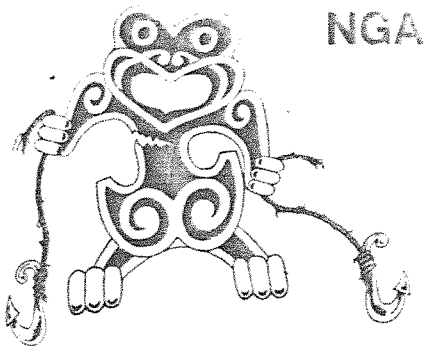

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THE ALLAN NIXON MEMORIAL LECTURE 1989

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A MAORI PERSPECTIVE ON THE CRIMINAL JUSTICE SYSTEM

In reviewing the topic for this evenings discussion, "A Maori Perspective On the Criminal Justice System", one is reminded of the satirist Ambrose Bierce's comment that:

"Lawyers strangle you with words, give that strangulation meanings hitherto unknown to man, and then create assumptions about your death that deny the reality of its occurrence."

Any discussion of the extant criminal justice system carries with it such a set of meanings and assumptions, and the topic for tonights korero is no different.

First there is the obvious implication that a Maori perspective on the criminal justice system must be an analysis of the Pakeha system currently in operation: it is not generally assumed that a Maori perspective on justice could refer to Maori, not Pakeha, processes and institutions.

Secondly, the assumption that the criminal justice system is Pakeha leads to the belief that because it is in operation in New Zealand it is appropriate for all who live here, as if the fact of its existence some how gives it an inherent validity. To paraphrase the philosopher:

"I operate therefore I am".

Unfortunately such a view has the effect of restricting debate about criminal justice to an analysis of existing procedures, structures and administration. When this analysis is grounded in the belief that "one law for all" means "one process for all", rather than "one resultant justice for all", the debate becomes confined by a monocultural strangulation. In this context, the jurisprudence, the philosophy, the culture from which the processes arise are unquestioned: they are accepted as "givens" which are beyond debate because they incorporate ostensibly universal notions of justice and right. Who could possibly quibble with the ideals of the rule of law, equality before the law, and one law for all?

Yet such ideals as used in New Zealand are not so much universal as the products of a particular culture. They are defined, they have a meaning, which reflects the values of that culture. For this reason, tonights discussion does not focus on the processes of arrest, prosecution and sentencing within the Pakeha system of criminal justice. Rather it attempts to determine the actual rationale which underpins those processes: it seeks out the cultural heart of the system itself.

This approach enables the Pakeha criminal law to be seen as not just a means of impartially regulating social order, but as a culturally-specific means of defining what social order actually means. It also establishes the framework in which to consider the different cultural base of Maori criminal law and the need to give that base contemporary expression in a system of Maori criminal justice.

These issues will be addressed under three broad headings:

1. The cultural and ideological bases of Pakeha Criminal Law.

2. The use of that law as an instrument not so much to protect the Maori but to oppress and control them.

3. The cultural, constitutional and structural definitions of a Maori Criminal Justice System.

1. THE BASES OF PAKEHA CRIMINAL LAW

Any system of law is shaped by the history and values of its particular culture and is adapted over time to maintain a sense of social order. Most have been derived from a concept of divine authority which has been exercised through allegedly impartial human agents, or it has been incorporated into the belief systems whereby divine sanction is accepted as direct and personal. In both cases, the system is one which is attuned to the particular cultural needs of its people. It provides a myth of externally sanctioned order, and the reality of control by which societies regulate conduct and maintain harmony.

The Pakeha criminal law and the processes which have been established to enforce it in New Zealand are regarded as the cornerstone of the "Rule of Law". They are seen to represent the community desire for peace, good order, and protection from harm. Their roots are in the Western Christian heritage, their growth has been nurtured by the interaction of particular socio-cultural and economic theories, and their contemporary manifestation perpetuates a set of attitudes which reflect its history.

