Ki a Te Rangikaheke raua ko Pirihira

By Eddie Taihakurei Durie. January 30, 2007

After speaking at Awahou on 15 January, at your invitation, at a meeting of N'Rangiwewehi and N'Rangiteaorere, I said I would send you some thoughts on your approach to your water claims in response to the Crown's position that the water belonged to the Crown.

Those thoughts are set out below.

If you want me to elaborate on these off-the-cuff opinions, I would need to re-read the literature that I looked at long ago, and catch up with the subsequent opinions (like those last year from Auckland University Anthropology Department). I would then add references and no doubt would need to do some rewriting.

Introduction

First, Māori traditionally have such a sense of duty to future generations, in the preservation of the tribe's natural resources, that in conscience they cannot readily surrender their claims to water ownership. Exceptional circumstances would be needed. I do not refer to water generally, like rain water, but to the water in those iconic rivers, lakes, swamps and springs that are the treasure troves of the tribal territory.

Further, regard should be had to the objectives of any settlement. If a primary objective is to promote tribal identity, culture and traditions, as I would expect, it would be wrong to give away those claims to the natural elements that symbolise tribal identity and culture.

That seems particularly important in your case. Traditional stories and songs tend to celebrate 'the waters of Rotorua' rather than the 'the lakes...' and it is by reference to water in 'Wai-ariki' that the district is known. Te Arawa must be one of the few peoples

(I think 'nations' is the better term) who identify more with their inland waters than their surrounding lands.

Second, the Crown's claim to ownership should not be admitted. While there may be no objection to negotiations about water access as a matter of public interest, the Crown's assertion of ownership as of right is unprincipled and should be stoutly opposed. It is founded upon a dated, mono-cultural premise and is inconsistent with the Treaty of Waitangi.

I will first introduce the conflicting theories affecting the ownership of water in New Zealand, focusing on Māori and English law.

In doing so, I have constantly in mind that the laws of a state or of a people are culturally laden. They do not purport to give vent to universal truths but to express the mores of a society; that is, they reflect the people's history, institutions, values and beliefs. It follows that the relevant law in this case is not just the standard law of New Zealand (based on that of England). The relevant law is also the distinctive Māori law that was here long before. The result is that when the two are in conflict, it is not principled to talk in terms of one legal dogma alone. It is necessary to consider both legal theories and then to find a sound framework in which the conflicts can be debated (and to be wary of lawyers who talk only in terms of standard law).

I will then go on to consider how in fact, the principle of adopting a bicultural approach, or of examining Māori law and not just the law of England, has already been introduced to New Zealand law and official practice.

We are further fortunate in New Zealand in that the Treaty of Waitangi then provides a moral framework for the resolution of cultural conflict issues. I will therefore consider as well, a Treaty framework for the resolution of property issues where there appears to be a conflict between English and Māori laws.

We are also fortunate in that just over a year ago, the international community adopted a more explicit framework in the form of the Declaration of the Rights of Indigenous Peoples. I contend the Declaration is an important source of principle whether or not New Zealand has subscribed to it. This too, will be examined. It reinforces the Treaty approach.

It is then necessary to consider why it is probably inconvenient, in view of the public interest, for the Crown to admit to the Māori ownership of water, and then to consider how those issues should be addressed directly.

Finally, I will consider the specific water regimes of Ngati Rangiwewehi and Ngati Rangiteaorere and why it is critical that no general solution is sought without representation for their interests.

Māori law and the ownership of water

Māori law is unlike the New Zealand law adopted from England. By New Zealand law the Crown claims the ownership of water on the basis of longstanding legal theory. By Māori law, the hapu hold the natural resources in their respective territories. That includes the water. It is an integral part of those resources. A hapu owns the water to the point where it flows from its territory.

The assertion that the hapu held the natural resources in their territories is based on ethnological observations of the reality on the ground. These date from the explorers,

whalers and traders of the early 1800s, and from officials from England and New South Wales. Hapu control or ownership of resources was accepted in the Treaty of Waitangi, where Māori are described (in article 1), as the sole sovereigns of their respective territories. By 1860 it was also accepted that there was not one part of the country that was not held by one or other tribal group.

