I have thought really hard about what I should say here in Hawaii, so far away from my place—something that would be insightful and would somehow translate across to the realities of Hawai‘i Nei.

I am going to talk about three things today. First, I am going to tell you the story of the colonisation of a small town of my country to help summarise the colonial experience there, to give you some context by telling you a story which I think is, in a way, reflective of the colonial experience of my people. This story takes place in the town of Gisborne in the North Island. In Māori we call the island Te Ika a Maui, meaning “The Fish of Maui.” the place where Gisborne lies was, in traditional times, called Turanganui-a-Kiwa, meaning “The Great Standing Place of Kiwa.” So first, an example of the colonisation story in Aotearoa. The second thing I want to do is to ask, What is the point in this game? Why should indigenous people struggle within the law? I will give you some of my own views on that question. Finally, partly as a result of some conclusions I will

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reach in the second part, I will ask, “Is the law a good tool with which to struggle to achieve that objective?” So I am not going to engage with the minutiae of the law with you. I am not going to discuss in erudite fashion complicated and subtle doctrines. I am going to engage with you about the law as a tool. I am going to talk to you about the law as a tool, using indigenous stories to illustrate one view of those things. This is just one view.

The Story of Te Kooti

In the eastern coast of the North Island of New Zealand, the place called Turanganui-a-Kiwa was populated by three large tribes. The largest was Aitanga a Mahaki. “Aitanga” is a word in my language for “copulation”. Thus in the Polynesian way, (there being no problem with sexual themes) the name of the tribe is literally “the result of the copulation of Mahaki”; their ancestor, and what a large result it was. Two further, smaller tribes were on their boundaries – Ngai Tamanuhiri, the descendants of Tamanuhiri, and Rongowhakaata, the descendants of Rongowhakaata. These tribes were autonomous, exercising their own powers in accordance with ancient tradition that had been in place in that part of the country for around 1,000 years and, before that, in the Pacific, in the Cook Islands, and in Tahiti. I should confirm in passing what you already know, that is that the Māori are Polynesian and we left Tahiti, the Marquesas, Nuka Hiva, and Rarotonga, about 1,000 years after Hawaiians did. That difference of 1,000 years is why, when we speak Māori, we speak Māori with quite an accent by comparison to Kanaka Maoli here.

In 1840, the British Crown entered into a treaty with the Māori tribes of Aotearoa called the Treaty of Waitangi. Five hundred and forty-five chiefs signed that treaty, almost all of them signing the Māori text. A small number of those who signed were from Turanganui-a-Kiwa. The treaty was in two languages, and in the English language it purported to be a treaty of cession – that is, a treaty that transferred Māori sovereignty. In return Her Majesty guaranteed resource rights; real estate rights; “exclusive and understood possession by Māori of their lands, forests, fisheries”, for so long as they wished to possess them. Basically it was a guarantee of customary rights and aboriginal title, but no governmental rights. In the Māori version, autonomy is not ceded, but is specifically...
guaranteed to the chiefs. The word used in the Māori translation was “te tino rangatiratanga.” “Rangatira” is the Māori word for “chief.” “Rangatiratanga” is “the authority of chiefs” – effectively, tribal authority. So the Māori text guaranteed autonomy to the tribes and it also guaranteed ownership of resources and “all of their treasured things.” The word “taonga” is used and taonga means treasured cultural possession. Thus Her Majesty Queen Victoria, perhaps unwittingly, promised to protect Māori autonomy, first, and, secondly, Māori ownership of their resources, including all of their treasured things.

Not much happened after that. Turanga continued to be an autonomous area, as it always had been. The British Crown was practically not present, there was a British resident there but nothing else. The chiefs were the chiefs, as they always had been, and the tribes ruled their lives. By the 1860s, however, there was considerable contest over land, and war broke out between the Crown and a number of the large North Island tribes. About 14,000 troops were sent down from the Crimea, I understand, in order to put down the so-called rebellion. The forces of Tawhiao the Māori king, were attacked in the centre of the North Island in a place called Waikato and again in Turanga, north of Turanganui-a-Kiwa. And the last of the campaigns was a campaign against Te Aitanga a Mahaki, Rongowhakaata, and Ngai Tamanuhiri in Turanga itself.