Those attitudes shape, and in turn are shaped by, a particular social and cultural context. Within that context, the act of theft is given definition only through a framework of particular relationships and specific concepts of ownership. The act of taking a life is rendered unconscionable only within certain culturally-recognised boundaries. The connections between these philosophical and cultural definitions of crime on the one hand, and the political bases of authority and power on the other, are close and crucial. Their inter-relationship means that the definition, interpretation and implementation of the criminal law is largely ideological. The law is a means of:

"Maintaining bonds of obedience and deference, in legitimising the status quo, in constantly recreating the structure of authority which (arises) from property and (which) in turn protects its interests".

This legal purpose is political, and it uses the criminal law as an instrument to promote a particular capitalist ideology. By defining as unacceptable those acts which directly threaten the economic status quo, be it treason or theft as a servant, or by basing definitions upon the indirect protection of a property interest, as in the origins of rape as damage to a chattel, the law has always reflected the ethos and ideology of capitalist patriarchy.

But the law is more than a palimpset of ideology. It is also a powerful and profound cultural statement. Political ideologies do not develop within a vacuum. They grow within, and are shaped by, the values of a particular culture in a process of symbiosis and interdependence. Thus the New Right has arisen from a Western culture predicated upon individualism and the myths of efficiency. That culture has in turn been moulded by a capitalist ethic which made acceptable the ideas of individuated responsibility and glaring socio-economic disparity. Culture has shaped the ideology; the ideology has reflected the values of the culture.

The criminal law is a product of this symbiosis. It reflects notions of individual rather than collective liability and is based on perceptions about the function or dysfunction of certain acts in relation to the particular cultural ideals of a society. The outcome of certain acts become important, and relevant to the determination of criminality, if the hurt occasioned is disruptive of a particular sense of order and a particular set of cultural values. In this sense, the question of what is a "crime" is one of definition, not of the act itself, but of the reasons why the act may or may not be culturally unacceptable. The question of how the dysfunction created by any criminal act is then remedied, is also a matter of cultural definition.

The clearest and most-cited example of this process of definition is of course the act of killing. The act of taking a life is not in itself a crime. It becomes a crime only when certain defined criteria are met. These criteria arise from definitions within a culture and will differ across cultures. They may also differ within a particular culture so that, for example, intentionally killing an enemy in war is not generally a crime, but intentionally killing a person in peace time is. The act and its consequences are the same, but culture (and politics) define whether it will be criminal.

The definitions which underlie Pakeha Law are clearly monocultural. They reject any Maori perspective of criminality and thus reaffirm the view that "one law for all" means "one Pakeha law for all". They ensure the constitutional rejection of Maori participation in the process of legal definition, maintain the cultural arrogance of dismissing any notion of Maori law which could contribute to that process and thereby deny the validity of Maori law itself.

2. THE INTERACTION BETWEEN PAKEHA AND MAORI LAW

Pakeha experts have made many assumptions about Maori culture. One of the most persistent is that because Maori society did not possess a Western-style legislature or judiciary, it did not possess law, since

"...there is no law until there are courts".

Such a view meant that any Maori institutions used to maintain social order could be dismissed as merely expressions of "lore" or quaint and sometimes barbaric customs. When this view was framed within Governor Grey's view that

"the colonists and the Maori should form but one people under one equal law"

it became easy to dismiss the philosophy, the matauranga or cultural bases which underpinned the systems of Maori law. This dismissal involved the removal of one of the major cohesive forces in Maori society and so had a direct effect on the security, values, and self-esteem of the people themselves. The increasing alienation of land compounded this sense of loss because it removed the tangible link between those living in the present and those in the past from whom the precedents for the law came.

Those precedents were based in a cultural context which recognised a collective weave of social responsibility that linked people to their wider community and their ancestors. Those precedents were clear and defined, and Maori people know which acts were unacceptable "hara" or crimes.

The definitions of "hara" arose from a framework of social relationships based on group rather than individual concerns. The rights of individuals, or the hurt they may suffer when their rights were abused, were indivisible from the welfare of the whanau, the hapu, the iwi. Each had reciprocal obligations founded in a shared genealogy and a set of behavioural precedents established by common tipuna. Those precedents became te tikanga o nga hara, the "criminal code" and were accepted as binding because they

"were the law which came from the wisdom of our past...which bound us to our tipuna".

