exchange land (2004: 80). However, rather than distinguishing what belonged to the *tangata whenua* (original people of the land), the effect of Native Land Court adjudication may be seen as identifying for European settlement what did not belong Māori. As Richard Dawson observes, ‘To the despair of chiefs and many other Māori, the court became an effectual instrument—especially in its first thirty years of operation—for colonists to acquire rights pertaining to “their” land’ (2001: 85). Consequently, settlement and development of land in the North Island (*Te Iki a Māui*) accelerated with a concomitant hastening of amalgamation and assimilation of Māori

¹² As Sinclair (1957) indicates, these conflicts were historically referred to as the ‘Māori Wars’ but, more recently, and particularly following the success of Belich (1986) and an ensuing television series, as the ‘New Zealand Wars.’ However, as Keenan (2002: 107) observes, ‘Of all issues that then weighed heavily upon Maori, none was as important as the fate of the land. This is why Maori have viewed the wars as “Nga Pakanga Whenua O Mua—the Land Wars.”’

¹³ Under English law, the Crown is assumed to hold radical title to all land. While a grant of freehold is practically equivalent to ownership, technically, it is a form of tenancy (Megarry & Wade 1984: 12).

into a colony, driven by ‘genuine, if blinkered, idealism’ (Boast 2008: xv). Boast (2004: 72) argues ‘no evidence [exists] that Māori regretted the demise of Crown pre-emption and there is some evidence of Māori support for the right to sell on the free market.’ Nevertheless, in the light of the evidence of dispossession it caused, policy predicated on the Crown exiting the Māori land market was abandoned by 1869 (Boast 2008: 6), and, Crown pre-emption was formally reintroduced by the Native Land Court Act 1894.

In *R v Symonds* (1847), Judge Chapman held that native title was ‘entitled to be respected’ and not extinguished without indigenous consent. However, English law (and settler politics) determined how far native title was to be respected. Before 1865, Māori had two options: to subsist or to sell their land to the Crown, but were precluded from becoming landlords. After 1865, they were subject to the untrammelled ambitions of a settler government and the irreversibility of free-market transactions. What was not available was a legal system that recognised Māori customs as parallel law or which equitably developed New Zealand common law as a synthesis of Māori and English norms. In the first regard, although there were never separate courts of law and equity in New Zealand, until 1873 the administration of common law and equitable jurisdictions were separate in the United Kingdom. Even after merger of the administration, as Patricia Loughlan notes, ‘There was no merger of equitable and common law rules and principles, no joining of substantive legal and equitable doctrines and no alteration of legal and equitable principles’ (1996: 21-22). In W. Ashburner’s famous metaphor, ‘the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters’ (cited by Loughlan 1996: 22). There was, then, ample precedent of English law accommodating distinctly different normative systems within one overall framework of law and justice but only within the terms set by British Parliament.

Differing conceptions of transactions

Māori may have sought to incorporate Europeans into their communities, out of courtesy or to avoid conflict that might result in the alienation or appropriation of their land. They may have welcomed cultural exchange. As Margaret Mutu explains, Māori ‘had decided that their people could benefit from the knowledge, skills and goods that Europeans could offer’ (1999: 319). In land dealings made before 1840 and for some time after, argues Alan Ward (1973: 29), Māori may have believed they were granting

rights of occupancy, or may have included land ‘disputed with neighbouring hapu [sub-tribe, extended family group]’ or ‘recently conquered and tenuously held.’ Māori customary tenure was based on a different concept of inhabitancy from the individual title of the common law. As Aileen Moreton-Robinson expresses the aboriginal worldview, ‘Although the concept “property” commonly refers to things owned by persons, or the rights of persons with respect to a thing, it is more than a relationship to the tangible and material. It embraces metaphysical and intangible rights’ (2005: 126). Waerete Norman explains that a claim to land ‘was fixed at the outset when people bestowed their mana on the land by naming it after themselves or after some event enhancing their mana [authority, prestige, pride, or status]’ whereas physical control ‘was secured by the process of “ahi kā” (keeping the fires of occupation burning)’ (1999: 200-1). According to McHugh (1991: 74) dispossession through migration could take as many as three generations as the ‘fire became cold’ (*ahi mātaotao*).

The custom of *tuku whenua* was widely practised in pre-colonial New Zealand, in terms of which, tribal leaders who held the *mana whenua* for the tribe could allocate lands for a particular individual and his family for them to live on and use’ (Mutu 1999: 319). ‘The *mana whenua* (that is, very approximately, the spiritual power and authority for the lands vested by the gods in a tribe, in particular, its chief) remained always in the tribe’ (318, footnotes omitted). As Māori engaged with settlers, whom they might have presumed to be sojourners, the practice of *tuku whenua* was extended in respect of land ‘for the use of a particular European and his descendants’ (318). After the Treaty and the declaration of Crown pre-emption, Mutu (1999: 319) observes,

The nature of the land transactions changed in one essential respect. They were still *tuku whenua*, but the agreements being entered into by the tribes were no longer with individual Europeans. The tribes were now dealing with the Queen of England, the highest chief of all English chiefs, and hence, also the paramount chief of all incoming settlers ... There would have been no reason to have any misgivings about entrusting a person of such high rank with lands for her subjects for as long as she and her descendants were kings and queens of England.

