MĀORI LAND AND LAND TENURE IN NEW ZEALAND: 150 YEARS OF THE MĀORI LAND COURT

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This is a general historical survey of New Zealand's Native/Māori Land Court written for those without a specialist background in Māori land law or New Zealand legal history. The Court was established in its present form in 1865, and is still in operation today as the Māori Land Court. This Court is one of the most important judicial institutions in New Zealand and is the subject of an extensive literature, nearly all of it very critical. There have been many changes to Māori land law in New Zealand since 1865, but the Māori Land Court, responsible for investigating titles, partitioning land blocks, and various other functions (some of which have been have later been transferred to other bodies) has always been a central part of the Māori land system. The article assesses the extent to which shifts in ideologies relating to land tenure, indigenous cultures, and customary law affected the development of the law in New Zealand. The article concludes with a brief discussion of the current Māori Land Bill, which had as one of its main goals a significant reduction of the powers of the Māori Land Court. Recent political developments in New Zealand, to some extent caused by the government's and the New Zealand Māori Party's support for the 2017 Bill, have meant that the Bill will not be enacted in its 2017 form. Current developments show once again the importance of Māori land issues in New Zealand political life.

Le droit foncier Māori en vigueur en Nouvelle-Zélande est un droit complexe.

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On note tout d'abord que si la Nouvelle-Zélande est un pays de la Common Law, le régime juridique du droit foncier Māori emprunte cependant très peu aux théories générales du droit anglais, puisque l'ensemble des règles applicables relève principalement du domaine législatif.

Ensuite, ce droit n'apparaît pas non plus comme le produit d'un ordonnancement logique et spécifique de telle sorte qu'il ne peut véritablement être expliqué que pris dans une perspective historique.

Environ 5% de la Nouvelle Zélande a le statut officiel de terres Māori en pleine propriété ("Māori freehold land") dont la quasi-totalité est située dans l'île du Nord et qui couvre 12% de cette partie de la Nouvelle Zélande.

On doit ici faire observer que cette dénomination n'englobe pas l'ensemble des terres appartenant au peuple Māori considéré comme groupe ethnique, puisque de nombreuses terres qui n'entrent pas dans la catégorie légale des "Māori freehold land" sont également détenues par les Māori notamment dans les zones urbaines.

La majeure partie des terres Māori sous le régime de la pleine propriété ("Māori freehold land") sont situées dans des zones rurales et connaissent d'importantes difficultés tant dans leur mode de gestion que dans leur rentabilité économique.

A cela s'ajoute un phénomène en constante augmentation, de morcellement des parcelles de terres, de telle sorte qu'aujourd'hui une grande majorité des Māori qui vivent sur ces "Māori freehold land", ne sont en fait que seulement propriétaires de surface réduites dont certaines n'ont aucune valeur marchande réelle.

Les litiges qui portent sur ces terres sont de la compétence exclusive d'une juridiction spécialisée appelée la Māori Land Court (le Tribunal Foncier Māori).

I INTRODUCTION

This article is a general survey of the development of Māori land law in New Zealand, relating some of the main changes to ideological developments overseas. The law relating to Māori land tenure in New Zealand is very complex. This law is principally statutory, is unique to New Zealand, and owes comparatively little to general doctrines of English common law. It cannot be said to be the product of any systematic or rational design, and it is only explicable historically. About 5% of New Zealand has the legal status of "Māori freehold land", nearly all of which is in the North Island (about 12% of the North Island).[1] It is land subject to the jurisdiction of

1 There are two main reasons why there is so little Maori freehold land in the South Island: (a) the pre-European Maori population was concentrated in the North Island; and (b) mostly the South

a specialist court (the Māori Land Court). Māori freehold land is not co-terminous with land held by Māori people as an ethnic group: a great deal of land is owned by Māori people (in urban areas, for example) which is not Māori freehold land. Most Māori freehold is rural. It has numerous administrative and financial problems associated with it, of which the most serious is a proliferation of small interests. The current pattern is for most Māori people to own an array of tiny shares, some of them quite literally worthless – in a monetary sense – in a large number of blocks.

2015 marked the 150th anniversary of the establishment of the Māori Land Court, which has been in continuous operation since early 1865, although the Court was first provided for by the Native Lands Act 1862. The Māori Land Court should not be confused with the better-known Waitangi Tribunal, which was not established until 1975. Unlike the Waitangi Tribunal, the powers of which are mainly recommendatory, the Māori Land Court is a binding court of record within the New Zealand system of courts.[2] Appeals from the Court lie to the Māori Appellate Court, established in 1894 as the Native Appellate Court, and ultimately to the New Zealand Supreme Court. For some years appeals from the Native Appellate Court went to the Judicial Committee of the Privy Council in London. This option, however, was terminated well before the abolition of all appeals to the Privy Council by legislation enacted in 2003 which came into effect on 1 January 2004.[3]

In New Zealand there is a clear separation between land tenure issues and environmental law. The Māori Land Court is concerned strictly with land tenure. Environmental law is the province of the Resource Management Act 1991 and the Environment Court, which deals with appeals and other matters relating to resource consents. Nevertheless there is an overlap in the sense that a key issue in New Zealand law has long been, and remains, the scope of the jurisdiction of the Māori

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Island was acquired by pre-emptive Crown purchasing before the establishment of the Native Land Court.

2 The Tribunal deals in the main with historic grievances against the Crown. This article deals with the Waitangi Tribunal only in passing. For a brief recent survey of the Tribunal see R P Boast "The Waitangi Tribunal in the Context of New Zealand's Political Culture and History" (2015) 18 Journal of the History of International Law 1. Some key books on the Tribunal are Janine Hayward and Nicola R Wheen (eds) *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004); Giselle Byrnes, *The Waitangi Tribunal and New Zealand History* (Oxford University Press, Melbourne, 2004); and Michael Belgrave *Historical Frictions: Maori Claims and Reinvented Histories* (Auckland University Press, Auckland, 2005). There is a wide-ranging academic debate on "tribunal history", and the extent to which the Tribunal imposes contemporary standards of fairness and justness to the past.

3 Supreme Court Act 2003, s 42 (ending of appeals to Her Majesty in Council). This step was not popular with Maori, or with conservative New Zealanders.

Land Court and in particular whether it extends to water bodies (lakes, rivers, and the foreshore). This is discussed further below.

II ORIGINS OF THE COURT

The most distinctive features of New Zealand law insofar as it affects indigenous land tenures are the existence of a separate system of indigenous tenures governed by statute, and a specialist court. The Native Land Court, today the Māori Land Court, is New Zealand's oldest and longest-established specialist court. It has a long and intricate history and has been affected by many shifts in direction. Today the Court is a very different body from its 19th century ancestor. At the same time the Court of today preserves many continuities with the past. The Court's core jurisdiction concerns the investigation, partition, and regulation of intestate succession to interests in Māori land.

The Māori Land Court has been a controversial institution in New Zealand history, and many historians have been very critical of it and its judges.[4] The Court has a very complex history, and certainly examples can be found, even in the 19th century, of its judges actively criticising the government and doing its best to protect Māori interests.[5] In the course of the 20th century the Court has continued to change and develop, evolving into the modern court which plays principally a protective role and which is staffed largely by Māori judges and Court staff.

The Māori Land Court originated in a political debate about Māori land issues in the late 1850s, a time when politicians and officials were seeking alternatives to the existing system of Māori land acquisition. The Court derives from the Native Lands Acts of 1862 and 1865, which were a complete reversal of earlier policies. Before 1862 it was assumed that Māori people had title to their lands under Māori customary law, and that this customary title could be extinguished only by the Crown and not by private individuals. Māori customary tenure is typically Polynesian with rights held by overlapping groups at various levels, and Māori society always was, and

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4 For a critical assessment see David V Williams *Te Kooti Tango Whenua: The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999). On New Zealand legal history more generally see Peter Spiller, Jeremy Finn, and Richard Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001).

5 For a detailed analysis of the history of the Court to 1909, including a representative edited collection of its leading decisions, see R P Boast *The Native Land Court 1862-1887: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2013) and Boast *The Native Land Court, Volume 2, 1888-1909: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2015). See also Boast, *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865-1921* (Victoria University Press and Victoria University of Wellington Law Review, Wellington, 2008). For a general text on Maori land law see Richard Boast, Andrew Erueti, Doug McPhail and Norman F Smith *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004).

remains, strongly tribal, structured around iwi ("tribes"), hapu ("sub-tribes") and whanau (extended families).[6] Before 1862 the government had bought large areas of land from Māori by deeds of purchase, and by this means about two-thirds of the country had passed into the hands of the government before the Native Land Court was established. By 1862 nearly all of the South Island had already been acquired by the government, as well as large areas of the North Island.[7]

In the late 1850s this so-called "pre-emption" system disintegrated, partly as a result of the disastrous purchase of the Waitara block in Taranaki in 1859 (which led to the outbreak of war in Taranaki). There was a complicated search for alternatives from around 1859-1862. In August 1862 a government led by Alfred Domett brought a new Native Lands Bill before the House of Representatives, which was enacted as the Native Lands Act 1862. This was soon repealed and placed by the Native Lands Act 1865. The Preamble to the 1862 Act stated that the new legislation would "greatly promote the peaceful settlement of the colony and the advancement and civilisation of the natives" if their rights to land were "assimilated as nearly as possible to the ownership of land according to British law".[8] The legislation aspired to create a process by which Māori could convert their land from customary tenures to the freehold tenures of English law, using a special court for this purpose. This court was the Native Land Court, today the Māori Land Court.[9] Section 4 of the 1862 Act allowed the Governor to establish a court or courts which had the function of investigating "who according to Native custom are the proprietors of any Native Lands and the estate or interest held by them therein". Once land had been investigated then it would be Crown-granted to the owners as fixed by the Court, at which point the grantees became legal owners and could deal with the land as they pleased, including selling it to private buyers if they wished.

The Native Lands Acts belong ideologically with changes to land tenure that occurred in many countries during the 19th century, reflecting the liberal faith in

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6 The classic study is I H Kawharu *Maori Land Tenure; studies of a changing institution* (Oxford University Press, Oxford, 1977).

7 The best-known of the early pre-emptive deeds are the Ngai Tahu (all South Island) deeds of 1844-1864, which were considered fully by the Waitangi Tribunal in its *Ngai Tahu Report,* Wai 27, 3 vols, 1991; on these deeds, see also H C Evison *Te Wai Pounamu: The Greenstone Island: A History of Southern Maori during the European Colonization of New Zealand* (Aoraki Press, Wellington, 1993); Evison *The Long Dispute: Maori Land Rights and European Colonization in Southern New Zealand* (Canterbury University Press, Christchurch, 1997); Evison (ed) *The Ngai Tahu Deeds: A Window on New Zealand History,* Canterbury University Press, Christchurch, 2006.

