TE MANA MOTUHAKE ME TE IWI MAORI: INDIGENOUS SELF DETERMINATION

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ABSTRACT

Mana Maori Motuhake or Maori self determination is developing into one of the most pressing political and legal issues in modern New Zealand. The Maori struggle for recognition of that right is a long one. It began with contact with British colonisers, and has continued in different forms throughout New Zealand's history. The following thesis suggests that that struggle is one which the Maori share with Indigenous peoples throughout the world. The recognition in law of Mana Maori Motuhake in New Zealand will come from an understanding, by both Maori and Pakeha, of the international nature of that struggle.

Accordingly the essential purpose of this thesis is to put the issue of Maori rights into an international and colonial perspective. In Part I, the question of Indigenous self determination is discussed in the context of historical and contemporary developments in international law. It is concluded firstly that there is room for the proposition that a right of Indigenous self determination can be drawn from the current state of international law. Secondly, it is argued that recent developments in the United Nations suggest positive recognition of that right will occur in the near future.

In Part II, the development of colonial law in the United States, Canada and New Zealand add a further dimension to this international perspective. In this part parallel developments in the three countries are highlighted to prove the 'indivisibility' of colonialism, and the inexorable development in modern law toward recognition of the 'colonial paradigm'- Native title and

Native sovereignty.

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The uneasy relationship between Maori and Pakeha (white New Zealanders), and the rules which govern that relationship are undergoing fundamental redefinition in modern New Zealand. This reflects mounting Maori nationalism. It also reflects a national Pakeha identity crisis. It is important that we get this redefinition process right. A failure to do so will almost certainly result in social and political disharmony at a level unprecedented since the Pakeha-Maori wars of the 1860s. Recent developments in New Zealand and internationally suggest that we are now in a unique position to avoid that scenario.

Governmental and judicial responses to Maori grievances and Maori rights have, in the 20th century, been piecemeal and unprincipled. Each issue has been dealt with as an isolated problem unrelated to New Zealand's colonial past or to international law concepts of self determination. The result has been a gradual transformation of the context within which Maori grievances and issues are perceived by government and the Courts. The context has shifted from colonialism and 'international' conflict to discrimination and socio economic inequity. The Maori were transformed from a <u>people</u> suffering under British colonialism to a <u>minority</u> suffering from social and economic injustice. The trend has been careful and insidious. The reverse trend which has already begun, is by contrast, occurring at giddying speed. The creation of the Waitangi Tribunal; its immense popularity as a forum for tribal grievances; the fact that tribalism itself is regaining lost strength; the current

beginnnings of a Maori rights litigation boom; the proposal to entrench the Treaty of Waitangi in a Bill of Rights; the rebirth of the Kotahitanga; the maturation of the objective of Maori nationalism beyond 'biculturalism' and toward self determination are but a few of the signs that the conceptualisation of Maori issues is shifting back to its roots.

The following discussion is an attempt to put the issue of Maori self determination into an international perspective. To show that the Maori struggle is by no means unique. To express it as an Indigenous struggle, shared by Indigenous peoples throughout the world. In that context it is argued that the only possible legal framework within which the relationship between coloniser and colonised can be worked out is a colonial one. Though the point may appear obvious, it had until recently been forgotten by the Pakeha majority in New Zealand. That provided the basis for the 'minoritisation' of Indigenous issues, not just in New Zealand, but around the world. Third World decolonisation in the 1960s and 70s was premised upon an acceptance that the situation Third World peoples lived under was colonial. Indigenous self determination - decolonisation - will never be achieved until the same conceptualisation is applied to Indigenous peoples living as minorities within nation-states imposed upon them by the coloniser. Throughout this discussion it will be argued that modern developments, both in domestic and international law, are fast approaching this point.

My approach to the issue is at two levels. In Part I, historical and contemporary developments in international law are discussed. In that part, the development of the international concept of self determination both for 'minorities' and for

'peoples' is discussed and applied to the situation of Indigenous peoples. In Part II, a comparative analysis is provided of the evolution of colonial law in the United States, Canada and New Zealand. Here it will be argued that this law was premised upon a recognition of Native title and Native sovereignty. Further, the current return to prominence of Native rights issues in the three jurisdictions suggest that the law is developing toward a re-establishment of that paradigm.

This two levelled approach shows clearly how historical patterns have converged, divided and reconverged. In the early era of British colonial expansion into the new world, international law and Indigenous rights were a single body of law. By the mid-twentieth century the two had become completely divided. International law regulated the relations of States. Indigenous rights were considered to be purely domestic issues. Today, in the latter part of the 20th century, the two are reconverging in a way which promises a return to the original framework within which relations between coloniser and colonised are to be worked out.

PART I: INDIGENOUS SELF DETERMINATION AND INTERNATIONAL LAW

1. INTRODUCTION

The treatment of indigenous peoples during the age of European colonial expansion reflects a broad spectrum of experience. At one end of the spectrum existing property rights were recognised and protected, as eventually was the right to regain independence. At the other end of the spectrum no rights at all were recognised by the colonising power, systematic

settlement policies reduced the indigenous population to a minority and, upon achieving independence, the new state exercised full internal sovereignty over them. Despite this apparent diversity of experience early attempts to regulate the activities of colonial powers imposed, within the parameters of a crude international order, a single standard of treatment in respect of colonised peoples at all points along the spectrum. This, it is submitted, showed implicit recognition on the part of the colonial powers, of the indivisibility of the colonial process. It affirmed the notion that the two poles described above, in fact belonged to a single spectrum and could not be divided into separate categories. With the establishment of the UN and the new age of decolonisation which has dominated international law and politics for the last thirty years, the single standard was replaced by a double standard both literally and figuratively. The new right to self determination of peoples espoused by the UN as the basis of international peace and the liberation of peoples suffering under colonial regimes, was to be a right only if the indigenous peoples retained their status as a majority population. Minoritised indigenous peoples were not, in the international scheme of things, to be considered peoples at all. Instead, as Sanders (1) points out, they were accorded rights as individuals and minorities whose problems were understood not in terms of decolonisation and self determination, but in terms of economic exploitation, racial discrimination and individual human rights. That perspective is changing -- rapidly. With the decolonisation process all but complete in the

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1 Sanders, The Re-emergence of Indigenous Questions in International Law (1983) 1 Can. Human Rights Y.B.3

third world, commentators increasingly are confronting the argument that self determination is a right attaching also to sub-state groupings such as indigenous enclaves. As well, indigenous advocacy of their own cause has become more urgent and articulate in recent years and has identified more closely with the third world goals of decolonisation and self determination.

Against that background the following chapter will trace the development of international law and practice in relation to indigenous peoples up to the present day. This will include the development of self determination as an international law principle, the development of the concept of collective minority groups rights and recent development in terms of melding these into a distinct and comprehensive law in respect of minority indigenous peoples drawing on both traditions.

As a secondary objective this chapter is also designed to provide an essential international law content against which the remainder of this thesis should be viewed.

2 COLONIAL ROOTS

2.1 Guardianship and Early Concepts of Indigenous Rights.

Victoria (2) in the 16th century was the first to apply a theoretical framework to the fact of colonialism. He argued that the Indians of the Americas were human beings whose title to land and whose civil and political institutions were entitled to be respected and protected. Colonial government he argued could be imposed by "nations of more mature intelligence" only in

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2 Francisco de Victoria, De Indis et de lure Belli Reflectum

circumstances where such imposition was for "the welfare and in the interests of the Indians, and not merely for the Spaniards..." (3) This was the first articulation of the doctrine of guardianship or trusteeship which affected the development of international law in relation to indigenous peoples up to and including the UN Charter. Victoria's formulation however became self-serving. The "official" motives of colonial conquest shifted from political and economic gain to christianising and civilising the savages. Within that framework colonisation became self-justifying. Christianity and civilisation were clearly of benefit to the "savages" and would be imparted with or without their consent. In exchange they would lose their homelands. Thus the doctrime of guardianship developed as a paradox. It was promoted as the only hope of reducing the worst excesses of colonisation while at the same time providing a basis for the legitimation of colonialism itself. (4)

The concept resurfaced during the British colonial era in the Royal Proclamation of 1763 which accorded special protection to the land title and hunting and fishing rights ofthe "several Nations or Tribes of Indians with whom We are connected, and who live under Our Protection..." in North America.

In three significant cases of the early 19th century (5) Chief Justice Marshall of the US Supreme Court attempted to

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3 Ibid, Quoted in Bennett Aboriginal Rights in International Law (1978)

4 Op. cit. Sanders p.5

5 Johnson v McIntosh (1823) 21 US (8 Wheat) 543 Cherokee Nation v Georgia (1831) 30 US (5 Pet) 1, Worcester v Georgia (1832) 31 US (6 Pet) 515

utilise this concept of guardianship as a means of reconciling the conflict between the struggle of the Indian Nations for survival and the fact of US colonial expansion. These cases provided the most sophisticated analysis of indigenous peoples rights during this period as well as highlighting the severe limitations which colonialism placed on the early concept of guardianship.

The first of these, Johnson v McIntosh, made it clear that the legality of colonial acquisition and assertion of sovereignty over Indian lands could not be called into question under the principle of guardianship or any other principle: (6)

However extravangant the pretension of converting the discovery of an inhabited country into conquest may appear if the principle has been asserted in the first instance, and afterwards sustained, if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned.

Thus guardianship was to be a principle mitigating the worst affects of colonialism without actually attacking the culprit itself.

Cherokee Nation v Georgia concerned the legal status of indigenous groupings, in this case the Cherokee Nation. At issue was whether the Cherokee could, in an action against the state of Georgia, invoke the original jurisdiction of the US Supreme Court as a foreign state pursuant of Article III of the Constitution. The majority decision delivered by Chief Justice Marshall denied the Cherokee application. The court accepted the view that the

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6 Ibid, Johnson at 591

Cherokee were a state which was not part of the union, but rejected the contention that this state was "foreign" as required by Article III.

The Cherokee were, he held "a domestic dependent nation" (7) who were "...in a state of pupilage." (8) Finally, in terms echoing Victoria's doctrine he concluded; (9)

> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief of their wants; and address the President as their great father... Their relationship to the US resembles that of a ward to its guardian.

As a whole, the case produced a curious blend. In terms anticipating the UN decolonisation period 130 years later, Chief Justice Marshall accepted that the Cherokee Nation had a separate and legitimate existence as a political entity: (10)

> They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognises them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the Citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognise the Cherokee Nation as a state, and the Courts are bound by these acts.

Yet almost in the same breath he used the guardianship principle to strip this new found status of any apparent beneficial effect in law. Like a child ward, the Cherokee nation would be subject to the absolute authority of its guardian -- in

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7 Op. cit. Cherokee Nation at 17

8 Ibid.

9 Ibid.

10 Ibid, at 16

this case the federal government. Nor did it appear that the court contemplated an eventual termination of this relationship allowing the Cherokee to regain in law the full independence they asserted in practice. It was forseen that the obligations of guardianship would cease only when the last of the Cherokee lands had been ceded, voluntarily or otherwise, to the United States. (11)

Worcester v Georgia, the most far-reaching of the three cases, concerned essentially a conflict of jurisdiction between the US and the state of Georgia. In the course of his third such decision, Chief Justice Marshall elaborated on both the guardian/ward and the "domestic dependent nation" limbs referred to in Cherokee Nation. As to the former, he considered that the relationship between the federal government and the Cherokee was an exclusive one. In particular it precluded the state of Georgia from legislating for the Cherokee territories to the detriment of the Cherokee. The rationale behind this exclusivity was clearly to protect the Cherokee from the emnity exhibitted by neighbouring states. (12)

As to the status of the Cherokee Nation, Chief Justice Marshall concluded the following: (13)

> [T]he settled doctrine of the law of nations is that a weaker power does not surrender its independence - its right

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11 Ibid, at 17

12 See US v Kagama (1886) 118 US 375 at 384
"They owe no allegiance to the states and recieve from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadly enemies." See generally also Andress and Falkowski: Self Determination Indians and the United Nations: The Anomalous Status of America's Domestic Dependent Nations (1980) 8 Am.Ind. L.R. 97 at 101

13 Op. cit. Worcester v Georgia at 561-2

> to self government, by association with a stronger and taking its protection. A weak state in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a state. Examples of this are not wanting in Europe.

The description of the Cherokee as a "domestic dependent nation" in Cherokee Nation was so contradictory as to be particularly apt. They were not foreign and so were domestic. For their own protectin they were subject to plenary US jurisdiction, against whom they had the collective status of wards. They were therefore dependent. Finally they were collectively a nation, similar in stature to the weaker European nations who were "associated" with stronger powers. The Indian Nations, according to Marshall, "had always been considered as distinct, independent political communities, retaining their original natural rights," (14) foremost among these being the right to self government. Thus the Cherokee were independent and self-governing -- but only to the extent allowed by the federal administration upon whom they were dependent.

In the context of this trilogy of cases Marshall posed a paradigm within which to contain the contradictions of 18th and 19th century colonialism. Encompassing it all was the simple reality of colonial conquest. This, Johnson v McIntosh makes plain, was not open to question by the Supreme Court. To do so would be to question the legitimacy of the Court itself. Within that limited framework both Cherokee Nation and Worcester v Georgia show Marshall grappling with the tension between federal guardianship on the one hand and Cherokee nationhood on the other. The guardian/ward relationship as understood by him

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14 Ibid, at 559

required the submission of the ward to the unilateral authority of the guardian. The guardian in return owed a duty to act in the interest of the ward. Pitted against this was the historical and political reality that the Cherokee were indeed a nation which had not, in the colonial process, surrendered either its independance or its right to self government. This too Marshall accepted.

Rather than resolve the issue of power distribution between the "guardian" and the "nation", he simply incorporated the conflict into the paradigm and restated it in three words. The Cherokee were a Domestic Dependent Nation. 'Domestic' because the Court refused to question the legitimacy of colonial acquisition. 'Dependent' because of US guardianship. Yet in the same breath a 'Nation' because they refused to surrender, indeed continued to assert independance and self government.

Despite its contradictions, within this paradigm can be found the seeds which provided the theoretical framework for UN decolonisation in the 1960's and 1970's. As we shall see, this was made possible in two steps. The first was to reject that which the Supreme Court refused to question - the legitimacy of colonialism itself. Freed of that framework, the tension between self government and guardianship could be resolved by fusing them into a single model. Under Marshall, the objective of guardianship was federal protection from state greed. The price was submission to plenary federal authority. Chapters XI and XII of the United Nationd Charter combined with the subsequent declarations on decolonisation turned guardianship or "trusteeship" as it had come to be known, on its head. Rather than competing with self government, the objective of trusteeship

became itself the realisation of self government for colonised peoples. (15)

2.2 Early International Standard Setting.

The next stage in the development of the concept of indigenous peoples rights at international law came with the Berlin Africa Conference of 1884-5. It accompanied the last great surge of European colonial expansion. That is the grab for black Africa. The conference, attended by 14 nations in all, was concerned specifically with European commercial and colonial activities in mid-Africa, in particular the Congo. (16) It was aimed primarily at establishing a trade and territorial pecking order among the colonial powers active in the region. Nevertheless, it represented the first real attempt at consensus as between themselves on the issue of their obligations toward indigenous peoples. The Final Act (Art.6) of the conference provided that; (17)

> All powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in abolishing slavery and especially the slave trade.

According to Snow, this Article (18)

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15 Support for this analysis can be found in the ICJ opinion in the South West Africa (Namibia) case [1971] ICJ Rep at p.31: " In the domain to which the above proceedings relate, the last fifty years...have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self determination and independance of the peoples concerned."

16 Op. cit. Sanders Re-emergence...; at p.17

17 Quoted in Snow The Question of Aborigines in the Law and Practice of Nations. (1919) p.149

18 Ibid, at 21-22

> ...marked the definite acceptance by the civilised states of a legal relationship towards aboriginal tribes of a personal and fiduciary character -- a responsibility which was at once individual and collective. The declaration of the conference regarding aborigines left no doubt on this point. The principle of the law of nations that such tribes are the wards of the society of nations and that the sovereignty of civilised states over them follows the disposition of territorial sovereignty made by the civilised states among themselves was upheld.
>
> (emphasis added)

The 1888 declaration of the Institute of International Law (19) and Brussels Africa Conference of 1889-90 (20) took similar positions each building on this concept of guardianship and the obligation of states to protect and "civilise" the indigenous populations subjected to colonisation. These duties of "civilised" states were referred to, in a patronising way, as the "white man's burden".

Snow again, summarises the practice of colonising states at that time in the following terms: (21)

> [D]omination of distant communities by a Republic was permissible when needful and to the extent needful, but only provided the state recognised and fulfilled the positive and imperative duty of helping those dominated communities to help themselves by teaching and training them for civilisation, as the wards and pupils of the nation and of the society of nations
>
> (emphasis added)

Empire building was clearly an acceptable phenomenon of the time. The phrase "when needful and to the extent needful" was code for "when it is to the commercial or political advantage of the colonising power". The "white man's burden" of civilising (and christianising) the natives provided a crusade-like, quasi

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19 Ibid, at 174 especially Articles (IV) and (V) quoted therein.

20 Ibid, at 178

21 Ibid, 175

religious and expost facto justification for conquest. Seen in this light, colonial expansion was the duty of every good christian state.

Thus, as with Victoria's and Marshall's concept of guardianship, this new and now fully international trust obligation could be imposed only within the general parameters of colonialism. The nature of the standard necessarily implies that colonial expansion was itself legitimate. Accordingly, consensus among the colonial powers as to the standard of treatment of indigenous peoples at the time should be understood primarily as a means of entrenchng the atatus quo rather than altering it. In addition the conference failed to agree on a mechanism for the collective administration of the Congo -- its major objective. The Congo, after reverting to its original colonial master, became the Belgian Congo. Nonetheless, a standard had, for the first time been set, and while its connotations were at the time largely negative, international standard setting would over the next 80 years come to the fore as one of the most effective mechanisms for addressing the concerns of colonised peoples. The Berlin-Africa conference represented the first step in that direction.

3 SELF DETERMINATION AND DECOLONISATION

3.1 Self Determination of Peoples and the League Era

The conclusion of World War I saw the first tentative incursion of the concept of self determination into the colonial world. Self determination had been dubbed by the allied powers

as "the honourable aim of the war," (22) largely to lure the US into the fray. US President Wilson was the greatest champion of this newly proclaimed right. In his view its recognition was the basis upon which a new era of peace and order might be built. In a speech to Congress he declared; (23)

> No peace can last or ought to last, which does not recognise and accept the principle that governments derive all their just powers from the consent of the governed and that no right exists to hand peoples from sovereignty to sovereignty as if they were property.

This new concept in international relations provided the cornerstone of two post war developments. The first was the reconstruction of Europe. The second was the creation of the mandates system under Article 22 of the Covenant of the League of Nations.

The latter represented a limited institutionalisation of self determination in respect of the colonial possessions of the European powers. By the terms of Article 22, colonial powers administering league mandates were charged with the "sacred trust of civilisation" for "peoples not yet able to stand by themselves under the strenuous conditions of the modern world." Under the supervision of administering powers, the mandates were to be prepared in order to (24)

> ...build up in as short a time as possible a political unit which can take charge of its own policies.

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22 Umozurike, Self Determination in International Law (1972) p.14

23 (1917) 54 Cong. Rec. 1742, Quoted in Clinebell and Thomson; Sovereignty and Self Determination: The Rights of Native American Indians under Contemporary International Law (1977-8) 27 Buffalo L. Rev. 669 at 702

24 Op. cit. Umozurike at p.31

For the first time the "sacred trust" with a lineage running back four hundred years to Victoria, was to have a positive objective. It would terminate not upon assimilation or extermination, but upon the attainment of self determination. The mandated territories were divided into three categories representing a descending scale of "civilisation". The "A" mandates were all middle eastern and recognised as sufficiently "civilised" to attain self determination quickly. For "B" and "C" mandates (the former mostly African and the latter mostly Pacific territories) self determination was seen as a more remote objective, often subordinated to the political ambitions of the mandatory state. Nevertheless, according to Duncan Hall (25)

> [i]n practice the [League of Nations Permanent] Mandates Commission consistently acted on the assumption that the words in Article 22 of the Covenant about the peoples of "B" and "C" mandates being "not yet able to stand by themselves" implied the goal of sovereign independance.

It was by no means however a universally or objectively applied principle. The domination of the league by the Allied Powers meant that the mandates were limited to former colonial possessions of Germany, Austria-Hungary or the Ottoman Empire. Colonial possessions of the Allies were exempt. Even within this very restricted application no mechanism was provided in Article 22 for reporting or enforcement, and the requirement of unanimity in League voting ensured that colonial powers were not subjected to direct scrutiny or criticism.

The other application of the principle of self determination was as the guiding principle in the reconstruction of post war Europe. In that context it became clear that despite its

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25 Hall, Mandates, Dependencies and Trusteeship (1948) at p.81

selective application and its contradictions the right did have one important characteristic. It was clearly intended to be a right of peoples -- not of states or territories. As noted, the prevailing theory of the time, espoused not only by President Wilson but also by the Russian Bolsheviks (26) was that the war could be attributed to the hegemony of the European military powers (notably Germany and Austria-Hungary since they were on the losing side). A similar war could only be avoided in future by rejecting the practice of treating weaker nations and nationalities as chattels to be bought, sold and fought over. Thus peace could be maintained in Europe by recognising a right of self determination vesting in European nations since they were a product of the hegemony of the military powers. In accordance with this view the Balkans were divided into Lithuania, Latvia and Estonia; Poland and Czechoslovakia were created; and a careful regime of collective minority rights was created protecting those nationalities who were not accorded independence. (27)

The point is an important one from the perspective of minority indigenous peoples. It shows clearly that at its inception, the concept of self determination of peoples was deliberately applied to sub-state groupings. That is to minority

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26 For example the Declaration of the Rights of the Peoples of Russia of 15 Nov. 1917 included the following as rights accruing to Russia's minority nationalities

(1) the equality and sovereignty of Russians nationalities

(2) the right to Russian nationalities to free self determination up to seceding and the organisation of an independent state.

The Russian position was later to become crucial in the drafting of the UN Charter insofar as it included a right to self determination.

27 See Infra footnotes 69 to 79 and accompanying text

peoples within a pre-existing state. As will become clear in the discussion below, the applicability of self determination to minority peoples has been a topic of considerable debate under the UN decolonisation instruments, and has been the major obstacle to a recognition at the international level of a right to self determination for all indigenous peoples. The emphasis in Europe on nationalities rather than states as the appropriate unit of self determination provides some historical support for the argument that minority peoples are intended to be the beneficiaries of such a right.

3.2 Indigenous Peoples and Article 23(b) of the League Covenant.

Though clearly percieved as relevant to the colonised world beyond Europe, the primary and immediate importance of self determination at the time was as a tool for the maintenance of peace in the "civilised world". The mandate mechanism was necessary because of the power vacuum created by the defeat of three colonial powers. As noted, the mechanism was applied only in that narrow context.

The only standard of universal application to indigenous peoples was that contained in Article 23(b) of the League Covenant. It provided

> (23) Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the members of the League
> ...
> (b) undertake to secure the just treatment of the native inhabitants of the territories under their control.

Though the standard set could hardly be described as rigorous or particularily enlightened, it at least applied a single standard to all League members. Hall described it as one of the mysteries of the Covenant because "it remained dead

wood".(28) Each of the six other clauses of Article 23 "budded and grew" into one or more of the League's technical organs while (b) did not. It was utilised only once by Britain in the case of the Liberian state and its treatment of indigenous tribes. Britain threatened in 1934 to have Liberia expelled from the League for its failure to observe the terms of 23(b). (29) Apparently nothing came of the threat. Despite its ineffectuality, Article 23(b) is important for at least two reasons. Firstly its application to the Liberia case makes it clear that minority indigenous peoples within independent states were protected by its terms. Secondly, it is not completely true that the provision remained "dead wood" as Hall put it. It is widely regarded as the predecessor to Chapter XI of the UN Charter regarding the rights of non-self governing territories. (30) As will be argued below, the scope of Article 23(b) provides further historical evidence in support of the view that Chapter XI and the right to self government contained therein, (31) was originally intended to apply to minority indigenous peoples within independant states as well as "off shore" colonial possessions.

3.3 Indigenous Peoples and the League Era Cases

Three important cases during this period dealt either directly or by way of obiter with the status or indigenous

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28 Op. cit. Hall p.273

29 See Kingsbury, M.Ph. Thesis (Oxon) (1984) at p.16

30 See Infra footnotes 50 to 54 and accompanying text

31 See Article 73(b) United Nations Charter. Note however that self government did not necessarily inply a right to secession. (cf. Chapter XII; Art 76(b) UN Charter)

peoples at international law. They provide an interesting contrast to the developments in the old world.

(a) The Cayuga Indians Case (32)

This involved a claim for annuities allegedly owed by the state of New York to the Cayuga Nations most of whom had migrated to Canada as part of the Iroquois Confederacy after the American revolution. On behalf of the Canadian Cayuga, Britain argued that because most Cayuga were in Canada, the Cayuga Nation was in Canada and the annuities should be paid north of the border.

The Anglo-American Claims Tribunal took a rather circuitous route in refusing the application. The decision was based on the tribunal's conclusion that tribes were not legal units in international law; (33)

> The American Indians have never been so regarded...from the time of the discovery of America, the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied...So far as an Indian tribe existed as a legal unit, it is by virtue of the domestic law of the sovereign within whose territory the tribe occupies the land, and so far only as that law recognised it.

From this very grand statement as to the legal status of indigenous peoples came the innocuous conclusion that the money owing had to be paid per-capita to all Cayuga.

(b) Island of Palmas Arbitration (34)

Though primarily concerned with the legal efect of title by discovery, this decision dealt also with the status of treaties made with indigenous governments.

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32 [1926] 6 R. Int'l Arb. Awards 831

33 Ibid at 176

34 [1928] 2 R. Int'l Arb. Awards 831

On the facts the US as successor to Spain contested Dutch claims to the Island of Palmas, near the Philipines. Since Spain's discovery of the island was unsupported by occupation the Panel concluded that the US could not take a good title. By reaching this conclusion however, the Panel felt constrained to disregard several treaties between the East India Co. and the indigenous peoples of the island. These treaties were according to the Panel, (35)

> ...not in the international law sense treaties or conventions capable of creating rights and obligations such as may in international law arise our of treaties.

(c) Status of Eastern Greenland (36)

This case involved a dispute between Norway and Denmark as to sovereignty over Eastern Greenland. In the context of this analysis, the case is important for its view that although early Norwegian settlements were exterminated by the indigenous Inuit, their successful resistance could not extinguish Norway's claim: (37)

> Conquest only operates as a cause of loss of sovereignty when there is war between two states and by reason of the defeat of one of them, sovereignty over the territory passes from the loser to the victorious state. The principle does not apply in a case where a settlement has been established in a distant country and its inhabitants are massacred by the aboriginal population.

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35 Ibid at 856

36 (1933) PCIJ Ser. A/B No. 53

37 Ibid at 47

(d) Conclusion

Essentially these cases represented a conservative view of the international status of indigenous peoples during the colonial period. They were considered to be exclusively the subject of domestic law having no international existence even when engaged in such international acts as treaty making and war with colonial powers. Not only do they provide a stark contrast with the developing international law in so far as it applied to European and Middle Eastern peoples, they in fact represent a retrograde step even when compared to the principles formulated by Marshall more than a century earlier. Although he qualifies their "nation" status with both "domestic" and "dependent," (38) Marshall did not rule out a unique quasi-international status for the Cherokee. Indeed, as already discussed, he specifically analogised the circumstance of the Indian nations to that of the weaker European states. Ironically the Panel in the Cayuga case utilised the Marshall decisions as authority for the exact opposite proposition.

In the 1975 Western Sahara (39) reference the International Court of Justice rejected directly or indirectly the dicta quoted above from the Palmas case and the Eastern Greenland case. Both cases were premised on the idea that sovereignty over lands inhabited by indigenous peoples could be secured by simple "discovery" and occupation. In essence the original people did not have sufficient existence in law to possess either title to the soil or sovereignty over it. This was known as the doctrine

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38 Supra, Note 5 Cherokee Nation v Georgia

39 [1975] ICJ Rep 12

of terra nullius. As a logicl extension of this it was possible to conclude that transactions between the indigenous people and the colonial power, by treaty or by war, had no impact in international law either. These notions were unanimously rejected by the Court in Western Sahara not just as outdated principles having no place in modern international law, but as incorrect representations of historical legal principle as well (40)

> [I]n the case of [colonial] territories the acquisition of sovereignty was not generally considered as effected unilaterally through occupation of terra nullius by original title but by agreements concluded with local rulers...[S]uch agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title and not original titles obtained by occupation of terra nullius.

In more forceful language Vice President Ammoun, in a separate but concurring opinion, declared; (41)

> The concept of terra nullius employed at all periods, to the brink of the twentieth century, to justify conquest and colonisation stands condemned.

3.4 The League Era: A Synthesis.

This period then produced a number of contradictions. In respect of Europe and the Middle East the concept of self determination of peoples had gained momentum and was developing quickly. As noted, the percieved applicability of self determination to all peoples regardless of state boundaries is an important indicator as to interpretation of the same principle today.

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40 Ibid at 39

41 Ibid at 78

On the other hand, while a standard in respect of the remainder of the world had, for the first time, been set in Article 23(b), in substance it could not have been more ambiguous or less rigorous. This, combined with the fact that the League, dominated by the colonial powers, had no effective promoters of Article 23(b) rights of colonised peoples, was decisive in its underutilisation when contrasted with the other provisions of Article 23.

Finally the three Anglo-American arbitrations reflect the most conservative 19th century doctrine although decided in the 1920's and 1930's.

Thus the development of international standards in respect of self determination was selective and contradictory in its application. Nonetheless, some aspects of its emergence as a principle of international law, such as its application to substate groupings, provide historical support for the cause of indigenous peoples today. On the other hand those aspects which impact negatively on that cause, notably the Anglo-American arbitrations, should no longer be considered good law.

3.5 Decolonisation and the UN Concept of Self Determination.

Since the creation of the United Nations in 1945, the right of peoples to self determination has developed into one of the most important principles of modern international law. Pomerance describes its status in these terms; (42)

> For many representatives in the UN, self determination has not only been transformed from a political or moral principle to a full legal right; it has become the peremptory norm of international law, capable of over-riding other international legal norms and even such other possible

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42 Pomerance, Self Determination in Law and Practice (1982) at 1

peremptory norms as the prohibitions of the threat or use of force in international relations.

The principle has been mentioned, elaborated upon, set out and reaffirmed in a multitude of international instruments both UN and non-UN. The more important ones will be considered below. Moreover there is support in the ICJ advisory opinion on Namibia (43) and in the Western Sahara case (44) for the proposition that the right of peoples to self determination is a principle of customary international law.

International agencies, and notably the UN have been far less assertive in defining "peoples," as the unit to which the right attaches. In particular the problem has been one of establishing a dividing line between peoples and minorities. This issue is an important one in the context of indigenous peoples since they have characteristics of both categories and hence occupy the grey area around the dividing line. Special Rapporteur Cristescu suggested the following definition in 1981: (45)

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43 [1971] ICJ Rep. 16

44 [1975] ICJ Rep. 12; Judge Ammoun in a separate but concurring opinion described self determination as a "general principle" within Article 38(1)(b) of the Courts statute. He further commented (at 103-4):

> ...As for the "general practice" of States to which one traditionally refers when seeking to ascertain the emergence of customary law, it has in the case of the right of peoples to self determination, become so widespread as to be not merely "general" but universal since it has been so enshrined in the Charter of the United Nations...and confirmed by the texts that have just been mentioned; pacts, declarations, and resolutions, which taken as a whole epitomize the unanimity of States in favour of the imperative right of peoples to self determination...

45 Cristescu The Right to Self Determination: Historical and Social Development on the Basis of UN Instruments (1981) p.41 para 279

> (a) The term "people" denotes a social entity possessing a clear identity and its own characteristics;
> (b) It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;
> (c) A people should not be confused with ethnic and religious minorities, whose existence and rights are recognised in Article 27 of the International Covenant on Civil and Political Rights.

This attempt does no more than beg the question and simply highlights the difficulties international law theorists are having in distinguishing peoples from minorities.

A more helpful and comprehensive attempt at a definition was made by the International Commission of Jurists. (46) In it a number of relevant objective criteria are listed, though as the ICJ are careful to point out no single criterion, if unmet, would be fatal to a claim to people-hood. The criteria are:

(1) A common history
(2) Racial and ethnic ties
(3) Cultural and linguistic ties
(4) Religious and ideological ties
(5) A common geographic location
(6) A common economic base
(7) A sufficient number of people
(8) Consciousness of its own identity
(9) Assertion of the will to exist

Indigenous peoples would clearly satisfy any test drafted in these terms. Although as the Israeli delegate to the UN in 1952 put it such definition may in the end prove unhelpful: (47)

> Whenever in the course of history a people has been aware of being a people, all definitions have proved superfluous.

The right to self determination of peoples was first included in Articles 1(2) and 55(1) of the UN Charter. These

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46 ICJ Secretariat, The Events in East Pakistan: 1971 (1972) at 70

47 Israel: Statement to Third Committee of General Assembly (1952) Quoted in Kingsbury op. cit. note 29 at 63

provisions use the phrase "the principle of equal rights and self determination of peoples" inspired by the 1936 Russian Constitution and included in the Charter at Soviet suggestion. (48) At that stage, self determination as a universal right was a new idea, and the approach of many states -- paritcularly from the west -- was at best tentative. The provisions of the Charter for example do not indicate pre-eminence in 1945-46. Charter chapters XI and XII, widely regarded as the primary mechanisms for the peaceful attainment of self determination for colonised peoples, do not even mention the term.

Chapter XII, the UN successor to the League Mandate system, created an "International Trusteeship System" in respect of three categories of territory; former League mandates; former territories of the axis powers defeated during World War II; and territories voluntarily placed under the system by states responsible for their administration. (49) Predictably only the first two categories are represented in the system. Fairly rigorous accountability obligations are imposed on the administering power including periodic visits by UN delegates, the submission of annual reports as well as specific obligations which may be provided for in individual trustee agreements between the administering power and the UN. (50) Article 76(b) provides that the objectives of trustee administration is

> ...progressive development towards self government or independence as may be appropriate to each territory and its peoples, and the freely expressed wishes of the people concerned.

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48 Op. cit.Umozurike note 21 at 44

49 UN Charter Art. 77

50 UN Charter Art. 87

Chapter XI which, as noted, is derived from Article 23(b) of the League Covenant concerns itself with "non-self governing territories". There are a number of important differences between the two mechanisms; Firstly their respective objectives differ in that independence is not included as an objective of non-self governing territories. Instead the aim is: (51)

> to develop self government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

Accountability is also less rigid in that administering powers are required only to "...transmit regularly to the Secretary General for information purposes..." reports on social, economic, and educational conditions in the territory concerned. (52)

The modest objective and lower accountability standards may be explained by the fact that Chapter XI applies automatically to all states administering "territories whose peoples have not yet attained a full measure of self government." (53) In all cases to which Chapter XI applies "the inhabitants are paramount" and the promotion of those interests is a "sacred trust" (54) reminiscent of the League Covenant and beyond to the writings of Victoria and Chief Justice Marshall.

Chapter XI is a quantum leap forward from the hyprocrisy of the League Mandates and the ineffectiveness of Article 23(b) of

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51 UN Charter Art. 73(b)

52 UN Charter Art. 73(e)

53 UN Charter Art. 73

54 Ibid.

the Covenant. But it is still not perfect. Those things omitted from Chapter XI indicated clearly that these new concepts of self determination and decolonisation were still in the early stages of development at the time of drafting. Firstly no timetable for the attainment of self government was provided, so that how and when it was achieved appeared to be a matter for the discretion of the administering power. Secondly no sanctions were provided in the event of breach of the standard other than the ultimate sanction of expulsion from the UN. Finally and most importantly Chapter XI contained no definition of a "non-self governing territory".

This calculated omission made the scope of Chapter XI unclear. That in turn made the potential application and scope of self determination itself unclear. Belgium argued strongly the Chapter XI should have universal application to all territorial peoples who were not self governing. Such an interpretation would have brought within the ambit of Chapter XI and the principle of self determination the classic overseas or external colonies as was clearly intended, and also the peoples situated within the metropolitan boundaries of independent states, who are subjected to internal colonialism. The inclusion of this latter category was much more the subject of debate. (55)

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55 The Belgians found support for this position in the writings of Duncan Hall:

> "The idea that expansion by seaways on the same space of time and for the same kind of reasons, has been of a quite different kind would have delighted a medieval schoolman." How wide, he might have asked, must be the space of water before a territory ceased to be a detached part of the mainland and became "overseas" and so was presumed to have become incapable of uniting politically with, or being assimilated to, the mother country? And he could have made good play with little-known facts of geography.

Included within it are indigenous peoples in the west, in eastern bloc countries particularly Russia and China and a host of minority groupings and enclaves in new third world countries.

The Belgian delegate to the UN argued in 1952 that the problems suffered by colonised people in Asis and Africa were also being experienced by underdeveloped ethnic groups in places such as the Americas. Though "more than half of the 60 members of the UN had backward indigenous peoples in their populations" (56) only eight states had submitted information under the Chapter XI mandatory reporting prodecure.(57) Thus, according to the Belgian view, drawing a distinction between internal and external colonialism would artificially preclude self determination for a majority of peoples living under colonial regimes.

