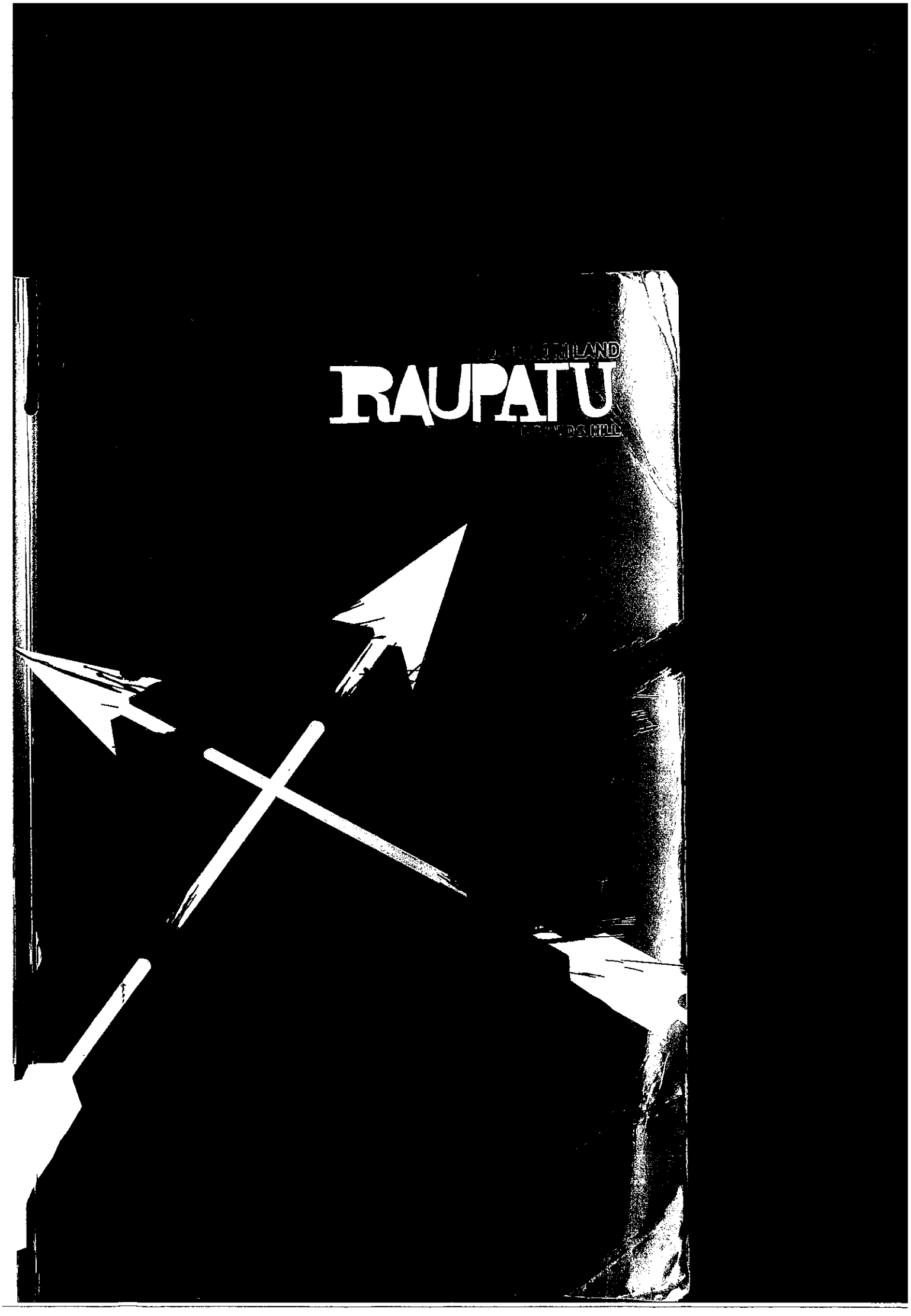
RAUPATU

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The Confiscation of Maori Land

Edited by Richard Boast and Richard S. Hill

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'An Expensive Mistake': Law, Courts, and Confiscation on the New Zealand Colonial Frontier

Richard Boast[*]

> We have lost all Imperial control in this portion of the Empire [New Zealand], and are reduced to the humble but useful function of finding men and money for a Colonial Assembly to dispose of in exterminating natives with whom we have no quarrel, in occupying lands from which we derive no profit, and in attracting to their shores a vast Commissariat expenditure which we have the honour to supply out of the taxes of the United Kingdom, and from which they derive enormous profits. (*The Times*, 28 April 1864)

> I believe that Members of the Cabinet are agreed that the confiscation policy as a whole has been an expensive mistake. (*Donald McLean*, 1869)

Confiscation and Law

This chapter deals with the evolution of confiscation law in New Zealand. 'The law' needs to be considered in its dual nature, both as legal norm and as process. Considered as a legal norm, 'the law' relating to confiscation was an evolving framework of statute which began in 1863 and quickly became very elaborate. The precise details of confiscation legislation have been banished to the Appendix. To comment on all such legislation would make this paper far too long as well as mind-numbingly dull. The principal statute was the New Zealand Settlements Act 1863, but its enactment was just the beginning.

* My thanks to Shaunnagh Dorsett, Reader in Law at Victoria, for her comments on an earlier draft of this paper.

The 1863 Act led to a luxuriant growth of other statutes – another 21 in all, by my count – some of which dealt with the general law of confiscation, and others which concentrated on particular confiscations (such as the Tauranga District Lands Act 1867, the Mohaka and Waikare Districts Act 1870 and the Poverty Bay Lands Titles Act 1874).

'Law', however, refers not only to Acts and proclamations, it is also a process by which conflicts are litigated and adjudicated upon through the courts. With respect to confiscation, this has two aspects. First, there was a group of cases in which the confiscation process was reviewed and analysed by the ordinary courts through the ordinary processes of civil litigation. The most recent of these cases, on the Tauranga confiscation, was decided by the High Court only a few years ago (in 1995).[1] This is thus a category of litigation which is by no means closed. Second, the confiscation legislation of 1863 set up a specialist tribunal, a remarkably interesting one as it happens, this being the Compensation Court (which did not sit in all of the confiscated areas, however). The Native Land Court also became involved in the confiscation project in some places. The rule of law was a reality in colonial New Zealand, and the courts did not necessarily do what politicians wanted or hoped; Chief Judge Fenton, who ran both the Native Land Court and the Compensation Court, whatever else historians have to say about him (and they have said plenty), was no toady of the government.

The confiscation of land for settlement appears to a be a very British practice. If it was important in colonial New Zealand, similar processes took place two centuries earlier in Ireland.[2] In contrast, confiscation seems not to have been a feature of Spanish colonisation in the Americas. Some examples of taking land for rebellion might be found in the vicreroyalties of New Spain or Peru, but it was not a standard or important aspect of colonial policy there. This suggests that the use of confiscation has some connection with the structures of imperial law and policy, which were based on quite different foundations in the British and Spanish colonial empires. Part of the reason may be that in the Spanish colonies, there was an abundance of land and thus no particular need to confiscate it; more important than land was the control and appropriation of indigenous labour through such devices as *encomienda* and *repartimiento*.[3] In the Spanish colonial world, at least, legal superstructure grew out of an economic base.

However, the extent to which comparisons might be pursued depends very much on how confiscation is perceived. If it is seen more broadly as a

1. *Faulkner v Tauranga District Council* [1995] 1 NZLR 357.
2. See, especially, Nicholas Canny, *Making Ireland British 1580–1650*, New York, 2001. Further literature on confiscation in Ireland is cited in Boast and Hill's introduction to this volume, note 6.
3. For a comparative study of Spanish and English colonial practice, see J.H. Elliott, *Empires of the Atlantic World: Britain and Spain in America 1492–1830*, New Haven and London, 2006.

coercive shifting of indigenous populations hither and yon in order to suit the convenience, ideologies, land hunger or deranged dreams of settlers, missionaries, colonial authorities and ideologues, then the scope for comparative analysis is broadened. Confiscation in New Zealand might well be compared to policies of *congregación* in New Spain, the Jesuit *reducciones* of Brazil and Paraguay, or, more appositely maybe, Indian removal in the United States.[4] Where 'congregation' slides into 'reduction' and into 'removal' or 'annexation' or 'confiscation' is not at all clear. In focusing here on statutory confiscation for rebellion coupled with military settlement, I do not mean to suggest that delimiting confiscation from other forms of coercively moving populations around is obvious or easy.