8 Native Lands Act 1862, Preamble.

9 By s 2 of the Maori Purposes Act 1947 the word "native" in all legislation, statutory instruments etc was changed to "Maori". The Native Land Court and the Native Appellate Court became the Maori Land Court and the Maori Appellate Court at this point.

individualised tenures and hostility to land held by corporate entities or traditional collectivities (whether these be indigenous towns, as in Mexico, or Māori sub-tribes in New Zealand).[10] In Britain these ideas had their practical manifestation in legislation enclosing the common lands and abolishing the remnants of Gaelic customary tenures in Scotland and in Ireland.[11] In the European Enlightenment it was standard discourse to equate freehold tenures with liberty and progress, and customary tenures with despotism and poverty. In Europe such ideas were an important component of the republican ideals of the French revolution, but were seen also in reforms to land tenure carried out in Prussia and other countries.[12] As the authors of a classic account of the early American republic have written, the English-speaking world's version of the civic humanism that derived originally from Renaissance Italy came to rest on two main foundations, the right of the citizen to bear arms and "freehold property as the fundamental safeguard and guarantee of the citizen's independence of judgment, action, and choice".[13] In Spain and Spanish America the key texts include the Constitution of Cadiz (1812),[14] the Ley Madoz in Spain (1855),[15] the Mexican Constitution of 1857 (Article 27 of which provided that no civil or ecclesiastical corporation was permitted to acquire or administer real

10 On the ideological background to and historical context of the Native Lands Acts see R P Boast "The Ideology of Tenurial Revolution: The Pacific Rim" (2014) 1 Law & History 139.

11 Enclosure in England was a gradual process, beginning in the 16th century, but which was at its apogee from 1790-1820. Whether this vast process was beneficial, and, if so, to whom, is one of the most prolonged debates in English historiography. Leading texts are G E Mingay *The Agricultural Revolution 1750-1880* (B T Batsford, London), and Michael Overton *Agricultural Revolution in England: The Transformation of the Agrarian Economy 1500-1850* (Cambridge University Press, Cambridge, 1996). Both of these standard texts see enclosure as on the whole beneficial and necessary. For a more critical account emphasising the social costs of the process see J M Neeson *Commoners: Common Right, Enclosure and Social Change in New Zealand,* (Cambridge University Press, Cambridge, 1993).

12 In Prussia the key statute was the Allgemeines Landrecht of 1807.

13 Stanley Elkins and Eric McKitrick *The Age of Federalism: The early American Republic, 1788-1800* (Oxford University Press, New York, 1993) 9.

14 Constitución política de la Monarquía Española promulgada en Cádiz a 19 de marzo de 1812.

15 See generally Josep Fontana *La época del liberalismo (Historia de España,* Vol VI), (Crítica and Marcial Pons, Barcelona and Madrid, 2007) 277-282.

property), and the Mexican *Ley Lerdo* or *Ley de Desamortización* of 25 June 1856.[16] The preamble to the statute sets out the liberal position with the great clarity:[17]

> Whereas one of the principal obstacles to the prosperity and growth of the nation is the lack of movement or free circulation of a great part of real property, the fundamental basis of public prosperity….

The *Ley Lerdo* was a general *desamortización*[18] law, aimed not only at ecclesiastical corporations but civil ones as well, including the indigenous towns. The New Zealand Native Lands Acts of 1862 and 1865 are its counterparts.

III THE NATIVE LANDS ACTS OF 1865 AND 1873

In October 1865 the House of Representatives enacted a new Native Lands Act, replacing the earlier 1862 Act. The new legislation had been drafted by Francis Dart Fenton, who became the first Chief Judge of the new body. The 1865 Act was much more elaborate than its 1862 predecessor. Section 5 of the 1865 Act provided for the establishment of a judicial body having the status of a court of record, consisting of "one Judge … who shall be called the Chief Judge" as well as "other Judges" who were to hold office "during good behaviour" (ie the formula used for the superior

16 The statute was after the Mexican Liberal politician Miguel Lerdo de Tejada. Presumably this enactment reflected in some respects the legislation enacted in Spain in 1855. The principal target of the *Ley Lerdo* was the vast endowed lands held by the Church in Mexico. Much of this land was worked by peasant tenant farmers. One consequence of the law was that many of the endowed Church lands came into the hands of wealthy ranchers and owners of haciendas, leading in turn to far worse conditions for the rural peasantry. The great historian of Mexican liberalism is Jesús Reyes Heroles. See eg Reyes Heroles *El liberalismo mexicano: Los Orígenes,* Asociación de Estudios Históricos y Políticos Jesús Reyes Heroles AC, Secretaría de Educación Pública, and Fondo de Cultura Económica, México D F, 1974 [first published 1961]. On the period of 'the Reform' (la Reforma) see eg, Jan Bazant *Alienation of Church Wealth in Mexico: Social and Economic Aspects of the Liberal Revolution 1856-1875* (Cambridge University Press, Cambridge, 1971); Richard Sinkin *The Mexican Reform, 1855-1876: A Study in Liberal Nation Building* (University of Texas Press, Austin, 1979); François-Xavier Guerra *Le Mexique: De l'Ancien Régime à la Révolution* (L'Harmattan, Paris, 1985) (translated into Spanish as *México: del Antiguo Régimen a la Revolución* (Fondo de Cultura Económica, México D F, segunda edición, 1991); Jennie Purnell "With all due Respect: Popular Resistance to the Privatization of Communal Lands in Nineteenth-Century Michoacán" (1999) 34(1) *Latin American Research Review* pp 85-121; Emilio H Kourí "Interpreting the Expropriation of Indian Pueblo Lands in Porfirian Mexico: The Unexamined Legacies of Andrés Molina Enríquez" (2002) 82 *Hispanic American Historical Review* 69-117.

17 Ley de 25 de Junio 1856, Preamble ("Que considerando que uno de los mayores obstáculos para la prosperidad y engrandecimiento de la nación, es la falta de movimiento ó libre circulación de una gran parte de la propiedad raíz, base fundamental de la riqueza publica…").

18 The term is not readily translatable, but means essentially "de-mortgagisation" and carries the idea of freeing or emancipating land, whether in the possession of the regular or secular Church, or other communities including the indigenous towns.

courts of record).[19] Under s 23 of the 1865 Act the Court could vest blocks of land in tribes, but only if the block was larger than 5,000 acres. Such orders were made very rarely. Otherwise the block had to be vested in individual owners, who could not be more than ten people in any single block of land. Thus began the "ten owners rule", which lasted from 1865-1873. Following a court order the grantees could then apply for a Crown grant, in practice allowing the grantees to alienate the land as they pleased.

The 1862 Act had not significantly changed Māori land tenure, but the 1865 Act soon resulted in very significant changes all over the country. The Court began sittings in many parts of the North Island, and began dealing with large blocks of land. It was the Hawke's Bay region which was the main catalyst for further developments in the history of the Native Land Court. Because the number of grantees in a single block could only be ten or less, many large and valuable blocks ended up in the hands of a small number of chiefs. Many of them became entangled in debt and for this and other reasons sold their shares to private purchasers, a classic example being the Heretaunga block. Alienation of interests proceeded very rapidly, purchased by land speculators and land brokers. The government's response was to set up the Hawke's Bay Commission of 1873, one of the first of the many government-mandated reviews and inquiries into the Court's actions which have been so influential in its long and complicated history. The Hawke's Bay Commission was a bicultural body and four commissioners, two Māori (Wiremu Hikairo, of Rotorua, and Major Te Wheoro, from the Waikato) and two Pakeha (C W Richmond and F E Maning). Richmond, a High Court judge, was the chairman. The Commission heard a great deal of evidence from Hawke's Bay Māori, who mainly criticised the actions of dealers and middle-men rather than the Court as such, complaining that in many instances that interests in land had been paid for in liquor, which was illegal at the time, or about Māori chiefs being threatened with imprisonment for debt unless they sold their lands.

The Commission's main report focused on the Court itself, rather than on the settler community, and suggested that new legislation be enacted. Richmond was critical of the Court's practice in acting only on the evidence before it. Although that was proper practice for ordinary courts of law, the Land Court was a different kind of institution: "the judgments of the Native Land Court are what are technically termed judgments in rem, which conclusively ascertain title against all the world".[20] He was also critical of the effects of the ten owners rule. To Richmond, the main

19 Native Lands Act 1865, ss 5 and 6.

20 [1873] AJHR G7, p 8.

problem was that once the ten owners as fixed by the Court had acquired a Crown-granted legal title, they were able to deal with their interests, including selling them, essentially as they liked without reference to the original customary owners.

In 1873 the statutory law was changed, abolishing the ten owners rule, and instead requiring that all of the owners be listed in a "Memorial of Title" on the back of the Court certificate (Native Land Act 1873, s 47). This was probably an improvement on the ten owners rule. But it created a new set of problems. Exactly what sort of interests in the land did the people listed in the memorial of title actually have? They were not exactly legal owners, nor were they exactly customary owners. For some years the ordinary courts of law were clogged with complicated legal questions about the legal interests of persons holding memorials of title. Towards the end of the 19th century, as a result of yet further changes, the concept of "Māori freehold land" began to emerge, meaning land that been investigated by the Native Land Court and under its jurisdiction, but which nevertheless was held by a freehold title.

IV THE COURT IN OPERATION IN THE 19TH CENTURY

The Native Land Court soon became a busy institution, and was before long investigating titles to land all over the country. The Court worked by means of written applications filed in advance by Māori people: eg to have title to their land investigated, to have it partitioned, for relative ownerships to be determined, for equitable owners to be added to the title, and so forth. The Court did not do anything of its own motion, and the Crown played no formal role in the cases. The various applications would be collected together, advertised, and then at the actual sittings the Court would work its way through the list. Cases that came up would be heard, or adjourned, or dismissed. The judges saw their task as to work their way through the case list that had been prepared in advance for the particular sittings. Adjournments were very frequent.

The main type of case that the Native Land Court heard was referred to as an *investigation of title.* In these cases the Court would hear all of the claims to a particular block, and then decide who the correct owners were. The principal criteria applied by the Court in these cases were based on occupation and descent. Groups usually were required to show that they were descended from a recognised ancestor on the block and prove continued occupation down to 1840. The cases could be very long and intricate, and could sometimes last for months. Often there would be numerous claimants and counterclaimants, some of them claiming the entire block and others only parts of it. Sifting through the array of claims could be a very difficult task. An example of this complexity was the investigation of title to Mokoia Island in Lake Rotorua, heard in 1916. Judge MacCormick, who heard the case, complained that the Mokoia investigation was "about the most unsatisfactory case in this Court's

history".[21] There were some 29 separate claimants and claimant groups, some laying claim to the whole of the island and others to only parts of it, mostly representing sections or hapu of Ngati Whakaue, Ngati Uenukukopaku, Ngati Rangiwewehi, and Ngati Rangiteaorere, all of these being Māori iwi living in the Lake Rotorua region.