Opposition to the 'Belgian thesis' came mainly from Latin American states, but also from newly independent African and Asian countries.(58) Latin American countries argued that Indian

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Newfoundland, he could have pointed out, had a better claim to be regarded as "Overseas Britain" than Hawaii as "Overseas America". The latter was 2,400 statue miles from the American mainland and its population is preponderantly Asiatic and Polynesian. Newfoundland, on the other, was wholly British in population -- and only 2,300 statue miles away from the mother country. The questioner might have gone on to ask, if the debate had been rather later than 1939, "What did land and sea distances matter anygow in the air age when no point on the planet was separated from another by more than sixty hours -- or had it already dropped to thirty?"H. Hall Mandates, Dependencies and Trusteeship 43 (1948)

56 (1952) 7 UN GAOR C.4 at 22 Doc. No. A/2361

57 Ibid, at 23

58 See eg. statements of delegations from Peru, Philipines, Guatemala, Mexico, Ecuador, Colombia, El Salvador, Bolivia, Brazil, Ethiopia: at GAOR 7th sess; 4th Cttee; 245th Mtg para 5;7;8

groups within their borders were fully integrated politicially and had no separate right of self determination. Further to treat indigenous minorities as having the same rights as the peoples of overseas colonies would encourage the self destruction of states under the provisions of Chapter XI.(59)

Africa and Asian opposition was because of justifiable suspicion of Belgium's motives. They saw the Belgian thesis as a means of dissipating the growing drive toward Third World decolonisation, an attempt by Western colonial powers who had taken all the flak, to share the blame out a little more evenly. In addition almost all of these newly independent states, having taken on the old boundaries, consisted of amalgams of different peoples brought together to form an artificial state unit. They therefore, viewed their own boundaries as at risk if their constituent peoples were accorded an unlimited right to self determination. To combat the Belgian thesis these countries formulated what became known as the "Blue Water thesis" whereby they argued that Chapter XI the supposedly universal right of self determination applied only to classic overseas colonies and not to peoples living within the borders of a pre-existing state.

This clash between the self determination of peoples and the territorial integrity of states was resolved in a series of resolutions passed by the General Assembly between 1960 and 1970. These were part of a wider agenda of institutionalising self determination and making it synonymous with decolonisation.

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59 Barsh, Indigenous North America and Contemporary International Law (1982) 62 Oregon L. Rev. 73 at 85

In 1960 the General Assembly passed the Declaration on the Granting of Independence to Colonial Peoples and Countries (Resolution 1514). The resolution adopted particularly aggressive language in its advocacy of the right to self determination. Declaring the process of liberation to be "irresistable and irreversable" (60) member states were encouraged in a foreshortening of the decolonisation timetable to take "immediate steps to ...transfer all powers to the peoples of those territories, without any conditions or reservations, and in accordance with their freely expressed will and desire."(61)

The declaration was essentially three dimensional with the third being a necessary product of the first two. The first dimension pertained to decolonisation in respect of which paragraph (1) provides the following:

> The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

This provided the context within which the second dimension, self determination, would operate. Paragraph (2) incorporated that principle in terms which would be echoed later in Common Article One of the 1966 Covenants:

> All peoples have the right to self determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Though the two concepts are clearly separate, the affect of this declaration was to restrict the framework of self

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60 GA Res. 1514 (1960) 15 UN GAOR Supp. (No 16) at 66-7 preamble. UN Doc A/L 323 and add 1-6

61 Ibid, para.5

determination to colonial situations and decolonisation. Since colonialism was "alien subjugation", decolonisation necessarily implied the secession of the former colony and the creation of an independent state. The product of this reasoning was the third demension of the 1960 declaration contained in paragraph (6)

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatable with the purposes and principles of the United Nation Charter.

On its face, the provision proscribed any assertion of self determination which would lead to the disintegration of a pre-existing state. This did not seem an unreasonable limitation in most (though not all) cases. Extensive Western use of the federal model as a means of accomodating ethnic, religious and linguistic diversity, showed that self determination short of secession was a viable proposition within the borders of an independent state.(62) In fact paragraph (6) was interpreted as a codification of the blue-water thesis, espoused by Latin America and Third World countries in opposition to the Belgian thesis. It came to be understood not as denying a right of secession for peoples living within independent states, but as denying to these peoples <u>a right of self determination period.</u> In short, the reasoning process operated in the following terms: self determination means decolonisation; decolonisation means secession and independence; secession is only available to "off-shore" colonies because the secession of internal colonies was incompatible with the territorial integrity of the state

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62 Op. cit. note 24

concerned; therefore self determination is only avaliable to "off-shore" colonies.

This interpretation was confirmed the day after Resolution 1514 by the passing of Resolution 1541(XV) setting out the principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73(e) (chapt. XI) of the Charter. Principle VI provides that full self government can be achieved through independence, free association with another state or integration; suggesting that secession is not the only mode available. Principle IV however makes it clear that none of Chapter XI applies to peoples who are not "geographically separate and...distinct ethnically and/or culturally" from the administering country. If there was any doubt after Resolution 1514 as to the continued viability of the Belgian thesis this resolution buried it. Chapter XI does not apply to indigenous enclaves.

A similar line was taken in 1970 in a further refinement of the scope of self determination and decolonisation. The Declaration on the Principle of International Law Concerning Friendly Relations and Co-operation Among States (63) discouraged

> any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states...

A limitation was however placed on the protective shield of territorial integrity and states were no longer completely immune in respect of metropolitan groupings. They had to be "possessed of a government representing the whole people belonging to [its]

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63 GA Res. 2625 (1970) 25 UN GAOR Supp. (No 28) at 121, UN Doc A/8082

territory without distinction as to race, creed or colour," such that it could be said to be acting in compliance with "the principle of equal rights and the self determination of peoples." In short, denial of political participation by voting and so forth would be grounds for a minority grouping to secede legitimately despite a state's claim to breach of territorial integrity. For minority peoples of course, the right to vote is largely irrelevant anyway, since most lack sufficient numbers to influence majoritarian decisions. The proviso does not therefore, represent any significant change of direction by the UN.

These three resolutions and particularly Resolution 1514, (64) the first, form what may be called the "new UN law of self determination".(65) New in the sense that it represents a departure from its antecedents. The early doctrines of Chief Justice Marshall, clearly the basis upon which the modern law of self determination was developed, recognised that the Cherokee Nation, a minority indigenous people situated within an independent state, had a right (albeit fragile) to self government.(66) When the concept was resurrected under the League of Nations the notion that self determination should attach to terrirories and not peoples was expressly rejected. It was percieved that the instability of Europe was the fault of state territories reflecting power games instead of ethnic

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64 Pomerance called it "the foundation stone of what may be called the New UN Law of self determination"; from Self Determination in Law and Practice (1982) p.12

65 Ibid, though the term is used in a different sense here.

66 Op. cit. note 11

groupings. Self determination had to be a right of peoples to be effective. Even the use of the phrase in the UN Charter itself was taken from a model for the self determination of peoples within a sovereign state.(67)

The new UN law of self determination of peoples however compromised its universality for enforceability. It would for the first time be an enforceable legal right backed vociferously by the General Assembly, but it would only be for some peoples. By falsely equating decolonisation through secession with self determination, minority peoples "trapped" within the boundaries of independent states were excluded completely.

Minority indigenous peoples, particularly in the West, are the ones most badly affected by this exclusion. For most, the only difference between their predicament and that of "blue-water" colonies is that in their territories the settlers stayed. Ironically, the rise of decolonisation in the Third World was matched by a corresponding and contemporaneous slump in the fortunes of many indigenous peoples. Indian policy in the US in the 1950's and 1960's was "termination". Whole nations were terminated in law as was the federal trust responsibility in respect of them in a deliberate attempt to assimilate by coercion. The Canadian White Paper on Indian Policy of 1969 was equally aggressively assimilationist and the 1967 Maori Affairs Act in New Zealand was dubbed "the last land grab". In the international arena, the 1957 ILO Convention 107 in respect of tribal and semi-tribal minority peoples was drafted around the

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67 Op. cit. note 24

idea that indigenous peoples had a positive right of assimilation into the majority people.

The absolute contrast of the two situations can be traced to an important change in the single principle which had previously bound them together; the guardianship or trust principle.

From Victoria to the League convenant, the stated objective of the "sacred trust of civilisation" had been to "civilise and christianise" the native populations that European expansion continually encountered. As noted, this became a quasi-religious justification for colonialism itself. Until such time as these peoples emerged reborn in the colonisers image they were to be the wards of the civilised world. Most importantly, in terms of the point being made here, the objective applied to all indigenous peoples whether majority or minority. All this was to change under Chapters XI and XII of the Charter, as influenced by the resolutions mentioned above reflecting the Third World's newly acquired domination of the General Assembly. The revolutionary new objective of the post World War II trust became the destruction of "colonial and alien subjugation" and its replacement with self determination through sovereign independence.

For those who failed the "blue water" test however, state practice at the time suggests that the historical objective of the trust in respect of these as yet unrecognised peoples remained unchanged and was prevented from evolving in the same direction. In the New World at least, with civilisation and christianity being the norm now, the terminology employed to describe the trust objective changed to assimilation, and still later to integration -- but the substance was the same.

4. SELF DETERMINATION AS A MINORITY RIGHT

Although indigenous peoples have consistently rejected minority labelling, two factors make a discussion of this broad area of the international law of human rights relevant. The first as discussed, is that their exclusion from the rubric of the UN law of decolonisation makes the recognition of a right of self determination through the processes of Chapter XI of the Charter and Resolution 1514 (XV) rather unlikely. Consequently other avenues outside that context must be pursued. The minorities category is the most likely substitute. Secondly, though clearly "peoples" in terms of the definitions already discussed, indigenous groupings are in most instances also undeniably minorities.

Special Rapporteur Capotorti in a study of the rights of Minorities at International Law (68) commissioned by the UN defined minorities as (69)

> ...groups numerically inferior to the rest of the population of a state, in a non-dominant position, whose members being nationals of a state possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity directed towards preserving their culture, traditions, religion or language.

This clearly includes within its terms minority indigenous peoples. As such, the development of the law in respect of minorities is clearly pertinent to their situation.

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68 Capotorti: Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities (1979) UN Doc. E/CN.4 Sub. 2/ 384/ Rev. 1.

69 Ibid, at 96

4.1 Minority Rights Under the League

In a manner complimentary to the reorganisation of state boundaries in Europe earlier, the development of collective minority rights reached a peak under the International Protection of Minorities System established after the First World War. As with the creation of new European states according to natural ethnic boundaries, the establishment of a careful system of minority rights recognised the threat to world peace which dissaffected minorities presented. President Wilson set out that objective in these terms: (70)

> We are trying to make a peaceful settlement...to eliminate those elements of disturbance...which may interfere with the peace of the world, and we are trying to make an equitable distribution of territories according to the race, the ethnographical character of the people inhabiting those territories...Take the right of minorities. Nothing I venture to say, is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities...

In accordance with that objective, a plethora of collective protections and rights were established mostly in the context of education and worship, to safeguard the interests of racial (the term then used), religious and linguistic minorities.

Instead of the modern UN system of declarations and covenants, the standards were set out in a series of multilateral treaties separately undertaken in respect of each state submitting to the regime. In most cases, this was done outside the official umbrella of the League. Like the mandates, minority rights has no universal application. They were imposed almost

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70 League of Nations "Report of the Committee of Three" (Japan, Spain, and the UK) pursuant to Resolution of 7 March 1929; League of Nations Official Journal Special suppl. No. 37 (1929) Quoted in Sohn and Beuergenthal, International Protection of Human Rights (1973) pp.216-7

exclusively in the territories of the defeated powers, and of course did not apply outside Europe and the Middle East. Special minorities clauses were incorporated into peace treaties signed by four of the defeated powers; Austria, Bulgaria, Turkey and Hungary. (71) Five other states signed complete minorities treaties with the principle allied powers, (72) while five new states were required to make declarations before the League as to minority rights. (73) Finally special minority regimes were established for territories within the boundaries of two further states -- Germany in respect of Silesia and Finland in respect of the Aaland Islands.

The great number of treaties meant that even within this very restricted territorial application, no uniform standard existed. There were nevertheless a number of common features. The Polish treaty provided a model in respect of several of these. It contained a series of non discrimination provisions and then guaranteed to Polish nationals belonging to racial, religious or linguistic minorities the right to establish, manage, and control (at their own expense) charitable religious and social institutions as well as schools. Special provisions were also added regarding public schools using the language of the minority in districts where the minority constituted a

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71 Dinstein: Collective Human Rights of Peoples and Minorities (1976) 25 Int. Comp. LQ 102 at 113

72 Ibid, they were Poland, Czechoslovakia, Roumania, Greece and the Sub-Croat-Slovene State which is present day Yugoslavia.

73 Ibid., They were Lithuania, Latvia, Estonia and Iraq..

considerable proportion of the population. (74) Minority nationals in these districts were also assured an equitable share in the enjoyment and application of sums provided out of state funding. (75)

In addition to provisions such as these which provided a sort of bench-mark for minority rights, other treaties contained guarantees which exceeded these standards considerably. Most importantly, in some cases where minority populations were concentrated geographically, systems of limited local autonomy were instituted by treaty for the minority peoples concerned. Thus the Aaland Islands were accorded self government by agreement between Finland and Sweden. (76) The Saxons (German speaking) and Szeklers (Hungarian) in Rumania were accorded "local autonomy" in respect of education and religious matters, (77) as were the Vlachs of the Pindus in Greece. (78) The Ruthene minority in Czechoslovakia were guaranteed in comprehensive terms a full right of self government as well as a right of equitable representation in the Czech national legislature. Articles 10 to 13 of the Treaty Concerning

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74 Op. cit. note 71 at p.115. Versailles Treaty with Poland 1919, 13 Am. J. Int'l. 1. (supp) 423 at 426-8: Quoted in Dinstein.

75 Op. cit. note 74 Art. 9 Treaty with Poland.

76 Agreement between Sweden and Finland regarding the Aaland Island placed on record June 27 (1927) 2 League of Nations O.J. 701

77 Treaty on Protection of Minorities in Roumania Art 11; Dec. 9, 1919 a.d. No. 191 3 Treaties, Conventions, International Act, Protocols and Agreements Between the United States of America and Other Powers (1923) (Redmond) at 3728

78 Treaty on Protection of Minorities Within Greece, Art.12, Aug 10, 1920. 28 L.N.T.S. at 256

Protection of Minorities Within Czechoslovakia set out their rights in the following terms: (79)

> Article 10
> Czecho-slovakia undertakes to constitute the Ruthene territory south of the Carpathians within frontiers delimited by the Principle Allied and Associated Powers as an autonomous unit within the Czecho-Slovak State, and to accord to it the fullest degree of self government compatible with the unity of the Czecho-Slovak State.
>
> Article 11
> The Ruthene territory south of the Carpathians shall possess a special Diet. This Diet shall have powers of legislation in all linguistic, scholastic and religious questions, in matters of local administration, and in other questions which the laws of the Czecho-Slovak State may assign to it. The Governor of the Ruthene territory shall be appointed by the President of the Czecho-Slovak Republic and shall be responsible to the Ruthene Diet.
>
> Article 12
> Czecho-Slovakia agrees that officials in the Ruthene territory will be chosen as far as possible from the inhabitants of this territory.
>
> Article 13
> Czecho-Slovakia guarantees to the Ruthene territory equitable representation in the legislation assembly of the Czecho-Slovak Republic, to which assembly it will send deputies elected according to the constitution of the Czecho-Slovak Diet upon legislative question of the same kind as those assigned to the Ruthene Diet.
>
> (emphasis added)

Of course self government rights of this breadth were clearly not the norm under the League system in respect of minorities. It would not be realistic to argue that a universal right to minority self government could be extrapolated from these clauses. Nonetheless, the Ruthene example represents simply one extreme end of a spectrum of guarantees which clearly rejected an assimilative approach to minority rights issues.

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79 Treaty on Protection of Minorities With Czechoslovakia Arts 10-13, Sept 10, 1919 A.D. No. 185 3 Redmond op cit note 77 at 3703-04

Peoples who for political, econmic numerical or other reasons could not attain full self determination through independence, had nevertheless a right to maintain their ethnic, religious or linguistic integrity within the context of the state having dominion over them. Even to the extent, as the Czech treaty shows, of being accorded a collective right to self government where circumstances so warranted. In the words of the Permanent Court of International Justice the objective of the system was (80)

> To secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying their enduring special needs. In order to attain this object, two things are regarded as particularly necessary...
>
> The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.
>
> The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two elements are indeed closely interlocked, <u>for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions and were consequently</u>

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80 <u>Minority Schools in Albania</u> [1935] PCIJ ser. A/B No. 64 at 17

compelled to renounce that which constitutes the very essence of its being a minority.

(emphasis added)

In short, the system provided the first (albeit limited) recognition of an anti-assimilation right. That is the right to a separate collective existence as a minority and the right to maintain that separateness. This of course, is also the essence of the concept of self determination although minority rights were not couched in those terms. Further, the recognition in respect of certain special minorities of a right to local autonomy testifies to the extent to which the idea of minority self determination had developed under the League as a means of preserving both peaceful co-existence and the minority itself.

It must be reiterated however that international jurisprudence concerning the status and rights of indigenous minorities during this period (as the Anglo-American Arbitrations show) was far less progressive. That aside, these models of local self government or autonomy within the context of the state are directly applicable to the circumstances and indeed aspirations of many indigenous minorities.

Unfortunately that model was never allowed to fully develop. The manipulation of these minority protections by the Third Reich to provide a justification for German expansion meant that the system failed and was discreditted as a contributing cause for World War Two. With it went the whole concept of minority group rights. The advent of the United Nations saw its replacement with the "melting pot" theory espoused by states with high immigrant populations, notably the US and UK (and its

satellites). Supported by the new hegemony of the US this assimilationist approach became the new agenda for the development of minority rights under the UN.

4.2 The UN Human Rights Approach

This change of direction brought with it a sharp division between individual rights and group rights. Group rights became restricted to the new law of self determination and decolonisation, the beneficiaries of which, as discussed, were the "blue water" colonies of the European powers. For everyone else the strongly individualist new law of "universal human rights" applied. This was a regime of anti-discriminatory, egalitarian rights applying individually to all humans as opposed to minority groupings. This rejection of the League approach of protecting sub-national minorities is reflected in the history of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. It was established in 1947 as a sub-commission of the Human Rights Commission. Originally two sub-commissions were proposed, one in respect of discrimination and another for minorities. That the two were eventually fused indicated a general unwillingness on the part of states to single out minorities as a focus of UN activity. Despite this, the new Sub-Commission initially expended much effort on its minorities mandate. The proposals offered were so unpopular with states that they were being consistently referred back to the Sub-Commission for "further study". (81) As a result the Sub-Commission changed its emphasis

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81 Op. cit. note 68 at 28 n.59 Caportorti Report . Referred to in Thornberry op cit note 76 at 442; as to original terms of reference. As to the lack of acceptance of the Sub-Commissions'

to the prevention of discrimination in 1954.(82) It was another 23 years before the completion of the first UN study of the rights of minorities. (83) The study concerned the principles set out in Article 27 of the UN Covenant on Civil and Political Rights, (84) the single reference to minority rights in the major UN Human Rights instruments. The fact that Article 27 was inserted in the Covenant at all is testimony to its insipid terms when contrasted with the far more assertive statements of individual rights contained in its other provisions. Article 27 provides: (85)

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their groups to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Like the individual rights, it is drafted in negative terms, apparently imposing upon states a minimial standard of tolerating ethnic, linguistic or religious differences.

The limitation of its scope to non-interference only, is reinforced by the Sub-Commission's rejection of proposals put forward by Eastern bloc countries at the time of drafting which

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proposal see Hoare The UN Commission on Human Rights; in The International Protection of Human Rights; (E. Luard ed.) (1967) at 76, in which he notes that this reflectednot only the difficulty and delicacy of the political issues which may arise in minority questions, but the lack of agreement even on principles relating to this subject in the international community, and its apprehensions of the possibility of exploitation, for political purposes, of any UN work on minority questions, even if directed to recommendations of a general character.

82 Thornberry; Is there a Pheonix in the Ashes? International Law and Minority Rights (1980) 15 Texas Int'l L.J.421

83 Op. cit. n.68 the Capotorti Report

84 UN.GA Res 2200A (1966) 21 UN GAOR Supp. (No.16) 52

85 Ibid, Art.27

included more positive duties to promote minority culture and language. Yugoslavia for example suggested a clause more closely akin to the old League system: (86)

> Every person shall have the right to show freely his membership of an ethnic or linguistic group [note "religious" is excluded] to use without hindrance the name of his group, to learn the language of this group and to use it in public or private life, to be taught in this language, as well as the right to cultural developments together with other members of this group without being subjected on any count to any discrimination whatsoever.

This was rejected on the grounds that it placed undue emphasis on the right of minorities instead of stressing the importance of tolerance and non-interference, the only duty which could properly be the subject of a universally applicable standard. (87)

Further, although supposedly concerned with minorities as groups, the substance of Article 27 is actually couched in individual rights terms. The rights contained therein attach to individual "persons belonging to minorities" and not to the group collectively.

This general approach has prevailed even in secondary UN instruments dealing solely with the rights of minorities. The International Covention on the Elimination of All Forms of Racial

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86 9 UN ESCOR, Commission on Human Rights, UN Doc E/CN.4/L.225 (1953) The Soviets had a similar though simpler draft:

The State shall ensure to national minorities the right to use their native tongue and to possess their national schools, libraries, museums and other cultural and educational institutions.9 UN ESCOR, Commission on Human Rights, UN Doc. E/CN.4/L.222 (1955) Quoted in Thornberry, op cit note 82 at 449 n.115.

87 Op. cit. Thornberry, note 82

Discrimination (88) for example is clearly assimilationist in its objective. Article 1 defines discrimination as a distinction or preference based on race which impairs equal enjoyment of human rights and fundamental freedoms. Special measures for minorities are allowed only in cases of, and to the extent of, any inequality. Upon achieving equality, special measures for the minority group concerned must stop. Thus minority rights to the extent that they are acceptable, are viewed only as temporary aberrations.

Despite this apparently vehement refusal to recognise minorities as legitimate subjects of international law outside the context of human rights, it is becoming clear that changes are in the wind in the UN approach to minority issues. Thornberry, correctly it is submitted, attributes this change to three factors. (89) The decline of the hegemony of the United States in the UN; the US' own disillusionment with its melting pot theory, as evidenced by the activism of minority groups in that country; And finally the virtual completion of decolonisation on Asia, Africa, the Pacific and the Caribbean which has dominated UN forums for thirty years. The last point in particular has returned minority issues to the foreground as the UN seeks new directions for the principle of self determination. This is hinted at in the 1970 Declaration concerning friendly relations and co-operation among states (90) in which self determination and secession are seen as legitimate

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88 GA Res 2106A, 20 UN GAOR Supp (No.14) 47-51, UN Doc. A/6014 (1965)

89 Op. cit. note 64 at 455

90 GA Res 2624 (XXV) (1970) op cit note 63

objectives of minority peoples though only in the limited circumstances of exclusion from representation in the government of the state. (91)

The commissioning of the Capotorti Report also suggests this attitudinal change, and the substance of the report is clear evidence of it. In particular Capotorti suggests that the prevailing view of Article 27 as embodying a negative and limited standard is up for revision. In relation to cultural rights for example he comments: (92)

> it is generally agreed that because of the enormous human financial resources which would be needed for full cultural development, the right granted to members of minority groups to enjoy their own culture would lose much of its meaning if no assistance from the governments was forthcoming. Neither the non-prohibition of the exercise of such a right by persons belonging to minority groups nor constitutional guarantees of freedom of expression and association are sufficient for the effective implimentation of the right of members of minority groups to preserve and develop their own culture.

Here, Capotorti is clearly saying that a negative right in the context of minorities is in many cases meaningless unless it implies a further obligation on the part of the state to support the preservation of these characteristics which gave the minority its status.

Further, it is impossible, at least in most indigenous cultures, to separate cultural rights off from indigenous political institutions or from land and resource rights. Cultural practices are always an integral part of the political mechanisms of the community. Cultural beliefs and practices always reflect the community's perception and use of the

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91 Ibid, and accompanying text.

92 Op. cit. note 68 at p.36

resources around it. As such it may be argued that Article 27 requires a far more holistic approach from state governments. An obligation to protect minority culture implies a further and wider obligation to protect the total environment within which that culture is able to thrive.

This attitudinal change has also manifested itself in decisions of the judicial wing of the UN. The Human Rights Committee in respect of the Lovelace Communication (93) for example considered that Article 27 rights were capable of exercise only as part of a collectivity even though on a strict construction of the provision such rights are accorded to individuals only. (94)

Beyond Article 27, a number of proposals for an instrument dealing with minority rights have been made to the UN. Yugoslavia circulated one in 1978, this time including religious minorities within the scope of the draft (95) and expanding upon the substance of Article 27 so as to reintroduce the concept of minorities as collectivities. Article 3 of the draft, for example, provides:

> For the purpose of realising the conditions of full equality and complete development of minorities as collectivities and of their individual members, it is essential to take measures which will enable them freely to express their characteristics, to develop their culture, education, language, tradition and customs and to participate on an equitable basis in the cultural, social, economic and

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93 Communication made pursuant to Article 5(4) of the Optional Protocol to the UN Covenant on Civil and Political Rights 1966 Reported in [1982] 1 CNLR 11

94 Ibid, at 12-13

95 Yugoslavia, Draft Declaration on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities UN Doc CN. 4/L1367/Rev 1 Quoted in Thornberry op. cit. note 82 at 445

political life of the country in which they live.
(emphasis added)

In addition at least two other declarations have been made by non-UN bodies dealing with minority rights; The Copenhagen Declaration of 1978 (96) and the Charter of Rights for Minority Ethnic Communities and for Linguistic Minorities. (97)

It is probably still too early in the apparent renaissance of minority issues to forsee a clear course for the future. As noted the signs indicate at least their return to prominence and a revival of collective concepts of minority rights, perhaps up to and including a right to self determination in some circumstances.

4.3 Indigenous Peoples as Minorities

Recognition that minority indigenous peoples made up a special category within the general rubric of minority issues came quite early in the history of the UN. Along with the creation in 1947 of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, the General Assembly passed Resolution 273 (III) calling for a study to be undertaken of the "large aboriginal population and other underdeveloped social groups which face peculiar social problems" on the American continent. An ad hoc committee was established but was used mainly as a forum for Eastern bloc attacks on Western states, particularly the US. The US response was to charge that ECOSOC (the superior body) had no jurisdiction to act

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96 Adopted Sept. 21, 1978 at the conference on Regional Autonomy, Copenhagen Sept 17-22 (1978)

97 Int'l A. for the Defence of Menaced Languages and Cultures (1976)

until requested to do so by the governments concerned. (98) According to Kingsbury "the substantive issue died in a torrent of East/West invective." (99)

Outside the UN context, the International Labour Organisation became concerned as early as the 1930's with the situation of indigenous peoples. The ILO's activities were largely restricted however to South America, and then only within the narrow parameters of indigenous peoples as exploited labour pools. (100) In 1957 the ILO produced Covention 107 on the "Protection and Integration of Indigenous and Other Tribal and Semi Tribal Minorities in Independent Countries," the first and still the only recognition of the special status of indigenous peoples in an international instrument of its kind. In a manner reflecting the basic tenor of the Covention, its introductory article provides that:(101)

> Governments shall have the primary responsibility for developing co-ordinated and systemic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.
>
> (emphasis added)

Though drafted with the intention of encouraging better living conditions for indigenous peoples, Covention 107 is generally viewed negatively now by indigenous peoples as being assimilationist and individualist.

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98 Bennett, Aboriginal Rights in International Law (1978) at p.13

99 Kingsbury, "Indigenous Peoples" and the International Community M.Ph Thesis (Oxon) 1978 at p.17

100 From Sanders, The Re-emergence of Indigenous Questions in International Law (1983) 1 Can Human Rights YB.3 at 19

101 Op. cit., text reproduced in Bennett note 98

As noted at the beginning of this section on minorities, the view that indigenous rights issues can be productively analysed from a "minorities" perspective is not a popular one, least of all among indigenous peoples themselves. Indigenous leaders argue stenuously that they are peoples not minorities and that minority labelling both denigrates and domesticates their struggle. That view is entirely understandable given the "individual human rights" framework currently imprisoning minority issues; the failure of measures such as ILO Convention 107 to address the real grievances of indigenous peoples; and by contrast the revolutionary changes made possible in part by the UN decolonisation instruments.

Two important points are worth making here. The first is it should be remembered that the current restrictive approach to minority rights is a very recent post World War Two development. Prior to that, and particularly during the League period, minority rights were seen in much broader collective terms. The dividing line between states and minorities could at times be an extremely fine one with both categories being bona fide subjects of International Law. The contemporary devaluation of minority issues is a product of "melting pot" theories of nation building once popular in North America but now losing ground. In other words there is a danger in accepting without question the prevailing framework and marshalling arguments around the quite artificial boundaries and categories which comprise that framework. The minorities/peoples distinction is a perfect example of this artificial boundary creation. Seen in this light it becomes clear that a minorities perspective, while it does not and should not provide a comprehensive answer to issues of

indigenous peoples rights, must not be rejected as completely irrelevant.

The second point is that even among the so-called "territorial" minority peoples (ie. peoples who retain an unintegrated territory) indigenous groupings are quite unique. If the justification for collective minority rights is cultural survival, as it was under the League, then indigenous peoples have the greatest claim to such rights. In almost all instances the degree of cultural difference between indigenous minorities and the mainstream culture or cultures is dramatic. Put simply, indigenous minorities are more different than other minorities and therefore more deserving of special and radical protection measures. Both ILO Convention 107 and early UN concern with the plight of indigenous peoples in the Americas show that even in the heyday of assimilationism this fact was recognised though it produced few substantive benefits. That recognition has continued and is growing in strength. The ILO accepting that Convention 107 is based upon outmoded concepts, has begun the task of drafting a new convention. (102) And as discussed below the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities is also taking important initiatives in the area through its Working Group on Indigenous Populations.

From all of this a sense emerges that indigenous peoples with their unique history as "colonised minorities" will provide the link between the UN Law in respect of minorities on the one hand and the UN Law of decolonisaation on the other. This link it is submitted will provide the means by which the principle of

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102 "Kahtou" March/April 1987 pp.10 and 13

self determination will finally succeed in crossing the divide between these mutually exclusive categories. Generally states appear more willing at this point to accept self determination for indigenous peoples rather than as a general principle applying to all territorial minorities. This is firstly because, as noted, indigenous peoples share with the Third World, a common colonial history. Thus the leap of logic or faith between the decolonisation of the Third World and the self determination of the Fourth World is one that can be made by the international community without difficulty. At least at an intellectual level. Secondly and more practically, while nearly all states have minorities, not all have indigenous minorities. Traditionally the label "indigenous" has been applied only to aboriginals of the Americas and Australasia. Within that limited context, as one would expect, Eastern Bloc and Third World countries are more than willing to entertain international recognition of indigenous rights. Thus for reasons which are historical, political, and legal, indigenous peoples issues are now at the very cutting edge of developments in relation to minority rights and in relation to the redirection of the concept of self determination.

5. INTERNAL SELF DETERMINATION AND INDIGENOUS PEOPLES

The first part of this chapter set out the colonial or historical roots of the principle of self determination as the "active agent" in UN decolonisation. Most importantly it pointed out that this early law applies in the first instance to indigenous peoples in the New World -- those peoples who have been reduced to minorities in their homelands today. The next

two parts detailed the creation of a division between overseas colonies having indigenous majorities and minority indigenous peoples, mostly of the new world, living within the borders of independant states. The former were accorded a right to self determination through decolonisation, the latter were relegated to the lesser status of "minority" and thereby excluded from the spectrum of collective rights accorded only to "peoples".

This final section anticipates what is in essence a return of self determination to its roots. It is argued that international law is developing rapidly toward bridging the "rights" gap between indigenous majority and indigenous minority. This is being allowed to happen firstly because restrictions on self determination such as territorial integrity are decreasing in relative importance, and secondly because of the rediscovery of the concept of "internal self determination,": The right of sub-state groupings to autonomy within the larger nation state. This represents an attempt at coming to terms with indigenous peoples as minorities as well as peoples. It will be remembered that this model was used extensively in respect of European minorities after World War One, but was subsequently rejected. Today, minority indigenous peoples advocate strongly this very same model as a vindication of their, as yet unrecognised, peoplehood.

5.1 Indigenous Claims to Self Determination

The history of indigenous claims to self determination in one or other form before international fora is a long one. Indigenous peoples have consistently refused to accept that their grievances in respect of land and political rights are purely

domestic issues. In 1882, 1884, and 1914 for example, Maori delegations travelled to England to protest to the Queen the New Zealand governments' failure to honour the Treaty of Waitangi. In 1906 and 1909 delegations of British Columbia Indians made the same journey. Deskaheh of the Six Nations Confederacy spent two years attempting to get the case of the Iroquois heard before the League of Nations in 1923 and 1924. He was successful, with the help of sympathetic member states, in having a petition forwarded to the Secretary General of the League, but was consistently blocked thereafter -- notably by Britain. The great Maori prophet Tahupotiki Wiremu Ratana also petitioned the League in 1924 -- but to no avail. Yet again the Iroquois sought to be heard during the drafting of the UN Charter in San Fransisco in 1945 -- but were ignored. (103)

The dramatic upsurge in the late 1960's of indigenous identity and nationalism saw, with the active support of non-indigenous groups such as Survival International, an intensification of indigenous activity at the international level. Since the late 1960's international indigenous organisations have been formed and have obtained consultative status to the UN itself as non-governmental organisations. The most representative of these is the World Council of Indigenous Peoples established in 1975. The World Concil has been one of the greatest advocates of indigenous self determination and in 1981 produced a draft convention on Indigenous Peoples Rights which gave priority to that principle. (104)

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103 Supra, see generally Sanders note 1 at pp.13-14

104 Infra note 110 and accompanying text.

Most recently two indigenous groups, both from Canada, have filed contraversial "communications" with the Human Rights Committe of the UN under the Optional Protocol to the 1966 Convention on Civil and Political Rights. Both argue that as peoples, they have been denied the unqualified right to self determination guaranteed by Article 1 of the Convention. (105) Article 1(1) and (2) provides:

> (1) All peoples have the right of self determination. By virtue of that right they freely determinate their political status and freely pursue their economic, social, and cultural development.
> (2) The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The Mic Maq Nation from Atlantic Canada, claim that by virtue of a 1752 Treaty with the British Crown, the Mic Maq Nation is a British dependency unlawfully annexed by Canada and entitled now under international law to exercise its inherent right of self determination. The response of Canada has been (inter alia) to assert that Indian self government under the Indian Act is sufficient recognition of a right to self determination, that the claim contravenes Canada's territorial integrity in any case, and that self determination claims cannot be the subject of "individual" communications anyway. (106)

The Lubicon Lake Band of Alberta have also based their claim on Article 1. The substance of the claim is in two parts;

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105 Infra see text.

106 For the detail of the Communication and the response of the Canadian Government see Barsh Indigenous North America and Contemporary International Law (1983) Oregon L.R. 73 at 95

firstly that their collective right to self determination under Article 1(1) has been denied; and secondly that exploitation of the resources on their traditional lands has destroyed game and fish stocks to such a degree that the band has been deprived of its traditional means of subsistence contrary to the terms of Article 1(2). The Canadian government has replied in terms apparently of general application to all Native Indians in Canada; (107)

> In the present state of international law a thinly scattered minority group living within the midst of a more numerous population grouping and occupying territory co-extensive with that grouping cannot claim to be a people within the meaning of Article 1 of the Covenant.

Though no final decision has been reached by the Committee in respect of either communication, the responses of the Canadian government are interesting in and of themselves. In both cases a standard defence has been adopted in the face of indigenous claims to self determination. In the case of the Lubicon Lake Band, it is to stress their minority status as a means of denying their peoplehood. In respect of the Mic Maq the age old territorial integrity argument is dragged out yet again.

5.2 Overcoming Terrirorial Integrity

As has alreasy been discussed, the right of peoples to self determination has been limited in practice by its corollory, the territorial integrity of states. The orthodox position has been that self determination attaches only to peoples under colonial and alien domination, not all peoples, and that colonial means non-continguous "salt water" colonies. Those peoples living

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107 Response of the Government of Canada to Communication No. 167/1984 (Lubicon Lake Band): Geneva May 31, 1985

within the territory of a larger state have accordingly been treated as minorities both at international and domestic law. As a result international lawyers have long considered self determination in practice to be a right of territories rather than peoples.

The major justification for the protection of territorial integrity at the expense of self determination is that to do otherwise would encourage a multitude of secessionist movements and mini-states and comprise world peace.

There are however a number of grounds for questioning the credibility of the principle, its efficacy in the post decolonisation age as well as its logical and theoretical consistency as a limitation on the right to self determination of peoples.

5.2.1 The Enclaves and Related Examples: Credibility.

The enclaves (108) are examples of conflict between the interests of a state on the one hand and a small, in most cases distinct population on the other. These enclaves are invariable contiguous to, or contained within that state. In some cases, as with the Ibos in Nigeria or the Iritreans in Ethopia, the minority enclaves seek to secede from the state exercising formal sovereignty over them. In others, for example the Sahrawi's of the Western Sahara or the Timorese of East Timor a neighbouring state seeks or sought retrocession of the territory inhabited by

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108 The term enclave as used here denotes simply a distinct minority people with xome sort of cohesive land base or bases sufficient that it has the potential to form a separate political unit. Thus in this context it does not include the unique examples of Hong Kong; Goa; Ifni; or Macao; where the populations concerned are not distinct.

the enclave on the claimed ground that it is historically a part of the state's own territorial integrity. In all cases, the essential conflict is between the right of an enclave people to self determination and the countervailing claim of the state concerned to protection of its territorial integrity.

Thus, with ethnically distinct populations having a territorial base and asserting a right to self determination independently of the claimant state, these examples indicate the validity of such claims in concrete situations directly applicable to those of minority indigenous peoples.

In the case of the Sahrawi's, the Western Sahara, their homeland, was claimed both by Morocco and Mauritania. In a landmark decision on the question of sovereignty over the territory, the International Court of Justice, without directly addressing the question of conflict between the two principles, indicated the relative importance of self determination. Judge Ammoun in a separate but concurring judgment commented for example: (109)

> As for the general practice of states to which one refers when seeking to ascertain the emergence of customary law, it has in the case of the right of peoples to self determination become so widespread as to be <u>not merely "general" but universal</u> since it has been so enshrined in the Charter of the United Nations...and confirmed by the texts that have been mentioned: pacts, declarations and resolutions which taken as a whole, <u>epitomise the unanimity of states in favour of the imperative right of peoples to self determination.</u>
>
> (emphasis added)

In accord with the terms of Resolution 1541 (110) the exercise of this now universal right could result in something

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109 <u>Advisory Opinion in Western Sahara</u> [1975] ICJ Rep. 12 at 103-4

110 Resolution 1541(XV) principle VI supra at pp.24-5

other than independence -- for example free association or integration with another state. But the choice had to be one for the people concerned to make. It could not be arbitrarily imposed under a claim to territorial integrity.

