

New Zealand Journal of Public and International Law



VOLUME 11 ■ NUMBER 1 ■ NOVEMBER 2013

SPECIAL CONFERENCE ISSUE
THE NEW ZEALAND BILL OF RIGHTS ACT

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Fleur Adcock
Richard Boast
Petra Butler
Andrew Geddis
Claudia Geiringer

Kris Gledhill
Rt Hon Judge Sir Kenneth Keith
Janet McLean
Rt Hon Sir Geoffrey Palmer
Alicia Cebada Romero
Hon Mr Justice Rabinder Singh

NEW ZEALAND JOURNAL OF
PUBLIC AND INTERNATIONAL LAW

© New Zealand Centre for Public Law and contributors

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

November 2013

The mode of citation of this journal is: (2013) 11 NZJPIL (page)

The previous issue of this journal is volume 10 number 2, December 2012

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

SPECIAL CONFERENCE ISSUE: THE NEW ZEALAND BILL OF RIGHTS ACT

Foreword	
<i>Petra Butler and Claudia Geiringer</i>	vii
The New Zealand Bill of Rights Act 1990 – An Account of Its Preparation	
<i>K J Keith</i>	1
The New Zealand Bill of Rights Act 1990 and Constitutional Propriety	
<i>Janet McLean</i>	19
The Moral Force of the United Kingdom's Human Rights Act	
<i>Rabinder Singh</i>	39
Dissent, the Bill of Rights Act and the Supreme Court	
<i>Andrew Geddis</i>	55
The European Court of Human Rights and Religion: Between <i>Christian</i> Neutrality and the Fear of Islam	
<i>Alicia Cebada Romero</i>	75
The Interpretive Obligation: the Socio-Political Context	
<i>Kris Gledhill</i>	103
Sources of Resistance to Proportionality Review of Administrative Power under the Bill of Rights Act	
<i>Claudia Geiringer</i>	123
Property Rights and Public Law Traditions in New Zealand	
<i>Richard Boast</i>	161
Māori and the Bill of Rights Act: A Case of Missed Opportunities?	
<i>Fleur Adcock</i>	183
The Case for a Right to Privacy in the New Zealand Bill of Rights Act	
<i>Petra Butler</i>	213
The Bill of Rights after Twenty-One Years: The New Zealand Constitutional Caravan Moves On?	
<i>Rt Hon Sir Geoffrey Palmer QC</i>	257

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw, Informat and EBSCO electronic databases.

NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Manuscripts should generally not exceed 12,000 words. Shorter notes and comments are also welcome. Authors should see earlier issues of NZJPIL for indications as to style; for specific guidance, see the *New Zealand Law Style Guide* (2nd ed, 2011). Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Regular submissions are subject to a double-blind peer review process. In addition, the Journal occasionally publishes addresses and essays by significant public office holders. These are subject to a less formal review process.

Contributions to NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ\$100 (New Zealand) and NZ\$130 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
United States of America
e-mail info@gaunt.com
ph +1 941 778 5211
fax +1 941 778 5252

Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

Advisory Board

Professor Hilary Charlesworth
Australian National University

Professor Scott Davidson
University of Lincoln

Professor Andrew Geddis
University of Otago

Judge Sir Christopher Greenwood
International Court of Justice

Emeritus Professor Peter Hogg QC
Blake, Cassels and Graydon LLP

Professor Philip Joseph
University of Canterbury

Rt Hon Judge Sir Kenneth Keith
International Court of Justice

Professor Jerry Mashaw
Yale Law School

Hon Justice Sir John McGrath
Supreme Court of New Zealand

Rt Hon Sir Geoffrey Palmer QC
*Distinguished Fellow, NZ Centre for
Public Law/Victoria University of
Wellington*

Dame Alison Quentin-Baxter
Barrister, Wellington

Professor Paul Rishworth
University of Auckland

Professor Jeremy Waldron
New York University

Sir Paul Walker
Royal Courts of Justice, London

Deputy Chief Judge Caren Fox
Māori Land Court

Professor George Williams
University of New South Wales

Hon Justice Joseph Williams
High Court of New Zealand

Editorial Committee

Professor Claudia Geiringer (Editor-in-
Chief)

Associate Professor Petra Butler (Editor-
in-Chief)

Amy Dixon (Student Editor)

Professor Tony Angelo

Professor Richard Boast

Associate Professor Alberto Costi

Associate Professor Meredith Kolsky
Lewis

Dr Mark Bennett

Dr Joel Colón-Ríos

Dr Rayner Thwaites

Dean Knight

Joanna Mossop

Professor ATH (Tony) Smith

Assistant Student Editors

Aysser Al-Janabi

Lani Buchanan

Harriet Bush

Paul Comrie-Thomson

Johannes Fetz

Rachel Hyde

Daniel Jackson

Matthew McMenamin

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

Officers

Director	<i>Professor Claudia Geiringer</i>
Associate Director	<i>Associate Professor Petra Butler</i>
Associate Director	<i>Dr Carwyn Jones</i>
Associate Director	<i>Dean Knight</i>
Associate Director	<i>Dr Rayner Thwaites</i>
Centre and Events Administrator	<i>Anna Burnett</i>

For further information on the Centre and its activities visit www.victoria.ac.nz/nzcpl or contact the Centre and Events Administrator at nzcpl@vuw.ac.nz, ph +64 4 463 6327, fax +64 4 463 6365.

The week of twenty-first birthday celebrations at which preliminary versions of most of these articles were originally presented was hosted by the New Zealand Centre for Public Law, and was made possible with the generous support of Judge Ian Borrin and the New Zealand Law Foundation.



PROPERTY RIGHTS AND PUBLIC LAW TRADITIONS IN NEW ZEALAND

*RP Boast**

This article is about the public law aspect of New Zealand's land law system. It seeks to discover the broad characteristics of New Zealand land law from the standpoint of public policy and the country's distinctive legal history. The article suggests that while components of the New Zealand system have been borrowed from elsewhere, such as the Torrens system (devised in South Australia) or the nationalisation of petroleum in 1937 (based on similar legislation in the United Kingdom), the particular combination of these components that mark the legal framework in place today is unique. This combination also includes some features not found elsewhere, including the concept of Māori freehold land and the creation of a new vesting regime for the foreshore and seabed in 2011. It is also argued that any proposal to reform or remodel New Zealand's system of property law (including through reforms to the New Zealand Bill of Rights Act 1990) should take the existing framework into account.

I INTRODUCTION

This article is about property and, in particular, real property.¹ Property law and property rights are often typically regarded as occupying a private, not a public, space. Yet it is the case that countries have developed particular approaches or laws relating to land, to rights in land and to

* Barrister and Professor of Law, Victoria University of Wellington. This article is a revised and substantially expanded version of my part of a paper co-authored by myself and Neil Quigley in 2011: RP Boast and Neil Quigley "Regulatory Reform and Property Rights in New Zealand" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (New Zealand Law Foundation and LexisNexis, Wellington, 2011) 127. My thanks to an anonymous reviewer who sent some comments on an earlier draft of this paper.

1 The law of personal property is not connected with national political traditions or with public law in quite the same way, although personal property law can also have a "public law" component to some extent (and of course all property rights are "public" in the sense that they are enforced and recognised by the law and by the courts). For example, New Zealand has long had systems of registration of personal property mortgages, formerly under the Chattels Transfers Act 1908, a close study of which might in fact reveal some aspects of personal property securities law which were peculiar to this country, or at least to colonies with similar economies to New Zealand. More recently, some national resources have been explicitly reorganised using a personal property rights model, fisheries being an example.

access to land, which can certainly be seen as key aspects of their national constitutional and national traditions. One example is the public right of access to private land in Sweden, which is undoubtedly an important aspect of Swedish public law, to say nothing of being an important aspect of Swedish distinctiveness.² In France, by contrast, private landowners' rights are strictly protected, and the banks of most lakes and watercourses belong to riparian owners. Another example is Britain, characterised by its network of customary rights of way protecting public rights of access to the countryside, which equally clearly is a part of British public law and policy, and a dimension of British self-identity.³ Yet another example might be that of the "national park", invented in the United States (national parks have been described as "America's best idea").⁴ This is also an important part of American identity and distinctiveness, and a key part of the architecture of American public lands law, even if it is the case that national parks have been established in many countries, if not necessarily following American models.⁵ In this very broad sense land law has not merely a public law dimension but also an international law dimension, evidenced by the concept of UNESCO world heritage sites (New Zealand has three)⁶ or by the law relating to the protection of historic buildings during armed conflict.

