In the Waitangi Tribunal **Wai 207**

Wai 785

Under	**The Treaty of Waitangi Act 1975**
In the Matter of	**The Te Tau Ihu Inquiry (Wai 785)**
And	
In the Matter of	**The claim to the Waitangi Tribunal by Akuhata Wineera, Pirihira Hammond, Ariana Rene, Ruta Rene, Matuaiwi Solomon, Ramari Wineera, Hautonga te Hiko Love, Wikitoria Whatu, Ringi Horomona, Harata Solomon, Rangi Wereta, Tiratu Williams, Ruihi Horomona and Manu Katene for and on behalf of themselves and all descendants of the iwi and hapu of Ngati Toa Rangatira**

BRIEF OF EVIDENCE OF RICHARD PETER BOAST

Part Three: Law and Customary Law

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BRIEF OF EVIDENCE OF RICHARD PETER BOAST

1 Introduction

1.1 **Law and Colonisation:** In this part of evidence I wish to focus specifically on some of the legal-historical dimensions of the three-cornered encounter between Maori, settlers and the Crown in the Cook Strait area. A number of aspects of this will be traversed, including the nature of Maori 'customary' law, the changes to that customary law as a result of the spread of Christianity and missionary influence, the extent to which Maori were subject to English criminal law in the 1840s, and the legal and jurisdictional issues which underpinned the collision at the Wairau in 1843.

2 Colonial Law and Customary Law

2.1 **Shifts in perceptions of customary law: 'In Satan's Time':** There is considerable evidence of a deliberate softening of the more rigorous rules of Maori customary law during the 1840s and 1850s, partly as a result of the general diffusion of Christian ideas, and partly through quite specific missionary advice. Samuel Williams testified in the Native Land Court that McLean had asked him to persuade Ngati Toa and Ngati Raukawa to allow Ngati Apa to sell the Rangitikei block to the Crown and that he had done so. Williams said that he "advised Te Rauparaha to show consideration to the conquered tribes living on the land and that they should consent to a sale of the portion of the country".[1]

2.2 **The CMS mission:** The arrival of the CMS mission in Cook Strait was described by Heni Te Whiwhi, Matene Te Whiwhi's daughter, in 1905.[2] According to this source, shortly before the battle of Kuititanga, Matene Te Whiwhi and Tamihana Te Rauparaha decided that they wanted a missionary "to come and reside in the midst of Ngati Raukawa". They told their people of their intention to travel to the CMS main base in the Bay of Islands, and went there despite the anxiety of their people "that Ngapuhi might do them harm for some early acts of Ngati Raukawa against Ngapuhi". Nevertheless they went, and shortly afterwards Octavius Hadfield was sent to Cook Strait where he set up the mission at Otaki and at Kenakena (Waikanae).

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[1] Evidence of the Revered Samuel Williams, Himatangi case, (1868) 1 C Otaki MB 227.

[2] 1905 AJHR 78.

Missionary teaching had a significant impact, especially in such areas as slavery and the rights of 'slave' tribes to sell land. But there was also something of an intellectual and mental revolution as well. Missionaries were apparently able to convince some that Maori had been living, quite literally, under the government of Satan. Nopera Te Ngiha told the Native Land Court in 1868 that:[3]

> In Satan's live there were slaves, of the three hapus, at Kapiti. Satan's time was up to Mr Williams. [I] can't tell about mana in the time of Satan.

2.3 **"Before my hands were tied by the Gospel": Effects on land tenure rights:** Not everyone was happy about the changes. Rangatira complained that under missionary influence some tribes became 'whakahi' (cheeky), questioning the accepted scheme of things. Parakaia Te Pouepa, the main claimant in the Himatangi case, speaking of the relationship between Ngati Apa and Ngati Raukawa, said that the latter "began to be 'whakahi' after the missionaries came – about 1842 – they began to be cheeky". Missionary "preaching and the purchase of land from them by the Government about 1847 caused them to say the land was theirs."[4] Henare Te Herekau, also of Ngati Rauakwa, said much the same:[5]

> Though the Christianity and the notice of the government has raised these people out of their degraded position, if they had shown themselves before my hands were tied by the Gospel, I should have killed them or sent them off to some other Island.