The largest investigations of title ever heard by the Court took place in 1886, when the formerly independent Rohe Potae or "King Country" was split into three huge surveyed blocks of land (the Rohe Potae proper, of 1.6 million acres, Tauponuiatia, of about one million, and Waimarino, of about 500,000 acres) and investigated in separate hearings at Otorohanga, Taupo, and Wanganui.[22] The main case, at the Waikato town of Otorohanga, was heard by Judge Mair, a former army officer, sitting with the Ngati Porou chief Paratene Ngata as Assessor. The case was presided over with great tact and skill by Mair and Ngata, and was mostly vested in a coalition of claimant tribes who included Ngati Maniapoto, Ngati Raukawa, and Whanganui groups. The Tauponuiatia case is famous as including certain blocks around the peaks of Mts Tongariro, Ngauruhoe and Ruapehu, gifted to the Crown by Te Heuheu Tukino Horonuku, paramount chief of Tuwharetoa. These blocks formed the nucleus of what today is Tongariro National Park.

The Court did not only hear investigations of title, however. Another important type of case was a *partition,* or a division of a Māori land block into smaller sections. Most Māori land blocks have been repeatedly partitioned and repartitioned since the original investigation of title. Often this was at the request of the owners, who wanted to have their land split up into smaller sections so it could be better managed for farming, or divided into house sites, marae reserves and so on. Sometimes investigation of title and partitioning were simultaneous processes. When the Court investigated title to the vast Tauponuiatia block in 1886-87 it split this block into 151 sub-blocks, as well as making orders vesting another 25 sub-blocks in the Crown, including the gifted mountain peaks blocks referred to above. Partitioning was also used during the process of land-purchasing, particularly when purchasing was being carried out by the government. After purchasing a number of undivided share interests the Crown would then apply to the Native Land Court to have the block split into Crown and "non-sellers" (as the expression went) portions. Another important part of the Court's work was making succession orders. If an owner died,

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21 (1916) 3 Mokoia Island MB 85.

22 The originals of these judgments are at (1886) 4 Taupo MB 69 (Boast, above n 5, vo1 1, 1092-1100) [Tauponuiatia]; (1886) 9 Whanganui MB 199-200, 290 (Boast, above n 5, vol 1, 1110-1116)[Waimarino]; (1886) 2 Otorohanga MB 55-70,(Boast, above n 5, vol 1, 1168-1197) [Rohe Potae/King Country]. These cases were one of the outcomes of complex negotiations between the New Zealand government and the Maori leaders of the King Country, the negotiations lasting from 1881-1885.

his or heirs had to apply to be entered in the Court titles in the place of the deceased. Usually successions were fairly routine, but matters could get complicated in the case of adoptions, which often created intricate legal and factual problems relating to the practical application of Māori custom.

The Court gradually came to be a familiar and established part of the Māori world. Māori became very used to the Court and its methods of hearing cases and taking evidence. The Court recorded its evidence and judgments in large leather-bound folio books, the "Minute Books", which today form a vast record of the Court's proceedings. A number of places around the North Island became known as the "Court towns", where the Court would sit. Sometimes the sessions would last for only a few days, on other occasions, particularly in the Waikato, Whanganui, Hawke's Bay, and the East Coast, the hearings could last for months. The most famous of the Court towns was the Waikato town of Cambridge, where the Court had many sittings from 1879-1886. Other important venues were the Hawke's Bay towns of Waipawa and Hastings, the city of Gisborne on the East Coast, Otorohanga in the King Country, and Marton in the Rangitikei region. The Court did not usually sit in major metropolitan centres such as Wellington or Auckland. There were however some parts of the country where Māori made determined efforts to exclude the Court for a number of decades: the King Country, the Rotorua region, and the Urewera region. The Court did not begin sitting in the Rotorua region until 1881 and in the King Country until 1886. In the Urewera region, as a result of special legislation enacted in 1896, titles were investigated by the Urewera Commission, a special tribunal, rather than by the Native Land Court.

V THE COURT AND MĀORI LAND TENURE

The principal purpose of the Court was to convert land held on customary tenure over to a remodelled freehold tenure. This process of change was greatly complicated by the emergence of the category of "memorial" land under the Native Land Act, but by the end of the 19th century, as a result of some additional legal changes, the class of land known as "Māori freehold land" had taken shape.

The cases that came before the Court were often extremely complex and difficult. On many occasions the Court drew attention to the intractability and complexity of the evidence. "The investigation occupied 47 days", the Court said in one case relating to a block of land on the Waikato coast, "the evidence brought forward in each case being very voluminous and of a very conflicting nature".[23] In the Taheke case (Rotorua region) in 1886 the Court complained that "the evidence has been of

23 Manuaitu-Aotea Investigation of Title (1887) 16 Waikato MB 307 (Boast, above 5, vol 1, 1204-1216).

a very conflicting nature".[24] The Court had to have some means of unravelling and adjudicating the complex multi-party claims which constantly confronted it.

There has been a considerable amount of debate amongst historians about the Court's process of inquiring into customary tenures. It was at one time commonly thought that the Court applied in a fairly rigid way a certain number of *take,* a Māori term meaning something like a foundation of title or a legal cause of action. It was thought that the Court worked within a fixed number of specific *take,* such as *take raupatu* (conquest), *take tupuna* (descent), and so on. It was also once thought that the Court applied in a no less rigid way the so-called "1840 rule", by which the Court would refuse to recognise changes in customary entitlements that had arisen after 1840 (such as post-1840 occupations or conquests of territory). As more recent research has shown, the Court's practice was in fact relatively pragmatic and flexible. Māori would advance claims to land based on a range of traditional categories and terms which the Court made little attempt to classify or analyse. The Court is also often said to have had a fixed practice of confining its decisions to evidence given in Court, and of refusing to consider extrinsic material or making independent inquiries. Recent research has however shown that the Court made site visits to the land in question, usually in company with the parties in the case; sometimes the Court's Māori Assessor would travel to the land in issue and inspect it carefully, and would prepare a report that would be copied down in the minutes.[25]

Nevertheless the Court certainly did have a basic and very consistent approach to Māori land titles, and that was to give particular weight to evidence of occupation. Claims based merely on descent from a particular ancestor with no evidence of occupation were much less likely to succeed. The strongest claims were those supported by evidence both of descent and of occupation. Thus in the Taheke case in 1886 the Court awarded the block to Ngati Te Takinga because they were able to prove to the Court's satisfaction that Ngati Te Takinga were descended from those who had played an important role in the conquest of an earlier group named Ngati Tutea and that they (Ngati Te Takinga) had occupied the area and were still in occupation of it at the time of the case. In the Nelson Tenths case in 1892, Ngati Toa, who had participated in the conquest of the Nelson region before 1840, were denied an interest in the Nelson Tenths lands because they had – in the Court's view – failed

24 (1886) 3 Taheke MB 219.

25 Boast *The Native Land Court, Vol 2, 1888-1909: A Historical Study, Cases, and Commentary,* (2015), 109-126.

to maintain occupation. The Court allocated the lands to Ngati Tama, Te Ati Awa, Ngati Rarua and others who were both conquerors and occupiers.[26]

VI JUDGES, ASSESSORS AND LAWYERS

The keynote of the Māori Land Court bench in the 19th century was its astonishing diversity. Comparatively few of its judges were lawyers. In a survey of the Native Land Court judges carried out for the Waitangi Tribunal in 1994, Bryan Gilling found that only thirteen of the 45 judges appointed from 1865-1909 were qualified lawyers.[27] The principal criterion for appointment in the early years of the Court seems to have been some familiarity with the Māori world. The judges came from a diversity of backgrounds: surveyors, army officers, government land purchase officers, and so on. One of the most important of the 19th century judges, Judge Rogan, was formerly a surveyor, a land purchase officer, a district commissioner and a resident magistrate in the Kaipara area before he became a judge of the Court. The Chief Judges, however, were always qualified lawyers (Chief Judge Fenton, Chief Judge Macdonald, Chief Judge Seth Smith and so on). Life as a Māori Land Court judge could be very arduous. Hearings were often at very out of the way places, such as at Waitangi in the Chatham Islands or at Taupo, a very isolated place in the 19th century, and not easy to get to. The hearings of the Rohe Potae case at Otorohanga, which lasted for three months in the winter of 1886, were especially demanding. According to the *Waikato Times* the weather was often "most inclement and bitterly cold"; the Judge (Mair), the Assessor (Paratene Ngata) and the Court staff "had to cross a flooded river in a canoe, walk through mud and water, sit for hours on a bench wrapped in ulsters and were only too glad to retire to the shelter of their blankets".[28]

Some of the judges of the Native Land Court had literary or scholarly leanings. Judge Maning was a well-known author, who before becoming a judge wrote two books which continue to be widely read today, his *History of the War in the North of New Zealand* (1862) and *Old New Zealand* (1863). Judge Fenton edited and published a collection of leading judgments of the Native Land Court in 1879. Judge Wilson wrote a series of articles for the *Auckland Star* on pre-European Māori life, published in 1894 as *Sketches of Ancient Māori life and History*; he also a published a biography of the prominent Ngati Haua chief Te Waharoa. Judge Gudgeon and

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26 (1892) 2 Nelson MB 7.

27 Bryan Gilling *The Nineteenth-Century Native Land Court Judges: An Introductory Report* research report commissioned by the Waitangi Tribunal (Wai 814 [Gisborne Inquiry]. Doc#A78, 1994), at 24.

28 *Waikato Times* (Hamilton, NZ) (Vol XXVII, Issue 2230, 23 October 1886) at 2.

Chief Judge Seth Smith were active in the Polynesian Society, established in 1892.[29] Some of the judges had more unusual literary leanings. Judge Wilson published a book on *The Immortality of the Universe* in 1875. One of the 20th century judges, Judge Acheson, even wrote a successful novel, *Plume of the Arawas,* a romantic adventure story set in pre-European New Zealand published in 1930. Many judges had some kind of understanding of the Māori language, and some understood it well enough to give oral judgments in Māori or draft documents in it.[30]

The Court sat with Māori assessors for most of the 19th century. The Court's judgments were in theory joint decisions of the judge and the assessor. The assessors were also a diverse group. It was a rule of practice that the assessor in any given case had to be unrelated to any of the parties involved in the hearing. If assessors were believed to have local connections parties in Court would complain about it. One of the claimants in the 1886 Taheke case alleged that the assessor was related to some of the parties in Court and that he had been heard to comment favourably on the cases of some of the parties. The assessor, Honi Kaka, "indignantly denied" these assertions, and the case continued.

The Native/Māori Land Court engaged a legal process, and this meant that sometimes Māori would need legal assistance to present their cases. One of the many transformations brought about by the Land Court was that it forced Māori into engaging with courtrooms and with lawyers. At various times, however, lawyers were banned from the Native Land Court. The Native Lands Act 1873 provided that "the examination of witnesses" and "the investigation of title" was to be carried on by the Court without "the intervention of counsel". The ban was removed in 1878, reinstated in 1883, and removed again in 1886. Some lawyers certainly did build up large practices in the Native Land Court. Examples are John Sheehan, Sir Walter Buller and W L Rees. As well as lawyers, para-legals, usually referred to as "conductors", regularly appeared in the Court. The conductors seem to have been unofficial barristers, usually Māori themselves, who were skilled at presenting cases and cross-examining witnesses. They played a very important role in the hearing of cases and the demanding process of compiling lists of owners to be entered into the Court titles.

