

Indigenous law and responsible water governance

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Malaysia and New Zealand

Had I met the fourth Lord President, Tun Suffian, I would have been keen to know of the experience of a Malay boy brought up under colonial rule and who, at age 31, became the first Malay to be a Magistrate. I was brought up as a Māori under an English legal system and became the first Māori to be appointed a Judge of the Māori Land Court, at age 34. However, by about age 44, Tun Suffian was a High Court judge, Chief Justice at about 56, and Lord President by age 57. At 58 he was awarded the title of Tun.

That would be a stellar performance in New Zealand today. In New Zealand in the 1900s, it would have been unheard of.

Tun Suffian is on record as contributing to the drafting of the Malay Constitution and subsequently as one of its ardent supporters. The New Zealand constitution is distributed over several statutes and conventions. There is a strong argument for a single constitutional document in New Zealand. Nonetheless, notwithstanding our dispersed constitution, the New Zealand Courts have been effective in maintaining and advancing democratic principles and the rule of law. Since the 1980s, this has been done with increased sensitivity to cultural minorities, including the indigenous minority.

This month in New Zealand we celebrated Māori Language Week. I was reminded that Tun Suffian's recognition of the National Language of Malay in the Merdeka University case would have struck a welcome chord amongst the growing numbers of New Zealanders promoting the Māori language today. There is much I would like to know about the role a Malay boy might have played last century in bringing to the British common law a distinctly Malay intelligence.

Māori interest in Malaysia grew following the period from 1959 to 1963 when our most prominent, modern warrior, the highly respected, Sir Charles Moihi Bennett, was New Zealand High Commissioner to the newly independent Federation. At age 29, Sir Charles was commander of the Māori Battalion in the second World War. Sir Charles became a personal friend of the first Prime Minister, Tunku Abdul Rahman and in 1963 he was awarded a Malayan

title as Honorary Commander of the Order of the Defender of the Realm. Some 4000 New Zealand soldiers served here, in Malaysia, at about that time.

In comparison with the legal pluralism of Malaysia, New Zealand has the tradition of a single jural order, introduced by English settlers in 1840. By 1858, the British settlers outnumbered the indigenous Māori. Māori are now 15% of the population. Nonetheless, the common law recognises native custom as a source of law and English law applies only so long as it is applicable to the local circumstance.

That leads to this paper on Indigenous Law and Responsible Water Governance. The paper is about how other cultures, and different world views, can help us to develop better policy. In this case, the focus is on how the Māori world view helped to reshape New Zealand water policy.

The Different World Views

The contrast between the Māori and English world views is profound. The English who settled in the 19th century, believed that Man is master of the world and the world is for him to exploit. They cleared the forests, drained the wetlands and built an economy based on the maximum exploitation of the new, man-made pastures.

In Māori tradition, the people are an integral part of a finely tuned ecosystem. Their economy is based on preserving as they are, the forests, wetlands, rivers, lakes and streams.

The wholesale destruction of the wetlands took away the Māori's primary access to food, and materials for clothing and shelter. Those on the flats became dependent on the settlers for basic supplies. Those who once were warriors became labourers.

That Māori survived more from the oceans and inland waters, than from the land, is obscured by New Zealand's large land mass. In fact, before the English came, Māori had no farmable animals and few crops. The primary diet was fish, water fowl and water based plants. It is also no longer obvious, that the flats were mainly wetlands, and that lakes and streams abounded. Naturally, it is these that were the focus of Māori collective harvesting. The largest Māori structures for the capture of wildlife were in rivers, and while the settlers used fences and stakes to mark out the ground, the Māori had staked the coastal seas and inland waters to delineate the family, food-gathering boundaries.

In this century, after the unbridled exploitation of the land and the draining of wetlands, the government looked at the ongoing exploitation of the rivers, lakes and streams and the need for a clear policy. Once more the old thinking kicked in. In 2014 the then Prime Minister, having regard to an opinion on English law, declared that no one could own water. The consequence, in his view, was that subject to obtaining the necessary local authority consents, the local authorities and commercial interests could exploit the natural water bodies for free, on a first

come, first served basis. Commercial use includes the discharge of waste to water bodies and the use of water for power generation, as well as the abstraction of water.