Missionary influence was critical in the decision made by the younger chiefs of Ngati Toa and Ngati Raukawa to acquiesce in Ngati Apa selling the Rangitikei block to the Crown: "the young men, such as myself, Hakaraia and Matene Te Whiwhi, wished to follow advice of missionary [sic] and take the boundary to Turakina, and, after, to Rangitikei".[6]

3 The Criminal Law and Maori: the Kuika case (1842)

3.1 **Murder of Rangihaua Kuika:** In December 1842 a young Maori woman named Rangihaua Kuika, wife of the whaling boss James Wynen, was

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3 Himatangi case, (1868) 1 C Otaki MB 397.
4 (1868) 1 C Otaki MB 203.
5 Ibid 207.
6 Evidence of Rawiri Te Whanui, Himatangi case, (1868) 1 C Otaki MB 231-2.

gruesomely murdered at Cloudy Bay, along with her little boy aged 18 months. Samuel Ironside, the Wesleyan missionary at Cloudy Bay, was in little doubt as to what had happened:

> From all the circumstances, I should judge some European has *lusted* after her, and finding her unwilling to consent had *forced* her, and found it necessary to *murder* her in order to conceal the crime. Rash attempt! The God of Heaven saw him.

The principal suspect was a man named Richard Cook, one of John Guard's employees. Cook was denounced to the Cloudy Bay community by his own Maori wife, Kataraina, as the murderer. The local Maori community wished to exact utu on the spot, but Ironside and others managed to persuade them to let the Queen's justice take its course. Local Maori and Pakeha leaders collaborated to take depositions from a number of people, which were then forwarded to Michael Murphy, the Police Magistrate at Wellington. Murphy arrived with two constables on 7 January 1843, arrested Cook and took him to Wellington to stand trial in the Supreme Court.

3.2 **Trial of Richard Cook:** The case, as the first trial of a European for the murder of a Maori in the Cook Strait region, naturally attracted intense interest. When J W Barnicoat arrived at Cloudy Bay with the New Zealand Company survey party on April 22 he noted in his journal that not only had Ironside and some local Maori gone to Port Nicholson "as evidence in the affair" but also that "a great many Maoris also went from curiosity and are said to take a great interest in the result".[7] Certainly much was at stake with this trial. Ironside's biographer has written that the Crown as the essence of justice, Ironsides' own credibility and the Treaty of Waitangi itself were all "on trial with Richard Cook".

3.3 **"[N]ot the slightest doubt in my mind exists of the prisoner's guilt":** George Clarke jr, was aware of the case and thought that although the evidence against Cook was "circumstantial" it was nevertheless "very strong".[8] Ironside went to Wellington to act as the interpreter (not as a witness) and was rather disturbed by the Crown prosecutor's attitude to the case, which struck him as somewhat lacking in zeal. Another problem was

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[7] Barnicoat Journal, qMS 0139, ATL Wellington, entry for April 22 1843.

[8] George Clarke jr. to George Clarke sr., 20 Jan 1843, qMS-0469, WATL (original at DHL); Clarke wrote that "not the slightest doubt in my mind exists of the prisoner's guilt."

that in March, Murphy, who had managed to arouse the antagonism of the Wellington settlers, had been replaced as Police Magistrate at Wellington by A.E. McDonogh, who was unfamiliar with the case.[9]

3.4 **The key witness:** At the hearing before the Chief Justice the main prosecution witness was Cook's Maori wife Kataraina. The Crown prosecutor (R D Hanson) seems to have assumed that Cook and Kataraina were not lawfully married according to English law, but this was not the case. The case was heard by the Chief Justice, William Martin. Cook's barrister called on Ironside to testify that he himself had married the couple, and then raised the point that according to English law a wife could not give testimony against her husband. The point was accepted by the Court; the prosecution case collapsed, Martin C.J. directed the jury to acquit, and Cook was set free. Ironside was appalled and the Maori people of Cloudy Bay and the Wairau were enraged as well as disillusioned with British justice. Additional evidence could have easily been obtained from other witnesses at Cloudy Bay, as the local people well knew. It was also well-known that Maori had been executed in the colony for the murder of Europeans.[10] Fairly or not, it appeared that the official legal system punished Maori murderers of Europeans but condoned the reverse.[11] Ironside returned home to Port Underwood on 27 April and wrote in his diary:[12]

> Returned home early this morning from P Nicholson quite sick from the effects of the voyage but glad to get here. The man Cook is acquitted, but I think had there been more diligence on the part of the prosecution he would have been convicted.

