

1841

(Taonui, R., 2012a)

# Te ture – Māori and legislation

## by Rāwiri Taonui

As British settlers arrived in increasing numbers, Māori were forced to adapt to an alien system of rules and regulations. The new laws that affected them most directly were those that over time separated them from their land.

## Māori traditional law

### Māori law to 1840

At the time of the Treaty of Waitangi's signing, Māori lived according to a complex system of customary laws. These were based in concepts such as:

- mana (status, either inherited or acquired)
- tapu (sacred prohibition)
- rahui (a form of tapu restricting access to certain food sources)
- utu (repayment for another's actions, whether hostile or friendly)
- muru (a form of utu, usually a ritual seizure of personal property as compensation for an offence).

### Acknowledging Māori law

In 1839 Lord Normanby of the British Colonial Office instructed Captain William Hobson to seek the approval of Māori chiefs to surrender sovereignty of their territory. In return the chiefs were promised benefits that included 'British protection and laws administered by British judges'.

The colonial officials who first attempted to introduce British law to Māori recognised that they needed to take account of existing Māori laws. James Stephen, the Colonial Office advisor who drafted Lord Normanby's instructions, believed that British authority in New Zealand should be exercised through 'native laws and customs', and in 1842 Britain's secretary of state for the colonies, Lord Stanley,

### Restorative justice

A rigorous discussion known as a whakawā preceded a muru (a formal act of redress). The party who had the muru performed on them accepted the consequences and took no further action.

Taranaki leader Peter Buck (Te Rangi Hīroa) described taking part in a muru:

'Our leaders made fiery speeches accusing the local tribe of guilt in sexual matters, punctuating their remarks with libidinous songs. The

advocated a justice system that included Māori customs such as tapu.

village chiefs admitted their fault and then proceeded to lay various articles before us in payment, such as jade ornaments, bolts of print cloth and money in pound notes...

## Laws incorporating Māori customs

Some laws attempted to take account of customary practice:

- The Native Exemption Ordinance 1844 and the Resident Magistrates' Act 1867 allowed Māori convicted of theft to pay the victim a sum of money in compensation – a form of muru.
- The Resident Magistrates Courts Ordinance 1846 required legal disputes involving only Māori to be heard by a resident magistrate assisted by two Māori chiefs. The chiefs would generally decide the verdict.
- Section 71 of the New Zealand Constitution Act 1852 set apart districts where Māori laws and customs would be observed. However, this section of the act was never implemented.

We then rubbed noses with our hosts, engaged in amicable conversation, partook of a feast provided for us, and returned [home].'

## Tohunga Suppression Act 1907

The colonial administrators who proposed incorporating Māori traditional law and custom into New Zealand's early legislation regarded this as a temporary measure. They assumed that Māori would become assimilated into settler society, and that everyone in the new country would then be subject to a body of laws that no longer took account of Māori customary law.

The laws named above were all eventually repealed or replaced by others that dealt alike with Māori and non-Māori. Some later laws actually banned traditional Māori customs. The Tohunga Suppression Act 1907 made it an offence to practise as a tohunga. In practice, however, this law was seldom enforced.

## Laws affecting Māori land

### Ahi kā – the fires of occupation

Customarily, rights to land and its resources were held by iwi or hapū, and individuals derived their rights from membership of these groups. The rights were sustained through continued occupation or use. It could include seasonal visits and temporary encampments.

This principle of occupation is called ahi kā – 'keeping the fires burning'. If a group or individual abandoned an area of land, their claim to it weakened over three or more generations until it could be considered extinguished.

#### Flickering flames

According to Douglas Sinclair: 'If a woman left her fireside to marry

## Traditional claims to land

An iwi would base its claim to land upon a take (right) supported by occupation. These take included:

- take taunaha or take kite – land discovered
- take raupatu – land taken by conquest
- take tukua – land gifted
- take tīpuna – an ancestral right validated by reciting whakapapa.