If it is accepted that property law has a public law component, then it follows that the precise content of this component varies from country to country. Even neighbouring countries with shared cultural and historical traditions can differ widely in this respect. (There is no counterpart to Sweden's public right of access to the countryside in nearby Denmark, for instance.) New Zealand and Australia are similar in many respects, but the public law component of property law in the two countries is not the same. There is no counterpart to Māori freehold land in Australia, and no counterpart to the Native Title Tribunal in New Zealand (its functions are quite unlike those of

2 The Swedish term is *allemansrätt*, protected by the Constitution of Sweden. There are similar rights in Norway and Finland.

3 There may be 190,000 kilometres of these in Britain.

4 Philip Burnham *Indian Country, God's Country: Native Americans and the National Parks* (Island Press, Washington DC, 2000) at 10. The first national park to be established anywhere in the world was Yellowstone National Park, established in 1872, although the United States National Park Service was not established until 1916. The second national park established anywhere seems to be Tongariro National Park in New Zealand, set up by the Tongariro National Park Act 1894. If national parks are an important aspect of public real property law in the United States, they are scarcely less so in New Zealand. There is a strong sense in New Zealand that the highest and best use of any land is as a national park.

5 National parks in New Zealand do, in fact, very much follow the (so called) "Yellowstone model". A key aspect of the "Yellowstone model" is that all the land within the national park is owned by the state. National parks in Britain, however, where there is comparatively little Crown land, are quite different.

6 Tongariro National Park, Te Wahipounamu/Southwest New Zealand (comprising four adjoining national parks), and the New Zealand Sub-Antarctic Islands. It is perhaps a significant clue to national identity that all of our world heritage sites are essentially "natural" rather than "cultural" sites (Australia is somewhat different in this respect).

either the Māori Land Court or the Waitangi Tribunal). Property rights in Australia have a level of constitutional protection that they do not have in New Zealand.⁷ The legal trajectories followed in the two countries have both similarities and differences. This article is a search for New Zealand's public property law traditions. The argument made below is that New Zealand's public property law has some very distinctive features in this respect, and – more importantly – that the exact combination of these components that exists in New Zealand is in fact unique. A clear understanding of these components is necessary to any kind of discussion as to whether private property rights in New Zealand deserve more explicit legal recognition and protection, whether through amending the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) or by other means. This paper seeks to do no more than to provide a context for a discussion of this question, not the discussion itself.

There is no developed legal literature on these themes in New Zealand, and not much reflection on them even by historians (although political biographies of key figures such as John Ballance and John McKenzie certainly do address their particular attitudes towards land and land tenure).⁸ A literature on legal geography, which is starting to emerge in some jurisdictions, has not emerged in New Zealand either.⁹ My argument is that any attempt to enshrine property rights in a legislative or constitutional text should reflect basic values about property and property rights, and thus before

7 I have in mind s 51(xxxi) of the Constitution of Australia, which allows Parliament to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". Probably the best-known discussion of s 51(xxxi) is that in the Australian movie *The Castle* (1997).

8 See Timothy McIvor *The Rainmaker: A Biography of John Ballance, Journalist and Politician 1839–1893* (Heinemann Reed, Auckland, 1993); and Tom Brooking *Lands for the People?: The Highland Clearances and the Colonisation of New Zealand* (University of Otago Press, Dunedin, 1996). On the connections between Māori land issues and land tenure policy more generally see RP Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865–1921* (Victoria University Press and Victoria University of Wellington Law Review, Wellington, 2008).

9 Historical geography is a recognised sub-discipline of geography and perhaps of history. Legal geography is a much newer sub-discipline: see generally Nicholas Blomley *Law, Space and the Geographies of Power* (Guilford Press, London, 1994); and Nicholas Blomley, David Delaney and Richard Ford (eds) *The Legal Geographies Reader: Law, Power and Space* (Wiley-Blackwell, London, 2001). Māori customary law had a distinct legal geography from the common law and statute-based system that supplanted it in colonial New Zealand, although to some extent the Māori legal geography of New Zealand still survives and sits alongside the normative legal geography of the official legal system. The human geography of any place is always partly "legal" in that ownership, boundaries and land titles are determined by law. To a very large degree, the subject of land law is concerned with the projection of law into spatial relationships. The classic exemplar of the legal geography of any particular place is the "cadastral map", a map of an area showing boundaries and titles, which may or may not be superimposed on a map of landscape features and topographies. The legal geography of a particular area has its own history, so that one can also speak of legal historical geography. My concern in this article, however, is to attempt to delineate only the main features of the public dimensions of property law, although these features are obviously historical products in their own right.

this step is taken it seems valuable to inquire into what these basic values might be. One way of conducting such an inquiry might be to carry out some kind of poll of contemporary opinion. This article, however, adopts a different approach, and seeks to explore state practice and public attitudes, as reflected in New Zealand legal history.

My argument is only that a particular *combination* of trends and circumstances is unique to New Zealand. In many areas New Zealand legal developments have followed trends and developments elsewhere, particularly in Britain.¹⁰ New Zealand nationalised petroleum in 1937, for example, largely because Britain had already done so, and the debate on the nationalisation and denationalisation of coal in the late 1940s also reflected British controversies at the same time.¹¹ The Torrens system, now a bedrock of New Zealand property law, was devised in South Australia and was not effectively implemented in New Zealand until 1870. The policy of individualisation of customary tenures as reflected in the Native Lands Acts has some affinities with parliamentary enclosure in Britain and the abolition of customary tenures in Ireland and Scotland, but also with trends in the United States, Hawaii and Latin America. (New Zealand's Native Lands Acts have many ideological affinities with, for example, the *Ley Lerdo*, enacted in Mexico in 1856¹² or with the policy of general allotment in the United States.) There are also some ingredients in the New Zealand "mix" which are genuinely unique, including the category of Māori freehold land as it currently exists and (as far as I am aware) the reservation of marginal strips in Crown grants to lands adjoining rivers, lakes and the foreshore. Like that of all countries, the public law components of New Zealand's land law system are a combination of the international and local.

10 For a comparative study, see John C Weaver *The Great Land Rush and the Making of the Modern World* (McGill-Queen's University Press, Montreal and Kingston, 2003).

11 In 1948 the Labour Government passed the Coal Act of that year, which nationalised all coal in situ in New Zealand (this was very controversial at the time). The effect of the 1948 Act was reversed by National's Coal Mines Amendment Act 1950. The nationalisation and denationalisation of coal is one of the rare examples of a significant political crisis over nationalisation and natural resources policy in New Zealand legal history, the other being the issue of foreshore and seabed policy after 2003.

12 Named after the Mexican Liberal politician Miguel Lerdo de Tejada. The principal target of this statute 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. For a useful introduction to Mexican legal history in English, see Stephen Zamora and others *Mexican Law* (Oxford University Press, Oxford, 2004) at 1–42; for full accounts, see Guillermo Margadant *Introducción a la Historia del Derecho Mexicano* (8th ed, Editorial Esfinge, Mexico DF, 1988); and Oscar Cruz Barney *Historia del Derecho Mexicano* (Oxford University Press, Mexico DF, 1999). On liberal reforms in Mexico, see, for example, Richard Sinkin *The Mexican Reform, 1855–1876: A Study in Liberal Nation Building* (University of Texas Press, Austin, 1979); Jennie Purnell "With all Due Respect: Popular Resistance to the Privatization of Communal Lands in Nineteenth-Century Michoacán" (1999) 34 *Latin American Research Review* 85; and 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.

