THE ANCIENT MAORI SYSTEM OF LAND TENURES (SOME NEW ASPECTS)

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I INTRODUCTION

Did the Maoris really have a definite system of land tenures, or was their only law that of the "Strong Arm", ie, Force?

This is the question which faces everyone who attempts to gain an accurate knowledge of rights to land among the Maoris; and quite a large body of authority has at various times supported the contention that the Natives of New Zealand, prior to the proclaiming of the sovereignty of the Queen, recognised only the doctrine that "Might is Right".

Of infinitely greater weight, however, is the definite recognition of Maori land customs by the British Government, as in the Treaty of Waitangi, the recognition by successive Governors in their proclamations to the Natives, by the New Zealand Legislature in numerous Acts, and by the Native Land Courts in numbers of recorded decisions. These have one and all taken it for granted that the Maoris did have a system of land tenures, a system very incomplete, no doubt, but still one worthy to be considered a body of Native custom, having more or less binding effect among the tribes.

No one will contend, of course, that this system of land tenures was as elaborate and as universally adhered to as are those of the civilised nations of today. We cannot say that the

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Natives of New Zealand, in respect of their rights to land, ever obeyed "laws" strictly so called. They did, however, through many generations and under varying conditions, respect and obey many well-recognised *customs* relating to land, and a perusal of the evidence hereinafter submitted will indicate that these "customs" are well entitled to be considered a definite system of land tenures.

Only a very brief acquaintance with the Native Land Court cases is necessary to give one some insight into the way the Native regards his interests in land. Continually we find the Maori referring to the "custom" of his tribe, the "custom" which has been observed for many generations by his ancestors, the "custom" which has been respected by strangers or by other members of the tribe. On all possible occasions the Maori would refer to such and such a "custom" of his tribe as proving his claims to land. He did not claim land as having a moral right thereto, but he claimed it as being entitled under some definite custom of the tribe. On occasion, the arrogance of some powerful chief might cause a well-known custom to be ignored, but the custom would survive the chief, and the temporary suspension would only cause it to be more highly treasured by the rank and file of his people.

The "customs" of the Maoris with regard to their land were definite, and they received almost universal respect. They were not mere rules of convenience or mere habits of conduct. There is indeed a world of difference between a binding custom and a course of habit. As one great writer has put it: [1]

> Custom must not be confounded with mere frequency or even habit of conduct. In any state or other society in which customary law is admitted, custom as a part of the law means the conduct which is enforced as well as the strict or loose nature of what the society allows - not always very well, even in the case of national law in the ruder stages of national existence - and which is followed as well from fear of such enforcement as from the persuasion that the received rule requires such conduct to be followed. In other words, custom is that line of conduct which the society has consented to regard as obligatory.

These words of Professor Westlake are strikingly applicable to the Maori customs with regard to land. The Maoris of New Zealand were split up into a large number of tribes, the customs of which were in most cases identical and in others remarkably similar in character. The love of the Maori for his land was intense, and the customs relating to land were as jealously maintained and as strictly enforced as the loose nature of Maori society allowed. The

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1 Westlake, *Intl. Law*, 2nd edit, Vol I p 15. See also Hall, *Intl Law*, 6th edit pp 13-14.

Maori followed the custom partly from fear of the wrath of the tribe or of the chief, and partly from the persuasion that the customs of his ancestors must be respected and obeyed. The tribes as a whole, and the individual members thereof, showed by their conduct that they considered such customs to be binding upon them.

What more could one expect in such a state of civilisation as the Maoris had attained to? Yet we find men like Resident Busby, the representative of the Crown prior to the establishment of the Colony, declaring that: [2]

> their only law was that of the 'Strong Arm', and that the Natives, down to the Treaty of Waitangi, had no conception of the existence of a right implying an obligation on the part of others to respect that right.

We must not judge the customs of the Maoris, however, by the highest standard. Their customs or rules with regard to land may not have been given to them by a determinate superior, individual or composite, to whom they rendered habitual obedience. Nevertheless, comparing the two states of civilisation, the customs of the Maoris were as much enforced in New Zealand as were the laws of our own nation in England during the early days of the race.

This one thing also we must bear in mind, that the Maoris had no literature to assist them in building up a system of law, the art of writing being quite unknown, and they had thus to depend altogether on their famous gift of storing up tradition, handing down minute details for generation after generation in that wonderfully accurate manner which has been the admiration of all observers.

The Maoris had no all-powerful Prince willing and able to enforce due obedience to their customs, but the customs were enforced by such means as existed, chief of these being the general opinion of the tribe, as expressed in the meetings of the elders or through the mouth of the chief. That these customs should have been observed for several centuries speaks volumes for the power available in their behalf.

It must not be supposed that the Natives of New Zealand simply followed their customs as a matter of convenience. Rights in land were to them of paramount importance, and, even if a certain custom conflicted with their interests, they almost invariably respected it as being the custom of the tribe. For instance, it was the custom for a "tamaiti whangai" or adopted child to

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2 See App Year 1861, E No 2 No 3.

share in the landed rights of a deceased person on equal terms with the children of the body.[3] Again, it was frequently the case that a deceased Native left an "Ohaki" or verbal Maori Will, disposing of his interests in land in a certain manner.[4] In these cases, persons who would otherwise have received the whole of the deceased's interests in land, found themselves sharing the land with others, but they knew the customs of their tribe and so made no demur.