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29 On the Polynesian Society see M P K Sorrenson *Manifest Duty: The Polynesian Society over 100 years,* (The Polynesian Society, Auckland, 1992). The Polynesian Society is still in existence and publishes the *Journal of the Polynesian Society,* one of the leading journals of Polynesian archaeology and anthropology.

30 On the cultural and historiographical significance of the Native Land Court see R P Boast "The Native Land Court and the Writing of New Zealand History" (2017) 4 Law & History 145.

VII MĀORI LAND AND THE COURT IN THE LIBERAL ERA (1891-1912)

Further complex changes occurred during the period of the Liberal government of 1891-1912 under the premierships of John Ballance, Richard Seddon, and Joseph Ward.[31] The Liberal government was powerfully influenced by contemporary ideas about land and land tenure, including theories that land should be profitably managed by the state in the interests of the nation. Many on the left wing of the liberal party were interested in even more radical ideas, including land nationalisation, the nationalisation of key resources, and the idea that land should only be granted by the Crown on leasehold.

In 1894 the Liberals were responsible for a major new statute, the Native Land Court Act of that year. In many ways the 1894 Act continued with what had gone before, including the Native Land Court. However the 1894 Act contained two important innovations. These were the establishment of the Native Appellate Court and the restoration of Crown pre-emption. Section 79 of the 1894 Act provided that there would now be "a Court of Record, called 'The Native Appellate Court,' which shall consist of the Chief Judge and such other Judges of the Native Land Court as the Governor may from time to time appoint". This was an important step, and the Appellate Court, today the Māori Appellate Court, is still in operation and regularly hears appeals from the Land Court. Before this time all appeals were by way of rehearing. The establishment of the new appeal body was certainly a progressive step, but it was a very cheap version of an appeal court. No physically separate appeal court with its own judge or judges, or with its own separate premises and staff, was established at the time, and indeed never has been. The Appellate Court only came together at particular times and places whenever an appeal needed to be considered. A number of the judges of the Court added to their duties the responsibility of sitting on the Appellate Court as and when required. No system for reporting the decisions of the Appellate Court in a formal series of law reports was ever set up.

The other new departure in 1894 was the reimposition of Crown pre-emption, which had originally been waived in the Preamble to the Native Lands Act of 1862. The Native Lands Acts had created a complicated system of Māori land titles, and

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31 On the Liberal regime of 1891-1912, one of the most important in New Zealand political history, see David Hamer *The New Zealand Liberals: The Years of Power 1891-1912* (Auckland University Press, Auckland, 1988). The Liberal premiers are the subject of full political biographies: see Timothy McIvor *The Rainmaker: A biography of John Ballance* (Heinemann Reid, Auckland, 1989); Tom Brooking, *Richard Seddon: King of God's Own: The life and Times of New Zealand's Longest-serving Prime Minister* (Penguin Books, Auckland, 2014); Michael Bassett *Sir Joseph Ward: A Political Biography* (Oxford University Press, Auckland, 1993).

competition between the government and the private sector as purchasers.[32] The government privileged itself as a purchaser in a number of ways. One was to institute a system by which a block being targeted by the Crown as a purchaser could be "proclaimed", effectively preventing the owners from selling their shares to any private party. Owners in this situation could essentially sell to the government, on the government's terms, or not at all. In the 1880s there were two major regional pre-emptions, the King Country and the Rotorua region, where private land-purchasing in the entire region was banned, and the only permitted purchaser was the state. In 1894 this was taken to the next logical step by s 117 of the 1894 Act, which provided that "it shall not be lawful for any person other than a person acting for or on behalf of the Crown" to acquire shares in Māori land. This was a radical and controversial step. There were to be many further changes relating to Crown purchasing of Māori land interests in the 20th century.

In 1900 the Liberal government enacted two important statutes, the Māori Councils Act and the Māori Land Administration Act. The driving force behind this legislation was Sir James Carroll, himself Māori, who became Minister of Māori Affairs in 1899. The Māori Councils Act attempted to give Māori communities a degree of limited autonomy, allowing them to make by-laws relating to public health and liquor licensing. The Māori Land Administration set up Māori Land Councils. Māori could vest land in a Council, which had power to administer the land and lease it out to European settlers. The legislation was not a success. Although Māori in some regions were willing to vest their land in the Māori Land Councils, these bodies were under-resourced and faced great difficulties in performing their statutory functions. In 1905 they were converted into Māori Land Boards, run mostly by the judges and registrars of the Native Land Court. Other amending statutes empowered compulsory vesting of Māori land in the boards in certain circumstances – such as the failure to pay rates – and Māori soon became disenchanted with the whole project.

The last important step taken by the Liberal government was a massive reform of statutory Māori land law, resulting in the Native Land Act 1909, a comprehensive code of Māori land law. The key architects of this important role were Carroll and his parliamentary under-secretary, A T Ngata. Also important in the reform process was John Salmond, at this time counsel to the Law Drafting Office, and later to be Solicitor-General and then a judge of the Court of Appeal. The legislation drew on a fund of ideas discussed by Ngata and Sir Robert Stout, the Chief Justice, in a series of detailed reports on Māori land matters they had prepared in 1907-08. The judges

32 On the Crown purchasing system from 1865-1921 see R P Boast *Buying the Land, Selling the Land* (above n 5), 297-340.

of the Native Land Court were closely involved in this important reform. In September 1909 the judges and Presidents of the Māori Land Boards (essentially the same people) came to Wellington at the invitation of Carroll and spent three weeks commenting on Salmond's draft. This was followed by a further conference with the judges, and once the Bill was introduced into the House it was examined in detail by the Native Affairs Select Committee. The Bill was essentially a bipartisan measure, and was steered through the House by Carroll.[33]

This 1909 Act was a colossal achievement, bringing a great deal of much-needed clarity, and doing away with a complicated and confusing body of statutes. But it was not in the end especially innovative. The Native Land Court remained at the centre of the Māori land system, now supplemented by the Native Appellate Court established in 1894. One important change was the establishment of a new system of formal owners' meetings to deal with Crown and private offers to purchase land, but the new Reform Government quickly exempted itself from the requirement to submit purchase offers to meetings of owners by an amending Act in 1913.

VIII THE DECLINE OF LIBERAL IDEOLOGIES

New Zealand's Native Lands Acts, like cognate legislation in Latin America and elsewhere, were based on a core assumption of mid-19th-century economic liberalism: that individual clear titles to land were essential to economic and social progress. Towards the end of the 19th century this confident assumption collapsed. One dimension of this collapse was the debate between "Romanists" and "Germanists" in 19th century-Germany, part of a widespread process of debate and argument over the German Civil Code (Bürgerliches Gesetzbuch [BGB], 1900). The literature on this debate is vast, and a staple of comparative law studies.[34] In the course of this debate, the "Germanist" opponents of the "Romanists", the most famous of the latter being Friedrich Carl von Savigny, developed a new interest in German customary law as a counterweight to Savigny and the other Romanist professors, and began to study it seriously, thus creating essentially a new field of customary law studies. Prominent "Germanists" included Jakob Grimm, A L Reyscher, and Georg Beseler. An important outgrowth from this was the work of Otto Friedrich von Gierke, professor of law at Berlin, who studied collective

33 On Sir John Salmond and the 1909 Act see R P Boast "Sir John Salmond and Maori Land Tenure" (2008) 38 VUWLR 831; Mark Hickford "John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi (2008) 38 VUWLR 853.

34 See generally J Q Whitman *The Legacy of German law in the Romantic Era: Historical Vision and Legal Change* (Princeton University Press, Princeton, 1990).

fellowships (*Genossen)*. His work was very influential in the English-speaking world.[35]

Also important in this shift towards a revalorization of collectivities and customary law were certain legal developments in Great Britain. One of the most interesting of these was the various Irish Land Bills enacted by the UK parliament in the late 19th century. The Liberal Government's Landlord and Tenant (Ireland) Act 1870 gave statutory force to the so-called '3Fs' of the 'Ulster custom' (fair rent, fixity of tenure, and free sale).[36] These customary rights were not formally given effect to in lease contracts, but were widely observed in Ulster nevertheless. This legislation signalled a move away from the liberal and individualising approach to the law of land tenure, and was built on in subsequent Irish Land Bills. There were similar developments in Scotland, exemplified by the Crofters' Holdings (Scotland) Act of 1886, which protected the crofters by granting security of tenure, provided for the rights of compensation, recognised the distinctive nature of Gaelic customary tenures, and provided for arbitration by a Crofters' Commission. Developments in Ireland and Scotland were observed closely in the British colonies, including New Zealand. In New Zealand John McKenzie, Minister of Lands in the Liberal government, was himself from one of the crofter counties (Ross and Cromarty) and was intensely aware of tenurial developments in Scotland.[37]

Probably the most important trends, however, emerged in anthropology, and especially as exemplified in the work and writings of Franz Boas (1858-1942). Boas, born and educated in Germany, was profoundly influenced by the German critique of the Enlightenment.[38] Some historians have characterised anthropology as it emerged in Germany as "antihumanist" in that it advocated a scientific-rationalist approach to the study of humanity, rather than via the traditional pathways of

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35 See generally Antony Black *State, Community and Human Desire: A group-centred account of political values* (Wheatsheaf, London, 1988); Black "The Individual and Society" in J M Burns (ed) *The Cambridge History of Medieval Political Thought* (Cambridge University Press, Cambridge, 1988) 588; Black *Guild and State: European Political Thought from the Twelfth Century to the Present* revised edition (Transaction Publishers, New Brunswick (NJ), 2003).

36 T W Guinnane and R I Miller "Bonds without Bondsmen: Tenant Right in Nineteenth-Century Ireland (1996) 53 *Journal of Economic History* 113; Kerby Miller *Emigrants and Exiles: Ireland and the Irish Exodus to North America* (Oxford University Press, New York, 1985) 39-40; Richard Shannon, *Gladstone: Heroic Minister* (Allen Lane/Penguin, London, 1999) 77-85.

37 Tom Brooking *Lands for the People? The Highland Clearances and the Colonisation of New Zealand: A biography of John McKenzie* (Otago University Press, Dunedin, 1996, 271-2.