II A CENTRAL AMERICAN CASE STUDY: COSTA RICA AND HER NEIGHBOURS

The themes I am pursuing may emerge a little more clearly if the discussion is shifted away from New Zealand briefly to another part of the world. Central America is a region where national traditions regarding land and tenure have formed a central component of the literature regarding national distinctiveness and, in particular, why it is that the Republic of Costa Rica is so different from her neighbours, and from El Salvador and Guatemala especially. (New Zealand and the Central American republics, as it happens, have more in common with each other than might be thought, in particular, a shared history of a sustained attack on indigenous customary tenures in the nineteenth century.)¹³ Costa Rica belongs to a different legal tradition than New Zealand. Costa Rica is a civil law country with legal traditions reaching back into Roman law via Spanish private law, and also to the imperial law of the Spanish colonial empire (*derecho indiano*). Costa Rica has a Civil Code (*código civil*), first promulgated in 1841. Yet putting this fundamental difference in legal style to one side, it is interesting that statute law and policy relating to land and land tenure in New Zealand and Costa Rica have some similarities.

The seventeenth political philosopher James Harrington, who published his classic work *Oceana* in England in 1656, is known especially for his attempts to link patterns of land-holding with republican liberty.¹⁴ That there is some connection between tenure and political liberty and stability seems to be borne out by empirical experience as, for instance, the contrasting histories of Costa Rica and that of neighbouring countries such as Guatemala or El Salvador demonstrate. Costa Rica is a land of small family farms and rural prosperity, a bit like a Central American version of New Zealand, and also stands out in the region for its long history of democratic stability and levels of literacy and healthcare that are equivalent to most countries in the developed world. It also stands out for possessing a remarkable public ideology of democratic republican nationalism and a strong sense of exceptionalism. Many observers see differences in patterns of land ownership as one of the

13 There are other parallels that can be explored. One is the importance of frontier treaties between colonial regimes and indigenous groups. Professor Abelardo Levaggi of the University of Buenos Aires has written a fascinating book arguing that despite Argentina's commitment to a strongly positivist legal culture in which "treaties" between indigenous groups and the state were, strictly speaking, a juristic impossibility (in contrast with the United States), nevertheless such treaties, as a matter of actual practice, happened all the time: see Abelardo Levaggi *Paz en la Frontera: Historia de las Relaciones Diplomáticas con las Comunidades en la Argentina (Siglos XVI–XIX)* (Universidad del Museo Social Argentino, Buenos Aires, 2000) (translation: *Peace on the Border: History of Diplomatic Relations with [the Indigenous] Communities in Argentina*). I have argued elsewhere that the same is true of New Zealand in key respects: RP Boast "Recognising Multi-Textualism: Rethinking New Zealand's Legal History" (2006) 37 VUWLR 547.

14 For an analysis of Harrington's ideas regarding property ownership, see JGA Pocock *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, Princeton, 1975) at 285–293.

key ingredients in understanding the political distinctiveness of Costa Rica when compared to (for instance) nearby El Salvador. As long ago as 1950, in his classic geography of Latin America, Preston E James noted that in Costa Rica "the traditional large estate of Latin America is rare". This had important consequences:¹⁵

Associated with this distinctive characteristic of land tenure and the widespread literacy is the notable attitude of equality among the people; there is no small group of landed aristocracy which dominates the social life, manipulates the politics with the support of an army, and collects the larger share of the benefits of the economy.

Costa Ricans have a strong awareness of this exceptionalism, although there is now a growing concern in the country that its unique brand of political and economic exceptionalism, "*la excepcionalidad de Costa Rica*", may now be under threat.¹⁶ Whether or not that is so, the broader point remains that the distinctive features of property ownership and distribution certainly do have a public law dimension and those distinctive features can be, and can be perceived to be, an important component of the political culture of a state. In Costa Rica such a perception is highly self-conscious and is the focus of a substantial literature. In New Zealand, by contrast, the particular "public" components of the property system have not been explored systematically, even if New Zealanders probably do have a general sense of what these might be.

III CATEGORIES OF LAND IN NEW ZEALAND

Before proceeding further it is necessary to clarify the principal categories of land in New Zealand. These are "general" (Crown-granted) land, Crown land, Māori freehold land and Māori customary land. The most recent and authoritative definition of these various categories is found in s 129 of Te Ture Whenua Maori Act/Maori Land Act 1993. Here "general land" is defined as "land (other than Maori freehold land and General land owned by Maori) that has been alienated from the Crown for a subsisting estate in fee simple". This is a very accurate definition, as it makes it clear that all private titles in New Zealand derive from a Crown grant. Moreover, in New Zealand such grants are not "lost", as they often are in English law, but can be readily located. Crown land, which

15 Preston E James *Latin America* (Odyssey Press, New York, 1950) at 651. More recent comparative accounts include: Consuelo Cruz *Political Culture and Institutional Development in Costa Rica and Nicaragua* (Cambridge University Press, Cambridge, 2005) which presents a very sophisticated discussion of the relationship between political culture and democracy in these two radically different neighbouring countries; Jeffery M Paige *Coffee and Power: Revolution and the Rise of Democracy in Central America* (Harvard University Press, Cambridge (Mass), 1997) which focuses on ideologies; and Robert G Williams *States and Social Evolution: Coffee and the Rise of National Governments in Central America* (University of North Carolina Press, Chapel Hill and London, 1994) which focuses on the varying parts played by governments in key areas such as land tenure and labour controls: see especially 98–103, which summarises the varying parts played by governments in the area of land tenure in the various Central American countries.

16 See Iván Molina and Steven Palmer *Historia de Costa Rica* (Editorial Universidad de Costa Rica, San José Costa Rica, 1997) at 122.

is about half the country, is defined in the same Act as "land ... that has not been alienated from the Crown for a subsisting estate in fee simple". Basic to both definitions is the notion that the surface area of New Zealand as at the acquisition of Crown sovereignty was held by Māori under Māori customary law. This title had to be extinguished, by purchase or by some other means, before the Crown could acquire a proprietary title to it, or grant it. Māori freehold land is defined in the same provision as land, "the beneficial ownership of which has been determined by the Maori Land Court by freehold order", also a very accurate definition. Māori freehold is land that has been individualised and feudalised but which has remained in permanent Māori ownership. Māori customary land is the residual and original category of land, that is, land held under Māori customary title independently of any Crown grant. It is a category of symbolic rather than practical importance in New Zealand real property law today.

One new development needs to be emphasised. Section 11 of the Marine and Coastal Area (Takutai Moana) Act 2011 gives to the "common marine and coastal area" a "special status". This status is *sui generis* and is defined by the statute itself. Section 11 is a very remarkable provision, as it in effect creates a whole new category of land which had never existed before. Lawyers recognise, and law students have long been taught, that there are four categories of land in New Zealand, that is, Māori customary land, Māori freehold land, Crown land and general land, each regulated by their own statutes. But now we have a fifth category, which might be called common marine and coastal area land. Since it comprises the entire territorial sea, estuaries, the foreshore and, to some extent, the beds of navigable rivers, it is an area of no mean size. I have not seen any exact calculations of its actual acreage, but there may be more land in this category than there is Māori freehold land. This is land which, by statutory fiat, belongs to no one – a concept that common lawyers, brought up to believe that all land has to belong to somebody, have some trouble with. This really is a revolution in our country's land law system. The last occasion on which a new tenurial category was created was perhaps with the Native Lands Act 1865 or maybe the Land Transfer Act 1870, depending on whether one sees general land as a wholly new category, or simply as a statutory recasting of Crown-granted freehold tenures.

