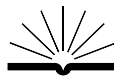
CARWYN JONES

NEW TREATY, NEW TRADITION

Reconciling New Zealand and Māori Law



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Preface

Stories play an important role in the construction and maintenance of legal systems. In his influential "*Nomos* and Narrative," Robert Cover explains that law is an institution built on the stories of a community's social life: "For every constitution there is an epic, for each decalogue a scripture."[1] Law must be understood in the context of these common narratives if it is to have relevance in our lives.

My use of Māori storytelling forms reflects Cover's view of law. By using *pūrākau* (Māori stories) throughout the book, I seek to reinforce the social, cultural, and political contexts of law. This is consistent with recent legal history scholarship of colonial societies, which views law as both a product and source of cultures of those societies.[2]

As a means of transmitting embedded norms and cultural values, storytelling is particularly relevant to research on Indigenous law.[3] Anishinabe legal scholar John Borrows has noted that "stories express the law in Aboriginal communities, since they represent the accumulated wisdom and experience of First Nations conflict resolution."[4] Borrows uses storytelling techniques throughout his own work to explain, explore, and discuss Indigenous law and legal issues.[5] Borrows has even used storytelling forms to explain the importance of stories.[6]

Stories not only play an important role in the production and maintenance of legal culture within communities, they are also employed to communicate legal rules and principles in various cultural communities. For example, Lumbee scholar Robert Williams Jr. illustrates the vital role of stories in

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establishing common understandings of legal rights and obligations within various American Indian cultural models of diplomacy.[7] In many American Indian societies, suggests Williams, stories have long been understood as an essential ingredient of successful diplomatic and treaty relationships.[8] In this context, stories might have many functions. They may be told to establish and facilitate communicative processes. They may be told to educate treaty partners about expected standards of behaviour and accepted legal norms. Some stories might also generate law.[9] One of the most significant aspects of stories within American Indian diplomacy is their integrative power to transcend cultural and social borders. Williams sees the creative potential of stories as crucial in this regard, empowering communities to imagine new connections and relationships: "In American Indian treaty visions of law and peace, a treaty itself was a special kind of story: a way of imagining a world of human solidarity where we regard others as our relatives."[10]

Williams also notes that many critical race and feminist legal scholars have employed storytelling techniques to assist in their analysis of legal issues and "to make connections with strange others in a world of human diversity and conflict."[11] Critical race theorist Derrick Bell explains various types of discrimination by constructing a series of separate narratives.[12] Feminist legal scholar Patricia A. Cain recounts the stories of lesbian women in order to ground her theoretical approach in the lived experiences of women.[13] Richard Delgado argues that storytelling can be employed as an academic technique to provide an appropriate and effective voice for those who might otherwise be marginalized within legal systems.[14]

Stories reflect traditional Indigenous forms of preserving and transmitting knowledge. Their re-telling at different times by different people helps to construct and maintain a sense of shared cultural values.[15] Pūrākau, therefore, provide a means of expressing the values, norms, rules, and processes that comprise the body of Māori legal traditions, within a context that maintains the integrity of the subject matter.

Linda Smith has noted the inextricable link between whakapapa and *te reo* (the Māori language) and pūrākau. She has pointed out that whakapapa is inherently connected to stories and events that involve ancestors. These stories are understood through *whakapapa* (genealogy), and knowledge captured in whakapapa is transmitted across generations by the re-telling of those stories.[16] The survival and revival of Māori language and culture is a key part of the reassertion of tino rangatiratanga.[17]

Māori educationalist Jenny Lee suggests that using pūrākau "creates the opportunity to write about culture as well as write culture into the text."[18] An

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example of how storytelling forms can enable Indigenous researchers to "write culture into the text" can be seen in Jo-ann Archibald's *Indigenous Storywork*.[19] Archibald considers the role of Indigenous storytelling in educational settings and uses Indigenous storytelling forms throughout the book to explore and develop her ideas. Her Stō:lo traditions and culture inflect these stories and her research as a whole. Her approach provides an opportunity to introduce many Indigenous cultural forms, to demonstrate practices, and to illustrate cultural values. Readers can see, for example, the book reveals the importance of dreams within Stō:lo culture and the way that dreams can be analysed in order to assist in our understanding of the world. The practical application of dreams is characteristic of many Indigenous cultures, as is also evident in John Borrows's *Drawing Out Law,* an exploration of Indigenous legal traditions through storytelling forms.[20]

Here I use the opportunity provided by pūrākau to weave *waiata* (songs), *karakia* (prayers), *whakatauki* (proverbs), and other Māori forms into the research. These performative opportunities help communicate Māori concepts across cultures. In addition to providing an appropriate cultural context in which to explore Māori concepts, pūrākau can help Māori researchers communicate with Māori communities. I use short narratives, in the pūrākau form, to illustrate my analysis and arguments. These stories are from my own community and about my own ancestors. They provide information about me as well as my interest in these issues. They tell the reader who I am and, specifically, who I am in a way that makes sense to the Māori world. Some of the stories are about ancestors from the time of the first arrival of Māori in Aotearoa. Others are more recent, with characters from the nineteenth and twentieth centuries. While these stories are based on histories recorded elsewhere in books or songs or other forms, I have retold them here to support the discussion in this book. The final story in the book is not based on a previously existing narrative. Although the character is prominent in Māori mythology, this story is based on my own experiences and engagement with issues relating to Indigenous legal traditions. It is, in that sense, a new story, intended to reflect the need for new stories about Māori legal traditions and the treaty settlement process.[21] Overall, the stories presented here provide examples of Māori law and explain Māori concepts, principles, and values within a culturally appropriate context.

These stories are not intended to be an authoritative or definitive history; rather, I have adapted them for the purpose of this book in order draw attention to the issues and arguments addressed here. Lee suggests that adopting a pūrākau approach "guides us to speak in a language that is not exclusive, but

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draws on our own ways of seeing, speaking and expressing ourselves in order to bring 'to life' the issues and complexities of our experiences that may be culture specific and local and/or more universal in nature."[22] This approach assists in situating the researcher in relation to the research, while at the same time leaving space for others to approach the research from their own locations. The conscious use of voice can also help to make transparent the researcher's own "ideologies, knowledge, subjectivities and politics."[23] I deliberately employ a storytelling voice to make clear that the stories and histories of my whānau and our ancestors are retold within the context of this book and for the purpose of communicating aspects of this research. They are all presented in the context of a father telling stories to his son. This grounds the discussion of the settlement process and Māori legal traditions in the reality of Māori lives. The figures of father and son remind the reader that these issues are relevant to the lives of real people and that the values and practices of Māori legal traditions continue to animate day-to-day Māori life. The stories also serve to remind the reader that law is a human and social phenomenon concerned with relationships among people; law influences how people interact with the world. Finally, the stories are intended to reflect a traditional way of preserving ancestral knowledge and transmitting that knowledge from one generation to the next.

The use of storytelling as a means of cultural reproduction and communication is, of course, not unique to Māori communities. Cherokee scholar Thomas King argues for the fundamental role of stories in our lives by quoting the Nigerian storyteller Ben Okri. Okri suggests that everyone is effectively part of one's own story, constructed by one's own actions. Thus, "If we change the stories we live by, quite possibly we change our lives."[24] Or, as King himself simply and elegantly suggests, "The truth about stories is that's all we are."[25]

The stories in this book provide a space for various forms of communication – for songs and prayers, legends and histories – and also for expressions of hope, aspiration, concern, care, and humour. They are Māori stories; they help to situate the ideas within a Māori space.

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Glossary of Māori Terms

Note: Plurals in Māori: plurals of nouns are indicated by a preceding article or determiner, such as "ngā" or "te," while the plural form of the noun will often be the same as the singular (e.g., ngā waka – the canoes; te waka – the canoe). In some cases, the first vowel sound will be lengthened in the plural form of the noun (e.g., tangata – person; tāngata – people).