38 On the formation of Boas' ideas see Julia Liss "German Culture and German Science in the *Bildung* of Franz Boas" in G W Stocking (ed) *Volksgeist as Method and Ethic: Essays on Boasian Ethnography and the German Anthropological Tradition* (History of Anthropology vol 8), (University of Wisconsin Press, Madison, 1996) 155.

classical studies and philology. This is shown by the lack of academic support for Boas' work in Germany in the 1880s at a time when scientific anthropology was emerging in that country and humanism was still dominant.[39] Boas moved to the US and became professor of anthropology at Columbia University in 1899. Boas is the link between his own students (notably Ruth Benedict, Margaret Meade, Edward Sapir, Alfred Kroeber, Melville Herskovits, Manuel Gamio and Gilberto Freyre) and the intellectual history of 19th century Germany. Bunzl has argued that Boasian anthropology is linked intellectually with Kant's critique of the Enlightenment and the writings and ideas of Johann Georg Hamman, Wilhelm and Alexander von Humboldt, Johann Gottfried Herder, Karl Ritter, Wilhelm Dilthey, Theodor Waitz, and Adolf Bastian, the latter being Boas' own professor.[40] German relativism as developed in this tradition thus became central to American anthropology after 1900, as cultural relativism supplanted the earlier evolutionist anthropology of Edward Burnett Tylor, Lewis Henry Morgan, and the legal historian James Sumner Maine.[41]

Another component in this eclectic array of ideas, books, and policies were some new tendencies in British economic and social history, associated particularly with and John and Barbara Hammond (née Bradbury) and R H Tawney. The Hammonds' classic work *The Village Labourer 1760-1822* (1919) was a sustained attack on parliamentary enclosure. To the Hammonds "enclosure was fatal to three classes: the small farmer, the cottager, and the squatter".[42] Enclosure destroyed, and was designed to destroy, the customary village community:[43]

> In England the aristocracy destroyed the promise of such a development when it broke the back of the peasant community. The enclosures created a new orgnisation of classes. The peasanr with rights and a status, with a share in the fortunes and government of his village, standing in rags, but standing on his feet, makes way for the labourer with no corporate rights to defend, no corporate power to invoke, no

39 Andrew Zimmerman *Anthropology and Anitihumanism in Imperial Germany* (University of Chicago Press, Chicago, 2001), 45.

40 Matti Bunzl "Franz Boas and the Humboldtian Tradition: From *Volksgeist* and *Nationalcharakter* to an Anthropological Concept of Culture" in G W Stocking (ed), *Volksgeist as Method and Ethic: Essays on Boasian Ethnography and the German Anthropological Tradition* (History of Anthropology vol 8) (University of Wisconsin Press, Madison, 1996) 17.

41 See R C J Cocks *Sir Henry Maine* (Cambridge University Press, Cambridge, 1988); William O'Barr "Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law (1993-1994) 27 *Loyola Los Angeles Law Review* 41; G W Stocking *After Tylor: British Social Anthropology 1881-1951* (University of Wisconsin Press, Madison, 1995).

42 Hammond, J L, and Barbara *The Village Labourer: A Study in the Governance of England Before the Reform Bill* (Longmans, Green & Co, London, 1919), 97.

43 Ibid, 105.

> property to cherish, no ambition to pursue, bent beneath the fear of his masters, and the weight of a future without hope.

The work of the Hammonds and Tawney was associated with a broader trend which, as Stefan Collini puts it, "understood economic rationality as the operation of systematic selfishness".[44] Other contributors to this particular discourse included Arnold Toynbee, J A Hobson, and Sidney and Beatrice Webb, who together propounded a vision of the Industrial Revolution "not just as a catastrophe for certain classes, but also … as establishing a quite new form of civilisation, one driven by the narrow and unchecked pursuit of profit".[45] Such writers rejected 19th century political economy as exemplified by Bentham and Ricardo. Instead they idealised English rural society in the centuries before the industrial and agricultural revolutions and saw both as destructive of a relatively stable and prosperous peasant agrarian culture founded on custom and usage. This earlier generation of historians had a significant impact on postwar Marxist or *Marxisant* historians, notably E P Thompson and Christopher Hill, who often wrote about land tenure and customary law.[46] On the other hand the critique of enclosure by the Hammonds was rejected by a later generation of economic historians, although it has been revived more recently by J M Neeson.[47]

The new mood was also important in Latin America and the United States. It was especially important in Mexico, where the spectacular artistic and cultural legacy of the great pre-Columbian civilisations has always been a powerful presence. Mexican liberals had "dismissed the Aztecs as mere barbarians and viewed contemporary Indians as a hindrance to their country's modernization".[48] But by the early decades of the 20th century the mood had shifted towards a strong identification with the pre-Columbian past as the foundation of Mexican identity; this cultural reversal could also involve a defence of communal land ownership.[49] The Mexican revolution of 1910-1920 had an enormous impact on the development of *indigenismo* not only in Mexico but in Latin America as a whole. In the Mexico of President Lázaro Cárdenas, president from 1934-1940, and as exemplified by such cultural icons such

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44 Stefan Collini "The Literary Critic and the Village Labourer: 'Culture' in Twentieth-Century Britain" (2004) 14 Transactions of the Royal Historical Society 93.

45 Ibid, 98.

46 See especially E P Thompson *Customs in Common,* (Penguin Books, London, 1993).

47 J M Neeson *Commoners: Common Right, Enclosure and Social Change in England, 1700-1820* (Cambridge University Press, Cambridge, 1993.

48 D A Brading "Manuel Gamio and Official *Indigenismo* in Mexico" (1988) 7 Bulletin of Latin American Research 75.

49 Ibid, 76-77.

Manuel Gamio, Diego Rivera, and Frieda Kahlo, this renewed interest in indigenous collectivism produced a cultural climate which was very receptive to re-establishment of collective tenures in the form of the government's *ejido* programme, a massive revesting of land by the state in corporate village communities.

In the United States the key figure is John Collier, who can be said to be the most important single figure in the history of Federal Indian law in the United States. He exemplified a new era in Federal Indian policy and was the chief architect of the Indian Reorganisation Act 1934 (IRA).[50] Collier had earlier led an attack on the allotment system originally introduced into the reservations by the General Allotment (Dawes) Act of 1884. He founded the American Indian Defence Organization in 1923 and always opposed assimilation. In 1933 Roosevelt took the step of appointing Collier to the position of Commissioner of Indian Affairs, placing Federal Indian administration under the control of one of its most prominent critics. Collier and his officials, including the jurist and scholar of Federal Indian law Felix Cohen (1907-1953), immediately began work on the legislation enacted as the Indian Reorganisation Act (IRA) the following year. IRA was a milestone in American legal history and many of today's Indian governments were established under it. Collier was well aware of the new mood of *indigenismo,* land reform, and socialism emanating from Mexico, and was an open admirer of Cárdenas and his policies, including building up the labour unions, agrarian reform, and nationalisation of the petroleum industry. (American business leaders and conservatives were notably less enthused about any of these policies, needless to say, nor were they fond of the Indian Reorganisation Act.) Collier was also personally friendly with Manuel Gamio, a former pupil of Franz Boas and a prominent archaeologist and anthropologist in Mexico and a leader of Mexican *indigenismo*.[51] Gamio and Collier were both "indigenists" in the sense that they were personally committed to community life and to the values and ethics of indigenous peoples as a counterweight to what they perceived as the selfish individualism of the modern world. Indians had the right to their own forms of cultural expression, but it was more than that: those cultures embodied ethical ideas which were valuable in their own right. The same spirit also emanates from the book *The Cheyenne Way,* an admiring study of the customary law

50 On John Collier and IRA see Kenneth R Philp *John Collier's Crusade for Indian Reform* (University of Arizona Press, Tucson, 1977); Lawrence Kelly *The Assault on Assimilation: John Collier and the Origins of Indian Policy Reform* (University of New Mexico Press, Albuquerque, 1983); E A Schwarz "Red Atlantis Revisited: Community and Culture in the Writings of John Collier" (1994) 18 American Indian Quarterly 507.

51 See Brading, above n 48.

of the Cheyenne published by the legal scholar Karl Llewellyn and the anthropologist E. Adamson Hoebel in 1941.[52]

Thus in the 1930s both Mexico and the United States thus pursued a similar anti–assimilationist path in indigenous policy. This was a significant policy reversal for both countries, driven in both countries by progressive "indigenist" officials: Gamio in Mexico and Collier and Felix Cohen in the United States. Policies in both countries shared a rejection of earlier liberal models of individualising tenures and favoured a return to collectivist communal tenures.

The new approach to land and tenure had some impact in New Zealand, but the overall impact was mixed. The Liberal government of 1891-1912 was certainly affected by new ideas relating to land tenures, shown by the intensity of the freehold/leasehold debate at that time. The Liberals aspired to create a society in which property ownership was widely-spread rather than concentrated in the hands of a rural landed elite. The effectiveness of such policies in New Zealand and Australia was immediately noticed by the Latin American economist Raúl Prebisch in 1924, who contrasted New Zealand's family farms with the continued oligarchic grip on rural land in such countries as Argentina, Uruguay, and Chile.[53] The Liberals established an important commission of inquiry on Māori land and Māori land tenure in 1893 (Rees-Carroll Commission) which led to some important statutory changes to the Māori land tenure system. These included establishment of the Validation Court in 1893[54] and the re-establishment of Crown pre-emption and establishment of a Native Appellate Court in 1894.[55]

However this willingness to experiment with new forms of tenure did not translate into a receptiveness towards Māori customary law. In the period from 1890-1910 the status of Māori customary law was further weakened by statute, shown by legislation enacted in 1895 depriving ohāki (Māori death-bed declarations as to the disposition of property) of any legal effect[56] and provisions in the Native Land Act 1909 stipulating that Māori customary title could not prevail against the Crown,[57]

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52 K N Llewellyn and E Adamson Hoebel *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press, Norman, 1941); see also W Twining *Karl Llewellyn and the Realist Movement* (University of Oklahoma Press, Norman, 1973) 153-169.

53 See E J Dosman *The Life and Times of Raúl Prebisch 1901-1906* (McGill-Queen's University Press, Montreal and Kingston, 2008) 48-50.

54 Native Land (Validation of Titles) Act 1893.

55 Native Land Court Act 1894, s 70, s 117.

56 Native Land Laws Amendment Act 1895, s 33.

57 Native Land Act 1909, s 84.

that Māori wills had to be enacted in the same manner as wills made by Europeans,[58] that adoption of children by Māori custom was "without any force or effect"[59] and that marriages according to Māori custom were void.[60] On the other hand the same statute greatly extended existing provisions allowing owners of Māori land blocks to form incorporations.[61]

One reason why new trends in anthropology only slowly percolated into New Zealand was that teaching of anthropology and Māori universities was more or less non-existent. No chair of anthropology was established in New Zealand until 1949, and New Zealand anthropologists such as Sir Peter Buck and Raymond Firth had to pursue careers overseas. New Zealand legal scholarship, such as it was, showed little interest in Māori customary law. Sir John Salmond, the country's most prominent jurist, showed little interest in the subject and university teaching in law, overwhelmingly based on British models, ignored the subject completely, notwithstanding the fact that the Māori Land Court had purportedly been basing its decisions on Māori customary law since 1865. Nevertheless there were academics in New Zealand interested in anthropology who had studied overseas, such as Ivan Sutherland at Canterbury University College and Ernest Beaglehole at Victoria.[62] Probably the closest New Zealand equivalent to John Collier and Felix Cohen in the United States and Manuel Gamio in Mexio was Sir Apirana Turupa Ngata, who became Native Minister in 1928 and who brought in sweeping new legislation facilitating Māori land development in 1929. Ngata was simultaneously a radical moderniser, seeking to ensure that Māori could benefit from New Zealand's grasslands revolution, while at the same time remaining in the countryside to protect their culture and heritage. Ngata was supportive of research on contemporary Māori society and indeed himself published papers on anthropology Ngata's unique vision was however lost when he was forced to resign in 1934.