Writing on International Law, Professor Westlake has said:[5]

> The best evidence for the consent which makes international law, is the practice of states appearing in their actions, in the treaties they conclude, and in the judgements of their prize and other courts, so far as in all these ways they have proceeded on general principles and not with a view to particular circumstances, and so far as the actions and judgements of their courts have not been encountered by resistance or protests from other states. Even protest and resistance may be too feeble to prevent general consent being concluded from a widely extended practice.

The Maoris had no prize or other Courts, and they had no written treaties (prior to the coming of the Europeans), but they had the traditions of their fathers by which they might know how their people had acted in days gone by. These traditions they found to disclose a settled course of action based on certain general principles, and these principles did not vary according to the particular circumstances of the time. Thus their traditions showed that the rights of a free member of their tribe were as much respected as the rights of the chief himself. Similarly a powerful tribe could no more obtain a title to territory by conquest alone, without use and occupation, than could the weakest tribe in the country.

Occasionally, without doubt, the traditions would hew that here and there a custom had met with resistance and protest, or even with temporary suspension, but do not these things occur in the best-regulated of societies? Even in our own day, we have seen the power of the law defied for a time by a powerful section of the community, yet the law remains though temporarily set at nought. So it was with the customs of the Maoris. The occasional resistance to their customs was too feeble and too temporary in its effect to prevent general consent being concluded from a widely extended practice.

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3 See infra, under "Adoption".

4 See infra, under "Ohaki".

5 *Intl Law*, 2nd Edit Vol I p 16. See also Hall, *Intl Law* 6th Edit p 15.

All authorities are agreed as to the passionate love of the Maori for the lands of his ancestors. At all times he was ready to fight, and, if need be, to die in defence of his rights.[6] Under the most trying conditions he would seek to maintain his claims, and this from no sordid motive or lust for pecuniary gain. In one place[7] Resident Busby has stated that the result of his seven years' experience as British Resident was

> a conviction that the Natives had no idea of property in land such as exists in the minds of people where it has been the subject of legislation.

The Resident was right. The Maoris had no such idea of property until after the coming of the Europeans, but they had an idea of property infinitely higher, for it was based on sheer love for their land, coupled with the knowledge that land provided food for them, protection from their enemies, and gave them a certain amount of "mana" or prestige. How much higher was the Maori view of landed rights in those days than are our own today.

It cannot be denied that the enforcement of rights to land among the Natives of New Zealand was often left to the person whose rights had been infringed. A tribe would not as a rule bother itself about trivial disputes between individual natives, but the power to enforce customary rights was always there, ready to be exercised by the common consent of the community through the agency of the chief or of the elders. In all primitive communities we find the same state of things. Men are allowed to exercise a certain amount of self-help, provided the interests of the community as a whole are not thereby endangered.

In this connection the words of a great authority on international law are of interest. He says: [8]

> It is moreover not true to say that municipal law is invariably enforced by a determinate authority. There are stages of social organisation in which public opinion, which is the ultimate sanction of all law, whether municipal or international, is often able only to say to the individual that, when the law is broken to his hurt, he may himself exact redress if he can. When the early Tetonic societies allowed a person, upon whom a certain kind of legal injury had been inflicted, to seize the cattle of the wrongdoer and keep them till he obtained satisfaction, or when they told him to refer a quarrel

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6 See remarks of Sir Wm Martin, ex-Chief Justice, App Year 1861, E No 2 No I III.

7 See infra.

8 Hall, *Intl. Law*, 6th. edit p 15. For concrete instances of "Self-help" in early English Law, see numerous references in the well-known works of Pollock & Maitland, and of Professor Holdsworth,

> involving legal questions to the issue of trial by combat, they showed much the same powerlessness to enforce law directly that is usually shown by the community of states. Even at a far more advanced point of development there is probably always some law which can only be supposed by a violent fiction to be enforced by a determinate authority. Evidently the Courts give effect to a custom because it is already regarded as having the effect of law; and during the time that it has existed, before appeal has been made to the courts, it must have been imposed upon unwilling persons by the strength of public opinion alone.

The fact is that the rights of all communities are, in the last resort, maintained by the physical force of the community. The mode of enforcing a right amongst the Maoris differed greatly from that employed among civilised nations of today, but it differed only in degree of effectiveness and in manner of operation. The Maori did not have courts or legislatures to assist him, but he could have his grievances discussed at one of the frequent general meetings of his tribe, or he could seek the aid of the chief, whose power as the mouthpiece of his people was usually very great. Should these then fail him, he might then exercise some form of self-help, provided his "arm" was strong and his actions did not conflict with tribal policy or with the safety of the iwi (tribe) or hapu (sub-tribe).

In considering the effect of wars upon rights to land, there is a tendency to overlook the fact that an integral part of the Maori system of land tenures was the title under conquest and occupation. Title under conquest and occupation was not a thing outside the law, as it were, but it was itself part of the law. Thus, if one tribe conquered another and occupied the territory of the defeated tribe to the exclusion of the latter the conquerors would get a title under universally recognised Native custom.

In the same way, and in strict accordance with international law, Greece has in recent years obtained a perfectly valid title to much territory formerly owned by Turkey. Yet, although Greece obtained the land by force, ie by the "strong arm", we do not say that she retains the land by force. She retains it by a right recognised equally by the great powers and by the Maoris, the right under complete conquest coupled with use and occupation.

Before we conclude this somewhat scanty introduction to our thesis, we should just like to quote some remarks by that eminent authority on Native tenures, Sir William Martin, a former Chief Justice of the Colony and a strong upholder of the claim of the Maoris to have had definite rights in land under the ancient customs of the tribes. According to Sir William: [9]

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9 *Pamphlet on the Taranaki question*, 1861 AJHR E-2, No I, III.