Evidence that Māori saw themselves as owning everything in their territories, including rivers, harbours and water generally, includes evidence of Māori levying watering dues on whaling and trading ships, charging harbouring fees for mooring in harbours and bays or attempting to impose charges for the use of rivers.

While the sovereign rights of the hapu were purportedly ceded to the Crown (article 1 of the English text) it is now recognised that it was governance that was ceded (as cited in the Māori text) and that in terms of article 2 the natural resources or properties remained with the hapu unless the hapu willingly sold them to the Crown.

The primary assertions are these:

- Māori held territory, or areas over which they had influence or mana.

- The territory that they held was not just land. It included the whole of the territorial resources of land, lakes, rivers, springs, swamps and inland seas. The water-based resources would have been especially significant because of the lack of animals and the high dependence on fish and water-fowl.

- The territory was held according to Māori law, not English law. This means it was held or owned by the occupying hapu, usually solely but also jointly with other hapu, and with individuals and whanau exercising use rights of specified resources as established by long-term user.

- Unlike English law there was no concept of someone owning the bed of the river, lake or harbour but not the associated water. To Māori the water was as much held or possessed as the associated bed, and it was held for so long as the water remained or flowed over the tribal territory.

- While Māori did not have the same concept of ownership as in English law, and saw the resources as part of an ancestral being (the earth), it is their effective control of the access to those resources that equates with ownership at English law.

NZ standard law and the ownership of water

At the heart of New Zealand standard law is the English legal theory that all natural resources emanate from the Crown, a theory that derived from the feudal tenure system introduced to England in 1066. The Crown is said to hold the radical or inherent title while all others hold in fealty from the Crown, under some form of licence or grant. The theory still applies today so that all private land in New Zealand (except Māori customary land), is said to be held in 'fee simple', which is simply one form of fealty under the feudal system.

The second great movement in England was that of enclosing the land to admit of individual ownership of all the resources in a defined area, rather than different persons having different licences for the same area, like licences for growing wheat, gathering timber, hunting, fishing and so on. Under this system the focus was entirely on land and its allotment in parcels. As a result where land adjoined a river the riparian owners were said to own to the centreline, as though the river was not there, while the Crown continued to own the water flowing over it. However, where land was allotted in parcels the roads created to serve them remained vested in the Crown. The adjoining owners did not own to the centreline. The same rule was applied to navigable rivers, which were effectively highways in the early days. The bed of these rivers likewise remained vested in the Crown, just as for roadways. Enclosures developed in England from the 12th century, became more common in the 15th century, and became the norm after radical programmes to enclose as much land as practicable in the 17th and 18th centuries. Historians will know how it was the cause of much bitterness, especially in Scotland where it threatened the survival of the clans as a social and political force.

Māori had no feudal system or system of enclosures. Land, rivers, lakes, swamps and inland seas remained simply as resources. Individuals or whanau owned not defined areas of land, but defined use rights in respect of particular resources and usually, with multiple use rights in respect of any one resource. Māori did not therefore distinguish between land and water ownership. For example, a river was simply a river, comprised of bed below and water above, and the critical issue was simply which hapu had control over any particular portion of the river.

A bicultural legal framework

From at least the time of the Water and Soil Conservation Act 1967, and probably earlier, the Crown has presumed that it owns all the water. The presumption is reinforced by English law.

For example, although the Te Arawa people secured a settlement in respect of the main lakes in their district, in the 1920's, in 1967 the Water and Soil Conservation Act of that year reminded them that the Crown still purported to own the water. A lawyer, Hon Ralph Hanan, was then Minister of Māori Affairs and in answer to Dr Doug Sinclair, at Tamatekapua, he asserted, correctly in my view, that the Crown's ownership of water was recognised by 'English law'. What he failed to consider was whether the application of English law was appropriate to the New Zealand circumstances.

Here the relationship is between Crown and hapu, and in terms of the Treaty of Waitangi, that relationship is not one of dominance and subservience but one of partnership.