## Identifying occupation rights

Customary ways of identifying occupation rights included:

- tūāhu – sacred mounds or stones erected on first settlement
- tohu – signs marking human occupation, such as markings on trees and rocks, burial sites of umbilical cords (iho) of chiefly children and burial sites of bones
- knowledge and evidence of eeling, fishing, hunting and gathering sites
- ātete – evidence of successful defence of resources against challengers.

## Land Claims Ordinance 1841

Many of the early laws affecting Māori dealt with the ownership and sale of Māori land. The Land Claims Ordinance 1841 established the Native Protectorate Department to prevent settlers fraudulently taking land from Māori. It also created the Old Land Claims Commission to investigate purchases of land from Māori before the Treaty of Waitangi was signed in 1840.

The Crown dismissed many of the more extravagant pre-treaty land claims by settlers, and radically reduced the area of land sold under other claims. However, another feature of the 1841 ordinance was that it allowed the Crown to keep the difference between land claimed and land awarded to European buyers.

Willoughby Shortland, the colonial secretary, argued that this policy did not conflict with the Treaty of Waitangi. He was among a number of settlers who asserted that Māori rights to land guaranteed by the Treaty only extended to land that was obviously used by them for housing or cultivation.

outside the tribe it was said that her fire had become an unstable ahi tere. If she or her children returned, then the ancestral fire was regarded as rekindled. By this act the claim had been restored. If the fire was not rekindled by grandchildren, then the claim was considered to have become cold, ahi mataotao.<sup>1</sup>

### Oh, really?

The Old Land Claims Commission heard 1,200 claims concerning pre-treaty purchases. The claimants included: two brothers who claimed 1.3 million hectares including all of what is now Auckland; an Australian who had never been to New Zealand who claimed 8.1 million hectares in the South Island; and the New Zealand Company which claimed all land between New Plymouth and Christchurch.

## Native Land Purchase Ordinance 1846

From 1840 the European demand for land increased dramatically as settler numbers swelled. Under Article Two of the Treaty of Waitangi, only the Crown could buy land from Māori.

Governor Robert FitzRoy relaxed this rule in 1844, allowing direct purchases by settlers. However, under the Native Land Purchase Ordinance 1846 Governor George Grey stopped such direct sales and Native Land Purchase Commission agents, working for the Crown, purchased as much Māori land as possible. The strategies they employed to convince the sellers were often dubious, and included:

- targeting the weaker members of tribes
- forcing sales under threat of military action
- purchasing from individuals rather than the groups who owned land rights collectively
- purchasing from non-owners
- promising reserves for Māori on tracts of land that they sold, then not providing them, or providing reserves that were smaller than promised or were on unsuitable land.

## New Zealand Settlements Act 1863

Under the New Zealand Settlements Act 1863 the land of any tribe 'engaged in rebellion' against the government could be confiscated.

Altogether 1.3 million hectares of Māori land was confiscated, often on an inconsistent basis. The middle and lower Waikato Kingitanga tribes lost nearly all their land while Ngāti Maniapoto, who had been active combatants during the Taranaki and the Waikato wars, lost very little. The difference was because the fertile Waikato lands were better suited for European settlement.

## The compensation courts

Māori who claimed their land had been unfairly confiscated could take their case within six months to a compensation court. Sometimes, by the time the court found in favour of the Māori claimants, their confiscated land had been sold. The court might then award barren or marginal land in compensation. Other wrongfully confiscated land was returned to people who were not its former owners.

### Fingers in many pies

Thomas Russell was a founder of the Bank of New Zealand. Frederick Whitaker was the bank's solicitor. Both men were also ministers in the colonial government when their bank arranged a £3 million loan from Britain to finance the New Zealand wars and the development of confiscated Māori lands. The New Zealander newspaper reported that 'Mr Whitaker the bank solicitor advised the bank to consult with Mr Whitaker the Premier, who very civilly referred Mr Whitaker the bank solicitor to Mr Whitaker the Attorney-General, and Mr Whitaker the Attorney-General gave Mr Whitaker [the post of] the Acting Minister of War during the

In total, about 530,000 hectares of confiscated land was returned by the compensation court. It was returned under individual title, which broke down tribal solidarity over later land sales. 'Gunpoint' sales also took place when armed settlers forced Māori to sell their individual titles. One Matamata settler obtained 20,000 hectares this way.

absence of Mr Russell of the firm of Whitaker and Russell.'