āe	yes
Aotearoa	New Zealand
aria	form
aroha	love
atua	god
ea	state of equilibrium
e Tama	son/boy
hapū	Māori kin community
hara	wrongs
Hawaiki	traditional homeland of Māori
iwi	Māori nation/people
kai	food
kaitiaki	guardian/steward
kaitiakitanga	guardianship/stewardship
kanohi ki te kanohi	face to face
karakia	prayer/incantation
kauhanga	passageway

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kaupapa	principle/foundation
kāwanatanga	government
kōrero	talk/stories
kōrero rangatira	chiefly discussion
kotahitanga	unity
kuia	grandmother/female elder
mamae	injury/hurt
mana	spiritually sanctioned authority
mana whenua	authority in relation to land
manaakitanga	nurturing relationships
marae	central community space/complex
mauri	life force
moana	sea
motuhake	special, distinct
muru	ritualized confiscation of property
noa	profane/everyday/flipside of tapu
Pākehā	New Zealander of European descent
Pāpā	father/Dad
pāua	abalone
pōwhiri	welcome ceremony
pūrākau	Māori story/stories
rangatira	chief/leader
rangatiratanga	chiefly authority
taihoa	slow down
take	reason for action
Tāne	one of the *atua* (Māori gods)
tangata	person
tāngata	people
tangata whenua	Indigenous/"people of the land"
taonga	treasured possession
tapu	spiritual character of all things
tātau	we – you (two or more) and I
tawhito	ancient (noun or adjective)
te maramatanga o ngā tikanga	philosophy of Māori law
te reo	the Māori language
tikanga	the right, correct, or just way of doing things
tikanga Māori	Māori law and practice
tino rangatiratanga	self-determination/chiefly authority
tipua	demon/supernatural being

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tipuna, tupuna/tīpuna, tūpuna	ancestor/ancestors
tohunga	expert/priest
ture	law
utu	balance and reciprocity
waiata	song(s)
waka	canoe
Waka Umanga	“vehicle for community undertaking”
whakahaere	management
whakapapa	genealogy
whānau	extended family
whanaunga	relation
whanaungatanga	relationships
whare wānanga	traditional university/house of learning
whenua	land

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Pronunciation Guide

Note: This Pronunciation Guide is a reproduction of the Te Reo Māori pronunciation guide that appears on the Victoria University of Wellington website, http://www.victoria.ac.nz/maori-at-victoria/ako/te-reo-at-victoria/te-reo-pronunciation-guide.

Sounds

There are fifteen distinct sounds within the Māori alphabet:

- five vowels: "a," "e," "i," "o," and "u"
- eight consonants: "h," "k," "m," "n," "p," "r," "t," and "w"
- two digraphs (two letters that combine to form one sound): "wh" and "ng."

Vowels

While there are only five vowels, combinations of vowels (diphthongs) are common, e.g., "au," "ao," "ea," "oi," and "ua."

A vowel can also have a long or short sound. A long sound is usually denoted by a macron (a bar appearing over a vowel to indicate it is lengthened during pronunciation, e.g., "ā" as in "wāhi").

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Pronunciation

Vowels are pronounced as follows:

Short

“A” as in “aloud”
“E” as in “entry”
“I” as in “eat”
“O” as in “ordinary”
“U” as in “to”

Long

“A” as in “car”
“E” as in “led”
“I” as in “peep”
“O” as in “pork”
“U” as in “loot”

Consonants

Pronounce consonants as you would in English, with two key exceptions:

The “t” sound depends on which vowel appears after it. When it follows an “a,” “e,” or “o,” pronounce it with as little sibilant sound as possible (almost like a “d”). When it follows an “i” or “u,” it includes a slight sibilant sound, but not nearly as much as an English “t.”

“R” is pronounced as a soft “rolled” “r.”

Digraphs

The “ng” digraph is pronounced as it sounds in the English word “singer.”

The “wh” digraph originally sounded like the “wh” in “whisper,” but in most dialects has evolved to be more like the English “f” sound.

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1

Tino Rangatiratanga and Māori Legal History

TAMATEA

"What story are we going to have tonight, Pāpā?"
"What story would you like, e Tama?"
"Maybe the one about Rātā?"
"That's a good one, isn't it? Do you remember what happens in that story?"
"Rātā tries to cut down a tree, Pāpā. He wants to make a canoe. But the spirits of the forest keep putting the tree back together again every night when Rātā goes home."
"That's right, e Tama."
"Why don't they let him build his waka, Pāpā?"
"Because he didn't follow the proper process. He didn't say a karakia to Tāne before he chopped down the tree. He didn't follow tikanga."
"What is 'tikanga,' Pāpā?"
"It is just the right way of doing things, e Tama. Like when we say karakia before we have our kai. Or when we have a pōwhiri to welcome visitors. In some ways, tikanga is a bit like the Pākehā idea of 'law.'"
"But Rātā was able to build his waka in the end, wasn't he?"
"Yes, but only after he had acknowledged Tāne and the spirits of the forest appropriately. That was very important. Just like when our ancestor, Tamatea, was careful to acknowledge the great tree that Tāne provided to build the waka Takitimu. On the voyage to Aotearoa, Tamatea would chant:[1]

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Ko wai te waka e takoto nei,
Ko Takitimu, Ko Takitimu.
Pā atu ra taku hoe,
Ki te riu tapu nui o te waka e takoto nei
Rei kura, rei ora.
Rei ora te mauri-e.
Ka turuturua, ka poupoua,
Ki tawhito o te rangi-e.
Rurukutia,
Rurukutia te waka e takoto nei.
Rurukutia te kei Matapupuni,
Rurukutia te ihu matapupuni a Tāne.
Rurukutia i te kowhao tapu a Tāne,
Rurukutia i te mata tapu a Tāne.
Rurukutia i te rauawa tapu a Tāne,
O te waka e takoto nei.

Who is the sacred canoe that lays here in rest?
It is Takitimu, it is Takitimu.
As I rest my paddle on
the sacred hull of this ancestral canoe that lays here in rest.
This canoe is a cherished treasure with its everlasting life force,
The life force that is the vital essence of this canoe.
It is to be firm, it is to be fixed and connect us
to our ancestors of the higher realm.
Bind together,
Bind together this canoe that lays here in rest.
Bind together the lashings from the stern and
Bind together the lashings to the bow of the sacred canoe, created by Tāne.
Bind together the sacred timber of Tāne and
Bind together the sacred embodiment of Tāne.
Bind together the sacred sides of the canoe of Tāne to be as one,
to the sacred canoe that lays here in rest.

"Did that keep the waka safe, Pāpā?"
"Ae, e Tama. Tamatea and the others on board Takitimu safely completed their journey to Aotearoa."
"What happened to Tamatea and the others after they got to Aotearoa?

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"Tamatea made a home for himself at a place called Kawhai-nui. But some people say that he wasn't entirely happy in Aotearoa."
"Why not, Pāpā?"
"Well, Tamatea had been a great leader of his people back in Hawaiki. He had a deep knowledge and understanding of the tikanga in that place and so was able to fulfill the role of a chief. But things were different in Aotearoa. There was already a community at Kawhai-nui and they had their own leaders – people who knew about the local way of doing things and the way that tikanga had developed in response to this new land and new circumstances. Tamatea was still highly respected, but he found it difficult to find a role for himself in his new home. Nobody disputed Tamatea's knowledge and power, but the means of expressing knowledge and power had changed. The tikanga had changed."
"Has tikanga changed again since that time, Pāpā?
"Many times, e Tama. Tikanga must constantly adapt to new situations and different contexts, adjust to meet challenges that arise, and grow along with the hopes and dreams of our people."
"And what about the others who came with Tamatea, Pāpā? What did our other ancestors do? Did they know that tikanga had changed? Did they try to do anything about it? Did they try to change things themselves, like Māui did?"
"So many questions! And very good questions they are too. We'll get to their stories soon, e Tama."

Tikanga, Change, and Māori Legal Tradition

Change and adaptation are important aspects of any dynamic legal culture. Legal cultures, like other features of social life, adapt and develop in response to changes in matters such as community values, technology, and the environment. Flexibility and dynamism are often identified as defining characteristics of common law systems. This book is concerned with another flexible and dynamic legal culture – that of the Māori peoples of Aotearoa/New Zealand.[2] In particular, it examines the ways in which Māori legal traditions have changed in response to the process of the negotiated settlement of historical claims against the state. The settlements stemming from the 1840 Treaty of Waitangi and agreed between Māori groups and the state provide significant opportunities and challenges for Māori communities and, inevitably, force those communities to confront questions relating to the application of their own legal traditions within these changing circumstances. These questions are especially pertinent in the context of establishing post-settlement governance

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entities, a process that unavoidably touches on issues of identity, authority, rights, and resource management. This book focuses specifically on Māori legal traditions and post-settlement governance entities. However, the intention is not simply to record changes to Māori legal traditions but also to offer some assessment of whether these changes and adaptations support or, alternatively, detract from two key goals of the settlement process: reconciliation and Māori self-determination, or *tino rangatiratanga*.