They became part of the process by which certain acts were made subject to sanction. These definitions of unacceptability were based not so much on the fact that people had individual rights, but rather that they had collective responsibilities. They were based too on the specific belief that all people had an inherent tapu which must not be abused, and on the general perception that society could only function if all things, physical and spiritual, were held in balance.

The commission of any hara would damage that tapu and upset that balance. Constraints on behaviour, a criminal law, was therefore developed to preserve harmony within and among individuals and their community. That law was not an isolated set of rules to be invoked only upon an infringement of accepted behavioural limits. Neither were they part of a distinct discipline to be "learned" separately from the spiritual and religious beliefs of society. Instead they grew out of and were inextricably woven into the religious and hence the everyday framework of Maori life. They reflected a special significance which was manifest in the spiritual ties of the people to their Gods, and the whakapapa shared between individuals and the ancestors who bore them. The Maori in fact lived, not under the law, but with it. This inter-relationship affected the definition of the criminal act itself, the ideas of responsibility for it, and the process by which the hara would be redressed.

Because individuals were inextricably linked by whakapapa to their whanau and iwi, so were their actions the unavoidable responsibility of the wider group. An offender could not be isolated as solely responsible for wrong doing; a victim could never be isolated as bearing alone the pain of an offence. There was a collective, rather than an individuated criminal responsibility, a sense of direct as well as indirect liability.

The inter relationship between the deities, the ancestors, and the living, thus provided the base of definition for both crimes and responsibility. Certain acts were therefore "criminal" not so much because of the immediate imbalance which they caused, the social dysfunction which they created, but because of the behavioural prescriptions laid down through the interdependence of the living and the ancestors: the act itself was less important in defining criminality (or explaining offending) than reasons why it was defined as unacceptable.

Thus the act of rape was a hara punishable by death, not just because it physically hurt the victim. Neither was it a crime because, as in early English law, it damaged a chattel owned by a man. Rather it was forbidden because it violated the inherent tapu of woman. It thus in turn upset the spiritual, emotional and physical balance within the victim herself, and within the relationships she had with her community and her tipuna. The act of rape was therefore proscribed to protect that balance and to preserve her tapu.

Such laws provided stability within Maori society and illustrated an obvious correlation between the power to impose legal sanction and the mana implied in that power, a correlation shared by Pakeha. To the Maori it was tied to the ancestral and spiritual origins of the law and to its binding force as a fundamental base of good order. To the Pakeha it was similarly regarded as ~~a fundamental~~ base of social order. However in the colonial context it was also regarded as the justification for ultimate sovereignty over the country. It was inevitable that ~~the~~ two ideals needed to find some way to co-exist or conflict would follow.

Conflict was initially avoided because the Maori were numerically dominant and their traditional norms were still largely functional. Pakeha settlers and missionaries therefore adapted to Maori procedures and accepted the need for some fusing of their legal system with the Maori.

However the increased number of settlers brought with it an increased call for "good government and law and order." Misunderstanding arose when this call was echoed by a number of Maori leaders. The Pakeha assumed that this desire for social order on the part of the Maori implied a willingness to submit to British law and order. The Maori on the other hand implied no such submission. Rather they assumed that social order could be maintained by a retention of their mana and a possible adaptation or sharing between the Maori

and Pakeha systems. Increasingly however the settlers saw the replacement of Maori law by Pakeha as an inevitable step in the process of colonisation. Indeed, the imposition of the 'rule of law' was implicit in the Pakeha notions of sovereignty.

The humanitarianism of Victorian colonialism was clearly to be superceded by the realities of political power, realities woven together by the twin threads of monoculturalism and racism. In a general sense, ideas of monoculturalism assumed that Pakeha values and ways of doing things were the only valid ones, and that other cultures should accept those ways either because they did not possess appropriate methods of social order themselves, or because they possessed ideals which were inferior. The basis of those assumptions was an innate prejudice against the norms of other cultures. Their implementation in policies exercised through political power and ethnically-defined "rights" of civilised superiority or competence led to personal and structural racism. Within this context the possibility of retaining Maori autonomy or establishing complementary legal systems was undermined and the institutions of Maori law were gradually replaced by the dictates of the settler government.