On the other hand, the New Zealand Māori Council, a statutory body to represent Māori interests, argued that Māori tribes had a proprietary interest in water bodies, contended that all people were entitled to access to pure water for domestic consumption and to clean water for recreation, and sought a management framework by which Māori, general public and commercial interests could be balanced. This required, in the Council's view, a constraint on commercial use, and a charge on commercial usage.

To counter the Prime Minister's reliance on English law, the Council pointed to the Māori law and practice in relation to water. Unsurprisingly, given the historic, Māori reliance on water bodies, Māori law has settled views on proper, water use. However, the land is important too and the principles for each are the same. I will therefore explore the Māori law concepts generally, the application of the principles today, and the uptake of the Māori Council water policy by several political parties in this month's elections.

Māori law and water policy

Māori communities and their law

The Māori people call their law "tikanga", which means that which is proper, correct or right. It requires no State to enforce it for it is enforced at the level of the tribe (hapū), or self-enforced by being internalised in the mind.

The tribe was comprised of a few hundred people. They will have taken the name of a famed forebear from whom most members trace descent.

As the tribes grew they divided to spread across the district, typically along the rivers or lakes, so that the tribes of a catchment were invariably related, and came together as required, under the original ancestral name. Today, the tribal groups are relatively settled since the land is no longer theirs to spread over. Instead, a core group tends to staff the customary villages (papakainga) while most of the tribe's members live in nearby towns.

While the tribes are part of an ancestral coalition, each is autonomous in managing their own affairs. The governance was typically a Council of 10 or so family heads (koromatua) guided by a single chief (rangatira), who was recognised by popular acclaim.

The relationship with the natural world

Their law is based on spiritual beliefs connecting tribal members to their past and future, to each other, and to the natural world. Here are some pointers:

1. All people have a spirit (wairua). Good health is determined by reference to both the body and the spirit.

2. The world is occupied by the living and the spirits of the departed. Orators address both. The living and the dead share the land and waters and hold them for the generations to come.
3. The Māori, the wildlife, the land and the waters are all related by descent from primordial ancestors. They are part of the same family and are interdependent. Māori are as much concerned for the good health of the wildlife and their environs, as they are for their own health.
4. The land, mountains, lakes, rivers and streams each have their own life-force (mauri). They descend from ancestors (tupuna) and they are treated as living beings. In introducing themselves to other groups, Māori identify themselves according to the ancestral mountains and rivers of their customary villages.
5. Māori determine their own status, their place in the world, and their relationship to other Māori throughout the country, by the length and breadth of their genealogies. For example, I usually recite my own genealogy back 25 generations to one of the captains of the last set of voyagers from the Pacific. Others trace their genealogies much further back and to much earlier vessels, and some go back to the gods to establish their connections to other lifeforms. The breadth of these genealogies allow Māori to link to each other, no matter where they are from.
6. The places Māori occupy, and the things they do, are either sacred or profane. For example, the speaking place (paepae) on the main courtyard (marae) is sacred (tapu). On the other hand, the cookhouse is profane (noa). Hunting and foraging, or digging the garden are secular activities, but in undertaking a significant journey or attending a house of learning, the participants are in a sacred state.

The law imposes a sense of personal responsibility in the way Māori relate to each other and to the environment, so that the people are protected from spiritual contamination in moving between sacred and secular conditions. The law is not based on individual rights but on the corollary of a right, the individual duty or responsibility.

The ethic of respect.

The essential requirement for Māori, to keep peace with others, the living, the dead, the generations to come and the gods of the natural world, is continually to honour them and show respect. I will look separately at honouring other persons and other beings.