On the 14th of November, 1865, 1,400 troops surrounded and besieged a fort just outside Turanga, in Māori a pa, into which had retreated 800 men, women and children who sided with the Māori king. The pa was attacked and bombarded, seventy-one people were killed before the siege was broken. One hundred and thirteen (initially and then more after that) men were captured and sent without trial to Chatham Island, about 500 miles off the coast of the Southern Island. In the Māori language Chatham Island is called Wharekauri. They were imprisoned there, 123 in all, but they were allowed to take their wives and children with them, so about 350 of the worst offenders and defenders were removed to the Chathams without charge or trial and without any indication of the length of their sentences. A schooner named Rifleman arrived with a cargo of seed potato indicating to the prisoners that there was going to be yet another year in captivity, the people decided to rebel. They took over the Rifleman, and returned to Aotearoa, to Turanga. Their leader, their spiritual leader, was a man named Te Kooti who belonged to the Rongowhakaata tribe. He galvanised the prisoners and gave them hope during the preceding
winter. While seriously ill, he had received a series of spiritual visions and founded a faith called the Ringatu faith, which still exists today. There are about twenty-thousand adherents of this millennial movement, which promised the removal of the coloniser and the redemption of the Israelites, as Te Kooti called his people.

Te Kooti led this rebellion, the hijacking of the Rifleman, and the return to Turanga. He landed at Whareongaonga to discover that his tribe’s most prized possession, a carved house called Te Hau Ki Turanga, which currently stands in the National Museum, had been taken at gunpoint by Crown soldiers for shipping to Wellington for display. He found that a law had been passed that confiscated the lands of all of these individuals who had been involved in the so-called rebellion. He also found out that 50,000 acres of tribal lands, no matter who owned those lands, would be taken in compensation to the Crown. And he found that the captain of the militia had built his house on Te Kooti’s own family land. Te Kooti headed to the centre of the North Island to the large lake in the middle called Lake Taupo, hoping to establish a peaceful settlement there, but when he got to the border of the large tribe butting on to the eastern coast, Tuhoe, they would not allow him passage because they feared if he took passage through that area that British troops would follow through. Tuhoe had just been defeated brutally in war in the northern part of the island and frankly did not want anymore trouble. So Te Kooti, cornered with 300 people – men, women and children and little food – turned back to Turanga and attacked. Thirty settlers were killed, including the captain of the militia, Captain Biggs, who had built his house was on Te Kooti’s land at Matawhero. Forty Māori who had sided with the British were killed. He then took 200 prisoners and returned back into the mountain bordering on the Tuhoe country, at a large rock edifice called Ngatapa.

The colony was in outrage. The newspaper reports at the time indicate that the English were all getting ready for jumping on ships and heading back home for fear that the natives had finally done the thing that everyone feared, which was to kill British men, women, and children in their beds. The militia was called, the soldiers gathered, they moved up to Ngatapa and attacked. They besieged the now 450 odd people in the pa and cut off its water supply. There was one escape route, which was unguarded. It was a rocky precipice at the back of Ngatapa. From it there was a sheer drop of several hundred feet. The people after five days without water sought to escape by this means. Many died in the fall from the precipice. Some got away,
but were so weak that they were recaptured and taken back to Ngatapa.

This story unravelled in a hearing before the Waitangi Tribunal, over which I presided. And at this point, one witness who gave evidence before us pulled out a copy of the notebook of one of the soldiers, Corporal Tombilson, who detailed what happened when the 200 odd male prisoners were brought back to Ngatapa after being captured. He wrote that the prisoners were gathered on top of the cliff at Ngatapa, and then his notebook says they were stripped, bound, and shot, and then in all uppercase, “SHOT LIKE DOGS.” Then they were pushed off the cliff. The remains of those 136 prisoners who were executed in this fashion, without trial, or charge for that matter, are still at the foot of Ngatapa. Only about seventy got out of that turmoil alive. Thirty five odd escaped. The rest were either imprisoned and later released.¹ Te Kooti was never caught.

During the course of our inquiry, we calculated that forty-three percent of the adult male population of that district were killed by Crown forces.