> The Maoris, even in their old heathen state, were not without law. A strong authority was exercised within each tribe. On all occasions the life of the Maori man, in peace and even more in war, was fenced round with forms and ceremonies, with minute and rigid rules. All the tribesmen consulted together on matters affecting the tribe. The old system of government fell with the fall of heathenism (i.e. on the coming of the Europeans). The authority of the Chief and of the heathen priest sank gradually. For years the people experienced the mischiefs which flowed from the decline and the failure of the power which formerly restrained and governed their tribes. Yet the usage of public deliberation remained.

These views of Sir William Martin are amply borne out by the experience of the writer, who, as the result of several years' research work on the subject, involving a close study of most of the evidence available, has become firmly convinced that the Native race of New Zealand, long before the coming of the white men, had built up a somewhat elaborate and certainly effective system of tenures in land, and a system so well grounded in the very life of each tribe that not even the constant warfare of many generations sufficed to affect it to any appreciable extent.

II "THE STRONG ARM"

> When a strong man armed keepeth his palace, his goods are in peace: But when a stronger than he shall come upon him, and overcome him, he taketh from him all his armour wherein he trusted and divideth his spoils.[10]

We proceed now to deal with the so-called "law of the strong arm", the law which many people believe to have been the only law recognised by the Maoris in regard to their rights in land. By way of an introduction to our subject, we would quote an extract from the judgment of the Compensation Court in the case of the Oakura block, given at New Plymouth in June 1866:[11]

> The conclusion at which we have arrived, after our experience in the Compensation Court and as members also of the Native Land Court, is that before the establishment of the British Government in 1840, *the great rule* which governed Maori rights in land was *force* - ie that a tribe or association of persons held possession of a certain tract of country until expelled from it by a superior power, and that, on such expulsion, *if* the invaders *settled* upon the evacuated country, it remained theirs until they in turn had to yield it to others.

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10 *St Luke's Gospel.*, xi 21-22.

11 *Important Judgments, 1866-1879.*

In making the above remarks, it may at first sight appear that the Compensation Court (which consisted of Chief Judge Fenton and Judges Rogan and Monro) upheld the view that the right of "the strong arm" dominated the whole system of Maori land tenure. The Court, however, appears to have had in mind the relations existing between tribe and tribe rather than those among the various members of each separate tribe. Naturally the doctrine of "might is right" exercised a tremendous influence on inter-tribal relations; perhaps even a dominating influence in the years preceding the establishment of British rule; yet, even in those later days of constant warfare between the tribes, some other rights beside that of "the strong arm" were universally recognised. For instance, as is implied in the extract quoted above from the judgment re the Oakura block, invaders of a country, in order to obtain a title thereto, had not only to conquer the land by force of arms, but had also to *settle* on and occupy the conquered territory. This rule, that conquest without occupation gave no title to land, was so firmly established and so universally recognised that it in itself proves that the right of "the strong arm" was by no means the only right recognised among the Maoris.

Furthermore, we must remember that for many generations after the coming of the first Maori canoes from far-distant Hawaiki, the tribes dwelt in peace, and the so-called right of "the strong arm" was a thing yet unknown. During those days, the leaders of the various canoes - the men who became the founders of the different Maori tribes - partitioned out the land in a general way among their followers and doubtless laid down a number of rules by which they were to be guided in matters affecting the tribal lands. It was the tribe, moreover, which really possessed the land, the individual members having merely interests in the land subject to the all-pervading tribal right. It is probable that an elaborate system of land tenures had been in existence in the closely-settled islands in the Pacific whence they came, and the leaders of the great migration would naturally apply many familiar customs in dealing with landed rights in the newly-adopted country.

In the course of time, fresh usages with regard to land would crop up and would come to have the force of binding customs. The sound of war had scarcely been heard in the land since the days when the first-comers overcame the original inhabitants, and during all these generations the so-called "law of might" seems to have been almost unknown. Men laid claim to land by virtue of descent from their ancestors, rights under occupation were respected, and many fundamental rules affecting tenures became ingrained in the Maori mind, to be transmitted from generation to generation along with the other traditions of the race.

Then came the days of constant warfare between the tribes, when vast tracts of country were laid waste and depopulated with resultant confusion of titles in land. Many of the original

owners would have their claims finally settled at one or other of the usual cannibal feasts. Others would be driven off their lands or allowed to remain as slaves. In those strenuous days, nothing but a long-established and universally-recognised system of land tenures would have stood the strain. Mere rules of convenience relating to rights in land would have been swept away, and the land would have been the spoil of the strong.

That the Native customs affecting land survived the terrible inter-tribal wars is due to the fact that the individual members of each tribe had full knowledge of their landed rights, and these rights they cherished more than life itself and strove manfully to maintain against all comers. The very life of the individual and the tribe was bound up in the land, and the rights handed down from their ancestors were to them a sacred trust.

It is the contemplation of this constant state of warfare which has caused so many otherwise competent observers to believe that the Maoris recognised no law but that of "might". Men like Resident Busby and others of his day lived in an atmosphere of unrest and strife. The tribes were nursing their injuries and were still breathing vengeance against each other after the manner of the race. The power of the "strong arm" had been before mens' eyes for many years, and the somewhat numerous instances of its trampling on long-established custom made people overlook the countless instances in which these customs were still obeyed. Inter-tribal relations engaged everyone's attention so much that people failed to see that the inner life of the tribe went on in much the same manner as of old. Men still continued to acquire interests in land under inheritance from their fathers, under cultivation and occupation, under dowry, under gift, under adoption and under the many other sources of title which built up the Maori system of tenures. The tribal wars no doubt had practically suspended all inter-tribal relations respecting land between many of the tribes, but the system itself was not thereby swept away.