Almost in passing, the Court went on to conclude in response to the specific question before it, that the evidence indicated no ties of territorial sovereignty between the Western Sahara and either Morocco or Mauritania which could affect in any way the right of the Sahrawi people to self determination. (111) Morocco, faced with decision and a similarily adverse report by a UN Visiting Mission to the area (112) announced the famous "Green March" in which 350,000 unarmed civilians entered the Sahara "to gain recognition of its right to national unity and territorial integrity." (113) As a result of the Security Council's failure to respond decisively and the General Assembly's passing of two conflicting resolutions on the matter, the Western Sahara was carved up by Morocco and Mauritania in the face of the International Courts finding.(114) Sahrawi resistance continues.

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111 Op. cit. note 109 at p.68

112 The Visiting Mission reported that "there was an overwhelming consensus among Sahrawis within the territory in favour of independence and opposing integration with any neighbouring country." Report of the UN Visiting Mission to the Spanish Sahara in Report of the Special Committee of 24 on the Spanish Sahara. Quoted in Frank and Hoffman Self Determination in Very Small Places (1975) 8 NYU J. Int'l. and Pol. 333 at 340

113 Letter from Permanent Representative of Morocco to the UN and the President of the Security Council. Quoted in Frank and Hoffman ibid.

114 Spain acceded to the division of its former colony by tripartite agreement between itself and the two claimant states. On November 14, 1975 The UN response was to pass Resolution 3458A (XXX) reaffirming ...the inalienable right to the People of the Spanish Sahara to self determination... as well as a second taking notice of the tripartite agreement.

Nonetheless, the principle espoused by the Court was plain enough, as was the fact that Morocco and Mauitania's actions were in breach of it. Breach of the principle of self determination of peoples, to the extent that international lawyers recognised it as such, simply served to reaffirm the principle.

East Timor was the subject of a similar claim by neighbouring Indonesia at about the same time. Though Indonesia initially indicated support for East Timorese self determination, Indonesian forces subsequently invaded East Timor stressing that the East Timorese and neighbouring Indonesian West Timorese were culturally and ethnically identical, and that the island of Timor being situated in the centre of the Indonesian archipelego was naturally within the territory of Indonesia. Thus in the first instance the East Timorese were not strictly to be considered a people. Secondly their territory was so completely surrounded by Indonesia that East Timorese independance was impractical. There is some substance in the former point. If self determination is a right of peoples first and foremost, there is some argument that the East Timorese alone constitute only half of a people and that if self determination does apply to the Timorese at all, it applies to the <u>whole</u> population of Timor.

Nonetheless, the presumption on favour of self determination over territorial integrity is apparently a strong one since despite the question mark above, the UN response was to support the East Timorese. On December 12, 1975 the General Assembly passed a resolution strongly deploring "the military intervention of the armed forces of Indonesia in Portuguese Timor" and calling upon Indonesia to "withdraw without delay...in order to enable the people of the Territory freely to exercise their right to

self determination and independance." (115) The General Assembly further recommended that the Security Council "take urgent action to protect the territorial integrity of Portuguese Timor and the inalienable right of its peoples to self determination." (116) The Security Council condemned the Indonesian action (117) but imposed no sanctions. At each council session since 1975 the Security Council has adopted similar resolutions, although a recent fall off in support for such resolutions appears to reflect a growing acceptance of fait accompli in East Timor. (118)

The case of East Timor provides an important precedent for the following reasons: Indonesia's argument is essentially that the East Timorese have no independent right to self determination but that they are really a minority group within the overall "Indonesian people". The UN response was to declare the deprivation of the East Timorese right to self determination to be in contravention of International Law. The principle which may be drawn from all this is that the self determination of peoples overrides the territorial integrity of states -- even in situations where the "peoplehood" of the unit seeking self determination is in doubt.

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115 The contravesial nature of the whole question of East Timorese self determination was however reflected in the voting figures in respect of the resolution: 72 for, 10 against, and 43 abstentions. See Frank and Hoffman, note 112 at p.348

116 GA Resolution 3485 para 6. (1975) UN Doc GA 5438at 262

117 SC Res 384 (1975) 30 UN SCOR 10; UN Doc S/PV 1869

118 See generally Blay Self Determination vs Territorial Integrity in Decolonisation (1986) 18 NYU J. Int'l L and Pol. 441 at 456

Belize provides a further example of the apparent paramountcy of self determination in the face of a Guatemalan claim to historical title to the territory. In that case the UN refused to accept any settlement between the disputants (Guatemala and the UK in respect of Belize) which was not in accord with the wishes of the population of Belize, in this case a group ethnically and linguistically distinct from the Guatemala population. As for Guatemala's territorial integrity, the UN adopted a resolution calling on the UK to decolonise Belize before 1981 without even mentioning the historical claim of Guatemala. (119)

In a second category of cases minority groupings have sought to subdivide colonial boundaries before the colony gains independance with the aim of establishing a separate political entity or integration with a neighbouring state with which the minority group has closer ties. Again, such claims are analogous to those of indigenous peoples today, the difference being only one of status of the whole territory when the claim is made. In general such claims have been rejected as contrary to the principle of uti possidetis requiring post colonial states to conform to former colonial boundaries.(120) Thus the conflict is once again between the territorial integrity of the putative state and the right of the sub group claiming secession to self determination.

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119 (1981) 35 UN GAOR Supp. (No 48) at 214-5; UN Doc A/35/48; note though that Guatemala's historical claim is not generally considered to be a strong one. There exists a Treaty of 1859 between Guatemala and the UK recognising British sovereignty: See Frank and Hoffman note 112 at 359-61

120 See generaly Blay note 118 at 449-50

Though orthodox doctrine apparently accords pre-eminence to the putative state and territorial integrity, the number of colonies in which the doctrine has not applied could lead one to question the existence of the principle at all. Ruanda-Urundi was divided along ethnic lines between Rwanda dominated by the Hutus and Burundi dominated by the Tutsis. With UN support the British Cameroons were divided in two with each section opting for a different political status; the North joined Nigeria and the South the State of Cameroon. The former Gilbert and Ellice Islands previously administered as a single colony were separated by decolonisation. The former populated by Micronesians eventually became Kiribati while the latter populated by Polynesians became Tuvalu.(121) In the same way India became divided between India and Pakistan. In all the cases cited, self determination was exercised by peoples, who like indigenous minority peoples, did not comprise a majority of their former territories. As was the objective of the League era, the self determination of peoples overrode the integrity of the territory concerned.

The third and final category of enclave cases consists of the more straight forward claims by minority groupings within the state to secession. This situation has been dealt with specifically by UN Resolution 2625 (1970) discussed earlier.(122) In essence the resolution provides that the right to self determination does not provide a pretext for dismemberment of the state where such states are:

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121 Pomerance: Self Determination Today: The Metamorphosis of an Ideal (1924) 19 Is. L. Rev. 310 at 322

122 Op. cit. note 63 and accompanying text

> conducting themselves in compliance with the principle of equal rights and self determination of peoples...and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The corrollary of this proviso is of course that if the enclave is not accorded equal rights and political representation then secession becomes a legal remedy available to it. The two most notable examples here are the Biafran secession from Nigeria and the Bangladesh secession from Pakistan. Though the Biafran secession ultimately collapsed in what is generally accepted by internatinal scholars to be a vindiction of Nigeria's territorial integrity, the secession was recognised by a number of mainly African and Eastern Bloc countries. Even the Bangladeshi secession, (123) whose success is attributed to the active support of the Indian army rather than any sense of right, moral or legal, being on their side -- is at least an indication that the "monolith" of territorial integrity is not insurmountable. At the very least the 1970 Resolution provides a door through which a limited number may pass.

To sum up, in all the examples from the three categories referred to, peoples (whose relationships with the particular state exercising sovereignty over them is in essence the same as that of minority indigenous peoples) have had their collective rights recognised in spite of state claims to territorial integrity. This fact alone is significant once it is accepted that the only legitimate obstacle standing between indigenous peoples and self determination is the territorial integrity

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123 The secession of Bangladesh from Pakistan is also unique in that the two territories were not contiguous. Commentators have nevertheless been reluctant to explain the success of the secession on that basis alone.

"sacred cow". Commentators have argued that state and UN practice make a distinction between secession from an independent state on one hand and retrocession or subdivision of pre-independance colonies on the other. (124) To admit that such distinctions are made apparently for no rational reason except for political convenience, is to admit that territorial integrity is not a principle at all but as Pomerance suggests, simply a tool to be manipulated. (125) Be that as it may, it remains that despite UN and academic dogma in relation to territorial integrity, examples exist showing its subordination to the self determination of peoples in concrete situations similar in principle to that of minority indigenous peoples.

5.2.2 Efficacy and Consistency

There are at least three other bases for questioning the territorial integrity obstacle to indigenous self determination. Two will be discussed here, while a third and major reason will be the subject of a separate section.

The first relates simply to its continued relevance in the post decolonisation age. It was designed as a means of restricting decolonisation to the generally recognised colonies, and to avoid having to grapple with issues of internal colonialism. Now that this process is all but complete, territorial integrity, instead of being a safety valve, will serve only to suffocate the continued dynamism of the principle of self determination. Thus, the restricted application of self determination to external colonies only, in a world where

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124 See generally Blay note 118 at 449

125 Pomerance, note 121 at 328

external colonies no longer exist, will inevitably condemn self determination to the history books. Current UN activity in the area of minorities and especially indigenous minorities suggests that the UN is anxious to maintain and enhance the continued relevance of self determination in the post colonial era.

The second point relates to the declared objective of territorial integrity. This was, as noted, primarily to ensure world peace by discouraging the disintegration of states through secessionist wars. In fact some of the most brutal wars of modern times have resulted from state claims to territorial integrity. The Indonesian war with FRETILIN of East Timor for example caused the deaths of 10% of the East Timorese population -- 60,000 people. In addition 50,000 were forced to leave the territory as refugees. (126) The Moroccan "Green March" into the Western Sahara caused 60,000 Sahrawis -- three quarters of the population -- to seek refuge primarily in Algeria. (127) The President-elect of the Thirty First General Assembly warned the Third World not to condone the use of territorial integrity as a means "to replace the old imperialism by another form of foreign control founded on territorial claims."(128) Thus, not only is it questionable whether the principle ever achieved its objective of promoting world stability, there is evidence that it actually caused wars.

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126 Frank and Hoffman note 112 at 348

127 Ibid, at 341

128 UN Doc. A/C4/SR.2175, Fourth Committee at 15 Nov 27 1975. Quoted at ibid p.342

5.3 Self Determination as a Continuum: Internal Self Determination

The third and final reason is that territorial integrity was never intended to be used as an obstacle to self determination in the first place. It was designed to prevent the dismemberment of states. As already discussed, the problem was that the UN of the 1960's and 1970's equated self determination with secession and independance, so that any claim to self determination by a national minority was automatically seem in terms of a threat to the unity of the state concerned. Such was not the intention of the drafters of the UN Charter. Nor indeed is it apparent in the texts of the major decolonisation instruments.

Discussions during the drafting of the UN Charter in 1945 indicate what was actually intended by the phrase "self determination of peoples" as used in Articles 1(2) and 55(1). The Belgian representative at the talks, fearing that "peoples" could include sub-national groupings as well as states, sought to pre-empt that possibility by proposing a clause giving greater weight to the rights of states and implying that "peoples" meant state populations. (129) This proposal was rejected by a two-thirds majority at the meeting on the basis that the Charter should extend this right to states, nations and peoples. This broad application of self determination was considered the only way to achieve universal peace and friendly relations.(130)

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129 The proposed amendment to Article 1(2) provided:To strengthen international order on the basis of respect for the essential right and equality of states and of the peoples' right to self determination.

(1945) 6 UNCIO Docs p.300; From Umozurike Self Determination at International Law (1972) p.45

130 Ibid,(1945) 6 UNCIO Docs at 703-5; Referred to in Umozurike

In relation to the inclusion of the phrase "self determination of peoples" in the Charter the drafting Sub-Committee reported:(131)

> Concerning the principle of self determination, it was strongly emphasised that this principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Charter; on the other side, it was stated that the principle conformed to the purposes of the Charter only so far as it implied the right of self government of peoples and not the right of secession.
>
> (emphasis added)

Thus the Charter, like the League minorities system, recognised a grey area short of secession within which the right to self determination continued to have meaning. It was this area which was intended to vindicate the right of minority peoples to self determination.

In the same way Resolution 1514 confirms a right of self determination for all peoples. Only secessionist movements are outlawed. Resolution 2625 makes the same point. Though applying only to external colonies, Resolution 1541 concerning non self governing territories makes it abundantly clear that self determination is not a synonym for secession. It may also be expressed through free association or integration with another state. Finally there is Common Article One of the 1966 Covenants on civil and political rights, and economic, social and cultural rights. Without any qualifications it provides:

> (1) All peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.
>
> (emphasis added)

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131 Ibid.

Thus as one writer puts it, (132)

The conclusion is inescapable that the decolonisation of nearly all overseas colonies has not rendered the principle of self determination obsolete. Neither is the content of the principle as dictated by its fundamental ideal exhausted by such decolonisation, nor is there an absence of peoples for whose political existence the principle had significance even though these peoples are beyond the scope of the particular formulation used by the UN for identifying peoples to whom self determination is to be accorded.

That comment was made in 1973. It can no longer be said as categorically that the peoples to whom the writer refers are in fact "beyond the scope" of self determination. The post decolonisation era has seen the growth of a school of thought challenging the inflexibility of the UN principle of self determination. Buccheit in 1978 proposed that self determination should now be seen as a continuum, with secession as its ultimate, but not sole vindication.(133) Pomerance suggests that the complexity of current claims to self determination require solutions of corresponding complexity. He states this view in these terms:(134)

> Such complexity can only be handled by means of a flexible approach which sees self determination as a continuum of rights, as a plethora of possible solutions, rather than as a rigid absolute right to full "external" self determination in the form of complete independence. The "choice of the

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132 Sinha, Is Self Determination Passe? (1973) Colum. J Transnat'l L. 260 at 273

133 Buccheit Secession: The Legitimacy of Self Determination (1978) at 222

134 Pomerance note 121 at 73

> choices" to be offered to a "self" exercising the right of self determination may need to be determined by others and not by the "self" which is being consulted. (Indeed, as has been seen, this coincides with current law and much of past practice.) Independence, or other options, may need to be precluded -- even if desired by the "self" concerned. Such alternatives as federal schemes, autonomy, minority rights guarantees of non-discrimination, and the right of "option" may present themselves as forms of self determination best suited to the particular circumstances.
>
> (emphasis added)

Of course none of this is particularly new, it is simply being rediscovered. Chief Justice Marshall catergorised the Cherokee as "domestic dependent nation" enjoying a residual right to internal self government within the overall US federal structure.

Further, as noted, local autonomy for minority peoples was used extensively under the League of Nations as a way of striking a balance between the minority and the state so as, in the interests of world peace, to remove minority grievances while maintaining the unity of the state. Thus, it will be remembered, the Ruthenes were granted "the fullest degree of self government compatible with the unity of the Czecho-Slovak state." Similarily the Soviet constitution guarantees a right of self determination to the Russian peoples, but again to be exercised within the structure of Soviet federalism.

The idea that self determination can be satisfied through the exercise of a measure of local autonomy or self government has come to be known as "internal self determination". It has the important advantage of providing a solution to majority/minority conflict which is flexible, and capable of adapting to the particular circumstances of the parties. Thus, rather than causing conflict as the territorial integrity protagonists would have it, the recognition of minority "internal

self determination" in fact provides an avenue for the parties to avoid conflict. According to Suzuki; (135)

> When a particular political group constitutes the power apparatus by which a given body politic controls its territory or inhabitants, its authority is derived from the community's expectations regarding its appropriateness as a decision maker. Demands for a separate public order system by a sub group which had a territorial base within the existing territorial community result from a loss of authority within the broader associations as a transformation of the sub groups expectations regarding who is to govern whom.

Accordingly, recognition of a right to internal self determination may be seen either as ameans of preventing a loss of minority authority within the broader state, or as a means of institutionalising sub-group nationalism within the superstructure of the state in order to avoid conflict. The grant of autonomy to Southern Sudan in 1972 for example terminated for a considerable time that area's secessionism. On the other hand the Eritrean conflict in Ethiopia was the result of Ethiopian's violation, in 1962, of the 1952 federation agreement which established Eritrea as an autonomous unit.

5.4 The Application of this Concept to Indigenous Peoples

Adopting for the moment Pomerance's model of self determination, the next question is what might it mean on the ground for indigenous peoples. That is, at what point along Pomerance's "continuum of rights or plethora of possible solutions" do minority indigenous peoples fit? The answer, it is submitted, may be found in a new paradigm whose nature is

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135 Suzuki Self Determination and World Public Order: Community Response to Territorial Separation (1976) 16 Virginia J. Int'l 779

dictated by a combination of the two levels of self determination discussed in this chapter.

Recognition of indigenous peoples as "special" minorities yields that part of the paradigm which may be conveniently labelled the "cultural survival perspective". This perspective has its basis in the threat to indigenous cultural survival posed by the hegemony of the majority settler cultures. In a sense it may be traced to the collective approach to minority rights adopted by the international community during the League era in order to combat the pressure confronting all minorities to assimilate. Its substance therefore is self evident. This level of self determination requires a degree of autonomy within the state sufficient to ensure the survival of indigenous peoples whose cultures, languages and world views contrast dramatically with those of settler populations.

The second and most important half of the paradigm gives emphasis to the relationship between indigenous peoples and the Third World. That is, it approaches indigenous self determination from a perspective which highlights their historical and contemporary status as <u>colonised peoples</u>. At this level, self determination becomes important not just as a vechicle for cultural survival but as a natural expression of "peoplehood" which has been suppressed since colonisation and continues to be suppressed. This part of the paradigm evokes the same "liberation" terminology used in the 1960's and 1970's by the Third World during its process of decolonisation. From this perspective indigenous self determination too takes on an added decolonisation dimension which transcends issues of cultural survival (though such issues are clearly important), and demands

the recognition within the nation state of self governing indigenous political entities.

Thus, this emergent right of indigenous self determination, if viewed in terms of this paradigm, may be best characterised as a hybrid of its "minority peoples" and "decolonisation" roots, having elements of both, though combined in a manner which reflects to some extent the unique concerns of minority indigenous peoples.

Beyond this fairly broad framework the details are rather more elusive. This is so because although the minority/decolonisation paradigm holds true in all cases, the individual circumstances of indigenous peoples around the world vary so greatly that a single model for all would be inappropriate. There are nevertheless, common threads or issues running through all cases which make it possible to compile a "shopping list" of relevant concerns which must be addressed in adapting internal self determination to given circumstances. Asbjorn Eide lists six such concerns;(136)

First, the distinction between the collective rights of the indigenous populations to be separate, within defined territories, and their right on the other hand to participate in the wider society as individuals on a basis of non-discrimination. Second, their right within their habitat to land and other resources, including water resources. Third, their right to determine or influence development projects affecting those territories. Fourth, their right to decide on or influence

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136 Eide UN Action on the Rights of Indigenous Peoples in The Rights of Indigenous Peoples in International Law (Ruth Thompson ed.) (1978) 11 at p.25

the system of education, which is essential to the maintenance of culture. Fifth, their right collectively to organise their religious life in accordance with their own traditions. Sixth, within some limits to control the application of their own customary law with regard to such matters as land use, transfer of property and inheritance.

The Third Assembly of the World Council of Indigenous Peoples in 1981 produced a draft convention on Indigenous Peoples Rights. That convention used, as a first step, the formula contained in Resolution 1541 and the 1966 Covenants: (137)

All peoples have the right to self determination. By virtue of that right Indigenous Peoples may freely determine their political status and freely pursue their economic, social and cultural development.

(emphasis added)

A later draft article goes on to suggest the various forms which the exercise of that self determination may take:(138)

> One manner which the right of self determination can be realised is by the free determination of an Indigenous People to associate their territories and institutions with one or more states in a manner involving free association, regional autonomy, home rule or associate statehood as self governing units. Indigenous Peoples may freely determine those relationships after they have been established.

Again what is stressed here is flexibility, even where the word formulae adhere closely, as in this case, to existing UN instruments.

The evolution toward a recognition at international law of a right of indigenous peoples to internal self determination is not

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137 Part I, Article 1. Quoted in Eide supra at 27

138 Ibid, Part I, Article 3.

yet a fait accompli. Events over recent years affecting indigenous peoples suggest at least that this is the direction in which the law is evolving, and that this process of evolution is gathering speed.

The re-emergence of indigenous issues after the "dark ages" of UN decolonisation began in the late 1970's. In 1977 UN Non Governmental Organisations (NGOs) held a conference in Geneva on discrimination against indigenous populations in the Americas. The conference adopted a "commentary on indigenous rights" drafted by indigenous representatives and styled the "Declaration of Principles for the Defence of Indigenous Nations and Peoples of the Western Hemisphere".(139) Apart from the discreditted ILO Convention 107, this was the first time the rights of indigenous peoples had been the sole subject of such a declaration. It dealt extensively with the status of indigenous peoples, treaties and rights to self government and self determination. In respect of self determination, the declaration provided that the interference in the institutions of self government; interference with the determination of membership or citizenship; occupation oftheir land; the assertion of jurisdiction over them except in accordance with the terms of treaties are all intrusions upon the right of indigenous self determination.(140)

In 1978, as part of the UN sponsored "Decade to Combat Racism", a World Conference to Combat Racism and Racial Discrimination was held in Geneva and attended by 125 counties.

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139 International NGO Conference on Discrimination Against Indigenous Populations in the Americas 1977 (Sept 20-24); Geneva Statement and Final Documents 4,5 (1978)

140 Referred to in Barsh Indigenous North America and Contemporary International Law (1983) 62 Oregon l Rev 73 at 100

The declaration of the World Conference made general points in respect of minority groupings but also made provision for indigenous peoples as a special category. Article 21 recorded the Conference's endordement of (141)

> the right of indigenous peoples to maintain their traditional structure of economy and culture, including their own language, and also [its recognition of] the special relationship of indigenous peoples to their land...

Article 8 of the more specific "Program of Action" included in the Declaration set out a list of collective rights in specific areas. These included the right of indigenous peoples to call themselves by their own name, to have an official status, to form their own representative organisations as well as

> ...(c) To carry on within their areas of settlement their traditional structure of economy and way of life; this should in no way affect their rights to participate freely on equal basis in the economic, social and political development of the country.
>
> (d) To maintain and use their own language wherever possible for administration and education.
>
> (e) To recieve information and education in their own language, with due regard to their needs as expressed by themselves, and to disseminate information regarding their needs and problems.

A second NGO Conference on "Indigenous Peoples and The Land" in 1981 initiated the next phase in the development of indigenous rights by successfully calling for the creation of a UN Working Group on the issue.

Meanwhile in 1971 the Economic and Social Council of the UN, a body which had previously said next to nothing about the issue, authorised a massive study to be undertaken of the special problems of discrimination against indigenous peoples.(142) The

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141 UN Doc A/CONF. 92/40 at 14 (1978) Quoted in Hudson The Rights of Indigenous Peoples in Nation and International Law - A Canadian Perspective LL.M Thesis (McGill) (1984) p.97

142 ECOSOC Resolution 1589(L) 21 May 1971

result was the epic Martinez-Cobo Report which took 12 years to complete.(143) Though styled as a study of discrimination against indigenous peoples, Special Rapporteur Martinez-Cobo soon found that approach inadequate in addressing the issues. The particular problems of minority indigenous peoples, he found were not rooted in discrimination but in a failure of domestic and international law to recognise collective rights subsisting in indigenous minorities as peoples. Hence in his view:(144)

> self determination in its many forms must be recognised as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own fate.

This simple statement represents an important breakthrough in thinking in indigenous issues. It indicates the progressive development away from an individual rights framework and toward an increasingly acceptable concept of indigenous self determination. In addition, it suggests that self determination will eventually be seen as a benchmark standard rather than one of a variety of options. Most importantly, Martinez-Cobo makes it clear that indigenous self determination must be accepted, not as a separate and isolated right, but as the appropriate structural context within which land, cultural and political rights should be expressed.

Martinez-Cobo also set out something of the nature and content of self determination as it should apply to indigenous peoples:(145)

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143 UN Study of the Problems of Discrimination against Indigenous Populations, Special Rapporteur Jose Martinez-Cobo UN Doc E/CN. 4/Sub. 2/476/ add.4 etc

144 UN Doc E/CN. 4/Sub. 2/1985/21/ Add 8, para 380

145 Ibid, paras 579 and 581

> Any measures designed to achieve the proper participation of indigenous communities in all matters influencing their lives must respect and support the internal organisational structures of such populations, since those structures form part of their cultural and legal heritage and have contributed to their cohesion and to the maintenance of their social and cultural traditions. Accordingly, Governments must abandon their policies of intervening in the organisation and development of indigenous peoples and must grant them autonomy, together with the capacity for managing the relevant economic processes in the manner which they themselves deem appropriate to their interests and needs...
> It must also be recognised that the right to self determination exists at various levels and includes economic, social, cultural and political factors. In essence, it constitutes the exercise of free choice by indigenous peoples who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they live and to set themselves up as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State, including the individual and collective right to be different and to be considered different, as recognised in the statement on Race and Racial Prejudice adopted by UNESCO in 1978.
>
> (emphasis added)

Thus, it is basically percieved as a right to limited local autonomy -- limited in the sense that it would not normally include a right to secession. The emphasis on self determination as a means of maintaining the social and cultural heritage of the peoples concerned, and the reference to the "collective" right to be different, makes it clear that it is grounded in concepts of minority rights and protection as well as the more popularly accreditted UN law on decolonisation. Indeed much of the terminology used here and in other contexts, is more reminiscent of the League minorities protection system and the Albania Minority Schools case than it is of UN Resolution 1514 and so on. Of course this makes perfect sense when it is remembered that the subject matter of this developing law are minorities as well as peoples. As such they are able to draw on two distinct

international law traditions and are in the process now of developing a third which has characteristics of those traditions as well as elements unique to the experiences of minority peoples who are also indigenous. Examples of the latter include the universally held reverence for, and spiritual relationship to the land and environment, communal social structures, reverence for elders and so forth.

The view that the context of self determination should be determined largely by the indigenous peoples themselves reflects the diversity of the circumstances of these peoples on the ground. These differences in history and experience under a multitude of internal colonial regimes makes the setting of uniform standards as to content extremely difficult, though perhaps not impossible. Thus Martinez-Cobo adopts the sensible position of allowing the principle of self determination to freely adapt to individual circumstances.

The Report has had only a limited impact on the UN structure generally. It has been criticised by commentators as overly long, as outdated in parts and incomplete in others.(146) Nonetheless, the feedback that has been forthcoming from UN bodies has been positive. The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (the body which sponsored the Report) subsequently described it as "a work of definitive usefulness".(147) In addition, the Working Group on Indigenous Populations which had by this time been established, was directed to rely on the report in its task of

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146 See eg. Sanders The UN Working Group on Indigenous Populations Unpublished Report 26 Sept, 1987 at p.3

147 Sub Comm'n Res 1984/35A Preamble

drafting a set of international standards in relation to indigenous peoples.(148)

Thus the Report clearly represents the first major step toward recognition of self detemination for indigenous peoples, at least since 1945. Since the publication of the Reports' recommendations in 1983, matters have proceeded at a dizzying pace. So much so in fact that Barsh writing in 1986 felt sufficiently confident to state that the consensus among states is; (149)

> ...some form of separate institutional existence for indigenous communities, albeit more or less within the framework of the territorial state, has become a relatively respectible concept.

Though intentionally couched in cautious and ambiguous language, this still represents considerable progress on the view held in the 1960's and 1970's that if indigenous peoples had a right to vote then that was sufficient self determination. Arch assimilationist states in North America and Australasia are now beginning to accept the idea that indigenous autonomy within the framework of the state could form the basis of government policy -- and that existing international human rights norms are inadequate to deal with the problems of their indigenous peoples.

The next step in this progression was the establishment in 1982 of the UN Working Group in Indigenous Populations mentioned earlier.(150) The creation of this body removed all doubt as to

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148 Sub Comm'n Res 1985/22 para. 4(a)

149 Barsh Indigenous Peoples an Emerging Object of International Law (1986) 80 AJIL 369 at 377

150 The Working Group was established on the recommendations of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and subsequently approved by the Human

the respectability of indigenous peoples and questions as appropriate subjects of international law.

Convened as a group of supposedly non-political "experts" its mandate was in two parts;

> (1) to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations...to analyse such materials, and to submit its conclusion to the subcommission,
> and
> (2) to give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and differences in the situations and aspirations of indigenous populations throughout the world.

In 1984 a number of indigenous organisations along with Australia and Canada expressed concern that the Working Group was simply compiling data uncritically. The Sub-Commission issued a request which signified the next and most recent step in the progression toward international recognition of the right of indigenous self determination. The Working Group was instructed thenceforth to;(151)

> ..."focus its attention on the preparation of standards on the rights of indigenous peoples" and accordingly "to consider in 1985, the drafting of a body of principles on Indigenous rights based on relevant national legislation, international instruments and other juridical criteria."

The overall objective of the Sub-Commission was made even clearer in a 1985 resolution noting the Working Group's submission to the Sub-Commission's request. The Sub-Commission endorsed the Working Groups' (152)

> ...decision to emphasis in its forthcoming sessions the part of its mandate related to standart setting activities, <u>with the aim of producing, in due course, a draft declaration on</u>

Rights Commission and ECOSOC [Sub-Comm. Res 2 (XXXIV) (1981); Comm. Res 1982/19; ECOSOC Res 1982/34

151 Sub-Comm Res 1984/35B (Aug 27)

152 Sub-Comm Res 1984/22 (Aug 29)

indigenous rights which may be proclaimed by the General Assembly.

(emphasis added)

A concrete first step therefore will be the padding of a non-binding UN declaration in the rights of indigenous peoples. The first ever.

Most governments appear now to accept the inevitability of such a declaration. This has been reflected in an increase in governmental observer delegations to the Working Group sessions. While only Norway, the Netherlands and Denmark expressed more than "interest" in the Working Group at its first session, the 1985 session ellicited comments of praise from many governments directly affected -- including Australia, New Zealand, Canada and the United States. In addition, although the Human Rights Commission vote on the establishment of the Working Group produced seven abstentions from Latin America and Eastern Bloc countries,(153) its recent mandate to begin drafting was adopted by the Commission without the need for a vote.(154)

It is rumoured that the Working Group is planning to produce the draft declaration by 1992 so as to coincide with the cinquecentennial of the "discovery" of the Americas and a proposed "International Year of Indigenous Peoples." (155) Given the very positive feedback from states about the Working Group's activities, a five year timetable does not at this stage seem unrealistic.

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153 Comm Res 1982/19

154 Comm Res 1985/21

155 See eg Barsh note 147 at p.369

There are fairly clear indications already that indigenous self determination will be included in the declaration in some form. Firstly the "Plan of Action" for the Group's 5th session to be held in 1987 has at the top of its list of drafting priorities a "consideration of the right to autonomy, self government and self determination, including political representation and institutions."(156) This ensures that the issue will be discussed and, although there is no guarantee of results, its priority status on the agenda reflects its current respectability. Secondly, Erica Irene Daes the present chairperson of the Working Group has indicated her own personal support for the concept of indigenous self determination.(157) In her view the overall principle of self determination exists at several different levels and distinctions should be made between them. The first is external self determination, the right of an entity to determine its own international status. The second is the right of a state population (not people) to determine its form of government. Thirdly, the right of a state to maintain national unity and territorial integrity and to govern without outside interference. Fourthly, the right of developing countries to cultural, social and economic development. She describe the final dimension in the following terms;(158)

> The right of a minority or an indigenous group or nation mainly within state boundaries to special rights related not only to protection and non-discrimination, but possibly to the right to educational, social and economic autonomy for the preservation of group identities.

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156 Ibid, annex I para 3a

157 Daes Native Peoples Rights (1986) 27 Les Cahier de Droit 123

158 Ibid, at 126

In the context of this level of self determination she goes on; "the interpretation of the term 'self determination' specificially excludes the right of secession."(159) The idea advocated here conforms closely to the concept of indigenous "internal self determination" discussed in this paper. Daes makes it clear that the liberal-democratic ethic that equality and non-discuimination rights are sufficient protection is now largely discreditted -- at least in respect of indigenous peoples and perhaps, Daes suggests, in respect of all minorities. Thus, at the risk of appearing overly optimistic, all the signs indicate a positive recognition of indigenous self determination in some form within the next five years.

6 CONCLUSION

It is difficult to draw satisfactory conclusions in an area in which change is occurring so rapidly, and in which the final picture can only be guessed at on the basis of the indicators avaliable.

On the one hand it must be reiterated that arguments are avaliable and are utilised to assert an existing and unextinguished indigenous right to self determination. Such arguments have a strong historical basis in the Marshall decisions and the treaty making process. They also gain support from modern instruments such as Common Article One of the 1966 Covenants which contains an unqualified right of all peoples to self determination. Further the traditional limitation on self determination of state territorial integrity does not preclude

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159 Ibid, at 127

the existence of a right to internal self determination. It is on the basis of this and other supporting material that a number of North American tribes have filed claims with the Human Rights Committee under the optional protocol to the Civil and Political Rights.

On the other hand, this paper has been concerned largely with the progression toward positive recognition of indigenous self determination. That does not imply that the two areas are mutually exclusive. In fact claims of existing right before both domestic and international fora have been instrumental in acceleration the process of positive recognition.

That process has, through five hundred years of contact, developed in definable phase. At the beginning of the process De Las Casas, a contemporary of Victoria called upon the Spanish to consider by what right one people could impose their laws and institutions on another. By the time of Chief Justice Marshall the imposition was fait accompli. His approach was instead to attempt to reconcile the reality of white colonialism with the just struggle of the Cherokee. This he did through "domestication" of Indian sovereignty. The League era offered greater hope through the discovery of both self determination and collective minority rights, but delivered neither to indigenous peoples. It seemed that indigenous issues would inevitably disappear from international consciousness. The great age of United Nations decolonisation appeared to confirm this as the blue water thesis cleaved the colonised world in two. On one side of the line Third World peoples were granted self determination through independent nationhood. On the other side were indigenous peoples trapped, as minorities, in nation-states

that they could never hope to rule, and deliberately ignored by an international order which rejected collective minority rights in favour of individual human rights.

But then, history has an uncanny habit of returning to its source. The last fifteen years have provided ample evidence that the long struggle of indigenous peoples for control of their collective futures will be no exception. The new found strength of indigenous peoples, indigenous cultures, indigenous leaders and above all world indigenous solidarity has made the five hundred year old challenge of De Las Casas more real today than ever before.

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PART II: INDIGENOUS SELF DETERMINATION AND COLONIAL LAW: NATIVE TITLE AND NATIVE SOVEREIGNTY.

1. INTRODUCTION

Part I was concerned with international law developments in the area of Indigenous self determination. The discussion did not centre specifically on the status of Maori rights but necessarily applied to the situation of Maori people by virtue of their status as an Indigenous people. In part II Maori rights, in particular the concept of Maori sovereignty, will provide the primary focus.

The approach will be to trace the developments of colonial law, and later domestic law, in North America and New Zealand from the point of contact with white settlers to the present day. The evolution of Native Rights in Canada and the U.S. will provide a point of comparison against which concurrent developments in New Zealand may be better understood. In some instances the North American experience will provide a benchmark. Although it cannot be said that U.S. or Canadian law and policy adequately addresses the plight of their respective native peoples, yet when compared with New Zealand equivalents, they are made to appear positively progressive. Many such examples will be cited in the following discussion. In other instances, common elements in the three jurisdictions will be highlighted so as to show quite striking similarities, not just in the

general contour of Native law and policy, but in much of the detail as well. Thus, it is hoped that such a comparative analysis will provide new eyes through which to understand the large struggle of the Maori for recognition of their peoplehood, and add as well, a new dimension to current understanding of colonialism and Maori law and policy in New Zealand.

The following analysis is divided into three parts, each corresponding to a discernible period in the continuing history of colonisation in North America and New Zealand. They are: The Contact period; the era of the Conquest Myth; and the Present Day. These 'colonial phases' are significant for several reasons. Foremost among those reasons is that the phases appear in each country at around the same time reflecting similar changes in the power dynamics as between coloniser and colonised and similar changes in settler attitudes toward the status of Indigenous people and their rights. These similarities underpin a strong sense of 'connectedness' between Indian and Maori. Most importantly a comparative analysis makes it clear that these changes affect 'the law' in fundamental ways. For example, relations of relative political and military equality evoked the 'Indian' nations' and 'Sovereign Maori' terminology of the Contact period. This in turn became encapsulated in 'the law' - The Royal Proclamation of 1763, the 'Cherokee cases' and the Treaty of Waitangi. By contrast, the 'dark ages' of the mid-19th to the mid-20th

centuries in which, in all three jurisdictions, Indian and Maori were reduced to powerless and suffering minorities, evoked racist images of Native peoples as 'primitive barbarians' and 'savages'. These too became encapsulated in 'the law' - both judge-made and legislative. The following will trace these developments. Though we have been taught that there is a single body of Native Law, there are in fact two quite distinct and conflicting streams - the first borne of the political realities of the contact era, the second borne of the mythology of conquest and justified by legal adoption of the racist imagery referred to above. Until recently it has been this conquest mythology which has dominated as 'the law'.

It will be argued that, like International law in this area, the domestic law in all three countries is slowly returning to its source - the 'colonial paradigm' as I have chosen to call it. The current upsurge in Indigenous nationalism, particularly in New Zealand and Canada,has resulted in new points of power having been found and exploited by Indigenous peoples through the use of white political and judicial structures, and by effective manipulation of the media which delivers Indigenous images to white people. 'The law' has been reminded of the original terms by which Indigenous peoples agreed to 'contact', and has been asked why those terms have not been adhered to. The power dynamics have changed again, so has the terminology. In time, 'the law' will be dragged kicking

and screaming to the party. The above, it is submitted is accurate as a description of the evolution of colonialism and of decolonisation in North America and in New Zealand. The positive recognition in law of Mana Maori Motuhake or Maori self determination, as an historical fact and as a modern reality, will come only from acceptance of that framework. In short that the interface between Maori and Pakeha is still colonial in nature and that conflicts, whether legal or political, will only ever be resolved within a colonial paradigm.