These three tribes Te Aitanga a Mahaki, Rongowhakaata, and Ngai Tamanuhiri were effectively gutted in this process over a two-year period, from the end of 1865 to 1868. But the story does not stop there. Because what follows on from there is the Poverty Bay Commission, which moves in and allocates the lands in the district to those who were loyal, and confiscates the rest. And the Māori Land Court takes that allocated land and individualises its titles, so that within a twenty-year period, from the early 1870s through to the mid-1890s, eighty percent of the land base of these tribes, was lost in addition to forty percent of the adult men.

Now that story is a story that is repeated all over the world in this period. There is nothing particularly unique about it. It is familiar to so many.

The Words of Te Kooti

Te Kooti was an extraordinary man for many reasons. He was a skilled fighter; a leader (although he did not have good lineage); a religious prophet who founded a church that is still is strong today; and a poet. He wrote song-poems detailing all of his feelings as these

¹ With the exception of Hamiora Pere who was found guilty of treason and hanged.
events were going on. Many of these song-poems, which you might call chants in English, are still sung today. One of the greatest is the song known as *Pinepine te Kura*. It is very long and it details the story of the departure from the Chatham Islands, the story of the Matawhero massacre, the story of Ngatapa, and Te Kooti’s late escape into the centre of the North Island to hide under the protection of the Māori King. The great thing about these songs is that they provide us with eloquent testimony from the man himself about what he saw happen at the time it happened, in a Māori way – not in an English way – but in a Māori way. The song is about twenty minutes long, so I am not going to sing you all of it . . . I’m only just getting started, but this verse always rang with me:

\begin{verbatim}
Nau mai ka haere taua, ki roto o Turanga
Kia whakangungua koe ki te miini
Ki te hoari, ki te pu hurihuri
Nga rakau kohuru a te Pakeha a Takoto nei
\end{verbatim}

Part of the translation of this tells you what is going on in this man’s mind. He is delivering it as a story to a young child. He says to this young boy:

\begin{verbatim}
“Come. Let us go to Turanga,
that you may be tested by the Minnie rifle,
by the sword and by the revolver,
those murderous weapons of the white man laying all around us.”
\end{verbatim}

He then tells the story of Ngatapa as I have explained it to you.

Now Te Kooti was a man who was attacked illegally, unquestionably illegally, even by the English standards of the time; who was imprisoned without charge and held unjustly; who was attacked again upon his escape; whose followers were executed illegally without charge or trial, and who was after that chased for much of his life.

About two months before he died in 1893 – peacefully, ironically, under the protection of the Māori King – Te Kooti told his followers:

\begin{verbatim}
Ko te waka hei hoehoenga ma koutou i muri i au ko te ture.
Ma te ture ano te ture e aki.
\end{verbatim}
Translated, he said: “When I am gone, the canoe that you shall paddle shall be the canoe of the law, for only the law can undo the law.” This was a man who had no cause to have faith in or rely in any way on the law. He said, “The canoe you shall paddle after I am gone is the canoe of the law because” – this is my reading of what he was saying – because only laws of liberation can undo laws of oppression. I will return to this theme at the end.

**What do indigenous people look to the law to achieve?**

So why did he do that? Why did he say that his people should rely on the law and nothing else after being treated so badly by the law? That leads me to the second question: What do indigenous peoples look to the law to achieve? This is, I believe, the central philosophical question. It is easy to get lost in doctrinal debate within the law and its paradigm. It is much harder to get above that and ask, “What’s the point? Why are we doing this? Why are we struggling in this way, as directed by Te Kooti and others, rather than in some other way? Why is resort to the law a sound strategy?”

Is it because we seek recognition of indigenous rights? Well that begs the question, “What rights?” Rights, after all, are not an end in themselves, they are just a means to an end. A right to access to tertiary education, for example. Even a right of equal access to tertiary education is meaningless unless, in the end, that right creates equitable gender or minority representation in tertiary institutions. Sometimes I think western law is so hung up on the formalism of its rights structures that it forgets that those rights have a point. If the rights are not achieving the point, get rid of the rights – Get to the point.

So, in the indigenous area, what sort of rights are we talking about? Are we talking about the old rights? The ancient rights of indigenous peoples as they exercised them in their areas? But what if those rights related to old economies no longer relevant? What if those rights relate to foods that no longer exist, or foods that just are not eaten anymore by those indigenous peoples? Worlds change. Peoples change. Economies change. They must. If they do not, they die. So the rights must be relevant and exercisable. So saying that recognition of rights is the point in the game just begs the question. It does not provide us with an answer because rights are a means to an
end. They are not the end. They are not the point. They are the means to the point.