At very least, issues of cultural conflict must be debated in a bicultural framework. The mere assertion of ownership on the basis of English law is unacceptable, mono-cultural dogma.

Bicultural principles from NZ standard law

In fact it has long been recognised that as a matter of English legal principle, adopted in New Zealand, the property rights of native peoples in the colonies are not to be determined in accordance with the concepts of English law. The danger of mono-cultural assumptions is adverted to by the Privy Council in Amodu Tijani v Secretary of State for Southern Rhodesia, in 1921, the Privy Council noting: "There is a tendency operating at times unconsciously, to render [the title to Native Land] in terms which are appropriate only to systems which have grown up under English law".

The Crown in New Zealand acknowledged the same principle in 1865. It that year a Native Land Court was established by statute to determine the title to Māori customary land. It was expressly directed to determine ownership rights "in accordance with Māori custom". (Unfortunately, the Court was also set up to change the customary tenure, so that individual land rights were from the Crown, not the hapu, and to establish a system of enclosures.)

The Treaty of Waitangi also contains a significant, implicit acknowledgement that the English theory of tenure, which assumes that the natural resources are inherently the property of the Crown, has no application to New Zealand where the radical or inherent title was already accounted for. In terms of the Treaty, Māori were to retain their properties but the Crown had the exclusive right to buy them. As colonial dispatches made clear, this was necessary to preserve the English tenure system whereby private rights to land could derive only from the Crown. It follows that the Crown's right was subject to acquisition from Māori.

The important point then is that as a matter of English law and colonial practice, it is not the position that the Crown is able to assume the ownership of water. The same is presumptively the property of the hapu, in accordance with Māori law. In terms of the principles of the Treaty, it is for the Crown to prove its right to any part of the natural resources by reference to some legitimate acquisition.

Mention should be made of one other tenet of English colonial common law known as the doctrine of aboriginal title. I contend that this is not an appropriate doctrine to apply as it is founded upon rules that Māori had no part in devising and which are in conflict with the Treaty.

The doctrine of aboriginal title enables a property interest to be established by proof of ownership or possession from a time before the assertion of British sovereignty and the continuation of exclusive possession through to the present day. The title could therefore be lost by a Pakeha simply using the property, without consent, or it could have been extinguished by the Crown, by explicit legislation or even, by inference from government action.

The doctrine has been useful for many aboriginal people, including Māori in the foreshore case), in asserting property rights before the Crown. However, it shifts the onus from the Crown to prove an acquisition. Instead, Māori must prove an original and ongoing possession. Moreover, the law's insistence on proof of continuous and exclusive possession, means that its application in the New Zealand context, where there is no history of exclusive Māori reserves, means that it will have limited application here. It has been impossible to keep the public off areas of foreshore that Māori claim, for example, and it is very doubtful that Māori will secure any significant foreshore areas on a strict application of the doctrine's tests. It seems also that the Crown has extinguished any water rights that might be secured under the doctrine, by legislation.

The point must be made then that the doctrine is entirely a European device and that in practice it has served to limit aboriginal claims and to legitimise adverse European occupations. While it came to pre-eminence in decisions of the United States in the 1830s, it origins have been traced to Jesuit priests reflecting on the Spanish conquests of the Americas. In other words its origins are mono-cultural. Unlike the Treaty of Waitangi, it is not a doctrine to which Māori subscribed. And it is no substitute for the Treaty that requires that the Crown should prove its title by reference to some legitimate acquisition.

Framework for resolution: the Treaty of Waitangi

As I have said, a framework is required in which tensions between Māori and Pakeha can be settled, and we are fortunate that in New Zealand, the Treaty of Waitangi was effectively set up to provided for such a framework, from the very founding of the modern state. It is therefore appropriate that the question of water ownership should be debated in terms of the Treaty's principles.

The Treaty guaranteed to the hapu the full authority (tino rangatiratanga) of their lands, estates, forests and fisheries. It is generally accepted that in the context of a Treaty between two vastly different cultures, such words are to be broadly construed. In this instance, they should be construed to include the whole of a hapu's natural resources.

The Treaty makes no specific mention of water but in the absence of a specific provision the water must be treated as part of the natural resource under the control of specific hapu for so long as that water is in their territory. It is an integral part of a resource.