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[9] Allan, *Nelson*, 245. Murphy had made himself unpopular with the governing elite at Wellington, partly because he had refused to give in to pressure to arrest Te Rangihaeata for opposing settlement and surveys at Porirua; and eventually Administrator Shortland gave in to pressures to dismiss him. For a discussion of the background see Hill, *Policing the Colonial Frontier*, vol 1, 1986, 192-4.

[10] On 7 March 1942 a man named Maketu was hanged at Auckland for the murder of a Pakeha woman, the widow Roberton, her two children , her servant and a Maori boy (the latter being a grandson of the Ngapuhi chief Rewa). The case had some similarities with the Kuika affair, one being that the local people wished to immediately exact utu on the culprit; but he was nevertheless arrested by the Police Magistrate and tried at Auckland. Governor Hobson treated the affair with great seriousness, and sent HMS *Favourite* to Kororareka to help keep order should it be necessary. On the Maketu case generally see Wards, *Shadow*, 54-5.

[11] Richard Hill has noted the importance of the case in adding to Ngati Toa disenchantment (*Policing the Colonial Frontier*, vol 1, 1986, 169: "Cook Strait Maoris, and those throughout the colony was word spread, compared Cook's freedom to flee New Zealand with the fates of Maketu and Kati before him, and their opposition (particularly that of the Ngatitoa) to expanding European encroachment stiffened."

Later in his life Ironside summarised the affair as follows:[13]

> There were grave reasons why the natives were dissatisfied with this acquittal. They had grounds for believing that had it been a white man who had been murdered, Cook would not have been acquitted. Here are some of these grounds: A native man was executed at the Hokianga some months before for the *supposed* murder of a European. The evidence against him was wholly circumstantial but all the natives approved of his execution. Another native was executed at Auckland later on, for a similar crime, and though no person saw him do the deed yet all the Maoris believed him guilty, and acquiesced in his sentence. Now, they were morally certain that Cook was guilty of murdering Kuika, and the reason given for his acquittal was *want of evidence*. But they knew that evidence could have been obtained by sending over to Cloudy Bay.

3.5 **Significance of case to the Wairau Affair:** The importance of the Kuika case to the events that took place at the Wairau later in the year has often been overlooked. At the time that the murder of Kuika and the escape of Richard Cook were still fresh in everyone's minds, tensions suddenly soared to new levels with the arrival of a New Zealand Company survey party sent to the Wairau from Nelson. It is significant that when Samuel Ironside asked Rangihaeata to explain his actions after the battle one of the reasons he gave was that the Pakehas "did not punish the murder of Kuika".[14]

4 The Wairau Incident as a Legal Issue:

4.1 **Background**: An immediate problem following Hobson's proclamations of sovereignty in May 1840 was the extent to which Maori were governed by English law. This was a theoretical problem, in the main, as at first the tiny New Zealand colonial state completely lacked the resources to impose English law on the Maori population. Even theoretically, however, did English law apply to the Maori people? For the first few years of the colony's existence the position was uncertain and provoked widespread disagreement amongst colonial officials. The problem was a complex and multifaceted one. Two incidents of the early 1840s allow some of the

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12 Ironside journal, MS 3817/2, WATL, entry for 27 April 1843.
13 Ironside, *NZ Methodist*, 7 March 1891, cited Chambers, *Samuel Ironside in NZ*, 133.
14 Ironside in *NZ Methodist*, 1892, cited Chambers, *Samuel Ironside in NZ*, 137-8.

complexities to be elucidated, and the eventual resolution of the issue examined.