Māori would not, then, have seen any inconsistency between their own continued access and ‘radical title’ to land and the exercise of rights by a newcomer. Ironically, whereas imperial common law has traditionally restricted aboriginal title to use-rights, this may have been precisely the nature of the privileges Māori presumed they were extending to Europeans.

The arrangements *hapū* (sub-tribes or extended family group) initiated concerning land highlighted the gulf between Māori concepts of the nature of their relations with settlers and the latter's perception of such relationships. From the Māori perspective, transactions with early traders and missionaries were almost certainly personal, and, later, Māori continued to believe that the government could not introduce a third party to the land who had not been approved by them (Durie 1996: 461). But bad faith is not required for inter-cultural misunderstanding to arise, as Durie (1996: 457) argues: 'The same transaction could be seen in different lights. Where Maori allocated land, the settler imagined a purchase. Where vacant possession was thought to have been taken, Maori continued on the land as before. While payment was seen as final, subsequent tribute was in fact required. Where Pakeha saw friendship, Maori saw obligations.' In the terminology of contract, there was no *consensus ad idem* (meeting of the minds). Being such fundamentally different systems, Māori custom and the common law would necessarily conflict over spatio-temporal occupancy. Andrew Erueti characterises English land law as 'a body of clearly defined and simplified rules that facilitated the private use of and enjoyment of land' that 'provided the title-holder with virtually all rights in the land' (2004: 42). In contrast, under Māori custom, 'competing claims of right coupled with the intricate system of overlapping and intersecting rights held by members of different kinship groups makes it difficult to say who "owned" the land, or waters of lakes, lagoons, rivers, and the open seas' (43). Whatever, mutual incomprehension prevailed initially, the consequences of settler individualism and instrumentalism came to be recognised by Māori. Angeline Greensill quotes an 1873 prediction by Te Ataria of the Ngāti Kahungunu *iwi*:

The plains and the mountains are being removed from under our feet; the hundred pathways of Heretaunga are being trampled by angry greedy people. Soon all we may have left will be the sea and the beaches although even now Pakeha covet our fish, drain the waters that feed the sea, and take away the rocks and sand...the ocean is in danger of being taken like the rest of the whenua [land]. (2005: 159)

Time and the Treaty revisited

Contemplating colonial New Zealand law, it is easier to identify breaches of Māori land rights, confiscations and fraudulent purchases, than to recognise policies that made Māori culture victim of a worldview that incorporated social and symbolic measures dissimilar from their own (Parsonson 2001: 173). Nevertheless, the effect of policies, well-meaning or otherwise, was to deny Māori the right to deal with their land in a way

consistent with (evolving) customary law. The bicultural and bilingual Waitangi Tribunal ('the Tribunal'), which was established in 1975 'to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty' (Long title of the Treaty of Waitangi Act 1975), has investigated historical grievances and draws attention to the kinds of assumptions that underlay the colonial governments' Māori land policies. The Tribunal seeks to interpret and redress identifiable instances of legal imbalance and give new weight to the Māori worldview, the Māori custom and value system, and law and policies.

Recent Treaty scholarship argues that Māori concepts of time were and are culture-specific. While the Treaty continues to be seen by some commentators as a 'developing social contract' between New Zealand peoples, which recognises the Treaty's 'timeless' nature—not only as a compact between Māori and the Crown but also as a founding document of colonisation which also looks forward to national cohesion—it has no independent standing in domestic law. Postcolonial lawmakers are dependent on contemporary interpretations of the Treaty for the settlement Acts of Parliament following from the reparative justice procedures of the Tribunal hearings, consultation process, deliberations and negotiations with the Crown. These interpretations, as Giselle Byrnes has pointed out, often coalesce around Māori concepts of time (2006: 2). Deliberations of the Tribunal almost always understand the Treaty, implicitly or explicitly, as a forward-looking social agreement rather than a 'synchronic' historical document.

According to Byrnes (2006: 3), following the Treaty of Waitangi Amendment Act 1985, which expanded the Tribunal original remit to include claims from the signing of the Treaty in 1840 to the present, the Tribunal has emphasised the timelessness of the Treaty thereby permitting Māori to test orthodox assumptions regarding the nature of change over time. In the context of the Tribunal's interpretation of *Allocation of Radio Frequencies Report* (1990), a diachronic view of Māori time is taken by the Tribunal which acknowledges changes in relations through time and protection for many kinds of material and *taonga* (treasures), such as *haka* (dances) and *whakapapa* (genealogies), though it has yet to pronounce on intellectual property. The conclusion inferred from this report is that the principles of the Treaty are understood to be 'out of time'

providing arguments for contingencies that could not have been envisaged at the Treaty was concluded. Similarly, in the *Muriwhenua Land Report* (1997), the Tribunal asserted that the canons of justice and protection should ‘apply to all ages’ (Byrnes 2006: 5). However, it is not that, ‘the space between past and present is eliminated as they are compressed into a single entity’; rather, Māori notions of time, although culturally specific, are embedded in physical space rather than abstracted out of it in the predominant European sense. For example, in *The Whanganui River Report* (1999), Māori conceptions of the river resource as a *tapuna awa* (living ancestor) were recognised. Inclusion of the flow of life in relationships between things in the dimensions of *tangata whenua* (people of the land) is implicit in this culture-specific interpretation of time.

