

The Rise and Rise of the Neotribal Elite

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Introduction

My purpose today is to explain neotribal capitalism, - a fairly daunting task given its complexity and the fact that the ideas may be new to you. Neotribal capitalism is an explanatory model showing how the processes that occur in global capitalism shape things at the local level. Using the model it is possible to suggest a new explanation for retribalisation in New Zealand, to explain the success of the iwi elite, and to give sound reasons why iwi are not entitled to traditional economic resources.

Capitalism is an economic system that regulates peoples' relationships to resources in ways that are in constant flux. Elites rise and fall as fortunes are made and lost in this volatile accumulation system. The ability of any elite to rise and sustain the rise depends on the extent to which it controls the regulatory environment, - the laws, norms, values, institutions and so forth. It is this political power that determines whether or not elites embed their privileged status, - as a naturalised 'aristocracy' or as an oppressive oligarchy. The Maori neotribal elite should be understood within this larger process.

Neotribal capitalism explains the process of elite emergence in New Zealand within the enabling context of biculturalism, - itself a social movement that is part of contemporary global forces. It traces the ways in which the neotribal elite has seized the ideological high-ground and acquired considerable institutional power.

Once biculturalism and retribalisation are viewed as contemporary phenomena a very different picture emerges of what is happening in New Zealand, - with major implications.

The post-colonial explanation

Biculturalism and retribalisation are usually explained using post-colonial theory¹. This ‘narrative’ (to use its own jargon), is an account of how people fight for liberation and self-determination against global oppression, both historical globalisation as in colonisation, or the contemporary variety, often referred to as neoliberalism.

It is an epic tale of struggle and justice. Its language evokes heroes and villains, oppressors and victims. It speaks of ‘holocaust’, ‘scorched earth’ and the manifest destiny of a conquered but undefeated people. It gives history an on-going omnipotence over the successive generations forced to carry its burden. A Maori academic, Ani Mikaere, captures this historical burden in her claim that ‘Maori² continue to bear the scars of colonisation . . . Pakeha guilt lurks just below the surface; ‘Maori grief and rage inhabit the same psychological and spiritual space, often unleashed by the smallest of triggers’.

In the postcolonial reading, modernity, with its scientific rationality, its democratic politics, and its capitalist economy, is dismissed as just another cultural form, one used as the weapon of the colonising oppressor. All forms of Western culture are suspect. Knowledge itself is regarded as the most insidious tool of oppression, visited upon the powerless by the agents of contemporary colonisation, - teachers³. To be labelled Western is to be damned as a member of the oppressor class.

If this sounds fanciful then I advise you to read the writings of Maori academics such as Professors Mason Durie, Linda Tuhiwai Smith, and Sidney Mead. The culturalist⁴

¹ There are many varieties of post-colonial theory. – indigenous theory (which includes kaupapa Maori), multiculturalism, cultural theory, cultural studies and so on. All these approaches share a disdain for ‘eurocentricism’, scientific rationality – (particularly objectivity), ‘the West’, and disinterested scholarship. There are a number of writers who criticise the anti-science of these post-colonial social scientists. Of interest are Keith Windschuttle, *The Killing of History*, Sydney: Mcleay; Roger Sandall (2000). *Culture Cults, Designer Tribalism and Other Essays*, Boulder: Westview; Todd Gitlin (1995). *The Twilight of Common Dreams*. NY: Metropolitan Books. Adam Kuper (1999). *Culture, the Anthropologist’s Account*. Cambridge Mss.: Harvard University Press; and Francis Wheen (2004). *How Mumbo-jumbo Conquered the World, A Short History of Modern Delusions*, Fourth Estate; Roger Scruton (2000). *An Intelligent Person’s Guide to Modern Culture*, Indiana: St Augustine’s Press.

² Ani Mikaere (2004). Are We All New Zealanders Now?, *Red and Green*, December, No. 4, 33 - 45. First presented as the Bruce Jesson Memorial lecture, University of Auckland, November 2004.