Such dictates were of course always framed to reflect the ideals of "the law" and notions of equalitiy under the law. However the pursuit of this one Pakeha law was in itself a racist act that was dismissive of, and damaging to, the ideals of Maori law, Maori sovereignty, and indeed Maori cultural survival. However, the government justified its actions on the grounds that Maori institutions were simply inferior to their own, as is clear in Governor Grey's comment that

"The general policy...has been to convince the natives that their traditional customs had...become obsolete and useless and that it would be to their own advantage to adopt our laws."

Such views were in direct contrast to the Maori beliefs that they should retain authority over their own people and share as sovereign ~~partners~~ in the political and legal structures of the country. Their beliefs were encapsulated in the statement of a leading Chief that:

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

They were also encapsulated in the Maori belief that the Treaty of Waitangi provided the ultimate protection for their way of life, their institutions and their culture. When the Courts and legislature ~~dismissed~~ rejected the Maori perceptions of the Treaty, the ~~rejection~~ dismissal of any notion of Maori self-determination and continued Maori authority appeared complete. ~~inevitable~~.

And indeed the denigration of Maori law and culture is now familiar to many New Zealanders aware of the catalogue of statutes and judicial decisions which redefined the place of the Maori in this land. But the ideals of Maori law and the values which underpinned Maoari culture did not die. Instead the whispered ideology of tribalism, the nuances of language, and the underlying worth of the culture itself, defied attempts by the Pakeha to demean, to objectify, to close them off to the future. Although an agony was often induced into the Maori heart, pulverizing it as it tried to live under a Pakeha domination which mocked it,the heart survived. Today the Maori ngakau seeks solace in the rejuvenation of the culture which nurtured it, and the institutions which strengthen it. One such institution is the Maori legal system.

THE DEFINITIONS OF A MAORI CRIMINAL JUSTICE SYSTEM

The issue of re-establishing a Maori system of criminal justice leads to interesting debate.

It is dismissed by politicians as "completely unacceptable", categorised by historians as "apartheid", and demeaned by lawyers as "unworkably bizarre". Indeed the Pakeha response to the issue reminds one of the statement of the American criminal lawyer Samuel Liebowitz that

"To protect their own interests or to rebut a view which challenges their version of the status quo, people will fabricate, obfuscate and ameliorate."

In the welter of misinformation and obfuscation people tend to misinterpret the context and the grounds upon which the proposal is based, and they lose sight of the fact that the issue raises serious questions of cultural respect as well as constitutional importance.

A senior counsel has thus dismissed as "bizarre" the idea of a parallel Maori High Court and Maori Court of Appeal, when this has not been advocated. Another has raised questions about the ascertainment of guilt and appeal procedures, when such notions have a quite different base of definition in Maori law. Such views reflect an ethnocentric view of the law and a misunderstanding of the ideals and processes which underpinned Maori law. In essence, they reflect the same views which since 1840 have dismissed Maori legal processes or denied their validity.

The parallel Maori proposal has a base of cultural, constitutional, and structural definition. Criticism of the latter has meant that the philosophical foundations which would give the structure meaning have been ignored. It is accepted that the re-establishment of Maori-based judicial structures will require long-term research and development. However, an understanding of the structure's constitutional and cultural base is a necessary precondition of any debate about how a Maori process will operate in the 20th Centrury.

The cultural definition of a Maori system is based in the belief that one law for all means not one common procedure for all, but one resultant justice for all. There are different ways to achieve that justice, and no one process is superior to another. Each is valid, and that which arises from an appropriate cultural base will be the one which will most effectively ensure justice for the people from that culture.

The purpose of the criminal law should not be to fashion society or to mould Maori wrongdoers according to an English or Pakeha model but to reflect the state of society. Because our social structure is based upon the special relationship between the tangata whenua and the Crown, the law can only be relevant if it recognises that relationship. At present its interpretation of the one law principle as being one Pakeha law prevents it from doing so: instead it maintains a legal fiction that it can operate in a culturally neutral way while ignoring the fact that it developed in a specific cultural and socio-economic context far removed from that of the Maori community.