## Footnotes

- Douglas Sinclair, 'Land: Maori view and European response'. In *Te ao hurihuri: the world moves on: aspects of Maoritanga*. Wellington: Hicks Smith, 1975. Back

## The Native Land Court

### Native Lands Acts 1862 and 1865

The Native Lands Acts 1862 and 1865 established the Native Land Court. This freed up more land for purchase by settlers as it individualised Māori land title. Justice minister Henry Sewell described the aims of the court as, 'to bring the great bulk of the lands in the Northern Island ... within the reach of colonisation' and 'the detribalisation of the Māori – to destroy, if it were possible, the principle of communism upon which their social system is based and which stands as a barrier in the way of all attempts to amalgamate the Māori race into our social and political system.'<sup>1</sup>

### Native Land Court

Although many Māori were willing land-sellers, the operations of the Native Land Court led to deep dissension among Māori and also contributed to serious health and social problems.

Any 'interested Māori person' could apply for a Native Land Court hearing, and speculators often convinced individual Māori to sell land before its other tribal owners knew of the sale. The Native Land Court's hearings were frequently held some distance from tribal homelands, requiring landowners to travel and accommodate themselves in another territory. They also had to pay court costs, survey costs and legal fees. The Ngāti Kahungunu chief Renata Kawepo won a series of cases against land speculators in Hawkes Bay, but then had to sell much of the land to pay his legal and living costs.

In 1883 the New Zealand Herald wrote, 'No one knows when the [land] block in which he is interested will be called, so that all he can do is wait with patience until

his turn comes. In this very waiting, weeks and sometimes months are passed, and unless the lands in which they are interested are of considerable value, more money is expended in securing them than they are worth.’<sup>2</sup>

## The ‘10-owner rule’

According to Māori custom the group who occupied a block of land held decision-making rights over it. The Native Land Court did not uphold this custom.

In its early years the court often awarded ownership of land areas of less than 5,000 acres (2,023 hectares) to a maximum of 10 named owners, although many more might claim ownership. In 1873 the ‘10-owner rule’ was abolished, and all those with interests in the land became equal owners. However, their descendants also inherited legal ownership, whether they could still claim occupation rights or not, so shares became tiny as the number of owners increased over succeeding generations.

MP Robert Bruce declared that ‘we could not devise a more ingenious method of destroying the whole of the Maori race than by these land courts. The natives come from the villages in the interior, and have to hang about for months in our centres of population ... They are brought into contact with the lowest classes of society, and are exposed to temptation, the result is that a great number contract our diseases and die.’<sup>3</sup>

## Native Rights Bill 1894

The Native Rights Bill 1894 was drafted with the help of Te Kotahitanga, a pan-tribal Māori unification movement, and it was tabled in Parliament by Māori MPs. It sought the abolition of the Native Land Court, the right of Māori to make their own land laws, and Māori control of reserved lands and land development. At the first reading all non-Māori MPs walked out of the debating chamber. Parliament rejected the Bill in 1896. One Māori MP, Wi Pere, reflected that ‘This Bill seeking mana will not be granted until all the land has been alienated, whereupon there will be no place left for its application.’<sup>5</sup>

### Footnotes

- New Zealand Parliamentary Debates, 1870, vol. 9, p. 361. [Back](#)
- New Zealand Herald, 8 December 1883. [Back](#)
- New Zealand Parliamentary Debates, 1885, vol. 52, p. 515. [Back](#)
- New Zealand Herald, 1 August 1885. [Back](#)

### Doing it hard

In 1885 the New Zealand Herald observed the effects of the Native Land Court: ‘men and women have abandoned all work and all industrious occupation. ... for the most part they have for years past lived in tents, or slept on the ground with the shelter merely of a break-wind. They have been made to do this by having to run from one part of the country to another after Land Courts. They have had to live on wretched watery food, such as potatoes, and the only relief from the utter misery of their surroundings is in getting drunk. What wonder is it that they should die of consumption like rotten sheep, and that the children born of them should "linger out a short life?"’<sup>4</sup>

- Quoted in R. J. Walker, 'The genesis of Maori activism.' The Journal of the Polynesian Society 93, no. 3 (1984), p. 273.