³ According to Graham Smith (2003), an influential Maori educationalist, kaupapa Maori education is the way to break this oppression. ‘Kaupapa Maori Theory’ is a Transformative Praxis. ‘Its powerful ability to mobilise Maori community resistance and to develop transformation’ has enabled ‘Maori parents . . . (to) penetrat(e) the hegemonies which held ‘dominant Pakeha State’ education and schooling in place’ (p. 7). The liberatory claims for kaupapa Maori are ambitiously extended in declarations of its ‘transformative potential within other indigenous contexts (p. 3). Smith, Graham H. (2003). ‘Kaupapa Maori Theory’: Transformative Praxis and New Formations of Colonisation’ from ‘Cultural Sites, Cultural Theory, Cultural Policy’, The Second International Conference on Cultural Policy Research’ Te Papa Museum, Wellington

⁴ Referring to culturalism as ‘a central component of Kiwi political correctness, a moral enforcement incomprehensible in terms of lived social reality but comprehensible in terms of a reconstructed social

ideology they espouse is repeated uncritically in numerous masters and doctoral theses, in speeches, conference papers, textbooks and journal publications. It is hugely influential.

Ironically social science students are taught this culturalist ideology as ‘truth’ despite the rejection of concepts of ‘truth’ and ‘objectivity’ by these intellectual relativists.

The post-colonial story has several main themes.

The first theme is the idea that present-day Maori revivalism is the up-dated restoration of a traditional culture. It emerged to combat the ongoing oppression and injustice begun in colonial times and continued today. It is emancipatory, transformative, - revolutionary⁵ even. It argues for self-determination and the restoration of tikanga Maori, - ‘the first law of Aotearoa⁶’ with its principles of ‘utu’ and ‘muru’. It takes the approach that ‘history makes people’ rather than the modernist challenge to the gods that it is people who make history.

The second theme extends the first. Self determination requires the restoration of kinship as the structuring principle of socio-political organisation, - of retribalisation. This romanticised version of kinship justifies the inequalities of ascribed birth hierarchy rather than democratic equality and citizenship⁷.

reality’, Christopher Tremewan argues that culturalism ‘insists on a biological connection between ethnicity, culture and entitlement and, in my view, is better termed cultural fundamentalism. Its historical antecedents are invidious. Yet it dominates policy prescriptions and academic analysis of New Zealand society.’ Christopher Tremewan (2004) ‘International Students: A Fundamental Challenge to the Social Sciences’. Paper presented at the International Students for New Zealand, Policies and Prospects Conference, 28 August, University of Auckland.p. 4.

⁵ ‘Graham Smith (1990) claims that kohanga reo and primary kaupapa Maori schools are ‘two of the most powerful and direct statements of resistance to aspects of the present Pakeha education system’ (1990: 77). However there is mounting evidence that kaupapa Maori is not the revolutionary site of struggle claimed by kaupapa Maori writers. Kohanga reo, ‘the essence of the ‘revolution’ of 1982’ (Smith, 2003: 6) has experienced a significant decline in numbers from a peak of 765 in 1996 to 650 in 2003 (MOE, 2003). Of the forty-five percent of Maori children enrolled in early childhood education, just over thirty-four percent of this number are in Maori medium centres. The small proportion of Maori students in Maori medium education (just over fourteen percent) and kura kaupapa Maori (just over three percent of the Maori medium education total) suggests a limited pool of neotribalist adherents.’ (quoted in E. Rata, (2004). ‘Ethnic ideologies in New Zealand Education, What’s Wrong with Kaupapa Maori ‘, Paper presented at the TEFANZ Conference, July. Available at www.education.auckland.ac.nz or from the author.

⁶ Mikaere, op cit, p.39. Mikaere’s paper is worth reading as a more extreme example of neotribal fundamentalism. In a truly remarkable rewriting of history she makes the bizarre claim that utu and muru operated in the past as restorative principles of justice and should be reinstated.

⁷ For a discussion of the incompatibility between neotribalism and democracy see Elizabeth Rata (2004). ‘Neotribalism or Democracy? You choose’. Paper presented at the Aotearoa Tertiary Equity Committee Conference (ATEC), Auckland. 3 September 2004. Available at www.education.auckland.ac.nz or from the author.

The third theme is the insistence on a primordial ethnic identity, refined further as indigenous⁸ giving a 'double' claim to the concept. 'Indigenous' adds the authority of claims to place to support the claims based upon race.

Settler descendants who accept the post-colonial narrative and who are unable to find a Maori ancestor, proudly assert a Pakeha ethnic status. In this way these members of the new professional class⁹, usually humanitarian leftists, redefine and reposition themselves in ethnic terms. Biculturalism replaced class politics as their political project, itself a common feature of left-wing idealists world-wide.