2. CONTACT: ESTABLISHING THE 'COLONIAL PARADIGM'

2.1 North America: Colonial Practice, Colonial Law

The history of Anglo-colonial 'law' begins with British colonial practice on the eastern seaboard of what is now the United States, in the seventeenth century. An understanding of this period in North American history is crucial to a full conception of the equivalent period of first contact in New Zealand - of the mythology and 'law' which accompanied it, and of a later revision of that same mythology and law.

The hallmark of this period, to be repeated later in New Zealand, was the British preference for undertaking the business of colonising North America by diplomatic means. Relations between the British and Indian tribes or confederacies were rightly perceived by both sides as international in character and were regulated on that basis.

Thus the execution and negotiation of treaties with the tribes became the primary instrument of British expansion, as well as the means whereby British hegemony as against other European colonial powers could be secured.

The choice of diplomacy and treaty over was a conquest as the basis for relations between settler and Indian was one grounded not in humanitarian concerns for Indians, but in the political realities of the time. It was not a unilateral gesture on the part of the British but a mutually accepted means of regulating common and competing interests. Strong J. in the Supreme Court of Canada decision in St. Catherines Milling & Lumber Co. v. The Queen (1) considered that British diplomacy & treaty making during the contact period was founded upon very practical considerations:

> To ascribe it to moral grounds, to motives of humane consideration for the aborigines, would be to attribute to it feelings which perhaps had little weight in the age in which it took its rise. Its origin as, I take it, experience of the great impolity of the opposite mode of dealing with Indians which had been practiced by some of the provincial governments of the older colonies and which led to frequent frontier wars involving great sacrifice of life and property and requiring an expenditure of money which had proved most burdensome to the colonies."

During this time, treaties were sought for three main purposes: to secure political alliances, to regulate trade

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1. (1887) 13 SCR 577 at 609. The decision was subsequently appealed to the Judicial Committee of the Privy Council

and still later, to acquire land upon which to settle.(2) A number of factors combined to require the parties to deal with each other in this way. From the Indian perspective, white contact initially meant manufactured goods and so it as not in the Indian interest to order relations in a way which might threaten trade and access to those goods. From the British colonial perspective animosity between fledgling settlements and the surrounding nations and confederacies would have been dissasterous. In most places, Indians still substantially out-numbered settling. At a commercial level, the settles relied on trade as much as the Indians did. Britain, at that time, lacked both an adequate colonial administration and a large enough merchant fleet. As a result Indians provided by way of trade many of the supplies and so-called "wilderness survival skills" which the settlers could not procure for themselves. Thus trade clauses in treaties were seen as particularly important for both sides.

The final and decisive factor was a combination of Indian military strength, and competing claims by the French and Spanish to colonial hegemony in North America. For both of these reasons the British perceived the securing of alliances with Indian nations as crucial to their interests

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2. See Williams Treaty making in Canada and New Zealand (1986) Unpublished paper at p. 3.

in the region.(3) Among these alliances none was more important than that of the five nations of the Iroquois Confederacy in the North East.(4)

The famous 'covenant chain' of alliances between the Iroquois and conquered or allied nations spread Iroquois influence over the entire Northeast by the 1700s - west to Lake Huron, south to the Tennessee River. Sir William Johnson, the British Superintendent of Indian Affairs for the Northern Department, estimated that the Confederacy was capable of putting 12,000 men on the battlefield.(5) This in itself helped engender British respect for the Iroquois, and made it plain that British hegemony, as against the French in particular, could not have been achieved without Iroquois support.

These sorts of political realities became entrenched in 'the law' of white/Indian relations during the contact period: In the form and content of treaties of 'peace', 'friendship' and 'alliance' between Britain (and later the United States) and Indian nations; in the Royal Proclamation of 1763; i the decision of the Privy Council in the Mohegan Indians case; and later still in the decisions of Chief

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3. See Jones License for Empire (1982) at p. 2.

4. Ibid, pp. 21-35.

5. Ibid, at 65.

Justice Marshall of the U.S. Supreme Court.(6) Thus, as is suggested in Cohen, relations from first contact through to the end of the 18th century were premised upon three assumptions:

> (1) that both parties to treaties were sovereignpowers; (2) that Indian tribes had some form of transferrable title to the land; and(3) that acquisition of Indian lands was solely a governmental matter, not to be left to individual colonists.(7)

The 'Iroquois Deeds' between the Crown and the Five Nations recognized traditional Indian rights to their land and political institutions and offered Crown protection of Iroquois geographical and political integrity.(8) In return, the Iroquois promised loyalty to the British Crown and offered to surrender certain of the lands under their control if the British could prevent French incursion into their territories.(9) Thus promise of protection in exchange for loyalty to the promisor was formalised in 1701 in Albany where the Sachems of the Five Nations met with the

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6. These are referred to in Part I supra.

7. F. Cohen, Handbook of Federal Indian Law (1982 ed.) at p. 53: Note that these are also the three essential elements of the Treaty of Waitangi.

8. Jackson, Memorandum Submitted to Attorney General of the United Kingdom on behalf of Union of B.C. Indian Chiefs (1981) p. 5.

9. Ibid., at p. 6.

Lieutenant-Governor of New York. In 1726 a new deed was executed granting to the Crown all of the lands around the lower Great lakes, "to be protected & defended by His said Late Majesty for the use of the said Nations.' The deed was clearly understood to have left both Iroquois sovereignty and title intact. The Secretary of Indian Affairs reported in 1756:

> That memorable and important act by which the Indians put their Patrimonial and conquered lands under the Protection of the King of Great Britain, their father against the encroachments or Invasions of the French is not understood by them as a cession or surrender as it seems to have been ignorantly and wilfully supposed by some. They intended to look upon it as reserving the Property and Possession of the soil to themselves and their Heirs. This Property the Six Nations are by no means willing to part with and are equally adverse and jealous that any forts or settlements should be made thereon by either us or the French. (emphasis added)(10)

After the American revolution, the Continental Congress adopted the same policy as the English. The treaty of alliance with the Delaware of September 17, 1778 was the first treaty entered into between the United States and an Indian nation.(11) By the terms of Article 4, breach of the Treaty by members of either party could not be punished until "a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws,

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10. Secretary Warall to Sir Wilheim Johnson, January 9, 1756 O'Callaghan Documents Relative to the Colonial History of New York, Vol. 7 at p. 18.

11. Treaty with Delawares, Sept. 17, 1778, 7 Stat. 13.

customs and usages of the contracting parties and natural justice...." Article 5 dealt with the all important matter of trade between the parties, while Article 6 secured to the Delaware, in the following terms, ownership of their traditional territories:

> ...the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold first the chain of friendship now entered into.(12)

Its terms made it obvious that this was an international treaty. The law governing any breach would not be that of the United States, but a code which could be agreed upon by both parties. The promotion of international trade featured as of central importance to both parties. The Delaware are referred to throughout the instrument not as a tribe but as a "nation'. Such nomenclature is telling. Indeed the U.S. Supreme Court in Worcestor v. Georgia(13) (of which much more will be said shortly) concluded that the first treaty with the Delaware nation

> ...in its language, and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe. The sixth article shows how congress then treated the injurious calumny of

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12. Op. cit. Cohen, at p. 59.

13. (1832) 31 U.S. (6 Pet.) 515.

> cherishing designs unfriendly to the political and civil rights of the Indians.(14)

To back-track a little and approach this material from a different angle, one might well ask - what do these treaty examples tell us about 'the law' at the time? How are they relevant to the status and rights of Native American? It is submitted that these treaties were, in themselves, 'the law.' The Crown, and later the United States clearly intended themselves to be bound by these undertakings. Effective colonial expansion depended at this time on the acquiescence of the more powerful Indian nations as signified by treaty. Most importantly, these treaties did not simply manifest the political framework within which the parties negotiated, they represented also the legal framework adopted by the parties as against each other. Put most simply, the use of the Treaty form implied immediately Indian title to, and sovereignty over the soil of North America. Either or both of these two fundamental elements might have been consensually modified in some way by the specific terms of the Treaty, but they were the starting point. The Indian nations were both owners and sovereigns in their traditional territories. Thus, it is important to recognize that the Treaties did not, indeed could not create either Indian sovereignty or title. These things pre-existed the treaties in fact and in law. Accordingly the

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14. Ibid. per Marshall C.J. at 550.

treaties simply recognized Indian sovereignty and title both by their nature, and by their express terms.

Judicial and legislative developments clearly support this contention. The first British decision on the question of the status and rights of Native Americans within the British Empire came in the case of the Mohegan Indians v. Connecticut (1703-1743).(15) The case involved an attempt by the colony of Connecticut to appropriate lands guaranteed to the Mohegans by virtue of a 17th century treaty which secured British protection of the Mohegan people. In 1703 the Mohegans petitioned the Queen to enforce their right in the face of settler claims that the only law which applied was British or Connecticut law from which the Mohegans could claim no such rights. A Royal Commission was struck and eventually it recommended that the land be returned. This decision was appealed to the Privy Council which held the Mohegans to be a sovereign nation and rejected a contention that an alleged conquest gave title to the colony.(16) Having recommended that a Commission of Review re-examine the question, a second Commission was established in 1738. The Commission's decision was set aside following

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15. The Governor and Company of connecticut and Mogeagan Indians (London) 1769; 5 Acts of the Privy Council of England, Colonial Series 218; (London 912). In Smith, Appeals to the Privy Council from the American Plantations 418 (New York 1950).

16. Op. cit. Jackson pp. 7-9.

allegations of "gross irregularities."(17) The third and final Court of Commission convened in 1743. Commissioner Horsmanden, writing for a majority of the Court held that:

> The Indians, though living amongst the King's subjects in these countries, are a separate and distinct people from them, they are treated as such, they have a polity of their own, they make peace and war with any nation of Indians, when they think fit, without control from the English. It is apparent the Crown looks upon them not as subjects, but as a distinct people, for they are mentioned as such throughout Queen Anne's and His present Majesty's commissions by which we now sit. And it is plain in my conception, that the Crown looks upon the Indians as having the property of the soil of these countries; and that their lands are not by His Majesty's grant of particular limits of them for a colony, thereby impropriated in his subject until they have made fair and honest purchase of the native.... so that from hence I adjure this consequence, that a matter of property in lands in dispute between the Indians as a distinct people (for no act has been shown whereby they became subjects) and the English subject, cannot be determined by the law of our land, <u>but by a law equal to both parties, which is the law of nature and nations</u>; and upon this foundation, as I take these commissions have most properly issued." (emphasis added)(18)

The terminology and imagery adopted by the Commissions is important. The Mohegans are continually referred to as a "people". Though it may appear an obvious fact, the use of the word carries with it important political and legal implications. By the latter half of the 19th century it had

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17. Apparently the Commission was stacked with Connecticut men and decided in favour of the Colony without hearing from Mohegan representatives at all. See Henderson <u>Aboriginal Rights in Western Legal Tradition</u> in <u>The Quest for Justice: Aboriginal Peoples and Aboriginal Rights</u>, Boldt & Long (1985) pp. 198-9.

18. <u>Ibid</u>., Smith at 425.

all but disappeared from the vocabulary of the colonial Courts, at least in the context of Native peoples. As we shall see, it came to be replaced by new terminology and imagery which served to justify new conclusions as to the law.

The Mohegans decision was subsequently confirmed by the Privy Council. By virtue of this simple confirmation of Commissioner Horsmanden's obiter, the highest court in the Empire affirmed Mohegan title and sovereignty notwithstanding the 17th Century treaty that, by consent, brought them under the protection of the Crown. Such an affirmation went beyond the immediate and pressing interests of the Mohegan. The decision affirmed the same legal framework which had been applied in practice in the treaties both preceding and post-dating it. The rules were that since Indian nations and settler nations stood to each other as distinct peoples, the code governing their relationship was International Law. Any modification of that relationship had first to be consensual, and second to be by means of treaty, as the accepted method of signifying agreement between two nations. The underlying premises of these rules were the political fact, and the legal principle of Native title and sovereignty over the soil. These premises applied not just to the Mohegan nation, but to all of the Indigenous peoples who had been, or would be colonised by the British imperial machine.

The next affirmation of this legal framework came in legislative form: The Royal Proclamation of 1763 which marked the conclusion of the 7 years war with France. The Proclamation was grounded politically in the growing realisation "that continued white expansion [westward] not only might, but would exasperate the Indians into renewed fighting"(19). Thus the Secretary of State for the Southern Department stated bluntly that British policy, up until now applied on a nation by nation basis, would henceforth be applicable on a grand scale to encourage "...the Preservation of the intoned Peace and Tranquility of the Country against any Indian Disturbances."(20)

A further factor was that Indian alliance during the Seven Years War, which was crucial to British victory, could be assured only in a watertight guarantee of the framework of Indian rights discussed above.(21) Thus Sir William Johnson was convinced that this might be achieved by means of:

> ...a solemn public treaty to agree upon clear and fixed boundaries between our settlements and their hunting grounds so that each party may know their own and be a

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19. Op. cit., Jones p. 46 (emphasis added).

20. Secretary of State for Southern Department to Lords of Trade, May 5, 1763; in Cumming and Mickenberg, Native Rights in Canada (2nd) (1972) p. 95.

21. Op. cit., Jackson at p. 18.

> mutual protection to each other of their respective possession.(22)

Indian territorial integrity was thus comprehensively affirmed and guaranteed in Part IV of the Proclamation which provides:

> Whereas it is just and reasonable and essential to our interest and the security of our Colonies that the several Nations or Tribes of Indians, with whom We are connected and who we under Our Protection should not be molested or disturbed in the Possession of Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, as their Hunting Grounds;

The wording was carefully chosen. Once again 'Indian Nation' terminology is used, an affirmation of the legal equality mentioned in the Mohegan's case. The statement that such a guarantee is "essential to Our interest" underscores the fact that the Proclamation, though unilateral in form, was in substance a simple affirmation of the consensual framework which had been built up in the past, particularly between the British and the Iroquois. Much of the content of the Proclamation had in fact already been mapped out by treaty with the Iroquois. The Proclamation affirmed that to breach that framework would have been both illegal and to borrow the words of Strong J., "would have proved most burdensome to the colonies."(23)

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22. Ibid, at p. 19, Sullivan; Papers of Johnson II 879; quoted in ibid., at p. 19.

23. Op. cit., St. Catherine's Milling.

Finally, the Crown does not assert that the Indians are British subjects. Instead, the Crown claims only to be "connected" with the "Nations or Tribes." Nor does it necessarily conflict with the claim that Indian territories are "Parts of Our Dominion and Territories." This issue, as we shall see, is fully dealt with in the decisions of Chief Justice Marshall.

The Proclamation affirmed other parts of the legal framework of white/Indian relations as well. White settlement west of the proclamation line or outside the boundaries of the new colonies of Quebec, East Florida, West Florida and the Hudsons Bay Company territory was prohibited.(24)

Secondly, all private purchases of Indian lands, whether inside or outside the boundaries of the colonies, was strictly prohibited. Instead the accepted principle of cession by treaty to the Crown was affirmed as the process whereby land could be acquired for settlement.

> We...strictly enjoin and require that no private person do presume to make any private purchase from the said Indians, of any Lands reserved to the said Indians.... But if, at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us in OUr Name, at some Public Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively.(25)

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24. Ibid, Paragraph 2 of Part IV.

25. Paragraph 4.

The final affirmation "in law" of Indian title and sovereignty came after U.S. independence in the form of a series of seminal decisions of the U.S. Supreme Court headed by Chief Justice Marshall. These decisions were handed down between 1810 and 1832 at a time when the power dynamics between settler governments and Indian nations had already begun to change.

Three of these cases have already been referred to in Part I, though from the perspective of their impact as subsequent developments in modern International law rather than domestic law.(26) The following analysis approaches the cases from a perspective which gives greater emphasis to their place as the final statement in the construction of a political and legal framework within which to express the rights of coloniser and colonised; a process which began at the point of contact and was already two centuries old. Since later decisions and later judicial interpretations of the Marshall cases are disregarded a irrelevant for present purposes, it is submitted that conclusions which differ from those in Part I are justified.

A second point relates to the relevance of these American decisions to the remaining British colonies

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26. Johnson v. McIntosh (1823) 21 U.S. (8 Wheat) 543; Cherokee Nation v. Georgia (1931) 30 U.S. (5 Pet) 1; Worcester v. Georgia (1832) 31 U.S> (6 Pet) 515. See footnotes 5 to 15 and accompanying text. In a very real sense it is difficult to divorce International from domestic law in the area of Native Rights since the latter is so clearly grounded in the former. Indeed this was the point made by Commissioner Harsmanden in the Mohegan case (supra).

(particularly for the purposes of this discussion; Canada and New Zealand). Are they evidence of the development of a uniquely American law of Indian rights, or did they affirm the precepts of British colonial law? Strong J. in the Supreme Court of Canada decision in St. Catherines Milling(27) makes it clear that these decisions were good law in the British territories as well:

> The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception trace its origin to a date anterior to the revolution and recognize it as a continuance of the principles of law or policy as to Indian titles then established by the British government...."(28)

The case of Fletcher v. Peck(29) concerned a conflict between land patents issued by the state of Georgia and the unextinguished Indian title of certain tribes inhabiting the area. Chief Justice marshall for the majority avoided the issue completely and would be drawn to state only that Indian title was not necessarily repugnant to the seisin in fee of Georgia.(30) Justice Johnson in dissent however

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27. Op. cit. St. Catherine's Milling.

28. Ibid. at 610.

29. (1810) 10 U.S. (6 Cranch.) 87.

30. Ibid, at 143.

approached the facts using the framework of Indian title and sovereignty which had been consistently utilized up to that point, and which would later be taken up by Chief Justice Marshall himself. "[T]he uniform practice of acknowledging their right of soil by purchasing from them, and restraining all persons from encroaching upon their territory makes it unnecessary to insist upon their right of soil." As to Indian sovereignty he concluded "innumerable treaties formed with them acknowledge them to be an independent people."(31) Colonisation imposed but one limitation on their inherent sovereignty and title, a limitation which articulated as well the interest of the states in tribal territory:

> Unaffected by particular treaties, [that interest] is noting more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets, and the limitation upon their sovereignty amounts to the right of governing even persons within their limits except themselves.(32)

Thus, to the extent that it was discussed at all, the accepted framework of Indian rights was affirmed in unequivocal terms.

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31. Ibid, at 146.

32. Ibid, at 147.

The second case to discuss the status of Indian title was Johnson v. McIntosh(33) Again the facts turned on a conflict as to title; this time between speculators who had purchased directly from the Illinois and Piankeshaw nations, and others who had subsequently taken title from the U.S. The U.S. title had its root in a treaty of cession purporting to transfer the land without reservation as to any previous transfers. The Chief Justice quickly dispatched the primary issue. In essence he held that the internal land tenure systems of the particular Indian nations in question were beyond the reach of any U.S. Court; that the speculators took only what title the Indians chose to give; and that if the Indians subsequently annulled those grants by a later absolute cession of the same lands to the U.S., they were at liberty to do so.(34) Such a conclusion affirmed Illinois and Piankeshaw internal sovereignty at least.

In attempting to provide a comprehensive analysis of settler title in the U.S. however, Marshall went beyond the bounds of the specific facts at issue. For this purpose he formulated and applied the doctrine of discovery.

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively

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33. (1823) 21 U.S. (8 Wheat.) 543.

34. Ibid, at 590.

> acquire.... But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflict in settlement, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consumated by possession. (35) (emphasis added)

Thus this doctrine was primarily a means of regulating relations between the colonial powers. The title which Britain took was good only against other contenders. It did not purport to extinguish Indian title. It did however create a correlated limit on Indian sovereignty in that the nations were precluded from ceding title to any but the discoveror.(36) Marshall states this proposition in the following 'enigmatic'(37) terms:

> In the establishment of these relations, the rights of the original inhabitants were in no instance, entirely disregarded; but were necessarily to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were

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35. Ibid, at 570.

36. Ball in Constitution, Court, Indian Tribes found in [1987] Am. Bar Foundation Research Journal 1 at 26 argues that even this restriction was in fact illusory. The tribes were free to transfer lands to purchasers other than agents of the 'discovering state', but could transfer only the Indian interest. This conclusion is confirmed by the decision in Johnson v. McIntosh. Thus argues Ball, the restriction is no more than an 'abstract tautology'.

37. Op. cit., Jackson 44.

> necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it(38) (emphasis added)

The restriction on sovereignty is apparently stated in broad terms, though without reference to any subject save the restriction on alienation. It would be fair to conclude therefore that the only aspect of Indian sovereignty which was 'necessarily diminished,' was that of free alienation of lands. No other aspect of Indian sovereignty was at issue in the case and none was mentioned even hypothetically. Aspects of Indian sovereignty would become central issues in the next two decisions and so it must be assumed that these are authoritative on the broader question of what other limits there were.

The Chief Justice then makes a remarkable confession as to the difficulty of rationalising any restrictions at all on Indian sovereignty (even in the limited area of alienation of title), and as to the real basis for his rule:

> Every rule which can be suggested will be found to be attended with great difficulty... However extravagant the pretension of converting the discovery of an uninhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable

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38. Ibid, at 574.

> of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people it may perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.(39) (emphasis added)

In a manner which foreshadowed the judicial approach of the second half of the 19th century and beyond, Chief Justice Masrshall admitted that when all else failed, the pretense of the rule of law could be dropped and the courts were willing to give legal effect to the 'might' of the coloniser. He clearly felt uncomfortable in his admission. As was noted at the beginning of this discussion of the Marshall decisions, the power dynamics as between coloniser and colonised were beginning to change. Marshall's admission is the first sign of that change; the facts surrounding the two subsequent cases of Cherokee Nation and Worcester show that political equality could quickly become political and military subjugation. Though the above passage begs the opposite conclusion, Marshall eventually recants his confession, as we shall see, and refuses to accept that the evolving political and military dominance of the settler government could affect the essential framework of Indian rights worked out when relations were far more equal.

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39. Ibid, 591-2.

The next Supreme Court decision in Cherokee Nation v. Georgia (40) involved a headlong clash between the sovereignty of the Cherokee Nation and the designs of the state of Georgia upon Cherokee lands. Georgian had by legislation attempted to annul the Cherokee constitution and apply Georgian laws in Cherokee territory. As noted in Part I, the Cherokee sought, in reply, to invoke the original jurisdiction of the Supreme Court under Article III of the Constitution. They claimed status as a foreign state, and sought to enjoin these incursions on their sovereignty.

The decision is curious for the way in which the Court divided on the issue. Two judges rejected outright the political and property rights of the Cherokee; Two considered that they were indeed a foreign state; The remaining two (including Chief Justice Marshall) opted for the middle ground and declared the Cherokee to be a "domestic dependent nation." (41) Thus the "foreign state" advocates on the Court were a minority by four to two, but a majority (again by four to two) affirmed that the Cherokee were nevertheless a distinct political entity exercising a measure of sovereignty.(42) Chief Justice Marshall stated

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40. (1831) 30 U.S. (5 Pet.) 1.

41. Ibid, at 17.

42. Op. Cit, Sanders, Indian Self Government in the U.S.

the paradigm within which Cherokee sovereignty was necessarily limited in the following terms:

> Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by the voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian."(43)

The title which he says is asserted by the U.S. against Cherokee will, is that which was attained by discovery as discussed in Johnson v. McIntosh. The only impact upon Indian rights set out in that case was the restriction upon alienability of land. Is Cherokee sovereignty restricted in any other way? Marshall states also that they are in a state of pupillage and that they are wards of the U.S. The notion of the U.S. exercising a protectorate function is certainly not new. Indeed it predates the U.S. and was exercised as well by Britain as a treaty obligation owed to the Iroquois. For all of that, the Mohegan case makes it clear that British protection was not inconsistent with Indian sovereignty and implied no dimunition of it (except perhaps the Treaty requirement of loyalty and good faith - but such promises were consensually made in any event).

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43. Supra, Cherokee Nation at 17.

Decisions of the era beyond the Marshall cases have seized upon the language used here as providing justification for some of the most unbelievable abuses of native people and their rights. But, it is submitted these late interpretations are inconsistent with what Marshall intended, they are inconsistent with the historical context in which Cherokee Nation fits, and they are inconsistent with the second and final of the Cherokee cases: Worcestor v. Georgia (44)

The Worcestor decision has, rightly, been described as "the culmination of an evolving doctrine on Indian rights and is properly to be regarded as the centrepiece of that law."(45) It concerned a further attempt by the Georgian legislature to legislate for the Cherokee territories. In this instance, Worcestor, a missionary was convicted pursuant to legislation making it illegal for whites to enter the territories of the Cherokee without authorisation from the Governor of Georgia. The real agenda for this legislation was to keep missionaries out of Cherokee country because it was believed that they were responsible for formenting Cherokee nationalism. Thus, although the case is often described as a conflict between state and federal prerogtive; the real conflict was Indian/white.

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44. (1832) 31 U.S. (6 Pet.) 350.

45. Op. cit., Jackson at 48.

Chief Justice Marshall began by reaffirming the 'doctrine of discovery' - but made it clear, in the following terms, that, bar the restriction on alienation referred to in Johnson v. McIntosh, none of the pre-existing rights of the Indian nations were affected:

> This principle [of discovery]...was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers but could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.(46)

Thereafter the Chief Justice expressly repudiates any notion of conquest, an idea with which he had been toying in Johnson v. McIntosh:

> The extravagant and absurd idea that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.(47)

The historical fact was that Britain, and still later, the U.S. were too busy fighting off other colonial pretenders to do other than conciliate with the Indian nations whose allegiance they desparately needed.

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46. Ibid, at 544.

47. Ibid, at 544-5.

In this way the sovereignty of the Cherokee, and indeed of all the Indian nations, was recognised as historical and present fact and reaffirmed as historical and present law.

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the simple exception of that imposed by irresistable power, which excluded them from intercourse with any other European potentate...The very term 'nation', so generally applied to them, means "a people distinct from others...." The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves.... WE have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense.(48)

Finally, in case it should appear that this conclusion contradicted his 'domestic dependent nation' formulation in Cherokee nation, Marshall set out just what should be understood by the term "dependent." He traced the provisions of Article III of the Treaty of Hopewell (with the Cherokee) acknowledging the Cherokee to be under the protection of the United States and no other, and noted that this was in fact common colonial practice.

> The stipulation is found in Indian treaties generally. It was introduced into their treaties with Great Britain;...its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation. The Indian perceived in this protection only what was beneficial to themselves - an engagement to punish agressions upon them. It involved practically no claim to their lands, no dominion over their persons. It merely bound the nation to the British Crown as a <u>dependent</u> ally, claiming the protection of a powerful friend and neighbour, without involving a surrender of

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48. Ibid, 559-60.

> their national character. This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government nor the Cherokees understood it otherwise.(49)

Thus the Cherokee "dependent" status had its source in treaty promises of protection which were properly international obligations. As such it could not be understood to effect a dimunition of Cherokee sovereignty and was in essence consensual in character. Accordingly the Cherokee situation was similar to that of smaller European states:

> The settled doctrine of the law of nations is that a weaker power does not surrender its independence - its right to self government - by associating with a stronger and taking its protection.... Examples of this are not wanting in Europe

2.2 Conclusion

Worcestor v. Georgia effectively synthesized all that had gone before by encapsulating what might best be termed the 'colonial paradigm' utilized throughout the period of initial contact. By treaty, by colonial legislation and by the jurisprudence of the colonial courts, Indian title and Indian sovereignty was repeatedly affirmed and reaffirmed. Title and sovereignty were the two fundamental components of that paradigm. They were the bases upon which white settlers were accepted on North American soil and they formed the focus of Indian/white relations until the 1830s. As such they were, as Chief Justice Marshall makes plain,

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49. Ibid, at 551-2.

"the Law." Subsequent decisions and legislation attacked this paradigm, unilaterally abrogated it, attempted to discredit it or ignore it - yet its enforceability as a statement of indigneous rights is clear and irrefutable. Its terms are as precise and articulate a statement of Native demands in North America today as they were during the times when the paradigm was first constructed. Nor is this colonial paradigm restricted in its application to North America. At the very least, it is a statement of British colonial law and so applied to all of the peoples colonised during the British expansion. When the Imperial machine arrived officially in New Zealand eight years after Worcestor v. Georgia, the same rules were applied.

2.3 New Zealand and the Treaty of Waitangi: Maori Sovereignty and Pakeha Sovereignty.

The process whereby the formal colonisation of New Zealand began in 1840 must be seen, in law, as an extension of the process of British expansion into North America. To view white settlement in New Zealand as an isolated example of British colonialism in the South Pacific, or even for that matter Australasia, is to disregard two centuries of the development of colonial law and practice.

That law and practice, discussed extensively above, governed initial British relations with the Maori as it did with the Indian nations. Once again this is made clear in the events preceding and surrounding the treaty-making process in New Zealand. It was put beyond doubt in the

decision of the full court of the New Zealand Supreme Court in R. v. Symonds.(50) This was one of the few decisions of the New Zealand Courts of the Contact era which touched on issues of aboriginal title to land. Ironically the facts of the case repeat those of Johnson v. McIntosh, and, as in that case, the Maori interest was not represented in argument. Nevertheless, Chapman J. makes it abundantly clear that the colonial paradigm with its framework recognition of Native title and Native sovereignty, applied as much to New Zealand as it did to the North American continent wherein it was first formulated:

> "The intercourse of civilised nations, and especially of Britain, with the aboriginal Natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established principles of law applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our Colonial Courts and the Courts of such of the United tates of America as have adopted the common law of England, have invariably affirmed and supported them so that at this day, a line of judicial decisions, the current of legal opinion, and above all, the settled practice of the colonial Governments, have concurred with certainty and precision what would otherwise have remained vague and unsettled. These principles flow not from what an American writer has called "the vice of judicial legislation". They are in fact to be found among the earliest settled principles of law; and they are in part deduced from those higher principles, from charters made in conformity with them acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon." (emphasis added)(51)

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50. (1847) [1840-1932] NZPCC 382.

51. Ibid., at 388.

Chief Justice Martin in the same decision refers to these principles as the "general law...of the British colonial empire."(52) Indeed as evidence thereof he quotes and adopts none other than Kents' Commentaries on American Law.(53) Finally, in terms which might have been lifted directly from the decision of Chief Justice Marshall in Johnson v. McIntosh, he describes the nature of Maori title:

> The Natives are admitted to be the rightful occupants of the soil with a legal as well as just claim to retain possession of it and to use it according to their own discretion, though not to dispose of the soil at their own will, except to the government claiming the right of pre-emption.(54)

Quite apart from jurisprudence which confirmed the "colonial paradigm" after the events, formal British acquisition of the islands of New Zealand was expressly premised upon a recognition of both Maori title and Maori sovereignty. As in North America, to do otherwise would have been ludicrous. The subsistence of both title and sovereignty in the tribes was so obvious as to be unquestionable. In the early 1830's when unofficial white settlement began in earnest, there were only 300 non-Maori

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52. Ibid, at 893.

53. Ibid, Vol. 3 at p. 379.

54. Ibid.

in New Zealand. Even by the time of formal acquisition in 1840, this had risen to only 2000. By contrast the Maori population at the time was estimated at between 150,000-250,000! In the already quoted words of Chief Justice Marshall "...it was an extravagant and absurd idea that the feeble settlements on the sea coast..." could have snatched title and sovereignty from the Maori.(55)

Thus by the Murders Abroad Act of 1817(56) concerning the punishment of crimes committed by British seamen 'abroad', the Islands of New Zealand were expressly considered to be 'not within His Majesty's dominions.' The Australian Court Act of 1828(57) provided that courts in the colonies of New South Wales and Van Dieman's Land may try offences, "committed in the islands of New Zealand...not [being] subject to His Majesty or to any European state."

In a memorandum from Lord John Russell (of the Colonial Office) to Lord Palmerston concerning claims of British sovereignty by a company formed for the purpose of colonising New Zealand (58) the former wrote:

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55. Supra, Worcester v. Georgia

56. 57 Georgia III cap. 53 preamble.

57. 4 Georgia IV, cap. 96, s. 4.

58. The New Zealand Company claimed that Britain had secured sovereignty over New Zealand by discovery and that colonisation should occur immediately.

> If these solemn Acts of the Parliament and of the King of Great Britain are not enough to show that the pretension made by this company on behalf of Her Majesty is unfounded, it might still further be repelled by a minute narration of all the relations between New Zealand and the adjacent British colonies, and especially by the judicial decisions of the Superior Courts of those colonies. It is presumed however, that, after the preceding statement, it would be superfluous to accumulate arguments of that nature....(59)

In 1835, a coalition of Chiefs from the northern portion of the North Island issued a Declaration of the Independence of New Zealand, declaring New Zealand to be a sovereign and independent state. This was done largely at the urging of Busby, the official 'British Resident' who feared French designs on New Zealand. The Declaration had the signatures of 35 chiefs appended to it, all of whom belonged to the Nga Puhi confederation of tribes (whose role in New Zealand during colonisation was similar to that of the Iroquois) and who barely represented even a significant minority of the Maori population of New Zealand. As such the Declaration could not have been effective beyond the boundaries of the Nga Puhi. Of course there was no need for such statements. The NgaPuhi were as with all the other tribes and confederations, sovereign in fact; and were, by Maori custom and British colonial law, recognized to be

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59. 18 March 1840: Note that though the Treaty of Waitangi was signed a month earlier on 6 February, news of this did not reach England until October: Passage quoted in Re Kauaeranga (1877) 4 Hauraki M.B. 236.

sovereign in law. The Declaration did no more than provide further evidence of the truth of these two propositions.

By 1839, increased pressure from a burgeoning settler population, tales of woe and social disorder from James Busby(60), and the urgings of the New Zealand Company led to the dispatching of Captain Hobson from London, with instructions to enter into a treaty of cession with the Maori tribes of New Zealand. His instructions were provided by Lord Normanby,(61) the terms of which affirm yet again that the colonial paradigm applied to the Maori, "whose title to the soil, and to the Sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government."(62)

Later in those instructions Lord Normanby qualifies his understanding of Maori sovereignty, in a manner often portrayed as fatal to the thing itself:(63)

> I have already stated that we acknowledge New Zealand as a Sovereign and independent STate, so far at least

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60. Oxford New Zealand History (1984). These were according to Anne Parsonsonn, grossly overstated .

61. 14 August 1859 in; McIntyre and Gardner, Speeches and Documents on New Zealand History (1970) p. 10.

62. Ibid., at p. 11.

63. See e.g. Prendegast C.J. in Wi Parata v. Bishop of Wellington (1877) 3 N.Z. Jur. (N.S.) S.C. 72 at 77.

> as it is possible to make that acknowledgment in favour of a people composed of numerous, dispersed, and petty Tribes, who possess few political relations to each other, and are incompetent to act as even deliberate in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown.(64)

Of course, his recognition of the whole of New Zealand as a unitary state, if that was his intention, represented a fundamental misconception of the nature of Maori society. As was the pattern of recognition in North America, it was the tribes (or nations as they are referred to in North America) which were sovereign, and which were recognized as such. To consider the whole of New Zealand to be subject to a single sovereign entity or power, was as ridiculous as making that same claim in respect of North America. Nor were the tribes dispersed and petty. It took ten thousand imperial troops to subdue the Waikato confederacy in the 1860s! The notion that sovereignty over the whole was divided amongst various nations or tribes was therefore not new. It had, as noted, been the pattern of recognition in the U.S. and Canada. Thus Lord Normanby's "qualification" must be understood not as diminishing the notion of sovereignty in anyway - but as recognizing its division between the tribes, and as recognizing that reconstruction of that divided sovereignty would represent the sum of available sovereign authority in New Zealand.

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64. Supra, Speeches and Documents at 12.

On the 6th of February 1840, Captain Hobson entered into a treaty with 45 northern chiefs. The treaty became known as the Treaty of Waitangi, after the place where those chiefs signed it. In the months following, nearly 500 more adhesions were secured from many (but not all) of the leading chiefs of the North Island, and the northern portion of the South Island.

The Treaty of Waitangi was a formal affirmation of the colonial paradigm - of Maori sovereignty and title - as the framework Within which colonisation of New Zealand would be allowed to occur. In form, it resembled all of the British and U.S. Treaties entered into with Native people in Eastern North America. Much of the familiar language of British protection was used in this treaty as well. In substance however, the Treaty of Waitangi contained none of the specificity and detail of the North American treaties. There was no provision as to resolving a conflict of laws, as with for example, the Treaty of Hopewell. There was no provision as to the maintenance of peace between coloniser and colonised; as to the cession of specific lands; or as to the delineation of Maori territories. Instead the Treaty provided no more than a general framework within which these details might be later worked out. In substance, the Treaty of Waitangi resembled the Royal Proclamation of 1763 - though the former was consensual in form, and the latter unilateral. Both were intended to establish a comprehensive framework for ordering relations between coloniser and

colonised. This was to be based upon an equally comprehensive guarantee of what later came to be known as 'aboriginal rights'. The terminology has varied but he substance ha remained constant: Aboriginal title and aboriginal sovereignty.(65)

An understanding of the specific terms of the Treaty of Waitangi is crucial to understanding the extent to which the 'colonial paradigm' was imported with British colonisation to New Zealand. Accordingly it is worthwhile spending some time analysing the complexities and ambiguities of this seemingly simple document.

The Treaty consists of three articles preceded by a preamble. Its complexity is attributable solely to the fact that it was drafted in two versions, one in English, the other in Maori. Neither is a direct translation of the other. Though until very recently, the English text has been treated as the primary reference point it was in fact the Maori text which was signed by Hobson and by 500 of the 539 chiefs who acceded to its terms. For this reason, the current understanding as indicated by the Waitangi

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65. The fact that these instruments so closely resemble each other is testimony to the further fact that they belong to the same body of law and develop from identical processes though on opposite sides of the world. The essential indivisibility of colonialism and therefore of colonial law is a notion which is central to the arguments being set out in Part II.