IX THE ERA OF MĀORI LAND DEVELOPMENT

The years from roughly 1930 to 1970 was the era of large-scale Māori land development, in which the Native/Māori Land Court was to play an important role. Māori land policy from around 1910 to 1940 was dominated by Sir Apirana Ngata, who was a law graduate and who became Native Minister in the Liberal government

58 Native Land Act 1909, s 133.

59 Native Land Act 1909, s 75.

60 Native Land Act 1909, s 190.

61 Native Land 1909, s 317.

62 On Sutherland see Oliver Sutherland *Paikea: The Life of I G Sutherland* (Canterbury University Press, Christchurch, 2013).

led by Sir Joseph Ward which took office in 1928. Before 1928 Ngata had worked closely with G H Coates, who became Native Minister in 1921. Ngata believed that Māori people should remain in the countryside to preserve and protect their culture, and that they should be encouraged by the state to become more actively involved in farming and land development. Legislative backing for this programme was provided by s 23 of the Native Lands Amendment and Native Land Claims Adjustment Act 1929.

The 1929 legislation saw the beginnings of a new era both for the Native Department and for the Native Land Court. The Native Department, which had formerly done little more than service the Land Court and carry out the government's land-purchasing requirements gradually evolved into the large and multi-purpose Department of Māori Affairs, which was at its peak in the 1950s. One of the Department's major functions was the development of Māori land. The launching of the land development schemes was unaccompanied by any sophisticated research into the actual state of the Māori economy by specialists in economics, sociology, or anthropology. Policy formation was primitive by contemporary standards, being made and unmade in the marked absence of anything resembling sophisticated socio-economic research, and the development scheme programme was no exception. (Sadly, the formation of Māori land policy at the present time suffers from the same defects, and compares poorly with policy formation in the 1960s.) New Zealand invested much more heavily in research targeted towards increasing agricultural production than in the fields of sociology and economics. There was no attempt to craft a Māori land development policy carefully targeted towards the wide regional variations in Māori land ownership and tenure. Nor, naturally, was any thought given to environmental and ecological issues. Development schemes by defintion involved large scale land development, which meant massive environmental and ecological changes to the remaining corpus of land in Māori possession. As with all forms of land development in New Zealand, the schemes involved large-scale forest clearance, land drainage, road-building, and the introduction of pasture and livestock. The schemes came, in short, with an environmental cost, an aspect of the history of the schemes that is not much discussed in the literature. The prevailing *idée fixe* that more land had to be brought into production come what may is exemplified perfectly by the development schemes. In retrospect it might have been more sensible to leave some of the land in sustainably managed native forest, or at least converting it to exotic forest plantations, rather than trying to turn it into farms.

The development era also meant major changes for the Land Courts, and a much enhanced administrative role for the judges. In 1905, as mentioned, the old Māori Land Councils had been abolished, and their responsibilities transferred to the Māori Land Boards, who were usually run by the Judges and Registrars of the Court. In

1913 the Boards and the Court were formally merged, in the sense that the local Māori Land Court Judge also became the presiding officer of the local Māori Land Board. The Boards had many administrative and advisory functions, and the net effect was to involve the judges in a vast array of administrative responsibilities which were often quite different from those of an ordinary judge. The Land Courts became very important institutions at the local level, especially in areas of high Māori population such as Northland, the East Coast, Whanganui, Rotorua, Taupo, and Hawke's Bay. Ngata's 1929 legislation greatly enhanced the powers and functions of the Boards, and, hence, of the Land Court Judges. The Boards could now, for example, purchase and establish farms, buy and sell stock, and enter into mortgages. Some of the judges, notably Judge Harvey in Rotorua and Judge Acheson in Northland, became very active land managers and administrators, working in close association with Māori community leaders at the local level. At Rotorua Judge Harvey administered a large-scale Māori housing scheme, which at its height included a joinery factory, tile factory, timber yard, bulk-store, and timber-felling on Māori land, all administered by Judge Harvey and his staff.

By this time it had become apparent that the titles to many Māori land blocks were becoming very crowded, some blocks having hundreds or even thousands of owners, some possessing very small interests (this is the same problem that has occurred in a number of other Pacific countries, including French Polynesia, where the term used is *l'indivision.*[63]). Similar problems arose in the Cook Islands, to which a Native Land Court on the New Zealand model was exported when the islands fell under New Zealand administration.[64] In New Zealand, a number of methods were devised to remedy this. One of these was a consolidation scheme, in which contiguous blocks are grouped together, re-surveyed, and the shareholdings concentrated together to create new titles which better reflect – so it is hoped – the needs of families. The 1909 Act contained comprehensive provisions empowering

63 For a case study of tenurial change in French Polynesia, see Tamatoa Bambridge *La terre dans l'archipel des Australes: Étude du pluralisme juridique et culturel en matière foncière* (Au vent des Iles, Papeete, 2015).

64 The Cook Islands came under New Zealand sovereignty in 1901. The Native Land Court in the Cook Islands was provided for by s 6 of the Cook and other Islands Government Act 1901 and the Cook and Other Islands Land Titles Court was established by Order in Council in 1902. On the establishment of the Court see *The descendants of Utanga and Arerangi Tumu v The descents of Iopu* [2012] UKPC 34 (decision of the Privy Council on appeal from the Court of Appeal of the Cook Islands). On land tenure in the Cook Islands see Ron Crocombe "The Cook, Niue, and Tokelau Islands" in Ron Crocombe (ed) *Land Tenure in the Pacific* (Oxford University Press, Oxford, 1971) 60; Ron Crocombe and Ross Holmes *Southern Cook Islands Customary Law, History and Society: Akapapa'anga, Kōrero Tūpuna Ture 'Enua o te Pā 'Enua Tonga i te Kūki 'Airani* 3 vols (Cook Islands Library and Museum Society and Ross Holmes, Auckland and Rarotonga, 2014).

the Native Land Court to set up consolidation schemes, and in 1911 the first such scheme was set up on the Waipiro Block on the East Coast. This scheme was completed in 1917, and many others were established in other parts of the country. Consolidation schemes could be beneficial, but they were enormously time-consuming and expensive to establish. They did not offer a permanent solution to the crowded titles problem in any case, only a temporary respite. In many instances consolidation schemes were set up not to benefit the owners as such, but rather to consolidate Crown interests acquired through the purchase of undivided interests. The massive Urewera consolidation, which was commenced in 1919, was principally established to consolidate Crown interests in the Urewera blocks. It was a vast project affecting 44 separate land blocks and required special enabling legislation (Urewera Lands Act 1922)

Other devices were introduced into the legislation in an effort to remedy this problem, including provisions allowing landowners to incorporate, with the Incorporation paying a dividend to the owners. Another solution was to give the Land Court jurisdiction to establish various kinds of landowning trusts. Many Māori people became familiar with the so-called "438 Trust", a reference to s 438 of the Māori Affairs Act 1953 (today an ahu whenua trust).[65] A great deal of the day to day work of the Māori Land Court today is concerned with the regulation of these landowning trusts. Under the existing law trustees are appointed by the Māori Land Court, and much of the Court's work relates to applications from owners, or factions of owners, asking for trustees to be removed. Much Māori land, however, still remains unincorporated (ie no Incorporation or Trust has been established); unincorporated blocks can sometimes be burdened by complicated administrative problems, including a proliferation of ownership interests.

X THE HUNN AND PRICHARD-WAETFORD REPORTS AND THEIR OUTCOMES (1961-1967)

By the 1960s the government had become acutely concerned about the administrative problems associated with Māori land and the Māori Land Court. In 1960 Jack Hunn, at that time acting-secretary of the Department of Māori Affairs, completed a major report on the Department which traversed the whole field of Māori policy, including Māori land. The report, commissioned by the Labour government of 1957-60, was released to the public by the National Government in 1961. Māori reaction was mixed: while the report was progressive in some respects and while the administrative problems with regard to Māori land could not be denied, Hunn's evident belief in the desirability and inevitability of Māori assimilation

65 Te Ture Whenua Maori Act/Maori Land Act 1993, ss 354 and 215.

("integration") was the subject of eloquent criticism by Māori commentators.[66] Hunn believed that multiple ownership was a barrier to Māori economic development. "Everybody's land", he wrote, "is nobody's land."[67] Hunn calculated that each year the number of title interests added was equal to about 20 per cent of the Māori population. These facts were well-known to the judges of the Court, and indeed to everyone who was well-informed about Māori land, but thinking of a solution to the problem was not easy, and many of Hunn's solutions were perceived by Māori as coercive and insensitive. This problem of crowded titles has continued to worsen, and it is now estimated that there are about 2.5 million ownership interests in Māori land blocks – the actual Māori population is circa 450,000 – with an average of 96 owners per block.

In 1965 there was a further report on Māori land and on the Māori Land Court. The report was authored by Judge Prichard of the Court and Hemi Waetford of the Department of Māori Affairs. Both had a great deal of experience with the practical problems of managing Māori land. Their report drew attention to interests in Māori land blocks worth only a few pennies at best, and rent payments spread over such an unwieldy array of owners that the administrative and accounting for the block cost more than it received in rent. Like Hunn, Prichard and Waetford saw multiple ownership as a major barrier to Māori economic development. The Prichard-Waetford report has received a great deal of criticism, particularly for some of the solutions that it advocated, but in fact the report was based on solid evidence and the problems the authors described were only too real in the case of many Māori land blocks . Prichard and Waetford were certain that it was "apparent that the great majority of Māoris [sic] are of opinion that there must be changes in substance".[68] That was probably true – but the issue was one of what kinds of changes were desirable.

In May 1966 an important conference on Māori land legislation took place in Auckland, organised by Auckland University and the New Zealand Māori Council. Those who took part included prominent Māori academics (including Drs Biggs, Hohepa and Kawharu) and various politicians, including Matiu Rata, Labour MP for Northern Māori. The conference did not dispute the fact that there were some very serious problems with Māori land administration, but the somewhat coercive

66 See Bruce Biggs "Maori Affairs and the Hunn Report" (1961) 70 Journal of the Polynesian Society 361.

67 J K Hunn *Report on the Department of Maori Affairs* 1961 p 48.

68 I Prichard and H T Waetford "Report to Hon J R Hanan, Minister of Maori Affairs, of the Committee of Inquiry into the laws affecting Maori land and the jurisdiction of the Maori Land Court", unpublished typescript, December 1965, p 10 (copy in possession of author).

remedies proposed by Hunn and then Prichard and Waetford were all rejected. A number of alternative solutions were proposed, but these were ignored by the government of the day. The following year parliament enacted the Māori Affairs Amendment Act 1967. This Act contained some beneficial reforms, including a remodelling of the provisions relating to Māori land trusts, but it also contained some very coercive changes which made the Act very unpopular with the Māori population. These changes related in the main to provisions in the legislation governing the status of Māori land, compulsory termination of small interests, and to the provisions relating to incorporations (the amending Act made them more like ordinary companies).

