

*New treaty, new tradition: reconciling New Zealand and Māori Law*

By Carwyn Jones. Victoria University Press, Wellington (2016)

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Reviewed by Tim Rowse

According to Carwyn Jones, New Zealand's late twentieth century return to the Treaty of Waitangi is both an opportunity for tikanga Māori and a threat to it. While the laws of the New Zealand state and the legal traditions of Māori are dynamic (and tikanga Māori "has had a transformative impact on the regulation of New Zealand public life", 77), the treaty's eminence in law and policy "places pressure on Māori legal systems to become more connected to and focussed on the state and state legal institutions," so that it is likely that Māori are "discarding" tikanga Māori rather than reinvigorating it (138). Paying particular attention to the treaty settlement process initiated in 1994, Jones closes his book by recommending empirical research on how particular settlements have shaped the constitutions, dispute-resolution mechanisms, and election/appointment of governing bodies of post-settlement governance entities (PSGEs). The objective of such studies would be to construct plausible narratives of Māori agency, formed as it is by the interplay of state-provided structures of opportunity and Māori desires and ways. Such narratives would answer two questions (26): "Are the changes to Māori legal traditions resulting from the treaty settlement process self-determined changes or reactive changes?" and "What does this tell us about the effectiveness of the settlement process in reaching goals of tino rangatiratanga and reconciliation?"

In justifying these questions, Jones' first and second chapters review, with economy and clarity: recent theories of legal pluralism and self-determination (with Canadian and New Zealand scholars prominent); relevant New Zealand common law cases since 1840; and public policy discourse and legislation since the Waitangi Tribunal was established in 1975. For this reviewer, an Australian onlooker, Jones' book is a useful primer on the steps by which New Zealanders have created a vibrant and thoughtful treaty settlement process. Before he gets the reader to that process, however, Jones devotes Chapter Three to discussing five concepts of Māori law: whanaungatanga (the centrality of relationships to Māori life), mana (the importance of spiritually sanctioned authority and the limits on Māori leadership), tapu/noa (respect for the spiritual character of all things), utu (the principle of balance and reciprocity) and manaakitanga (nurturing relationships, looking after people, and being very careful about how others are treated). Reviewing two disputes - among Māori Party MPs and among Māori claimants to the Central North Island (CNI) Forestry - he illustrates that Māori sometimes turn to the New Zealand state to help sort out their contests over the application of tikanga. He does not evaluate the outcomes of these two disputes: his point is merely that Māori law "remains a vibrant force" by "actively engaging with other legal traditions that regulate contemporary New Zealand society" (86).

Jones then turns, in Chapter Four, to the treaty settlement process. Before describing what he says, I should note that Jones' account of the current contexts of tikanga Māori silently excludes two topics that must surely be among the determinants of its ongoing pertinence. He says nothing about the political economy of Māori development: the socio-economic position and aspirations of Māori, the economic utility of the property they own and claim, the skills and work orientations that equip Māori for productivity. And he says nothing about how Māori face the criminal law of New Zealand: Māori notions of culpability, policing, moral solidarity and punishment. The domain of Māori life that preoccupies Jones in this book is their renewal - through interaction with the state - of their property-owning collective agency. His isolation of this particular interface of Māori and the world that they inhabit - New Zealand's treaty settlement process - is justifiable, for if "reconciliation" and "self-determination" are to be

more than fine words, New Zealand's treaty settlement process is a practical experiment of global significance. But it is not the only interface of tikanga and the world at large.

In 1994 the New Zealand government established the Office of Treaty Settlements (OTS) to deal with breaches of the Treaty of Waitangi that are alleged to have occurred before 21 September 1992. Jones has combed the resulting archive - statements of principle and terms of settlements - and he has read commentaries by the Waitangi Tribunal on negotiations between Māori and the OTS. Crown sovereignty is an unchallenged premise of the treaty settlement process. He attributes to the OTS a concern for "certainty", so that no "settlement" will ever be re-opened. Jones wonders whether considerations of "justice" can be fully aired if the state and Māori differ in the value that they place on "closure". As well, the vocabulary in which operational aspects of negotiated settlements are stipulated rarely include Māori terms such as the five listed above. When they are used it is to co-opt them: for example using "mana" to refer to the sovereignty of the New Zealand state. The design of PSGEs is shaped by the practical necessities of the negotiated settlement (such as receiving money), not by Māori political concepts. Models of good governance prevail over diversity among Māori practices, and the Crown seeks "economies of scale" to which Māori are under pressure to adapt. Jones worries that the Crown has become, in effect, the arbiter of the legitimacy of Māori political institutions, displacing evaluations informed by distinctive Māori concepts. Like other "Indigenous nations", their empowerment entails "juridification" of their corporate capacities.

All this is open to the rejoinder that Māori concepts are under continual review by Māori themselves and that new and alien practices may seem to them to satisfy the demands of new situations. The transfer of resources to Māori cannot help but stimulate rivalries among Māori and the one thing on which disputants might agree is to welcome the Crown's disinterested attention to disputes in the effort to achieve closure. Jones devotes several pages to a boundary dispute between Ngāti Tama and Ngāti Maniapoto, and he returns to the CNI forestry settlement, in order to argue that "if the settlement process damages relationships between and among Māori communities, then it also damages the ability of those communities to apply Māori legal traditions relating to dispute resolution. This leads to reliance on the Crown..." (127). Historical experience grounds Jones' suspicion that the settler colonial state tends to blunder even as it intends to do good. However, the imperatives of a settler colonial *state* - regulatory consistency inducing security and predictability - are not completely unavailable to Māori, nor irrelevant to peace among them. How would boundary disputes between iwi have been resolved before 1840?

Jones continually reminds the reader that "the shadow of the state legal system" falls over tikanga (131). He implies that there is a connection between Māori articulating "their issues in a rights discourse" and moving "away from tikanga-based approaches to understanding and expressing the relationships between and within Māori communities, not to mention relationships between Māori communities and the state" (147). He concludes that "the treaty settlement process *appears* to encourage the discarding of Māori law rather than the re-invigoration of *applicable* tikanga" (138, emphasis added). This is the kind of vigilant scepticism that has pushed the Crown to be as accommodating as it is, so one can sympathise with the politics of Jones' suspicion. But let's give weight to his "appears" and "applicable", for they keep two doors open: to the analyst's empirical investigation of Māori experiences of interacting with the state, and to the evaluations (what remains "applicable"?) by Māori themselves of their tikanga.