Confiscation in English law probably derives from the common law doctrine of forfeiture, by which the estates of those convicted of high treason were forfeited to the Crown. This was an aspect of the general law of tenures. In common law conceptions, land is an estate, granted by and held from the Crown; by my treason I break the bond with the Crown and thus my estates revert back to it. How, logically, can I hold land from my sovereign whom I have betrayed with my treasonous behaviour? But we are concerned here with *statutory* confiscation, of necessity directed against collectivities and not individuals, and – even more importantly, at least in New Zealand and in Southern Africa – against those whose lands were held allodially and not under Crown grant.

Comparative accounts of the interaction between the law and indigenous peoples in the British empire have not devoted much attention to statutory confiscation.[5] That is because it is the common law as a factor of imperial and cultural unity which has so far been of greatest interest to legal historians.[6]

4. On Indian removal, see Daniel Walker Howe, *What God Hath Wrought: The Transformation of America 1815–1848*, New York, 2007, pp.342–7; William G. McLoughlin, *Cherokee Renaissance in the New Republic*, Princeton, 1986; McLoughlin, *Cherokees and Missionaries, 1739–1839*, Norman and London, 1995.
5. The leading comparative studies are P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-determination*, Auckland, 2004; and John C. Weaver, *The Great Land Rush and the Making of the Modern World, 1650–1900*, Montreal, 2003. Neither of these two fundamental texts deals with statutory confiscation, no doubt for the reason that the subject is not very germane to the phenomena analysed by these two scholars.
6. See Daniel J. Hulseboch, 'Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750–1777', *Law and History Review*, 16, 2 (1998); Hulseboch, 'The Ancient Constitution and the Expanding Empire: Sir Edmund Coke's British Jurisprudence', *Law and History Review*, 21, 3 (2003); McHugh, *Aboriginal Societies and the Common Law*; McHugh, 'Sovereignty this Century: Maori and the Common Law Constitution', *Victoria University of Wellington Law Review*, 31 (2000), pp.187–314; Mark Walters, '*Mohegan Indians v Connecticut* in British North America (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America', *Osgoode Hall Law Journal*, 33, 4 (1995), p.785; Walters, 'Towards a "Taxonomy" for the Common Law, Legal History and the Recognition of Aboriginal Customary Law', in Cathy Colborne and Diane Kirkby, eds, *Law, History, Colonialism: The Reach of Empire*, Manchester, 2001; Walters, 'Histories of Colonialism, Legality and Aboriginality', *University of Toronto Law Journal*, 57, 4 (2007).

Statute law is a very poor relation to the common law, historiographically speaking, for very understandable reasons, statutes being inherently tedious to read and to analyse. As Douglas Hay and Paul Craven have put it, '[t]o the limited degree that it has been described by historians and lawyers, rather than simply evoked, the general law of empire usually has been treated as the common law'.[7] It seems to be the case, in fact, that it is Marxist legal historians, more ready to see the law as simply coercive, who have shown the greatest interest in statute.[8]

Statutes, in fact, do have precedents and genealogy, a whakapapa as we would say in this part of the imperium. Statutes employed in one colony were applied in another, and their movements about the empire can certainly be charted, as Hay and Craven have done with master-servant Acts and Hilary Golder and Diane Kirkby with married women's property legislation.[9] Nor was this process of legislative recycling a simple matter of precedent being invented at the imperial centre and radiating outwards from there, as Hay and Craven have demonstrated. Statutes of great importance as precedents could equally well originate in, say, the West Indies as in England. A famous example of a precedent created on the imperial periphery, one the importance of which it is difficult to exaggerate, is the celebrated 'Torrens' system of land registration. The system was pioneered by the radical Liberal Robert Richard Torrens in South Australia in 1858 and exported from there all over the empire.[10] This was a statute which actually *abolished* the common law rules relating to arguably the most important of all legal matters to the colonial mind, title to land.[11] The implications of this legislation for Maori title were colossal.[12] Imperial legal

7. Douglas Hay and Paul Craven, 'Introduction', in Hay and Craven, eds, *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955*, Chapel Hill, 2007, p.2.
8. A famous example being E.P.Thompson, *Whigs and Hunters:The Origins of the Black Act*, London, 1977.
9. See Hay and Craven, eds; Hilary Golder and Diane Kirkby, 'Mrs Mayne and Her Boxing Kangaroo: A Married Woman Tests Her Property Rights in Colonial New South Wales', *Law and History Review*, 21, 3 (2003). See also Rosemary Hunter, 'Australian Legal Histories in Context', *Law and History Review*, 21, 3 (2003).
10. See D. Whalan, 'The origins of the Torrens system and its introduction into New Zealand', in G.W. Hinde, ed., *The New Zealand Torrens System: Centennial Essays*, Wellington, 1971, p.1; S.R. Simpson, *Land, Law and Registration*, Cambridge, 1978.
11. Real Property (South Australia) Act 1858. This was adopted in Queensland in 1861 and in New South Wales and Victoria in 1862. New Zealand's first 'Torrens' Act was the Land Transfer Act 1870, which was re-enacted in 1885, 1908, 1915 and 1952.
12. See *Beale v Tihema Te Hau* [1905] 24 NZLR 883; *Assets Co Ltd v Mere Roihi and Wi Pere* [1905] AC 176; Judith Binney, 'Encircled Lands: Part One: A History of the Urewera from European Contact until 1878', research report commissioned by the Crown Forestry Rental Trust, Wai 894, A12, 2002, pp.46–67, 326–51 (on the Beale decision); R.P. Boast, *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865–1921*, Wellington, 2008, pp.197–201; Bryan Gilling, '"Vexatious and an Abuse of the Process of the Court": The *Assets Company v Mere Roihi* Cases', *Victoria University of Wellington Law Review*, 35, 1 (2004), pp.145–64; Kathryn Rose, 'Te Aitanga-a-Mahaki Lands: Alienation and Efforts at Development, 1890–1970', research report commissioned by the Crown Forestry Rental Trust and the Te Aitanga-a-Mahaki Claims Committee, Wai 814, A18, 2000.

unity could thus sometimes revolve around abolition of the common law. As I have argued on a number of occasions, New Zealand's essential constitutional reality is the centrality of statute,[13] but statute could certainly be borrowed from elsewhere whenever necessary.

One source of precedent for statutory confiscation in New Zealand, Ireland, has been mentioned already. There are obvious similarities between the Irish and the New Zealand confiscations, as some scholars have pointed out,[14] although not always with an especially sophisticated grasp of either Irish historiography or New Zealand complexities. No evidence has yet been found that the seventeenth-century Irish Acts were consciously used as a model for their New Zealand counterparts. There does seem to be a connection, however, between Irish legislation and the Suppression of Rebellion Act,[15] enacted concurrently with the New Zealand Settlements Act on 3 December 1863. The Irish precedent was certainly an obvious one at the time, due to the prominence of Irish land issues in nineteenth-century British politics. New Zealand politicians would have been aware of Irish precedent in a general way, and they also would have had some understanding that confiscation of land from 'rebels' was tried and true practice in the British Isles, and perhaps elsewhere in the empire.

Certainly Ireland's experience was turned to by those who sought to *criticise* policy in New Zealand. Ireland may have provided helpful coercive precedent, but it stood also as a counter-example and a warning. Sir William Martin, retired chief justice, denounced the confiscation project in a paper published in 1863:[16]

> The example of Ireland may satisfy us how little is to be effected towards the quieting of a country by the confiscation of private land; how the claim of the dispossessed owner is remembered from generation to generation, and how the brooding sense of wrong breaks out from time to time in fresh disturbance and crime.

The late 1850s and the early 1860s had seen the rapid rise of the Fenian independence movement in Ireland and in the United States, probably what

13. See R.P. Boast, 'Maori Fisheries 1986–1998: A Reflection', *Victoria University of Wellington Law Review*, 30, 1 (1999), pp.111, 120–1.
14. See Brigid Kelly, 'The Alienation of Land in Ireland and in Aotearoa/New Zealand under English Colonization', *Auckland University Law Review*, 9, 4 (2003), p.1353.
15. 27 Vict No.27, 'An Act for the suppression of the Rebellion which unhappily exists in this Colony and for the Protection of the Persons and Property of Her Majesty's Loyal Subjects with the same (Temporary)'. This enactment was essentially a statutory establishment of martial law, allowing the Governor in Council to issue 'Orders' to suppress rebellion (s 2). Such Orders could not be questioned in the Supreme Court (s 3) and provided for the establishment of Courts Martial (ss 4–8). The Suppression of Rebellion Act is not part of the 'confiscation' legislation, strictly speaking, but is obviously an important dimension of the general context of the New Zealand Settlements Act.
16. Sir William Martin, *Observations on the Proposal to take Native Lands under an Act of the Assembly*, reprinted in *Appendices to the Journals of the House of Representatives* (AJHR), 1864, E-2, p.7.