Tribunal(66) is that where the texts cannot be reconciled by reference to each other, the Maori should be "treated a the prime reference" in view of its "predominant" role in securing signatures(67) Such a conclusion must have been consistent with Maori understandings in 1840.

By Article I of the English text the chiefs ceded to the Crown -

> ...absolutely and without reservation all the rights and powers of sovereignty [which they] respectively exercise or possess....

By contrast the Maori version of Article I did not cede even a Maori equivalent of sovereignty. Instead it ceded a thing called Kawanatanga. This was a word invented by the missionaries (who in fact translated the Treaty into Maori), and used extensively in the 1820 Maori translation of the

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66. A tribunal with recommendatory powers only, established under the Treaty of Waitangi Act 1975. The tribunal's mandate is to hear claims by Maori that their rights under the Treaty have been breached by virtue of s. 5(2) of the Act, it has further authority to

> "determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by differences between them."

Much more will be said later about the workings and decisions of the tribunal which has been instrumental in the revival of the colonial paradigm in modern New Zealand.

67. Report of the Waitangi Tribunal in re the Motunui Claim (1983) WAI 3 at para. 10.1.

Bible. Its base is Kawana - a simple transliteration of "governor." It was used in the Bible to describe the position and authority of such notable figures as Pontius Pilate. For the moment let us assume that "governorshp" not sovereignty was ceded in the Maori text and that the substance of the term is not as yet clear.

In return for whatever was ceded in Article I, the "Chiefs and Tribes of New Zealand" would be protected, according to Article II, in

> ...the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess....

This amounts to a simple enough guarantee of all the rights fitting under the rubric of aboriginal title.

Article II of the Maori text differs in two respects - one relating to the list of things protected, the other and more important one in the context of this discussion, relating to the extent of that protection.

> As to the first, while the English text is centred around "real estate rights", the Maori refers also the protection of intangible things. The guarantee of "o ratou taonga katoa", or all things treasured by the ancestors has been taken to include language, custom and religion.(68)

As to the extent of protection of these things, the Maori text did not guarantee an equivalent of "full, exclusive and undisturbed possession." It guaranteed "te

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68. Report of the Waitangi Tribunal in re Te Reo Maori Claim (1986) WAI 6 at 4.3.5-9.

tino rangatiratanga." An understanding of this difference is critical to a clear perception of the framework being set up by the Treaty. Rangatiratanga was also a term coined by the missionaries. Its base is rangatira meaning chief. The addition of the suffix -tanga abstracts this, denoting thereby, chiefly power, authority, prerogative or domain. Its biblical usages confirm this interpretation: The phrase "The kingdom come" in the Lord's prayer is rendered "kia tae mai Tou rangatiratanga." In the same way the notion of Roman imperial authority is rendered "te rangatiratanga o Roma." Thus while it is difficult to define either Kawana-tanga or rangatiratanga precisely, the representation of Pilate's authority as Kawanatanga and the superior Roman authority as Rangatiratanga gives one a sense of the relative importance of that which was ceded by Article I, and that which was retained by Article II of the Maori text.

What can be stated with precision, if one attempts to read between the two texts, is that the "sovereignty" ceded by English Article I was strictly limited in its scope by the "rangatiratanga" retained to the Maori in Article II of the Maori text.

In a recent report, the Waitangi Tribunal grappled with the relationship between Pakeha sovereignty and Maori rangatiratanga:(69)

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69. Report of the Waitangi Tribunal in re the Orakei Claim (1987) WAI 9.

> 11.5.2 The meaning of tino rangatiratanga has caused us much trouble. There is no precise English equivalent and, it is used in the treaty in an 'un-Maori' manner. To give it the meaning both parties would have understood, we would render it as full authority....
>
> 11.5.6 The Maori word for authority is mana. Rangatiratanga and mana we have said are "inextricably related words" (Te Ati Awa Report (1983) 10.2). In the Manukau Report (1985: 8.3) we related that 'mana' had been used in the earlier Declaration of Independence of New Zealand to describe "all sovereign power and authority" but Williams [the missionary responsible for translating the Treaty] was careful to avoid using 'mana' for 'sovereignty' in the Treaty, for due to its spiritual and highly personal connotations no person could cede it. Thus he used 'Kawanatanga' for 'sovereignty' and 'rangatiratanga' for the Maori authority though to Maori, mana would have described both. Kuini mana [crown authority] for one (as was used colloquially), Mana Maori [Maori authority] for the other, and Mana Motuhake to describe the autonomous character of the latter
> (emphasis added)

The second part of Article II reserved to the Crown exclusive authority to purchase lands which the tribes wished to sell. By Article III, the least controversial of the three articles, the Maori were collectively and individually guaranteed all the rights and privileges of British subjects.

Now it is possible to set out with some precision the salient points of the framework of Maori/Pakeha race relations which was being established by the Treaty of Waitangi.

Firstly, like the Royal Proclamation, the Treaty recognized and guaranteed Maori title to the whole of New Zealand. It also guaranteed tribal territorial integrity in

the Article II phrase "exclusive and undisturbed possession."

Secondly pre-existing Maori sovereignty was clearly recognized in both the form of the Treaty and in the specific provisions of Article I. Moreover, that sovereignty was modified by Article I but it was not extinguished. In essence a right to internal Maori self-government - Mana Motuhake - remained intact and was protected by the terms of Article II (Maori text). In return for that protection, what remained of the sovereignty rubric was transferred to the Crown pursuant to Article I. This so-called 'sovereignty' amounted to the exclusive right to exercise governmental powers in respect of the growing settler population. As was expressly included in Article II, it also reserved to the British Crown the exclusive right to purchase land held by the tribes.

Given two centuries of colonial law and practice - the affirmation of Native title and sovereignty in countless treaties, in the Royal Proclamation, and in judicial pronouncements in North America - it is hardly surprising that the Treaty of Waitangi was a simple restatement of that same colonial paradigm in respect of New Zealand. There is ample evidence that this was how the Treaty was understood at the time by the chiefs.(70) The instructions of Lord

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70. Op. cit., Orakei Report at 11.5.19.

Normandy make it equally clear that this was the intention of the British Crown.

There has recently been a great deal of argument as to whether the Treaty of Waitaingi was in fact the instrument whereby the British Crown formally 'acquired' New Zealand.(71) Principally, the events which have led historians and lawyers to question that effectiveness of the treaty are as follows. On January 14, 1840 (nearly a month before the Treaty was signed) Governor Gipps of New South Wales swore in Captain Hobson both as British Consul to New Zealand and as Lieutenant Governor of New Zealand. On January 19, the Proclamation of the 14th was published declaring in part that the jurisdiciton of the colony of New South Wales extended to New Zealand(72). These and similar proclamations are cited in order to show that the Treaty was really irrelevant to the British acquisition of sovereignty in New Zealand. That acquisiton was effected by unilateral declaration and not consensually.

Two factors make such analyses both fruitless and irrelevant. Firstly, upon what basis could a mere unilateral declaration from Australia rob the Maori of their

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71. Williams, The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi? (1985) 2 Australian Journal of Law and Society 41; and Kelsey, Legal Imperialism and the Colonisation of Aotearoa

72. Ibid, Williams at 42-5.

sovereignty? There had been no conquest. And Chief Justice Marshall makes it plain that British "discovery" did no more than pre-empt the designs of other European powers - it did not, and could not derogate from the pre-existing rights of the Indigenous peoples. Accordingly the New South Wales proclamations may be understood as establishing British pre-eminence as against other contenders but they could not affect the relationship between the British Crown and the Maori people. That had still to be worked out in negotiaton between the parties. Such a conclusion accords both with logic and common sense.

The second point relates to an earlier conclusion that the Treaty of Waitangi did no more than affirm a pre-existing and legally enforceable framework of rights. It follows from this that even if it were conceded that the Treaty was irrelevant to British acquisition, the rights expressed in it would be unaffected since they have independent enforceabilty in any event. Cherokee title and sovereignty was, according to Marshall <u>confirmed</u> by the Treaty of Hopewell, not created by it. The same reasoning must apply with equal force in New Zealand.

2.4 Conclusion

The promises made (on both sides) in the Treaty of Waitangi, like those signed by the Iroquois, Mohegan, Deleware or Cherokee, encapsulated the political realities of the contact period. From these came naturally the legal norms which have been described and discussed in the

preceding pages. Without exception, that reality was at least political equality to and independence from the colonies. In the cases of the Iroquois or the Maori, the years of initial contact were characterised by marked political and military superiority over fledgling settler administrations. How could these realities not be reflected in 'the law' and the legal processes established during these times to govern relations between the two groups?

In the years that followed, the power dynamics between them began to change so that by the 1830's in the U.S., and the 1860's in New Zealand these 'fledgling' settler administrations had become dominant in the equation. The fate of the colonial paradigm during this time is the subject of the next section. Suffice it to say that Maori and North American Native peples continued to rely on that paradigm as the recognition of their rights and as the focus for the next 100 years of military and later political struggle.(73)

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73. This was made worse in New Zealand by a complete lack of legislative and jurisprudential affirmation of the paradigm.

3. THE MYTHOLOGY OF CONQUEST; COLONIAL PARADIGM BECOMES COLONIAL PARODY

By the 1830's in the U.S. and by the 1860's in Canada and New Zealand the colonial paradigm was under threat. Though the framework of Native title and Native Sovereignty had been firmly entrenched in the law, it became increasingly apparent that the power dynamics were changing and that colonial governments and courts were beginning to exercise a new-found hegemony as definers and redefiners of this 'law'. Law, the development of which had once been a bilateral and consensual process, became increasingly a phenomenon unilaterally imposed upon Indigenous peoples in all three jurisdictions. The political reality of the time was one of settler populations and administrations growing in size, in power and in arrogance.

In the 100 years which was to follow, this arrogance characterised the entire development of the Native rights framework. Meanwhile Maori and Indian peoples alike were battered by disease, war, social dislocation and increasing marginalization. By the end of the 19th century, popular mythology in the three countries was that Native peoples would eventually disappear completely. By these means, Native policy moved from the centre-stage of colonial politics at the beginning of this era, to the periphery of the national consciousness by the end. In the words of James Youngblood Henderson: "This is a journey to the

darkside of the law - a failure of the rule of law in British society."(74)

The jurisprudential and legislative subjugation of Native peoples and the colonial paradigm was achieved and rationalized by means of a new "mythology of conquest." Of course there had been no real conquest. The colonial paradigm was premised upon the idea that Native/white relations were worked out consensually. In effect that history was substantially rewritten during this period in order to provide a justifying context within which to promote current policies. Thus the Courts and the legislators, sometimes expressly and sometimes more subtlety, created a conquest. Title that had been formerly unquestioned now depended on the 'grace and favour of the Crown.' 'Sovereign Indian nations', became overnight, mere savages whose sovereignty had never been recognized. In some instances, particularly in the United States, the Courts rationalized unreviewable federal plenary power through a strictly legal concept of conquest. In most cases however, conquest was merely implied as the unquestioned reality which allowed arbitrary and unilateral governmental abrogation of Native title and sovereignty. Judicial decisions of the period almost without exception read like the pronouncements of a conquering power. The terminology

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74. Henderson, Aboriginal Rights in Western Legal Tradition in Bold and Long, The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (1985) at p. 214.

used and the doctrines advocated reflect a depth of arrogance and racism which, when compared with earlier decisions, is breathtaking. The following discussion traces the development of that mythology, and its effect on the colonial paradigm.

3.1 The United States

3.1.1 Removal, Allotment and Federal Plenary Power

The first major attack on Indian territorial integrity came under the controversial Indian Removal Act of 1830. In fact the Act provided a sinister background to the Cherokee cases which were being concurrently argued before the U.S. Supreme Court. The policy of removing the Indian nations in the east to points west of the Mississippi was not a new one,(75) but this was the first time legislation had been resorted to in an effort to give effect to a broader policy of providing lands in the east for settlement. It was naively invisaged that the territorial integrity of the relocated nations could be guaranteed in perpetuity in permanently protected "Indian country" west of the Mississippi. The Act provided for "voluntary" removal and relocation, except that refusal to volunteer exposed the

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75. This policy was first accomplished by Treaty on a nation by nation basis from 1817 on: see generally, Sanders, Aboriginal Self Government in the United States (1985) (Institute of Intergovernmental Relations), pp. 1011.

particular nation to the threat of cessation of federal protection and the imposition of state law.(76) As the Cherokee found out in respect of Georgia, that would have meant immediate legislative termination of the Cherokee nation. In the end, and notwithstanding Marshall's vindication of Cherokee sovereignty in Worcestor v. Georgia, the Cherokee were subjected to the brutality and inhumanity of the removal policy. After securing a sham removal treaty with a small faction of the Cherokee in 1835, the Military carried out a forced removal of the whole Cherokee nation in 1838. In the 'trail of tears' which followed over 4000 Cherokee died. The Cherokee plight has, through history, come to symbolize the barbarity of the Removal policy. In truth it provides an apt symbol for this whole "conquest" period in the colonial history of the New World.

By 1869 the whole process of treaty-making, the consensual vehicle which underpinned the colonial paradigm was being questioned. In that year the Commissioner for Indian Affairs stated:

> A treaty involves the idea of a compact between two or more sovereign powers.... The Indian tribes of the United States are not sovereign nations capable of making treaties, as none of them have an organized government of such inherent strength as would secure a

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76. See generally Cohen, Hand Book of Federal Indian Law (2 ed.) (1982), pp. 81-2.

> faithful obedience of its people in the observance of compacts of this character.(77)

Within two years treaty-making had been formally abolished by Congress. The provision doing so was tucked away in the 1871 Appropriations Act. It provided

> ...that hereafter no Indain nation or tribe within the territory of the U.S. shall be acknowledged or recognized as an independent nation, tribe or power with whom the U.S. may contract by treaty.

Though it conceded that

> Nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.(78)

The wording used is somewhat contradictory. The first part of the section acknowledges that the ability to enter into treaties implies independence and apparently for that reason, prohibits future treaties. The second part however, acknowledges the earlier treaties to be valid - implying of course that the parties to those treaties <u>were</u> independent powers.

Whatever its contradictions, the effect of this section on the future of Native Rights was plain enough. Thereafter Indian law and policy would be given effect to by unilateral congressional fiat - a process in which Indians would have

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77. Ibid, at p. 106. Comm'r Ind. Aff. Ann. GGP, HR Exec. Doc. No. 1, 41st Cong. 2d Sess. 448 (1869)

78. 25 U.S. C. s. 71.

no formal role - and in most cases no informal role either. The colonial paradigm recognized no such Congressional power. Issues which affected the interface between Indian and settler governments were to be settled by agreement between the parties - not by imposition of one party's solution upon the other. Such paradigms appeared to be increasingly irrelevant.

In fact, the U.S. had, before 1870, an extensive history of legislative regulation, aspects of this interface. Foremost among these was the Constitutional provision of 1787 which gave congress the power

> ...to regulate commerce with foreign nations, and among the several states, and with the Indain tribes.

The Trade and Intercourse Acts passed between 1790 and 1834 were designed to control trade between the U.S. and Indian nations, and for that purpose to maintain the integrity of "Indian country."

Thus as U.S. Indian legislation developed during the contract era, it maintained as its sole concern, the external relations of the tribes with the U.S. and the individual states. No attempt was made to interfere with the internal workings of Indian governments.(79)

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79. Supra, Marshall C.J. in Worcestor v. Georgia

"Certain it is, that our history furnishes no example, from the first settlement in our country, of any attempt on the part of the Crown, to interfere with the internal affairs of the Indians" (at 457).

This was to change dramatically following the decision of the Supreme Court in Ex parte Crow Dog.(80) The case concerned an attempt to apply federal criminal law to a situation where an Indian had been charged with the murder of another Indian on a reservation. The Supreme Court held that federal jurisdiction had never been asserted in such circumstances and that the Courts, both federal and territorial, must therefore defer to the jurisdiction of the tribal justice system. The decision, though soundly based in the colonial paradigm, did not match the mood of the time. Congress retaliated two years later with the Major Crimes Act 1885, the first ever assertion of unilateral colonial legislative authority over the internal affairs of Indian nations. The Act specified seven major crimes (including murder) which, even if committed by an Indian against another Indian in Indian country, would become regulated by federal criminal law.

The Act was challenged the next year in U.S. v. Kagama.(81) The Supreme Court rejected the notion that the Major Crimes Act was beyond the legislative competence of congress. Both the imagery and the rationale adopted by Miller J. is telling.

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80. (1883) 109 U.S. 556.

81. (1886) 118 U.S. 375.

> These Indian tribes are wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights....From their very weakness and helplessness, so largely due to the course dealing of the federal government with them and the treaties in which it had been promised, there arises the duty of protection, and with it the power. This has always been recognised by the Executive and Congress and by this court whenever the question has arisen.(82) (emphasis added)

In a complete flip, the imagery used in Worcestor and the other contact cases is disgarded and the nations are reconceptualised as "lost societies without power, as minions of the federal government"(83). The case reads as though a conquest had occurred, though none is referred to. The 'tribes' (no longer 'nations') are weak and helpless according to the Court, and no other justification is needed for this newly asserted congressional power to unilaterally abrogate treaties and turn the colonial paradigm on its head. Chief Justice Marshall's articulation of the Cherokee as a "domesic dependent nation" (itself enigmatic), is reinterpreted by the Court. In the intervening fifty years, the nations had been relegated to "local dependent communities."(84) The duty of protection, described by

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82. Ibid, at 383-4.

83. Wilkinson, American Indians, Time, and the Law (1987) p. 24.

84. Ibid, at 382.

Chief Justice Marshall as an international obligation which did not strip the protected nation of the "right of government,"(85) became itself the justification for omnipotent federal power in Kagama.

In a final attack on the underpinnings of the colonial paradigm the Court dismissed the notion of Indian sovereignty:

> Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States or of the States of the union. There exist within the broad domain of sovereignty but these two.(86)

In this short decision, the Supreme Court set out the basic framework which was to dominate the conquest era. The denial of Indian sovereignty; the assertion of plenary and unilateral federal power; and the rationalizing of both of these premises through the use of incredibly racist and patronising images of Indian people and Indian life. This framework was almost the exact antithesis of the colonial paradigm. As will be demonstrated shortly, that same framework was utilized with equal effect in Canada and in New Zealand.

The next major initiative in the U.S. was legislative rather than judicial, but it was clearly motivated by the

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85. Supra, Worcestor v. Georgia.

86. Supra, Kagama at 379.

Kagama framework. In the General Allotment Act of 1887 title to reservations was individualized into family allotments in direct violation of the provisions of many treaties:

> "Section 5 of the [General Allotment] Act provided that title to allotments be held in trust by the United State for 25 years or longer if the President so desired. During the trust period encumberances or conveyances were void....
>
> Section 6...subjected the allottees to the civil and criminal jurisdiction of the state or territory in which they resided.(87)

By 1892 allotments could be leased(88), and in 1906 they became fully alienable notwithstanding the 25 year moratorium, provided that the alienor was "competent."(89) Reservation lands deemed to be "surplus" after families had been allotted land, was opened up for settler homesteading. By this means the integrity and cohesion of tribal lands was almost completely lost.

Wilkinson aptly describes the effect of the Allotment Act on the Indian nations in the following terms:

> Allotment and the other assimilationist programs that complimented it devastated the Indian landbase, weakened Indian culture, sapped the vitality of tribal legislative and judicial processes and opened most Indian reservations for settlement by non-Indians.

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87. Op. cit., Cohen at 131.

88. Ibid., p. 135, 25 U.S.C. s. 336.

89. Ibid., 136-7; 25 U.S.C. s. 35.

> Ultimately it compromised the guarantee of measured separatism by dashing any remaining hopes that traditional Indian socities might truly remain separate.(90)

The major effect of the allotment period was, predictably, massive land loss. The collective Indian landbase shrank from 138 million acres in 1887 to 48 million by 1934.(91) Such figures make it clear that the primary goal of allotment was land acquisition. Further removal westward was now no longer a viable proposition. Indian country once at the edge of white settlement, had by the 1880's became a series of isolated jurisdictional pockets surrounded by white settlement. Allotment was therefore the only way to get at the landbase short of simple confiscation. Allotment was used for the same purpose in New Zealand from 1865 on, and yielded the same devastating results.(92) In both countries, the individualisation of title laid the foundations for serious Native poverty in the 20th century.

Land loss should not however be seen as the only effect of allotment, as Wilkinson corrctly suggests in the above passage. Allotment was an attack on Indian government as

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90. Op. cit., Wilkinson, American Indians, time, and the Law, at p. 19.

91. Supra, Cohen at p. 148.

92. See infra notes on this point.

well. A secondary objective of the Act was to promote Indian assimilation by terminating the tribes as political entities and privatising the tribal landbase. The net effect was to render tribal governments completely irrelevant to the allotment process.(93) In accordance with the terms of s. 6 of the Act (supra) the vacuum left by tribal governments would be filled by either the federal or state administrations. In practice this would mean a 50 year period of direct rule of Indian nations by the Bureau of Indian Affairs. As Theodore Roosevelt put it; "The General Allotment Act is a mighty pulverising engine to break up the tribal mass. It acts directly on the family and the individual."(94)

Kagama and the General Allotment Act represented a joint congressional and judicial assault on Indian title and Indian sovereignty. Together they dominated the law of Indian/settler relations right up to the late 1950's, bar one brief respite in the 1930's.

In the Courts throughout this period, Kagama's inversion of the colonial paradigm became entrenched as current legal mythology. Indeed Kagama affected not just future developments of the law, it also rewrote the past.

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93. Op. cit., Sanders, Aboriginal Self Government in the U.S. at p. 16.

94. S. Tyler, A History of Indian Policy (1973) at 104.

In Lone Wolf v. Hitchock(95) the Supreme Court upheld a federal sale of tribal land even though the treaty requirement of consent by three quarters of adult males had not been met - even on the most liberal interpretation of the treaty's transfer provisions. The Court justified unilateral abrogation of this treaty obligation on the basis of the federal government's overriding obligation to protect the Indians! The Indian tribes are dependent wards of the U.S.; the U.S. knows best what is good for the Indians; if the U.S. says that taking their land without their consent and in breach of treaty obligations is good for them, then the courts have no business second guessing government policy. The simple logic of that proposition is astounding. What is more the Court asserts that the U.S. has always had this power, and its exercise has always been considered unreviewable by the Courts.

> Plenary authority over the tribal relations of the Indians has been exercised by congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.(96)

Federal plenary power, as it was originally formulated by Chief Justice Marshall, was in the context of federal/state competition for control over Indian affairs. It was constructed to exclude state jurisdiction, not to

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95. (1903) 187 U.S. 553.

96. Ibid,at 565.

exclude the jurisdiction of the very Indian governments it was designed to protect.

The Court, preferring perhaps to end on a positive note, concluded:

> If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body of redress and not to the courts.(97) (emphasis added)

This assertion of the non-justiciability of Native rights questions was a tool used frequently by the courts in all three countries to reject native claims. It was used to greatest effect in New Zealand where it has survived until recently as the dominant doctrine in respect of Maori rights.(98)

The revision of history continued unabated throughout the conquest period in decisions which used Kagama both as a framework and a springboard. In Cherokee Nation v. Kansas Rly. Co.(99). It was held:

> "The propositon that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the States are sovereign...finds no support.

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97. Ibid, at 568.

98. See infra notes on this point

99. (1890) 135 U.S. 641.

In Montoya v. U.S.(100) the court rejected outright one of the basic premises of the colonial paradigm.

> The North American Indians do not and never have constituted 'nations'....In short the word 'nation' as applied to the uncivilised Indians is so much of a misnomer as to be little more than a compliment (emphasis added)

Again the courts seemed to have little difficulty with rationalizing such revisionism purely by adopting racist imagery and racist terminology.

3.1.2 The Indian New Deal:

A brief reprieve came in the form of a legislative initiative in 1934 which signalled a limited policy reversal. The Indian Reorganisation Act 1934 (IRA) was the centrepiece of the "Indian New Deal", a post-depression attempt to include the tribes in the benefits of the famous "American New Deal". The central objective of the Indian New Deal was the strengthening of reservation communities by expanding land bases, providing development capital and strengthening local self government. Interestingly enough, a more limited policy turn around occurred in New Zealand seven or eight years later which revitalized tribal communities in a similar way and which was similarly temporary.(101)

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100. (1901) U.S. 261.

101. See infra notes on this point.

The IRA prohibitted further individualization of tribal title, returned to tribal title any 'surplus' lands which had not yet been sold, and authorized the expenditure of $100 million for the expansion of reservation land bases. Only $4 million of that sum was in fact appropriated by congress for the purpose and in most cases only marginal lands were purchased.(102)

Section 16 provided a limited recognition of tribal government. The governmental model suggested by the Act was a white one:

> Any tribe or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by laws, which shall become effective when ratified by a majority vote of the adult members of the tribe.

In practice the Bureau of Indian Affairs (BIA) monitored closely both the terms and the adoption of tribal constitutions - which had to be approved by the secretary of the Interior. Apart from its requirement of a constitution and bylaws, s. 16 was drafted in a manner which could potentialy accommodate a multiplicity of tribal government structures. In reality the constitutions adopted varied little. In most cases, BIA drafted "boilerplate" constitutions were adopted without argument. These

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102. Op. cit., Sanders, Aboriginal Self Government in the U.S., at p. 21.

constitutions invariably contained extensive BIA supervisory powers over all important government functions.(103)

Notwithstanding these and other serious shortcomings in the Act and in the administration of the New Deal, they did represent an important shift in the assumptions which had built up around Indian law and policy in the 50 years since Kagama and the Allotment Act. They signalled the beginnings of revival of tribalism and concepts of Indian 'nationhood', though these would not be consummated until the modern era. In the same way tribal governments and tribal courts were revitalized or began operating for the first time as a result of this policy shift and the very limited funding which accompanied it. Finally and perhaps most importantly of all, the tribal land base was stabilized - though no attempt was made to address the problems of fragmentation and loss of cohesion in that land base, which were the legacy of allotment.

3.1.3 Termination

The years following World War II produced a complete shift back to the Kagama framework with the introduction of a new policy of co-ercive assimilation called 'Termination.' Superfically the policy reflected political disillusionment with the New Deal.(104) It had failed to produce the

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103. Ibid., p. 29.

104. Philp, Termination: A Legacy of the New Deal [1983] Western Historical Quarterly 165 at 180.

results anticipated as quickly as anticipated. The result expected was the removal of the tribes as a drain on the federal budget. The fact that the New Deal was structurally and administratively incapable of producing such a result was not understood until much later.(105) The real impetus for this reversal can be found much deeper in the colonial psyche however. Termination boldly repeated the same racism and arrogance exhibited in Kagama and rehearsed in every judicial and political initiative thereafter, bar the New Deal itself. The fact that identical laws and policies appear in Canada and New Zealand (as we shall see), serves to substantiate this contention. Accordingly the termination policy should be understood not as a policy reversal but as a return to form.

Central to the scheme of termination was the enactment in 1946 of the Indian Claims Commission Act. The intention behind the creation of the Indian Claims Commission was according to Philp;

> ...to end federal guardianship toward Indians by permitting them to submit claims for past wrongs committed with government approval. Once cash awards had been granted, the U.S. could wash its hands of Indian affairs.(106)

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105. Op. cit. Sanders, pp. 18-33 and sources cited therein.

106. op. cit. at 172.

Thus the Commission was to solve once and for all, the 'Indian problem' by paying the tribes off and then extinguishing them as political and jurisdictional entities. In 1953, by the terms of Concurrent Resolution 108, congress adopted as official policy, a list prepared by the Commissioner of Indian Claims, of tribes ready to be 'released from federal care'. The list established a clear agenda and ultimately resulted in the termination of 109 tribes and bands involving 1,362,155 acres of land and 11,500 individual Indians.(107)

In a concurrent initiative congress enacted Public Law 83-280 in the same year.(108) The statute delegated to six states, jurisdiciton over most crimes and many civil matters within Indian country. It also offered any other state the option of taking the same jurisdiction if it wished. In effect Public Law 280 overturned the ratio of Worcestor v.Georgia which had held that state law, and in particular, state criminal law had no effect in Indian country.

The icing on the cake of almost 100 years of colonial parody came a year later with the decision of the United States Court of Claims in Tee Hit Ton Indians v. United

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107. John, Alternative Approaches to Alaska Native Lands & Governance, Dec. 1984 unpublished paper at p. 30; quoted in Sanders, supra.

108. 18 USC s. 1162, 25 USC ss. 1321-1326, 28 USC ss 1360 and 1360 note.

States.(109) The Tee Hit Ton sought compensation for the exploitation of timber resources on their traditional territory in Alaska. The court rejected the plantiffs' claim and in the process of doing so made it clear that the mythology of conquest had, in the time since Kagama become firmly entrenched in the judicial consciousness as fact. According to Feed J.:

> After conquest [the Indians] were permitted to occupy portions of territory over which they previously exercised "sovereignty" as we use that term.(110)

To state that the Tee Hit Ton were conquered is preposterous. The history books make no mention of any war, or any conquest in Alaska. These people were not even colonised until the 20th century. He substantiates this 'fact' of conquest by the use of the following empirical evidence:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indian ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerers will that deprived them of their land.(111)

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109. (1954) 348 US 272.

110. Ibid, at 279.

111. Ibid, at pp. 289-90.

Thus, the effect in law of 'conquest' was to render Indian land rights unenforceable. Indian title according to Reed J.

> ...is not a property right but amounts to a right of occupancy which the sovereign grants and protects against encroachment by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.(112)

The contrast between the rhetoric, imagery and law of this case as against that of, say, Worcestor v. Georgia is stunning. Indeed these two cases encapsulate in microcosm the underpinnings of their respective eras. As has already been suggested, there is no single body of 'Native law'. These cases show that there are two laws, diametrically opposed and in constant conflict with each other.

3.2 Canada

3.2.1 Treaty Making and Treaty Breaking

Because the federal state of Canada did not exist until confederation in 1867, and because most of North America was British until 1776, much of Canada's early colonial history was shared with or based on that of the United States. For that reason, no distinction was made between the two countries in the earlier discussion of the contact era in North America. The result has been that the only distinctively Canadian jurisprudence on Native Rights issues

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112. Ibid at 279. The decision of Reed J. was affirmed on appeal to the U.S. Supreme Court: see [Wilkenson].

(at least until the 1970's), comes out of the conquest era - the period in which native rights were continually being denigrated. Policy and legislation for 100 years after confederation, with one notable exception, belonged also to that era - to its attitudes and to its objectives.

The notable exception is that treaty-making continued throughout this period as the primary vehicle for westward and northward expansion and the 'bringing in' of native title. As noted, treaty-making was abolished in the U.S. in 1871, while in New Zealand only one agreement was ever signed in respect of which the term 'treaty' was used.

Between 1871 and 1877 in Canada seven treaties were executed along the fertile belt of the prairies as the new federal administration sought to set the stage for 'orderly' white expansion into the Canadian West. These seven treaties covered the lands between Ontario and British Columbia. Much of the remaining areas north of the fertile belt were mopped up between 1899 and 1929 by treaties No. 8 to 11 and by adhesions to treaties No. 5 and No. 9. Although they ceded vast expanses of land, in most cases only sparsely populated, all treaty negotiations were carried out in accordance with the "public meeting" process required by the terms of the Royal Proclamation of 1763. This was undertaken by a sort of travelling roadshow which visited major meeting places in the area sought (usually trading posts), and gathered signatures as it went. This often meant that the term 'negotiation' was a misnomer.

Government officials were generally not empowered to modify treaty provisions in any way. The Indian input therefore was generally reduced to affirming or rejecting the offer.(113)

These "numbered treaties," of which 11 were finally executed, probably ceded over half of the Canadian land mass to the Crown. There was very little variation between the treaties. All provided for the setting aside of small reserves to be determined either on the basis of 160 acres(114) or 1 square mile(115) per family of five. Cash annunities varied, but averaged $5 per head excluding Chiefs who got $25 and Headmen who got $15. One-off cash payments to individuals, also a common characteristic of the numbered treaties, varied depending on the date of the treaty's execution. Their common feature according to one commentator was that they were "so small," and in such "fantastic disproportion to the value of the territory ceded" that they could be considered only as token payments.(116)

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113. Harper, Canada's Indian Administration: The Treaty System (1949) 7 America Indigena 129 at 147.

114. Treaties 1, 2, 5 and 8.

115. Treaties 3, 4, 7, 9, 10 and 11.

116. op. cit. Harper at 136.

One of the most important of all the Treaty guarantees was the explicit reservation of hunting and fishing rights over land ceded to the Crown but as yet unsettled. This guarantee was clearly perceived by the Indian signatories not just as a protection of the food resource but also of their lifestyle in the face of inevitable white invasion.(117)

Of equal importance were the clauses which promised farm equipment, stock and seed to encourage farming, or

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117. Tonar, Two Views on the Meaning of Treaties Six and Seven in Price (ed.), The Spirit of the Alberta Indian Treaties (1979) at p. 32. The importance of hunting and fishing rights in the treaty negotiations is evidenced by the following excerpt the Report to the Commissioners for Treaty 8:

> "Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted a to render it impossible to make a livelihood by such pursuits. But over and above the provison, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be free to hunt and fish after the treaty as they would be if they never entered into it."Quoted in Cummings and Mickenberg, Native Rights in Canada (2nd) (1972) at p. 16.

which promised federal provsion of schools and medical supplies.(118)

The Indian view of these treaties was that they were a simple continuation of the treaty tradition which began with the Iroquois during the contact era. They were still centrally concerned with territorial and political integrity "within the framework of a protectorate relationship with the Crown."(119) It is true that circumstances had changed much since those early days - none could have been more aware of the extent of change than the Indian signatories to a treaty; it was a constant reality in the lives of their peoples. As Jackson states succintly

> ...the Indians were facing increasing white settlement, devastating epidemics, the influx of whiskey traders and the disappearance of the buffalo, the staple of the tribes' economy. The protectorate role embodied in the treaties was accordingly not confined, in the Indians' eyes, to preserving their territorial and politicial integrity within lands they were not prepared to cede, but also extended to the protection of the traditional Indian economy and assistance in the development of new forms of Indian economic self-sufficiency."(120)

Thus it is in this context that the hunting and fishing provisions were understood to be guaranteeing, as far as was

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118. Supra, Taylor, at p. 32. In many cases such clauses were added at the request of Indian signatories; See discussions concerning negotiation of Treaty 6 and Treaties 1 to 3.

119. Jackson, The Articulation of Native Rights in Canadian Law (1984) 18 UBCLR 255 at 281.

120. Ibid.

still possible, a traditional economic base. Further, what in modern parlance between developed and developing countries would be called 'economic aid provisions,' - the gaurantee of farming equpment, educational facilities and medical supplies - allowed progressive development toward new forms of self-sufficiency. All of this was confirmed, in the Indian view, by consistent use of the treaty form to conclude negotiations. In like manner the consistent policy of carrying on negotations with tribal chiefs affirmed that the white government recognized the legitimacy of Indian governments.

While the Indian view of the treaties remained constant through history, the government perspective had changed radically. Treaties were now perceived primarily as instruments for the acquisiton of land for settlement. They were considered to have no international character, and very little political content. The hunting and fishing guarantees were seen as necessary for the moment, largely in order to secure agreement, but were temporary and would soon be forgotten. The agricultural and educational promises were considered central to that process of forgetting. They were to promote the speedy assimilation of Indians into white life.

The cases throughout this period make it clear which view would prevail as the law. The power base from which the Iroquois, Cherokee, Delaware or Mohegan could enforce their understanding of the treaties in the 18th century had

been overwhelmed by the mid 19th century. In the result the treaties were, quite literally, whitewashed.

The first case to deal with the status and nature of treaties in Canada concerned the question of whether the payment of annuities owed under the Robinson treaties in central Ontario was a federal or provincial obligation.(121)

One interesting point about the case is that the parties seem to have assumed throughout the dispute that the obligation was enforceable. At issue was simply who was responsible for paying. In New Zealand, the Courts simply refused to acknowledge at the outset that promises under the Treaty of Waitangi were enforceable.

In the first instance, arbitrators were appointed to settle the Robinson annuities dispute extra-judicially. In their view the treaties were clearly in the nature of "international compacts"(122) which should be liberally construed. On final appeal to the Privy Council the argument was avoided, though not specifically rejected. The Privy Council simply concluded that even if the treaties in question could be characterised as such, it did not aid in solving the issue of the case and so could be left undecided.

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121. A.G. Canada v. A.G. Ontario [1897] AC 199 (The Robinson Annuities case].

122. Ibid, at 211.

It is difficult however, to reconcile Lord Watson's view as to the status of the annuities clause with international status. He concluded that the treaty obligation was:

> ...a promise and agreement, which was nothing more than a personal obligation by its governor as representing the old province, that the latter should pay the annuities as and when they become due.(123)

The treaty was then, a simple private law contract - a conclusion consistent with the government perspective on treaties as instruments for the acquisiton of land.

The low water mark came in the case of R. v. Syliboy,(124) a 1929 decision of the Nova Scotia County Court. The decison was at trial level, and technically should have had almost no precedent value. It was however, quickly adopted as an accurate statement of 'the law' on the status of treaties.

At issue was a very early treaty between Governor Hopson of Nova Scotia and the Mic Maq nations(125) executed in 1752 and styled "The Treaty or Articles of Peace and Friendship Renewed." By its terms the Mic Maq, who had previously allied themselves with the French, were received

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123. Ibid, at 213.

124. (1929) 1 DLR 307.

125. Op. cit., Cumming and Mickenberg, Appendix 3 for Treaty text.

back into His Majesty's "Favor, Friendship and Protection." The treaty guaranteed hunting and fishing rights(126) and made provision for trade and commerce between the parties.(127) In common with other treaties of the contact era, it also designated a forum through which disputes between the parties could be settled amicably.(128) In short, this treaty was probably one of the most international, in form and content, of all the Canadian Indian treaties.

In a single stroke, Judge Patterson of the Nova Scotia County Court rewrote both the terms of the treaty and the entire history of the contact era:

> Treaties are unconstrained Acts of independent powers. But the Indians were never regarded as an independent power.... The savage's rights of sovereignty even of ownership were never recognised.... In my Judgment the Treaty of 1752 is not to be treated as such; it is at best a mere agreement made by the Governor in Council with a handful of Indians.(129)

Syliboy makes it clear that the racism and arrogance so prevalent during the conquest era in the U.S., had also taken root in Canada. Once again the Indians were savages,

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126. Article 4.