The fourth theme in the post-colonial story is the politicisation of ethnic identity. In culturalist ideology, ethnicity, rather than citizenship, is the basic socio-political category. Government policies, institutional positions and practices deal with people as members of the re-created tribal group rather than as citizens.

This leads to demands for group rights based upon the indissoluble or foundational kin-group rather than the contractual association of individuals that is an essential feature of democracy¹⁰.

The neotribal capitalism explanation

The neotribal capitalist model explains things differently. It rejects the post-colonial account as the self-serving ideology of an emergent pre-colonial elite. The Maori revival is explained as the local expression of a contemporary global phenomenon, - itself a historical 'event' in capitalism's unsettled existence and not as a response to colonial oppression.

The shift to localised forms of identity such as ethnicity and indigeneity is a reaction to the contraction of global economic expansion from the 1960s onwards. This contraction triggered a corresponding loss of faith in modernity. The result is a worldwide resurgence of local fundamentalisms as people look to their traditions for stability in an unstable world. In the turbulence of rapid change and redefinition, spaces opened up for emergent elites, first as leaders of the peoples' movements then as a class-for-itself. New Zealand is no exemption to this process.

⁸ Despite its ready acceptance in New Zealand, indigeneity is a contested concept. Like other concepts of primordial categorisation, indigeneity is part of modernity's armoury of intellectual concepts used in the service of particular political interests. This is not to say that sometimes those interests cannot be justified. For an interesting discussion of the debates about the concept of indigeneity see Jeremy Waldron (2002). 'Indigeneity? First Peoples and Last Occupancy', Paper presented as the 2002 Quentin-Baxter Memorial Lecture, Victoria University of Wellington Law School, 5 December.

⁹ Refer Elizabeth Rata (2004). 'The Capitulation of the Left, *Red and Green*, December, No. 4, pp. 13 - 32) for a discussion of the new professional class and its abandonment of class for identity politics.

¹⁰ These associations, as the legal historian, F. W. Maitland observed, met the 'universal need for some kind of group above the level of the individual', one that *is* dissolvable. It is these free associations that are the structural mechanism linking social and legal forms through to religious and economic liberty'. (with reference to Toqueville). Alan Macfarlane, (2002). *The Making of the Modern World*. Houndsmills: Palgrave, p. 84)

Once retribalisation is understood as a contemporary phenomenon and not a response to colonisation it starts to look very different – with enormous implications.

If there is no revival of the tribe, there is no justification for contemporary iwi to inherit the past. The Treaty of Waitangi as the document of inheritance¹¹ and the concept of iwi ownership of traditional resources can be re-thought. The neotribal capitalism model is this re-thinking. It goes this way -

Contemporary iwi is fundamentally different from the traditional social structure, - so much so that the contemporary tribe is a new socio-political structure, - a neotribe. This is the main insight of neotribal capitalism.

Historical rupture

The neotribe is not the ‘descendant’ of the traditional tribe. There are the obvious reasons. It is a different time. The context is different. The conditions are different. In themselves these changing times and conditions may not lead to a fundamental disjunction between the past and the present. There can still be historical continuity despite many differences.

In the New Zealand case however, there are grounds to argue that a historical rupture did occur. The traditional redistributive economy was replaced, as early as the mid-nineteenth century, by the accumulatory economic system, namely, capitalism¹². One of the benefits of colonisation was the destruction of the birth-ascribed inequalities of traditionalism for the less stable but flexible class mobility.

Traditional economies are redistributive systems. They do not have the economic system to generate wealth from resources. Resources on their own are simply resources. If nothing is done with them then nothing happens. No wealth is created. ‘Nothing comes from nothing’.

What does matter is what people *do* with the resources and whether the political and legal system exists to regulate the activity in ways that enables production, distribution and consumption.

The historical rupture was total because capitalism and traditional redistributive economies are incompatible. First, economic resources are used differently. Second, the different use of resources changes the relationship of people to the resources themselves.

¹¹ Reparations for historical injustices is a linked but separate issue. It is itself highly problematic. Apart from specific breaches of the law it is difficult to see how direct causal links can be made between historical experiences and contemporary circumstances. Almost all peoples have suffered historical injustices at some time and in some form. Why is the present responsible for some injustices and not others? Another issue is the prevalent idea that the morality of the present should be imposed upon the past with associated attempts to rewrite the past to fit what it *should* be, according to the revisionists.

¹² Webster, Steven (1998). *Patrons of Maori Culture*. Dunedin: Otago University Press.