Sir William had in mind when he wrote about 'fresh disturbance and crime'.[17] More generally, what was referred to as the Irish Land Question had been a core issue of British politics since the 1848 Famine, if not before, and was to last out the nineteenth century.[18] It could well have been Ireland that the Aborigines Protection Society had in mind when it protested against confiscation in New Zealand to Grey in January 1864:[19]

> We can conceive of no surer means of adding fuel to the flame of War, of extending the area of disaffection, and of making the Natives fight with the madness of despair, than a policy of confiscation. It could not fail to produce in New Zealand the same bitter fruits of which it has yielded so plentiful a harvest in other countries, where the strife of races has perpetuated through successive generations; and that, too, with a relentlessness and cruelty which have made mankind blush for their species.

The New Zealand government, stung by these and other criticisms of its behaviour, responded, somewhat lamely, that Maori themselves had confiscated land in pre-European times. Confiscation, it was claimed, was well-known in Maori customary law, and being punished by land-taking was the only thing that Maori would understand. In a pamphlet published in November 1864, the Society dismissed this out of hand as self-serving: '[t]he truth is that confiscation is persisted in because the colonists want the land, and they would rather that the last Maori should cease to exist than forgo their insatiable cupidity'.[20] A harsh judgement, but not altogether an incorrect one.

Along with Ireland, the other obvious parallel to confiscation in New Zealand is South Africa, or, to be precise, the Cape Colony and Natal during the nineteenth century.[21] But there does not appear to be a large literature on confiscation in nineteenth-century southern Africa, or on the legal means by which it was brought into operation.[22] It is, of course, no accident that the Cape Colony and New Zealand, both confiscation zones, also happened to share Sir George Grey as a colonial governor. Grey had favoured a scheme of soldier-settlement in British Kaffraria and was also a prime architect of the

17. See F.S.L. Lyons, *Ireland since the Famine*, London, 1963, pp.124–138.
18. W.O. Morris, 'The Land System of Ireland', *Law Quarterly Review*, 10 (1887), pp.33–157.
19. Aborigines Protection Society to Grey, 26 January 1864, AJHR, 1864, E-2, p.16, cited in Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wai 143, Wellington, 1996, p.113.
20. Aborigines Protection Society, *The New Zealand Government and the War of 1863–64*, Pamphlet, London, November 1864, cited in A.J. Harrop, *England and the Maori Wars*, London, 1937, p.209.
21. It would be interesting to know whether, and to what extent, statutory confiscation was employed in British India and what the legal foundations for any such policies may have been.
22. See J.S. Galbraith, *Reluctant Empire: British Policy on the South African Frontier, 1834–1854*, Berkeley, 1963; Timothy Keegan, *Colonial South Africa and the Origins of the Racial Order*, Charlottesville, 1996; Noël Mostert, *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People*, London, 1992; Frank Welsh, *A History of South Africa*, London, 1996.

confiscation policy in New Zealand, as he himself claimed.[23] In South Africa, the principal focus of interest at present appears to be the Natives Land Act of 1913. This was segregationist rather than confiscatory (though it would be wrong to insist on a strict division between the two) and a first major step towards the full-blown *apartheid* regime that emerged after 1948.

Statutory Confiscation in New Zealand

John Weaver has noted the propensity of British colonial regimes to create colossal mountains of statute law relating to land.[24] There could be no clearer illustration of this propensity than the efflorescence – if that is the right word (perhaps a rampant spread of noxious weeds might be a better metaphor) – of statute law relating to confiscation in New Zealand. Statute led inexorably to yet more statute. The mountains of statute so casually built up were also disregarded, flouted or ignored when the occasion demanded. Sometimes the various floutings and shortcuts necessitated yet further validating enactments. The law was, in short, a mess. But this did not seem to matter especially. Again, the New Zealand experience was not dissimilar to the Irish. In both cases, there was legal complexity at the centre and tenurial mess on the ground.

One overlooked legal dimension of statutory confiscation is that it does in fact recognise pre-existing Maori ownership and tenure. There was no need to confiscate land belonging to Aborigines in New South Wales or Victoria. All their land was assumed to belong to the Crown *in dominium* anyway. It could be, and indeed was, Crown-granted without *any* intervening stage of extinguishment of the native title. The New Zealand Settlements Act 1863 and its amendments, in contrast, do at least recognise that there was a Maori title *to* extinguish. Sir John Salmond's belief that the Crown acquired full proprietary rights over the entirety of the country on annexation is, if anything, refuted by these Settlements Acts.[25] If the land was the Crown's already, why confiscate it? Confiscation in New Zealand was one of the means by which the Maori title was extinguished, although the principal method, by far, was not confiscation but Crown purchase, both before and after the enactment of the Native Lands Acts of the 1860s.[26]

23. Grey to Newcastle, 17 December 1863, cited in Harrop, p.198; on Grey's policies in South Africa, see Harrop, p.200; James Rutherford, *Sir George Grey, K.C.B., 1812–1898: A Study in Colonial Government*, London, 1961, pp.431–9.
24. Weaver, p.64.
25. See R.P. Boast, 'Sir John Salmond and Maori Land Tenure', *Victoria University of Wellington Law Review*, 38, 4 (2007); Mark Hickford, 'John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910–1920', *Victoria University of Wellington Law Review*, 38, 4 (2007), pp853–924.
26. See Boast, *Buying the Land, Selling the Land*, pp.32–40.

The principal statutes up to 1880 have been tabulated in the Appendix (by no means was this the end of statutory provisions dealing in some way with confiscation – in fact, such statutes are still being enacted). These statutes fall into two main groups. There are those which build on or supplement the parent Act, the New Zealand Settlements Act 1863. Amendments to this Act were passed in 1864, 1865 and 1866. In 1867, the government also enacted the Confiscated Lands Act, which made significant changes, especially with regard to reserves in confiscated lands. This group of statutes can be thought of as the core group of enactments. But there was much legislation relating to specific confiscations as well, such as the Tauranga District Lands Act of 1867 and 1868 or the Poverty Bay Grants Act of 1869. By my count, in the period from 1863 to 1880, two statutes were enacted relating to Taranaki, six for East Coast-Poverty Bay, one for the Waikato, two for Tauranga and one for Mohaka–Waikare. There were probably provincial enactments relating to particular confiscations as well. None of the confiscations went smoothly or simply. They *all* sank into a morass of confusion, and they all required special legislative interventions of various kinds.

In short, there was an ample and intricate body of statute law which required continuous amendment. And the reasons are not hard to find. Partly, the amendments reflect omissions or problems in the parent statutes. But more importantly, they give legal effect to various pragmatic solutions and agreements achieved locally. The Mohaka and Waikare Districts Act 1870, for example, ratified an agreement between local Maori and the Hawke's Bay Provincial Government, led at the time by Donald McLean. The Act simply bypassed the elaborate procedures of the New Zealand Settlements Act 1863. The Tauranga legislation ratified Governor Grey's promises to the Tauranga tribes that most of their confiscated lands would be returned to them.[27] The later Acts are, in fact, full of *ex post facto* validating and deeming provisions.[28] Moreover, some of the legislation was not enforced at all. The East Coast Land Titles Acts and the East Coast Act of 1868 had no effect whatever (putting to one side the effect of this legislation as background threat in the upper Wairoa). These Acts were simply forgotten about after a new crisis broke out on the East Coast with the escape of Te Kooti and his whakarau from the Chatham Islands. Confiscation was later resumed at Turanga (Gisborne) but on a quite different legal footing and with a very different focus.

The original purpose of the New Zealand Settlements Act of 1863 was to finance the cost of war, in particular the costs of the invasion of the Waikato. The Act was part of a group of basically financial measures passed at the same time as the New Zealand Loan Act 1863 and the Loan Appropriation Act 1863.