4.2 **The Bay of Plenty Crisis, 1842:** The first crisis broke out in the Bay of Plenty in 1842. In the first of two interrelated incidents Taraia, chief of Ngati Tamatera and one of the leading Hauraki chiefs, attacked a Ngai Te Rangi community near Katikati and killed a number of the inhabitants. Later in the year an even more serious crisis occurred when the son of an Arawa chief named Tohi Te Ururangi was killed at Katikati by Ngai Te Rangi, probably for taking some potatoes from the area already made tapu by the deaths arising from the earlier fighting with Ngati Tamatera. In retaliation Tohi Te Ururangi led an attack on the Ngai Te Rangi stronghold at Tuhua (Mayor Island) and the situation threatened to escalate into a full-scale regional tribal conflict. The Bay of Plenty crisis provoked considerable debate amongst colonial officials, including Chief Protector George Clarke, the colonial attorney-general (William Swainson) and Acting-Governor Shortland, as to whether Maori living in such areas as the Bay of Plenty should be left to carry on with their customary feuds and conflicts. The government toyed with the notion of arresting Taraia, but this was abandoned in favour of attempting to mediate. Taraia told Shortland "that the Governor was no Governor for him or his people and that he had never signed the Treaty nor would he acknowledge its authority", and that he had for years fought the Tauranga people and intended to continue to do so.[15] Later in the year a small detachment of troops was sent to Tauranga commanded by Major Bunbury. They remained there some months and were then withdrawn. No further action was taken by the government and the disputes were in the end resolved by peacemakings brokered by missionaries and leading chiefs in which the government played little part.

5 **The Swainson-Clarke Debate:** Swainson subsequently argued that Maori tribes who had not signed the Treaty of Waitangi were independent vis-a-vis the Crown, which could not lawfully interfere in their affairs. Acting-Governor Shortland, however, believed that as the whole of the country was British territory, all Maori were subject to English law and the government had no option but to attempt to enforce it. George Clarke, Chief Protector of

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[15] See Nancy Taylor (ed.), *Journal of Ensign Best,* R.E. Owen, Government Printer, Wellington, 1966, 364 (8 July 1842).

Aborigines, argued for a policy of gradual extension of British law by persuasion and cooperation with the chiefs, and for the establishment of a system of Native Courts.[16] While the legal situation was still in this state of uncertainty a quite different crisis broke out in the Cook Strait region.

5.1 **The Wairau and the Nelson J Ps:** In early 1843 Te Rauparaha and Te Rangihaeata, chiefs of Ngati Toa, had personally halted the New Zealand Company surveys of the Wairau Valley – as will be described more fully in the next section. Ngati Toa were careful to avoid harming the surveyors or damaging their property. However, in a seemingly insignificant but in fact symbolically highly-charged action Ngati Toa burned down a small hut made by the surveyors out of grasses and reeds gathered from the land. The response of the authorities at Nelson was to issue a warrant for the arrest of the chiefs for arson. Partly this reflected a Lockean theory of property: the Wairau was believed to be empty or at least disputed land and the hut, made by the surveyors from their own labour, was their property.[17] The Wairau issue was not a 'battle' over land, and indeed was not really about land, at least not directly: it was to do with the application of criminal law. The Nelson Justices of the Peace believed, or claimed to believe, that they had the same powers that J.P.s did in England, where to a large extent they controlled most stages of the criminal justice process until trial.[18] In accordance with time-honoured English practice, an information was sworn against Te Rauparaha, and a party of magistrates and special constables was assembled, exactly as they would have been in England, to take the supposed malefactors into custody. Ngati Toa, of course, refused to accept the role in the theatre of justice that had been planned for them. They had legal ideas of their own, one of which was their undoubted right to all products of the soil. Under a Lockean, labour-based theory of property, the reed hut was the property of the surveyors; to Ngati Toa it was theirs and the Nelsonians'

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16 See generally C.H. Wake, "George Clarke and the government of the Maoris", *Historical Studies: Australia and New Zealand,* vol. 10, p 339.

17 On Locke and British imperial theory see Anthony Pagden, "The struggle for legitimacy and the image of the Empire in the Atlantic", in Nicholas Canny (ed), *Oxford History of the British Empire,* vol 1, 1999, 34-54.