IV PATTERNS OF OWNERSHIP AND TENURE

What, then, are the patterns of land ownership and land tenure in New Zealand, how do these patterns relate to a broader economic and political framework, and what are the historical origins of what we see about us today? Strangely these questions, which have received great attention in (for instance) Central America, have not received very much attention in New Zealand to date. There are a number of excellent legal texts which deal with our existing land law, and there are also some solid works of environmental history. But these works do not really grapple with the bigger and more fundamental questions of the relationships between property, economics and politics with which I am concerned. So here I can do little more than indicate in a general way what seem to be the distinctive features of New Zealand in these respects.

Some basic statistics are needed to inform the discussion. New Zealand covers an area of 268,680 sq km, making the country a bit smaller than Italy (301,277 sq km) and a bit larger than the United Kingdom (244,820 sq km). A high percentage of the land is in direct Crown ownership and, indeed, no less than eight million hectares (that is, 80,000 sq km) or 30 per cent of the entire land mass of the country is vested in and managed by the Department of Conservation, New Zealand's largest landowner by far. Other categories of Crown land bring the total up to around 50 per cent. About 5.6 per cent of the country, or 1,515,071 hectares, is Māori freehold land, but this is not evenly spread around the country and there is only 71,629 hectares of Māori freehold land in the South Island today, barely 0.4 per cent of the South Island. The Māori Land Court today does conduct sittings in the South Island but it rarely has much business there. For all practical purposes 0.4 per cent is equivalent to "none" – a major tenurial difference between the two islands which goes strangely unremarked upon, and which is given added significance by the fact that the South Island is considerably larger than the North. The heaviest concentrations of Māori freehold land (measured by Māori Land Court district) are found in the Waiariki (Taupo–Rotorua), Aotea (Taranaki–Whanganui) and Tairāwhiti (Gisborne–East Coast regions), where over 20 per cent of the land in each region is Māori freehold land today: 22 per cent in Waiariki and around 26 per cent in Aotea and Tairāwhiti. What is not Crown land or Māori freehold land is what is termed "general land" in New Zealand property law, land held on private title, about 45 per cent of the country.

The marked tenurial variation between the two main islands arises from differing legal histories. The category of Māori freehold land derives from the Native Lands Acts of 1862 and 1865 and from the key institution established by the legislation, the Native (now Māori) Land Court. The Native Land Court never became very important in the South Island because the Māori customary title to most of the South Island had already been extinguished by the time of its establishment.

V PRINCIPAL CHARACTERISTICS OF THE LEGAL FRAMEWORK

The legal framework relating to land or interests in land in New Zealand has, in my opinion, the following principal characteristics:

- (a) The absence of a formal constitutional protection of property rights;
- (b) Strong protection of private property rights in land, partly deriving from the common law but more particularly by means of the "Torrens system", currently implemented by the Land Transfer Act 1952;
- (c) A countervailing tradition of partial protection of access to the countryside and rural areas by means of the Queen's chain ("marginal strips"), Crown/public ownership of the foreshore and seabed, and an elaborate system of national parks and other protected public lands;
- (d) Cheap and efficient conveyancing and highly effective state guarantee of private titles;
- (e) A strong and well-developed law of compensation for public works takings, notwithstanding the absence of formal constitutional protection of property rights;

- (f) A strong system of zoning laws, and a corresponding lack of clarity about the acceptable impacts of regulatory control over land (as opposed to direct takings for public works);
- (g) A high degree of nationalisation of basic resources (development rights with respect to natural water, geothermal energy, petroleum etcetera);
- (h) A significant part of the country held under a unique form of tenure with no counterparts in other developed countries (Māori freehold land, which takes up about 12 per cent of the surface area of the North Island);
- (i) A significant percentage of the surface area of the country held directly by the Crown (about 50 per cent of the land mass of the country), most set aside for conservation purposes; and
- (j) A degree of persistent confusion about the scope and consequences of Māori customary rights under the Treaty of Waitangi and the common law doctrine of aboriginal title.

In my view any attempt to constitutionalise property rights in some formal manner has to engage with the realities of the New Zealand system of property rights and property rights law as they exist in reality. The above combination of circumstances is unique to this country. I will now go through the above points in turn.

A Absence of Formal (that is, Constitutionalised) Protection of Property Rights

It is elementary that New Zealand lacks a basic constitutional protection of property rights, such as (for instance) the takings clause of the Fifth Amendment of the United States Constitution. This has led to a call from some commentators that such protection should be established.¹⁷ As New Zealand obviously does not actually have a core document that we could call a "written constitution", any such protection would have to be incorporated into some other higher-level statute, perhaps into the Bill of Rights Act. I will not be pursuing this particular debate in this article.

B Strong Protection of Private Property Rights in Land

Notwithstanding the absence of formal constitutional protection, it is certainly a mistake to imagine that New Zealanders are unconcerned about private property rights in land or that such rights are not well-entrenched in New Zealand law. This is achieved by two main methods. First, New Zealand is a common law country and is heir to English law traditions of strict protection of property rights in land and interests in land by common law devices such as actions in trespass. Probably more importantly, New Zealand is a leading exponent of the "Torrens" system, first pioneered in South Australia by the radical reformer Robert Torrens and effectively implemented in

¹⁷ See Boast and Quigley, above n *.

New Zealand by the Land Transfer Act 1870.¹⁸ Virtually all private titles to land in New Zealand (about 45 per cent of the surface area) are fully covered by the system, now governed by the Land Transfer Act 1952. The consequences of the legislation in some respects, most famously with the case of void instruments, were not always clear and have been the subject of a number of important appellate decisions by the New Zealand Court of Appeal, the High Court of Australia and the Privy Council.¹⁹

The system amounts essentially to a state guarantee of title to holders of estates in land as defined by surveys and marked out on the land by survey pegs positioned on property boundaries. The legislation abolished common law actions in ejectment and for the recovery of land.²⁰ Current registered proprietors have an effectively unchallengeable title. The legislation also changed the law relating to common law mortgages by providing that mortgagees have only a charge on the land,²¹ but nevertheless implemented a highly effective system of protecting the rights of lenders by means of a right to mortgagee sales. The private housing market and the rural land market in New Zealand, which both have high rates of turnover, are underpinned by this legislation which works comparatively well.

C A Countervailing Principle of Protection of Public Rights of Access to the Countryside, Beaches Etcetera

On the other hand, there is also in New Zealand an established right of access to the countryside, albeit one that has taken distinctively New Zealand forms. New Zealand lacks any equivalent to the concept found in Swedish common law of a general right of public access to privately owned rural land. Nor is there any counterpart to the vast network of public rights of way and pathways found in Britain. What New Zealand does have, however, is the concept of the "Queen's chain" or "marginal strips": areas of land in public ownership around the margins of lakes, the foreshore and rivers, deriving from the Land Act 1892 and taking the form of reservations of land in Crown title in

18 See generally DJ Whalan "The origins of the Torrens system and its introduction into New Zealand" in GW Hinde (ed) *The New Zealand Torrens System: Centennial Essays* (Butterworths, Wellington, 1971) at 1; and David Grinlinton (ed) *Torrens in the Twenty-First Century* (LexisNexis, Wellington, 2003). On the core principles of the Torrens system, see especially SR Simpson *Land, Law and Registration* (Cambridge University Press, Cambridge, 1978).

19 See *Gibbs v Messer* [1891] AC 248 (PC); *Assets v Mere Roihi* [1905] AC 176 (PC); *Boyd v Mayor of Wellington* [1924] NZLR 1174 (CA); *Clements v Ellis* (1934) 51 CLR 217; *Frazer v Walker* [1967] 1 AC 569 (PC); and *Breskvar v Wall* (1971) 126 CLR 376.