27. Tauranga District Lands Act 1867.
28. See Confiscated Lands Act 1867, s.9; Tauranga District Lands Act 1867, s.2.

All three Acts were passed by the General Assembly in December and formed part of a connected programme. Here, again, there are parallels with Ireland's unhappy seventeenth century. The linkage with paying for the costs of war and invasion can certainly be seen, for example, in the Commonwealth's Act of Settlement of 1652.[29] At the time of the New Zealand Settlements Act in 1863, of course, there was no Maori representation in Parliament, just as Irish Catholics were not represented in the Irish Parliament or the various parliaments and assemblies of the Interregnum.

The Loan Act made provision for a loan of £3 million to be raised in London, and the Appropriation Act laid down how the loan was to be allocated amongst the general and provincial governments. It was to be used for bringing settlers to the country, for the 'cost of Surveys and other expenses incident to the location of Settlers'[30] and 'for suppressing the present Rebellion',[31] this last being a euphemism for the costs of invading and conquering the Waikato. It was fully anticipated that the loan would be repaid out of the profits from the sale of the confiscated land. Indeed, the Colonial Treasurer, Reader Wood, said as much to the House on 10 and 12 November.[32] This understanding was reflected in section 5 of the Loan Appropriation Act, which stated specifically that if the profits from the sale of confiscated land were insufficient to repay loan monies advanced to the provinces, the shortfall was to stand as a charge against the provincial revenue to be later repaid as the assembly would determine.[33] In fact, when Reader Wood went to London in 1864 to negotiate the loan, the imperial government was prepared to advance only £1,000,000, and there was considerable objection even to this 'from economic puritans like Richard Cobden, and many severe reflections on the injustice of the war'.[34] Edward Cardwell, Secretary of State, had his own misgivings about confiscation as well, and agreed to it only reluctantly – and thus not supporting disallowance of the New Zealand Settlements Acts – and largely because of Grey's support of the confiscation project.[35]

Typical of the reaction of many in Britain to the legislation was a letter by J.E. Gorst sent to *The Times* on 24 December 1863.[36] Gorst stated – quite accurately, I would say – that the duty of governing Maori had been 'absolutely neglected'. The only department of state connected with Maori affairs 'which

29. Act for the Settlement of Ireland 1652.
30. Loan Appropriation Act 1863, s.3.
31. Ibid., s.3.
32. See B.J. Dalton, *War and Politics in New Zealand, 1855–1870*, Sydney, 1967; *New Zealand Parliamentary Debates* (NZPD), 1861–3, pp.861–2, 846–8.
33. Loan Appropriation Act 1863, s.5.
34. Dalton, p.195.
35. Ibid., p.196; Cardwell to Grey, 26 April 1864, Waitangi Tribunal, *Raupatu Document Bank*, Vol. 17, Wellington, 1990, pp.6684–5).
36. Cited in Harrop, p.202.

had any life' was focused solely on land buying. Nothing had been done for Maori education except to provide some subscriptions to mission schools, most of which were 'extremely bad'. The colonial newspapers tended, he said, to be full of insults and affronts to Maori. Gorst noted that '[t]he Maoris have a firm persuasion, derived, I believe, from the lessons of mischievous and traitorous Europeans, that as soon as ever the white race is sufficiently powerful their lands will be seized and they will be reduced to a condition of servitude as other aboriginal races have been before'.

On 26 April 1864, the confiscation policies of the New Zealand government were denounced in the House of Commons and the debates received much coverage in *The Times* and other newspapers. English public opinion failed to see why British resources should be expended on a conflict in New Zealand of scant significance to the British taxpayer. On 26 April 1864, *The Times* noted that[37]

> the lives of 10,000 English soldiers and more than £1,000,000 of public money raised by taxes in the United Kingdom annually have been and will be under the control of the Legislature of New Zealand, which contributes not one penny to our taxes, which gives not one soldier to our army, which makes and unmakes its own Ministers, passes and repeals its own laws, and pursues its own policy, without the least reference to our wishes, our convenience, or our interests.... What possible benefit do the people of England derive from the most successful campaign against the Waikatos, from the most signal victory over the Ngatiruanui tribe? What does the poor man, whose sugar, beer and tea are taxed for such a purpose, receive as an equivalent for what he expends? What justification can be urged for the conduct of the House of Commons in thus delegating its own duties to a remote assembly, the names of whose members it does not know, with whose constitution it is not acquainted, and over whom it can exercise no manner of influence?

'The next Maori war', *The Times* thought, 'must not be fought with British troops nor paid out of British taxes'.

If this is something less than a moral or human-rights critique, it nevertheless shares with Gorst, the Aborigines Protection Society and many others a critical attitude towards the war, the New Zealand government and the confiscation programme. The tendency of Tribunal-derived history at the present day to conflate all government into 'the Crown' can sometimes create the impression of a monolithic and resolute entity which did not actually exist; the imperial and New Zealand governments were not necessarily of the same mind, and there were competing factions, parties and interest groups within both. Both Grey and settler politicians knew that their actions were controversial at home and that support from the imperial centre might be withdrawn at any time, as

37. Ibid., p.208, citing *The Times*.

of course, it ultimately was. British troops were withdrawn and Grey recalled in 1867.

The New Zealand Settlements Act 1863, which 'attracted little debate'[38] in the New Zealand Parliament (in contrast to the House of Commons), laid down a very complex and unwieldy process for confiscation. Step One was the proclamation of a *district*. Where the Governor in Council was satisfied that 'any Native Tribe or Section of a Tribe or any considerable number thereof' was in 'state of rebellion', he could then declare that the district in which the group lived to be 'a District within the provisions of this Act'.[39] The Act was retrospective; although enacted in December, the operative date was 1 January 1863. Step Two was the selection by the Governor in Council of '*eligible sites* for settlements for colonization'.[40] Step Three was the actual taking of areas of land within these 'eligible sites' for 'the purposes of such settlements'.[41] Step Four was the payment – or non-payment – of compensation for lands so taken. Compensation had to be paid for any such taking *except* to particular individuals 'engaged in levying or making war or carrying arms' against the Crown, or who had aided and abetted any such person.[42] The New Zealand Settlements Act also provided for the governor to call upon 'any Native Tribes or individuals' in arms against the Crown to 'come in and submit to trial according to law'. Anyone refusing or neglecting to come in was similarly not 'entitled to Compensation under this Act'. The Act resembles public works legislation in some respects, the equivalent of a public work here being taking land for settlements within an 'eligible site' which, in turn, was located within a proclaimed district. (General public works legislation was enacted at the same time as the New Zealand Settlements Act, seemingly as part of the same package.)[43]

38. There is a good discussion of the parliamentary debates in the Waitangi Tribunal's *Taranaki Report: Kaupapa Tuatahi*, Wai 143,Wellington, 1996, pp.110–5.
39. New Zealand Settlements Act 1863, s.2.
40. Ibid., s.3.
41. New Zealand Settlements Act 1863, s.4: 'For the purposes of such settlements the Governor in Council may from time to time reserve or take any Land within such District and such Land shall be deemed to be Crown land freed and discharged from all Title Interest or Claim of any person whomsoever as soon as the Governor in Council shall have declared that such Land is required for the purposes of this Act and is subject to the provisions thereof.'
42. New Zealand Settlements Act 1863, s.5 (see Apendix).
43. Provincial Councils Powers Extension Act 1863; Provincial Compulsory Land Taking Act 1863; Land Clauses Consolidation Act 1863. There is recent judicial authority to the effect that taking land for settlements under the New Zealand Settlements Act indeed was a form of public works taking, a question of some practical importance as a result of the 'offer back' provisions of the current 1981 Public Works Act. Section 40(1) stipulates that where land has been taken for 'any public work' and is now no longer required 'for that public work' or 'any other public work', the land has to be offered back at current market value 'to the person from whom it was acquired or to the successor of that person'. See *Te Runanga o Ngati Awa v Attorney-General* [2004] 2 NZLR 252 (my thanks to Deborah Edmunds for this reference.)