Third, new forms of regulating the relationship between people and the social structure emerge. These norms, laws, practices, and procedures become fixed in the institutions of law, government and commerce.

Fourth, in their new identity as objects in a relationship controlled by an owner, resources are juridified as property, that is, given a legal identity. This requires a legal system with the power to enforce its authority in an ongoing and consistent way. A legal system subject to the mercurial whims of an oligarchy or democracy corrupted by cronyism cannot provide the legal stability required for property to serve as capital. Neither can a society without a legal system, such as the traditional Maori society, use resources as property.

This means that there is no continuity between the traditional tribe and the contemporary tribe. Today's iwi are not the same social structure as the traditional tribe. They are economic corporations controlled by an emergent capitalist elite.

It follows therefore that claims for ownership of traditional resources based upon legitimate inheritance to that tradition are unjustified.

By denying historical continuity I am not saying that contemporary iwi are not manned by descendants of the traditional kin-group, - of course they are. Just as the lands and waters claimed as resources today are the same lands and waters of traditional times.

What is changed so dramatically, - what has *caused* the sharp rupture between past and present is in the changed meaning of those resources into the concept of property, the replacement of kinship by class as the structuring mechanism of social relationships, and the new regulatory institutions of the legal and political systems.

In capitalism people relate to one another in terms of their access to and control of resources. This in turn creates social categories of people, - (socio-economic class), whose conditions of existence are determined in the final instance by the material resources (including intellectual and educational) available to them. The socio-political system regulates these as class categories, not kinship ones.

Kinship remains the main organising principle in the private sphere, whatever one's ethnicity. Maori families do not have the monopoly on the concept and practice of extended families. Many cultures retain functioning extended families. But the social structure itself is organised on the basis of class categories because it exists to regulate those categories. It is a fundamentally new society operating according to new principles.

The stages of elite emergence

Economic uncertainty in the post-1960s' period enabled new elites to emerge in the reconfiguration from class to identity politics that characterised the end of the post-war expansive prosperity.

Retribalisation in New Zealand was a local version of that shift. It opened up the conditions for the emergent neotribal elite to claim the traditional in the name of the people. They asserted their role as the inheritors of the traditional leadership system and denied both the historical rupture and their real class status.

Initially traditional resources were claimed in the name of Maori as a whole. There were to be reparations for historical injustice. Detribalisation was promoted as the cause of Maori marginalisation. Retribalisation was, therefore, the solution.

In hindsight this early appeal to traditional salvation was the first of many stages in the successful strategy to restore the power and privilege of a birth-ascribed kin elite and to conceal the its new privileged class status in a neotribalist ideology.

The second stage was reshaping Maori politics as tribal politics. The 1985 TOW Amendment Act was a significant event in this stage. Whoever could claim history to 1840 could claim the resources. At this point traditional was defined as tribal. Maori leaders now spoke as tribal leaders.

Marginalised, often unemployed Maori, in whose name the moral claim to historical reparations had been made, were cast adrift. The only way back in was through tribal identification.

Quiritarian Ownership

It was at this point that the local variety of capitalism I call neotribal capitalism is identified. In the legislation and government policies of the late 1980s and early 1990s the tribes were defined as the inheritors of the past. They were defined as the owners of traditional resources. This definition of owners meant that the resources could be defined as property.

Once owners are defined property can exist. Property is a relationship between an object and the controller of that object. It has no existence outside of that relationship, itself existing only insofar as it is institutionalised in the legal system.

This quiritarian ownership, or ‘property’ as understood in Roman law, is a pre-requisite for and structuring principle of capitalism’s legal system. It relates directly the controller of the resource object and the object that is controlled in terms of the duration, type and quality of this control. This is ownership. Resources and objects defined as property by their placement in such a relationship may be acquired, used in certain ways, and disposed of as the owner determines. It is a relationship recognised by others and sanctioned by the authority of the legal system.

The definition of the tribes as the owners of traditional resources opened the way for those resources to be understood as property. But ‘ownership’ and ‘property’ did not exist as concepts in the traditional economic system. There was neither the owner – object relation nor the recognition of such a relationship. Property and property owners did not

exist prior to the existence of a system that defined and regulated them. This is the legal system needed for 'property' to have the meaning it has in the capitalist system.

