

# **The Extension of the Common Law to Settled, Ceded and Conquered Territories, and the Survival of Indigenous Laws, With Particular Reference to New Zealand**

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## **I Introduction**

In classical international law, there were five modes of acquisition of territory. These were the occupation of *terra nullius* (uninhabited territory<sup>2</sup>), prescription (effective control over inhabited territory), cession, accretion (the acquisition of title over new land), and subjugation or conquest.<sup>3</sup> All were based on Roman law principles, and were often difficult to apply in practice. The common law, and British practice, generally mirrored the international law. Only cession, and occupation or settlement are arguably relevant to the Australasian situation, and prescription, accretion and conquest will not be further considered here.<sup>4</sup>

This paper begins with a review of the position of pre-existing indigenous laws in these situations. It will then examine the distinctions which have been drawn between settled and ceded colonies. The New Zealand position is then evaluated. This involves an evaluation of the status of the Treaty of Waitangi in international law, and the mechanism of the assumption of British sovereignty in 1840. The subsequent treatment of indigenous laws is then assessed.

## **II The position of pre-existing indigenous laws**

The application of more than one legal system within one jurisdiction was alien to the common law.<sup>5</sup> But it was not unusual for more than one legal system to co-exist. The Romans distinguished between the personal rights of Roman citizens (the *ius civile*), and the law of nations, applied in Roman courts to both Romans and foreigners in their interrelationships in both public and private law.<sup>6</sup> The basis of common law acceptance of aboriginal title is not apparently found in concepts of natural law. Its origins, like so much imperial constitutional law, lay in practice.<sup>7</sup>

When Britain colonised other parts of the world it introduced its own concept of law. But the general introduction of English law did not completely displace whatever had been pre-existing laws.<sup>8</sup> In each country English law existed side by side with local law- or in some cases the law introduced by earlier colonisers.<sup>9</sup>

However the Crown acquired sovereignty, property rights survived except where expressly confiscated by act of State before or simultaneously with the acquisition of sovereignty.<sup>10</sup> This continuity doctrine is now accepted<sup>11</sup> in preference to the earlier recognition doctrine, which held that the Crown was bound only by such pre-existing aboriginal rights as it chose to recognise.<sup>12</sup> A formidable body of authority was cited in *Mabo v Queensland (No 2)*<sup>13</sup> to support the claim that pre-existing indigenous laws were extinguished upon colonisation, unless expressly recognised.<sup>14</sup> But the court accepted that the strong assumption of the common law was that interests in property which existed under native law or custom were not obliterated by the act of State establishing a new British colony but were preserved and protected by the domestic law of the colony after

its establishment.<sup>15</sup> The consistent practice of the Crown from the sixteenth century had been the recognition of some juridical status in the non-European societies or those described at various times as “infidel” or “uncivilised”.<sup>16</sup>

The pre-existing laws of a civilised society survived generally,<sup>17</sup> subject to the requirement as to justice and morality. But the application of the rule was not always clear. Thus in settled colonies it was very doubtful whether the customary criminal law survived,<sup>18</sup> though family law was generally held or assumed to have survived even in settled colonies.<sup>19</sup> Thus the nature of a colony, be it settled or conquered, principally determined the relationship between Crown and subject, rather than private law.

### III Settled Colonies

The classic distinction, representing the common law doctrine of the seventeenth and eighteenth centuries, though never entirely consonant with the facts and much altered in its application and shorn of its importance by subsequent legislation, is that between settled and conquered or ceded colonies.<sup>20</sup> It differentiates colonies which had been added to the empire by the migration thither of British subjects, who had entered into occupation of lands previously uninhabited or at least not governed by any civilised power, and therefore not subject to any civilised legal system, and those which had been acquired by conquest or cession from some recognised power hitherto capable of governing and defending it.

The legal situation of the inhabitants of a settled colony presents one important initial difference from that of the inhabitants of a conquered colony. The former carry with them the law of England so far as applicable to the conditions of the infant colony, and they continue to enjoy as part of the law of England all their public rights as subjects of the British Crown.<sup>21</sup>

In colonies which were not settled, but where there were settlers, the common law did not apply automatically. It had to be applied by the prerogative or legislative action. Equally, where there was no civilised system of law the colony received the common law, though it was not necessarily a settled colony in the strict meaning of this term, and this application had again to be deliberate.