Background to the Treaty Settlement Process

The treaty settlement process unfolds against a broader historical and political backdrop. This book does not provide a comprehensive analysis of the history of race relations in New Zealand or even a comprehensive history of Māori-Crown relations. The section that follows instead paints in broad brushstrokes an outline of the political and historical context of the treaty settlement process in order to provide the context for an explanation of the dynamics of that process. I wish to avoid the stadial approach to history or the suggestion that New Zealand political history has moved in a linear fashion from a uniform Māori-Crown relationship to the heterogenous intricacies of the treaty settlement era. The reality is inevitably even messier and more complex. Here I provide a small number of key reference points in order to give a flavour of the Māori-Crown relationship over time.

Official British government involvement in Aotearoa did not begin with the signing of the Treaty of Waitangi on February 6, 1840. As a result of increasing settler activity in Aotearoa, including an established missionary presence, itinerant whalers and sealers, and growing numbers of permanent settlers, the British government had appointed James Busby as Resident of New Zealand in 1832. Busby's role was to try to establish some measure of law and order over a settler population that was often lawless. He was not provided with any resources or practical powers to achieve this, however, and was famously described as "a man-o-war without guns."[3] Busby encouraged the Māori peoples of the northern New Zealand to adopt some of the institutions of Western government. In 1834, a group of northern chiefs adopted a national flag, which was important for shipping and trading purposes. The following year, this northern group, referred to as "He Wakaminenga on Nga Hapū o Niu Tireni" (The Confederation of the United Tribes of New Zealand) adopted a Declaration of Independence. The declaration states that "all sovereign power and authority" within New Zealand resides with the chiefs of the various tribes. It includes provision for the chiefs to meet in congress each year to pass

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laws for the good governance of the country, and it asks the king of England to protect the independence of the chiefs. The relationship between the Declaration of Independence and the Treaty of Waitangi is worthy of its own study. In its report on Stage 1 of the Northland inquiry, the Waitangi Tribunal undertakes a comprehensive examination of both the Declaration of Independence and the Treaty of Waitangi, considering the likely meaning of those two documents for those who signed them.[4] The tribunal's view of the declaration was that it did not radically alter Māori political organization. That is, the declaration's intention that chiefs would come together in congress to pass laws did not override the authority of individual *rangatira* (chief/leader) and *hapū* (Māori kin community). It appears that the congress envisioned by the declaration may not ever officially have met. Nevertheless, the Declaration of Independence is important to the context of the Treaty of Waitangi, signed less than five years later.

The Treaty of Waitangi

The Treaty of Waitangi has been described as "simply the most important document in New Zealand's history."[5] At its heart the treaty provides a framework for the relationship between Māori and the New Zealand government. Consequently, the Treaty of Waitangi informs discussions in New Zealand public life that relate to constitutional powers and limitations, race relations, justice, identity, and reconciliation. It is a legal instrument, a political tool, and a historical document.

The treaty was signed in 1840 between representatives of the British Crown and a group of Māori chiefs, initially, at Waitangi in the Bay of Islands. There is still debate about the Treaty's precise legal status and its role in the British Crown's acquisition of sovereignty over New Zealand.[6] There is an English-language version and a Māori-language version of the treaty.[7] The vast majority of the Māori signatories signed the Māori version. Although there are significant differences between the two, the essential agreement, in both the English and Māori versions of the treaty, is that the Crown has the authority to establish some form of government in New Zealand and that Māori property and other rights and the authority of the chiefs is protected.[8] The concepts of self-determination and reconciliation underpin the treaty and infuse the discussion (legal and otherwise) about the relationship between Māori and the state.[9] These two important concepts consequently shape the contemporary discussions that take place between Māori and the Crown in the context of Treaty of Waitangi claims and the settlement of those claims. The fact that

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these formal interactions between the state and the Māori leadership began with the mutual recognition of these two important concepts is an important reference for the Treaty of Waitangi settlement process if that process is to contribute towards sustainable Māori self-determination and effective reconciliation.

The precise nature and scope of the governmental authority that was ceded and the Māori authority that was guaranteed by the Treaty of Waitangi has been the subject of considerable discussion. The orthodox view is that, while the treaty may have been an important part of the establishment of the Crown's sovereignty in New Zealand, it cannot have been the mechanism by which that sovereignty was practically effected. Prominent New Zealand legal scholar F.M. Brookfield uses Hans Kelsen's theory of a hierarchy of norms to suggest that the Crown's acquisition of sovereignty was a revolutionary act in constitutional terms.[10] He argues that the assertion of Crown sovereignty and the replacement of the Māori legal order with a new governing constitution had no validity within the pre-existing legal order.[11] The Treaty of Waitangi may have provided partial legitimisation for such a constitutional revolution, though only so far as the Crown's assumption of authority was consistent with treaty guarantees.[12] According to that model, New Zealand has effectively been undergoing a constitutional revolution since 1840, with various factors contributing to the legitimisation of the current constitutional arrangements.[13]

Constitutional lawyer and author Matthew Palmer has published similar views.[14] Palmer sees the Treaty of Waitangi as part of the establishment of Crown sovereignty rather than the instrument that technically transferred sovereignty from Māori to the British Crown. Palmer suggests that the Treaty of Waitangi was necessary as a political step more than a legal requirement and that the treaty is not an international treaty of cession but instead a treaty of protection. It provided protections and guarantees to the Māori chiefs so that the British Crown was able to assert sovereignty. While Palmer sees the treaty's strict legal role as rather limited, he goes on to consider the ways the Treaty of Waitangi can have legal effects within the New Zealand legal system.

Palmer primarily addresses the treaty's place within the colonial legal system. He acknowledges that the treaty also has a place within Māori legal systems and suggests ways in which the Treaty of Waitangi might have been viewed within Māori legal systems. His analysis in this area is somewhat limited, however. For a greater understanding of the meaning and effect of the treaty according to the legal rules and constitutional principles of Māori legal traditions, we must turn to other treaty scholars. Māori authors such as Ani Mikaere and Moana Jackson provide analyses of the Treaty of Waitangi that

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consider not only Māori perspectives on the Treaty but the constitutional impact of the treaty according to Māori legal traditions.[15]

Māori legal scholar Ani Mikaere argues that it is the Māori legal concepts in the Māori text that indicate the intent of the treaty agreement. She points to the consistency between the Māori text and the 1835 Declaration of Independence, and the political reality of the time, to suggest that the only reasonable meaning of the treaty is that, in signing, the Māori signatories declared and cemented their own authority, while acknowledging and defining the presence of the Crown and its citizens in their midst.[16] Mikaere compares this to a *pōwhiri,* a ceremony of welcome and encounter that acknowledges and recognizes a visiting group and provides space for them, but always takes place according to the traditions of the hosts, the *tangata whenua.*[17] One of New Zealand's foremost Indigenous rights advocates, Moana Jackson, has also pointed to rules of treaty interpretation that suggest greater reliance ought to be placed on the Māori text when seeking to ascertain the meaning of the Treaty of Waitangi.[18]

Mikaere also describes Māori legal systems as "the first law of Aotearoa," suggesting that they are the only legal systems upon which New Zealand's constitution could legitimately have been based.[19] This perspective supports the view that the treaty was signed within the context of Māori legal systems. Jackson further argues that the Treaty of Waitangi must be seen in the light of what was in 1840 already a long line of inter-*iwi* agreements that regulated political relations between *iwi* (Māori nation/people). Understood in this Indigenous context, the treaty does not talk about a shift in absolute sovereignty because, as Jackson has pointed out, this would have been inconceivable to Māori.[20] Giving up one's *mana* (spiritually sanctioned authority) or rangatiratanga was simply not possible under Māori law. Mana and rangatiratanga, Jackson notes, were part of the whakapapa (genealogy) of the community. The rights and obligations that are inherent within those concepts cannot then be transferred, at the stroke of a pen, to others who have different whakapapa and descend from different ancestors.

In 2014, the Waitangi Tribunal, the body charged with hearing claims based on the principles of the Treaty of Waitangi, released a report that supports the view that the treaty did not transfer sovereignty. This report addressed the first stage of inquiry into claims in the Northland region. Titled *He Whakaputanga me te Tiriti – The Declaration and the Treaty,* it focuses on the meaning and effect of the Māori-language texts of He Whakaputanga o te Rangatiratanga o Nu Tireni and Te Tiriti or Waitangi alongside their English-language counterparts: the Declaration of Independence and the Treaty of Waitangi. The central finding made by the tribunal was that the rangatira, the Māori leaders, who signed

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the Treaty of Waitangi in February 1840 did not cede their sovereignty in doing so. However, the tribunal makes clear that this report on the first stage of the inquiry does not contain findings in respect of claims, nor does it draw any conclusions about the sovereignty the Crown exercises today or how the treaty relationship should operate in a modern context.