In 1974, however, there was another important amendment to the Māori Affairs Act. This time the Act was the work of Matiu Rata, Minister of Māori Affairs in the 1972-1975 Labour Government. The 1974 reversed many of the unpopular changes made in 1967. The functions of the Māori Affairs Department were recast, and now included "[t]he retention of Māori land in the hands of its owners, and its use or administration by them for their benefit".[69] Matiu Rata was also largely responsible for the Treaty of Waitangi Act 1975 which established the Waitangi Tribunal.

XI THE MCCARTHY COMMISSION, 1980

In 1979 there was yet another inquiry, a Royal Commission on the Māori Land Court and Māori Appellate Court chaired by Sir Thaddeus McCarthy, formerly a president of the Court of Appeal. The Royal Commission conducted a number of public hearings, some of which were held on marae, and received submissions from many Māori organisations and individuals. One of the most influential submissions was that made by Judge (as he then was) E T Durie, who emphasised the distinctive character of the Māori Land Court, both a "Court of law" and a "Court of social purpose".

The McCarthy Commission reported in 1980.[70] The Commissioners were of the view that the separate system of title recording maintained by the Māori Land Court was no longer necessary or desirable, and that the title records of the Court should be brought under the ordinary Land Transfer Act system as soon as possible. The Commission pointed out there was a considerable diversity of opinion in the Māori community as to whether the Māori Land Court should continue in its present form, be strengthened in some way, replaced by new Māori bodies, or even simply abolished altogether. The Commissioners took the view that once the Court title

69 Maori Affairs Amendment Act 1974, s 4, inserting a new s 4(2) (a) into Maori Affairs Act 1953.

70 *The Maori Land Courts: Report of the Royal Commission of Inquiry* 1980 AJHR H-3. The other members of the Commission were W Te R Mete-Kingi and M J Q Poole.

records had been transferred to the Land Transfer system – which it rather optimistically thought could be done in a decade – the Court could then be dispensed with. For the present, however, the Court should be allowed to continue.[71]

By 1980 issues relating to Māori land had become very public and highly politicised. Such matters as the events at Bastion Point (Orakei), the Raglan golf course affair and the Land March of 1975 led by Dame Whina Cooper and others all achieved wide publicity. This politicisation became entwined with other questions, including the Māori historic grievances, fisheries matters, and most importantly, the status of the Treaty of Waitangi. In 1975 the Labour Government enacted the Treaty of Waitangi Act which established the Waitangi Tribunal, a completely new tribunal with a jurisdiction to inquire into whether acts or omissions of the Crown (ie, the state) were contrary to "the principles" of the Treaty of Waitangi of 1840. For some years the Waitangi Tribunal was not an institution of much importance, but this rapidly changed in the 1980s as it embarked on its course of fully inquiring into the entire field of political and legal relationships between the state and the Māori tribes over the entirety of New Zealand history. It soon eclipsed the Māori Land Court and became the most important judicial body concerned with Māori legal issues, but was (and is) a very different kind of institution from the Land Court. As events were to prove, however, the Māori Land Court was set to enter into a new era with its powers and responsibilities significantly expanded.

XII PROBLEMATIC SPACES: THE COURT AND RIVERS, LAKES AND THE FORESHORE

Many of the more dramatic and interesting cases in the Land Court and Appellate Court in the 20th century have been concerned with lands covered by water: lakes (including the Rotorua lakes, Lake Omapere in Northland, and Lake Waikaremoana), river beds (in particular the bed of the Whanganui River) and the foreshore (most famously in the case of the title investigation to Ninety Mile Beach). The principal issue is whether the Land Court actually has jurisdiction to investigate titles to lands of this kind. Most of the water bodies cases involved a complicated interplay between the Native Land Court and the ordinary courts.

The legal position regarding lakebeds is relatively straightforward: there is no bar to them being investigated by the Native Land Court. It was settled by the Court of Appeal in *Tamihana Korokai v Solicitor-General* (1913)[72] that the Native Land Court did indeed have jurisdiction to investigate the title of a bed of a navigable lake; it was for the Court to decide in any given case whether title had been proved

71 Ibid, 72-73.

72 (1913) 33 NZLR 321 (CA).

according to Māori customary law. (This case was concerned with the beds of the Rotorua lakes.) Following the Court of Appeal's decision on jurisdiction, the Arawa iwi brought proceedings in the Native Land Court seeking title to the beds of the Rotorua lakes. The applications were opposed by the Crown, but in the end the issue was resolved by means of a statutory settlement in 1922.[73] The legislation vested the beds of most of the Rotorua lakes in the Crown, and established the Arawa District Māori Trust Board which received income from the Crown and from fishing licences. There was a similar settlement relating to Lake Taupo enacted in 1926.[74]

The government remained reluctant to concede that the Land Court had jurisdiction to investigate the title to navigable inland lakes, notwithstanding the *Tamihana Korokai* decision, and continued to oppose claims of this kind. The Crown's position was rejected by Judge Acheson in a case relating to Lake Omapere in the Bay of Islands in 1929. Judge Acheson said that to any Māori the possibility that "he did not possess the beds of his own lakes" could only be a "grim joke".[75] In this case Judge Acheson held that Māori customary law recognised the ownership of lakebeds, that the Nga Puhi people owned and occupied the lake as at 1840, and that the title to the lakebed had never been lawfully extinguished. The last major lakebed case to be fought out in the Native Land Court related to Lake Waikaremoana. The initial title investigation took place in 1918, with title being awarded to the claimants. The Crown appealed the decision, which was not finally heard and determined until 1944. The Crown argued that the original title determination had been made without jurisdiction, but the Appellate Court was unpersuaded and dismissed the Crown appeal. The Appellate Court thought that the Land Court's jurisdiction was not in doubt.[76] A statutory settlement of the Waikaremoana issue was negotiated some years later; more recently still these earlier lakebed settlements have all been renegotiated.

Riverbeds are legally more complicated than lakebeds, as a result of s 14 of the Coal Mines Amendment Act 1903, which vested the beds of all "navigable" rivers in the Crown. Another complication is the common law rule of *ad medium filum aquae,* by which owners of riparian blocks have a title to the mid-line of the river bed. The most important river based claims in the Native Land Court in the 20th century related to the Whanganui River. The claimants, representatives of all the

73 Native Land Amendment and Native Land Claims Adjustment Act 1922, s 22 (Arawa District Lakes).

74 Native Land Amendment and Native Land Claims Adjustment Act 1926, ss 14-17.

75 (1929) 11 Bay of Islands MB 253.

76 (1944) 8 Wellington ACMB 31.

Whanganui tribes, sought title to the bed of the river. The application was opposed by the Crown, beginning a legal battle which was to last for 24 years, the Crown finally getting its way in 1962. The Native Land Court (1939) and the Native Appellate Court (1944), however, both viewed the Crown claim to the title of the riverbed with no sympathy and each Court found for the Māori applicants.[77] The end point of a long series of decisions and inquiries was the decision of the Court of Appeal in *In re the Bed of the Wanganui River* in 1962, where it was held that there was no separate tribal title to the river bed.[78] The Native Land Court and Native Appellate Court decisions of 1939 and 1944 were lengthy and well-reasoned, and it is safe to say fit better with modern understandings of the law relating to native title to land than did the decision of the Court of Appeal. More recent case law on navigable rivers in the ordinary courts has much more in common with the 1939 and 1948 Land Court and Appellate Court decisions than with the Court of Appeal decision of 1962.[79]

The issue of the jurisdiction of the Native Land Court over the foreshore was an even more long-standing problem. (The foreshore is the intertidal zone lying between high water mark and low water mark, an extensive and valuable area in New Zealand because of the lengthy coastline.) In the 20th century there were some significant developments in Northland, largely due to the presence of Judge Acheson of the Native Land Court. Acheson, who was sometimes very critical of the actions of politicians and officials, was engaged in a long courtroom battle with Sir Vincent Meredith, Crown solicitor at Auckland, over Māori foreshore claims in Northland. The most significant of these cases was concerned with the Ngakororo mudflats on the Hokianga harbour, ruled on by Acheson in 1941 and appealed by the Crown to the Appellate Court in 1944. In its decision in this case the Appellate Court could see no difference in principle between investigating title to the foreshore and title to any other piece of land.[80]

The last and greatest of the Northland foreshore cases was that relating to Ninety Mile Beach, which only commenced after Acheson had retired from the bench and returned to his native Southland. This case began in the Native Land Court at Kaitaia in 1957 before Chief Judge Morison. The claim in the Native Land Court was successful. Chief Judge Morison could not see why a claim to an area below high

77 (1939) 100 Whanganui MB 226-228 (Native Land Court); (1944) 8 Wellington ACMB 36-48 (Native Appellate Court).

78 [1962] NZLR 600 (CA).

79 *Paki and others v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277; *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67.

80 (1942) 12 Auckland NAC 137.

water mark was different from a claim to any other piece of land: the fact that it was covered and recovered by the tides was irrelevant. Chief Judge Morison thought that the evidence showed clearly that the beach area was owned and managed exclusively in terms of Māori custom, and was used as a "a major source of food supply".[81] He concluded that the claim had been made out. The Crown, once again, appealed the decision to the ordinary courts, and it was found both in the Supreme Court and in the Court of Appeal that the Māori Land Court had no jurisdiction to make orders respecting land below high water mark. In the Court of Appeal it was found that once the Native Land Court had made orders to a coastal block, the customary title to the foreshore was at that point extinguished.[82]

For a number of decades after the Court of Appeal decision in *Ninety-Mile Beach* the issue of the Māori Land Court's jurisdiction over the foreshore subsided on the assumption that it was settled law that the Court could not inquire into titles below high-water mark. In 1997, however, Judge Hingston of the Māori Land Court decided that the Court did have power to investigate foreshore titles, at least where there had never been a Land Court investigation to any adjacent coastal blocks. The Crown appealed his decision, which resulted ultimately in the Court of Appeal's decision in *Ngati Apa v Attorney-General* (2003),[83] upholding Judge Hingston's decision and finding further that at no time had there been any general extinguishment of Māori customary titles by statute to either the foreshore, ie the intertidal zone, or the bed of the territorial sea - the area between low-water mark and the territorial sea boundary (12 nautical miles). This decision opened up the possibility of private ownership of parts of the foreshore and seabed, an anathema to the New Zealand government. The effect of this decision was largely overruled by the Foreshore and Seabed Act 2004, which has now in its turn been repealed and replaced by the Marine and Coastal Area (Takutai Moana) Act 2011. The 2004 legislation was extremely controversial, and there was a considerable amount of Māori protest over the issue; the government's policy was strongly criticised in a report on the foreshore and seabed released by the Waitangi Tribunal in early 2004. The 2011 Act tries to strike a balance between public rights and interests and Māori customary rights relating to the foreshore and seabed. It provides, in effect, that the foreshore and the bed of the territorial sea is an unowned space. Māori are able to

81 (1957) 85 Northern MB 126-7.