18 On the role of the J Ps in the English criminal justice system see Douglas Hay, "Property, Authority and the Criminal Law", in Douglas Hay, Peter Linebaugh, John Rule, E P Thompson and Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England,* Harmondsworth, 1975; Peter King, "Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800, *Historical Journal,* vol. 27 (1984); J H Langbein, "The Criminal Trial Before the Lawyers", *University of Chicago Law Review,* vol. 50, (1983), 1-135.

claims to arrest them for burning their own belongings was simply absurd. The chiefs resisted arrest; by some means or other a shot went off; and Ngati Toa easily routed the armed posse of Nelson settlers. A group of survivors were massacred after the battle by Te Rangihaeata as utu for his wife, shot dead during the affray. In the end it was Maori law which was enforced on the Pakeha, rather than the other way round.[19]

5.2 **The Second Warrant:** After the Wairau, the Nelson magistrates, those of them who had survived, conducted their own independent investigation into the Wairau and then drew up warrants of arrest of Te Rauparaha and Te Rangihaeata for murder. When Sir Everard Home and Major Richmond sailed into Nelson Haven on 12 October 1843 Home was astonished to be handed the warrants (the references relating to this episode have already been given). Home declined to execute it, but the significance of this is that it shows once again the very large powers claimed by the J.P.s. They assumed, or pretended, that they had exactly the same powers as Justices of the Peace in England and were claiming that in fact the Crown's military forces were under their direction. Home did not think so.

5.3 **The Wairau as a Legal Problem:** Underpinning the collision at the Wairau, then, was a very serious legal problem. It was, in a sense, a legal problem relating to both substantive criminal law (was it arson?) and criminal procedure and constitutional law (what were the powers of the Justices – could they claim jurisdictional powers over Maori and order military officers to do their bidding?) The settler magistrates were claiming nothing less than a complete right of criminal jurisdiction over Maori. Under English criminal law as it operated at that time, JPs issued arrest warrants, received informations (prosecutions) and controlled the bail system and the control of offenders in cases of felony – such as arson – until trial, which would not be by them but by one of the judges. They were of course forgetting that they were no longer in England but lived in a Crown colony where the constitutional and legal norms were different - but where too the extent of difference was unclear and contestable. Governor Fitzroy, who arrived in the colony at the end of 1843, could certainly see that if unchecked the civilian

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[19] On the Wairau see John Miller, *Early Victorian New Zealand,* Oxford University Press, 1958, 70-96; Ruth Allan, *Nelson: A history of early settlement,* A H Reed, Wellington, 1965, 241-308; R P Boast, *Ngati Toa and the Upper South Island,* A report to the Waitangi Tribunal, March 2000, Wai 785 Doc #A56, 79-177.

magistrates' views could all too easily amount to a mere manipulation of the forms of criminal procedure as a means of exerting power and intimidating Maori, at the risk of a major confrontation. However he also told Maori at Waikanae at the February 1844 hui that "had you been Pakehas, you would have known that it was wrong to resist a magistrate, under any circumstances; but not understanding English law, your case was different".[20] It is probably the case that the legal position was simply not clear. Fitzroy's eventual solution was the Native Exemption Ordinance (16 July 1844) which deprived the Police Magistrates of power to order the arrest of Maori outside the towns, thus prohibiting the type of process used by the Nelson magistrates in mid-1843.[21] After meeting the chiefs at Waikanae in 1844, as noted, Fitzroy informed them that the settlers had been in the wrong and that the government intended to take no action against them.

5.4 **Martial Law:** On March 3rd 1846 Governor Grey proclaimed martial law in the Wellington region. There appear to have been five separate proclamations in total.[22] The proclamation stated that martial law would apply throughout New Ulster (the North Island) to the area which lies "to the south of a line drawn from Wainui [Paekakariki] in Cook's Strait to Castle Point on the East Coast".[23] The 3rd March 1846 proclamation was objected to by the Crown Solicitor, Hanson, on the basis that it was illegal, arguing that cultivations and homes were excluded from Fitzroy's grant.[24] Taylor recorded in his diary on 3 March that he had heard that "the town [Wellington] was in great confusion, several boat loads of settlers having come in and Hanson the Crown Solicitor had just sent in a protest declaring martial law to be illegal up the Hutt, that according to the terms of the grant made to the Company, the very land in question was granted to the

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20 Minutes of the Proceedings at Waikanae, 12 Feb 1844.