The constitutional definition is grounded in the status of the Maori as Tangata Whenua and as sovereign signatories to the Treaty of Waitangi. Pakeha law has consistently maintained that the Maori gave up the right to develop their own system of law with their cession of sovereignty in Article 1 of the English version of the Treaty. However, Article 1 of the Maori version grants no such sovereignty, and the retention of Rangatiratanga in Article 2 and the protection of te ritenga Maori in Article 4, clearly encompass the right of Maori to monitor the conduct of their own through appropriate legal processes. Rangatiratanga, or "absolute authority", means more than control over natural resources; it means legal and political authority over those people who are the beneficiaries of the natural resources. In essence, rangatiratanga necessarily includes the power to make law and exercise authority through Maori legal institutions.

Unfortunately most debates about the Treaty are defined by the Pakeha law. Maori people have often unknowingly been confined by Pakeha definitions of sovereignty and legal rights, so that their traditional concepts of authority and rangatiratanga have been made subservient to the sanction and control of the Pakeha legal system. The effect of this sanction has been to ignore the fact that at the time of the Treaty there was little debate about whether Maori people had unique rights and specific institutions to enforce them. The Maori, of course, knew of those rights and the rangatiratanga which upheld them because they shaped his life and infused his whole social structure. The Pakeha accepted them partly because the law acknowledged their validity, and partly because although they might seek to claim sovereignty, it was the Maori who had actual possession and power. The relevance of this last factor was particularly important. It ensured that any Pakeha claims to have gained control over the land through the Treaty could not be meaningfully enforced in the early period of contact. Indeed to paraphrase the words of Chief Justice Marshall in an American case dealing with Indian sovereignty it would have been

"an extravagant and absurd idea that the feeble settlements on the sea coast" could have ignored Maori possession and authority.

Increasing Pakeha power meant that such views could be dismissed under the guise of legal responsibility which was promoted as necessary to ensure the provision of equality under one system of law for all. However by implementing this philosophical fiction of the Pakeha law, the process actually created others - that the Maori as tangata whenua had no special status, and that any rights they may have, like those of other minorities, were held simply on sufferance from the Crown. In essence this meant that to gain the equal rights of a British subject the Maori were expected to abandon many of the things which made them unique - their sense of community, their religion, their laws, and their language.

The relationship between the Crown and native peoples, and the idea of tangata whenua or indigenous rights, nevertheless still provides a constitutional basis for Maori people to exercise authority over the conduct of their own. From a Maori point of view, the fact that such rights have been recognised as in early NZ cases do

"...established principles of law...found among the earliest settled principles of... the general law of the British colonial empire"

is simply confirmation within the Pakeha law of the rangatiratanga which established that authority. From a Pakeha perspective, those principles were, of course, nullified by a series of cases, and by the reality of the new political framework. However the validity of that claim needs to be addressed for a number of reasons.

Within a Maori context, there seems no principle in Maori or Pakeha law which permits one system to unilaterally deny the pre-existing rights of other people. In fact it would simply seem to be the height of monocultural arrogance for one system to assume that it could peaceably remove ancient rights to which it did not consent but which it has no satisfaction which it was not recognised. To do so merely establishes a fiction whereby the Pakeha law in effect says that the Maori had no rights to their land, language and culture, unless they were granted by the Pakeha. That the colonial law was prepared to adopt this fiction denied Maori people the right to be themselves, but it did not necessarily diminish the efficacy of their rights. And one of those rights is clearly the ability in constitutional terms to establish a Maori criminal justice system.

The development of a parallel system of criminal justice is, of course,

fraught with many practical difficulties. It cannot be implemented overnight, nor expected to develop without considerable resources devoted to its research, establishment, and continued operation. The effectiveness of any such process is dependent upon a re-evaluation by the Pakeha law of what legal equality means, and a reconsideration by Pakeha society of what is meant by the term ~~biculturalism~~. That reconsideration will ultimately flow from long term changes in Pakeha attitudes and processes. At present, they seem to demand that Maori people sort out their difficulties, but deny them the resources and the cultural respect to do so in a way which is different to those of the Pakeha majority. A continuation of that monoculturalism will prevent Maori people from adequately dealing with the consequences of criminal offending, and inevitably maintain the pressures which promote that offending in the first place.