82 *In re the Ninety-Mile Beach* [1963] NZLR 461 (CA). On this case see also R P Boast "*In re Ninety-Mile Beach* Revisited: the Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 VUWLR 145.

83 [2003] 3 NZLR 643. The case related marine farming in the Marlborough Sounds. See generally R P Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005).

claim certain types of rights in this area, either by negotiations with the government or by an application to the High Court.[84]

The foreshore and seabed issue had important political consequences. The 2004 Act was on the whole unacceptable to Māori voters, and resulted in the rise of a new political party, the New Zealand Māori Party, committed to the repeal of the 2004 Act. In 2008 the Labour government, responsible for the 2004 Act, lost power to a coalition formed by the National and Māori parties, and it was this government which brought in the new legislation in 2011. It can be said that an aspect of Māori land law, the Court's jurisdiction over the foreshore and seabed, was a significant factor in Labour losing political office. History has repeated itself with the 2017 general election, when the New Zealand Māori Party's commitment to a new Māori Land Bill that was unpopular with many Māori people was a principal factor in the Māori Party's political demise, the resultant disappearance of National's coalition partner from parliament, and a change of government.

XIII THE 1993 LEGISLATION

The current statute, Te Ture Whenua Māori/Māori Land Act 1993, took a long time to emerge. In 1978 a new Māori Land Bill was prepared, which was intended to update the old Māori Affairs Act 1953 and consolidate it with a number of other statutes. However the government of the day decided to not proceed with the Bill, and instead invited the New Zealand Māori Council to prepare recommendations on new legislation. The Māori Council released a policy paper in 1983 entitled *Kaupapa: Te Wahanga Tuatahi,* which played an important role in the design of the new Act.

The Māori Council's policy paper emphasised the cultural and historic importance of the remaining corpus of Māori land administered by the Māori Land Court. Albeit governed by a statutory tenurial system which was now at some distance from Māori customary law, nevertheless the corpus of Māori freehold land represented land that had been in unbroken Māori ownership since ancient times. It was a heritage that had to be preserved and protected:[85]

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84 See generally R P Boast "Foreshore and Seabed, Again" (2011) 9 New Zealand Journal of Public and International Law 271. Although there have been a number of negotiations between Maori claimant groups and the Crown under the 2011 Act, no negotiations have been finalised as at the time of this article.

85 New Zealand Maori Council, *Kaupapa: Te Wahanga Tuatahi* p 10, as cited in A K Erueti *Te Ture Whenua Maori 1993* Indigenous Peoples and the Law LLM Research Paper, Law Faculty, Victoria University of Wellington, 1993, p 12.

> [Māori land] provides us with a sense of identity, belonging, and continuity. It is proof of our continued existence not only as people but as the tangata whenua of this country. It is proof of our tribal heritage and kinship ties. Māori land represents turangawaewae.

It was because of this cultural and symbolic significance that alienations of Māori land had to be restricted and a principal objective of any new statute had to be the retention of Māori land in Māori hands. However Māori land was not only of cultural importance. At over 10 per cent of the North Island, it was still an immensely valuable estate, if a somewhat diminished one, and for this reason it had to be better managed so as to provide "even greater support for our people – to provide employment – to provide us with sites for our dwellings – and to provide an income to help support our people and to maintain our marae and our tribal assets".[86]

In 1989, as a part of a programme of central government restructuring, the old multi-purpose Department of Māori Affairs, and its functions were divided between what was at that time given the name of Manatu Māori (today Te Puni Kokori), a relatively small policy ministry, and an interim body, the Iwi Transition Agency. In 1993 the long-awaited Māori Land Bill was finally enacted. The preamble to the new statute acknowledged the remaining corpus of Māori land as a taonga tuku iho (ie as being of special significance) to the Māori people and "for that reason" it was desirable "to promote the retention of that land in the hands of its owners, their whanau, and their hapu". The second objective was "to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu". The Land Court was also referred to in the preamble, and given a particular function of implementing these fundamental concepts: ("And whereas it is desirable to maintain a court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles"). The Māori Land Court and the Māori Appellate Court remained at centre of the Māori land system under the 1993 Act. Section 6 expressly provided for the Court's "continuation": ([t]here shall continue to be a court of record called the Māori Land Court, which shall be the same court as that existing under the same name immediately before the commencement of this Act". The 1993 Act was thus to a significant extent a reversal of earlier policies and its provisions are extremely conservative in the sense that the law now aims to conserve the remaining amount of Māori freehold land in Māori hands. It is now very difficult to alienate Māori freehold land to persons outside the kin group, to devise by will to persons outside the family, and to change its status from Māori freehold land to general land. The judges of the Court see themselves as

86 Ibid.

having a duty to conserve and protect Māori land. It is arguably a very paternalistic body.

The 1993 Act was a product of its time, and was a response to the protest marches and demonstrations of the 1970s and 1980s about the continued loss of Māori land.[87] Today New Zealand is a very different place. There have been many settlements of historic claims, some of them involving the transfer of very significant amounts of cash and assets, and the "Māori economy" is now growing very fast. (In fact there is no "Māori economy" that is separate from the rest of the New Zealand economy: the term refers to a diverse range of enterprises from Māori businesses to self-employed people.) The Māori economy is also changing in nature, and is becoming much less dependent on traditional land-based economic activities (farming and forestry) or fisheries than before, although these sectors still remain very important. Māori businesses now own hotels, office blocks, and power stations as well as forests, fishery businesses, and farms. On the other hand there has also been a perception by many, both in government and in the Māori community, that the Māori economy could be performing even more strongly if the existing corpus of Māori land was better developed. Some of the statements that have been made about this are probably overly optimistic, as much Māori freehold land happens to be of poor quality and inaccessible. On the other hand the old paternalistic controls of the Māori Land Court are arguably looking rather outdated given current economic trends.

XIV SOME CURRENT TRENDS

At the present time there is a new Māori Land Bill (2017) which until recently was before the New Zealand parliament, but at the time of writing this article has been cast into limbo. The new Bill was conceptually quite different from the existing 1993 Act. It can be said to be an anti-paternalistic and neo-liberal statement aimed at "liberating" or "emancipating" Māori land from what are now perceived as the somewhat stifling restrictions of the 1993 Act. This is most clearly seen in clause 3 of the Bill, the "Aronga" or "Purpose" provision (clause 3), which now states that "[t]he purpose of this Act is to empower and assist owners of Māori land to retain their land for what they determine is its optimum utilisation".[88] This can be contrasted with the twin objectives of "retention" and "development" provided for in the current 1993 Act and points to a significant ideological re-orientation. It would

87 On this era see Robert Macdonald *The Fifth Wind: New Zealand and the Legacy of a Turbulent Past* (Hodder and Stoughton, Auckland, 1989). The legal *Zeitgeist* of this era is captured in P G McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).

88 This is also stated in Māori: "Ko te aronga o tēnei Ture ko te hāpai me te āwhina i ngā kaipupuri whenua Māori kia mau tonu ai i a rātou ō rātou whenua kia whakamahi rawatia mō tā rātou e whiriwhiri ai".

be normal in New Zealand for such a Bill to be introduced following extensive reviews and investigations into the existing law, but this has not been the case. Although some discussion papers were released, these were not comprehensive and gave little indication of the changes the government had in mind. A draft of the Bill was released for comment in 2014, and the draft was then reviewed by a Ministerial Advisory Group (MAG) after receiving submissions from interested parties (about 400 submissions were received). The legislation was introduced into parliament in 2016, following which there were extensive submissions before the Māori Affairs Select Committee by many organisations and concerned individuals, many – but not all – of them Māori. The new Bill was backed by the Māori Party in parliament, a coalition partner with the National Party government.

On the whole Māori reaction to the Bill was somewhat negative and certainly cautious, largely because it was perceived as poorly drafted and lacking in clarity. One issue is that Māori landowning bodies vary enormously in size, scale, resources and general economic clout: some are large and successful businesses who feel they have little need to be supervised by the Māori Land Court, but others are very different. The new Bill removed the familiar trusts and incorporations set out in the 1993 Act, replacing them with a new governance entity known as a rangatōpū, but there has been some criticism that the provisions relating to the new entity were unclear, and there was a degree of puzzlement as to why the old and familiar entities have been dispensed with. The Court's jurisdiction, considerably widened by the 1993 Act, was significantly restricted by the 2017 Bill. The Bill also set up a new dispute resolution process to operate independently of the Māori Land Court, carried out by a new mediation service of some kind – the details, however, were never made public, making it difficult for commentators and owners to respond. Many Māori people were concerned that the Court might have become less accessible and that that it might be more difficult to obtain the same levels of advice and assistance from Court staff and access to Court records that they currently enjoy. It probably is the case that the 1993 Act is too restrictive and a certain amount of liberalisation is called for, but by the time of the 2017 general election there was widespread concern that the new Bill lurched too far in the opposite direction.

At the 2017 general election the National Government lost office and the Māori Party vanished from parliament. Māori voters switched their allegiance to the New Zealand Labour party, re-forming a historic political alliance originally put together in the 1930s. The Māori Land Bill was undoubtedly a significant factor in the political collapse of the Māori Party, and there are now a number of Māori members of the three parties forming the current governing coalition (Labour, New Zealand First, and the Greens). It can be now seen that the Māori Land Bill was a very risky, and indeed unwise, political gamble; by helping to deprive the National Party of its

former coalition partner the Māori Land Bill can be seen as a significant cause of the recent change of government. Future governments will no doubt be more cautious. The Labour Party opposed the Māori Land Bill when in opposition, and it is certain that the Bill will not survive in its present form. It is not unlikely, however, that the new coalition government will proceed with some kind of reform of the 1993 Act. It is too early to tell what shape this may take. In the meantime the Māori Land Court continues to function as before.

There have been many changes in Māori land policy since 1865, but the concept of a specialist court charged with a special, and in many ways exclusive, jurisdiction over Māori land has always been a constant. In this respect the 1993 Act is a linear descendant of the original statutes of 1862 and 1865. The 2017 Bill also retained the Māori Land Court and the Māori Appellate Court, albeit with a narrowed jurisdiction and reduced to a more formally judicial role.

The Court is a key institution in New Zealand legal history, and is New Zealand's oldest and arguably its most important specialist court. It is a unique body, with no exact counterparts anywhere else in the world. Its record, known as the "Minute Books" are of incalculable historical and cultural importance and have recently been included on the UNESCO Documentary Heritage list for New Zealand (along with the Treaty of Waitangi, the Sir Edmund Hillary Archive, the Women's Suffrage Petition of 1893 etc). A number of archaeologists and anthropologists have begun using the Land Court's records in combination with archaeological evidence to reconstruct pre-European environments based on 19th century testimony in the Court.[89] The Court's principal judgments are now finally being published in a fully edited format with full notes and commentary. Whether the Court will continue in its present form, and what its future role and significance might be remain to be seen, but for the 150-year period from 1865 to 2015 its historical, legal, and cultural significance is undeniable.

89 See eg Caroline Phillips *Waihou Journeys: The Archaeology of 400 Years of Maori Settlement* (Auckland University Press, Auckland, 2000).