Several eminent authorities, however, have upheld views contrary to those expressed above, and it is only right that due consideration should be given to their contentions. Of those who have appeared to hold such contrary views, the most eminent was undoubtedly the late Sir Donald McLean, a former Land Commissioner and Native Secretary.

In his address of the 18th July, 1860, to the great conference of chiefs at Kohimarama, the Native Secretary, in introducing a message from the governor stated that: [12]

12 1860 AJHR E-9.

> No fixed law on the subject (of land) could be said to exist, except the 'Law of Might'. It was true various customs relating to Native tenure existed, but these were not in any way permanent, and endless complications were eventually resolved into the 'Law of Might'.
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> Powerful tribes took possession of land by driving off (or exterminating) the original inhabitants; those in their turn drove off less powerful tribes. The conqueror enjoyed the property while he had power of keeping it. None were certain how long they could occupy the land in peace.
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> Scarcely a year passed by without our hearing of war about land in some part of New Zealand.
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> Tribes vary in their customs about land, but after all their various customs are liable to be superseded by the "Law of Might".

In judging of the full effect of these remarks of the Native Secretary, we must not overlook the fact that he was addressing a gathering of powerful chiefs at a somewhat critical period in the country's history. He was explaining to them the policy of the Government and was justifying the stand it had taken over the Waitara dispute. It was to the interest of the Government of the day to strongly support the claims of the Waikatos against those of the Ngatiawas, otherwise it is doubtful if the "law of might" would have been given such undue prominence. We need only peruse the parliamentary papers for the years 1860 and 1861 to find numerous references by Commissioner McLean to the Maori system of land tenures, and we know that, in his official capacity, the Commissioner gave due heed to the settled Maori customs relating to land.

If we analyse the views put forward by him, we shall find no real evidence of a belief that a system of tenures did not exist among the Maoris.

He admits that various customs did exist and that these customs had endless complications, which, he says, were eventually resolved into the "Law of Might".

If by this he means that the ultimate driving power at the back of the Native customs was "Force", no one will disagree with him, but if he maintains that it was "Force" itself which was the "law", then we must submit that he was entirely in the wrong.

Nothing could be more loose than Native Secretary McLean's remark to the Chiefs that "the conqueror enjoyed the property while he had the power of keeping it". The *power* to keep land overrun by an invader was by no means sufficient to give a title to the land. The powerful Ngapuhi tribe from the North of Auckland frequently over-ran the lands of the weaker tribes to the south, and certainly they had the *power* necessary to keep at least portion of these lands in their exclusive occupation. They did not *exercise* this power however, and so obtained no title to the lands they had conquered, nor did they dream of claiming any such right. Their chiefs

knew perfectly well that the *power* to keep was insufficient in itself, without actual use and occupation of the land. In other words, the law of "force" or "the strong arm" was in itself of no validity. Its only efficacy, apart from occasional instances of abuse, was as a means of enforcing the binding customs of the tribes.

The contention that their various customs were liable to be suspended by the 'Law of Might' is one which nearly everyone will agree. In the first place it admits the existence of the customs about land, and in the second place, it holds that such outcomes are liable to be superseded by the Law of Might.

If, then, we remember how the Law of Nations has on occasion been superseded by the Law of Might, and how even Muncipal Law has sometimes been set at naught by the exercise of brute force, we shall see that the mere fact that Maori customs were liable to be so superseded is of little importance after all.

To support the view that the Maoris had no system of tenures and that they recognised only the Law of Might, its advocates would be required to prove that the Native customs were not only *liable* to be superseded by the power of Might, but were also *actually* and habitually superseded by this power. And this proof they are unable to give, for it is the Maori customs which have been habitually and actually obeyed, while the so-called Law of the "Strong Arm" (except as the ultimate power for enforcing valid customs) has been only occasionally exercised and has had no lasting effect on the customs of the race.

One of the most persistent advocates of the right of "the Strong Arm" as the only right recognised among the Maoris was Resident Busby, the British Resident in New Zealand prior to the foundation of the colony. His views may be found in the correspondence arising out of the publication of Sir William Martin's well-known pamphlet dealing with Native Affairs.[13] We shall quote very fully from Resident Busby's remarks, and shall endeavour to point out why we think his views were mistaken ones:

> The terms in which Sir William Martin speaks of the tenure of land by the Natives, and the 'rights' resulting therefrom, and what might and might not be done lawfully, appear to me to be founded upon a misconception of the actual condition of the Natives, who, down to the date of the Treaty [of Waitangi] had no conception of the existence of a right implying an obligation on the part of others to respect that right.