The various confiscation proclamations did not occur at the same time. The proclamations relating to the Waikato were made from 17 December 1864 to 2 September 1865,[44] and those in Taranaki in two rounds, the first in January 1865 and the second in September. The Tauranga region was proclaimed a district under the Act and confiscated in May 1865,[45] and Whakatane-Opotiki[46] on 16 January 1866. The Mohaka–Waikare district, the last to be confiscated under the 1863 Act, was not confiscated until 12 January 1867, following a recommendation from Donald McLean, the Hawke's Bay Provincial Superintendent.[47]

Most of us will have seen maps in various textbooks which show the 'confiscated areas', but, strictly speaking, all that these boundaries delineated were the areas in which the Act was to operate, not the area actually confiscated. The Act did not, in fact, confiscate by area. Rather it authorised a particular type of taking and then excluded anyone in arms against the Crown from their ordinary right to compensation. The Act was potentially of very wide application, as was certainly to be demonstrated in practice. The key question was whether the areas to be selected as 'eligible sites' were only to be relatively restricted parts of the proclaimed area – to which the answer was, no.

In the case of the Taranaki confiscation, for example, the selected areas and the proclaimed/taken areas were more or less identical. There were three proclaimed areas (Middle Taranaki, Ngatiawa and Ngatiruanui)[48] and four eligible sites (Waitara South, Oakura, Ngatiawa Coast and Ngatiruanui Coast)[49]. Apart from some areas already purchased, the boundaries of the three former and the four latter proclaimed areas were the same.[50] The boundaries of both the proclaimed area and of the area for eligible sites were massively expanded by Grey on 2 September 1865. The Waitangi Tribunal concluded that the Taranaki confiscations were within the powers of the New Zealand Parliament but, following an opinion of F.M. Brookfield of the Faculty of Law at the University of Auckland, were *ultra vires* (outside the powers of) the

44. See AJHR, 1928, G-7, p.15.
45. Proclamation of 18 May 1865, *New Zealand Gazette* (NZG), 27 June 1865, p.187. The Tauranga proclamation followed a lengthy process of negotiation and surveying, complicated by Crown purchasing of the Katikati and Te Puna Blocks.
46. NZG, 18 January 1866, p.17 (declaring the area to be a district and reserving and taking all the lands within the boundary for settlements). See Bryan Gilling, 'Te Raupatu o Te Whakatohea: The Confiscation of Whakatoea Land, 1865–1866', research report commissioned by the Treaty of Waitangi Policy Unity, Wai 894, A53, 1994, p.122. The area had to be re-proclaimed on 1 September.
47. See below.
48. Middle Taranaki, NZG, 31 January 1865, p.16; Ngatiawa, NZG, 5 September 1865, p.266; Ngatiruanui, NZG, 5 September 1865, p.266.
49. Waitara South, NZG, 31 January 1865, p.16; Oakura, NZG, 31 January 1865, p.16; Ngatiawa Coast, NZG, 5 September 1865, p.266; Ngatiruanui Coast, NZG, 5 September 1865, p.266). These dates are the NZG publication dates. The September Proclamations were made on 2 September.
50. See Waitangi Tribunal, *Taranaki Report*, figures 10 (p.123) and 11 (p.125).

New Zealand Settlements Act itself.[51] The key issue was the massive extension of the proclamations on 2 September. In the Tribunal's words:[52]

> The Act required a three-stage process. By section 2, the Governor was obliged to declare districts where tribes or a significant number of tribes were in rebellion. By section 3, he was then to set apart 'eligible sites for settlement', being prescribed and suitable areas within such districts. By section 4, he was finally to take such lands within those areas as might be necessary. The statutory prescription, which was necessary for the survival of the hapu in this case, was not followed. The Governor declared extremely large districts then purported to take the lot on the basis that the whole was an eligible site. This was done without an inquiry, which he was obliged to make, into such matters as which lands were suitable for settlement and how settlement could be arranged and without first laying out the settlements by survey in order to define the parts to be taken.

The government's actions altered 'fundamentally' the Act's objective 'of taking land in discrete areas for such numbers of settlers as might be sufficient to keep the peace'. There was no inquiry at all, just a 'global taking of mountain, hill, and vale', including the whole of Taranaki mountain (obviously unsuited for settlement). The Tribunal thought 'the whole confiscation to have been unlawful'.[53]

The same thing happened in the case of the Eastern Bay of Plenty confiscation. Here, too, all of the first three steps were telescoped into one. The Waitangi Tribunal has eloquently described what happened:[54]

> A confiscation district was simply proclaimed, and in the same step the whole of the land in that district was taken, whether suitable for military settlement or not, and without plans for military settlements being prescribed. It is now clear that the greater part of the land was either unsuitable for settlement, being hill country or swampland, or was more than could have been settled by military personnel at the time. Large areas have not been settled to this day. A significant portion was given 20 years later for the purposes of a university endowment.

If the Tribunal's analysis with regard to the Taranaki confiscation is right, then the same applies equally to the Eastern Bay of Plenty Confiscation. In fact, even at the time, the Compensation Court had very strong doubts as to the legality of what had been done.[55] And yet, without wishing to put matters too crudely, what of it? Had the confiscations been shown at the time to have been

51. See the discussion in Waitangi Tribunal, *Taranaki Report*, pp.127–9; F.M. (Jock) Brookfield, 'Opinion for the Waitangi Tribunal on Legal Aspects of the Raupatu (Particularly in Taranaki and the Bay of Plenty)', Wai 46, M4(a), 1996.
52. Waitangi Tribunal, *Taranaki Report*, pp.128–9.
53. Ibid., p.129.
54. Waitangi Tribunal, *The Ngati Awa Raupatu Report*, Wai 46, Wellington, 1999, p.65.
55. Ibid., p.85; Gilling, 'Te Raupatu o Te Whakatohea', pp.143–5.

ultra vires the legislation – which would have been difficult, as the Crown could not then have been sued civilly without its own consent – then the legislation would simply have been retrospectively validated.

The Compensation Court and Special Commissioners

Confiscation came with a process of judicial inquiry. The Compensation Court was initially provided for by sections 8–14 of the New Zealand Settlements Act 1863. The task of the court was to determine 'claims for compensation under this Act'.[56] By section 12, the judges of the court were given the same powers as resident magistrates in terms of controlling proceedings, compelling the attendance of witnesses and so on. The judges were also give power to 'make rules' for the conduct of the court, a provision which, according to Heather Bauchop, was to cause 'some confusion'.[57] The court's powers and functions were subject to constant adjustment and amendment. In essence, however, the Compensation Court was basically the same institution as the Native Land Court as constituted under the 1865 Native Lands Act, and both institutions had the same chief judge, Francis Dart Fenton. Other judges, such as Rogan and Monro, also presided over both courts. Precedent developed in one jurisdiction was routinely applied in the other, notably the famous '1840 Rule'. The court's procedural rules were set out in an Order in Council of 16 June 1866.[58]

In Waikato and South Auckland, we know next to nothing about the court's actions. Rather more is known about the workings of the Compensation Court in Taranaki and in the Eastern Bay of Plenty. Heather Bauchop prepared a detailed report on the court for the Taranaki Inquiry, the only really detailed study of the court in action.[59] Bauchop carefully analysed the vital role played in the hearings by Robert Parris, appointed Civil Commissioner in Taranaki in August 1865, who had the task of acting as Native Agent in the various hearings, and of Henry Hanson Turton, who was Crown Agent. The confiscation-compensation process resulted in decades of chaos in Taranaki. Some of the judges who were involved in the business felt embarrassed and humiliated by their role in it. Judge Rogan wrote to McLean in 1867 that while he had been prepared to issue awards to Maori, 'if the land be not surveyed I might as well have given them an order on the moon for all the

56. New Zealand Settlements Act 1863, s.8.
57. Heather Bauchop, 'The Aftermath of Confiscation – Crown Allocation of Land to Iwi: Taranaki 1865–1880', research report commissioned by the claimants, Wai 143, I18, 1993, p.12.
58. Ibid., pp.26–33.
59. Bauchop.

benefit it is to them'.[60] It seems that the confiscation process completely redrew the Taranaki tenurial map, making it essentially unrecognisable, but in an enormously time-consuming and destructive way. One of the key problems was that there simply was not enough ungranted available land for the court's awards to be carried out, and even where they were carried out, the land that was allocated was often inaccessible bush country, the better parcels already having been granted to settlers.[61] What is especially bewildering about the history of confiscation in Taranaki is the government's shift after McLean became Native Minister to a policy of purchasing land from Maori within the confiscated area as a way of cutting free from the tenurial mess, a possibly well-intentioned policy but one which seems only to have added to, rather than resolved, the confusion on the ground.[62] Although a number of the Taranaki raupatu claims have now been settled through the Office of Treaty Settlements process, the full story of the confiscation and the court there remains to be written.