There are, then, at least two separate histories or synchronicities that meet their diachronic point in each enactment following the deliberations of the Tribunal—a history of remembering that is also forward-looking, and one of forgetting that may or may not involve a culture of assimilation. These narratives are defined by cultural and political as well as sociological differences (Byrnes 2006: 2). The Tribunal interprets the Treaty as functioning as a distributive contract that is suspended between enduring cultural values and their demographic proportions. As M.P.K Sorrenson observes, ‘so long as the Tribunal retains its retrospective jurisdiction to 1840, it will continue to recover a hitherto largely submerged Māori history of loss of resources and mana, supposedly protected by the Treaty. The Tribunal’s findings may not be palatable to many New Zealanders, but it would be perilous to ignore them’ (1989: 177).

Conclusion

In the face of European settlement, ‘indigenous peoples did not stand idly by, give up or become passive objects; instead they resisted, temporised, changed, adapted, tried to exploit the European presence to get even with traditional enemies, adopted Christianity and in some ways made it their own, changed their material culture, and even defined and invented or reinvented themselves’ (Boast 2008:16). Nevertheless, time was fractured, and Māori adaptation to European ways meant adoption of European concepts of time. Colonial law created a division between the agents and beneficiaries of modernity by regulating as far as possible the pace of Māori adoption of the newly transplanted European culture. Being effectively outside of time meant the space of the

tangata whenua (people of the land) could be occluded also (Durie 1996: 34). If Locke foresaw the need to devise a political structure able to cope with the fallacies and mistakes that result from human misadventure, it would seem fair to say that such a structure was not established in colonial New Zealand. The frontier mentality of settlement conflicted with the politics of nation formation and created the possibilities for temporal disadvantage.

Could things have been different; was a result other than domination by colonial law possible? To pose such questions is not to invite imaginative speculation but rather to consider how the terms of the Treaty should have been actuated in relation to the normative systems of indigenes and settlers. Ani Mikaere observes that ‘Tikanga Māori was the first law of Aotearoa’ (2005: 153), and, for Durie (1996: 39) it is New Zealand’s original *lex situs* (the law of the place property is situated). In his view, the Treaty guaranteed Māori their own laws, just as the English were guaranteed theirs. This is not a revisionist fancy. The English Laws Act 1858 provided that the laws of England applied only ‘so far as applicable to the circumstances of New Zealand’; indeed, measures were taken in the colony’s early years to accommodate notions of collective responsibility—so alien to European individualism yet so natural to the Māori sense of community (Patterson 1992). These measures had been abandoned by 1858, a casualty of the feud between Attorney-General William Swainson and George Clarke (a missionary appointed Chief Protector of Aborigines) over the establishment of Native Districts. As Ward (1973: 61) notes, ‘The declaration of Native Districts would also have involved a *de facto* acceptance of the Maori social system, and allowed Maori people to adapt to the Western world, at a pace and manner more of their choosing.’ Furthermore, early laws provided the option for different regions to create locally appropriate laws, although this opportunity was never taken up. There is also the practical issue of recognition of law. Thus Belich (1996: 224) observes that ‘even in the late 1860s, when the power balance had shifted considerably in favour of the Pakeha, a great many Maori did not consider themselves obliged to obey Pakeha law when it did not suit.’

There were, then, in the early colonial period two sets of laws involving different peoples and different ontologies of time. It is likely that, at the signing of the Treaty, these were intended—at least on the part of Māori—to co-exist, and indeed, it is

plausible that they could have done so. In the event, the alien system prevailed when it could have co-existed, and the concepts of transcendental symbolism, which united the European experience of self in time and space under law, were denied to Māori occupation of space. These temporal-spatial occlusions are not historical artefacts; they remain crucial issues in contemporary New Zealand society and politics. As Jock Brookfield observes, ‘The revival of Māori customary law, tikanga Māori, so far as that is possible and so as that has now been changed for the better by the exercise and impact of kāwanatanga [governance] is necessary for the much fuller legitimation of the New Zealand legal system as a whole’ (2005: 360). The postcolonial jurisprudence of the Tribunal has significantly contributed to realising this imperative. Williams (2005: 381) may not represent legal orthodoxy when he says ‘tikanga Māori are now clearly acknowledged as the source of aboriginal title customary entitlements,’ but significant ‘steps have been made in honing New Zealand jurisprudence towards acknowledging two sources of law’ and ‘a very real possibility for legal pluralism [now exists] within the state legal system.’

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