It can also be fairly said in my view that the chiefs would not have signed the Treaty had it been provided that the water would belong to the Crown. Doubtless they would have

seen that as an intrusion on their mana or rangatiratanga, a term that equates with 'sovereign' authority.

Likewise, the Treaty never provided that English law would prevail or would replace the law of the Māori. And doubtless the Treaty would not have been signed had that been proposed. The chiefs were jealous of their own power, authority and law.

As I have said, the position settled in article 2 was to the effect that the natural resources would remain with Māori and would pass to the Crown only by their free consent. It is entirely consistent that Māori would continue to control access to their waters, and water use, for so long as the water was within their territory.

Framework for resolution: the Declaration

An alternative framework in which to address the question of water ownership is provided by the Declaration of the Rights of Indigenous Peoples adopted by the General Assembly of the United Nations in September 2007. It is particularly significant for it supplements the Treaty of Waitangi, covering with specificity a number of principles that in the Treaty are merely implied. Today, the two must go hand in hand.

While Declarations, unlike Conventions, are not legally binding, the Declaration has high moral force and so is an important source of principle when dealing with indigenous issues.

It is also an important source of principle notwithstanding that New Zealand has not signed it. First, it was supported by an overwhelming majority of 143 states to only 4, of which New Zealand was one. Second, but more importantly, New Zealand did not object to the principles relied upon here. On the contrary the NZ representative declared to the Assembly that New Zealand 'fully support[ed] the principles and aspirations of the Declaration'. The objection was simply to the wording, and then only in respect of four provisions. The words objected to create no serious obstacles to dealing with the issues in this case.

The primary principle in current context, and one that now has universal blessing, is that Māori property ownership is to be determined in accordance with Māori laws and traditions. There is no reference to ownership in accordance with English law.

The principle is reflected in articles 26 – 29, which:

- refer not just to land but to 'land, territories and resources';
- refer not just to ownership but to 'traditional ownership or other traditional occupation or use'; and
- calls for respect for the 'customs, traditions and land tenure systems of the indigenous peoples concerned'.

The principle is reinforced by article 5 which recognises the existence of indigenous legal systems and recognises the right of indigenous peoples to strengthen that system.

Finally, article 25 recognises that water may be part of that which was traditionally owned. That article provides:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

The accommodation of other interests

The foregoing does not imply that there is nothing to negotiate. It is rather to assert that the way forward cannot lie in the Crown's pretentious claim to the ownership of water as a matter of law.

The way forward lies rather in looking at the facts surrounding particular water regimes, in the context of both Māori entitlements and the reality that tribal territories have long been opened up to Europeans.

As to the particular facts of a case, there will be cases where the Crown will have validly purchased lands surrounding rivers, lakes, springs and so on. No doubt in those cases the Crown would then contend that the tribal interest in the associated water is either extinguished or at least is no longer exclusive.

In other cases the sheer length of time over which Europeans have now held riparian lands, rightly or wrongly, will open up arguments of legitimate expectations of water access, or that European claims have been legitimised by time.

I have no comments to make on the strength or weaknesses of these arguments. Much will depend on the facts of the particular case. The point only is that it is not necessary for the Crown to cling to its fallacious approach. There are more legitimate paths by which the issues can be resolved, and better and more direct ways to develop rules to accommodate the conflicting interests more fairly.

One matter mentioned to me was an assertion that it was contrary to Māori interests to claim the ownership of water because Māori would then be exposed to civil liability in the event of a flood or the like. Liability for a natural disaster seems very unlikely to me. Liability does not arise from some act of nature, but only from some human act like the aggregation of water in a dam or the alteration of a natural water course. Liability then accrues to the person who did the act, irrespective of who owns the water.

In any event, but for the Crown's introduction of settlers to New Zealand there would be no liability to settlers. If there is any prospect of liability then one should seek a

provision in the settlement whereby the Crown would cover the hapu in the event of any action.