It is therefore nonsensical for the neotribal elite to justify their claim to traditional resources as the reclaiming of tribal property. The resources exist as property only insofar as they are operated within the particular form of relationship that arose in Roman law as quiritarian ownership. Traditional resources were not property. They remained resources, not in themselves a source of wealth until the relationship exists whereby the resources can be acted upon.

The establishment of the relationship between traditional resources and people who are legally able to act on these resources occurred with the 1992 Treaty of Waitangi Fisheries Act (Sealord). Resources were turned into property when iwi were legally defined as owners and the resources legally defined as their property. The Sealord legislation created the means by which those resources could be 'operated' upon. By this I mean they could be used as capital for the creation of commodities.

By becoming the owners of capitalisable property the tribes became economic corporations. Like all corporations in the capitalist global economy a corporation's resources are not simply land, beaches, foreshore, ideas, airwaves and so on. Its resources are capitalised land, capitalised waters, capitalised ideas and the commodities produced from that capital.

There is no mystical transformation of resources into capital and commodities. It is people investing, working, creating and producing in association with others who do the transforming.

These activities and relationships of people are the source of wealth in capitalist economies. Traditional economies do not have the legal system of contractual regulation between individuals and associations that permits property to exist. Nor do they have the political system that regulates the legal and economic system both separately and to each other.

Capitalising resources was not the defining 'moment' of neotribal capitalism although it was an essential stage. The new system also required fundamental changes to the roles, positions and relationships of people who control and work the resources into commodities.

Despite claims to the contrary by tribal leaders, their position in relation to commodifiable resources creates a new relationship and a new social structure to regulate those relationships. It puts them into the structure in ways that are fundamentally different from their leadership position in the traditional order. In and through this process they became a ruling capitalist elite.

These features in themselves are not enough to explain why neotribal capitalism is any different from other forms of capitalism. The neotribes are economic corporations and the leaders are the ruling class as in any other version of capitalism.

Neotraditionalism

What makes neotribal capitalism distinctive is the neotraditionalist ideology¹³ that persuades tribal Maori, non-tribal Maori, and everyone else that these new organisations are not new, that they are modernised versions of the traditional tribe, and that because the traditional tribe used the resources then the tribe (through its leaders) owns those resources.

There is no distinction made between the *use* of resources that occurs in a traditional economy and the *ownership* of resources in capitalism, - a relationship to resources that changes the nature of resources use in fundamental ways.

By linking resource ownership to traditional leadership the ruling class of neotribal capitalism controls both the tribal economy and tribal politics. There is not the separation between the economic and political systems which defines democracy and that creates the institutional site (parliament and government) for the peaceful battle between contesting class interests.

The neotribal ruling elite is unchallenged because it is unchallengeable. There are two reasons for this. First, there is no individualised free and equal citizen to challenge the elite. (Given that the tribe is an indissoluble foundational group, the concept of a 'tribal citizen' is a contradiction in terms.) Second, the institutional site of a political arena separate from the economic sphere, that is, a place for the challenge to occur, does not exist¹⁴.

Elite Strategies

My interest in recent years has shifted to the increasingly sophisticated strategies of the neotribal elite. Their success is remarkable. A pre-colonial 'aristocratic' elite has, within two decades, re-positioned itself as a contemporary elite, as the owners (or at the very least the controllers) of capitalised resources originally claimed as reparations for historical injustices to all Maori.

The process of pre-colonial elite emergence is not confined to New Zealand of course. It is part of the global changes that I identified earlier. In the areas of the world that had

¹³ I define ideology as the philosophical ideas used in service of a political agenda by those who benefit from that agenda.

¹⁴ The citizen and the democratic 'subject' and the state as the democratic 'site' are discussed in Elizabeth Rata (2004). 'Neotribalism or Democracy? You choose'. Paper presented at the Aotearoa Tertiary Equity Committee Conference (ATEC), Auckland. 3 September 2004. Available at www.education.auckland.ac.nz or from the author. The idea of the subject and site required for democracy is also discussed in the final chapter of my book. (2000). *A Political Economy of Neotribal Capitalism*, Lanham: Lexington Books.

been colonised, pre-colonial elites, or those that claim to be the inheritors (legitimate or otherwise) of those elites, have re-emerged in the unsettled period of the last four decades. Various fundamentalist ideologies¹⁵ support the links to, and therefore justification from, the past.

Hindu¹⁶ and Islamic fundamentalism has its clerical elites. Warlords, criminals, army oligarchies control failed states in most continents¹⁷. In the Pacific, Tonga exemplifies corrupt kin-group oligarchies.