The special significance of He Whakaputanga (the 1835 Declaration of Independence) in the Northland region was one of the reasons the tribunal was required to produce a thorough analysis of evidence about the treaty's meaning and effects in 1840. In coming to its conclusions, the tribunal considered, among other things, statements from previous tribunal reports about the effects of the treaty. There is considerable variation among those earlier reports as to how the authority of the parties was affected by the treaty. In this report, the tribunal places particular emphasis on the *Report on the Orakei Claim* (1987) and the *Muriwhenua Land Report* (1997). The Orakei Tribunal took the view that the text of the treaty would not have conveyed the cession of the English concept of sovereignty, but that contemporary statements by Māori suggested that Māori accepted "the Crown's higher authority." The Muriwhenua Land Tribunal pointed out that, while the British might have assumed they had obtained sovereignty through the treaty, the guarantee of tino rangatiratanga meant that the Māori perspective would have been quite different. Consequently, the Muriwhenua Land Tribunal concluded that the best way to understand the treaty is as an expression of the parties' "honest intention that Maori and Pakeha relationships would be based on mutual respect and the protection of each other."[21]

Alongside earlier tribunal reports, relevant court rulings, and existing scholarship relating to the treaty, the Waitangi Tribunal also heard evidence from claimants and a number of eminent historians. Dame Anne Salmond dismissed the possibility that the rangatira had ceded sovereignty to the Crown, arguing that *kāwanatanga* (government) would have been understood as "a subordinate and delegated power."[22] Don Loveridge thought the rangatira would have understood they would become subject to a higher authority and to British law under the treaty,[23] and Paul McHugh described the treaty signing as part of "the process by which Māori agreement to British sovereignty over New Zealand was obtained."[24]

After assessing the evidence presented at the inquiry, the Waitangi Tribunal stated:

> We think it likely that the rangatira viewed their agreement with Hobson at Waitangi as a kind of strategic alliance. It followed on from and extended the alliance that they saw as dating back at least to 1820, and which had been

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> advanced since then by important developments in the 1830s ... They had chosen a powerful ally, with what they considered good reason. At the same time, they would have regarded the relationship as subject to further and ongoing negotiation as the two peoples came increasingly into everyday contact.[25]

The tribunal noted the divergence between British understanding and rangatira understanding but concludes, as the Muriwhenua Land Tribunal had done, that an agreement had been reached in the treaty. According to the tribunal, this agreement can be discerned from the Māori text, which mirrors the oral agreement and the explanation to the rangatira of Hobson's assurances. The tribunal states:[26]

> Our essential conclusion, therefore, is that the rangatira did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their own people and within their territories. Rather, they agreed to share power and authority with the Governor. They and Hobson were to be equal, although of course they had different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis.

After the Treaty

The mid- to late nineteenth century saw significant developments in the Māori-Crown relationship. The Kīngitanga, or Māori King Movement, which evolved through the 1850s, eventually resulted in the crowning of a Māori king. While the movement was not universally supported by Māori, the Kīngitanga represented an attempt to form a pan-Māori movement. It was intended to mirror the British monarchy and put forward a Māori leader who could engage with the British sovereign on equal terms. The Kīngitanga continues to this day and remains especially important to the peoples of the Waikato region.

One of the key objectives of the Kīngitanga when it was established was to bring traditional Māori lands under the authority of the Māori king and halt the rapid acquisition of Māori land by the British Crown. Land and sovereignty issues were at the heart of a series of major nineteenth-century military conflicts between Crown forces and Māori in various regions. Land confiscations

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often followed these conflicts, with regions such as the Bay of Plenty, the Waikato, and Taranaki being particularly hard-hit. These confiscations, or *raupatu,* are the basis of many historical claims.

Along with confiscations, a significant amount of land passed out of Māori ownership in this period through the operation of the Native Land Court. The first *Native Land Act* was passed in 1862, but the court was not fully established until the revised act passed in 1865. The primary function of the Native Land Court was to identify the customary owners of Māori land and transform the customary title to a fee simple title that could be freely bought and sold. The court was extremely successful at facilitating Māori land sales. The existence of this specialist court from relatively early in the contact period goes some way towards explaining why New Zealand has not experienced the landmark Aboriginal-title cases that have been a feature of Indigenous–State relationships in some other common law jurisdictions such as Canada and Australia.[27] Native land law in New Zealand has largely been governed by statute. The Native Land Court is now known as the Māori Land Court. Many aspects of its original functions continue, such as determining succession of interests in Māori land. However, the purpose of the court has effectively been reversed. The *Te Ture Whenua Māori Act* (1993) is the court's current governing legislation; its two key objectives are identified as the retention of Māori land in the hands of its owners and the better utilization of the land. There are now significant restrictions on sale and ownership of Māori land.

Also in this period, four seats were set aside for Māori in the House of Representatives. Māori were not formally excluded from voting prior to the establishment of these seats. However, because only land-owners were entitled to vote and because Māori land was primarily communally held, very few Māori were qualified to vote before the Māori seats were established in 1867. The Māori Representation Act 1867 removed the property ownership criteria and extended the franchise to all Māori males over the age of 21.[28] Since that time, there have always been Māori Members of Parliament from a range of political parties (primarily the Labour Party for most of the twentieth century). Sir James Carroll, one of the early Māori parliamentarians was acting prime minister for periods of time. The Māori seats remain an important part of Māori political representation. Māori have the option of choosing to vote on the Māori electoral roll or choosing to vote on the general roll; since the introduction of proportional representation in 1996, the number of Māori seats is determined by the number of Māori who choose to register on the Māori roll as compared to numbers registered on the general roll. The Māori Party has won at least one of the Māori seats in each of the four most recent general

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elections (2005, 2008, 2011, and 2014). Following the last three elections, the Māori Party has entered into confidence and supply agreements with the governing centre-right National Party.

Māori politics has always been vibrant outside of Parliament, too. The Māori Party itself was formed largely following a large-scale march (a *hikoi,* literally "walk") protesting the Crown's foreshore and seabed policy, which would eventually be implemented through the *Foreshore and Seabed Act* of 2004. That act effectively removed Māori customary rights to areas of the foreshore. The *Foreshore and Seabed Act* was repealed in 2011 and replaced with the *Marine and Coastal Area Act,* though many of the changes in the new legislation are either purely symbolic or merely cosmetic. The protest action relating to the foreshore and seabed was part of a history of similar activity. The *hikoi* itself followed on the concept of the famous "land march" of 1975. The land march is now generally seen as contributing to the political pressure that resulted in the establishment of the Waitangi Tribunal.

Another important community-led initiative was the Kohanga Reo movement. *Kohanga reo* means "language nest." The term is used to describe Māori-language immersion early-childhood education. The first kohanga were set up in the early 1980s and quickly became popular with Māori. They are often credited as having a huge impact on the revitalization of Māori language, culture, and identity. Subsequently, Māori immersion schools were established, as were Māori universities, or *wānanga*. In addition to being important for the revitalization of Māori language, the Kohanga Reo movement is identified by Linda Smith as central to the development of study tools such as Kaupapa Māori research (a Māori-centred research methodology), described in more detail below.

Māori make up a politically significant proportion of the electorate (15 percent). They have managed to use the Treaty of Waitangi as a political instrument reasonably successfully. The reports of the Waitangi Tribunal and the establishment of the settlement process have also helped to secure the support of non-Māori and the political will of successive governments to provide at least some redress for some widely recognized breaches of the treaty (land confiscations, for example). As political instruments with no direct legal enforceability, however, the treaty rights are always in a slightly precarious position. This precariousness was illustrated in 2003 and 2004, when the government decided it would be better to appropriate Māori property rights to the foreshore and seabed than to risk upsetting non-Māori voters, who make up the vast majority of the population. Whether or not recognizing Māori rights to the foreshore would have upset a significant number of non-Māori

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voters is debatable. In another example, what had appeared to be a consensus about treaty claims and the settlement process being a mechanism for redressing historical injustices was shattered in 2004 by then leader of the National Party Don Brash, in what is now known as the Orewa Speech. In that speech, delivered at the Orewa Rotary Club, Brash railed against what he saw as Māori privilege. He gained immediate and widespread popular support for his views. Though the National Party lost the general election the following year, and Brash was deposed as party leader, this incident revealed the fragile nature of political support for the treaty settlement process.

During this period, the courts also engaged with the treaty, and their decisions often mirrored the political context of the time. A key aspect of the development of constitutional recognition of the Treaty of Waitangi, and the establishment and refinement of the treaty settlement process, has been the recognition, interpretation, and application of the treaty in the courts. The courts' approach to the treaty has changed considerably since the 1840s, mirroring, and often influencing, public perceptions of the treaty and the political imperatives of the day. Below is a brief overview of some of the important cases and trends in treaty jurisprudence, from decisions in the nineteenth century to the inclusion of treaty principles in legislation, to more recent cases that focus on treaty claims and the settlement process.