Another argument is that water cannot be privately owned until it is captured, because it is a moveable thing. Once more, the argument derives from a monocultural English law. The real question is, "What is a fair law?" It is easy enough, if it suits the convenience of society, for the law to treat water as a moveable thing and incapable of private ownership unless captured or dammed. However, to suit a Māori convenience, it is equally easy for the law to provide that the water is owned by the hapu for so long as it remains on the hapu territory.

The springs of N'Rangiwewehi

I move now to the particular water regimes of Ngati Rangiwewhi and Ngati Rangiteaorere beginning with the Ngati Rangiwewehi springs. I do so to illustrate the dangers of a national settlement in respect of water without regard for the particular circumstances affecting particular water bodies.

I have not been informed of the full circumstances relating to the Awahou and Hamurana Springs of Ngati Rangiwewehi but as I understand the position, these springs emanate from a specific point in the earth that is completely surrounded by land that has remained in tribal hands or by lands that they have never freely and willingly ceded. The water is well known for its cold and pristine character. It has enormous commercial potential.

In principle, these springs appear no different from the fresh water springs that can be found in villages throughout Europe where local villagers regard the springs with particular reverence and where the villagers have had the benefit of the springs for longer than anyone can recall.

The critical aspect in terms of legal theory is that it is plainly consistent with local custom to treat the water as owned by the local hapu at the point of its escape and beyond until it flows into the lake, on the basis that that is how it was as a customary resource.

The next critical aspect in terms of the water negotiations is that there appears no significant impediment to maintaining that position today. There are two matters to consider.

The first is that in one case, some years ago, the local authority took the surrounding land and then pumped out the water. It was able to do so only because of enabling Crown legislation. It also appears that the Council could have used other springs on land the Council already owned, and which the Council still owns, but the Council chose to take the Māori springs.

It seems plain that contrary to the Treaty the Crown failed to protect the resource in Māori ownership and that the Crown should now restore it to Māori ownership, land and water included.

The second matter is that the surrounding land that was taken by the Council, and remaining part of the blocks, is now in private, Māori ownership. Again, the privatisation and enclosure of tribal lands was an act of the Crown that did not have Māori approval but in rectification of that wrong, there appears to be no impediment to restoring the ownership of the water to the hapu.

The point for the present is that the case in respect of the Rangiwewehi springs is not the same as the case for the hapu who are concerned with rivers or lakes where the ownership of the surrounding lands is no longer exclusively in tribal hands. It would be wrong were some general settlement reached on water that did not reserve the Ngati Rangiwewehi position.

Geothermal water/geothermal power

The geothermal water of Ngati Rangiteaorere, and presumably that of several other tribal groups, appears to be no different in principle from that in relation to the springs of Ngati Rangiwewehi. The water exits from the earth at a discrete point where the surrounding land remains in tribal hands. The principle that the water is owned, for so long as it remains in the vicinity, would appear to apply.

Lake Rotokawau

Lake Rotokawau of Ngati Rangiteaorere is also in a special position. It was excluded from the settlement in respect of the Te Arawa lakes, in the 1920s and again this century, because its status as Māori-owned was never in question. It will be recalled that the original lakes settlement was a settlement out of court. The issue was who owned the lakes given the mixed Māori and Pakeha ownership of the surrounding lands and its potential as a waterway. The matter was settled without prejudice to the Crown's claim to ownership.

However, the status of Rotokawau was never in doubt. The whole of the surrounding land was Māori land in one title, as it is to this day, and the Māori Land Court declared the whole, including the lake (or lake bed) was Māori land. The surrounding slopes remain in Native bush.

For that and other reasons the lake highlights the pretentiousness of the Crown's claim to the ownership of water. The lake sits in a volcanic crater where steep slopes make it difficult to access. Further, the great bulk of the water enters and exits the crater by subterranean passages. Not only is the water extremely pure, but to all appearances it is entirely captured in a natural bowl.

Nonetheless, the lake is plagued by despoiling trespassers, many Pakeha being now settled in the area as a result of past land alienations, and it is especially used by an adjoing recreational camp. Those using the land without some licence from the lake trustees can claim some right through the Crown's assertions to the ownership of the water. In this case, the facts not only emphasise the unreality of the Crown's assertion about water, but provide the basis for an argument that the Crown has a duty to assist Ngati Rangiteaorere to maintain control over this extraordinary cultural asset.