But New Zealand's strong democracy and educated population presents a different challenge to emergent elites. Armed force is obviously out of the question in this country. So too, one would have thought (and expected), given the educated populace¹⁸, is race fundamentalism.

Yet ethnic or race primordialism, and traditional fundamentalism are the ideological means by which a non-democratic corporate elite has acquired material resources and institutionalised power. The question begging to be asked is of course, - how has this happened?

One reason for this success is the 'goodness and power' contradiction of the post-war new professional class¹⁹ and its seduction by culturalism. The second, interdependent reason lies in the neotribal intellectuals themselves. It is this second reason that I will discuss today.

Neotribal intellectuals, often academics or connected to government in some way (such as membership of the Waitangi Tribunal) developed sophisticated brokerage strategies²⁰ that have institutionalised their positions, themselves, and their race ideology into key government and educational institutions.

The extent of the success can be seen in the institutional positions, political influence, and economic benefits acquired by what is, by any standards, a very small number of people.

Brokerage includes controlling the interpretation of the Treaty of Waitangi and Treaty politics, developing the idea and policies of treaty principles, and naturalising

¹⁵ Refer to Jonathan Friedman (1994). *Cultural Identity and Global Process*. London: Sage.

¹⁶ Meera Nanda (2004). *Prophets facing Backwards: Postmodern Critiques of Science and Hindu Nationalism in India*, Rutgers. Nanda argues for a return to the emancipatory project of modernity and the rejection of recent Hindu fundamentalism.

¹⁷ Jonathan Friedman (Ed.) (2003), *Globalization, the State and Violence*. Walnut Creek: Rowman and Littlefield.

¹⁸ Although the failure of the educated middle class to identify race and cultural fundamentalism, indeed the actual collusion of this group with the neotribal fundamentalists is not the topic of this address, it is a topic I address in a range of publications and conference papers. See also Christopher Tremewan (2004). *Op. Cit.*

¹⁹ Refer to Elizabeth Rata (2004). The Capitulation of the Left, *Red and Green*, No 4, 13 – 32.

²⁰ A detailed theoretical discussion of brokerage is available in Rata, E. (2003). Leadership Ideology in Neotribal Capitalism, *Political Power and Social Theory*. Vol 16. 45 - 73

neotraditionalism as the correct way to understand ‘authentic Maori culture’. In all these ways the neotribal elite is the driving force. It sets the agenda and controls the strategy.

The Customary Rights Strategy

In the past year I have noticed a discernable shift by neotribal intellectuals to a new strategy. Treaty of Waitangi justification is being taken over by appeals to ‘customary rights’. Two claims are made – both open to dispute. First, it is claimed that customary rights are property rights, and second, that these ‘property rights’ belong to the traditional foundational kin-group, - the iwi.

It is imperative that this new strategy is analysed and critiqued. Unchecked it will extend the neotribal elite’s claims for economic resources and political power.

Neotribal claims for ownership of present and yet to be discovered economic resources (for example, biotechnology and nanotechnology) along with claims for political rights are based upon certain assumptions about the nature of customary rights in English common law.

Two important assumptions are: 1. The customary rights recognised in English common law are foundational group rights. 2. The putative legal status of these customary rights confers ownership rights to economic resources, i.e. property, and political rights that adhere to the foundational kin group itself.

Both assumptions are based upon a mistaken interpretation of English common law.

The argument for the legitimacy of foundational kin-groups in a contemporary democratic socio-political system goes this way. Prior to the modern period (the last five hundred or so years), English society, as elsewhere, was (it is claimed) characterised by kin-group social structures. In the process of individualising workers, capitalism destroyed the kin-group as the societal structuring mechanism.

Because English common law reaches back before the modern period however, its scope extends to the pre-modern foundational kin-group. That is, English common law, according to the neotribalist reading, refers to pre-modern foundational group rights as well as to the individual rights that had a more recent appearance in the law.

An approach that can link English common law to foundational group rights gives those groups a legitimacy that extends beyond the interpretation of the Treaty of Waitangi into the establishment of English common law in New Zealand. It locates the legitimacy in the very constitution of New Zealand law itself (based as it is on English common law).

However, there is a strong counter-argument to the location of foundational kin-group rights in English Common law and, by extension, to their place in New Zealand law.