20 See now Land Transfer Act 1952, s 63.

21 Land Transfer Act, s 100.

Crown grants.²² After 1892 these marginal strips were not actually included in the Crown grant and thus remain in public ownership. These strips are currently managed by the Department of Conservation, although it is almost impossible to know definitely where all of these strips are or their combined acreage. In New Zealand the "Queen's Chain" has come to play a rather similar role to that of customary rights of way in England and any attempts to modify the law in the direction of what is perceived by the public – rightly or wrongly – as restricting access rights is greatly resented. The Conservation Law Reform Bill, introduced into Parliament in 1989, generated widespread concerns that a cherished right of access to the countryside was under attack (this was not actually the case). In November 1989 the Prime Minister Geoffrey Palmer took the step of disavowing any intention of diminishing public rights of access, a sure testimony to the role played by the Queen's Chain in the national psyche. As was reported in the *Evening Post*:²³

Prime Minister Geoffrey Palmer has given an assurance that the Government has no plans to restrict public access to the Queen's Chain.

His assurance follows concern about changes to the Chain proposed in the Conservation Law Reform Bill before Parliament.

The Chain, or marginal strip as it is also known, guarantees free public access to the coast and countryside by preserving, in Crown ownership, a 20m-wide strip of land alongside lakes, rivers, and the coast.

The changes to the chain were intended to simplify the law relating to it, but led to concern that the Government planned to give the chain to adjacent landowners.

Mr Palmer said that was not the intention. "I want to assure everybody that the Queen's Chain is secure.

"The Government isn't going to take it away. It's an important part of New Zealand's history. We want it. We're going to have it. We want to keep it."

In addition, New Zealanders had long worked on the assumption that the foreshore and seabed was publicly owned, which explains the widespread consternation relating to the foreshore and

22 Section 110 of the Land Act 1892 stipulated that in all sales or dispositions of Crown land, a strip of land 66 feet wide (now 20 m) was to be reserved around the sea coast, the margins of all lakes exceeding 50 acres, and along the banks of all rivers and streams more than 33 feet wide. This provision became in turn s 58 of the Land Act 1948. The current law relating to marginal strips is now set out in the Conservation Act 1987 as amended by the Conservation Law Reform Act 1990. Marginal strips are not access rights over private land but rather a category of Crown land (that is, the land was not Crown-granted in the first place). Some strips may originate from pre-1892 surveys, especially in Otago and Canterbury, but this is difficult to establish clearly.

23 *Evening Post* (Wellington, 29 November 1989).

seabed issue and the finding of the Court of Appeal in 2003 that Māori customary rights in the foreshore and seabed could still be asserted.²⁴

D Cheap and Efficient Conveyancing and State Guarantee of Titles

This is achieved by the land transfer legislation, already referred to above. New Zealanders find systems of private title insurance and the continued use of actions in ejectment (as, for instance, in the state of New York) difficult to comprehend. In New Zealand, titles are guaranteed by the state. Conveyancing is comparatively easy, uncomplicated and very effective. New Zealand shares this feature with other leading Torrens jurisdictions (for example New South Wales and Victoria). However the position of Māori freehold land, described below, is something of an anomaly.

The Torrens system and Torrens titles have been for so long a part of the architecture of New Zealand property law that the political context of the emergence and development of the system has been lost sight of.²⁵ It is possible for a newly-released major New Zealand history textbook not to mention the Torrens system at all.²⁶

E Strong Protection of Landowners with Respect to Clear Takings of Private Property for Public Purposes

As in other Western countries both the state and local authorities, as well as some other entities, can take land in private title for public purposes. Rights of landowners to full compensation are protected under the Public Works Act 1981. Such protection has long been regarded as fundamental in English law, and there is a long-established presumption of statutory interpretation that all

24 The decision referred to is the Court of Appeal decision in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA). In *Ngati Apa* the Court of Appeal overruled its own earlier decision in *Re Ninety-Mile Beach* [1963] NZLR 477 (CA) and held that Māori customary title to the foreshore and seabed had not been extinguished by any *general* enactment. The case was a straightforward application of ordinary native title law and it remains hard to understand why the Government was (apparently) taken by surprise by the decision. This decision led ultimately to the enactment of the Foreshore and Seabed Act 2004. See generally RP Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005); and Claire Charters and Andrew Erueti (eds) *Māori Property Rights and the Foreshore and Seabed* (Victoria University Press, Wellington, 2007). Along with Sir Tahakurei Durie and Hana O'Regan, the author was a member of a panel appointed in 2009 by the Attorney-General, Christopher Finlayson, to review the 2004 Act. The panel recommended the repeal of the 2004 Act, one reason being that it had simply been unsuccessful: no orders had been made under it by either the Māori Land Court or the High Court (Ministerial Review Panel *Ministerial Review of the Foreshore and Seabed Act 2004* (30 June 2009)). The law is now contained in the Marine and Coastal Area (Takutai Moana) Act 2011.

25 On the historical and comparative context of Torrens-type property systems, see Simpson, above n 18.

26 As in Giselle Byrnes (ed) *New Oxford History of New Zealand* (Oxford University Press, Melbourne, 2009). In fact, this work, exemplary as it is in many respects, ignores not merely property law but the law and the courts almost entirely: see RP Boast "New Zealand Legal History and New Zealand Historians: A Non-meeting of Minds" (2010) 9 *Journal of New Zealand Studies* 23.

provisions allowing takings of private property rights are deemed to be compensable.²⁷ On the whole, rights of compensation at full market values are strictly protected and the rights of landowners to challenge valuations are also well-established, although there have certainly been some issues historically with respect to takings of Māori freehold land for public purposes.²⁸ Sections 40, 41 and 42 of the Public Works Act 1981 reintroduced the principle that land no longer required for a public work had to be offered back to the original owners.²⁹

F Strong Zoning Laws and a Lack of Conceptual Clarity about the Acceptable Limits of Environmental Regulation

New Zealand has long had a system of zoning, based essentially on North American, rather than on British, models. The evolution of the current framework has taken many years. The subject was frequently debated in Parliament from 1890 onwards. An important conference on zoning was organised by the Government in 1912 and, following its deliberations, draft legislation was eventually prepared but was not enacted until 1926 (the delay caused by the disruptive effects of the First World War). The Act was not a success. Although the Town Planning Act 1926 provided for a director of town planning, by 1953 the position had been vacant for 20 years and only 17 planning schemes – which were optional – had been finalised.³⁰

The Town and Country Planning Act 1953 was, however, a pivotally important statute which created for the first time the solid foundations for a modern zoning system. Every municipal corporation and county council was required to "provide and maintain" a district scheme, consisting of a scheme statement, a code of ordinances and a map.³¹ The scheme had to "make provision" for various matters listed in sch 2 of the Act. The matters listed included, for example, the "preservation of objects or places of historical interest or natural beauty". Under the 1953 Act, all cities, towns and counties were split into zones, in which certain types of land use were permitted, other uses were allowed only by means of notification and rights of public objection, and others were basically forbidden or allowed only under very specific circumstances. The whole fabric of the New Zealand landscapes and cityscapes of today has been strongly affected, and even to some extent created, by this legislation. An important feature of the system has been rights of public objection and public

27 *Colonial Sugar Refining Co v Melbourne Harbour Trust* [1927] AC 343 (PC) at 359: "a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms". See also *Westminster Bank v Beverley Borough Council* [1971] AC 508 (HL).

28 For an excellent discussion, see Waitangi Tribunal *Wairarapa ki Tararua Report* (Wai 863, 2010) at 741–806.

29 Such provisions were contained in the Public Works Act 1928, removed by the Public Works Act 1954, and re-enacted in 1981.

30 See (1953) 299 NZPD 689 and 745 (debate on the Town and Country Planning Bill).

31 Town and Country Planning Act 1953, ss 19–21.

hearings, with appeals leading to what was then called the Town and Country Planning Appeal Board, an increasingly powerful judicial body and the ancestor of today's Environment Court – undoubtedly the most important administrative tribunal, if that is a proper name for it, in the country.