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## Administering Māori land

### West Coast Reserves Settlement Act 1881

In 1880, the Crown-appointed commission of enquiry, known as the West Coast Commission, considered the future of land returned to Taranaki Māori by the Compensation Court. Mohi Tāwhai, a Māori MP, resigned from the commission on the grounds that his two fellow members were not impartial. Both had acquired confiscated land.

The commission decided that Māori did not have to live on reserved land to benefit from it. This led to a system of leasehold titles under the West Coast Reserves Settlement Act 1881, administered by the Public Trustee. Under this act settler farmers could lease Māori land for a fraction of the market rate. Some Māori farmers also obtained leases, but at higher rentals over shorter periods. This leasing system was not changed until 1998.

### Native Lands Rating Act 1882

The Native Lands Rating Act 1882 introduced rates on Māori land (defined as land in multiple Māori ownership). Māori land was rated at up to 300% of equivalent European land. The rates became increasingly difficult to pay as owners of Māori land did not always formally pass it on to their descendants, and owners who remained living on the land found it difficult to collect contributions to rates from the growing number of owners living elsewhere. Rates were eventually managed by local bodies who, until 1978, could seize Māori land for unpaid rates.

### Public Works Lands Act 1864

From the time of the first Public Works act in 1864, Māori land could be taken for government projects such as roads, and later, railways and airports. The Crown often favoured Māori land over general land for these purposes since it could pay the owners less compensation, or none at all. Land not needed for the purposes for which it was taken had to be offered back to the original owners. The Crown often failed to apply this section.

#### Not for sale

In 2006–7 members of the Ngāti Tūwharetoa tribe occupied Taurewa Station, a Landcorp-owned farm near Lake Taupō. They were protesting against the government's failure to recognise provisions of the 1908 Public Works Act. The Crown had taken the Taurewa land under the act in 1913 for military training. It later

### Maori Lands Administration Act 1900

The Maori Lands Administration Act 1900 aimed to reduce Māori protest at the loss of land. It established seven regional Māori Land Councils, each of five to seven members. The councils had a Māori majority but a European chair. In 1905 they were reconstituted as boards with a membership reduced to three, only one of whom had to be Māori. From 1913 the boards required just two members – the judge and registrar of the Land Court. From 1928 Māori Land Boards could exercise all the powers of the legal owners of the land. In 1952, in recognition of the Māori effort during the Second World War, the boards were disestablished and decision-making returned to tribes and communities. By this time more than 90% of Māori land had been alienated.

became a government-managed farm, and in 2006 the government proposed to sell the farm to private interests. The occupation ended when the sale plans were cancelled and the land was transferred to a holding company.

## The Māori Trustee

From 1920 the Native Trustee took over management of all Māori reserves from the Public Trustee. After the Second World War, the position was renamed Māori Trustee. Under the Maori Land Amendment Act 1952, the trustee also managed Māori leasehold lands. The Maori Affairs Act 1953 instructed the trustee to convert uneconomic shares in multiply-owned lands (shares valued at less than £25) for sale to other owners or the government. In 1967 the level of uneconomic shares was \$50. These measures met with widespread opposition from Māori.

## Inheritance customs

Māori customs of adoption, marriage and inheritance were different to those of Europeans. For the first century after the signing of the Treaty of Waitangi, several Māori customs were recognised, at least in part, by the courts when dealing with the inheritance of Māori land. However, from the 1950s a series of laws overruled Māori inheritance customs. This meant that children adopted under Māori custom could no longer inherit Māori land from their adoptive parents.