There is sufficient evidence that English legal property relations were individualised as early as the Anglo-Saxon period. This is the time when English common law was first developed.

Professor Alan Macfarlane²¹ (in the intellectual tradition of Cambridge academics Henry Maine and F. W. Maitland) argues that individualism, not foundational grouping, was the distinguishing characteristic of Anglo-Saxon legal, economic and political relations. The individualised legal relation was fundamental to English common law from very early times.

According to Macfarlane 'Maitland had shown that not all civilisations had started in a world where individuals were embedded within the community, where contract was entirely subordinate to status, and where hierarchy and patriarchy were universal.' (p. 83).

This locates individuals and associations of individuals in various forms of contract at the beginning of the development of English common law. It means that the individual (in various forms of contractual trusts and associations), not the indivisible kin-group organisation, is the basis of that law.

Yet recent neotribal strategy claims to locate kin-group legal rights in early English common law. If successful such an approach will provide the basis for the institutional recognition of foundational kin-groups and will be used to justify their claims to political power.

This strategy will give a legitimacy reaching back to Anglo-Saxon times, - a far stronger case than can be made by appeals to the 1840 Treaty of Waitangi only (especially given the vulnerability of the Treaty to a range of interpretations as well as its status as an unratified agreement).

But the neotribal strategy of customary rights justification ignores the place of individuals and associations of individuals in various forms of contractual trusts, as the holders of customary rights recognised in English common law. Legal and property relations in English common law regulated individuals, not foundational groups, even in pre-democratic times.

The concept of quiritarian ownership in Roman property law was an individualising agent in the development of English common law as early as Anglo-Saxon times.

This suggests that the modern compatibility between English common law and democratic organisation is the result of individualism arising from pre-democratic English common law rather than from the overthrow of the traditional by modernist democratic forces.

²¹ Alan Macfarlane (2002). *The Making of the Modern World*. Houndsmill, Palgrave.

In other words, the continuity between traditional and modern English customary legal and property relations may provide a point of entry into understanding the resilience of customary rights in English common law. But those customary rights *were already individualised*.

It is likely that early English customary rights have survived into the democratic age because they contained that essential democratic condition, - the legal status of the individual so are compatible with capitalist property requirements. In contrast the rights attached to customary use in traditional economies are not compatible and cannot exist despite the neotribal claim to their revival.

It is to this individualised person (alone or in contractual associations regulated by legal trusts), not the foundational group, to whom customary rights belonged. Because of the individualised relation, these customary rights could become property rights.

English common law recognises the individualised property relation. Economic resources could be conceptualised as property *because* they belonged to an individual (or association). They could be acquired or disposed of.

Resources used in a traditional economic system cannot be property. They do not fulfil the requirements of quiritarian ownership.

It is a sleight of hand by the neotribal elite to claim that customary use is the same concept as property. The ownership of property requires a relationship between the owner and the thing owned that does not exist in traditional redistributive economies.

The customary rights approach to use economic resources cannot be metamorphosed as the property right of an economic corporation. Those customary rights ended when the traditional economic system ended.

However the acceptance of foundational kin-group rights by culturalist politicians, and the metamorphosis of customary use resources into capitalisable property has enabled the concepts of customary use and group rights to be re-defined and given a contemporary spin.

It certainly appears to be an unchallengeable way into further claims, both economic and political. However a challenge can be made – it requires distinguishing between customary use and property ownership and embedding that distinction in the incompatibility between traditional and capitalist systems.

Conclusion

In my work on neotribal capitalism I have established that there is a fundamental rupture between the economic activity of traditional Maori society and contemporary economic activity.

There is no conceptual link between the customary use of resources in traditional redistributive economies on the one hand and property used as capital for commodity production in modern accumulatory economies on the other. This means that customary use of resources is not a property right.

The concept of 'ownership' itself cannot be applied to customary use resources in a traditional redistributive economy. Ownership in an economic system based upon the use of capital resources (either intellectual or material) for commercial activity is a concept that implies a particular relationship between the owner and the property. This relationship and its regulatory contractual framework is absent from the traditional redistributive economy.

Therefore customary resources cannot simply become property available for ownership because the two concepts are incompatible and exist in fundamentally different contexts.

Contemporary tribal Maori property rights discourse is a political strategy by the neotribal elite to acquire access to commodifiable economic resources. This undemocratic elite has, with great skill and enterprise, dominated the intellectual climate.

It is a success achieved at the cost of New Zealand democracy.