127. Ibid.

128. Article 8.

129. Ibid, at 313-4.

and once again, that, in and of itself, provided justification for transforming "Articles of Peace and Friendship" into 'mere agreements...with a handful of Indians.'

Treaty promises it appears, fared equally poorly in the legislative field. Soon after the execution of Treaty 8 which, specifically guaranteed hunting and fishing rights, federal legislation was introduced to restrict hunting and trapping. One writer notes for example

> "In 1917, closed seasons were established in the Northwest Territories and Alberta on moose, cariboo and other animals essential to the economy of the Dene. In 1918, the Migratory Birds Convention Act further restricted their hunting. The violation of the treaty promises by this legislation has been recognised by Canadian courts which, contrary to the Indians' conception of the binding character of the treaties, have consistently held that treaty promises may, as a matter of law, be abrogated by federal legislation without prior Indian consent."(130)

This proposition was confirmed in the 1960's in R. v. Sikyea(131) concerning the shooting of a wild duck for food, out of season and in contravention of the Migratory Birds Convention Act referred to above. Judge Sissons, who heard the trial at first instance had a reputation for being sympathetic to Indian rights-based cases. Sikyea is just

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130. Supra, Jackson at p. 265.

131. (1962) 40 WWR 494 (NWT Territorial Court); (1964) 46 WWR 65 (NWT C.A.); [1964] SCR 642 (S.C.C.].

one of many such decisions which were overturned on appeal. Sissons wrote in the course of his decision:

> It is notorious that a few years ago a government official spoke to one of the local Indian chiefs and pointed out that shooting ducks in the spring was contrary to the Migratory Birds Convention. The chief asked what was this convention and was told it was a treaty between Canada and the United States. When queried "Did the Indians sign the treaty?" The reply was "No." "Then" the chief declared, "We shoot the ducks."
>
> The Indians have their constitutional rights and their own treaty preserving their ancient hunting rights. The old Chief was on sound ground. There is or should be as much or more sanctity to a treaty between Canada and its Indians as to a treaty between Canada and the United States.(132)

The reversal on appeal to the Federal Appeal Court was curiously apologetic. Perhaps Judge Sisson's comment that to subject Treaty 11 to the Migratory Birds Convention Act would render the guarantees contained in the former 'delusive mockeries and deceitful in the highest degree." The Covention was signed 5 years <u>before</u> execution of treaty 11.(133)

In any event Johnson J. who delivered the decision of the court concluded that the legislature must have made a mistake.

> How are we to explain this apparent breach of faith on the part of the government, for I think it cannot be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty

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132. Ibid, at p. 496.

133. Ibid, at 504.

> rights, for game birds have always been a most plentiful, a most reliable and readily obtainable food in large parts of Canada. I cannot believe that the government of Canada realised that in implementing the convention they were at the same time breaching the treaties they had made with the Indians. It is much more likely that the treaties were overlooked - a case of the left hand having forgotten what the right had had done.(134)

Of course if treaty obligations had been overlooked in the drafting of the convention, the Court would have been at liberty to read the Act down on the ground that there was no intention to abrogate those rights. The Court apologised for a decision it could easily have avoided. Still, the "savages" imagery which had underpinned earlier pronouncements, had disappeared. Perhaps that could be considered positive, though Michael Sikyea would not have been so easily impressed.

In the Supreme Court, the decision of Johnson J. was upheld, though in a judgment so devoid of legal reasoning as to be "embarrassing."(135) Hall, J. used most of his decison to discuss the status of the duck in question - i.e. whether it was wild or tame, and in two sentences simply agreed with Johnson J.'s reasoning. The overall effect of

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134. Ibid, at 74.

135. See Sanders, Pre-existing Rights: The Aboriginal Peoples of Canada, unpublished paper, UBC, January 5, 1988 at p. 5.

Sikyea is stated succinctly by Sanders in the following terms:

> The Sikyea decision and its progency established that Indian hunting and fishing rights could be taken away by general federal legislation. There was no need to demonstrate an intention to end Indian rights. It did not matter whether the hunting was protected by treaty, took place on a reserve or occurred in one of the three prairie provinces (and therefore under the provisions of the Constitution Act 1930). Indian hunting rights were upheld against provincial laws but only on reserves or where the rights were under the Constitution Act 1930, as under s. 88 of the Indian Act. Indians had rights only if they flowed from the division of powers, the Constitution or legislation.(136) (emphasis aded)

3.2.2 Aboriginal Title and St. Catherines Milling

If treaty-based rights did not fare well, such at least was consistent with the fortunes of concepts of aboriginal title and non-treaty rights. The most significant case to come out of Canada during the conquest era in relation to these issues was St. Catherines Milling and Lumber Co. v. The Queen,(137) a decison of the late 19th century, in the heyday of positivism and racism in the colonies.(138)

At issue was ownership of lands in respect of which the federal government had issued a timber cutting license. It

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136. Ibid., footnotes excluded.

137. (1885) 10 OR 197 (Ont. Ct. of Chancery); (1886) 13 OPR 148 CA (Ont.); (1887) 13 SCR 577; (1889) 13 AC 461 (PC).

138. As to positivism see Sanders, supra p. 2.

was essentially a division of powers case, but since the federal government claimed title by virtue of having purchased the Indian title, the case at first turned on the legal status of Indian title.(139) The treatment of the case by the Canadian courts before it reached the Privy Council in England makes it clear that judicial attitudes in Canada resembled closely those expressed by the U.S. Supreme Court in the Kagama line of authorities.

Chancellor Boyd of the Ontario Court of Chancery heard the case at first instance. His decision dominated later appeals within the Canadian hierarchy. It was widely praised in respect of its treatment of aboriginal title issues, despite the fact that his reasoning on the point was rejected by the Privy Council on appeal.(140) Boyd concluded:

> The colonial policy of Great Britain as it regards the claims and treatment of the aboriginal populations in America, has been from the first uniform and well defined. Indian peoples were found scattered wide cast over the continent, having as a characteristic, no fixed abodes, but moving as the exigenices of living demanded. As heathens and barbarians it was not thought that they had any proprietary title to the soil, nor any such claim thereto as to interfere with the plantations, and the general prosecution of colonization. they were treated 'justly and graciously', as Lord Bacon advised, but no legal

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139. In the end, it proved not to be a crucial argument. The Privy Council decided in favour of provincial title notwithstanding a holding that Indian title was legally enforceable.

140. See Sanders, supra at p. 1.

> ownership of the land was ever attributed to them.(141) (emphasis added).

He adds as a logical extension of the above, that a treaty in respect of the lands in question signed between the federal government and the Ojibway nation conveyed nothing.

> While in a nomadic state they may or may not choose to treat with the Crown for the extinction of their primitive right of occupancy. If they refuse the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country; and so, sooner or later, to displace them.(142) (emphasis added)

The above statements are packed full of social Darwinism, of the superiority of agriculturalists over hunters, and above all, of the superiority of white colonialists over Native peoples. The imagery is the same as that invoked in Kagama - heathens, barbarians and savages. And the purpose for invoking them is the same - to deny Indian rights. Chancellor Boyd goes a step futher. He denies Indian title in the face of clear legislative recognition! Perhaps he could be excused for disregarding the Mohegans case - a Privy Council decision, but the Royal Proclamation 1763 makes it clear that Indian title had legal force. Boyd's reply to this was the Royal Proclamation was superceded by the Quebec Act 1774, and so "must be regarded

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141. (1885) 10 OR 197 at 206.

142. Ibid., at p. 229-30.

as obsolete."(143) There is simply no basis for such a conclusion. To add insult to injury, this rejection of the rule of law and its replacement with an amateur anthrological analysis (which itself was patently errnoeous), is praised for its depth of reasoning! In the Ontario Court of Appeal(144), Boyd's decision was praised as having been "mapped out with so much care and perspicacity."

The appeal to the Supreme Court of Canada was a repeat performance.(145), with the single exception of a powerful dissent from Strong J. Ritchie C.J. was full of adoration for Boyd:

> The case has been fully and ably dealt with by the Learned Chancellor, and I so entirely agree with the conclusion at which he has arrived, that I feel I can add nothing to what has been said by him.(146)

Henry J. invented a conquest of the Ojibway as the context for denying their title.

> I think after the conquest of this country all wild lands, including those held by nomadic tribes of Indians, were the proporty of the Crown....

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143. Ibid. at 227.

144. (1886) 13 OPR 148.

145. (1887) 13 SRC 577.

146. Ibid, at 601.

> ...the Indians were never regarded as having title.(147)

In dissent Strong J. restated and defended the colonial paradigm. He referred to Johnson v. McIntosh, Worcestor, and Cherokee Nation(148) as the leading US cases on aboriginal rights, and concluded:

> The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognise it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognised and applied in British North America."(149)

He then went on to hold that there was not even a need for statutory recognition of the right to render it enforceable.

> I maintain that if there had been an entire absence of any written legislative act ordaining this rule as express positive law, we ought, just as the United States Courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the Courts were bound to enforce as such....(150)

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147. Ibid, at 639.

148. See infra notes relevant to this point.

149. Supra, n. 76, at 610.

150. Ibid, at 613.

Accordingly, the Royal Proclamation could be regarded only as evidence of Indian title, not the origin of it. The distinction is absolutely crucial to the colonial paradigm. By Strong J's analysis, aboriginal title is pre-existing and does not depend on colonial recognition for its legal enforceabilty. It exists independently and continues until specifically extinguished. It is ironic that if

St. Catherines had have arisen 80 years earlier, this view would have been in the majority. It is probably true also that if the fact situation arose today in Canada, Strong J's opinion would have been the majority.(151) Chancellor Boyd, the Ontario Court of Appeal and a majority of the Supreme Court belong to what might most appropriately be described as the "blatantly racist" school of legal thought. In this view, not only were native rights not pre-existing, they were not enforceable even when recognised as such in positive legislation. In the Privy Council positivism prevailed, a more subtle form of racism in which Native rights are considered to exist only to the extent specifically granted in legislation. Within that framework the Privy Council considered that Indian title was enforceable in law though its enforceability depended entirely upon the terms of the Royal Proclamation of 1763.

> Their possession such as it was, can only be ascribed to the general provisions made by the Royal Proclamation in favour of all Indian tribes then living

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151. See generally R. v. Guerin discussed infra

> under the sovereignty and protection of the British Crown.(152)

The Court further concluded that since Indian title depended on the Proclamation; its scope was defined by the Proclamation's terms. Indian lands were in that instrument referred to as "parts of Our dominions and territories" within which it was declared to be the will and pleasure of the King that "for the present" they should be reserved to the Indians as their hunting grounds. Such terminology in the Courts' view was consistent only with the proposition:

> ...that the tenure of the Indians was a personal and usufructory right, dependent on the good will of the sovereign.(153) (emphasis added)

In this way, Chancellor Boyd's finding as to the status of Indian title and as to the obsolesence of the Proclamation was overturned. As Sanders puts it "the choice for the Courts [in this positivist framework] was between no Indian rights and granted Indian rights".(154) The Court opted for the latter, but in doing so, impliedly rejected any notions of inherent right which had been the hallmark of the contact period. By shifting the framework, the status of Indian title could be instantly devalued. That title,

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152. (1889) 13 AC 46 at 53.

153. Ibid, at 54.

154. Sanders, Pre-existing Rights supra, at p. 2.

referred to by Chief Justice Marshall as "unquestionable and heretofore unquestioned" became "dependent on the goodwill of the sovereign." Positivism never really took hold in the U.S. where the notion of inherent Indian rights was strongly entrenched in legal mythology. Thus conquest law in America centred around defeasibility rather than recogniton of these rights. In New Zealand however, the same positivist framework has dominated since at least the 1860's - and continues even today to be a powerful force in the judicial treatment of Maori rights.

The St. Catherines Milling cases provide a graphic study of the treatment, not just of aboriginal title, but of aboriginal rights generally during this period. Colonial courts were far more willing than the Privy Council to issue decisions which can only be described as vehemently racist and which for the most part dispensed with legal analysis in favour of anthropolgical or sociological analyses. This was as true of American and New Zealand Courts as it was of Canadian Courts. The Privy Council on the other hand was clearly more aloof and was unwilling to adopt such tactics. Nonetheless, the positivist framework it espoused amounted to an equally final rejection of the colonial paradigm. Positivism reflected well the new found hegemony of colonial governments. To recognise only those rights specifically granted by the state meant implicitly the rejection of those rights which pre-existed the state. The colonial paradigm is of course made up entirely of pre-existing rights.

For Native peoples all of this meant that the choice offered by the law was between losing badly and losing worse.

3.2.3 Native Sovereignty and the Indian Act

The Indian Act(155) was to the Native sovereignty part of the colonial paradigm, what St. Catherines was to Native title.

In Canada, the regulation of internal tribal affairs began in the 1850's.(156) and by 1869 and the "Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs."(157) major inroads had been made into tribal prerogatives. By the terms of this Act the new Superintendent of Indian Affairs was vested with full power to manage or dispose of reserve land, to allocate land internally and to control reserve income.(158) The Indian

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155. Originally Statutes of Canada .C. 18 (1876) - now R.S.C. C I-6 (1970).

156. Two statutes were enacted by the province of Canada in 1850. The first an "Act for the Better Protection of the Lands and property of Indians in Lower Canada" (Prov. Can. Stat. c. 42 (1850)); The second an "Act for the Better Protection of Indians in Upper Canada from Imposition, and the Property Occupied or Enjoined by Them from Trespass or Injury (Prov. Can. STat. C42 (1850)). The first declared legal title in all reserves to be in the Commissioner of Indian Lands in trust for the respective bands.

157. Statutes of Canada C. 6 (1869).

158. Bartlett, The Indian Act of Canada (1980), pp. 3-4.

Act of 1876 did no more than entrench this pre-existing policy. In a manner similar to the broad powers held by the Bureau of Indian Affairs in the US, the Indian Act established sweeping executive control and supervision of every aspect of Indian life. The central policy of the Act was progressive and coercive Indian assimilation into mainstream Canada within the rubric of that bureaucratic power.

Initially, this policy was expressed through an attempt to destroy the power of traditoinal and hereditary leaders and to replace them with younger leaders, more amenable to assimilation. To this end an elective system of municipal style government was introduced. By an amendment in 1880(159) the system could be, and was, imposed upon any reserve "whenever the Governor in Council deems it advisable." In practice these band councils exercised jurisdiction only in respect of petty matters such as the control of stray dogs and cattle, or the "repression of intemperance and profligacy.(160) Councils were without authority to enforce their own by-laws until the amendment

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159. Statutes of Canada C. 28 (1890).

160. Madill, Indian Government Under Indian Act Legislation (Part 2) DIANA (1980) p. 4.

of 1980 and even then fines could only be imposed on conviction by a white justice of the peace.(161)

The powers of the Superintendent of Indian Affairs - exercised locally by the infamous Indian agents were overwhelmingly greater both in strict law and in political fact. All by-laws had to be consented to by the Governor in Council. The bureaucratic chain of responsibility meant, of course, that substantive consent was given or withheld by the local Indian agent.(162) An amendment of 1882 gave Indians agents the power of a stipendiary magistrate on the reserve. A meeting of the band council could not be summoned without notice being given first to the Indian agent.(163) Under s. 9 of the Indian Advancement Act of 1884(164) the agent was required to preside over every meeting of the council on the ground that giving the chair to the elected chief councillor would lead to "mischievous results".(165) Thus, although the form of municipal self-

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161. Op. cit. Bartlett at 16.

162. Op. cit. Madill at p. 5.

163. Ibid., at 16.

164. Statute of Canada C. 44 (1884).

165. Op. cit. Bartlett at 17.

government was in place, the Act was no more than an instrument for federal indirect rule and was administered for that purpose.

By a further amendment in 1884(166) the Potlatch and the Sundance were banned. The Potlatch in particular was and continues to be a central component of traditional governmental systems amongst west coast Indians. Further prohibitions of traditonal dance and customs were introduced in 1895;(167) 1914,(168) and as late as 1933.(169)

3.2.4 The White Paper: Assimilating the Colonial Paradigm

None of the attitudes which underpined such legislation, and few of the legislative details changed between that time and 1969. That year did not signal a policy change so much as an attempt to accelerate the policy already in place. In that year the new Trudeau government published the federal 'white paper' on Native Indian policy. The white paper decreed that since attempts at progressive assimilation had failed, a new policy of aggressive and

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166. Statute of Canada C. 27 (1884).

167. Statute of Canada C. 35 (1895).

168. Statute of Canada C. 3 (1914).

169. Statute of Canada C 42 (1933).

coercive assimilation would be substituted. In five years the Department of Indian Affairs was to be dismantled, the Indian Act would be repealed and replaced by a transitory Indian Land Act. Treaties would be terminated and all references to Indians in the (then) British North America Act would be purged. The final blow was to be a transfer for responsibility for Indian Affairs from the federal government to the provinces.(170) Aboriginal rights claims were according to the white paper, "so general and undefined that it is not realistic to think of them as specific claims capable of remedy".(171) Prime Minister Trudeau in a speech in that same year stated:

> Aboriginal rights, this really is saying "We were here before you. You came and took the land from us and perhaps you cheated us by giving us some worthless things in return for vast expanses of land and we want to reopen this question. We want you to preserve our aboriginal rights and restore them to us." And our answer -- it may not be the right one and may not be the one that is accepted...our answer is 'No'.(172)

The policy was a direct copy of the American termination policy of the 1940's and 50's. The same policy would be applied as well in New Zealand by the Maori Affairs

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170. See generally Weaver, Recent Directions in Canadian Indian Policy (1978) at p. 4.

171. Statement of the Government of Canada on Indian Policy (1969).

172. Speech reprinted in Cumming and Mickenberg, Native Rights in Canada (1972) (2ed.) at 331.

Amendment Act 1967.(173) The fact that the 'white paper' policies could be espoused in good faith by any government was testimony to the degree of Indian political marginalization in Canada, and to the basic irrelevance of Indian policy to white Canada. The same was true in New Zealand and in America. The fact that the White Paper never became law in Canada is evidence that at the very nadir of Indian powerlessness, the dynamics which had prevailed for 100 years were about to change again.

3.3 New Zealand

Of the three countries compared in this discussion, New Zealand was the country in which the mythology of conquest and concepts of positivism became most entrenched. In some ways such a conclusion is surprising. The Treaty of Waitangi was, and is, the most comprehensive statement of the colonial paradigm existent in any of the three jurisdictions. It stated in the most explicit terms possible that relations between coloniser and colonised would be premised upon a continuing recognition of Maori title and Maori sovereignty. Imperial administrators continually affirmed British recognition of New Zealand as a sovereign state.

Changing power dynamics has already become a familiar theme however, and New Zealnad was to be no different. As

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173. See infra notes relevant to this point.

those dynamics changed, so did 'the law.' Maori sovereignty was brutally suppressed when it was discovered that this was an obstacle to colonisation. Maori title was manipulated in a way that served the purposes of colonisation and not of the Maori. When one compares this to the clarity and logic of the colonial paradigm as it applied to New Zealand, it is difficult not to conclude that 'the law' had become founded on nothing more than suppression and manipulation.

3.3.1 Rejection of Rangatiratanga

The colonial administration in New Zealand did not lack the opportunities to give positive legislative recogniton to the rangatiratanga guaranteed by Article II of the Treaty of Waitangi, and exercised in fact by the tribes. In the decade preceding the anglo-Maori Wars of the 1860's three such opportunities presented themselves.

Sections 71 of the New Zealand Constitution Act 1852 (UK) provided:

> And whereas it may be expedient that the laws, customs and usages of the aboriginal or Native inhabitants of New Zealand...should for the present be maintained for the government of themselves, in all their relations and dealings with each other, and that particular districts should be set apart within which such laws, customs or usages should be so observed: It shall be lawful for Her Majesty...from time to time to make provision for the purposes aforesaid.

Essentially the provision provided for the creation by proclamation of 'Native Districts' within which tribal law and tribal sovereignty would prevail.

In 1860 in the months immediately prior to the commencement of hostilities, former Chief Justice Martin

(who had sat in the Symonds decision) and Wiremu Tamihana (a prominent Waikato chief) sought such a proclamation in respect of the Waikato, and the lands subject at that point, to the authority of the Kingitanga (King Movement). Settler and missionary groups were vehemently opposed to such a move. The Kingitanga had become a powerful confederation of Tainui and Taranaki tribes under the titular head of Potatau, the first Maori King. It had also become the primary focus for Maori nationalism and dissatisfaction with the effects of colonisation. In truth the settler administration feared the Kingitanga as 'altogether too distinctive and national in character to admit of its being blended into any form which would recognize European direction or ascendency.(174)

It was ultimately for that reason that Governor Gore Brown refused to make a declaration under s. 71.

In 1865, after most of the heavy fighting in the Waikato had ended, a Native Provinces Bill was mooted. Ward notes:

> ...late in the [1865] session Fitzgerald introduced a Native Provinces Bill which invisaged the creation of semi-autonomous Maori provinces.... The Bill recognized that the government could not then impose its rule in the King's territory without reviving the war in the Waikato, but it sought to establish some lawful authority which the interior tribes might, in

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174. McLean, Native Secretary - Memorandum, 30, April 1860. Quoted in Ward A Show of Justice (1974) at p. 121.

time, accept. Settlement meanwhile would be kept out of the Maori provinces.(175)

Stafford, the future Premier, protested the Bill strongly. Recognising Maori provinces would he argued, perpetuate "that Maori communism...that cursed wharepuni (sleeping house)...and the communism of the sexes", which were in his view the ruin and destruction of the Maori race.(176) Predictably, the Bill never became law. If enacted it would have created jurisdictional divisions similar to the American concept of "Indian country," so central to federal Indian law and Indian sovereignty today.

The final opportunity for recognition, was enacted as legislation but failed because it did not go far enough. By the 1858 Native District Regulation Act, local Maori councils or Runanga were established under a Pakeha chairman. These runanga were to be empowered to make by-laws on matters of local concern.(177) As collateral measure, the Native Circuit Courts Act of the same year created Courts which could enforce both these by-laws and the general law of the colony. The Magistrate would be a Pakeha and would be aided in his decision by Maori

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175. Ibid, Ward.

176. [1864-6] NZPD 621-4.

177. Supra, Ward at pp. 132-47 and Sorrenson Maori and Pakeha in The Oxford New Zealand History (1981) pp. 176-66.

'assessors', usually a local chief who could lend authroity to any decision of his superior.

In fact runanga or tribal councils were institutions of ancient origin whose princple traditional role was that of resolving internal tribal disputes in accordance with customary law. It was not surprising then that most tribes rejected the audacity of such a measure which sought to delegate to the chiefs, authority they already possessed and unquestionably exercised. In reality, the objective for the creation of the statutory runanga was to establish a body from which the government could purchase land, and which could be manipulated, if not completely controlled, by a Pakeha chairman. The policy was dropped 3 years later having failed in its primary objective of encouraging land sales and in gaining widespread acceptance among the tribes.

The runanga and circuit courts were clearly designed to establish a system of indirect rule rather than recognize Maori sovereignty or self-government. It resembled closely the model imposed, with greater success, in Canada - government by an Indian agent through a band council.

Thus, the settler government at the beginning of the Conquest era, rejected as incompatible with colonisation, any formal recognition of the tribes as political entities. The dynamics were almost identical to those obtaining between the state of Georgia and the Cherokee Nation in the 1820's. Georgia knew that to give recognition to the Cherokee as a nation would automatically halt colonial

expansion at the border of the Cherokee territories. So it was with the Maori in New Zealnad. If the treaty promise to protect tribal sovereignty was honoured, white settlement would have been stopped in its tracks. Almost without exception the tribes refused to sell land. White resentment of this fact was summed up in an editorial in The New Zealander a settler newspaper.

> The Maori will not be able to say to the Pakeha 'Thus far shalt thou come and no further; the Maori and the Pakeha will become joint occupiers of the same territory. But it is impossible that the two races should continue to live in neighbourly amity whose laws and usages in no way coincide. Both races must be persuaded to give their allegiance to the same laws; the same usages must pervade for both.... And since it is also very certain that this state of happiness cannot be obtained by the White race conforming to the usages of the Maori, it is plain that the Maori must be made amenable to the higher civilization of the white man.(178)

Two differences between the U.S. and New Zealand meant that the fate of the Cherokee was significantly different to the fate of the tribes in New Zealand which refused to sell or to accept Pakeha authority.

The first difference was that in the U.S. Indian Affairs was a federal matter - that is the ratio of the Cherokee cases. Strictly then, Georgia's refusal to recognize Cherokee sovereignty had no impact on the status of the Cherokee at all. In New Zealand as well, a division of power had been established between the settler administration in New Zealand and Colonial Office in London.

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178. Supra, Ward at p 164.

As was standard at the time, Native Affairs was considered to be an imperial concern, and was within the prerogative of the Colonial Office. That control (such as it was, bearing in mind the huge distances involved) was relinquished to the settler government in 1861.(179) The result was the New Zealand equivalent of Georgia having control of Cherokee affairs.

The second difference related to the sheer size of North America. This was the single fact which made the removal policy of the 1830's possible. There is no doubt that removal was implemented by coercion and that it had a devastating effect on the nations who were removed. Indeed it was the Cherokee who came to embody the brutality of that policy. But removal was perceived by the federal government as a compromise between settler greed for land on one side and Indian sovereignty on the other. In New Zealand, removal was simply not possible. Every part of both islands was claimed and jealously guarded by one tribe or another. There was no room for such a compromise, even if removal could be appropriately viewed in those terms. The tragic result was that the Kingitanga territories were invaded in July 1863 by 10,000 Imperial troops and militia,(180)

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179. See Report of the Waitangi Tribunal in the Orakei Calim 91987) WAI 9 at 4.5.

180. Supra, n.2, Sorrenson at 182.

fighting for the right of the Pakeha government to "acquire" land against the will of its owners. Tribes from throughout the central and southern North Island sent men to aid in the defence of King Tawhiao (the second king) and of the promises set out in the Treaty of Waitangi. The invasion meant however, that all hope of honouring the terms by which white contact was agreed to was lost.

3.3.2 Judicial Rejection of the Treaty of Waitangi and the Colonial Paradigm

As in Canada and the U.S., the inversion of the colonial paradigm, that is of Native Title and Native Sovereignty, was effected on two fronts. By legislative abrogation and by judicial pronouncement. The task of the courts in New Zealand was made easier by the fact no clear line of judicial recognition of the colonial paradigm had developed there. It is true that Symonds had restated the doctrine in Johnson v. McIntosh, but that in itself was not enough. The New Zealand Courts had no equivalent of Cherokee Nation or of Worcestor v. Georgia the cases which completed and cemented the colonial pardigm. It is also true that Symonds made it clear that the colonial law of North America and of New Zealand were the same. But the courts of the conquest era in New Zealand simply ignored that principle and applied feudal notions of the non-justiciability of title not derived from the Crown.

As noted, the clearest and most comprehensive statement of pre-existing Native title and Native sovereignty could be

found in the Treaty of Waitangi itself. Predictably, that treaty was, by various means, rendered ineffective and unenforceable in law.

This process of inversion began with the 1877 decision of the full court of the New Zealand Supreme court in Wi. Parata v. The Bishop of Wellington.(181) In that case the appellant argued (inter alia) that the making of a Crown grant to the respondent Bishop without prior extinguishment of the Maori title contravened the guarantees of Article II of the Treaty of Waitangi. Prendegast C.J., Who delivered the opinion of the court, concluded that the Court had no power to look behind a Crown grant. In reaching this conclusion he attacked every aspect of the colonial paradigm.

His conclusions in respect of the pre-existence of Maori sovereignty reflect a level of arrogance which was unprecedented - even for the conquest era. He begins by referring to the policy of the British Government prior to colonisation of recognising Maori sovereignty, and concludes that it was a mistake:

> On the foundation of this colony, the aborigines were found without any kind of civil government or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognise the independent nationality of New Zealand. But the thing neither existed nor at the time could be established. The Maori tribes were

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181. [1877] 3 NZ Jur. (NS) 72.

> incapable of performing the duties, and therefore of assuming the rights of a civilised community.(182)

Prendegast uses a theme which has now become familiar. To have any rights at all, the holder must be civilised; Native people are by definition uncivilised and so have no rights. As well, he indulges in the same amateur anthropology used in almost all the conquest era cases as a justification for that denial. The Maori had no system of law or government. Such a statement is outrageous in its arrogance and its bigotry.

He continues:

> So far indeed as [the Treaty of Waitangi] purported to cede sovereignty, it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist.(183)

In essence the propositon is that the Maori could not have been sovereign because they had no central government, no houses of parliament and no British style Court system. Though preposterous as a basis for legal doctrine, Prendegast's 'nullity' assertion served to bury both the Treaty of Waitangi and Maori sovereignty. New Zealand was in his view, "acquired jure gentium, by discovery and

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182. Ibid, at 77.

183. Ibid, at 78.

priority of occupation, as a territory inhabited only by savages.(184)

His conclusions as to the enforceability of Maori title were consistent with the above. He refers first to the Marshall decisions as "the most complete exposition on the subject,"(185) and to the Symonds decision as consistent with his own conclusions.(186) Prendegast proceeds to reach a conclusion diametrically opposed to the very core of the Marshall decisions, and to the conclusion in Symonds that Maori title "must be respected." He begins

> ...in the case of primitive barbarians, the Supreme executive government must acquit itself as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be made.(187)

Once again the conclusions are familiar and the imagery identical. The plaintiff chief is a 'primitive barbarian.' In the Treaty of Waitangi the imagery was "Chiefs of the Confederation of the United Tribes of New Zealand and the

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184. Ibid, at 78.

185. Ibid, at 77.

186. Ibid, at 78.

187. Ibid.

separate and independent Chiefs."(188) But that was dumped in order to justify an inversion of the law. That inversion, in the context of title, was that the executive now had a completely unfettered and unreviewable discretion to disregard Maori title as it saw fit. Such a conclusion was "of necessity" according to the Chief Justice, because these people are "primitive barbarians." The logic is impeccable. In this regard in fact, Wi Parata simply restates the principle of St. Catherines Milling - that Native title, once limited only by Crown pre-emption, was now depended for its existence on the grace and favour of the Crown.

He concludes:

> Especially it cannot be questioned, but must be assumed that the sovereign power has properly discharged its obligations to respect and cause to be respected, all native proprietory rights.(189)

This too is familiar. The U.S. Supreme Court in Lone Wolf v. Hitchcock(190) reached an identical conclusion in order to avoid reviewing a land sale in clear breach of treaty:

> [P]lenery authority over the tribal relations of the Indians has been exercised by congress from the

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188. See Treaty of Waitangi, Article I.

189. Supra, n.6 at 79.

190. (1903) 187 US 553 discussed supra.

> beginning and the power has always been deemed to be a political one not subject to be controlled by the judicial department.(191)

Like Chancellor Boyd in St. Catherines however, Prendegast C.J. went further in Wi Parata. He discussed the Native Rights Act 1865 which declared that the Courts had jurisdiction in matters "touching the title to land held under Maori custom and usage."(192) Prendegast wrote:

> The Act speaks further as to the 'Ancient Custom and Usage of the Maori people', as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. As we have shown, the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary supposition, that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts. Ideas and practices respecting property in land, and the power of alienation to Europeans, which have been growing up since the settlement of the country, cannot affect the question.(193) (emphasis added)

In St. Catherines Milling Chancellor Boyd was so convinced of his own analysis of Indian savagery, that he felt able to disregard the plain terms of the Royal Proclamation of 1763. Prendegast in Wi Parata, again so entirely convinced of the truth of his bigotted analysis,

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191. Ibid, at 568.

192. Native Rights Act 1865, s. 3.

193. Supra, Wi Parata, at p. 79.

simply disregarded the statutory provision which was inconsistent with that analysis.

His treatment of the colonial paradigm at contact is also familiar. He says British policy, practice and legislation has always been based on the proposition that the Maori were lawless. The very existence of the Treaty of Waitaingi shows this to be patently false. The Chief Justice is in fact attempting the same revision of history undertaken in Kagama, in Lone Wolf, in Montoya, in St. Catherines, in Syliboy and in all the other cases referred to which contributed to the mythology of conquest. It was an old trick but it worked as well (perhaps better) in New Zealand as it did in North America.

Wi Parata set out in clear terms the basic framework of the development of 'the law' of Maori rights throughout the conquest era. Later decisions would depart from its most racist hyperbole, but none would upset its underlying propositions. Maori Sovereignty and Maori title could not be enforced except by the grant of authority from Parliament. Law which is based so completely upon racial arrogance, as Wi Parata so clearly was, must be challeneged as invalid. Nor is one's sense of wrongness lessened in any way by knowledge of the fact that North American jurisprudence at the time drew its underpinnings from the same source. The similarities discussed serve only to prove the indivisibility of the colonial process, and the single

reality of Indigeneous peoples in North America and New Zealand.

In Moore v. Meredith(194) the Chief Justice cemented this inversion of the colonial paradigm. A claim to aboriginal title yielded in his view, "no estate in land known to the law beyond possibly, a tenancy at will...".

In Nireaha Tamaki v. Baker(195) Richmond J. adopted completely, Prendegast's views in Wi Parata:

> ...the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the Colony. There can be no known rule of law by which the validity of the dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction of their territorial rights can be tested. Such transactions began with the settlement of these islands; so that Native custom is inapplicable to them. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice. The security of all titles in the country depends on the maintenance of this principle.(196)

The final comment is a confession as to the real purpose behind the Courts' denial of aboriginal title in New Zealand. A reverse holding could lead to inconvenient questioning of white titles in New Zealand.

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194. (1889) 8 NZLR 160 (C.A.).

195. (1894) 11 NZLR 483 (C.A.).

196. Ibid, at 488.

The Privy Council on appeal considered that Prendegast's rejection of Maori custom and usage in Wi Parata "goes too far" and that it was "rather late in the day for such an argument to be addressed to a New Zealand Court."(197) But the Court refused to question Prendegast's basic assertion that Maori title existed entirely at the whim of the Crown.(198)

The facts of Wallis v. The Solicitor General(199) were similar to Wi Parata; land had been given to the church for a school which had never been built and now the donor tribe wanted it back. The Crown contended among other things that the cession of the land had been an act of state and could not be questioned by the Courts. The Crown contended further that any interference by the Court would be in breach of the "trust...confided in the Crown."(200) The New Zealand Court of Appeal deferred to the Crown, in a manner described by the Privy Council as "certainly not flattering

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197. [1901] AC 561 at 577, per Lord Davey.

198. Ibid.

199. [1903] AC 173.

200. Ibid, at 188.

to the dignity or independence of the highest court in New Zealand."(201)

This reprimand of the New Zealand Courts by the Judicial Committee sparked the famous Protest at Bench and Bar in 1903(202) at which judges publicly flailed the Privy Council,(203) threatened to end appeals there, and asserted that the correct doctrine in New Zealand was that the Courts could take no cognisance of Native title(204). This display of colonial patriotism cemented Wi Parata as the dominant legal doctrine in New Zealand for the next 100 years.

In 1909 Wi Parata was in fact codified as s. 84 of the Native Land Act of that year. The section provided:

> Save so far as otherwise expressly provided in any other Act the Native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in any other matter.

The 'security of titles' in the colony turned out to take priority over the colonial paradigm itself.

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201. Ibid.

202. Recorded at [1840-1932] NZPCC, App. p. 730.

203. Mc Hugh, "Aboriginal Title in New Zealand Courts" [1984], 2. Cant L. Rev. 235 at 249.

204. Supra, Protest at Bench and Bar at 732.

The same positivist doctrine was held to apply as well to fisheries - a matter central to the Maori economy. In Waipapakura v. Hempton(205) Stout CJ concluded:

> In tidal waters...all can fish unless a specially defined right has been given to some of the King's subjects which excludes others. It may be to put the case the strongest possible way for the Maoris that the Treaty of Waitangi meant to give such a exclusive right to the Maoris but if it meant to do so no legislation has been passed conferring the right, and in the absence of such both Wi Parata v. The Bishop of Wellington and Nireaha Tamaki v. Baker are authorities for saying that until given by statute no such right can be enforced....(206)

The finishing touches to the judicial picture of the conquest era came in the decision of the Privy Council in Hoani Te HeuHeu Tukino v. Aotea District Maori Land Board.(207) Tukino argued that a private Act of the New Zealand Parliament which in effect confiscated tribal lands was ultra vires. He contended that the New Zealand legislature was not empowered to contravene the provisions of Article II of the Treaty of Waitangi. The contention was logical enough if it could first be accepted that the legislative authority of the New Zealand Parliament could be traced to, and therefore restricted by, the Treaty. Viscount Simon L.C. in delivering the decision of the Privy

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205. (1914) 33 NZLR 1065 (SC).

206. Ibid, at p. 1071.

207. [1941] AC 241

Council simply assumed without question or argument that Article I of the Treaty was effective in ceding sovereignty to the Crown. Because however, the Treaty had the status of an international agreement between two "High Contracting Parties," any rights granted by its terms could not be directly enforced in New Zealand's domestic Courts. Instead the enforceability of these rights depended on their being expressly incorporated by legislation into municipal law.(208) Indeed even if such incorporation had occurred (and it had not) such legislation would have been susceptible to implied repeal by subsequent specific legislation of the kind in this case anyway. Ironically the Treaty, once worthless as a 'simple nullity' and not a treaty at all, was now unenforceable precisely because it was a treaty. The proposition in the case was simply another route to a Wi Parata conclusion.