In the Eastern Bay of Plenty, the court sat at Opotiki (7 March to 8 April 1867), at Maketu (8–12 July) and at Te Awa o te Atua (Matata) (9 September to 1 October). Its activities have been analysed by the Waitangi Tribunal to some extent, and rather more fully by Bryan Gilling in his report for Whakatohea. But I hope no one will be offended if I state that the activities of the court in the Eastern Bay of Plenty could also do with a lot more scholarly attention before we can claim really to understand what went on there.[63] It seems clear enough that the tapestry of chaos and confusion in the Eastern Bay of Plenty was no less rich than in Taranaki. According to Gilling:[64]

> The actual way in which the confiscated lands were disposed of is difficult to trace. The problems begin with the changes in the boundaries, even in the proclamations establishing the district and are then compounded by the multitude of individual arrangements made by the Compensation Court, by Crown Agent Wilson, and for the military settlers, and the varying records of those.

60. Rogan to McLean, August 1867, cited in Bauchop, p.224.
61. See Bauchop, pp.122–5.
62. See especially Tony Sole, *Ngāti Ruanui: A History*, Wellington, 2005, pp.358–61.
63. Unfortunately, no specific study of the Compensation Court in this area and of the Eastern Bay of Plenty grants was commissioned as part of the Wai 46 Inquiry, and the Tribunal has only reported on this confiscation insofar as it impacted on Ngati Awa and Tuwharetoa ki Kawerau (that is, not on Whakatohea). Bryan Gilling did write a full analysis of the Whakatohea confiscation (Gilling, 'Te Raupatu o Te Whakatohea'), but it is not discussed by the Tribunal (in fact I am not sure that Gilling's work was ever presented in evidence). Jane Luiten has dealt with aspects of the process in the research she carried out on behalf of Tuwharetoa ki Kawerau, see Luiten, 'Historical Research Report for Te Runanga o Tuwharetoa ki Kawerau', research report commissioned by Te Runanga o Tuwharetoa ki Kawerau, Wai 46, I5, 1995. The Tribunal's discussion of the activities of the Compensation Court in this area is fairly brief, see *The Ngati Awa Raupatu Report*, pp.83–92. There was a very intricate process of confiscation and regrant in the western part of this confiscation, but it has never been researched.
64. Gilling, 'Te Raupatu o Te Whakatohea', p.145.

Gilling makes the important observation, however, that for all the problems associated with it, the 'Compensation Court seems to have been much more sensitive to, and careful of Maori rights and sensibilities, and observant of the strict letter of the law, than were the various politicians and officials charged with the administration of the confiscation/compensation policy'.[65] Its judges had an unenviable job to do, one which they disliked; but they were judges, not mere administrators.

The Compensation Court did not sit in all of the confiscated districts. It sat in Taranaki, the Waikato, South Auckland and in the Eastern Bay of Plenty, but not in Hawke's Bay or Tauranga. In the case of Mohaka–Waikare, there was no judicial or quasi-judicial process at all. Instead, the Hawke's Bay provincial government entered into an agreement with local rangatira, dividing the whole region up into 'Crown' (i.e. retained) and 'returned' blocks, which was in turn ratified in statute.[66] At Tauranga, instead of the Compensation Court, special commissioners were given power to carry out investigations and inquiries, although quite what their powers were is hard to know as the Tauranga District Lands Acts do not say. The operation of the Commissioner's Court at Tauranga seems to have been, as far as I can see, fairly similar to the functioning of the Compensation Court in Taranaki and the Eastern Bay of Plenty. The process of investigation and allocation of grants dragged on at Tauranga for well over a decade. The first Tauranga commissioner was Henry Tacy Clarke (1868–76, 1878), succeeded by Herbert Brabant (1876–78), J.A. Wilson (1878–81) and then Brabant again in 1881. Historians who gave evidence for the claimants in the Tauranga Inquiry tended to be critical of the Commissioner's Courts' performance. Evelyn Stokes, for instance, argued that the 'process of inquiry and allocation of lands to Maori in the Tauranga confiscated lands fell far short of the independent judicial process that Maori as British subjects might have expected from the Crown'.[67] Vincent O'Malley has also pointed out that the Tauranga commissioners were under no specific obligation – unlike the judges of the Native Land Court – to make their findings on a foundation of Maori customary law.[68] The Waitangi Tribunal has upheld these criticisms.

At Gisborne, J.C. Richmond extorted a deed of cession out of the chiefs by hinting, none too subtly, that the government might pull out its forces

65. Ibid.

66. Mohaka and Waikare Districts Act 1870. On this process, see R.P. Boast, *Buying the Land, Selling the Land*, pp.59–60; Boast, 'The Mohaka–Waikare Confiscation, Consolidated Report; Volume 1: The Mohaka–Waikare Confiscation and its Aftermath', research report commissioned by the Crown Forestry Rental Trust, Wai 201, J28, 1995; Boast, 'The Mohaka–Waikare Confiscation, Consolidated Report; Volume 2: The Mohaka–Waikare Blocks', research report commissioned by the Crown Forestry Rental Trust, Wai 201, J29, 1995; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, Wellington, 2004.

67. Evelyn Stokes, *Allocation of Reserves for Maori in the Tauranga Confiscated Lands*, Vol. 1, Hamilton, 1997, p.9.

68. Vincent O'Malley, 'The Aftermath of the Tauranga Raupatu, 1864–1981: An Overview Report', research report commissioned by the Crown Forestry Rental Trust, Wai 215, A22, 1995, p.27.

and leave them to cope with Te Kooti on their own. This provided for the establishment of a special commission, the Poverty Bay Commission, charged with the task of adjudicating on claims to the 'ceded' lands. Both the 'cession' and the commission rested on no legal underpinnings other than the deed and a proclamation made by the governor on 13 February 1869, a fact that raises some serious questions about the legality of the whole affair.[69] Earlier confiscation legislation enacted for the East Coast was simply forgotten about. The government did not, of course, intend to retain ownership of the whole of the ceded area. As so often with confiscation, the point of the exercise was as much one of tenurial remodelling as of direct land acquisition (and once again there are some parallels with the Crown's 'surrender and regrant' policies in sixteenth-century Ireland). Loyal Maori could bring claims to the Poverty Bay Commission, which could inquire into their titles, following which grants could be awarded by the governor. The process can be seen as partly a compulsory, short-circuit version of the Native Land Court process, minus a full-scale system of title investigation, and it has many similarities with the post-confiscation process set up at Tauranga at more or less the same time. The commission had a number of peculiarities. One was that (strangely) Europeans could also apply to it for Crown grants. Another was that the commission's Maori grants were all joint tenancies rather than tenancies in common.[70] This was a departure from standard practice. Why that was done at Turanga and nowhere else, I have, frankly, no idea. In 1874, the ordinary jurisdiction of the Native Land Court was finally restored to the balance of the ceded area.[71]

Were the courts active collaborators in the confiscation project? It seems not. Again, more research is needed, but some incidents are now well-known. There was for instance a well-documented collision between Chief Judge Fenton and the government over the Tauranga confiscation. Fenton decided that the Native Land Court, set up by the Native Lands Act 1865, should start

69. As there was no statutory platform for the arrangement, the legality of both the deed of cession and the Stafford government's proclamation are entirely governed by the ordinary common law of native title. For a comprehensive account of the cession and the Poverty Bay Commission, see Vincent O'Malley, '"An Entangled Web": Te Aitanga-a-Mahaki Land and Politics, 1840–1873, and their Aftermath', research report commissioned by the Te Aitanga-a-Mahaki Claims Committee in association with the Crown Forestry Rental Trust, Wai 814, A10, 2000. For a study of one Turanga descent group who had a significant area actually confiscated, see Bryan Gilling, '"Great Sufferers Through the Cession": Te Whanau a Kai and the Loss of Patutahi', research report commissioned by Te Whanau a Kai Trust in association with the Crown Forestry Rental Trust, Wai 814, C1, 2001. See also the preamble to the Poverty Bay Lands Titles Act 1874, where the various legal steps taken at Turanga are recited in detail.

70. The difference is that joint tenancies are not incorporeal hereditaments and do not pass by will or administration: if a joint tenant dies the interest does not pass to their heirs but instead vests in the surviving co-tenants (known to lawyers as the 'right of survivorship').