## Restoring Māori customary law

### Sense of injustice

In the 1970s a wave of protest actions such as the Māori land march in 1975 and the 1978 occupations of Bastion Point and Raglan golf course drew public attention to the Māori people's sense of injustice. From 1980 annual protests on Waitangi Day impelled successive governments to make changes to legislation affecting Māori. Some of those changes gave greater recognition to Māori traditional law and custom.

## Status of Children Act 1969



One of the earliest law changes to reflect Māori custom was the Status of Children Act 1969. Previously a child's birth parents were considered the natural guardians. This was inconsistent with Māori custom, which regarded children as equally precious to all members of their wider family. The Status of Children Act 1969 removed the legal distinction between 'legitimate' and 'illegitimate' children. This law applied to both Māori and non-Māori, so the European law changed to reflect Māori practice.

## Treaty settlements

The Waitangi Tribunal was formed in 1975 to investigate contemporary breaches of the Treaty of Waitangi. From 1985 the Tribunal could also investigate historical treaty breaches. The Tribunal's findings upheld some major treaty claims, leading to substantial settlements for the iwi concerned. Special acts were passed to give effect to these settlements. Two examples are the Waikato Raupatu Claims Settlement Act 1995 and the Ngāi Tahu Claims Settlement Act 1998.

## Principles of the treaty

From the 1980s, an increasing number of new statutes referred to the principles of the Treaty of Waitangi. These include:

- the State-Owned Enterprises Act 1986, section 9
- the Conservation Act 1987, section 4
- the Resource Management Act 1991, section 8
- the Energy Efficiency and Conservation Act 2000, section 6.

Even if a statute does not make specific reference to the treaty, treaty principles may be a relevant consideration in its enforcement. The legal application of treaty principles has, in some cases, made it easier for Māori to enforce traditional customs and practices.

## Resource Management Act 1991

Until the passing of the 1991 Resource Management Act, environmental legislation took little account of Māori historical, spiritual and cultural concerns. Legal actions by Māori to protect traditional lands, waterways, reefs and other resources were seldom successful. The new act explicitly recognised Māori spiritual and cultural values and the principles of the Treaty of Waitangi. Under this act, environmental developments required consultation with iwi, and applications for resource consents had to be sent to iwi authorities.

### Exercising a right

A landmark case in 1986 established that traditional Māori fishing rights could override European laws. Tom Te Weehi was convicted in the District Court of taking undersized paua. He appealed to the High Court, claiming Māori customary rights. The judge found that he was exercising a customary fishing

## Te Ture Whenua Māori 1993

Te Ture Whenua Māori Act 1993 represented a significant change in the direction of Māori land policy. For the first time, the importance of the relationship of land to Māori and the need to promote land retention was acknowledged in law. Under this act the Māori Land Court was required to assist Māori landowners to promote the use, development and control of Māori land. The act emphasised retention of Māori land for the benefit of its owners, their whānau, their hapū and their descendants.

## Foreshore and seabed legislation

Since 1997 several pieces of legislation, including the Marine and Coastal Area (Takutai Moana) Act 2011, have attempted to resolve contradictions between Māori traditional claims to the foreshore and seabed, and European marine law. These laws result from Māori claims of traditional rights to marine areas and resources. The claims are based on indigenous property rights – the principle that before European law was imposed Māori already practised their own laws and customs which could not be entirely overruled by later laws.

## Footnotes

- Te Weehi v Regional Fisheries, p. 690. Back
- Quoted in Fergus Sinclair, 'Kauwaeranga in context'. Victoria University of Wellington Law Review 29, no. 1 (January 1999), p. 14. Back

right, that this exempted him from certain requirements of fishing laws, and that he did not therefore commit an offence. "The customary right involved has not been expressly extinguished by statute and I have not discovered... any adverse legislation or procedure which plainly and clearly extinguishes it."<sup>1</sup>

## Indigenous property rights

In 1870 Francis Fenton, a former chief judge of the Māori Land Court, acknowledged the legal principle of indigenous property rights: "Where native, native family, or tribe, have established as a matter of fact the exclusive exercise of rights of fishing in any locality, and have maintained it against others in the old days, that is before British law was established in the Island, then we have given a title to those rights as an easement."<sup>2</sup>

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