Well, is it about self-determination, then? Let us think about rights of self-determination. Economic self-determination, political self-determination. Well, the experience of the developing world teaches us that self-determination is not an end; it is just the beginning. What is the point of economic self-determination if in acquiring economic self-determination you do the same thing with it that the oppressor did? What is the point of that? What is the point of political self-determination if in acquiring that political self-determination you oppress your own. That cannot be the point. That must be a means to the point because, as an end in itself, it is a hollow end.

I think the point for indigenous minority peoples, or at least for the Māori, is survival. The point is survival. What is the point of getting independence if I do not use it to cherish and grow my own language, my own culture, my way of being, my own distinctiveness. What is the point in being self-determining if, in being self-determining, I replicate that, which has taken it away from me. Sometimes, the steps to achieving survival are nowhere near as grand as the philosophical, jurisprudential discourse of independence and sovereignty. Sometimes survival is a struggle, which occurs at a very personal level that has nothing to do with rights, nothing to do with sovereignty or self-determination. Sometimes it is just a personal decision, that I will learn to speak my language, that my children will learn to speak my language, that I will fish instead of eating at McDonald’s, that I will try to live the way of my ancestors and set an example for others to follow. Sometimes those struggles are far more important than struggles about rights and law. Sometimes the most important decisions are personal ones. So the trouble with law is that it does not know its place. It thinks that it is far more important than it actually is. And as lawyers and law students, particularly in western culture, we suffer from lawyering. We forget that rights are not the point, they are the means to the point.

If survival is the point, how good is law as a tool for securing the survival of indigenous peoples? Well, in many ways, it is not that good at all. Was Te Kooti wrong?
How is the law a valuable tool for indigenous people?

I will end on a hopeful message – do not get too depressed. But let us start at the basics. Law, whether in its legislative or judicial form, is inherently the guardian of the status quo. It is inherently hostile to any discourse which threatens the status quo. There is nothing radical about this idea, and I am not the first person to say it. But when you think about law and legal structure, it is just obvious that that is the case. There are two kinds of judges: conservative judges and really conservative judges. As a tool for change, as a tool to address indigenous survival, the law can only ever achieve incremental change if at all. That is in its nature. To expect otherwise is to expect a cat not to chase the mouse. Law is uncomfortable with subject matter which does not share its assumptions.

Law is uncomfortable with a set of paradigms and understandings which are not familiar to it, which are not within its discourse. How, for example, do you incorporate within decisions over the allocation of environmental rights, water rights and so forth, evidence from a tribe that says, “This river is my ancestor. When I wake up in the morning, I talk to her. She is my great, great, great, great, great, great, great, great grandmother. Here is the genealogy. You cannot take her. She is part of me. I am her, she is me.” This was actual testimony from the Wanganui River tribes. Families would go down to the river and the children were taught to talk to the river as if it is a living being. How do you take that to a hearing over the allocation of water rights for the production of electricity for the modern economy of New Zealand and say, “Here, deal with that.”? Well you can’t. That is the problem. These things are not talking to each other. They are talking from different paradigms entirely.

So the law is uncomfortable with subject matter which does not share its own assumptions. Look at the development of the doctrine of aboriginal title in Canada and Australia. Wonderful examples of this incremental nature of the law. In the early 1990s, two famous cases – one called Delgamuukw, in British Columbia, and the other called Mabo, in Australia – found that aboriginal title does exist. These people did have some rights, residual though they

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may be, in lands the titles to which have not been extinguished. Indigenous peoples in both countries saw this as a victory. But then the follow-up cases were heard and the devil was in the details. What were the legal tests for the maintenance of such a title across the process of colonisation? And the indigenous peoples in both countries became more and more depressed as these cases rolled out. The original proposition that indigenous peoples own lands, surprising though it may be, came to be “The indigenous peoples own lands, but not very often, because you have to prove continuity of use.” You had to prove that your use was not a new kind of use, but it was the same kind of use that your ancestors had 200 or 300 years ago. You had to show that the process of colonisation had not unduly interrupted this exercise of those rights claimed. We do not have time to discuss the limitations of the doctrine of aboriginal title, but it is no overstatement to say that the doctrine has not delivered all that was hoped for by indigenous people.