13 See App Year 1861, E No 2 No 3.

> In these remarks we have only to deal with the rights of property, *implying corresponding obligations to respect such rights.* In this sense, I do not hesitate to say that so far as we can trace their history there is no evidence of the New Zealanders ever having possessed any rights, with the exception of those which were created by the Treaty of Waitangi. Of what use is it, practically, for a man to say I possess a right to my property, when there is no law to define the obligations which are created by such a right, nor government with power to administer the law supposing it to have existed? New Zealand was, in an emphatic sense, a country without a law and without a prince. It is doubtful whether the New Zealander, until he witnessed the exercise of authority under the British government, possessed any idea corresponding to that which is conveyed to our minds by the word "authority". *Their only law was that of the "Strong Arm".*
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> Might, not Right, was the rule of conduct. He (the New Zealander) knew of no title superior to his own. When a sale was made by a person whose character made him feared, there was nothing for the weaker or more timid portion of the Tribe but submission.
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> In fine, the result of my experience during the seven years in which I held office (as British Resident), was a conviction that the Natives had no idea of property in land such as exists in the minds of people where it has been the subject of legislation; and that the rules which Sir W. Martin lays down were not rules established by Natives, but suggested by the precautions adopted by our own countrymen in order to obtain a title which could not be justly disputed.

In another portion of the same criticism of Sir William Martin's pamphlet, Resident Busby says: [14]

> I am most decidedly of opinion that no such right (i.e tribal right over all the lands of the tribe) had any existence, farther than as it might be the right of the strongest, to which the weak were obliged to submit. If Teira (in the celebrated Waitara case) had, under the same circumstances, offered land for sale before the Treaty of Waitangi, he would without doubt have been forced to submit to the authority of Wi Kingi and his party. That is, weakness must have yielded to power - the law of the strongest - which was the only law known to the Natives before the Treaty, but which came to an end when the Treaty was concluded.

We have quoted from Resident Busby's views thus fully because they go to the root of our subject and because they set forth very plainly the opinion that the Maoris really had no system of land tenures at all. This opinion is, and has been, shared in by quite a number of people, and it would be as well if we were to endeavour to expose at once its weak points.

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14 See App Year 1861, E No 2 No 3.

1 If we turn to the remarks quoted above, we shall find that the Resident was somewhat obsessed with the idea that Maoris had no conception of the existence of a right implying an obligation on the part of others to respect that right.

Doubtless, the Maori had not studied and digested Austin's *Lectures on Jurisprudence*, but nevertheless he knew that, if a man's ancestors had lived on a certain piece of land for many generations and had cultivated it, that man had a claim to the land, and a claim which the other members of the tribe, from the Chief downwards, would respect. It mattered not to this Maori whether it was binding Native Custom or the power of a mighty Prince which maintained him in his rights in the land. It was sufficient for him to know that for many generations the rights of his fathers had been respected, and that so the rights of his descendants would, in the ordinary course of events, be respected in days to come.

2 Again, we find the Resident stating that we have only to deal with rights of property as they are necessarily understood by *jurists and statesmen, implying corresponding obligations to respect such rights.*

But that is not so. Since the cession of the country to the Queen in 1840, we must judge of the Maori's rights of property *not* as they are necessarily understood by jurists and statesmen, but solely in accordance with Maori usage and custom, as we are bound in honour to do under the Treaty of Waitangi.

With regard to the Maori's rights in property prior to the year 1840, we must judge, not by the views of jurists and statesmen, but by the views of competent Maori and European authorities as to whether any particular rights were valid by binding Native custom.

3 It is somewhat astonishing to find Resident Busby maintaining that no trace can be found in the history of the Maoris (prior to the Treaty of Waitangi) of their ever having been possessed of any rights such as imply a corresponding obligation to respect such rights. He must surely have known of countless instances where rights to occupy a particular piece of land, to fish or catch eels in a particular stream, to hunt for rats or to dig for fern-root on a particular ridge, had been respected for many generations and had been free from interference from "the Strong Arm" of the chiefs. In the strict Austinian sense, the Maoris may have had no "rights" with regard to land, but that troubled them not at all. They knew that, in the ordinary course of events, binding Native custom would protect them as it had protected their fathers in the past, and with that they were satisfied,

> Theoretically, no doubt, all "rights" should be judged by the same standard, and this standard, according to the tone of Resident Busby's remarks, should be the severe Austinian one. But surely

> no one can, with reason, apply the strict Austinian rule to the "rights" of the Maoris in their land. We are dealing with practical things, and we must consider the circumstances of the Maoris, their state of civilization, and their customs and usages, and if in these we see plain evidence of "rights" corresponding in effect if not in full measure with our own European rights in land, we need have no hesitation in treating of them as valid rights enforceable under binding Native custom.

4 The Resident asks of what use is it for a man to say he possesses a right to his property, when there is no law to define the obligations which are created by such a right, nor government with power to administer that law if it existed. He states that New Zealand was a country without a law and without a prince and that the only law that the Maoris had was that of the Strong Arm.

It is true that New Zealand was a country without a prince, but that fact does not affect the position in the least. New Zealand was inhabited by a large number of tribes, most of them quite independent of each other, and they were subject only to their own chiefs and bound only by their own tribal customs.

Again, the Resident's contention that the Maori had no law to define the obligations created by his rights, would not bother the Maori in the least. The binding customs of his tribe had defined no obligations arising out of his rights, but somehow or other he and his fathers had been unmolested on the land for many generations, and though at times they had been under the rule of overbearing unscrupulous chiefs, yet always their rights in the land seemed to have been respected. In their eyes, the immemorial customs of their tribe had always seemed to triumph against the continued exercise of the right of "the Strong Arm", and they felt that the "Law of the Strongest" could only have temporary success if opposed to the custom of the tribe. In this spirit, the Maori of the olden days, if driven off his land by superior force (i.e., by the "Strong Arm"), would always endeavour to "keep his fires alight" on the land by performing acts of ownership thereon, in order that his claim to the land should be recognised again as soon as the oppressor retired or was driven off. In the same spirit his descendants would "kindle their fires" on the land, and always would they remember that they had been deprived of their possession by force, and that they were bound in honour to strive to regain their heritage.