Early case law does not engage with the interpretation of the treaty in any great detail. Instead it draws on international law and precedents from other parts of the common-law world. The New Zealand courts first directly addressed the application of the Treaty of Waitangi in the 1847 decision *R. v. Symonds*.[29] This case related to the pre-emption clause in Article 2 of the treaty, which states that Māori cannot sell land to any purchaser other than the Crown. The governor had purportedly waived the Crown's right of pre-emption to allow Māori to sell land to whomsoever they wished and so facilitate settlement through freer land sales. This case was brought forward in order to test the validity of the governor's waiver. The facts of the case, simply stated, were that there existed two competing claims to title, each asserted by a Pākehā settler (that is, there was no Māori party in the case). The plaintiff claimed to have purchased the land directly and had a certificate that he claimed waived the Crown's right of pre-emption. The defendant held a Crown grant of title to the same land. The court found that the plaintiff's direct purchase and the certificate of waiver could not displace title obtained by Crown grant. While this was consistent with the pre-emption clause in the Treaty of Waitangi, the court found that the clause simply reflected and affirmed long-standing common-law principles of Aboriginal title. Ultimately, the court did

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not need to address the interpretation of the treaty or any questions of its legal enforceability, relying instead on the common law. The court generally referred to the treaty in positive terms, however, emphasizing its affirmation of common law rights.

The Supreme Court did not use such positive language in reference to the treaty thirty years later in its judgment in *Wi Parata v Bishop of Wellington*.[30] This case also turned on the validity of a Crown grant. In this instance, the Crown grant had been made in favour of the Bishop of Wellington. It was issued in 1850, two years after the local iwi, Ngāti Toa, had agreed to set aside a piece of land upon which a school was to be built. The grant was then made, allegedly without the consent of Ngāti Toa. Twenty-seven years passed, and still no school had been built on the land; Ngāti Toa sought the return of the land on the basis that the school had not been built and that no consent had been given for the Crown grant. The chief justice ruled in favour of the defendant, reasoning that the existence of the Crown grant was evidence that the Crown had exercised its sovereign powers to extinguish any Native title to the land. Thus, any obligations that the Crown had to Māori were not legal obligations but moral obligations, which the courts had no role in enforcing. The judgment refers to many of the same authorities cited in *R. v. Symonds,* but Chief Justice Prendergast here arrives at quite different conclusions, relying on the doctrine of discovery and finding that, as Māori had no civilized system of law that could be recognized and that, as an uncivilized people, they were not capable of holding sovereignty, consequently they could not be said to have ceded sovereignty via the Treaty of Waitangi. This led to Chief Justice Prendergast's infamous description of the Treaty of Waitangi as "a simple nullity."[31]

One other early case ought to be noted in this brief overview. In *Hoani Te Heuheu Tukino v Aotea District Maori Land Board,* decided by the privy council in 1941,[32] the privy council applied to the Treaty of Waitangi the principle that international treaties cannot be enforced in the domestic courts unless they are incorporated into legislation. In one sense this could be seen to reinforce the decision in *Wi Parata,* which held that the Treaty of Waitangi does not, by itself, create legally enforceable obligations on the Crown in the domestic courts. On the other hand, the *Hoani Te Heuheu* decision reverses the assumption of Chief Justice Prendergast in *Wi Parata* that the treaty cannot be a valid international law instrument. In fact, the privy council appears to proceed on the assumption that the Treaty of Waitangi is a valid international treaty, although the court does address that issue directly.

The courts' engagement with the treaty begins in earnest in the late 1980s. In landmark cases from 1987 through the 1990s, the higher courts began to

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give some teeth to the principles of the Treaty of Waitangi. One obvious factor in the courts' interest in treaty principles was the inclusion of principle provisions in major pieces of reforming legislation. The *State-Owned Enterprises Act* (1986), the *Conservation Act* (1987), and the *Resource Management Act* and *Crown Minerals Act* (both 1991) each represented significant re-structuring of the public sector, and each contained a section protecting the principles of the Treaty of Waitangi (to a greater or lesser degree). One view might be that the courts were then only doing as the legislature directed. The number of treaty-related cases over this period can be explained by new legislative provisions that provide a basis for litigation. However, there is another contributing factor that should not be overlooked. The recognition of the treaty in the courts follows the establishment of the Waitangi Tribunal in 1975 and the extension of the tribunal's jurisdiction in 1985 to enable it to hear historical claims. The establishment of the tribunal and the increasing number of claims it was addressing form an important part of the context within which the courts were considering treaty issues. The seminal Court of Appeal decision in *New Zealand Maori Council v Attorney-General* (1987) makes explicit reference to the Waitangi Tribunal. Not only do the judgments refer to the substantive content of tribunal reports, which the Court of Appeal considers in determining how to interpret and apply the treaty itself, but the fact of the tribunal's creation is seen as significant. Several judges in the Court of Appeal note the enhanced constitutional status of the treaty, which Parliament clearly intended when it established a standing commission of inquiry to hear claims based upon treaty principles.

In the latter part of the twentieth century, the courts, the parliament, and the cabinet recognized various obligations of the Crown. Aside from direct statutory incorporation, the Treaty of Waitangi influences New Zealand law in much the same way as a valid international law treaty does, despite some debate as to whether or not the Treaty of Waitangi is such an instrument. Palmer suggests that, were the issue put directly to the New Zealand Supreme Court, it is likely the Treaty of Waitangi would be found to be a valid treaty for international law purposes and therefore binding on the Crown.[33] At this point, the New Zealand courts have shown a willingness to recognize the Treaty of Waitangi as an extrinsic aid to statutory interpretation, and a factor to be considered in applications for judicial review of government action.[34]

The judgment in *Huakina Development Trust v Waikato Valley Authority* illustrates the readiness of the High Court in 1987 to take notice of the principles of the treaty against the backdrop of the tribunal's activities, even in cases where there is no express statutory reference to the treaty or its

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principles. In that case, the central question was whether metaphysical considerations based on Māori cultural understandings ought to be taken into account in environmental planning decisions relating to the Waikato River. After using the treaty as an extrinsic aid to interpret the applicable legislation, the High Court found that these considerations were relevant. The judgment noted that the treaty was "part of the fabric of New Zealand society" and could therefore be deployed as an interpretive aid wherever there was ambiguity in a statute and the subject-matter was such that treaty interests would likely be affected.[35]

The *Huakina Development Trust* case actually preceded the 1987 *New Zealand Maori Council* case (sometimes referred to as the *Lands* case or the *SOE* [state-owned enterprises] case), though the latter has come to be seen as the beginning of the modern treaty jurisprudence. In that case, the New Zealand Court of Appeal had to face for the first time the task of implementing the principles of the Treaty of Waitangi. The case arose out of the re-structuring of the state sector that took place in New Zealand through the mid- to late 1980s. One of the key components of that re-structuring was the corporatization and privatization of many government departments. In order to begin this process, legislation was passed that would enable government departments to be transformed into "state-owned enterprises." This raised the possibility that significant land and other assets, which may have been the subject of Waitangi Tribunal claims, passing out of Crown control and ownership. If this happened, these assets would be effectively unavailable for use as redress of those claims. The enabling legislation includes a provision that "[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."[36] The New Zealand Māori Council argued that the Crown's proposal to transfer land and assets out of Crown ownership before claims to that land could be heard was in breach of the principles of the Treaty of Waitangi and therefore outside of the powers conferred by the state-owned enterprises legislation. Despite agreement on the outcome and approach, separate judgments were written by each of the five judges who heard this case in the Court of Appeal (which, at that time, was New Zealand's highest locally based court, with only the privy council above it in the hierarchy). The Court drew heavily on the work produced by the Waitangi Tribunal up to that point and characterised the treaty as a partnership. The Crown and Māori were the treaty partners, each with obligations to the other, similar to the obligations entailed in a private law partnership. Acting towards each other reasonably and with utmost good faith were central principles of the treaty partnership. The court described the Crown's obligations as similar to those

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that exist within a fiduciary relationship. Treaty principles involve a duty of active protection to reflect the Crown's promises in Article 2, which are expressed as positive guarantees. Furthermore, the court found that where treaty principles have been breached, some form of redress ought to be provided.

The basic principles as articulated in the *Lands* case were applied in a string of cases through the late 1980s and 1990s, many of them brought by the New Zealand Māori Council against the Attorney-General. The *Forests* case,[37] which follows directly from the *Lands* case, led to the establishment of the Crown Forestry Rental Trust, a major funder of treaty claims research, as part of an agreement that allowed the deregulation of the forestry sector to take place while protecting the ability of Māori to seek the return of Crown forest land as redress for well-founded treaty claims. The return of Crown forest land remains one of the few areas in which the Waitangi Tribunal has binding powers.