The efficacy of an autonomous Maori process is most of all dependent upon Maori people determining what legal structures might best help them support and monitor their young. As evidenced by the many calls for a Maori way to address offending, and by the establishment of Maori law courses at Te Wananga o Raukawa, the Maori community is both seeking that efficacy and actively researching what could be the jurisprudential foundation of an autonomous legal system. Indeed the current process of cultural revival ~~and the suggested responses to establish a Centre for Cultural Research and a Maori Law Commission will all help~~ establish the cultural framework within which that system could develop mana and ensure respect. Those factors make pertinent a Navajo proverb

"Ask not the how or the why: seek instead for when".

In practical terms there are many options and overseas models available to provide input into the establishment of a Maori process. Because of the changed situation of Maori society and because traditional Maori culture did not have a court institution as such, the structural organisation of the system would be quite new within Maori terms. However the ideals of mediation, balance and sanction which infuse Maori law would remain as the philosophical base. For this reason it would perhaps be inappropriate to speak of Maori tribal courts as the native American jurisdictions do, but to speak instead of runanga. The manner in which such runanga would be established, their composition, their jurisdiction, their laws, and their methods of operation are matters requiring considerable research.

However the key cultural and philosophical issue in a parallel Maori system is the need for Maori people to be able to assert their own rangatiratanga and their own control over the consequences of wrongdoing by their young. That need is part of the indigenous rights of a tangata whenua to make their own decisions in a way that is relevant to them. It is a rejection of the monoculturalism which has tried to turn Maori into non-Maori, and which always assumed that Pakeha models were suitable and appropriate to them. Indeed, if the idea of tangata whenua status, and the guarantee of rangtiratanga in the Treaty is to have meaning, it follows that Maori-based judicial structures are a natural development of the rights implicit in those concepts. The need for research and development to establish such a structure is long term; the need for commitment to its validity is immediate.

It was clear from research undertaken for the Justice Department Report "The Maori and the Criminal Justice System" that Maori people acknowledge that need. Indeed the whakatauki

> Kaore te ture e mokemoke ai, engari ka noho ai, ka whanga ai, ka wawata ai i te rongo te hiahia o te tangata.
> (The law never stands alone, but waits for people to feel its need)

is particularly appropriate in today's circumstances.

The Maori call for the recognition and re-establishment of their systems of law seeks to satisfy the need for justice within the criminal law. It arises not from some forlorn yearning for the past, but from a realisation that in the wisdom of the past are the ideals which can be adapted to yield justice today. ~~They also do~~ It does not arise simply from a widespread dissatisfaction with the bias and monocultural inappropriateness of Pakeha processes for Maori. It arises instead from the stirrings of a dream in the Maori community which seeks to ensure the recognition of their rightful place in Aotearoa.

That place is dependent upon a spiritual base to ensure continuity with the past, a languasge and cultural base to instil pride and self-esteem, and an economic base to provide security in a changing world. It is dependent essentially upon the affirmation of mana Maori and rangatira-tanga; the recognition of the right of Maori to determine their own destiny. A system of Maori law is an integral part of that self-determination since it provides the mechanisms to ensure balance and social order within the Maori community.

The story of the dismissal of those mechanisms which I have endeavoured to briefly explore this evening is a tale which links the the cultural suppression of the past with the cultural denigration of the present. Within it are the realities of cultural dismissal which were perpetrated in the name of the pakeha law, and the diminished sense of cultural worth which so many Maori feel at this time. The stirring dream of Maori is to restore that self-respect. Maori law amd Maori legal processes will help ensure the social harmony in which self-esteem can develop and the present longing for justice can be realised.

That is where the debate about a Maori justice system leads us. Let us then remember the words of our tipuna

> I te timatanga me te mutunga,
>
> ko tiaho mai te maramatanga.

Through all of this,
~~At the beginning and the end~~, let the light of understanding shine forth.