By all these means, the judicial inversion of the colonial paradigm was executed and cemented as 'the law.' Pre-existing Maori sovereignty and title were rejected and replaced by granted rights in a process which used racist imagery and racist assumptions as its lynchpin. By the time of the Tukino case, the Colonial paradigm had been buried, Wi Parata had become "the truth" and Tukino itself could be described as "unsurprising." "Every American Schoolboy

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208. Ibid, at pp. 324-5.

knows..." to borrow the words of Reed J. in Tee Hit Ton.(209)

3.3.3 Legislative Rejection of the Treaty of Waitangi and the Colonial Paradigm

It was noted that the attack on the colonial paradigm in New Zealand was executed on two fronts - judicial and legislative. It should be pointed out however that these 'fronts' formed part of a single process and should not be viewed as separate. In many ways, it was the legislation which encouraged judicial amnesia as to the contact era and contact law. That is, the early legislation as to Maori land title created a code which the Courts had no inclination to look beyond or behind. It became very easy therefore (as it was for the Privy Council in St. Catherines) to conclude that the only Maori rights are granted rights. As a corollary, judicial adoption of positivism served to affirm the legitimacy of the legislative attack on Maori title and sovereignty. Kagama had legitimated the Major Crimes Act in a similar way. The dynamic was therefore one of the judicial and legislative attacks feeding off, justifying and strengthening each other.

The Native Land Acts of 1862 and 1865 were therefore collateral 'accomplices' to judicial developments in Wi Parata and beyond.

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209. (1954) 348 US at 289-90.

The 1862 Act provided for the investigation of lands held by customary title and their replacement with Crown derived freehold titles. This was to be achieved through the working of a new tribunal - The Native Land court. The Act was not at that stage a code. It did not preclude Crown purchase of the bare aboriginal title and was to apply only in districts so proclaimed by the Governor. The first proclamation was not made until two yars later.(210) The intervention of war in the Waikato, Taranaki and Bay of Plenty meant that the Act never become fully operational before it was superceded by the Native Land Act 1865. That Act was far more agressive in the pursuit of its policy objectives. Those objectives were best articulated by the Honourable Henry Sewell in the House of Representatives:

> The object of the Native Lands Act was two-fold: to bring the great bulk of the lands in the Northern Island which belonged to the Maoris, and which, before the passing of that Act, were extra commercium--except through the means of the old purchase system, which had entirely broken down, within the reach of colonisation. The other great object was the detribalisation of the Maoris--to destroy, if it were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Maori race into our social and political system. It was hoped by the individualisation of titles to land, giving them the same individual ownership which we ourselves possessed, they would lose their communistic character, and that their social status would become assimilated to our own.(211)

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210. Report of the Waitangi Tribunal on the Cerakei Claim (1987) WAI 9 at p. 30.

211. (1870) 9 NZPD 361.

The central mechanism for achieving these twin goals was this "individualisation" of titles referred to by Sewell. In fact, although Sewell refers to two objectives, there was only one. The overwhelmingly important aim was to get at the land. Experience of the previous 20 years had shown that the only way to do so was to refuse to recognize tribal title. The Tribes refused to sell (and it was for that reason that the Waikato was invaded). Thus 'detribalisation' as Sewell termed it was not an end in itself - it was simply a means of getting at the land. History has shown it to have been extremely effective in achieving that end.

By the terms of the Act, title to tribal land had to be investigated by the Native Land Court which, on the basis of the evidence before it, would issue a certificate of freehold title - the equivalent of a Crown grant. The certificate could contain no more than ten names, with the named individuals taking as tenants in common. Though tribes people had assumed these 'owners' would take in trust for the whole tribe, the Court's interpretation of the Act was that those named were free to alienate without reference or obligation to their kinspeople.(212) This severely tested an internal tribal cohesion and reciprocity which was

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212. Supra, See generally Orakei at section 4-7; and Ward at 213.

already under threat from disease and war. Thus the Act created and promoted intra-tribal divisions which had never existed before.

The Act took claimants away from the land they were claiming because Court sittings were held in main centres and were invariably protracted affairs. Having abandoned income producing cultivations and having been forced to run up large debts for food and accommodation in the towns, tribes were often forced to sell immediately to creditors whatever they were awarded.

Nor could the tribes avoid the Land Court process. The Court decided only on the basis of the best evidence before it - a principle which invited tribes with little connection to the land in question to make claims in the hope that the real owners would not get notice. The real owners were forced to counter claim (if they were lucky enough to get notice) or risk losing their land completely. In this way, even the many tribes which completely rejected the Land Court's authority were inexorably drawn into the process.

By these means individualization of title was as effective at attacking the Maori land base as the identical allotment process would be in the US twenty years later.(213) As with the Allotment Act, New Zealand's Native Land Act would lay the foundation for Maori poverty and massive urbanisation in the 20th century.

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213. Supra, notes 75 and 76 and accompanying text.

It was not just an attack on the land-base however. Like the Allotment Act, it was also an attack on Maori sovereignty. Individualisation of title meant privatisation of title. Tribal authority and government was rendered completely irrelevant to a process which was transforming the tribes' spiritual and economic base. As in the United States, this blow to tribal cohesion and authority was nearly fatal.

In a move which must be seen as collateral to the above, the Native Representation Act was passed in 1867. It provided for the establishment of four Maori seats in the New Zealand parliament.(214) This was a simple expedient to trivialize what might otherwise have been a substantial Maori vote. One side effect of the individualization of titles was that Maori were now beginning to satisfy the old property requirements for voting purposes. The Native Representation Act meant that 35-40% of the population was reduced in Parliamentary representation to 4 voices out of 76.(215)

This was not the only impact of the Act. The four Maori seats aided in the process began in the Native Land

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214. For a discussion of this Act see Kelsey, Legal Imperialism and the Colonisation of Aotearoa in Tauiwi: Racism and Ethnicity in New Zealand (1984) at p. 34.

215. Dalziel, The Politics of Settlement, in Oliver and Williams (ed.), Oxford New Zealand History (1981) at p. 102.

Act of severing the political leadership from the people and the land. The four Maori MP's and not the tribal leaders became the official (and impotent) voice of the Maori people. Many of these MP's, though in some cases effective exploiters of the Pakeha governmental structure, had no constituencies of their own and were not recognized at all as tribal leaders. In this way the Act complemented the Native Land Act by co-opting, integrating, assimilating and finally silencing Maori political dissent. As this process ground on, the real Maori leadership could do no more than stand on the sidelines and watch.

These two Acts provided the foundation for the legislative attack on the colonial paradigm in New Zealand. Like the Indian Act in Canada and the Allotment Act in the U.S. these two measures dominated the whole of the conquest era in New Zealand, during which tribal land and tribal authority dwindled to a bare remnant of what it once was.

The military defeat by 1867 of the central North Island coalition of tribes under the leadership of King Tawhiao led to two Acts which nearly gutted the Kingitanga and its land base. The Suppression of Rebellion Act 1863 and the New Zealand Settlements Act of the same year established military Courts to deal wth charges of "rebellion against the Crown," suspended the right to habeus corpus and confiscated 3 1/4 million acres of 'rebel' land.(216) In

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216. For an excellent discussion of the latter Act and the circumstances surrounding it see Litchfield, Confiscation of Maori Land (1985) 15 VUWLR 335.

fact land was confiscated on the basis of its "fertility and strategic location," rather than because its owners were in rebellion.(217) The Acts rendered landless and powerless the most formidable Maori nationalist movement in New Zealands history and so left the attack on Maori title and sovereignty to continue largely unobstructed. Other religio-nationalist movements would become prominent throughout the late 19th and early 20th centuries, but those that worked inside the system were doomed to fail,(218) and those that worked outside the system were brutally put down.(219)

Legislation after this first raft of measures amounted to more of the same in ever increasing doses as the tribal power base (and therefore tribal opposition) dwindled and faltered. The Tohunga Suppression Act 1907 attacked central cultural institutions in the way that the anti-potlatch and anti-sundance laws had in Canada.(220) The Act rendered

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217. Sorrenson, Maori and Pakeha in Oliver and Williams (ed.) Oxford New Zealand History, (1984) at p. 185.

218. In respect of the Kotahitanga or Maori Parliament Movement see: generally Williams, Politics of the New Zealand Maori pp. 33-67.

219. See Scott, Ask That Mountain: The Story of Parihaka (1975).

220. See supra notes 166 to 169.

illegal the activities of Tohunga, the spiritual and educatonal leaders of the communities. By the 1909 Native Land Act, as mentioned, aboriginal title was rendered unenforceable against a Crown assertion of extinguishment.

An interesting though temporary departure from this pattern came with the advent of World War II. The departure was not due to any particular change of heart on the part of government, but because the traditional strength of tribalism could be harnessed for the war effort. The No. 28 Maori Battalion was formed at the behest of Maori MP's with its companies and platoons structured along tribal lines. Back home the Maori War Effort Organisation was established comprising Maori MPs and military personnel.(221) Under the auspices of this organisation tribal committees were estabilshed in all areas:

> ...in order to foster and restore to the Maori people that ancient characteristic of tribal leadership so vital to the successful prosecution of the Maori War effort.(222)

Not only were tribes recognised as political units for the first time since 1865, but co-ordination on a national scale meant that tribal leaders were working together in a single organisation. The tribal committees had

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221. See generally, Puao Te Atatu Report of the Ministerial Advisory Committee on Social Welfare (1986) Appendix 1.

222. Ibid, p. 16. Lt. Colonel Hemphill, Chief Administrator - Maori War Effort Organisation.

responsibility for and control over food production, workers and mobilization within the tribe on a day to day basis. Initiative and control over tribal resources was returned to Maori hands. When the War ended the Maori MP's lobbied to retain the committees (powers intact) on the strength of their great success. They saw the rebuilding of tribal cohesion as fundamental to the survival of the Maori people. To this end the M.P. for the Northern Maori electorate introduced the Maori Social and Economic Reconstruction Bill 1945. The Bill was taken over by the Minister for Maori Affairs and renamed the Maori Social and Economic Advancement Act 1945. All the teeth of self-government had been extracted in the political laundering process because, according to the Prime Minister of the time, it would "encourage Maori nationalism."(223) Tribalism and pan-Maori solidarity was encouraged only to the extent that it was consistent with the national (Pakeha) interest. Having outlived that purpose it constituted a threat to the same national interest and was promptly ditched in favour of the old assimilationist policies which inverted the colonial paradigm.

Thus, this temporary change of direction resembled the U.S. Indian New Deal in the 1930s(224) though its motive

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223. Supra, The Hon. Peter Fraser, from King Maori and Pakeha, p. 259.

224. See supra page 151 to 153.

differed. There was also an important difference in reasons for abandoning the policy. In the U.S., the New Deal was abandoned because it was perceived by white politicians to have failed. In New Zealand tribal reconstruction was abandoned after the war because it had been too successful.

The Maori Affairs Act of 1953 cemented the return of the conquest ideology. By the time of its enactment the bulk of Maori land had been alienated by sale or lease or had been "compulsorily acquired" by the Crown. The alienation rush was over but Maori land-holdings which had stabilized by now faced the legacy of a system designed to facilitate fast turn-over rather than retention and utilization. The primary concern was over an increasing "fragmentation" of interests - a problem which existed also in relation to the U.S. allotments. Fragmentation was caused by the imposed Pakeha concept of individual succession to family interests and exacerbated by a sharp increase in the Maori population in the post-war years. The Acts' answer to the problem created by its predecessors was to introduce a scheme whereby the Maori Trustee (a government office) could compulsorily acquire "uneconomic interests of less than $50.(225) The answer to

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225. See generally Maori Affairs Act 1953, Part XVIII; especially ss. 200 and 201.

fragmentation was to slowly confiscate all the fragmented titles.

The Maori Affairs Amendment Act 1967 was New Zealand's version of the 1969 'White Paper' or of the Termination policy. It was perceived, as with the White Paper and Termination, as the inevitable end in a long road of policies and laws which had successfully assimilated the Maori. Pursuant to its provisions large tracts of Maori land were unilaterally terminated and declared to be European land (that is land subject to the "normal law").(226)

The already weak restrictions on alienation of Maori land were relaxed even further,(227) and what residual restrictions as to successions to Maori land existed were dropped completely in favour of the Pakeha rules of succession.(228) In the words of one judge, the Act

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226. Maori Affairs Amendment Act 1967 s. 31(3) declared that all lands held by a Maori incorporation would cause to cease to be Maori Land. By subs. (2) the shares of the incorporation shareholders (the tribe or subtribe) were declared to be personalty and not interests in Maori land. By the terms of Part I (ss. 2-14) of the Act, the Registrar of the Maori Land Court could unilaterally declare land owned by less than 4 persons to be European land.

227. Part VI ss. 90-118.

228. Section 76: The effective of this change allowed non Kingroup members - spouses for the most part - to succeed to interests in kin owned land in the event of intestacy.

represented "Parliamentary recognition of the onward march of the Maori race toward equality with Europeans freedom of alienations of Maori land."(229) The Act was more correctly dubbed "the last land grab" by the Maori leadership(230).

By 1965, just before this Act, only an estimated 3,680,500 acres remained in Maori title. In 1840 that figure was close to 66 million.(231) Of the 1965 total over 271 thousand acres were classified as "probably of no use"; nearly 916 thousand acres were unoccupied or unsuitable for farming or forestry; and 1.28 million acres were subject to long term leases.(232) Only 695 thousand acres remained in Maori occupation.(233) The 1967 Act showed clearly that the systematic attack on the Maori land-base begun in 1862 had yet to abate.

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229. Alexander v. Maori Appellate Court [1979] 2 NZLR 44 at 56.

230. Supra, Tauiwi p. 90.

231. Figures quoted in Simpson, Te Riri Pakeha: The White Man's Anger (1979) at 241.

232. Ibid.

233. Ibid.

3.4 Conclusion

The foregoing set out to describe just how "the law" in the U.S., Canada and New Zealand developed in a way which contradicted and simply rejected the colonial paradigm of Native title and Native sovereignty. In the Courts, the imagery, terminology and principles invoked to invert the colonial paradigm, were not just similar as between the three jurisdictions - they were identical. In the legislatures, enactments used to attack Native title and sovereignty were often the same or similar. It is difficult to avoid the conclusion that this was not simply an incredible coincidence. As the power dynamics between coloniser and colonised changed so did the colonisers' image of both Indian and Maori. As those images changed so did the law. The similarities underscore the fact that the same sub-stratum of arrogance and racial superiority was the controlling influence in legal developments - the lowest common denominator - in the three countries throughout this period. It was this which demanded the judicial creation of a mythology of conquest. It was noted in the beginning that the Courts only rarely used the term. Most often it was used as an unstated backdrop to decisions which tore at the foundations of the colonial paradigm. Conquest mythology underpinned all of the legislative policies aimed at subsuming Maori and Indian into the 'national milieu.' It legitimated the 'domestication' of Indigenous rights issues, a framework contrary to the very nature of those rights. It

resulted in the political and legal marginalization of Indian and Maori. A marginalisation which transformed them from 'independent nations' at the beginning of the 19th Century, to the 'primitive savages' of the late 19th century - and thence to the 'disaffected minorities' of the 1960's and 70's. Throughout this whole analysis of injustice there has been one fact which can be clung to, and which provides hope: The mythology of conquest was just that - a myth. The concept which underpinned the rejection of the law as agreed to between coloniser and colonised was a lie, and can be empirically proved to have been such. Even the faith brought from Europe by the colonisers teaches that houses built on soft foundations will eventually collapse.

4. INDIGENOUS RIGHTS, INDIGENOUS SELF-DETERMINATION; THE COLONIAL PARADIGM IN THE MODERN AGE.

4.1 Introduction

Part II of this thesis began with the suggestion that the historical and current reality of Indigenous rights in North America might be most clearly understood by dividing the past and present into three. The law of contact; the law of conquest and the law of the modern era. The first two divisions - contact and conquest - are not just divisions in time. They have been demonstrated to be divisions of ideology, of perspective and of the fluctuation of power between coloniser and colonised. It was argued that the power balance which obtained at contact evolved naturally into a law of consensus between the nations meeting each other for the first time. The details of that law, I have called the colonial paradigm. It required that relations between the parties who met within this paradigm would be based upon a benchmark recognition of Native title and Native sovereignty. The terms of that paradigm were affirmed and enforced in treaties, in legislation and in judicial decisions. The 100 or more years from the mid 19th century on developed into the very antithesis of consensus. This period in which the judicial myth of conquest was established was a period of the imposition of the coloniser's law upon the colonised. This law entrenched and exploited the coloniser's new found hegemony. This new law rejected the colonial paradigm, not because it was unsound

in law or in justice - for it surely was sound; but because Native peoples were conquered savages. As such they could ot claim the protection of the coloniser's law. In this way law which had been the product of consensus between the parties, was appropriated by the coloniser for himself and for his benefit.

The fact that the writer insists upon a third division - the modern era - suggests that the story does not end at conquest. It was noted that contact and conquest cannot be synthesized into a single body of Indigenous law. They are, it was argued, irreconcilably incompatible with one another. That incompatibility holds the key to the modern era once it is recognized and accepted for what it is. The judges and politicians - white hegemony - are, in the modern era, confronted with a simple choice: Contact or conquest. That choice will govern the evolution of Indigenous rights into the 21st century.

Within the framework of that choice it will be argued that the mythology of conquest was not in its time, and is not now, a valid or defensible basis for the law of Indigenous rights. It will be argued further that judges and politicians are, inch by inch, moving toward an acceptance of that proposition. These changes are occurring, or will occur, because of a huge upsurge of Indigenous nationalism in the three countries discussed. That nationalism has translated into an Indigenous activism both within and outside 'the system' which is unprecedented.

Unprecedented that is, since the contact era. This activism has changed white images of Indigenous peoples, has educated white majorities in respect of the current and historic Indigenous reality, has forced the coloniser to look at himself. In proudly egalitarian societies such as the U.S., Canada and New Zealand, these revelations have provided a new powerbase from which to reassert the original colonial paradigm.

4.2 The United States

Changes in judicially invoked imagery of Indigenous peoples, and in judicial attitudes to Indigenous rights has been most marked in the United States. Though Native Americans are the most politically marginalized of Indigenous peoples in the three jurisdictions, the judicial transiton back to contact imagery and rhetoric has been much easier in the U.S. The resilience of the Marshall decisions, even during the conquest period, has contributed much to this transition. Decisions of the late 19th century such as Talton v. Mayes(234) helped to keep the colonial paradigm alive and would provide, in the modern era, a basis for a new myth of continuity. In that case it was held that Cherokee Courts were not subject to the Fifth Amendment requirement of a twelve member grand jury because tribal powers and jurisdiction predated the constitution and were

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234. (1896) 163 U.S. 376.

not affected by the passage of the Fifth Amendment. The case applied Marshallian concepts of pre-existing sovereignty at a time when such concepts had been uniformly rejected.

As well Felix Cohen, the formost American scholar on "federal Indian law," wrote a treatise on the subject in 1942.(235) That treatise returned the Marshall decisions to the centre-stage of Indian rights law.(236) In fact Cohen's handbook so dominated the field that it has taken on something akin to the status of a Supreme Court decision.(237) Cohen avoided, as far as was possible, the conquest cases and expostulated that tribal sovereignty was "perhaps the most basic principle of all Indian law."(238) The few Talton type cases out of the conquest era were reinterpreted by Cohen. Decisions once considered to be maverick became an affirmation of the colonial paradigm and provided a line of continuity between contact law and that

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235. Supra, Cohen, Handbook of Federal Indian Law.

236. Ibid (1942 ed.) at 143. Though his treatise confirmed Federal plenary power by right of conquest in an attempt to meld contact and conquest law.

237. See Wilkinson, American Indians, Time and the Law (1987) at pp. 57-59.

238. Supra, Cohen at 122.

of the modern era. The U.S. Supreme Court seems now to have accepted this reinterpretation as the basis for a new law, though it has continued to assert that federal plenary power remains intact.

In U.S. v. Wheeler(239) the Supreme Court held that successive prosecutions in tribal and federal courts was not barred by the double jeopardy clause of the fifth Amendment because the United States and the Navajo nation were in fact separate sovereigns. The Court cited both Worcestor and Cohen, traced unextinguished tribal sovereignty to the present day and concluded that the Navajo were in fact a third order of government in the U.S.(240) This amounted to an overturning of the Kagama doctrine that there existed but two sources of sovereignty the U.S.

In a curious attempt to blend the two conflicting streams of law, the Court held that this sovereignty was nevertheless fragile.

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufference of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.(241)

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239. (1978) 435 U.S. 313.

240. Ibid, at 319-32.

241. Ibid, at 323.

In other words the Court is willing to apply the colonial paradigm to Indian rights questions unless told to do otherwise by Congress. This blend has created a contradiction - a sovereign at sufference.

In Oliphant v. Suquamish Indian Tribe(242) decided in the same year the Supreme Court ruled that tribal criminal law did not apply to non-Indians even on a reservation. On the other hand in National Farmers Union Insurance Co. v. Crow Tribe(243) the Court upheld the pre-emptive civil jurisdiction of a Tribal Court and refused a non-Indian appellant access to the federal Courts for equitable relief after the tribal Court had given judgment to the respondent. A framework for dealing with tribal powers over non-Indians had been posed in 1981 in Montana v. U.S.(244) The Court suggested a test in which tribal jurisdiciton would apply where non-Indian action threatened or had some direct effect on the political integrity, economic security or health and welfare of the tribe. If National Farmers Union satisfied such a test it is difficult to understand why Oliphant in respect of criminal activity on the reservation, did not.

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242. (1978) 435 U.S. 191.

243. (1985) 105 S.Ct. 2447.

244. (1981) 450 U.S. 544.

In Merrion v. Jacarilla Apache Tribe245) the Supreme Court held that the tribes had an inherent power to impose a severence tax on non-Indian mining activities on the reservation. The plantiffs plea of non-user of this taxing power was rejected outright by the Court.

> Sovereign power even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakeable terms.

In Kerr McGee Corp. v. Navajo Tribe(246) the question of Navajo ability to tax business activity on Navajo land arose. The Court adopted liberal canons of interpretation in respect of Indian rights and the U.S. government current official policy of Indian self-determination in holding that the Navajo had such a right. The Court emphasized the close correlation between self-government and self-help in upholding the taxing power. Tribal governments, according to the Court, could "gain" independence from the federal government only by financing their own police force, schools and social programs.(247)

The foregoing cases have coalesced into something of a framework for this defeasible Indian sovereignty or

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245. (1982) 455 U.S. 130.

246. (1985) 471 U.S. 195.

247. Ibid, at 201.

jurisdiction. On the issue of Indian title two cases are worth referring to. In Mescalero Apache Indian Tribe v. New Mexico(248) Judge McKay of the 10th Circuit Court of Appeals seemed to reject the notion of conquest - at least as a basis for denying Indian title.

> The state questions the existence of any inherent tribal powers in this case. It argues the tribe could not have exclusive rights in any traditional territory because in effect there is no traditional territory: "the Mescaleros were being swept from their lands by a tide of white settler." If we were to accept the states argument, we would be enshrining the rather perverse notion that traditional rights are not to be protected in precisely those instances when protection is essential, ie. when a dominant group has succeeded in temporarily frustrating the exercise of those rights. We prefer a view more compatible with this nation's founding: rights do not cease to exist because a government fails to secure them. See The Declaration of Independence (1776).

In the County of Oneida v. Onedia Indian Nation(249) the Supreme Court showed graphically that contact rules rather than conquest rules were beginning to dominate modern law. At issue was a 1795 agreement purporting to transfer 100,000 acres in the state of New York. A suit claiming the transfer to have been invalid was first brought in 1970 - nearly 200 years later. The Court held by a 5-4 majority that the transfer was void for breach of the Trade and Intercourse Act. This decison gave priority to ancient

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248. (1980) 630 F. 2d 724 (10th Cir.): The decision was affirmed in the U.S. Supreme Court at (1983) 462 U.S. 324.

249. (1985) 470 U.S. 226.

Indian title above the intervention of time and of longstanding non-Indian expectations.

The above cases (and many others) have set out the detail of Native sovereignty and Native title in the modern era - they show a clear reintroduction of the colonial paradigm. The law of Indian, Native or Indigenous rights is, as Wilkinson has said "a time warped failed." He summarises his own view of the direction in which U.S. law is developing, in the following terms.

> One fascinating aspect of this development is the role of pre-contact times. It might initially appear that the powers of Indian tribes, say, 400 years ago, would have contemporary relevance if at all, only within the walls of an advanced anthropology or philosophy class. In fact the essence of the Marshall-Cohen view, now endorsed by the Supreme Court, is that these times are not only relevant but controlling. The original status of complete national sovereignty, not action by any European nation or the United States, is the beginning definition of modern tribalism. It is highly significant in other words, simply that the tribes were <u>once</u> sovereign in both the internal and external senses. To be sure that status has been altered repeatedly by statute, by treaty, and in a limited context, by implicaiton. But in the cases of the modern era the exceptions have proved far less important than the remarkable and crucial premise -- that tribal powers will be measured initially by the sovereign authority that an Indian tribe exercised, or might theoretically have exercised, in a time so different from our own as to be beyond the power of most to articulate.(250)

This overstates the current status of the colonial paradigm in American law. It fudges the Supreme Courts' view as to the defeasiblity of tribal sovereignty and understates the extent to which sovereignty and title have

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250. Supra, Wilkinson at p. 63.

in fact been "altered." Nonetheless judge-made law is clearly developing in the direction described by Wilkinson.

Legislative changes in the modern era, though less important in the U.S., have supported this move back to the colonial paradigm. In 1973, the Menominee Restoration Act reinstated the Menominee tribe, and amounted to an official repudiation of the old federal termination policy.(251) In 1975 congress enacted the Indian Self-determination and Educational Assistance Act.(252)

Despite its grand title, the Act simply provided for the implementation of a federal policy of devolution. It directs the Secretary of the Interior to contract with tribes to undertake Bureau of Indian Affairs programs. Though its substance is undramatic, the pre-ambular language of the Act is consistent with the new view of the tribes as bona fide governments.

> Congressional Findings
>
> Sec. 2 (a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that -
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> (1) the prolonged Federal Domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an

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251. 25 U.S.C. ss. 903-903f.

252. 25 U.S.C. s. 887 c.-1.

> effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
>
> (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons....

The Indian Child Welfare Act 1978(253) codified certain judicial decisions on jurisdiciton over children of the tribe.(254) The Act codifies tribal court pre-emptive jurisdiction over non-tribal courts in matters concerning Indian children. It require that where Indian children come before non-tribal Courts, the tribal Court must be notified. If the latter chooses to take jurisdiciton in the matter, state and federal Courts must defer.

4.3 Canada and New Zealand: Pre-Existing Rights

Similarities between Canada and New Zealand in terms of the process and dynamics through which the colonial paradigm is being reasserted warrants perspective on that process which yields a synthesis rather than separate analysis. It was for a similar reason that a single analysis of North America during the contact era was chosen. In the modern era the tables have turned and it is argued that patterns in New Zealand and Canada are coalescing.

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253. 25 USCA ss. 1901-1963.

254. For discussion, Supra, Sanders, Aboriginal Self-Government in the US,at 47; and Supra, Cohen, Handbook of Federal Indian Law at 196.

There are probably two main reasons for this similarity between the two countries. The first is that the legacy of positivism from the conquest era is far stronger in Canada and New Zealand than it was in the U.S. Neither Canada nor New Zealand have 'homegrown' versions of the U.S. contact jurisprudence. In New Zealand the Treaty of Waitangi, though it restated the colonial paradigm, was never affirmed as such by the New Zealand Courts in a way which could have provided a firm jurisprudencial framework. Nor could it have been. By the time Maori rights litigation had begun in earnest in New Zealand, the Anglo-Maori had been fought and racism and positivism had become the underpinning elements of indigenous rights throughout the New World. Similarly Canada had the Royal Proclamation, but as legislation that could be, and was, reinterpreted as a grant of limited rights rather than a recognition of the colonial paradigm.

Thus Maori and Native Canadian had much greater legal obstacles to overcome than did Native Americans. This was in turn offset by the second reason for similarities between the two countries: Indigenous peoples in Canada and New Zealand are far less politically marginalised than are Native Americans. In Canada the Native power base stems from three factors. Firstly, though only between 2 and 4% of the Canadian population.(255) Native peoples in Canada

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255. Asch records that census figures set the Native population at 491,460 but the real figure is probably more than double that at 840,000: See Michael Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution (1984) pp. 2-5.

have developed a degree of political cohesion which is unmatched in the three jurisdictions studied. Secondly, aboriginal title issues have yet to be settled in much of Northern Canada and most of British Columbia. White fear of aboriginal title actions which could halt resource exploitation in those areas has given Native peoples a degree of political clout far beyond their actual numbers. Thirdly, ongoing revelations of horrendous social and economic statistics in respect of Native people has generated a pool of liberal White Sympathy which has often been drawn upon by Native leaders. In New Zealand, the Maori powerbase comes primarily from numbers. At over 300,000 the Maori population is now figured at around 12% of the New Zealand population - Maori account for the largest minority in the country. Though political cohesion, and funding of Maori organisations is poor by Canadian standards, liberal white support is probably stronger in New Zealand.

These factors have meant that Indigenous issues have moved back into the consciousness of white Canada and Pakeha New Zealand, and back onto the centre-stage of national politics. This in turn has created the potential for a fundamental redefinition of the accepted premises of these two societies in a way which was never possible in the U.S.

4.3.1 Beginnings of Change

A groundswell of Native oppostion to the Canadian white paper of 1969 led to an embarrassing government reversal of the policy - a reversal which proved crucial to developments in Canada over the next 20 years, and showed that Native people could in fact effect Native policy. In the conquest era this would never have been possible.

Meanwhile, the Nisga'a of northern British Columbia, with whom the federal government had not signed a treaty, sought a declaration from the British Columbia Supreme Court affirming the continued existence of aboriginal title to their traditional territory. This landmark case reached the Canadian Supreme Court in 1972.(256) Six of the seven judges addressed the issue of aboriginal title. All entertained the idea that aboriginal title was a legitimate legal concept. They split evenly on the question of its continued existence in the modern era. Pigeon J., the seventh judge, rejected the Nisga'a claim solely on a procedural question without touching upon the substantive issue. This made it a 4-3 majority against the Nisga'a. The decision nevertheless blew the question of aboriginal title wide open. It was equivocal and there were no clear winners. But it was clear that a simple rejection of aboriginal title was no longer possible. Sanders writes:

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256. A.G. British Columbia v. Calder, [1973] SCR 313.

> The Calder decision significantly altered the framework for arguing aboriginal rights. According to the decision in the St. Catherines Milling case there were no legal rights unless they were recognised by some British or Canadian action. The aboriginal title issue in British Columbia seemed to be trapped in the historical-legal question whether the Royal Proclamation of 1763 applied west of the Rocky Mountains. Indian rights could not exist in British Columbia, the analysis went, if the area was terra incognita in 1763, that is land not known to the British. The fact that the land was known to, and controlled by the tribes was irrelevant. The issue was British law not Indian realities.(257)

Judson J. though writing for the three judges who held aboriginal title to have been extinguished, nevertheless rejected the St. Catherines positivism. Positive recogniton was not to be determinative of the legal existence of these rights:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settler came, the Indians were there, organised into societies and occuping the land as their forefathers had done for centuries. That is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructory right." What they are asserting in this claim is that they have a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this rights was "dependent on the goodwill of the sovereign."(258)

Judson grounded aboriginal title in Indian reality and not British recognition, an attitudinal change which

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257. Supra, Sanders, Pre-existing Rights at p. 7.

258. [1973] S.C.R. at 328.

signalled the beginnings of a return to the colonial paradigm.

In 1971 Quebec announced plans to exploit the hydro-electric potential of James Bay. The James Bay Cree sought an injunction in the Quebec Superior Court to halt the project.(259) Malouf J. granted the injunction pending a substantive hearing of the issues almost two months before the Calder decision was handed down by the Supreme Court of Canada.(260) The injunction was subsequently overturned by the Quebec Court of Appeal, but the Quebec government had already been unnerved into seeking a negotiated out of Court settlement. The settlement came in the form of the James Bay and Northern Quebec Agreement of 1975. The agreement dealt comprehensively with all aspects of the colonial paradigm: land title, hunting and fishing rights, as well as powers of self-government.(261)

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259. For a general discussion of the political background and the case see: Diamond, Aboriginal Rights: The James Bay Experience in Boldt and Long, The Quest of Justice: Aboriginal Peoples and Aboriginal Rights , (1985) 265-285.

260. See Kanatewat Chief Robert v. Attorney General of the Province of Quebec ,[1974] Quebec Practice Reports 38.

261. Supra, Diamond pp. 281-4.

In 1974, Thomas Berger, a B.C. Supreme Court Judge was appointed to head the McKenzie Valley Pipeline Inquiry.(262) The pipeline proposal was intended to bring natural gas from the northern slope of Alaska, across the Yukon Territory and down the McKenzie valley to feed markets in the US. It was to be the largest privately funded industrial project in the western world.(263) The Inquiry report according to Sanders, gave Indian claims their highest public profile in modern history.(264) Berger J. found in favour of those claims, and got such public support that the pipeline was mothballed.

In New Zealand, the first signs of real change came with the enactment of the Treaty of Waitangi Act 1975. Aboriginal rights based actions would not hit the Courts until 10 years later. The 1975 Act was a government response to a long period of vehement Maori protest beginning with the Maori Affairs Amendment Act of 1967. Like the Canadian White Paper, the 1967 Act had sparked off a storm of protest from tribal and national Maori organisations. The vehemence of the protest was both

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262. For an excellent discussion of the Inquiry procedures and dynamics see Jackson, The Articulation of Native Rights in Canadian Law (1984) 28 UBCLR 255, at 269-79.

263. Ibid, at 269.

264. Supra, Sanders, Pre-existing Rights at p. 9.

unforeseen and inexplicable from the government perspective. It had been assumed without question that the Maori people wanted assimilation as badly as the government did. The Act ushered in a new era of Maori militance and nationalism in the same way that the White paper did in Canada.(265)

The Treaty of Waitangi Act was an attempt to redirect that dissent. The Act established the "Waitangi Tribunal"(266) a body without final decision-making power,(267) but with jurisdiction to hear claims both individual and tribal that Maori rights under the Treaty of Waitangi had been abrogated.(268) The tribunal would also have exclusive jurisdiction to determine the meaning and effect of the Treaty's terms.(269)

The change appears unspectacular: The creation of a purely advisory body to government on Maori rights. It must

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265. For a discussion of the political events between 1967 and 1975 see Williams, New Zealand's Waitangi Tribunal: An Alternative Dispute Resolution Mechanism, Report to the Canadian Bar Association Committee on Native Justice (1988) at pp. 19-22.

266. The Treaty of Waitangi Act, (1975), s. 4.

267. Ibid, s. 6(3).

268. Ibid, s. 6(1).

269. Ibid, s. 5(2).

be remembered however that the conquest Courts in New Zealand had completley buried the question of the Treaty's justiciabilty and rejected the notion of pre-existing rights. The Treaty of Waitangi Act created a forum (albeit legally impotent) which had not existed in New Zealand since Wi Parata in 1987. This change was as important to the revival of the colonial paradigm in New Zealand, as Calder had been in Canada.

The first few years of the Tribunal's operation proved a disappointment(270). But in 1983 the potential power of this body was felt for the first time. The Tribunal heard a claim by Aila Taylor on behalf of the Te Ati Awa tribe of Taranaki. The facts surrounding the claim were a curious (though less spectacular) rehearsal of the large energy projects of northern Canada. The New Zealand government, in an attempt to make the country self-sufficient in energy, built a huge synthetic fuel plant in Taranaki. A water right was then sought to allow the pumping of effluent from the plant across a network of shellfish reefs claimed and used by Te Ati Awa. Having tried all the normal legal and political avenues for redress, the Te Ati Awa finally brought a claim to the Waitangi Tribunal.(271) Like the

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270. For a discussion of the two claims heard by the Tribunal before 1982 see Sutton, The Treaty of Waitangi Today (1981) 11 VUWLR 17.

271. Taylor for Te Ati Awa Tribe and Fishing Grounds at Waitara [Matunui Claim] 1983 WAI 6.

McKenzie Valley Pipeline inquiry before it, the Tribunal chose to hold its hearings in the community affected. This strategy proved as effective in New Zealand as it had in Canada. Its final recommendation, like that of Berger J., was that the pipeline should not proceed as planned. The government refused to accept the recommendation until public support for the tribunal's findings reached such a level that it could not be ignored. The outfall proposal was dropped and the governments' position reversed.(272) In the course of its report the Tribunal discussed the contemporary relevance of the Treaty of Waitangi:

> The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. It made us one country but acknowledged that we were two people. It established the regime not for uni-culturalism but for bi-culturalism. We do not consider that we need feel threatened by that, but rather that we should be proud of it, and learn to capitalise on this diversity as a positive way of improving our individual and collective performance.(273)

Even at this late stage, the Tribunal still saw a need to dress up its report with non-threatening multicultural platitudes - but the fundamentals of the colonial paradigm were there. The treaty was not only a source of rights -

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272. Supra, Williams, New Zealand Waitangi Tribunal pp. 30-31.

273. Supra, Motunui Claim at para. 10.3.

but an acknowledgment of their pre-existence, and a promise that they would continue notwithstanding white colonisation.

In the Kaituna Report(274) of the following year, the Tribunal attacked Wi Parata, the basis for the conquest cases:

> The proposition contained in [Wi Parata] was wrong in that it was based on a concept of international law and not on the established principles of colonial law. This leads us to the conclusion that the Treaty of Waitangi is no longer to be regarded as a simple nullity.(275)

In the 1985 Manukau report(276) involving one of the most controversial and comprehensive of all claims to the tribunal, clear signals were issued that a return to the promises of the Treaty - to the colonial paradigm - was the only way to avoid continuing injustice.

> We have come to see all the matters raised by this claim as illustrating in various ways the powerful feeling among Maori New Zealanders that the Treaty of Waitangi is a contract made with European New Zealanders which the Pakeha has failed to honour.
>
> The Maori New Zealander points out, with justification, that at a time when his people outnumbered the European by over one hundred to one he agreed to allow the European to live and settle in new Zealand on terms and conditions solemnly agreed to in writing by both parties. He says that he has kept his side of the bargain throughout its existence.

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274. Sir Charles Bennett and Others (Te Arawa, re Kaituna River) (1984) WAI 4.