It is very interesting to note that some of the leading Maori chiefs of the last few generations have strongly upheld the view that the right of "the Strong Arm" was the only right which they and their ancestors recognised in past days.

Thus we find Tamihana te Rauparaha (the Ngati Toa chief from Otaki) declaring before the assembled Maori Chiefs at the Kohimarama Conference in the year 1860 that: [15]

> We know very well that according to our customs, *might is right*. Our Maori plan is *seizure*. Kapiti [Island], for instance, was taken [ie conquered]. The chieftainship of that belongs to me. According to Maori custom, when a man prevails in a struggle, he claims it [the land]...Should I come forward and offer land for sale, perhaps some relative of mine would say "You have no land". In that case, if I had strength, I would carry my purpose. We, the Maoris, have no fixed rules.

The above remarks, however, cannot be allowed to carry much weight. The speaker was a powerful chief who was accustomed to having his own way in the councils of his own tribe and among his weaker neighbours. Probably, also, he was not altogether adverse to posing before the Conference of Chiefs as a man whose wishes everyone respected and whose power no one cared to withstand. Such a man could hardly be expected to strongly uphold the rights of others, when he himself had often shewn but scant respect for such rights.

We may well ask, however: did Te Rauparaha himself give full effect to his view that "might was right" and that the Maori "plan was seizure"? We have no record whatever of his having seized by force the land which the members of his tribe had cultivated for many years, nor do we know that he in his strength ever overthrew the claims of children or of people in his tribe who were too weak to withstand his power. There is nothing to show that Te Rauparaha disregarded rights under ancestry, under occupation and cultivation, under marriage dowry, under adoption or that he disregarded any other cherished rights of his followers.

The plain fact of the matter is that this particular chief was addressing a great gathering of chiefs on quite a different topic from the one we have now under consideration. His views may or may not have met with the approval of the other chiefs, though doubtless they would have been approved, as it was not to the advantage of the chiefs to uphold the rights of the rank and file of their tribes. The important fact for us is to note that Te Rauparaha's remarks cannot be taken as voicing the views of the members of his tribe. It is quite certain that, if he had attempted at any time to use his power to seize the lands of his peoples, they would soon have made him realize that rights which had been handed down from time immemorial were not to be lightly swept away.

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15 See App Year 1861, E No. 1D No 2, Speeches of Chiefs at Kohimarama Conference, July and August 1860. See also *The Maori Messenger*, published by authority in the Native Language, July, August and September, 1860.

Another great Maori Chief, named Tamati Waka Nene, has put his views on the subject very tersely.[16]

> In former days, if we had any dispute about land, we settled it by fighting; now it is done by the Court.

Probably this famous chief, in making the above remark, was thinking more of disputes between tribe and tribe than of disputes between individual members of a tribe. Just as in modern times European nations have disputes over territory and frequently resort to the arbitrariment of war, so the Maori tribes would often settle their differences in similar fashion. The victorious tribe, however, on conquering and occupying the disputed land, would acquire a good title thereto by Maori *custom*, and no appeal was required to be made to any such right as the right of "the Strong Arm".

Waka Nene's remarks cannot be regarded as being of general application, otherwise we would have to admit that the Maoris had no land tenures at all. Suppose one of Waka Nene's fighting chiefs had been killed in battle against the foe, leaving two sons of tender years to inherit their father's rights in land. If, then, some adult member of the tribe quietly occupied the lands of the dead chief, would the children have to establish their claims to the land by fighting the usurper? Of course not. The tribe would see to it that the tribal customs received proper respect. Doubtless, in similar cases, a usurper would occasionally succeed by force or threats of force, but such cases would not affect the general rule that the tribal customs must be obeyed.

Again, Waka Nene's statement can at best refer only to disputes arising in comparatively recent times. It is generally recognised that for many generations after the coming of the Maoris into New Zealand, they lived at peace among themselves, a sure sign that they had a fairly satisfactory system by which to decide disputes with regard to land.

In the proceedings of the Native Land Court re the Pukekura Block[17] there appears the following statement by one Nepia Marino:

> I have no claim from my forefathers; *my claim is my arm.* I have heard claims to this land through other channels, but the only one I recognise is conquest.

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16 App Year 1871, Vol 1A No. 2A page 25. Colonel Haultain's Report on working of Native Land Court Acts.

17 25 November 1867, see App Year 1873 Vol III G 3 Enclosure A page 15.

It is rather a pity that the Judge did not ask this Native if he would be prepared to claim only through "his arm" (ie through conquest) with regard to all other lands in which he happened to be interested. Nepia Marino would have sung a different tune if he had had any rights in the Pukekura block under ancestry or through occupation and cultivation.

We turn now to what may be considered a typical instance of the exercise of the right of the Strong Arm. It is disclosed in the correspondence arising out of the great Waitara dispute, and the Journals of the House of Representatives for the years 1860 and 1861 are full of references to the claim of the powerful Waikato tribe to the lands of the Ngatiawa in Taranaki.