The 1953 Act, after a long history of amendments, was updated and consolidated by the Town and Country Planning Act 1977. Structurally the law remained basically the same: focused on zoning, and permitted and discretionary uses. The Town and Country Planning Appeal Board became the Planning Tribunal. As was the case with the 1953 Act, the 1977 Act did not apply to the Crown, still heavily engaged in the construction of public works at that time. Crown projects were instead regulated under a non-statutory system of environmental impact reporting.³² One important development that occurred after 1977 was the increasingly complex and confused law relating to Māori and Treaty of Waitangi issues in the areas of town and country planning and water law. There were developments in a number of areas, including the interpretation of s 3 of the 1977 Act,³³ water resources,³⁴ mining, geothermal resources,³⁵ and environmental impact reporting and assessment.

In 1991 the Resource Management Act was enacted, which consolidated and expanded the law relating to town and country planning, air pollution, coastal planning, and allocation of rights to surface, subsurface and geothermal water. The Resource Management Act is a pivotal statute, which – along with the Land Transfer Act 1952 – is one of the two most important statutes to the practising property lawyer. Notwithstanding some of the claims made about the Resource Management Act (for example, the claim made that it established an "effects-based" system of environmental management, whatever exactly that means), to a large extent the system that really counts in New

32 Environmental impact reporting derives from a United States statute, the National Environmental Policy Act 42 USC of 1970 [NEPA]. New Zealand adopted a form of environmental impact assessment in 1973 with the adoption by Cabinet of the *Environmental Protection and Enhancement Procedures* prepared jointly by the Commission for the Environment and an Officials Committee for the Environment. As the Resource Management Act 1991 [the RMA] now binds the Crown, environmental impact reporting (in the NEPA sense) is no longer important in New Zealand; it has been superseded by the resource consents process under the RMA.

33 Section 3(1)(g) laid down a number of general principles. It was counterpart to Part II of the current Resource Management Act. For example s 3(1)(g) listed, as one of seven "matters of national importance" to be "recognised and provided for" in "the preparation, implementation, and administration of regional, district, and maritime schemes", the "relationship of the Māori people and their culture and traditions with their ancestral land". The meaning of "ancestral land" was clarified by *Royal Forest and Bird Protection Society v Habgood* (1987) 12 NZTPA 76.

34 Here the main issue was whether Māori spiritual and metaphysical values were relevant to the "benefit/detriment test" governing applications to take or discharge water under the Water and Soil Conservation Act 1967. The issue was of particular importance with respect to inland waters: see *McKenzie v Taupo County Council* (1987) 12 NZTPA 83; and *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

35 See RP Boast "Geothermal resources in New Zealand: A Legal History" (1995) 6 *Canta LR* 1.

Zealand is basically a North-American zoning system administered by local councils. It is in this area that there can be made the clearest case for a reform of the existing law by providing for some kind of formal definition of the acceptable limits of non-compensable regulation of landowners under the guise of environmental regulation. How much control should landowners be expected to put up with, without compensation? This is the area that "takings" jurisprudence in the United States is most concerned with.³⁶ There is certainly scope for further work on how serious, practically, the problem is in New Zealand, and whether United States solutions, if they are solutions, are something we should best emulate or avoid.

G A High Level of Nationalisation of Basic Resources

Another characteristic of the New Zealand system is the high level of resource nationalisation by the state, which perhaps somewhat cutting across the strong protection of property rights at common law and under the land transfer system. Such nationalisation has been characteristic for a surprisingly long time. The process began as early as 1903 with an amendment to the Coal Mines Act 1901 which dealt with the issue of coal ownership beneath the bed of the Waikato river by going to the perhaps extraordinary length of vesting the beds of all "navigable" rivers in the Crown.³⁷ Section 14 was enacted in response to the decisions in *Mueller v The Taupiri Coal Mines Ltd*³⁸ and *In*

36 The case law and commentary on "takings" in the United States is much too vast to cite here. The basis is the "takings" clause of the Fifth Amendment: "... nor shall private property be taken for public use without just compensation". Direct takings are not really the issue; the more difficult question is the permissible scope of amenity and environmental controls. The interpretation of the taking clause became a matter of crucial significance in the United States as a result of Justice Holmes' decision in the United States Supreme Court in *Pennsylvania Coal Co v Mahon* 17 US 393 (1922), where he famously observed that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be regarded as a taking". (The case is equally famous for Justice Brandeis' dissent, on which advocates of strict land use controls have relied ever since). In United States law today, to state the matter rather baldly, regulation of land within certain limits is an exercise of the "police power", and no compensation is required; but if the regulation crosses these limits, it becomes an exercise of the "eminent domain" power, and is invalid if "just compensation" is unavailable. The vital question of determining where these limits lie has vexed courts and commentators ever since, and has led to the production of large numbers of judicial opinions and learned articles and books. American law is thus characterised by an almost excessive fixation on the constitutional limits of land use control, and the contrast with New Zealand in this respect could hardly be more pronounced.

37 Coal Mines Amendment Act 1903, s 14. The provision was continued in s 206 of the Coal Mines Act 1925 and s 261 of the Coal Mines Act 1979. Although the provision is now technically repealed, it lives on as a consequence of s 354 of the RMA.

38 *Mueller v The Taupiri Coal Mines Ltd* (1900) 20 NZLR 89 (CA). This case was concerned with coal mining underneath the bed of the Waikato River. The defendants, riparian owners under a military grant made pursuant to Waikato confiscation legislation, claimed a right to mine coal under the river on the basis that their title, bounded by the river, extended to the mid-line *ad medium filum aquae*. It was held (Stout CJ dissenting) that due to, (i), particular circumstances relating to the grants and, (ii), the frequency of commercial navigation on the Waikato, the standard presumption was rebutted.

*Re Beare's Application*³⁹ (both in 1990), which were concerned, respectively, with title to the beds of the Waikato and Arahura Rivers. (The exact meaning of the expression "navigable river" has been a constant problem and has recently received the considered scrutiny of the Supreme Court.)⁴⁰ Also in 1903, the Water-Power Act took the first steps towards state control of development rights in water, particularly for the purposes of electricity generation.

A further expropriation came with the Petroleum Act 1937 which – without compensation⁴¹ – vested all petroleum, which includes natural gas, in the Crown. Section 3(1) of this Act provided as follows:

Notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum existing in its natural condition on or below the surface of any land within the territorial limits of New Zealand, whether the land has been alienated from the Crown or not, is hereby declared to be the property of the Crown.

This is still the law.⁴² It is perhaps tempting to see this legislation as socialism run riot, given the fact that it was enacted by the comparatively radical Labour Government that took power in 1935, but in fact the legislation was based on British precedent and was supported by the petroleum industry, mainly because oil companies prefer to deal with governments rather than with multifarious landowners. Other resources that have been nationalised are gold and silver, uranium, geothermal resources and all development rights relating to natural water. These nationalisations

39 *In Re Beare's Application* (1900) GLR 242 (SC). This was concerned with the Arahura River in Westland, an importance source of pounamu (greenstone). A mining warden had issued mining licences to mine gold in the river bed, which was located within a native reserve. Stout CJ held that the river, although possibly "navigable" by boats or canoes, was not a public highway and had never vested in the Crown; the licences were therefore invalid.

40 *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277. The Supreme Court decision reversed the Court of Appeal decision that in determining "navigability" the test to be applied related to the whole of the river (that is, whether the river had the status of a commercial artery, irrespective of whether any particular section of the river was navigable or not): see *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125. The Supreme Court preferred a "segmentary" test: some parts of a river might be "navigable" and others not. The case related to a particular stretch of the Waikato River, which was classed by the Court of Appeal as "navigable" (and thus vested in the Crown under the Coal Mines Amendment Act 1903) as the Waikato *as a whole* was non-navigable, while the Supreme Court came to the opposite conclusion with respect to the particular section of the river in issue. Earlier cases wrestling with the meaning of the provision were: *Hutt River Board v Leighton* [1955] NZLR 750 (CA); *The King v Morison* [1950] NZLR 247 (SC); and *Tait-Jamieson v GC Smith Metal Contractors* [1984] 2 NZLR 513 (HC).