Over this period, the Court of Appeal also addressed treaty principles in the context of broadcasting, and the Crown's obligations in relation to the Māori language. In the *Radio Frequencies* case,[38] the Crown was required to wait for a relevant Waitangi Tribunal report, so that it could be fully appraised of the treaty interest, before completing a tender process for the allocation of radio frequencies. In the *Broadcasting Assets* case,[39] the privy council confirmed the general approach that the Court of Appeal had taken to the application of treaty principles up to that point and noted that the particular circumstances, such as the state of the subject-matter to be protected, would determine the action required by a reasonable treaty partner acting in good faith. For example, if the Māori language was in a fragile state and past Crown action had contributed to this, then there would be greater obligations on the Crown to take action to redress this.

Primarily, the courts treated these cases as orthodox judicial review applications. The reasoning generally rested on established principles of administrative law, addressing procedural issues such as whether all relevant considerations had been taken into account or whether a decision-maker had acted outside the scope of his or her powers. There are some suggestions that the president of the Court of Appeal at the time, Robin Cooke, viewed the treaty as creating something more like an independent constitutional ground of judicial review, but this was never fully supported by the majority of the court, though the privy council did suggest that a statutory incorporation of treaty principles required a heightened level of court scrutiny of administrative action.[40] In one case, however, the Court of Appeal did make a decision relating to the substance of an administrative decision. The *Ngai Tahu* or

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Whale-watching case related to the grant of concessions under the *Conservation Act,* which would permit a commercial whale-watching enterprise to operate off the east coast of the South Island. The court found that, all other things being equal, treaty principles required that the local *iwi* be given "a substantial degree of preference" when the Crown is determining whether or not to grant applications for whale-watching concessions in that area.[41]

Most of the leading treaty cases during this period focused on large-scale action by the Crown, often as a result of the massive re-organization of the state undertaken by the fourth Labour government. The decision in *Barton-Prescott v Director-General of Social Welfare* shows how treaty principles can affect rights as between individuals.[42] This case related to the custody of a child; the issue was whether the director-general of social welfare had exercised its powers appropriately in determining that the child ought to be placed outside of the family rather than with the child's grandmother. The Treaty of Waitangi was cited because the child was Māori; the grandmother argued that the child should have the opportunity to be raised among the culture of the family. Drawing on the same principle as *Huakina Development Trust,* the High Court found in this case that treaty principles were relevant, despite no explicit statutory reference. Because the treaty was so fundamental to New Zealand society, the court found that treaty principles ought to shape the interpretation of legislation that impacts upon treaty interests.[43]

Since the turn of the century, the focus of cases brought before the courts appears to have shifted to procedural aspects of the claims and the settlement process itself. A number of judicial review proceedings brought in recent years have challenged procedural determinations made by the Waitangi Tribunal.[44] In *Haronga v Waitangi Tribunal* (2011),[45] the Supreme Court took the unusual step of substituting its own decision on a matter relating to the tribunal's procedure, rather than simply returning the issue to the tribunal in order for it to decide the matter again. The key issue in the *Haronga* case was whether the tribunal had correctly exercised its powers when it declined to grant an urgent hearing into claims that a specific block of Crown forest land must be returned to a specific claimant group. Generally, the tribunal would have discretion as to whether it granted an urgent hearing into a particular claim. In this instance, the Supreme Court found that, because the substantive claim to the land had already been determined to be well-founded, and the exercise of the tribunal's binding powers was sought, the tribunal could not be said to have concluded its functions in relation to the claim until it had made a decision about whether it would issue binding orders for the resumption of the relevant land. After assessing the case, the Supreme Court decided that the Tribunal

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had no choice but to grant an urgent inquiry to address the question. The focus on the claims and settlement process is mirrored in the increasing number of Waitangi Tribunal reports that assess aspects of the Crown's policy and practice in this area against treaty principles.[46]

The most recent Supreme Court decision that addresses the application of treaty principles provides an interesting bookend to this line of cases. The *Mighty River Power* case effectively addresses the same issues that arose in the *Lands* case, only this time in relation to how Māori rights to water would be affected by the partial privatization of state-owned power-generation companies. The Crown had taken steps to sell its shares in these companies. Mighty River Power was to be the first company transformed from a wholly state-owned company to the new mixed-ownership model. The company used significant volumes of water for hydro-electric generation (as did other companies put forward for partial privatization). The New Zealand Māori Council raised concerns about how partial privatization might constrain the Crown's ability to provide appropriate recognition of Māori water rights. The council submitted a claim to the Waitangi Tribunal on this basis. The tribunal granted an urgent hearing into that claim and recommended that the Crown halt its partial privatization process until Māori interests and treaty rights in water could be properly explored. When the Crown proceeded to sell shares in Mighty River Power, the New Zealand Māori Council made an application to the High Court for judicial review.

The High Court comprehensively rejected the Māori Council's submissions, finding that the Crown's actions in this situation were not even required to be consistent with the treaty principles. Leave was sought to appeal this decision directly to the Supreme Court (leap-frogging the Court of Appeal). While the Supreme Court also found no grounds for judicial review, it did find, importantly, that treaty principles were relevant. This finding lent further support to the approach articulated in the 1987 *Lands* case. Significantly, a key part of the court's reasoning was that the Crown had given evidence that it was engaging with Māori to identify and recognize Māori water rights. The court suggested that the legal and political context in relation to the treaty had changed sufficiently since 1987 for Māori to now be confident that their treaty claims would be appropriately addressed. It is debatable whether such a change has in fact taken place, but in making such a statement, the court signalled that Māori could rely on the expectation that the Crown would not remove its ability to provide redress for treaty claims without ensuring a full understanding of the Māori rights that might be affected, and that there would be in place an appropriate protection mechanism.

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The Settlement Era

Since the 1990s, the Crown has been engaged in a comprehensive process of negotiations with Māori groups over redress for the settlement of historical claims.[47] For more than forty years, the Waitangi Tribunal has provided a forum in which claims under the Treaty of Waitangi can be heard. However, the systematic, comprehensive settlement of historical claims is a much younger process. In 1992, the New Zealand government agreed that officials should develop a set of principles to govern the settlement of historical treaty claims. These principles were developed in the context of the national settlement of all Māori claims to commercial fishing interests and, after being roundly rejected by Māori, were amended slightly and became official Crown policy in 1995. Settlements agreed to between the Crown and the major tribal groupings Ngāi Tahu and Waikato-Tainui in the mid-1990s further established the framework for the modern settlement process. The Crown had commenced negotiations with both Ngāi Tahu and Waikato-Tainui before the comprehensive settlement policy was formalised. Both settlements provided key benchmarks for all subsequent settlement negotiations. In 1994, the government established the Office of Treaty Settlements (OTS) within the Ministry of Justice. OTS grew out of the Ministry's Treaty of Waitangi Policy Unit, and its officials are the ones who engage in settlement negotiations with claimant groups. While there is a significant body of literature that examines the Waitangi Tribunal claims process, there is surprisingly little that addresses the mechanics of the settlement process. The relative lack of settlement process literature may be explained by the fact that the process is relatively young: arguably, too little time has elapsed to pass any insightful judgments on the settlement process itself. Perhaps, too, the private and essentially confidential nature of settlement negotiations has not resulted in the same sort of raw materials generated by the highly public Waitangi Tribunal hearings and reports. Or perhaps the Waitangi Tribunal is perceived to be a more innovative mechanism than the internationally tried and true process of pragmatic and political government deal-making that characterises the settlement process. Whatever the case, the Waitangi Tribunal has been the subject of significantly greater comment and analysis than has the settlement process.

Key issues identified in the settlement process relate to definitions of Māori identity and appropriate models of Māori social and corporate organization,[48] the importance of viewing treaty claims and settlement as merely part of a wider process of reconciliation and constitutional evolution (albeit an important part),[49] and the need to encourage mechanisms of law and policy that

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positively contribute to the relationships that underlie, and are articulated by, the Treaty of Waitangi.[50] Each of these has continued to be significant in the development and implementation of the treaty settlement process. Each also highlights some of the pressures exerted on Māori legal traditions by the settlement process.

Māori groups experience many frustrations with the settlement process, including the lack of genuine negotiation in many areas; the view that Crown policies relating to matters such as group identification and mandate are unnecessarily rigid; and the lack of attention paid to actual grievances and matters of justice, such as the particular circumstances of the community concerned and the nature of reparations necessary in their unique case.