Thirdly, I think, the problem with rights law is that it is gut law. It clothes itself in doctrine, but in reality it is visceral. It is really very deeply emotively based. Let me give you some examples. When the Treaty of Waitangi was signed in my country in 1840 there was an acknowledgment out of the nature of the treaty itself that sovereignty resided in these tribes, not collectively, but individually, at least. And the imagery used to drive that conclusion was imagery of the “united and confederated tribes of New Zealand gathered here at Waitangi, sovereign in themselves.” That sort of imagery was used. By 1877, after the wars that I described earlier, in a very famous case called Wi Parata v. Bishop of Wellington4, the status of that treaty was tested. And the Chief Justice at the time found that the treaty was a simple nullity, it having been entered into with primitive savages who lacked the capacity to engage in treaty. Now, unsurprisingly, almost precisely the same jurisprudence is found in the U.S. cases. What drives the law is not rational doctrine, but in fact, in the case of Chief Justice Prendergast’s decision, amateur anthropology. They are primitive savages, therefore, they have no rights. They are noble savages, therefore, they have rights. It is dressed beautifully in doctrine, but in reality what was happening is that a judge was deciding, on the basis of some anthropological perception of the sort of people he is dealing with, what their rights should be and underlying that, a perhaps unconscious impulse to reflect the massive

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4 Wi Parata v. Bishop of Wellington [1877] 3 NZ Jur (NS) SC 72
power imbalance between coloniser and colonised following the wars of the 1860s. And I think a look through the indigenous rights jurisprudence in North America and Australasia will show this sort of phenomenon popping up time and time again.

So indigenous rights law is gut law. But therein lies its value, I think. As lawyers, particularly, we get tied up in discussing the development of fiduciary obligation both here and elsewhere, the development of the trust obligation, rights of sovereignty and self-determination and so forth. But what really drives law, at least in my country, is the perception of what is going on out in the community with people. Rights law is often a response to changes in the social, political or cultural environment in which the judge finds him or herself.

In 1987, the New Zealand Court of Appeal came out with a landmark decision called *The New Zealand Māori Council v. Attorney-General*, in which it characterised the Treaty of Waitangi as creating a partnership between the Crown and Māori, something quite unprecedented – a partnership between the Crown and Māori. Now what drove that, given that the leading authority up until that point was *Wi Parata v. Bishop of Wellington*, which said they are primitive savages and the treaty was a nullity? Well, the answer is obvious to someone who is familiar with the situation in my country. The reason that the law changed was a resurgence of pressure and assertiveness, a renaissance, a cultural, linguistic and so forth, political renaissance of the Māori people themselves such that the judiciary and the legislature, to their credit, felt that they needed to give some ground. And the give was, in the case of my country in 1987, *The New Zealand Māori Council v. Attorney-General* case, and the concept of partnership.

So law is capable of creating paradigm shifts, even if it is inherently conservative and inherently incremental, occasionally it will produce paradigm shifts and it will produce those shifts not as a result of doctrinal debate; it will produce those shifts because of pressures external to legal argument. And it produces those shifts, and this is the hook, it produces those shifts in utterly unexpected ways – often unexpected even by those whose campaign is behind the litigation or political movement seeking legislative change or change by jurisprudence and case law.

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Let me give you an example, and then I will finish. I will give you this example because I was involved with it as counsel before I went to the bench, and then somewhat involved with it, although at quite some distance, while on the bench. In the mid-1990s, a client of mine filed an application in the Māori Land Court for customary title to the foreshore and seabed of a large area in the northern part of the South Island. It was no mistake that it was a large area in the northern part of the South Island. This was the area where the industry of aquaculture, mussel growing, primarily, but fish farming as well was really starting to take off. It was an industry valued at around 300 million New Zealand dollars at that stage. Māori tribes had tried to get into the industry by making applications for marine space and had continually been turned down. And the big oligarchs, I suppose you might say, tended to get the licenses. At least that is what the Māori thought.

The foreshore and seabed is very interesting in Polynesian culture. We are island peoples, so that inter-tidal zone and the inshore fishery was, and remains to be in many ways, of enormous economic importance – in some ways, more important than the land-based economy. But first some history.