The respect for other persons is played out in set protocols when tribal communities meet and greet. It involves careful acknowledgement of the respective leaders, and the recitation of the genealogies by which the affected groups or individuals are connected, thus rekindling the

bonds of consanguinity. It involves acknowledging significant persons who have passed on from all the tribes, not just one's own.

Ideal conduct for Māori groups, in treating with one another, is to host each other generously, and to extol each other's virtues. One should seek to enhance the standing (mana) of others through words and by demonstrative acts of love, generosity and care.

Turning to the natural world, the respect for landforms is first played out, as already mentioned, by acknowledging the mountains, lakes and rivers of those with whom we meet.

Then, respect is paid to the lands and waters themselves, in managing everyday activities. For example, propitiations are made to Tangaroa, the god of seas and water life, before the start of a fishing expedition, seeking permission to take of his bounty. To show that the expedition is not motivated by greed or mindless exploitation, the first fish caught is given away, no more is taken than is necessary and the first large catch is for the elderly and needy. To ensure the survival of each species the breeding stock are preserved and the correct lifecycles are observed.

To maintain the environment from which the fish are taken, the fish are not gutted on the water but well inshore. Even the shells of shellfish must be taken inland for disposal and no form of waste is discharged to water. On landing, the baskets of catch are not dragged across the beach but are carried, so as not to disturb the shellfish in the sand. On lifting a rock in a river to take the freshwater crayfish (koura), or the abalone (paua) from the coastal rockpools, the rock is replaced in the position that it was, so the lifeforce (mauri) of the water body is not disturbed.

Similarly, on land, no great tree is felled without the permission of the forest god (Tane). Again, if it is a major tree, it should not be felled for personal gain but for the good of all. It should be used to make a large canoe or meeting house which are for the benefit of all. The good of the community is paramount and humility is a virtue which is especially desired of leaders. The grand house in the community is the meeting house for all. The people's homes are modest and that of the chief is indistinguishable from the others.

Turning again to the water bodies, the rivers, streams, springs, lakes, wetlands and groundwater. They too are ancestral entities and are addressed as living organisms. In Māori terminology, a water body has its own lifeforce (mauri) giving it a distinct character (ahua) personality (whakatangata) and authority (mana).

The water bodies supplied all that might be expected of water bodies for human survival. They supplied drinking water and a great range of fish, water fowl and edible plants. Water bodies provided the materials for clothing and shelter and timber from the swamp forests (kahikatea). They provided medicines and the means for transport.

And the water too comes from the gods. The water protects people when undertaking sacred

functions and releases them from a sacred state. It assists those who are sick through spiritual imbalance or contamination. Springwater is preferred for most rituals, flowing water for child baptism and the still water of a pool to assist the retention of knowledge. Washing and bathing is conducted in separate streams where practicable or otherwise in discrete parts of the river, or by carrying the water away from the river's edge.

Waste, including human waste, was discharged only to land at specified locations. The discharge of any form of waste to water, no matter how small, was forbidden. The contamination of water was not just a wrong (he), but a spiritual offence (hara) which would bring misfortune to the offenders and their tribe. When Māori first built homes in western form they built washhouses and toilets a distance from the house to prevent its contamination, and the waste was discharged to land pits. Boiled water used for cooking is seen as dead water which also was not discharged to living water that supplies food. The kitchen sink where food is prepared, could not be used for washing clothes or the body.

Water may also be contaminated in other ways. It becomes impure or unsanitary when its natural flow is disturbed or is modified by unnatural means, or when separate watercourses are fused so that the life force of the waters unnaturally mix.

The strength or health of most water bodies may be measured by the abundance of wildlife and water demons which inhabit it. The water fowl and demons (taniwha) are presented as guardians who protect both the waterbody and the associated tribe. Birds (manu) are well known to Māori as warning people of danger. Observations in nature were critical to survival and the birds were closely read. However, when the birds and demons abandon a water body, they portend of disaster. Their absence or reduction in numbers is a serious omen for the tribe.