Response to E.T Durie. Responsibility as a Framework for Governance and Care of Water

By Te Kawehau Hoskins. Jan 2009

This paper is addressed to the important issues raised in E.T. Durie's paper and I have added my own views as indicated throughout. Because I have been working with some of these ideas philosophically, my ramblings probably seem abstract/analytical. BUT we Māori are such pragmatists we need to pause now and critically reflect....

Māori law

A few points I would add regarding Māori law not highlighted in Durie's paper (but drawn in part from his and others work) are the following:

While regular across Aotearoa, Māori law was also deeply contextual. That is it was enacted flexibly and in response to a particular context and set of circumstances. Although Māori law worked from precedent, from tikanga (predictable customary responses) and recourse to first principles, all these might be set aside if considered irrelevant (or inconvenient!) to a particular case.

Māori law was of course enacted through multiple hapu authorities, not a single sovereign authority as in the western model. Hence in thinking about the role of Māori law today and how it might be struggled for and enacted, it is important to think of it as plural, local, contextual, flexible and responsive. I would also argue the ethos of Māori law is deeply 'relational'. As Durie notes 'law' stems from cultural values and practices. Māori culture has privileged relationships between people, the land and the cosmos and Māori constitutional forms reflect a concern for the sustainability of such relationships.

Māori law was also generated and embedded in the day to day personal and social life of the community. Māori did not look up law books to find out what was 'tika'. Rather law was generated through social practice/custom and performed by all community members daily. Hence Māori law was co-incident with moral and ethical values and behaviours. In this sense 'law' was never a separate and public body of rules distinct from 'private' moral /ethical behaviour. These were one and the same which meant that individuals and whanau were directly accountable to each other for all behaviours.

It is important to remember in this conversation that Māori did not have a term or concept for 'rights' (in the sense of entitlements) or for 'ownership'. Ownership for Māori meant the authority or effective control of, access to, and use of resources held by the hapu and with various whanau and individuals having user 'rights' to specific resources. 'Rights' related to the agreement to utilise, within parameters, certain

resources. 'Tika' or tikanga cannot be translated as rights in the western sense. Tikanga as we know are about 'right' and 'ethical' behaviour, not about personal entitlements that are accrued in exchange for the fulfilment of certain duties as in the Western model.

Durie makes the case for the efficacy and authority of Māori law, through arguing that 'law' is cultural, reflecting worldviews, histories, social systems, values and so on. The laws of our modern nation state (given birth to by the Treaty?) should then reflect Māori law and not simply English law. Durie argues that the Treaty did not provide that English law would prevail nor that Māori law be replaced. The assumption made by the Crown then of radical, underlying title to all lands and resources (water) should not to be 'admitted' by Māori, indeed article 2 acknowledges Māori 'ownership' (implicit in rangatiratanga) of their lands and resources. Hence the Crown's right to any resources was, and must still be subject to 'valid' acquisition from hapu, who hold the radical title (in English law terms).

English Law, the liberal democratic Nation State.

Western constitutional and legal forms that developed over hundreds of years culminated in the nation state system. In contradistinction with Māori constitutional forms the West came to value uniformity and universality of authority and state institutions such as the law. Law was separated out from the customary practices of communities and concentrated in a superordinate authority that operated over and above the community. Authority was vested not in multiple local authorities but in the sovereign, unitary and indivisible state. Hence the discourse of one law for all, and the rejection of the notion the Crowns sovereignty is divisible in the form of indigenous rights. Liberal democracies on the whole reject the idea that culture and ethnicity and associated notions of collective rights should have any place in political representation. There is a belief that liberal democracies have 'transcended' culture in favour of a supposedly neutral 'culture free' system, where everyone is regarded as an individual citizen (rather than collective) and treated the same before the law. Treating everyone the same was seen as transcending the 'inevitable conflict' believed to arise from recognising particularity (different cultural and other groups)

It is important to remember (given the dominance of Liberalism) that it is a legal system that far from being neutral, represents a particular cultural history and worldview in the same way Māori law does. In the context however of Western expansion (imperialism and colonialism), the particularity of Western law has been universalised and masquerades as a neutral (culture free) system for all.