We find that the Waikatos, about the year 1834, overthrew the Ngatiawas and drove nearly all of them out of Taranaki. The Waikatos then withdrew to their own territory without permanently occupying the land they had invaded. Te Wherowhero, the great chief of the Waikatos, continued to look upon the Ngatiawas as a beaten people whose interests in their lands had been extinguished and, according to Governor Hobson, he once illustrated his point of view by placing a heavy ruler on some light papers, saying:[18]

> Now so long as I choose to keep this weight here, the papers remain quiet, but if I remove it, the wind immediately blows them away: so it is with the people of Taranaki;

alluding to his power to drive them off. Governor Hobson's own view was that Te Wherowhero certainly had a claim to the land, but not a primary one, as the received rule is that those who *occupy* the land must first be satisfied. "But", says Governor Hobson, "he is the most powerful chief in New Zealand, and I fear will not be governed by abstract rights, but will rather take the law into his own hands."[19]

Here then we have a chief powerful enough and willing enough to exercise the right of "the Strong Arm" and to set aside a rule universally recognised among the Maoris for several centuries. No stronger case could be found in support of their views by those authorities who maintain that the Maoris had no system of land tenures and that they only recognised the law of Might.

Yet how weak is the case! Te Wherowhero tried to set aside for the time being this one rule of Maori custom, because it happened to suit the policy of the powerful tribe of which he was the

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18 See App Year 1860, E No 2 No 5. Extract from dispatch from Governor Hobson to Secretary of State, 15 December 1841).

19 Ibid.

head. He did not extinguish the custom, however, nor did he even influence it to any great extent. A custom which had received the assent of many generations was not to be thus set aside in a day. Nor do we find Te Wherowhero adopting in his own tribe the doctrine that "Might is Right". He did not treat the rights of his own followers as rights which could at any time be set aside by the use of "the Strong Arm" of their Chief. He knew too well how, from the early days of the race, his people had had certain rights in the lands occupied by the tribe, and these rights had been respected and enforced. Certainly any exercise of the right of "the Strong Arm" by their own chief would not have met with a warm reception at the hands of the doughty warriors of the Waikato, and any action of the chief in ignoring well-settled customs would have been promptly condemned by the tribe.

For many years, however, it appeared as if the power of Te Wherowhero had indeed given to the Waikatos that right to the Taranaki lands which they claimed. The Ngatiawas were afraid to return to Taranaki because of the threats of the Waikatos, and even the New Zealand Government of the day to some extent recognised the power of Te Wherowhero by making to him a considerable payment for the interests of his tribe. To this extent, the right of "the Strong Arm" vindicated its power, but the effect was purely local and temporary, and in no way important enough to justify us in doubting whether the Maoris really had a system of tenures in land.[20]

The position with regard to these claims of the Waikatos was put very tersely by Sir Wm. Martin D.C.L. (a former Chief Justice) in his famous pamphlet dealing with the Waitara dispute and with Maori rights in land. Said Sir William:-[21]

> That which Potatu (or Wherowhero, the Waikato Chief) really possessed was the *power* to overrun their (the Ngatiawas') land a second time. It was *might*, not right: -- the might of a successful invader, and nothing more. According to Native usage, the Waikato tribe had an interest in certain spots where their Chiefs had been slain and which had therefore become 'Tapu' (sacred). Beyond that, they had no further right in the soil.
>
> He (Wiremu Kingi) could not possibly doubt the title of his tribe to land which the invader had *never occupied*.

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20 For further references to this exercise by the Waikatos of the right of the "Strong Arm", see App. Year 1860, E No 2 No 12 Memo by Governor Fitzroy on Taranaki Land Question, dated 2/12/1844. See also App Year 1861, E No 1 App B 16).

21 See App Year 1861 E No 2 No I III.

> The right, or might, of the conqueror or successful invader was wholly outside of the tribe. If it prevailed at all, it prevailed absolutely, displacing the tribe altogether, and sweeping away all rights of the Tribe of the Chief, and of the Clansmen alike.

In other words, the Waikatos had the *power* to overrun the lands of the Ngatiawa a second time much in the same way as a strong nation has the *power* to overrun the lands of a weak one. In neither case, however, does the mere *possession* of this power have any effect on rights in land or on the customs relating thereto.

The case of the Waikatos' claim to Taranaki, therefore, has no real significance as an indication of any all-pervading power of the "Strong Arm".

Among miscellaneous references to the supposed right of "the Strong Arm" may be mentioned the following:-[22]

Rev R Taylor.

In New Zealand, whilst there was no fixed amount received by a chief (from the members of his tribe), he claimed a right over the property of everyone less powerful than himself, and when he saw anything he fancied, he took it.

This is a most extraordinary statement for a gentleman of the Rev Taylor's experience to have made. A great chief would undoubtedly be more powerful than the individual members of his tribe, and, according to this authority, such a chief could claim the cultivations of a member of his tribe and could seize them if he so desired. Nothing could be more misleading. Very rarely did a Maori chieftain ruthlessly set aside the customs of his tribe, and well he knew how his followers treasured their rights in land. If such a chief coveted the lands of a member of his tribe, his safest course would be to slay the owner first and then to appropriate the land, but the matter would not end there, for the relations or descendants of the dead man would ever seek to regain the land which had been lost. The mere fact that many powerful chiefs had far less land than some of their humblest followers is in itself sufficient to disprove this author's statements.

F D Fenton[23]

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22 *Te Ika a Maui*, page 357.

23 Formerly Chief Judge of the Native Land Court, in the case of *De Hirsch v Whitaker & Lundon*, 28 Jan 1870: see App Year 1870 Vol IV G I page 10.

The title deeds of aboriginal tribes to their lands were, as Chateaubriand says, 'the bones of their ancestors', and present possession; and *the only law for enforcing this title was force.* ...It is true that the right of an individual to use a particular piece of ground solely, and after the fashion of property, was recognised by the tribe as against the other members of the tribe, but the collective individual holdings, with the uncultivated or wild lands, formed the tribal estate, and only one estate as against all outsiders.