71. Poverty Bay Grants Act 1874, s.2.

hearing cases at Tauranga under its ordinary jurisdiction. Frederick Whitaker, at this time Agent for the General Government at Auckland, then informed Fenton that there was no point in the court sitting at Tauranga given that all the land there had been confiscated.[72] Fenton's response was that he could take no notice of behind-the-scenes pronouncements made by the Crown and that the matter would have to be dealt with by means of evidence and submission before the Native Land Court, just like any other point. Moreover, he said, Maori applicants before the court had 'a right to be heard'.[73] There was quite a bit more acrimonious correspondence after this. Fenton's recalcitrance was one of the main reasons why legislation was passed placing the management of the Tauranga confiscation into the hands of special commissioners and keeping Fenton and his court out of the region.

In 1867, there was another collision between the judiciary and the government over confiscation, this time in Poverty Bay. When the Crown sought an adjournment in the Land Court in July 1867, Judge Monro, one of the ablest of all the Land Court judges ('the best of us', was Fenton's opinion), came out with some scathing criticisms of the government's actions with regard to the Poverty Bay confiscations and awarded costs against the Crown and in favour of Te Aitanga a Mahaki. The government was enraged. J.C. Richmond, de facto Native Minister in the Stafford regime, suggested to Monro that he pay the Crown's costs himself as the government had no intention of paying anything. Monro was rebuked for his impertinence in presuming to criticise government policy. Richmond accused the judge of obstructing the 'pacifying of the country' and went on to lecture him for his 'objectionable' remarks in court:[74]

> The Native Land Court is not a proper place for indicating or promoting political opinions of any sort. The whole tone of your address is highly objectionable, as attempting to draw deep the distinction between the Court and the Government, with a view to extol the former at the expense of the latter.... The Government do not discuss opinions as to their general conduct with respect to the East Coast Titles, and to their industry or otherwise in bringing them before the Court, opinions which you, as a Judge, seem to have expressed without a particle evidence on the subject.

And lest it be thought that this sort of thing has come to an end, when, in 2003, Judge Wickliffe (now Judge Fox) of the Maori Land Court commenced hearing applications for investigation of title to areas of the foreshore and seabed on the East Coast following the Court of Appeal's decision in *Ngati Apa*,[75] she was subjected to criticism in the media by the Prime Minister, who expressed the view that the court probably had better things to do with its time.[76]

Confiscation as Tenurial Revolution

Statutory confiscation obviously revolutionises land ownership: it takes land off people, vests it in the Crown, and the Crown then grants it to others. But in New Zealand, confiscation was part of a tenurial revolution as well. Even the land that was *not* confiscated and ended up being 'returned' to local Maori came to be held under a radically different type of tenure. Confiscation was but one aspect of the colossal tenurial transformation of Maori land that occurred in nineteenth-century New Zealand, the main vehicles of this process being, of course, the Native Lands Acts and the Native Land Court. (That the Compensation Court essentially *was* the Native Land Court exercising a special jurisdiction is a point I have made already.)

The Mohaka–Waikare blocks offer one example. Most of the confiscated area was 'returned', but it came back under a tenurial structure quite different from the former customary tenure. The blocks were returned to named individuals, an arrangement later confirmed in the Native Land Court. For various reasons, the final step of issuing Crown grants to the named owners was never undertaken – except in the case of one block, Kaiwaka, which was granted to the pro-government rangatira Tareha – with the result that when the government commenced its purchasing programme in the region around 1910, the blocks were, strictly speaking, still Crown land. Following a legal opinion in 1914 from John Salmond, the Solicitor-General, the blocks were made into Maori freehold land by statute.[77] Ironically, this allowed the standard Crown purchasing methods to proceed without complicated jurisdictional problems surfacing in the Native Land Court. This confiscation also provided the background to one of only two occasions on which the effects of a New Zealand Settlement Act confiscation were reviewed by the Privy Council. *Te Teira Te Paea v Te Roera Tareha* (1902) was concerned with the question of whether the 'returned' Mohaka–Waikare blocks were regranted to Maori absolutely or on trust.[78]

72. Whitaker to Fenton, 14 December 1865, DOSLI Hamilton, Box 2, Folder 8, Waitangi Tribunal, *Raupatu Document Bank*, Vol. 123, Wellington, 1990, pp.47893–94.
73. Fenton to Whitaker, 18 December 1865, DOSLI Hamilton, Box 2, Folder 8, Waitangi Tribunal, *Raupatu Document Bank*, Vol. 125, Wellington, 1990, pp.47891–5.
74. See J.C. Richmond to Monro, 21 August 1867, AJHR, [1867], A-10D, pp.7–8.
75. *Ngati Apa v Attorney-General* [2003] 3 NZLR 643.
76. See R.P. Boast, *Foreshore and Seabed*, Wellington, 2005, pp.124–5.
77. Salmond, Opinion, 18 April 1914, MA 1/5/13/132, Archives New Zealand, Wellington.
78. *Te Teira Te Paea v Te Roera Tareha* [1902] AC 56. The litigation was concerned with the Kaiwaka block in particular. The plaintiffs in the case (and the appellants) were representatives of local Maori; the defendants were the Tareha's heirs, Tareha being the sole grantee in 1870. The Privy Council found for the defendants and held that the land was returned unconditionally. Some years later, Kaiwaka was sold to the Crown. On these events, see Boast, 'The Mohaka–Waikare Confiscation:

The Mohaka–Waikare case was far from exceptional. In no case were confiscated lands returned under Maori customary tenure. They came back, rather, under Crown grant and evolved into Maori freehold land. It is with returned lands that the differences between confiscation, on the one hand, and processes of title investigation and Crown grant in the Native Land Court, on the other, become very blurred. There is, in fact, no sharp line between 'confiscation' and 'title investigation'; the former was land-taking, certainly, but it was also a fast-track version of the latter.

Although the New Zealand colonial state abandoned the confiscation project in the narrow sense of taking land, under a special statutory regime, as punishment for 'rebellion', the larger project of individualising title through the Native Land Court, combined with Crown and private purchasing, was never abandoned. In the period from 1870–1900, and again in the decade from 1910–1920, Crown purchasing was pushed ahead with great vigour and determination, especially in the first decade of the Liberal regime. Confiscation was not so much abandoned or jettisoned as redirected into a different channel. Maori lost their land anyway. In the end, it made no difference whether one was a rebel or not. Ngati Manawa, for example, who fought in the wars mainly as allies of the government, have lost nearly all of their once extensive lands in the Rangitaiki valley and the Kaingaroa plateau.[79] McLean's opposition to confiscation, for all his empathy and close relations with Maori, was essentially a concern about means rather than ends. The ends were, and remained, Maori land alienation and close settlement. McLean, like all prominent nineteenth-century politicians – Fox, Ballance, Seddon, McKenzie, even Stout – was a true believer in 'close settlement', which, of course, became the mantra of the Liberals after 1891. Soldier-settlement, or 'close' settlement – in many ways, they are just variants of the same idea.

In New Zealand, the tenurial revolution was completed. New Zealand can be contrasted with Mexico and the United States during the 1930s. In Mexico, the *ejido* system was developed during the government of President Lázaro Cárdenas, while the United States enacted the Indian Reorganization Act 1934, designed by Roosevelt's Commissioner of Indian Affairs, John Collier (a committed socialist and admirer both of Cárdenas and of Indian collectivist lifestyles).[80] These reforms ended individualisation and sought also to restore or protect existing collective customary tenures. But in New Zealand, customary tenure was never de-individualised. There may be some parallels

Consolidated Report', Vol. 1, pp.102–17. The other case onsidered by the Privy Council was *Manu Kapua v Para Haimona* [1913] AC 761.

79. See Peter McBurney, 'Ngāti Manawa and the Crown 1840–1927', research report commissioned by the Crown Forestry Rental Trust on behalf of the claimants, Wai 894, C12, Wellington, 2004.