In 1869, a chief made application to the Native Land Court, as it was called then, over a large piece of sand foreshore called Kauaeranga. And the chief judge of the Native Land Court in 1869 found in favour of the chief and his tribe, and said whether there is customary title to these areas is a matter of evidence. The chief judge granted a form of title in a famous case called In re Kauaeranga. Once Wellington, New Zealand’s political centre, heard about that decision, a proclamation was made withdrawing from the Native Land Court the jurisdiction to grant titles to the foreshore and seabed. So three or four titles were granted and then everything went quiet as the Crown moved to stop those titles from being granted further. That jurisdictional bar against the Native Land Court was enacted in the Harbours Act of 1878. In 1990, the Harbours Act was under consideration for consolidation in the change to environmental law which led to the Resource Management Act of 1991. This well-known

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legislation brought all of the environmental legislation and all of the marine-based legislation in one place with a single regime running it.

The Resource Management Act 1991 repealed the Harbours Act. And the Harbours Act contained the jurisdictional bar that prevented the Native Land Court from granting titles. Everyone had thought that the title to the foreshore and seabed had been extinguished. But it had not. All that had happened was a piece of legislation said the court cannot grant the titles; it did not say the titles do not exist. And when that piece of legislation was repealed, voila, applications could be made, and one such application was made. The Crown applied to strike it out and the Māori Land Court said, no, you are entitled to grant such titles, it is just a matter of evidence as to whether they exist. That case went all the way to the Court of Appeal. The Court of Appeal sitting as a full court decided five-nil that Māori title to the foreshore and seabed could be granted by the Native Land Court if the evidence was there. The Legislature was shocked to say the least, but of course they had forgotten about the jurisprudential history. Well, what happened in my country was that this was an enormous political issue. The government introduced the Foreshore and Seabed Bill to extinguish any claims to the customary title, to vest such title in the Crown, and to give the Māori Land Court limited jurisdiction to grant some limited rights with respect to the foreshore and seabed. Māori, knowing that they had won in the Court of Appeal and seeing the bill introduced to confiscate their win, mobilised. Thirty-thousand Māori marched in the streets on a very cold, blustery, Wellington winter day. But the legislation passed anyway, because politics is about numbers, and the numbers were certainly not sympathetic to the Māori cause in this case.

But what happened after that was the unexpected paradigm shift. The Māori Members of Parliament (“MPs”) who were part of the government were under pressure. Six Māori MPs sitting in Māori constituencies were under enormous stress to pull out of the government in order to demonstrate the deep opposition felt in the Māori community over these issues. One MP, who was a Minister, resigned. She resigned and formed a new party – the Māori Party. In the by-election she won ninety percent of the vote and was back in Parliament. The Māori Party was born.

Now this, I think, is a great example of the way in which the law and legal struggle can produce changes that are utterly

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unexpected. Because Māori had actually lost the foreshore and seabed battle. Their rights over the foreshore and seabed had been extinguished, with only residual rights protected by applications to the Māori Land Court. This debate became no longer about the foreshore and seabed. It became much more about the solidarity of the Māori people themselves. Whether they still retained enough cohesion and enough spirit to create and maintain a broad-based political movement. And that story is still running— we do not know what the end of it will be. But it does teach us that legal process can produce quite unexpected results, and that those quite unexpected results can produce paradigm shifts in ways that are also quite unexpected. Because it is clear that the foreshore and seabed litigation was triggered a profound shift is the political environment in my country.

Well, that is my example. I will return to the story of Te Kooti and then I end.

When Te Kooti said, “The canoe you should paddle is the canoe of the law; for only the law can undo the law,” I think what he was really saying is that peace is the only way. War does not work. He tried that— it did not work. I think Te Kooti was saying to be peaceful, be subtle, be cunning. Use the system, particularly the law, and occasionally there will be successes to alleviate the tediousness of powerlessness. I think Te Kooti knew that people committed to the use of the law as a tool for survival— which was the point in the game in my view— would occasionally trigger a paradigm shift in utterly unexpected ways. It will occur too quietly for the status quo to predict the paradigm shift. I think that is what Te Kooti was really saying when he said to pit the law against the law — *Ma te ture ano te ture e aki.*