41 The Act provided compensation for persons injuriously affected by licensees exercising any powers conferred on them by the minister under the Act (that is prospecting for, or extracting, petroleum) but not for the taking of petroleum as such: see Petroleum Act 1937, s 29.

42 Crown Minerals Act 1991, s 10. See generally D Grinlinton "History and Development of Petroleum Law and Policy in New Zealand" (1995) 8 Otago LR 1.

were given effect to by a series of statutes, including the Geothermal Energy Act 1953⁴³ and the Water and Soil Conservation Act 1967,⁴⁴ and are now embedded in s 10 of the Crown Minerals Act 1991⁴⁵ and s 354 of the Resource Management Act. Not all minerals have been nationalised by any means: a considerable amount of the nation's coal reserves, for instance, are still owned privately. Mineral ownership in New Zealand is amazingly intricate, a complex patchwork, and could certainly do with some clarification.

New Zealanders, it seems, believe in strong property rights protection for houses and farms, but are less troubled by state nationalisation of energy resources, water and minerals. Generally resources have been nationalised once the state became aware of their significance, especially in the energy field. Geothermal resources were nationalised when the state became aware of the possibility that they could be used for the generation of electricity; following nationalisation, the New Zealand government went ahead and built one of the first large-scale geothermal power stations in the world (at Wairakei). Arguably the Foreshore and Seabed Act 2004 can also be seen as a nationalisation of a resource once the state became aware of its value, but this has, of course, proved to be far more controversial. The Government of the day did not see itself as nationalising anything, instead insisting that it was restoring the law to a longstanding status quo.

H A Type of Land Tenure that is Unique to New Zealand

Māori freehold land is an important category of land in this country and has no exact counterpart anywhere else. The expression "Māori freehold land" is a term of art in New Zealand law and

43 Section 3(1) of the Geothermal Energy Act 1953 vested the sole right to "tap, take, use and apply" geothermal energy in the Crown. Users of the resource other than the state required a licence from the Minister of Works. Today geothermal resources are treated as a water resource and are regulated by regional councils under the RMA. By s 2 of the RMA, "water" is defined to include "geothermal water" and "water body" as "fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer". The effect is that geothermal systems fall under ss 14 and 15 of the RMA, these being the main general provisions relating to water. As is the case with all water, no one may "take, use, dam, or divert" any geothermal water unless the use is allowed by a rule in a regional plan or by a resource consent: RMA, s 14(3)(a). On geothermal resources, see especially Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008) at 1468–1656 (summary of principal findings at 1633–1635). The Tribunal concluded that "the geothermal resource is a taonga of great cultural, spiritual, and economic importance, protected by the Treaty of Waitangi": at 1633.

44 Section 21(1) of the Water and Soil Conservation Act 1967 vested all development rights with respect to natural water in the Crown. Although the Water and Soil Conservation Act is now repealed, its effect is preserved by s 354 of the RMA. The 1967 nationalisation underpins the licensing regime for takings of and discharges into natural water as now regulated by the RMA.

45 Section 10 of the Crown Minerals Act 1991 states:

Notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum, gold, silver, and uranium existing in its natural condition in land (whether or not the land has been alienated from the Crown) shall be the property of the Crown.

certainly does not mean land owned in freehold title by people of Māori ethnicity. It should be understood, rather, jurisdictionally, as a category of land subject to the jurisdiction of the Māori Land Court under Te Ture Whenua Maori Act/Maori Land Act 1993. The 1993 Act is the most recent in a long chain of Māori land statutes that began initially with the Native Lands Acts of 1862 and 1865.

In New Zealand it was assumed that the indigenous people held title to the entire soil of the country – a major difference with Australia, where the opposite assumption prevailed – and thus before land could be allocated to settlers from the British Isles, the native title had to be extinguished somehow. Until 1862 this was done by what were known as pre-emptive purchases or deeds: the Crown simply bought land off Māori and then handed it over to the provincial governments for allocation. These purchases were often of very large areas, and by this means about two-thirds of the customary title was extinguished, including virtually the whole South Island (a few inconsequential areas aside), and parts of the North.⁴⁶ As at 1862, however, much of the most important and valuable land in the North Island – in the Waikato, Taranaki, Hauraki, the Bay of Plenty, East Cape, Gisborne and much of the North Island interior was still held by Māori under their traditional customary law.

In 1862 the first Native Lands Act was passed, which replaced pre-emptive purchase with an entirely different approach. The legislation put in place a process by which land held under customary title could now be converted to a Crown-granted tenure, held by Māori as named individuals (that is, not by tribes or sub-tribes – iwi or hapū). Once "individualised" in this way it could be alienated to private purchasers directly without any need for the state to intervene. (The state could also still purchase but, in effect, as a private purchaser rather than in the exercise of the Crown's prerogative pre-emptive rights.) Māori, alternatively, could keep such land in their own possession and often did so: Māori were free to alienate it or use it as they chose. The objectives of the Native Lands Acts can best be discerned from the preambles to the first two main statutes, that

46 The best known of the early pre-emptive deeds are the Ngāi Tahu (all South Island) deeds of 1844–1864, which were considered fully by the Waitangi Tribunal: Waitangi Tribunal *Ngai Tahu Report* (Wai 27, 1991). On these deeds see also Harry C Evison *Te Wai Pounamu The Greenstone Island: A History of Southern Māori during the European Colonization of New Zealand* (Aoraki Press, Wellington, 1993); Harry C Evison *The Long Dispute: Maori Land Rights and European Colonisation in Southern New Zealand* (Canterbury University Press, Christchurch, 1997); and Harry C Evison (ed) *The Ngai Tahu Deeds: A Window on New Zealand History* (Canterbury University Press, Christchurch, 2006). The pre-emptive purchase deeds used in the northern South Island were considered at length in the Waitangi Tribunal's report released in 2008: Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui* (Wai 785, 2008), which dealt also with the history of the Native Land Court in this region. On pre-emptive purchasing and pre-Treaty purchases in Wellington, see Waitangi Tribunal *Te Whanganui a Tara me ona Takiwa* (Wai 145, 2003). For pre-emptive purchasing in Northland and the Coromandel, see Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997); Waitangi Tribunal *The Kaipara Report* (Wai 674, 2006); and Waitangi Tribunal *The Hauraki Report* (Wai 686, 2006).

is, the Native Lands Acts of 1862 and 1865. The preamble to the Native Lands Act 1862 states that it would:

... greatly promote the peaceful settlement of the colony and the advancement and civilisation of the natives, if their rights to land were ascertained, defined, and declared, and if the ownership of such land, when so ascertained, defined, and declared, were assimilated as nearly as possible to the ownership of land according to British law.