General themes

Overall Durie is asserting that on the basis of :

- the prior existence and validity of Māori law;

- the Treaty of Waitangi (and the bicultural framework/partnership implied here);
- and the Declaration of the rights of indigenous peoples

that Māori law has a central place in the nation. The Treaty is seen a framework (moral? legal?) that accepts that law in Aotearoa will have its source in two streams. The treaty therefore provides the framework for the resolution of property issues and conflicts.

In relation to water rights in particular, Durie argues that both Māori law and the assumption of Māori ownership of waters must be asserted, or at least that the Crown's claim to ownerships should not be admitted and must be 'stoutly opposed'. In general terms I agree with Durie. Given Māori ownership of lands and waters are obvious in Māori law and affirmed by the Treaty, it is the Crown who must prove their ownership in any case, not Māori. Utilising 'aboriginal title' as in the foreshore and seabed case, assumes Crown title and Māori must prove their ownership through long-term exclusive possession etc.

Critique

I suggest that 'law' in this country must not simply acknowledge and 'accommodate' Māori law, but do so in a way that provides for differing constitutional forms and practices based on that law (I use the term 'constitutional' here loosely in the sense that it means ' preferred forms of social association and regulation'). That is, ideally we would have a situation where Māori law amounts to more than our 'cultural' concerns being added to the main frame of the existing legal system. Taking Māori law seriously means taking seriously Māori constitutional forms not merely adding Māori cultural content.

The western legal system is in many ways antithetical to Māori forms. Māori forms privilege local, community oriented (bottom up) and flexible forms whereas the Western system is a top down form of authority, separated out from a day to day sense of moral values and behaviour. I am not talking about a completely separate Māori system of justice, but rather that we work towards legal forms that provide significant flexibility for Māori approaches to be enacted and which are localised working through a range of local institutional forms.

If Māori cultural content and even 'rights' are incorporated into the dominant liberal state form, we may have achieved much in terms of moving to the centre of power, to gaining a 'voice' and much needed resources. Yet in my view, if the plural, relational, local, contextual and responsive/responsible dimensions of Māori constitutional and legal forms are overlooked (which are those forms and qualities that emanate from a distinctly indigenous and Māori orientation to others and the world) then my sense is that ultimately we have let go of what is distinctively important and valuable about Māori constitutional forms. My sense is that we often think ground is being made

through processes of inclusion of Māori into state systems, without recognising these can also be acts of assimilation.

When we use the language of 'rights', 'sovereignty', 'entitlements', 'autonomy' and so on we have assumed a whole body of thought and practices that is contrary to indigenous and Māori thought and practice. We are evoking a worldview that esteems uniformity, the sovereign self and the sovereign and singular nation, law, public sphere. In adopting the language of 'rights', 'sovereignty' and 'recognition' we are seeking admission into an economy that has oppressed ¾ of the world population and despoiled the planet.

Ultimately if our objective in struggle is only for ourselves, if our claims to rights, resources, authority and so on is only to be equal to the dominant culture, what have we really offered our mokopuna, the future, the world? Our claims cannot merely be self-serving but incorporate serious reflection and action on our responsibilities as humans and indigenous peoples for others and the environment. We have to recover ourselves but we are ethically obligated to always be responsible for others.

Proposal

I propose a Treaty of Waitangi constitutional relationship based in responsibility rather than rights and one I believe is much more in keeping with a Māori relational orientation. The two treaty 'partners' need to develop a 'politics of responsibility' for each other, the peoples of the 'nation' and the environment. A politics of responsibility, rather than rights represents a paradigmatic shift in the dominant constitutional discourse and encourages us to enlarge our politics, which I argue has become somewhat mired in self-serving and dead-end rhetoric. Invigorating and vitalising a Māori indigenous politics that foregrounds responsibility is to draw on the philosophical and ethical resources of our culture to offer ourselves and others the possibility of a sustainable future.