Chief Judge Fenton here clearly states that the individual Maoris did have rights in land, and that these rights were recognised by the tribe as against the other members of the tribe. He then goes on to say that the only law for enforcing their title to the land was *"Force"*.

Force, however, as has already been pointed out, is the ultimate driving power at the back of all law, whether municipal or international. The element of force was far more prominent among the Maoris than it is in all civilised states today, or, to put it in another way, the Maoris did not cover up and disguise the element of force to anything like the same extent that we do now. The Maori tribe, usually through the medium of its chief, enforced its customs with a heavy hand, and rarely do we find its authority completely set at nought.

Theophilus Heale[24]

I take it for granted (1) that the Native title to land is communal, all the free families of the tribe being its proprietors, the chiefs having no greater rights in it than the other members of the tribe, except in so far as, at the present time, they generally represent a greater number of families. (2) That this title was founded entirely upon ancient and uninterrupted occupation, or on conquest, followed by such acts as, in Native eyes, implied continued occupation, or at least dominion. (3) That this title (was) vested in the community and *maintained only by its physical force.*

Here again, we find the rights of the Maoris admitted, and the element of force brought in only as the means by which such rights could be maintained. *"Force"* itself was not the only right the Maoris recognised as many would have us think, but it constituted the chief means by which the tribe was enabled to have its customs respected and obeyed in cases of dispute.

Report of Horowhenua Commission[25]

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24 Inspector of Survey. Extract from letter to Chief Judge, Native Land Court, dated 7th. March 1871. See App Year 1871, No 2 Enclosure 5 page 17.

25 Dated 25 May 1896 (See App 1896 Vol. III G 2 page 4.

The tribes which had almost exterminated the Muaupoko [tribe] seem never to have permanently settled on the land [the Horowhenua Block]; but, *as right was co-extensive and co-existent with the power to enforce* it, the right of the Muaupoko to the land was practically extinguished. It is important to bear this in mind, because, when subsequently members of the Muaupoko claim rights based on a foundation prior to their dispersion, the arguments in support of those rights are founded on an extinguished basis.

With these views of the Commission, we must heartily disagree. The Muaupoko had "kept their fires alight" on the land, even though they had not be powerful enough to drive off the invaders. Their claims had by no means been extinguished. To require of the Muaupoko they should at all times have had the power to enforce their rights would imply that no right can possibly exist which is not capable of being at all times immediately enforced. This is a standard of perfection which even the most highly civilised of states have not yet attained. For instance, as has been already pointed out, the law of a civilised state may sometimes be temporarily set at nought by brute force exercised by a powerful body of citizens within the state. For the time being, there will be no power to enforce the rights of the other citizens, but this does not mean that the rights of such citizens will have been altogether extinguished. In due time they will be vindicated in their rights, and so it was with the Maoris of old. Year after year they would struggle to maintain their rights, knowing full well that as long as they "kept their fires alight" (i.e. performed acts of ownership with regard to the land) their rights could not be altogether extinguished.

According to Maori custom, the conquerors of the Muaupoko did not acquire a proper title to the Horowhenua Block because they did not permanently settle thereon after driving off the Muaupoko. If the right of the "Strong Arm" had been the only law recognised by the Maoris, then undoubtedly the Muaupoko would have lost their rights to Horowhenua. The conquerors not having conformed with the Maori custom by adding occupation to their title under conquest, the rights of the Muaupoko continued to exist, even though their "arm" was not strong enough to enforce those rights.

C W Richmond[26]

> The right set up by (Wiremu) King [re the celebrated Waitara case] is simply the old title of the Maori chief - the right of the strong arm. [27]

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26 Memorandum on Native Affairs, dated 25 May 1860. See App Year 1860, E No 1B No 2 page 2.

> The Governor, the Native Minister, and the Native Secretary have laboured to the utmost to make it appear that the claims of tribal right, and the right of the hapu, rest only on the "Strong Arm"; but they exclude from view and utterly disregard the array of authority on the other side; and the fact, recognised on all sides, that in all negotiation for the sale of land, from the date of the Treaty of Waitangi [1840] to that of the last purchase in Taranaki, such rights have been acknowledged and respected.[28]

Summing up, we find that the Maoris of New Zealand did possess a definite system of land tenure, that this system was universally recognised, and almost habitually respected, and that such occasional resistance as was offered did not materially affect those customs, nor did it have any lasting effect on rights in land. We also find that "Force" was somewhat frequently used as a means of commanding respect for rights in land, thus leading many people to imagine that it was "Force" which really constituted the whole "Law" of the Maoris, and that their only Law was this "Law of the Strong Arm". We trust we have shewn that it was possible for the Maoris, lacking in civilisation as they were, to have had a system of land tenures; it now remains for us to deal with a few of the ordinary customs under which land was actually held, leaving over the great bulk of these customs for future treatment.

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27 See also Memorandum by C W Richmond, dated the 3rd Decr 1860, attached to a Dispatch from Governor Browne to the Duke of Newcastle. App Year 1861 E No.1. Remarks of F D Bell, in House of Representatives, Debate - August 3. 1860, see "New Zealander" Aug 8th p 7 column 5, Fox's "War in New Zealand", pages 27, 28 (published 1860).

28 Letter from Rev Samuel Ironside, Wesleyan Missionary, to Commissioner Spain, dated 30/10/1844, See App Year 1861, E No 1. App B 7.