The 1862 and 1865 Acts had three main effects. First, the legislation amounted to a statutory waiver of Crown pre-emption; secondly, the legislation established a new judicial body, the Native Land Court, a purely statutory body with the power to make binding judgments in rem; and thirdly, the legislation set up a particular type of process, by which Māori customary titles could be converted into Crown-granted freehold titles.⁴⁷ These three core features of the legislation are interconnected. The legislation marked a decisive shift, indeed a complete about-face, from the previous law relating to Māori land and Māori alienation, which until then had been governed by the common law doctrines of native or customary title and Crown pre-emption. The process was supposedly voluntary. Māori were quite free to leave their lands in customary title if they wanted to, but if they did then they were alienable only to the Crown, the pre-emption rule remaining in force to that extent.⁴⁸ Just as with similar schemes in other parts of the world, however, the net effect was rapid alienation. Another consequence of the legislation has been the problem of crowded titles: with the rapid growth of the Māori population in the twentieth century, many Māori land blocks have ended up with thousands of owners, making efficient management very difficult.⁴⁹ As noted already, a significant amount of the North Island is Māori freehold land, which is mainly concentrated in a few regions, such as the area around Lake Taupō, parts of the East Cape region, around Rotorua, the King Country, and in the far northern part of Northland. There are numerous problems with Māori land, including overcrowded titles and difficulties in obtaining access to development credit, but it is also important not to exaggerate this; many very valuable farm properties

47 The literature on the operation of the Native Land Court is too extensive to cite here. The Court and its effects have been one of the main historic grievances inquired into by the Waitangi Tribunal under the Treaty of Waitangi Act 1975. On the Court and government acquisition of Māori land in New Zealand after 1865 see: Boast *Buying the Land, Selling the Land*, above n 8. For a case study of the Native Land Court in operation, see Richard Boast "Contextualising the Decisions of the Native Land Court: The Chatham Islands Investigations of 1870 (2010) 41 VUWLR 623. See also RP Boast *The Native Land Court 1862-1867: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2013).

48 Today Māori customary land, meaning land held under Māori customary title, is inalienable, a provision which can be seen as reflecting a long-standing rule of the common law: Te Ture Whenua Maori Act/Maori Land Act 1993, s 145: "No person has the capacity to alienate any interest in Māori customary land or to dispose by will of any such interest." The provision does not say that such land is alienable only to *the Crown*, however. Presumably this would now require statutory sanction.

49 On contemporary Māori land law (a subject taught in all New Zealand law schools), see Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004).

and forests are located on well-managed parcels of Māori freehold land. Māori freehold land is meant to be registered under the Land Transfer Act⁵⁰ (when registered it does not lose its status as Māori freehold land) but in fact the relationship between Māori freehold land and the Land Transfer Act is very confused in practice.

I Large Areas in Direct Crown Title

Another characteristic, as noted above, is that much of the New Zealand landmass belongs directly to the Crown (about half). This means that the law relating to public lands, public reserves and national parks is very important. There are consequential effects of this fact that are not necessarily obvious. A large part of the mineral corpus belonging to the Crown does so because the Crown is the owner of the surface title and thus holds the mineral estate *ad inferos* unless this has been separately granted away. Very little of the public estate is now available for Crown grant, and it can be assumed that this area will stay in Crown title for the foreseeable future. In contrast to, for example, the western United States, there is little developed scholarship on the law relating to public lands, perhaps a strange situation in a jurisdiction where so much land is in direct Crown ownership.

J Continued Importance of Māori Property Rights under the Treaty of Waitangi and Common Law Native Title⁵¹

This, too, is a significant feature of the current legal framework relating to lands and interests in land. The significance of this is of course highlighted by the continuing controversy over the foreshore and seabed. It can certainly be argued that the Foreshore and Seabed Act 2004 extinguished customary rights without compensation, which struck a jarring note at the time and which the present Government has endeavoured to remedy with new legislation. However, the effects of rights protected either by native title doctrine or by the Treaty of Waitangi on the actual law relating to land and interests in land, outside the special context of the foreshore and seabed, is not as significant as perhaps might be thought. The doctrine of indefeasibility of title means that in practice it is impossible to assert rights under the Treaty or under native title to Land Transfer Act land and, in any event, the Treaty of Waitangi remains unenforceable of itself in the ordinary courts.

50 Te Ture Whenua Maori Act/Maori Land Act 1993, s 123.

51 The literature on this subject has now become so vast and elaborate that no attempt is made here to cite the principal primary and secondary texts. For a comparative study, however, see especially PG McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination* (Oxford University Press, Oxford, 2004).

This has long been the general position, and still remains so, notwithstanding some interesting dicta in the courts from time to time.⁵²

Rights and interests protected by the Treaty are inquired into by the Waitangi Tribunal acting under its special statutory jurisdiction under the Treaty of Waitangi Act 1975, but its core powers are recommendatory only. The Tribunal has now released over 100 reports, some of them very substantial documents. Its work has also produced a very lively historiographical debate.⁵³ Claims are negotiated by the Crown and iwi leaders outside any formal statutory framework, resulting in a deed of settlement and then a claims settlement Act. These enactments can relate to national issues, such as the Fisheries Settlement Acts of 1989 and 1992 or, more typically, to particular iwi, such as the enactments settling the historic grievances of Waikato–Tainui, Ngāi Tahu, or North Island groups with interests in the central North Island forests.

VI DISCUSSION

The picture that emerges is thus a complex one. The law does reflect to some degree the rise and fall of particular ideologies – while New Zealand's socialistic or at least "big government" phase has come and gone, at least so it would seem, legal developments characteristic of this phase, including the nationalisation of resources such as geothermal energy and water development rights, remain in the law, and sit alongside the strict protection of private property rights in the Land Transfer Act and the common law. The legal framework is a historical product – a product of a century and a half of changing ideas and growth and development (and regression and reaction as well). Such is the reality of what surrounds us today.

The issues that arise from the above are many, and complex. My argument is that New Zealand has settled into a distinctive pattern when it comes to property rights in land, in which the state has played a very large role by setting up, state-guaranteed systems of title and by the nationalisation of

52 In 1992 in *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA) McKay J, giving judgment for the majority (Cooke P dissenting), stated that "treaty rights cannot be enforced in the Courts except insofar as they have been given recognition by statute". See also *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC). The complex issue of the "status" of the Treaty of Waitangi in New Zealand public law cannot be explored fully here.

53 Waitangi Tribunal historiography is itself the subject of a rich and wide-ranging debate in New Zealand, which cannot be explored fully here. Some important contributions include WH Oliver "The Future Behind Us: The Waitangi Tribunal's Retrospective Utopia" in Andrew Sharp and Paul McHugh (eds) *Histories, Powers and Loss: Uses of the Past – A New Zealand Commentary* (Victoria University Press, Wellington, 2001) 9; 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). In 2006 the *New Zealand Journal of History* devoted much of one issue to Waitangi Tribunal historiography: see Jim McAloon "By Which Standards? History and the Waitangi Tribunal" (2006) 40 NZJH 194; Giselle Byrnes "By Which Standards? History and the Waitangi Tribunal: A Reply" (2006) 40 NZJH 214; and Belgrave "Historians and the Waitangi Tribunal" (2006) 40 NZJH 230.

key mineral and energy resource now administered by various kinds of licensing systems, principally controlled by the Resource Management and Crown Minerals Acts. Does the existing structure basically suit us, or is it in some ways conceptually deficient and in need of clarification or revalorisation of basic principles by some kind of constitutional or quasi-constitutional statement? If the legal history is any guide, there is little to show that New Zealanders resent the large role played by the state in our land law system. The establishment of the Torrens system and the protection of public access to the countryside by means of the Queen's Chain do not appear to have been controversial in their day. There is no significant sector of public opinion at present that is interested in abolishing the Torrens system to replace it with private title insurance, or for privatising the remaining areas of Crown land, abolishing the country's system of national parks, revesting petroleum and natural gas in private titles, or allowing a zoning free-for-all as is seen in some states in the United States of America. The foreshore and seabed issue seems to have been resolved, at least for the time being, not by allowing privatisation of it but by means of the imaginative creation of a new category of public space. New Zealanders have long been used to a strict and highly regulated system of zoning and planning consents, which has played a large role in giving our towns and cities their present form and layout; no discernible popular movement for the abolition of the Resource Management Act is apparent, at least not to this writer.

The fact that New Zealanders have historically accepted a long-standing involvement of the state in *some* aspects of the national property system is not necessarily an argument for preserving the status quo, nor is it a guarantee that perceptions and ideologies are going to remain unchanging. Yet the fact remains that the characteristics of the system as identified here have been in place for some time. That New Zealand does have its own public doctrine, or public ideology, relating to land seems undeniable. It is at least as important to model a country's property law around its home-grown traditions as it is to use it to pursue political and economic ideologies.