275. Ibid., at para. 5.6.7.

276. Nganeko Minhinnick for Ngati Te Ata and the Manukau Harbour (1985) WAI 8.

> The Manukau claim throws into relief the way in which it is said that the European New Zealander has failed to live up to his obligations.
>
> In [the claimant's] view the pattern of unjust treatment continues still, and unless arrested, will yet continue until nothing is left but a deeply embittered people and the shreds of a worthless treaty.
>
> We are seriously disturbed by what we heard of recent events affecting the Manukau Maori people.... From their once extensive lands, forests, estates and fisheries all that is left is a few pockets of land, a severely restricted ability to enjoy traditional fisheries, and a legacy of their denigration as a people. If that which is left cannot be protected for their benefit, not as a consequence of a recent environmental awareness, but through a substantive recognition of their status as indigenous peoples, then the pattern of the past, the plundering of the Tribes for the common good, will simply be affirmed and continued.(277)

Though the Tribunal has not spoken in terms of Native title and Native sovereignty, that paradigm has become a central feature of Tribunal reports. In Motunui, the paradigm was explained as a treaty-right to use and control of tribal fishing resources.(278) By the time of the Orakei report(279) 'use' or title was unquestioned, and 'control' had become, in English, "full authority." The tribunal's translation of this concept into Maori showed clearly that Native sovereignty was beginning to be accepted as the crux

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277. Ibid., at pp. 8-9.

278. Op. cit. Motunui at para. 10.2.

279. (1987) WAI 9; discussed above at n. 69-70.

of the Treaty guarantees. The tribunal admits that Mana Motuhake (literally separate Maori autonomy) was the central political right protected by Article II of the Treaty.(280)

It is true that none of these pronouncements have any effect in strict 'law'. The Waitangi Tribunal is not a Court and can recommend but not 'decide.' As will be seen however, Tribunal statements as to the importance of the Treaty of Waitangi and of the colonial paradigm, have had a tangible impact upon legislative, judicial and policy developments in New Zealand.

4.3.2. Constitutional, Legislative and Policy Change

The enactment of the Constitution Act 1982 included three provisons relating in some way to Native rights.(281) Section 25, included within the Charter of Rights and Freedoms, saves aboriginal and treaty rights from abrogation through inconsistency with any of the other rights protected by the Charter.

Section 35(1) is the substantive provision. It provides:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

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280. Ibid., at para. 11.5.6.

281. Sections 25, 35 and 37.

The section was a political football during the constitutional repatriation debate in Canada. It was inserted in January 1981, extracted in November of the same year and finally reinstated after public protest but with the addition of the modifier "exsting."(282)

No one is sure of the exact effect of s. 35(1). It is worded in a way that gives maximum judicial discretion in deciding the actual content of 'existing aboriginal and treaty rights,' and in deciding the extent to which such rights might be defeasible. The section should have been hailed as a final rejection of conquest mythology and of conquest jurisprudence. It should have been understood as a necessary step in the resurrection of the colonial paradigm. It should have meant that rights derived from Native sovereignty and Native title could not be abrogated by unilateral government action as is still the case in the U.S.

The s. 35(1) cases so far have shown that the only change has been to shift the debate from whether aboriginal and treaty rights are legally enforceable to whether they had been extinguished before the enactment of s. 35.(283) The framework is self-defeating. To restate it in clearer

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282. See Sanders, The Indian Lobby in Banting and Simeon And No One Cheered (1983) 301.

283. See Sanders, Pre-existing Rights supra, at p. 22.

terms, the judicial approach has been to take the law of contact, superimpose upon it the law of conquest and enforce whatever was left over as at 1982. Since, as has been continually argued, the two 'laws' are diametrically opposed, the effect of this framework is to validate the conqeust cases and Acts which uniformly denied Native title and sovereignty. In short, attempts to fuse contact and conquest law within a single framework under s. 35(1) have resulted in the subversion of the former.

For example in R. v. Hare and Debassige(284) it was held in obiter that the fishing rights claimed had been extinguished by "operation of federal legislation" long before 1982. Section 35(1) did not have the effect of resurrecting such rights.(285) In A.G. Ontario v. Bear Island Foundation(286) Steel J. of the Ontario Supreme Court cited Chancellor Boyd in St. Catherines Milling and agreed entirely with his conclusions as to the nature of Native title. They were, in Boyd's time, and continue to be, personal and usufructory rights determinable at the will

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284. [1985] 3 CNLR 139 (Ont. C.A).

285. Ibid, at 155-6.

286. [1985] 1 CNLR 1 (Ont. S.C.).

of the sovereign.(287) On the question of Native sovereignty. Steel J. wrote:

> The Constitution Act 1867 allocated jurisdiction over all matters respecting Canada to the federal and provincial governments. It did not leave Indian bands with any jurisdiction over themselves. It was submitted by the defendants that, because the Act did not specifically take away internal self government from the Indians therefore the Indians had the right of self determination within their own areas, subject only to the overall sovereignty of the Crown. I disagree. The Act clearly provided under s. 91 (24) that Indians and land reserved for Indians were under federal jurisdiction, just as municipal institutions were clearly under provincial jurisdiction.(288)

It is as if the case came, through a time warp, out of the late 19th century. Nonetheless, it is merely a provincial Supreme Court level decision and there are signs in recent Canadian Supreme Court decisions and in Court of Appeal decisions that the opinions of Steel J. are no longer good law in Canada.(289) The only conclusion which can be safely reached in respect of s. 35(1) is that it has failed as yet, to yield any discernible change in the dynamics between coloniser and colonised.

The process set in train by s. 37 of the Constitution Act supports such a conclusion. Pursuant to its terms, four Constitutional Conferences were held between 1983 and 1987,

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287. Ibid, at pp. 26-32.

288. Ibid, at 78.

289. See infra notes relevant to this point.

attended by first ministers and Native leaders. The purpose of these conferences was the identification and definition of the rights of Aboriginal peoples to be included in the Constitution of Canada"(290) They produced no significant identification or definition of the rights contained in s. 35(1).

One significant development during this period was the rise of the concept of 'aboriginal self government' as the dominant political issue. In 1983 the Penner Committee (House of Commons Special Committee on Indian Self Government) published its findings.(291) The report adopted the Indian "First Nations" terminology - an important return of the use of contact imagery. The most important recommendation made by the committee was that Indian self government should be recognised as an aboriginal right and "explicitly stated and entrenched in the Constitution of Canada."(292)

The impact of this report was such that the final three Constitutional Conferences would be almost completely dominated by the issue. These developments had at least one

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290. s. 37(2).

291. For a discussion of those findings see Tennant, Aboriginal Rights and the Penner Report in Boldt and Long, supra, at 321.

292. Ibid., at 328.

positive effect notwithstanding the failure to secure a Constitutional amendment. The Penner Report and the Constitutional conferences legitimated the concept of aboriginal self government in Canadian politics if not in Canadian law. The fact that white politicians take the concept seriously at all, and indeed are sufficiently afraid of it avoid its entrenchment as a constitutional right (thus far) is a gain in itself.

On the negative side this process had succeeded for a time in dissecting the colonial paradigm. The conferences focussed entirely on self government and managed to convince Native leaders to leave discussion of land-base for these 'governments,' whether Indian, Metis or Inuit, until a later date. It developed in a way which assumed Native title and Native sovereignty to be severable. They are not. The entrenchment of a right to self government where the government lacks an economic base sufficient to be self sustaining, and must rely on handouts to survive, is fraudulent. The recognition of title without jurisdiction is equally meaningless. The colonial paradigm is ultimately about the survival of Native peoples and Native ways of life. Native title and Native sovereignty are two sides of this single paradigm, and it is this paradigm which is the only possible basis for that survival.

Constitutional and political developments in New Zealand are still at a primitive stage. Nevertheless, even at this early point the similarities are apparent. In 1985,

the New Zealand government published a draft Bill of Rights for discussion.(293) The preamble to the draft Bill refers to the Treaty of Waitangi in the following terms:

> Whereas...
>
> The Maori people, as Tangata Whenua o Aotearoa [the Indigenous people of new Zealand], and the Crown entered into a solemn compact, known as Te Tiriti o Waitangi or the Treaty of Waitangi, and it is desirable to recognize and and affirm the Treaty as part of the Supreme law of New Zealand;...

The proposed substantive provision on Treaty rights provides:

> 4. The Treaty of Waitangi
>
> (1) The rights of the Maori people under the Treaty of Waitangi are hereby recognized and affirmed.
>
> (2) The Treaty of Waitangi shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent.
>
> (3) The Treaty of Waitangi means the Treaty as set out in English and Maori in the Schedule to this Bill of Rights.(294)

Art. 4(1) is obviously based on s. 35 of the Canadian Constitution Act. The most notable difference is that in the New Zealand draft, no express mention is made of aboriginal rights. This may not be significant given that the Treaty is a simple restatement of aboriginal rights in any event.

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293. A Bill of Rights for New Zealand: A White Paper (Govt. printer) (1985).

294. Ibid, at pp. 10-11.

According to the commentary accompanying the draft the government position is

> ...that the time is overdue to remedy the past failure to honour fully the Treaty of Waitangi as part of our law and indeed as one of its foundation.(295)

Thus, the White Paper argues, the effect of constitutional entrenchment would be to immediately overturn the Wi Parata obiter that the Treaty is a "nullity."(296)

There no doubt as to the truth of the second point. As to whether such a provison would "honour fully the Treaty of Waitangi," the Canadian experience leaves room for a good deal of doubt. There may be a difference between the two situations in that the Treaty of Waitangi is completely a creation of the contact era. Aboriginal rights in Canada however though they have their genesis in that period, continued through the conquest period during which the concept was completely transformed by positivist thinking. At least that appears to be the judicial position in Debassige and Bear Island. Treaty rights in New Zealand did not undergo such a 'transformation' because no such rights existed during the conquest era. Only legislative rights were ever recognized. The logical conclusion is that Maori title (to the extent that it was not transferred) and Maori sovereignty must have survived intact. An analogy would be

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295. Ibid, p. 35.

296. Ibid.

a provison declaring "the rights of the Cherokee as declared in Worcestor v. Georgia are hereby recognized and affirmed."

Worcestor v. Georgia is, like the Treaty of Waitangi, a pure contact creation. Accordingly the rights guaranteed therein attach 'unmodified' by conquest law.

Clause (2) of Article 4 was probably drafted to deal with such a possiblity. The Treaty, it says "shall be applied to circumstances as they arise...." This is a veiled warning to the Courts that circumstances have changed since 1840 and they should not take the strict terms of the Treaty too seriously.

In the end of course the argument is purely hypothetical because the draft has not been enacted. The New Zealand government has not moved on the policy since 1985, and it no longer appears to be a current priority. It will undoubtedly be revived at a later date. The draft is referred to because it reflects a perception, on the part of the New Zealand government that the Native rights framework in Canada can be successfully borrowed and applied to the Maori. It is referred to also because it shows that Treaty rights issues have reached a level of political legitimacy in New Zealand which is approaching that of Canada.

The years since the first Waitangi Tribunal decisions have seen a gradual 'ratchetting up' of Maori objectives and a correlated deterioration of overt government opposition. The proposed constitutional entrenchment of the Treaty is an example. In 1987 the New Zealand Treasury published a

report within which an attempt was made to assess the present and future fiscal implications of this return to prominence of the Treaty of Waitangi and Maori rights.(297) As might be expected from such a report, the real implications of the Treaty were down-played as much as possible. Much of it was simply not a realistic analysis of the Treaty or of the direction in which Maori nationalism, now a significant force in the country, will develop over the next 25 years.(298) The Report is far more signiicant for what it concedes than for what it denies. It is conceded that most tribes will have justifiable land claims lodged before the Waitangi Tribunal in the near future(299)

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297. Treasury Report, Government Management: Brief to the Incoming Government (1987) Vol. 1.

298. The Report records that solutions must be found to grievances which are "practicable and which take existing realities into account" (at 321). The Treaty it says "does not specifically address the issue of financing government," and so has no implications in respect of the whole issue of taxation. In respect of the crucial issue of fishing rights, the report claims:

> ...there needs to be a considerable degree of bicultural accommodation in respect of fishing as the exclusive Maori ownership of extensive traditional fisheries would be unlikely to be widely accepted even if the case for such ownership may be strong if Article II of the Treaty, with its reference to "full, exclusive and undisturbed possession" is taken by itself (at 355) (emphasis added).

299. Op. cit. Treasury Report at 326-334.

and that the Crown will have no choice but to make "appropriate redress." It acknowledges implicitly that tribes have a legitimate claim to re-establish their economic base, and that the Crown may have to foot the bill.(300) The report refers also to the new policy of devolving Maori Affairs Department functions to tribal authorities.(301) In New Zealand this policy is completely novel. All of these changes acknowledge, almost inadvertantly, that the tribes have become the new unit of Maori policy in New Zealand. This change is an essential prerequisite to the return of the colonial paradigm in New Zealand. It suggests that a quiet revolution is happening.

The most telling admission of all relates to the government's motive for supporting certain of these changes:

> The government has...recognised that the Treaty involves the honour of the Crown, that the recognition of its spirit is important to social peace and that resentment based on past wrongs can be a major impediment to the success of programmes based on co-operation.(302)

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300. Ibid, at 331-332.

301. Ibid, at 131.

302. Ibid, at 320.

In short, Pakeha hegemony is not equipped to withstand substantial Maori dissent. The policies which are evolving are designed to curb that dissent as much as possible.

4.3.3 Judicial Return to the Colonial Paradigm

In the last few years concepts of pre-existing Native rights have been gaining increased acceptance in Canada and New Zealand Courts. Judges appear more willing now to draw their analytical framework from the contact era rather than the conquest era. That is, to presume the pre-existence of such rights, and to further presume their survival to the present day. These decisions show that the conquest cases are no longer the predominant force they once were.

While the Constitutional conference process carried on in Ottawa between 1983 and 1987, the Courts re-emerged as the primary forum for dispute resolution. The failure of those conferences to achieve any change in the law, cemented the primacy of the Courts as definers of Indigenous rights.

Nowegijick(303) in 1983 concerned the tax exemption provision in the Indian Act. The claimant sought to widen the ambit of the provision to cover income earned off reserve in circumstances where he was employed by a band owned company whose office was on reserve. The Supreme Court of Canada accepted the proposition and in doing so

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303. [1983] 1 SCR 29.

adopted a new interpretational framework for dealing with statutes relating to Native rights. Dickson C.J. stated:

> It is legal lore that, to be valid, exemptions to the laws should be clearly expressed. It seems to me however that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In Jones v. Meehan (1899) 175 US 1, it was held that Indian treaties "must...be construed, not according to the technical meaning of (their) words....but in the sense they would naturally be understood by the Indians."(304)

This new framework is crucial, given previous judicial pre-occupation with implied statutory termination of Native rights. As Sanders puts it:

> This was the first Canadian decision to state a special doctrine of interpretation of statutes and treaties in cases involving Indian rights. It was a clear departure from the Sikyea line of cases, where any general federal legislation would take away Indian hunting and fishing rights. It was also inconsistent with the argument accepted by Judson in Calder that general pre-confederation land legislation had ended any Indian territorial land rights in British Columbia.(305)

In terms of the contact/conquest dichotomy the case stood for a presumption in favour of contact and Indian rights, and against conquest and abrogation of those rights.

The following year the Supreme Court handed down its decision in Guerin v. The Queen(306). The case concerned a

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304. Ibid, at 36.

305. Sanders, Pre-existing Rights, supra at p. 11.

306. [1984] 2 SCR 335.

claim by the Musqueam Band against the federal government for mismanagement of its lands. The Court, reversing the British Columbia Court of Appeal, held that Indians had a legal interest in reserve land from which sprang the federal governments' fiduciary obligatons in the management of those lands. Such a finding is not particularly startling. The remainder of the case however, read like a major land claim decision. Dickson C.J. held that the Indian interest in reserve land is identical in nature to unextinguished aboriginal title. That interest, according to Dickson, was a "pre-existing legal right." He continued:

> In Calder v. AG British Columbia...this Court recognised aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. With Judson and Hall JJ. writing the principal judgments, the Court split three-three on the major issue of whether the Nisga'a Indians aboriginal title to their ancient tribal territory had been extinguished by general land enactments in British Columbia. The Court also split on the issue of whether the Royal Proclamation of 1763 was applicable to Indian lands in that province. Judson and Hall JJ were in agreement, however, that aboriginal title existed in Canada at least where it had not been extinguished by appropriate legislative action independently of the Royal Proclamation. Judson stated expressly that the Proclamation was not the "exclusive" source of Indian title. Hall J said that "aboriginal title does not depend on treaty, executive order or legislative enactment."(307) (emphasis added)

In this passage the Chief Justice basically rewrote Calder in a way that rejected finally the positivism of St. Catherines Milling . Hall J. who in Calder wrote for the three judges in favour of continuing aboriginal title, had

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307. Ibid, at 376-6.

based his decision on common law recognition and the Royal Proclamation. Judson J. though he recognized that the aboriginal claim to title was based in pre-existing possession, never stated that it was recognized in law. Dickson CJ represented the case as a vindication of pre-existing rights, with a division only over whether those rights had been extinguished. There was now no need to prove legislative (or perhaps even common law) recognition. The rights had independent existence. Guerin therefore represents an important change in judicial perception. St. Catherines can no longer be considered authority for the proposition that aboriginal rights are restricted within the terms of the Royal Proclamation. By the same token modern cases such as Bear Island which relied on that proposition must also be considered impliedly overruled. The case recognizes pre-existing rights as a 'free-standing' phenomenon for the first time in Canadian history. It must be remembered however that such a conclusion is not new. It was not the first time for such ideas in colonial history. Guerin represents a major step toward final rejection of the conquest cases as a basis for modern law.

In 1985, the Supreme Court decided Simon v. The Queen(308) a case which concerned the same treaty as was in issue in Syliboy,(309) The Court attacked that decision in

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308. [1985] 2 SCR 387.

309. see note infra.

a way that made plain the conflict between contact and conquest law:

> It should be noted that the language used by Patterson J (in Syliboy)..., reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada.(310)

In this passage, the Court clearly rejects the 'savage barbarian' imagery employed in Syliboy as a basis for conquest law. Once that causual link between conquest imagery and conquest law is recognized by modern Courts, logic requires that the law as well as the imagery of that era be rejected. Though the Supreme Court is clearly moving toward such a revelation, the connection was not finally made in Simon. On the status of the 1725 treaty the Court concluded:

> While it may be helpful in some instances to analogise the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique, it is an agreement sui generis which is neither created nor terminated according to the rules of international law.(311)

The Court is not yet ready to go so far as to say that Indian treaties are truly international instruments. As noted, contact law clearly did recognise them as such.

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310. Op. cit. note 35, at 399 per Dickson CJ.

311. Ibid, at 404.

These three cases represent the important initial steps in finally re-establishing the colonial paradigm. Together they provide a framework within which (1) Native rights are recognized to have their genesis in pre-existing Native reality rather than the vagaries of colonial recognition; (2) the modern presumption is against those rights having been extinguished; and (3) a rejects conquest imagery.

Further and more recent developments at levels below the Canadian Supreme Court suggest that the judiciary, coaxed by Native litigants, have moved to yet another stage in this process of re-establishment. In Sparrow v. Regina(312) the British Columbia Court of Appeal ruled that the Musqueam band had an existing, and constitutionally entrenched, aboriginal right to harvest salmon for food. The Federal Crown had argued that whatever aboriginal right to fish might have existed at contact, it had long since been 'extinguished by regulation' in fisheries legislation. The Court replied:

> In our view the "extinguishment by regulation" proposition has no merit. The short answer to it, is that regulation of the exercise of a right presupposes the existence of the right. If Indians did not have a special right in respect of the fishery, there would have been no reason to mention them in the regulations. The regulations themselves, which have consistently recognized the Indian right to fish, are strong evidence that the right does exist. It is clear that such a right has not been extinguished, either expressly (as Hall J. [in Calder] would require) or by implication (as Judson J. held).

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312. [1987] 2 WWR 577.

The decision suggests that the room within which a successful argument of extinguishment may be brought is narrowing. The notion of pre-existing rights used in Guerin suggests that legislative silence as to the existence of such rights denotes legislative acquiescence. In Nowegijick legislation is construed liberally in favour of Indians - a necessary corollary of which must be that legislation, to effectively extinguish aboriginal rights, must be express. In Sparrow, it was held that express regulation of such rights affirms rather than extinguishes them. The only remaining avenue is express legislative denial or expropriation of the rights - and that option was foreclosed by the enactment of s. 35 of the Constitution Act.

Such conclusions may be premature. The Sparrow case is currently awaiting appeal to the Supreme Court. If affirmed the possibilities are clear. The Indian Act band council system for example could be construed as affirmation of an unextinguished (though regulated) aboriginal right to self government. If that is the case, Sparrow provides further that the circumstances within which continued federal regulations of the right would be acceptable becomes severely restricted under s. 35(1).

A Quebec Provincial Court decision in Eastmain Band v. Gilpin(313) held that the imposition of a curfew for children under 16 as valid as within the bounds of Cree

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313. [1987] 3 CNLR 54.

residual sovereignty. The Band Council in question had not been delegated specific authority to enact such laws.

In May 1987 the most important aboriginal rights litigation in Canadian history began in a case brought by the Gitksan-Wet'suwet'en Tribal Council. The case is still at an early trial stage and it may be well into the 1990's before a final determination is made by the Canadian Supreme Court. Nonetheless, the nature of the claim suggests that it may prove to be the case which gathers together the threads of the three eras and reproduces the colonial paradigm in modern law. The Tribal Council is claiming what it calls "ownership" of and "jurisdiction" over its traditional territories - an area of some 22,000 square miles. These two heads of claim are nothing more than a restatement of the colonial pardigm - Native title and Native sovereignty. The time could not be more ripe for such a move

Developments in New Zealand have been moving in a direction similar to those in Canada. The historical lack of judicial recognition of any Maori rights at all has meant however, that current judicial understanding of such concepts have been far less sophisticated and more conservative in New Zealand.

The first major judicial treatment of Maori rights since the 1960's came in Te Weehi v. Regional Fisheries

Officer(314) in 1986. Te Weehi had been charged with the possession of undersized shellfish in contravention of the Fisheries Act 1983. He claimed the protection of s. 88(2) of that Act which provides: "Nothing in this part of this Act shall affect any Maori fishing rights."(315) On the issue of whether any Maori fishing rights existed, Williamson J. introduced the concept of pre-existing rights for the first time since R. v. Symonds:

> The phrase Maori 'rights' has been considered in several New Zealand judgments. Many but not all of these have taken a restrictive approach. Any consideration of such rights often commences with the Treaty of Waitangi.... The Treaty was signed in 1840 but obviously the rights which were to be protected by it arose by the traditional possession and use enjoyed by the Maori tribes prior to 1840.(316) (emphasis added).

This is the first judicial hint of a proposition which appears to be gaining momentum in New Zealand. That is that the negative jurisprudence in respect of the Treaty of Waitangi can be overcome by treating it as mere recognition of, rather than the source of Maori rights.

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314. Unreported decision of Williamson J. M662/85 (1986) (High Court).

315. This phrase was also central to the decision in Waipapakura v. Hempton supra, wherein it was held that it protected only legislatively recognized Maori fising rights. The clause was also considered in Inspector of Fisheries v. Weepu [1965] NZLR 322. Both cases found against the claimants of such rights though for different reasons.

316. Ibid, at p. 10.

Later in the judgment he refers to the Canadian decisions which have taken a similar view:

> Canadian Courts have consistently taken the view that customary rights of aboriginal peoples must be preserved and that Charters and treaties similar to the Treaty of Waitangi recognise obligations which arise as a result of those customary rights.(317) (emphasis added)

Calder and Guerin are also referred to. The latter he says "explains the pre-existing rights of Indians as creating an enforceable equitable obligation."(318)

Williamson J argues that the disparity in judicial attitudes between Symonds and the Wi Parata line of cases may be explained by the fact that the latter were decided "perhaps significantly after the Maori wars of the 1860's.(319) This is a clear allusion to the conflict between contact and conquest jurisprudence. In the conquest cases, Maori rights were extinguished (if they ever existed) by the mere fact of colonisation. In the modern era, Williamson J. rejects such an approach. Instead he appeared

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317. Ibid, at p. 18.

318. Ibid.

319. Ibid, at p. 12.

to adopt the test in the Canadian Baker Lake case.(320) He concludes:

> In [that case] Mahoney J. suggested that the real test in law for assessing legislation as to whether it was adverse to a right of Indian occupancy was whether it "expressed clear and plain intention to extinguish that right.(321)

The logical conclusion from Williamson J.'s reference to the Treaty of Waitangi being declaratory only and his view that customary rights must be expressly extinguished, is that even without s. 88(2) of the Fisheries Act, Te Weehi would have been exempt from its provisions. Those rights are simply assumed to exist because they have not been taken away. No attempt is made to find a source for them either in common law recognition or in the Treaty of Waitangi. Above all, the case suggests that, like Canada, the framework within which Native rights arguments are being dealt with in New Zealand has changed dramatically.

Williamson J's approach was developed in a much more spectacular way in Ngai Tahu Maori Trust Board v. Attorney General(322) The case concerned the introduction by the New Zealand government of a 'quota management system' for

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320. (1979) 107 DLR (3d) 513.

321. Ibid, at p. 18.

322. Unreported decision of Greig J. CP559/87 (1987) (High Court).

fisheries. Its central thrust was to be that transferable fishing quotas would be bought by individual fishermen who would only be allowed to take a season catch within the limits of the quota. The Runanga o Muriwhenua applied for an injunction to stop the scheme which, it was argued, abrogated Maori fishing rights protected by s. 88(2). The claimants were soon joined by a number of major tribal groupings in their action. The injunction was granted.

At the outset, Greig J. makes it clear that his decision is not "based on the words of the Treaty or its meaning or affect".(323) These issues he says will have to be decided on another day. Thereafter, the approach adopted is consistent with a Guerin-type concentration on the historical reality of pre-existing Maori fisheries and fishing law.

> I am satisfied that there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole cost of NZ at least where they were living. This was divided into zones udner the control and authority of the hapu and the tribes of the district. Each of these hapu and tribes had the dominion, perhaps the rangatiratanga, over those fisheries. Those fisheries had a commercial element and were not purely recreation or ceremonial or merely for the sustenance of the local dwellers.(324)

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323. Ibid, at p. 9.

324. Ibid, at p. 6.

He then goes on to address the issue of extinguishment, having assumed that such rights had independent legal existence:

> The next question I think arises is whether it can be said that the Maori gave away or waived any of those rights....[O]n the material that is before me at this stage there cannot be said to be any evidence which would satisfy me that those rights have by those means been lost. What is clear is that over the time since 1840 there has been a dimunition and restriction in Maori fishing through circumstances, to use a neutral word, which have in the end limited the exercise of those rights.
>
> The next point that seems to me to arise is to ask the question whether the rights have been taken away. There is nothing pointed to in any statute as directly or expressly doing that. It is I think clear, and I would if necessary cite TA Gresson J. in the Ninety Mile Beach case, that there needs to be some express enactment to take away the rights; they cannot be taken away by a sidewind or by some indirect implication. There is nothing, in my view, in the Fisheries Act 1983 or its amendments which could be said to have taken away the existing fishing rights.
>
> It may be argued that the common law has taken away or diminished those fishing rights. There is an argument that, on the assumption of sovereignty by the Crown in 1840, fishing in tidal waters and at sea became public under the control of the Crown. But even at common law private rights could continue, could be granted and can be protected. I think, however, that it would be surprising that such fishing rights which existed for centuries before the European came should be extinguished by common law, contrary to the solemn undertaking in the treaty, particularly in the English version.(325)

The case represents a major flip of the Wi Parata paradigm. What is more, the facts of the case were not a minor fisheries violation as in Te Weehi, they concerned a major government economic initiative worth potentially

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325. Ibid, at p. 7.

millions of dollars. The case is proof that the New Zealand Courts are now taking very seriously Maori rights and the colonial paradigm. Once again, like Canadian Courts, the New Zealand Courts are beginning to treat contact law as the starting point. In this case rights which in the past only existed following statutory recognition, now could only be taken away by direct and express enactment. As in Te Weehi, no source for the rights is sought beyond the fact that they were exercised freely before white contact.

The real test will come when the tribes seek enforcement of a right not expressly referred to in legislation. The principles in both Te Weehi and Ngai Tahu suggest that the courts will uphold such claims.

The third and final case related to yet another major policy initiative of the government. In 1987, the government announced its intention to transfer a number of Crown assets to "state-owned enterprises" (SOEs), created for the purpose of managing those assets on broadly commercial lines. These assets would include the bulk of Crown owned lands. After lobbying from Maori groups and an interim report from the Waitangi Tribunal(326), the government inserted s. 9 into the State Owned Enterprises Act - the instrument designed to give effect to its policy. Section 9 provided:

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326. Hon. Matiu Rata and Ngati Kuri Re Muriwhenua (Interim Report) (1986) WAI 22.

> Nothing in this Act shall permit the Crown to Act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

This was intended to respond to the fear expressed by Maori leaders that the transfer of Crown lands to SOEs would jeopardize land claims presently before the Waitangi Tribunal. Having inserted this clause, the government proceeded with implementation of its policy. The New Zealand Maori Council, a national organisation, reacted by seeking an injunction to stop implementation. The Council argued that without adequate and detailed safeguards, the policy itself was in breach of the Treaty. The Court of Appeal in The New Zealand Maori Council and Latimer v. Attorney General and Others.(327) granted the injunction.(328)

The case is not important for its analysis of the independent enforceability of pre-existing rights or even for that matter, of Treaty rights. The insertion of s. 9 into the SOE Act meant that these issues did not arise. It is important however because it reflects changing attitudes about the importance of Maori rights in New Zealand and the priority accorded them. It is also important because it had the effect of returning the Treaty of Waitangi to centre-

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327. (1987) 6 NZAR 353 (The SOE case).

328. For a discussion of the case see Boast, New Zealand Maori Council v. A.G.: The Case of the Century? [1987] NZLJ 240.

stage in political developments in the country. It represents the first step toward recapturing the political dynamics that existed at contact, a necessary prerequisite to re-establishing the colonial paradigm.

President Cooke introduced the Courts decision by saying: "This case is as important for the future of our country as any that has come before a New Zealand Court"(329) He concluded by noting:

> The prosaic language of the Courts' formal orders should not be allowed to obscure the fact that the Maori people have succeeded in this case. Some might speak of a victory, but Courts do not usually use that kind of language.(330)

The body of the decision is a mix of positive and negative findings in relation to Maori rights and the Treaty. A mix which suggests that times have changed, but that New Zealand still has a long way to go even before it catches up with developments in Canada and the U.S.

Cooke P. summarises the crux of the decision in two basic propositions:

> First that the principles in the Treaty of Waitangi override everything else in the State Owned Enterprises Act. Second that those principles require the Pakeha and Maori treaty partners to act towards each other reasonably and with the utmost good faith.(331)

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329. Ibid, at 355.

330. Ibid, at 373.

331. Ibid, at 373.

The first is an important finding. It reflects not just the terms of s. 9 of the Act, but also a new judicial perception of the importance of the Treaty. The second is a little more ambiguous. It hints at a need for compromise from both sides and not just on the part of the Pakeha. An historical analysis suggests that Maori rights have been compromised enough.

Richardson J. makes reference to the failure of conquest law to live up to the obligation imposed upon the Pakeha 'treaty partner.'

> ...the Treaty has never been legislatively adopted as domestic law in NZ. And any reading of our history brings home how different the attitudes of the treaty partners to the treaty have been for much of our post 1840 history: on the one hand, relative neglect and ignoring of the treaty because it was not viewed as of any constitutional significance or political or social relevance; and on the other, continuing reliance on treaty promises and continuing expressions of great loyalty to and trust in the crown. It is only in relatively recent years and as reflected in the Treaty of Waitangi legislation itself that the lagging partner has started seriously addressing these questions....Much still remains in order to develop a full understanding of the constitutional, political nad social significance of the treaty in contemporary terms and our responsibilities as New Zealanders under it.(332)

Notwithstanding Richardson's confession of guilt, Somers J. accepts the non-justiciability of the Treaty as the 'law':

> The received view of the law is that the Treaty of Waitangi does not form aprt of the municipal law of New Zealand as administered by the Courts except to the extent that it is made so by statute. This proposition

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332. Ibid, at 379.

> is referred to by the Privy Council in Hoani Te HeuHeu Tukino v. Aotea District Maori Land Board....
>
> Notwithstanding some criticisms of these opinions, I am of the opinion that they correctly set out the law. Neither the provisions of the Treaty of Waitangi nor its principles are, as a matter of law, a restraint on the legislative supremacy of Parliament.(333)

This is a complex and confused statement. Firstly, he leaps from the argument of the justiciability of treaty rights to the claim that the Treaty cannot be a fetter on Parliament. They are two quite separate issues - though melded in Tukino because of the nature of the claim in that case. He assumes one conclusion must follow from the other. There is logic to the view that if Parliaments' sovereignty is derived from the Treaty, that institution must lack the power to breach its own parent instrument. But even if it were conceded that this is not so, Somers J. leaves no room to argue that Treaty rights are enforceable independently of legislative recognition at least where they have not already been abrogated.

The preferable view is that of Cooke P. who argued that such questions, since not directly at issue in the case, were "probably better left free of the crumbs of dicta."(334)

> ...whether the Treaty of Waitangi has a status in international law; what are the principles for

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333. Ibid, at 399.

334. Ibid,at 360.

> interpreting international treaties; whether, apart altogether from the Treaty, Maori customary title has protection at common law. These are big questions, not sensibly to be answered by an individual judge's impressions based on argument and materials touching but not closely focused on them.(335)

It is difficult, even at this stage, to draw together a synthesis of these three cases. The concepts grappled with are new (in New Zealand), and the principles applied are raw. There appear to be two concurrent developments occurring in these cases at the same time. The first, evidenced by the two fishing cases, is that concepts of pre-existing aboriginal rights are returning to the status of credible legal principles. Within that framework, the Treaty of Waitangi is being perceived as a collateral phenomenon affirming but not creating those rights. This follows closely the Guerin approach. The second development relates to the continuing ambiguity of the status of the Treaty of Waitangi, and the rights declared therein. The SOE case reflects at least a new political status for the Treaty, which in isolated cases can translate into specific legislative recognition.

The Courts continue however, to avoid establishing a coherent principle of Treaty status. Despite the dicta of Somers J. quoted above, the political environment has changed too much not to have some across the board effect on the question. It is simply no longer acceptable to reject

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335. Ibid.

the Treaty's justiciability on the basis of bad conquest era decisions. Cooke P. implies as much by refusing to deal with the issue in dicta. Change will come - either by constitutional entrenchment of the Treaty or by judicial pronouncement. That change will have the effect of resynthesizing the now separate concepts of Treaty rights and pre-existing aboriginal rights into a single body of law, and single statement of rights.

In all three cases the courts have borrowed liberally from North American law - particularly Canadian. In a sense this represents a new level of internationalization of Indigenous rights issues. That international dimension to domestic colonial law has been missing since the contact era, and will continue to grow. The re-establishment of the colonial paradigm an only be aided by such developments.

It is not possible to argue that Native title and Native sovereignty are concepts expressed in the New Zealand cases. But they do carry the seeds of the colonial paradigm. If one recognizes that the right to fish pre-existed white contact, one is eventually forced to accept the <u>context</u> within which that right was exercised. As Greig J. says in the <u>Ngaitahu</u> case: "Each of these hapu and tribes had the dominion, perhaps the rangatiratanga, over those fisheries." If the Courts are willing to accept an unextiguished pre-existing right to fish, it becomes increasingly difficult to deny the pre-existing and unextinguished dominion.

Similarly, if the Courts adopt a position affirming the central importance of the Treaty to New Zealand's foundation, it is impossible to deny the cold, hard guarantee of Native title and Native sovereignty contained therein.

5. Drawing Conclusions

The law of Indigenous rights in the modern era is developing quickly. The signs are that it is developing away from conquest law, and in a way far more consistent with contact law. This is true for legislative and for judicial developments. The negative aspects of decisions such as Wheeler in the US, Bear Island in Canada, and the SOE decision in New Zealand suggest that the way is not yet clear for a return to the colonial paradigm as a legal framework for ordering relations between coloniser and colonised. The conquest era still exerts influence on modern Courts in all three countries, though that influence has diminished. To the extent that Courts perpetuate conquest law, they perpetuate also the racism which underpinned it. This is simply no longer acceptable. It can no longer be justified as a basis for law in a modern society.

The Courts have yet to face head on, the legal contradictions between conquest and contact. In a short time, it is submitted, they will have to. One gets a sense, in viewing recent judicial developments, that the Courts are

slowly, perhaps unwittingly, painting themselves into a corner. In that corner the choice between contact and conquest will have to be made. Once the Calder case was initiated by the Nisga'a in Canada, it was really only a matter of time before the Gitksan Wet'suwet'en would claim that their rights under the colonial paradigm remained intact. So it will be in New Zealand.

Indigenous people have appropriated such political power through use of the Courts, media and international pressure, that it is now no longer politically acceptable for white politicians to overtly oppose Indigenous objectives. Particularly in Canada and New Zealand. Accordingly the legislative and policy framework in respect of Indigenous peoples has changed as well. As with judicial changes, the results on the ground have been few at this stage. The social and economic statistics still speak much louder than the law. But, it is suggested, no real change can occur for Maori or Indian until the legal relationship between coloniser and colonised is dealt with in a way which ensures decolonisation for the colonised

HEI TIMATANGA HOU: A NEW BEGINNING

The great Maori prophet, Te Whiti o Rongomai, once said 'ko ta te rino i tutuki, ma te rino ano e hanga': That which is broken by iron, can also be mended by iron. He was referring to the coloniser's laws. The rights of the Maori people which have been abrogated by Pakeha laws, can also be restored by those laws. That proposition is as true for

Indian peoples, indeed for all Indigenous peoples. The modern convergence in purpose of International and domestic law suggests that Te Whiti's proverb may yet become a prophecy.

A basic premise of this thesis has been that the law can, and must deal with the injustices of the past in order to rectify those of the present, and in order to avoid those in the future. Modern Indigenous law and policy must be understood as a continuing colonial reality if the legacy of colonialism is ever to be overcome. Until that time, white majorities and Indigenous minorities will simply talk past each other. The developments discussed suggest that there is ample cause for hope, but there is still a long way to go before the circle is completed.

TUTURU O WHITI WHAKAMAUA KIA TINA!
HUI E!
TAIKI E!

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