21 Wake's view is that while the Native Exemption Ordinance was "a poor substitute for Clarke's Native Court scheme" it least "had the merit of recognizing the fact that the government had no independent authority away from the settlements".

22 Grey's Indemnity Ordinance of 14 October 1847 refers to proclamations of March 3 1846; 20 April 1846; 18 July 1846; 18 March 1847 and 27 April 1847.

23 The proclamataion was published in the *New Zealand Spectator and Cook's Straits Guardian* on 7 March 1846.

24 This is linked to the complex events in the Hutt Valley in 1846. Hanson's argument was that Maori in the Hutt Valley had every right to remain in possession of their lands and defend their right to do so: therefore the proclamation had no factual basis, as the supposed illegal actions which justified it were in fact lawful.

Natives".[25] Whether the proclamations of martial law were legally valid is a moot point, but this is a matter which more appropriately belongs to legal submissions. To settle the issue an Indemnity Ordinance was made by the Legislative Council on 14 October 1847 which retrospectively validated all actions done by military officers and others under the authority of the earlier proclamations. All officers etc. were "hereby respectively freed indemnified and discharged from and against all actions and prosecutions which they may have been or may become liable or subject to for or by reason or by means of or in relation to any act matter or thing done by any such officer or person by virtue or under the authority of the said Proclamations…".

5.5 **Execution of Te Wareaitu and transportation:** Following the campaign against Te Rangihaeata Grey administered one further lesson in enforcing the authority of the Crown by means of a public execution. According to one contemporary:[26]

> The second prisoner tried was the first one we took on that occasion; he is a chief of some consequence and it was proved that he had been a very active leader of the attacks on the Hutt, he was sentenced by the court martial to be hung, which was carried into execution the next day in front of the camp at Porirua.

5.6 The man hanged was the chief known as "Martin Luther", Matini Ruta Te Wareaitu, from Wanganui, tried and convicted of rebellion by a Court Martial which sat at Paremata on the 14 and 15 of September. I have already described the circumstances of his capture. Why this unfortunate man was selected as an example is unclear. Matini Ruta was hanged on September 17 in front of the army camp at Paremata. William B White wrote that his execution was "a great shame".[27] Another man named Rangiatea was found to be insane and was "let off with imprisonment for life". Matini Ruta's execution caused a sensation among the tribes: "the hanging of that native has startled all the natives in New Zealand".[28] Other "rebels" were

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[25] Journals of Rev Richard Taylor, Alexander Turnbull Library, Wellington, MS 0254-04, entry for 3 March 1846 (transcribed in Boast, *Ngati Toa and the Colonial State,* 119). See also Cowan, *New Zealand Wars,* 120.

[26] W J Swainson to J Parkes, 20 September 1846, in G M Swainson (ed), *William Swainson*

[27] Highlights in the life of William B. White, typescript, MS 4542, Alexander Turnbull Library.

[28] T.B. Collinson to his mother, 17 November 1846, MS 1039-1, Alexander Turnbull Library.

transported to Van Diemen's Land.[29] Those transported were a group taken prisoner by Wiremu Kingi at Pari Pari – near Waikanae – on August 13, "eight half-starved fugitives". Of the eight taken prisoner and convicted by court martial on 12 October, five were eventually transported across the Tasman; but when the Colonial Office and the Governor of Van Diemen's Land queried the legality of the proceedings Grey had the five returned to New Zealand and released.[30] Two of them were apparently detained in Auckland as witnesses against Te Rauparaha, but in fact Te Rauparaha was never put on trial.

[29] Transportation was, as in England itself, still the standard punishment for capital felonies in New Zealand law at this time.

[30] The primary sources for the legal complexities are given in Wards, *Shadow,* 294-6.