[The means of enforcement.](#)

While there are definite no go areas in Māori law, the main focus is actually on aspirational values. One should strive to be like famous forebears and be courageous, generous, caring of others, strong but humble and so on. Occasional lapses will be overlooked if overall, the person is striving to do good for the people. The focus is not on punishing the bad in persons but on encouraging them to give of their best.

Compliance with the law is largely self-enforced, driven by shame (whakama) or the fear of spiritual retribution (matakū); while the driver for doing good was community recognition. Where a punishment was needed it took the form of a raiding party which took the goods of the family of the wrongdoer (muru). But the focus was on maintaining balance rather than punishment. For example, if something was stolen something had to be taken to replace it. Indeed, if a child drowned through no-one else's fault, the family might still be raided to compensate the community's sense of loss.

[Ownership of Water bodies](#)

When the Prime Minister declared that no-one owned water, some Māori implicitly agreed,

for in Māori law, land and water are not capable of being owned in the sense of the private ownership of a tradeable commodity. Māori were only caretakers of the land for future generations. But what the tribes had was exclusive authority (mana) over the land and waters, subject to regulation by no one, and with the power to exclude access and use by others. Mana covers both ownership (the right to use and possess against all others), and the over-riding political authority to control the use and management. What they effectively had was ownership plus. They had mana over the lakes and wetlands in their districts (takiwa) and over the rivers and the water in the rivers while it flowed through their district. Similarly, they owned the springs and the water flowing down from the spring to the point where it leaves the tribal area. The same applies to wild creatures, like fish. Only the tribe can hunt them while they are in the tribal district. That is the Māori law.

How the principles are applied today

In 2012, the Māori Council claimed that the government's authority over the country's waterbodies had not been properly determined in accordance with a founding Treaty between Māori and the Crown. As mentioned, the Council sought a policy to resolve matters. The Council claimed that in Māori law, which government was bound to respect, the tribes owned the water bodies and that the tribal interests had not been extinguished in a Treaty compliant manner.

In 2014, the Council proposed a policy for consideration. The Council acknowledged that most New Zealanders today were not of Māori stock but all were entitled to free access to water for reasonable domestic needs, and to swim in most of the country's rivers and lakes. The Council did not agree with the Prime Minister's view that commercial users should have free access on a first come - first served basis. The Council argued that commercial users should pay, and that Māori should have a share of the royalties on account of their customary, proprietary interests.

The Council particularly urged that the pollution of most of the water bodies was totally unacceptable to Māori interests and that reforms were required. The government had delegated pollution controls to Local Governments, but the Local Governments tended to be dominated by commercial interests, who became judges in their own interests. The Council therefore proposed that an independent, expert Commission should set the standards and exercise controls.

The Council then opposed the prevalent English law approach which sets bottom lines for human conduct, and punishes transgressors. The Council pointed out how this had led to widespread and graphic pollution. The Council pointed to the aspirational top lines of Māori law, and the preference to recognise and benefit, those who strived best to achieve them.

Since the Council's plan was disclosed, the country has seen a significant change in public opinion with most of the political parties in contention for the 2018 election, accepting the greater part of the Council's proposals. There is now an increased awareness of the need to

change the policy, notwithstanding the impact on the economy as viewed in Western terms. People are now more conscious of the traditional Māori stance for the protection of the natural world, and while there are doubts about what is seen as superstition in the Māori legal system, there are increasingly fewer doubts about the need for such objectives as the Māori in fact achieved.

Conclusion

I end by repeating a couple of points. The first is that, embedded in Māori law is a concept which I think sits above the right to use what we possess, and that is a concept of the responsible use of such as we should have.

The second is that different world views can enhance the development of a countries policies and laws, and question such longstanding views as that Man is master of the world and the world is for him to exploit.

I think back then to a Malay boy, who was born into the richness of Malaysian culture but rose to the highest position in a legal system largely inherited from abroad. What an extraordinary potential there would have been to develop the law from a wide-ranging set of autochthonous principles.