80. On Collier, see especially Lawrence Kelly, *The Assault on Assimilation: John Collier and the Origins of Indian Policy Reform*, Albuquerque, 1983.

between the *ejidos* in Mexico, Indian reorganisation under Collier and Felix Cohen, and Ngata's land development schemes after 1928, but in this country the tenurial structure was certainly never changed. Compared to the Indian Reorganization Act, our major twentieth-century statute, the Native Lands Act 1909, is a boring, tepid and technical consolidation carried out on the most unimaginative of lines.[81]

Confiscation and Law: Some Reflections

Statutory confiscation, it seems to me, reveals little of interest about the relationships between law and political action, except, perhaps, that in a settler state such as colonial New Zealand, lacking as it did either effective constitutional guarantees or effective imperial oversight from the centre, 'politics' all too readily becomes 'law' in an entirely unmediated way through the enactment of statutes. To return to a point made earlier, statutes could be, and were, casually enacted, casually repealed and ignored or overlooked when necessary. New Zealand legal history is littered with bad statute law ('bad' in the sense of poorly conceived, hasty, incomprehensible, and sometimes of bad content as well). The confiscation statutes are just one example (and the Foreshore and Seabed Act 2003 is another, proving that the tradition has by no means come to an end). Of course, the various statutes work through certain legal concepts and categories – Crown grants, proclamations, awards and so forth – but any attempt to analyse the core, underpinning legal concepts of the confiscation statutes would be unfruitful to the point of revealing nothing whatever of any significance or interest. What is interesting about the legislation is what it sets out to do on its face. The legislature that enacted the legislation I have been considering reflected settler opinion. The settler community wanted to get its hands on coveted Maori-owned land in Taranaki and the Waikato and passed 'laws' to facilitate that aspiration. When it all turned out to be too difficult to carry through, other approaches were utilised instead. But the general goals – acquisition of Maori land and its settlement by British Isles immigrants (or, possibly, select numbers of reasonably compatible immigrants from other not-too-foreign European countries, such as Norway and Denmark: no southern Europeans need apply) – were never lost sight of.

The confiscation project was abandoned, mainly, because it turned out to be more trouble than it was worth. Hazel Riseborough some years ago made the

81. In my view, the same is true of most subsequent Maori land legislation in the twentieth century, with the possible exception of Matiu Rata's 1974 amendment to the Maori Affairs Act. This, and Rata's Treaty of Waitangi Act 1975, stand out as two beacons of imaginative reform and change in a long history of otherwise dreary tinkering.

point that the confiscation legislation created a situation that the government was unable to manage:[82]

> Having confiscated on paper a huge area of land in Taranaki, the government found it had neither the means to enforce confiscation on the ground or the finance to pay compensation to those who had not been 'in rebellion' or to those who had come in and submitted to the Queen's laws.

The experiment ground to a halt. No doubt the withdrawal of British army regiments played a role too. The last New Zealand Settlements Act proclamation was in 1867, and probably the last true confiscation was Richmond's Poverty Bay cession of 1869. McLean had by that time concluded that confiscation was an 'expensive mistake', and with the accession of the Fox–Vogel–McLean ministry to office in 1869, the project was stopped and never revived. But by then the programme could not be completely jettisoned either. Having confiscated land and having embarked on an impossibly complicated and convoluted process of tenurial rearrangement that was, in fact, beyond the resources of the colonial state to carry out, there was no option but to persevere, and to bring matters to an end by whatever means possible. If confiscation could be made to go away by local agreement, as happened in the case of Mohaka–Waikare, so much the better. But as that example shows, carelessness and haste could store up very thorny problems for the future. In any case, with the government's return to large-scale land purchasing in 1869, and the gradual reintroduction of a pre-emptive regime, confiscation was no longer necessary.

What is surprising is how few were the voices raised locally in protest. It is significant that even Sir William Martin's protest was couched not in the rhetoric of Whig constitutionalism – a rhetoric that the settler community could certainly deploy when it wanted in order to counter the alleged tyrannical propensities of colonial governors – but on a pragmatic level: instead of becoming a Greater Britain, or even a Better Britain,[83] confiscation might instead convert New Zealand into Another Ireland. Brooding Maori might feel inclined to turn to Fenian outrages. But if there was no widespread constitutional opposition locally, there were plenty of people in London who had their doubts about the project. Edward Cardwell's wariness, acid comments in *The Times* and the clear opposition of such bodies as the Aborigines Protection Society must have had a significant impact in New Zealand. But in my judgement, what counted more in the end were the confused realities and complex local loyalties, those on the ground, not in Wellington, but rather at Waiuku, Tauranga, Opotiki, New Plymouth, Taupo, Gisborne and Napier.

82. Hazel Riseborough, 'Background Papers for the Taranaki Raupatu Claim', research report commissioned by the Waitangi Tribunal, Wai 143, A2, 1989, p.12, cited in Sole, p.251.
83. James Belich's terms, of course.

Large-scale, region-wide efforts to wipe the tenurial slate clean by confiscatory legislation and remodel tenure and ownership through special courts and commissioners created only expense, confusion, resentment and bitterness. A 'brooding sense of wrong', in fact. Those who have worked with Taranaki iwi in particular will know that the brooding sense of wrong has not gone away – although the current round of settlements, if properly managed, may go some way towards ameliorating this.

Directions for Research

The conference at which an earlier version of this chapter was presented was, as far as I am aware, the first full academic conference ever to be held specifically on raupatu. This is an auspicious step in itself and a useful start. But much more needs to be known. I hope that it will not be taken amiss if I propose a research programme, or, at any rate, a personal wish list. Firstly, the vast and complex Waikato confiscation is a historiographical void, and it needs to be studied thoroughly. Secondly, in my view, future research ought to adopt a broader and more expansive view of the confiscation programme, and consider fully the successes and failures of the policy of military settlement which was an indispensable aspect of it. Third, much more needs to known about the Compensation Court and its activities. Some dauntless soul needs to take on the task of coming to grips with what exactly happened in Taranaki and (especially) the Waikato. The true history of the confiscations is to be found not in analysing legal discourses but rather in wading through grants, surveys, sketch plans, petitions, decisions of the Compensation Court and Native Land Court, appeals, rehearings and so forth. An unpalatable and irksome task, but vital. Fourth, some conceptual discussion seems overdue. There needs to be some consideration of the possibility – I put it no stronger than that – that the fortunes of some iwi in the years before the enactment of the New Zealand Settlements Act 1863 were affected by confiscation *de facto*, as were the experiences of many iwi afterwards. But what, exactly, is 'confiscation'? Is it really worse than other forms of land-taking by governments? Were Taranaki iwi really more wronged by government in the 1860s than were Ngati Toa in the 1840s, Ngai Tahu in the 1850s or Tuhoe in the 1920s?[84] There is, as I have said, no clear boundary between confiscation and other techniques of Maori land alienation, especially between confiscation and Native Land Court

84. Having raised this painful question, and while not meaning to downplay Taranaki's experiences in the 1860s and 1870s, and permanent dispossession from those days to this, I feel that I must state my own answer to this question – which is, no. I am not convinced that the current Office of Treaty Settlements policy of basically ranking raupatu as the most serious and punitive of government actions is actually justifiable.

investigation and Crown purchase: they shade into one another. Finally, to complete my personal wish list, we need a full monograph or book of essays on *each* of the confiscations, perhaps with a few full-scale studies of the East Coast thrown in, before it can be said that we really understand the process thoroughly.

Outside these islands, no doubt work will continue to be done on surrender and regrant and on confiscation in Ireland, adding to an already rich and varied historiography. One hopes that some day soon South African historians will have the time and resources to unravel the full history of confiscation in that country, including the evolution of statute law in the Cape and Natal. If the experience of Ireland and New Zealand is any guide, it is bound to be a complex story and full of surprises.

Chapter 8

Strands from the Afterlife of Confiscation: Property Rights, Constitutional Histories and the Political Incorporation of Maori, 1920s*

Mark Hickford

Introduction: Legal-Historical Narratives of 'Confiscation' and the 'Autonomy' of the Crown

Since the mid-1980s, there has been a growing movement towards depictions of Maori autonomy as distinct from, and even in competition with, the authority of the Crown. The emergence of this historiographical trend is described in much of Andrew Sharp's literature in the 1990s and since.[1]

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1. Andrew Sharp, *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand since the 1970s*, 2nd ed., Auckland, 1997; Sharp, 'Tino rangatiratanga and sovereignty', in David Novitz and B. Wilmot, eds, *New Zealand in Crisis*, Christchurch, 1992; Sharp, 'The problem of Māori Affairs, 1984–1989', in Martin Holland and Jonathan Boston, eds, *The Fourth Labour Government: Politics in New Zealand*, 2nd ed., Auckland, 1990, pp.251–63; Sharp, 'The Trajectory of the Waitangi Tribunal', in Janine Hayward and Nicola Wheen, eds, *The Waitangi Tribunal: Te Roopu Whakamana i Te Tiriti o Waitangi*, Wellington, 2004, pp.200, 204–5; Sharp, 'The Treaty in the Real Life of the Constitution',