Post-settlement governance has also proved to be a complex issue. Despite the fact that many Māori groups have already progressed through the settlement process and others are currently moving towards a settlement with the Crown, there is no uniform governance model for receiving and managing settlement assets – a model that could carry out the core responsibilities required and also be easily adapted to the particular needs of specific settling communities. Neither is there a standard mechanism for the resolution of disputes arising within settling groups (either between members or between members of the community and those charged with managing settlement assets) that would address the specific cultural practices and values of the settling community.

Overview of the Book

The first part of this book lays out important historical, theoretical, and conceptual background to the analysis of Māori law in the settlement process and also examines the nature of Māori legal traditions. This provides the context of the research and explores several fundamental principles that guide Māori legal traditions, offering a brief overview of Māori social organization as the foundation on which Māori legal traditions are based. It also outlines some important aspects of the operation of the system of tikanga, which encompasses Māori customary law. Five concepts central to the operation of Māori legal traditions have been identified in the work of anthropologists, legal writers, and Māori scholars:[51] These concepts are *whanaungatanga, manaakitanga, mana, tapu, and utu.* Detailed explanations of these concepts are set out in Chapter 2, but it is sufficient to note at this point that, collectively, these concepts speak to the nature of relationships, spirituality, and authority in the Māori world. These five central concepts and the key processes that derive

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from them together form the foundation of Māori legal traditions. This foundation has changed over time and continues to develop as a result of key tensions in Māori legal history.

I have used the idea of tension to capture the complexity and diversity of the development of Māori legal traditions, and to provide an analytical framework that suggests the broad shape (if not the precise detail) of the nature of Māori legal traditions over the period of the Treaty of Waitangi settlements. These tensions are not bound by chronological periods; in using them as a framework I avoid some of the more problematic aspects of periodization of histories of Indigenous peoples.

The idea of tension also avoids the appearance of uniformity (or near uniformity) that might be suggested in a discussion of Māori legal traditions according to theme. The existence of a tension implies that there is more than one perspective, strategy, or approach vying for attention at any given time. My intention is to convey the fact that there will always be a diversity of the types of change to which legal traditions are subject. By using the idea of tension to analyse Māori legal traditions, we see that the development of these traditions has not been – and is not currently – linear or uniform. Tensions are creative and produce dynamic change. By focusing on the tensions themselves, I hope to reveal some of the central concerns, strategies and modes of operation of Māori law. Once we understand something of the pressures placed on Māori legal traditions and the way those legal systems have developed in response, we can begin to understand the Māori legal context in which issues of post-settlement governance arise at the start of the twenty-first century.

The three tensions applicable to an examination of Treaty of Waitangi settlements are 1) adaptation (self-determined change vs. reactive change); 2) relationship to the treaty partner (engagement vs. disengagement with the state legal system); and 3) renewal (reinvigorating tikanga vs. losing relevance). These tensions are not completely separate from one another but, rather, coexist and overlap.

Alongside the tensions in Māori legal history, several key terms are used throughout this book to describe aspects and levels of Māori law and legal practice. The following definitions are employed:

- *tikanga* describes the right or correct way of doing things within Māori society. It is a system comprising practice, principles, process and procedures, and traditional knowledge. It encompasses Māori law but also includes ritual, custom, and spiritual and socio-political dimensions that go well beyond the legal domain.

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- "Māori legal tradition" is an aspect of tikanga that has a legal quality. This term includes Māori legal practice, Māori legal principles, Māori legal process and procedures, and Māori legal knowledge.
- "Māori legal systems" refer to the coherent systems that comprise Māori legal traditions. The plural form is used in order to reflect the existence of variations among different Māori communities.
- "Māori legal order" describes the fundamental values, institutions, and philosophical perspectives that underlie all Māori legal systems.

This terminology is consistent with that deployed by Harold Berman in his study of the Western legal tradition.[52] Like this book, Berman's study has a strong pluralist foundation. In the introduction to *Law and Revolution,* Berman argues that "[p]erhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems." He also notes that "[t]he same person might be subject to the ecclesiastical courts in one type of case, the king's court in another, his lord's court in a third, the manorial court in a fourth, a town court in a fifth, a merchants' court in a sixth."[53] Berman's terminology is particularly helpful in examining legal traditions in this pluralistic context. In *Legal Traditions of the World,* Patrick Glenn explores the concept and theory of "tradition" as it applies in a legal context. Glenn suggests that tradition can be seen as a means of capturing information from the past in a way that is meaningful for the present. Once understood in this way, traditions are not simply habitually repeated actions that remain fixed and unchanging.[54] When I write of Māori legal traditions, or use the term "traditional" in this book, I am establishing a link with practices and ideas that have been handed down from the ancestors; I do not intend to imply that anything "traditional" is static or somehow frozen in the past.

The second part of the book focuses on the treaty settlement process. Engagement in the settlement process has a significant impact on Māori communities. It can result in changes in leadership. Those in traditional leadership positions are not always the people chosen to speak for the community in the settlement process. The Crown conducts negotiations with only those representatives of the claimant community who can demonstrate that they hold a mandate from the community to engage in those negotiations. However, the Crown also requires that the mandate to negotiate be conferred through mechanisms such as a universal ballot of adult community members, a mechanism that owes more to Western liberal democratic processes than to any Māori legal traditions. The way leaders are chosen, as well as the means by which

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their authority is maintained, is also likely to differ from past practice. Collective community identity can also be affected. Community identity is often strengthened as community histories are researched, made more widely accessible, and validated through the settlement process. Choices about how to engage in the settlement process can sometimes change inter-iwi and intra-iwi relationships. Such matters are particularly significant in the New Zealand context, where there has been no history of state-imposed tribal registers, and where community affiliation has largely been a matter of self-identification coupled with recognition by the community itself. Despite this, experience to date indicates that iwi and hapū have continued to express their traditional ways of doing things, their customary law, both within the substance of settlement packages negotiated with the Crown and also within the constitutions of corporate governance entities established to manage settlement assets on behalf of the community. These changes to community identity and relationships, and other areas, have had significant effects on Māori legal traditions.

The very real danger for Māori and Māori legal traditions in interactions with the treaty settlement process is that the effects may represent an ongoing colonization of tikanga Māori rather than a healthy expression of tino rangatiratanga as part of a dynamic, living, legal culture. This book considers whether the effects of the settlement process on Māori legal traditions are consistent with the aims of the process and the aspirations of the iwi and hapū.

Key Tensions in Māori Legal History

The study of legal history has developed considerably in Aotearoa in recent years, but very little study has been done of Māori legal history, by historians, legal academics, or lawyers. Many people consider Māori legal history to be the study of the historical development of laws that relate to Māori. This approach derives primarily from the twin assumptions that Māori have had no distinct legal system historically and have no such system currently. As a consequence, the majority of New Zealand's legal-historical work does not take account of Māori law or Māori legal traditions. Neither do the majority of Māori histories engage in a legal-historical analysis. But a study confined to legislation and case law that affects Māori is in fact just a small part of this field. There are some notable exceptions to the norm: The research centre Te Mātāhauariki has done some excellent work on Māori customary law concepts, including the development of such concepts;[55] there has also been some very good legal-historical work on significant cases involving Māori or issues that particularly affect Māori.[56] Nevertheless, this work still only skirts the

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edges of the field of Māori legal history. An analytical framework structured around the three key tensions enables us to examine broad developments in Māori legal traditions.

Adaptation: Self-determined change vs. reactive change

It is difficult to distinguish between changes in Māori legal traditions that are self-determined and those forced upon the Māori legal order. All changes are responses to pressures on the Māori legal order; it can be challenging to discern precisely which pressures are due to the self-determining actions of Māori communities and which are due to external forces – and which are due to a mixture of both of these. Arguably, every change to Māori legal traditions is intended to maximize the self-determination of Māori communities. Nevertheless, it is useful to consider the range of adaptive changes that can occur and the tensions that exist between different types of adaptive change. How Māori legal traditions adapt is determined by the nature of the pressures exerted upon them, including whether such pressures are internally or externally generated. The clearest example of the divide between internally generated pressures and externally generated pressures can be seen in 1) the changes in Māori legal traditions that resulted from Māori migration to Aotearoa and settlement there and 2) the changes to Māori legal traditions that are primarily responses to later colonization. This tension is not simply about pre-contact and post-contact developments, however. Māori legal traditions respond to changes to Māori society initiated by Māori communities themselves, even as they experience change in response to external variables. Conversely, pre-contact Māori society was forced to respond reactively to a range of factors (including environmental conditions) beyond its control, which resulted in significant changes to Māori legal traditions. This tension is an important consideration in the context of this book because self-determination is a central concern of Māori involved in the treaty settlement process. It will be helpful to identify the types of changes that indicate that communities are in control of the development of their legal traditions. In particular, our attention should be focused on the following two questions:

a) Are the changes to Māori legal traditions resulting from the treaty settlement process self-determined changes or reactive changes?
b) What does this tell us about the effectiveness of the settlement process in reaching goals of tino rangatiratanga and reconciliation?

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Relationship to the Treaty Partner: Engagement vs. disengagement

The relationship between Māori legal traditions and the state legal system has been reasonably well documented. Strategies of engagement and disengagement have been employed by Māori communities, for as long as the treaty relationship has existed, in their attempts to retain the authority to regulate themselves. Over the history of the treaty relationship, one can see Māori engagement (and sometimes disengagement) with the specific institutions of the colonial parliament and government.[57] Various models of engagement have been deployed by Māori legal institutions at various points in time.[58] The common law has responded (though not always positively) to Māori engagement whenever it has occurred.[59]

Renewal: Reinvigorating tikanga vs. losing relevance

There is also tension between the desire on the part of some to reinvigorate Māori legal traditions and the wish on the part of others to set aside Māori legal traditions, based on the view that they are irrelevant to public life. This tension is perhaps most obvious in the deliberate choices made by Māori communities as they move through the treaty settlement process and establish post-settlement governance entities. Designing a constitution for a post-settlement governance entity requires that the settling community consider how and to what extent it wishes to see its legal traditions reflected in that constitution. In some instances, Māori legal traditions are reasserted, perhaps adapted to ensure they are relevant when confronted by the challenges of governance in the twenty-first century. In some cases, a deliberate choice is made to discard a particular legal tradition when it is seen to be no longer relevant, or perhaps when other options are perceived to better serve the needs of the settling community.

Tino Rangatiratanga and Māori-centred Research

Another important part of the framework of this research is the concept of tino rangatiratanga and its relevance for Māori-centred research. Tino rangatiratanga is the Māori concept of self-determination and autonomy; it has been described as comparable to the Western concept of sovereignty.[60] The idea of tino rangatiratanga is not only at the heart of the treaty settlement process but infuses Māori-centred scholarship. Although tino rangatiratanga is a distinctively Māori concept, self-determination is recognized as an important political

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objective by many Indigenous scholars who have articulated Indigenous approaches to research. Taiaiake Alfred, for example, has described an ethic of "warrior scholarship" that aims to contend with instances of colonial power expressed in academic or scholarly sites.[61] Indigenous self-determination underlies the ethic of warrior scholarship, which, according to Alfred, requires Indigenous scholars to honour Indigenous knowledge, confront false claims of legitimacy, and "fight for political independences in the face of state sovereignty."[62] Similarly, Dale Turner draws a philosophical connection between research/scholarship and "the legal and political discourses of the state."[63] Turner goes on to suggest that a "critical Indigenous philosophy must unpack the colonial framework of these discourses, assert and defend our 'indigeneity' within the dominant culture, and defend the legal and political integrity of Indigenous communities."[64]

The political objective of self-determination, which scholars such as Alfred and Turner perceive to be an inherent part of Indigenous-centred research, is expressed in the Māori worldview as tino rangatiratanga. Tino rangatiratanga is the concept used in the 1840 Treaty of Waitangi to reflect the authority of the Māori signatories, which the British Crown guaranteed would be recognized, notwithstanding the establishment of colonial government. The concept has a long history in the structure of the political relationship between Māori and the Crown.

As the Treaty of Waitangi settlement process and the treaty itself frame the subject of this book, the political objectives of tino rangatiratanga are central to the theme. When we consider how the settlement process has shaped Maori legal traditions, we also consider how these changes have contributed to or compromised tino rangatiratanga. The underlying aim of this book is to prompt changes in the political and legal discourse to open up space for the expression of tino rangatiratanga through the recognition of Māori legal systems in a way that is meaningful to Māori communities.

Within the Māori worldview, kinship relations animate tino rangatiratanga. The fundamental organizing principle of Māori philosophy is whakapapa (genealogy), supported by the associated concepts of *whānau* (extended families) and *whanaungatanga* (relationships). Māori theologian and philosopher Māori Marsden has described the importance of whakapapa to Māori philosophy and knowledge systems. He notes that all peoples create maps and models as a means of understanding and representing the world. Māori use whakapapa as the organizing model. That is to say that the symbols used by Māori to label, identify, and represent phenomena are based on genealogical forms, which are the basis for Māori philosophy and understanding of the world.[65]

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Whakapapa is fundamentally about connections[66]: "Whakapapa turns the universe into a moral space where all things great and small are interconnected, including science and research."[67] Ultimately, whakapapa establishes the relationships between each person and the world around him or her.[68] Māori businesswoman and former politician Donna Awatere states that, in the Māori world, all one's relationships with others are dependent on one's own identity and whakapapa. One's relationships with one's ancestors are understood as being ongoing, and the source of how one defines one's place in the world.[69]

As a consequence of the centrality of whakapapa within Māori philosophy, the associated concepts of whānau and whanaungatanga also require careful consideration. For example, my identity as a member of the iwi Ngāti Kahungunu is reflected in the stories woven throughout this book. Ngāti Kahungunu is the third largest iwi by population. The 2013 census figures show that a little more than 60,000 people identify as members of Ngāti Kahungunu, which is approximately 9 per cent of the total Māori population. Ngāti Kahungunu also has a relatively large traditional territory, covering the southern half of the east coast of the North Island of New Zealand. My family is from the northern part of this territory; our *marae* (central community space/complex), named Takitimu after the great canoe, is in the small town of Wairoa, which lies between the cities of Napier and Gisborne. My hapū is Ngai Te Apatu, and we describe where we come from with reference to the river Te Wairoa Hōpūpū Hōnengenenge Matangirau and the mountain Whakapūnake. We also see ourselves as intrinsically connected to these important landscape features.

This introductory chapter has outlined some of the important background to the Treaty settlement process. Some key terms and concepts that are central to the analysis in this book have also been introduced here. This chapter has also addressed the way in which political aspirations of tino rangatiratanga have informed my approach to this research.

The next chapter builds on the foundations laid out in Chapter 1, developing the framework for an analysis of Māori legal traditions in the treaty settlement process. It explores concepts from legal pluralism and Indigenous legal theory, as well as concepts in Māori philosophy of law, and then constructs a theoretical platform for further research. I discuss the nature of Indigenous self-determination and reconciliation, which can be seen as the two underlying objectives of the treaty settlement process.

Chapter 3 provides a brief historical overview of the development of Māori legal traditions. First, I provide the reader with a sense of the way that Māori

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law operates – how it "channels behaviour by regulation, prevention and 'cleaning up social mess.'"[70] Second, I draw attention to the three key tensions in Māori legal history that have contributed to significant developments within Māori legal traditions. Here, I discuss some of the effects on Māori legal traditions of Māori encounters with the New Zealand state. My intention is to provide a picture, albeit one painted with a relatively broad brush, of Māori legal traditions at the end of the twentieth century, as the comprehensive treaty settlement process takes shape.

The implementation of a comprehensive treaty settlement policy introduces a new set of challenges as Māori legal traditions move into the new millennium. Chapter 4 provides a detailed account of the treaty settlement process, the types of settlement agreements that have been reached, and the models of Māori governance emerging out of this process. I identify the governance aspect of settlement as a key issue because it reflects the process of re-grouping that is being undertaken by Māori communities as they strengthen themselves, build their capacity for self-determination, and develop modern Indigenous solutions and institutions.

Chapter 5 considers more directly the effects of the treaty settlement process on Māori legal traditions. Engagement in the settlement process has a significant impact on Māori communities, particularly around issues related to community governance. The chapter focuses on the effects of the Treaty of Waitangi settlement process in three broad categories: 1) Māori law-making, 2) Māori dispute resolution processes, and 3) the content of Māori law. I re-identify key tensions in Māori legal history and then examine the effects of the settlement process on each of these three aspects of Māori legal traditions.

Finally, Chapter 6 evaluates the changes to Māori legal traditions that have resulted from the treaty settlement process in terms of how these changes have contributed – or not – towards reconciliation and tino rangatiratanga. I argue that the treaty settlement process is undermining goals of self-determination/tino rangatiratanga and reconciliation, at least with respect to Māori legal traditions. I also suggest, however, that it is possible to change that narrative. By focusing on Māori legal traditions in the settlement process, we can re-story the process and move towards tino rangatiratanga and reconciliation, with the vision of realizing the mutually beneficial relationships expressed in the Treaty of Waitangi.

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