The original relatively clear distinction between deserted and uninhabited territories (which could be settled), and those which were inhabited (which could be acquired only by conquest or cession), was eroded after the American Revolution. It was clear that certain types of territory were without doubt *terra nullius*, such as uninhabited areas, abandoned territories, and areas inhabited by relatively few people totally lacking in any kind of social or political organisation. But it was less certain where the territory was inhabited by recognisable political entities.<sup>22</sup>

Three principal hypotheses were advanced. The first, supported by some of the early exponents of international law,<sup>23</sup> was that such people possessed sovereign rights. As a consequence, the acquisition of sovereignty over the lands of such people depended upon the concept of conquest not occupation.

Blackstone was unable to declare any rule by which the laws of England became the laws of a territory which was not a “desert uninhabited” country when the Crown acquired sovereignty over that territory by discovery and occupation as *terra nullius*.<sup>24</sup>

The second theory was that people could exercise sovereign rights in certain circumstances only. Vattel, at the end of the eighteenth century, extended *terra nullius*, to inhabited territory which was uncultivated by indigenous inhabitants.<sup>25</sup> Wandering tribes could lose to colonists land which was in excess of their requirements.<sup>26</sup>

The third theory, which tended to dominate in the later part of the nineteenth century, was that organised tribes in non-European territories had no sovereign title and therefore the land was regarded as *terra nullius*.<sup>27</sup> It became accepted that colonies occupied by a tribal society could be ‘settled’.<sup>28</sup> New Zealand has been cited as the example per excellence of this trend towards a legal fiction of a *terra nullius*, where it was not uninhabited, but there was no civilised government recognised by international law.

When colonists settled inhabited parts of the world the view taken was that for the purposes of municipal law that territory (though inhabited) could be treated as a “desert uninhabited” country.<sup>29</sup> This was on the basis that there was no local law already in existence in the territory, so the law of England became the law of the territory, and not merely the personal law of the colonists.

Since the High Court of Australia decision in *Mabo v Queensland (No 2)*<sup>30</sup> there is now no link between the concept of the settled colony and sparsely populated territory conceived (until that case) as *terra nullius*. *Mabo* re-iterated the common law presumption of the recognition of pre-existing indigenous laws. Indeed, *terra nullius* was not a term widely used in common law literature, or case law, and belonged rather to the Roman law tradition.

#### **IV Ceded**

A territory which began its imperial connection through conquest or cession was in an altogether different position, in respect of the subjects rights against the Crown, from settled colonies. Its inhabitants are at the outset rightless as against the Crown. In dealing with them the Crown, though no doubt morally bound by the terms of cession, possesses the plenitude of power and might make what arrangements it pleased. It might continue to govern them permanently by prerogative Orders in Council. Colonies ceded by a civilised state retained their own private law, but public law was created by the Crown.<sup>31</sup>

Almost invariably the acquisition of the territories of indigenous peoples was obtained by cession, accompanied by treaties in which the inhabitants’ entitlement to the continued occupation of the territory was declared.<sup>32</sup> This practice implies, by definition, that the territorial sovereignty and/or property rights of the inhabitants was recognised.<sup>33</sup> In practice, after establishment, the survival of pre-existing private law in both settled and ceded colonies depended largely upon its sophistication.

#### **V The Treaty of Waitangi as a valid treaty in international law**

New Zealand was, from the beginning, administered as a Crown colony.<sup>34</sup> New Zealand was held to be a settled colony, though not without difficulty.<sup>35</sup> From the

contemporary British perspective this was a treaty of cession which allowed for settlement and for the purchase of land.<sup>36</sup> However, because the chiefs actually had little formal law, and because of the direct proclamation of sovereignty over the South Island, New Zealand was treated thereafter as a settled colony.<sup>37</sup>

There can also be little doubt that the negotiation of the Treaty of Waitangi presupposed the legal and political capacity of the chiefs of New Zealand to make some form of internationally valid agreement.<sup>38</sup> Moreover, there is evidence that in the decade prior to the conclusion of the Treaty the British Government conducted itself on the basis that relations with the Maori tribes were governed by the rules of international law,<sup>39</sup> and therefore bound at least morally by the terms of a treaty of cession.<sup>40</sup> The fact that developments in international law doctrine subsequently denied treaty-making capacity to what were described as “Native chiefs and Peoples”<sup>41</sup> is immaterial.

If the Treaty of Waitangi were a valid international treaty, its very execution served to extinguish the separate legal identity of the sovereign chiefs, and brought questions of its implementation to the plane of domestic law.<sup>42</sup> New Zealand would then be regarded as a ceded territory, and its pre-existing laws subject to abolition or amendment by the Crown.<sup>43</sup> If it were not a valid international treaty, its application remained a matter for domestic law.<sup>44</sup> In both cases it depended upon the good faith of the Crown that the provisions of the Treaty were upheld. In either place the indigenous laws survived the survival of the common law. They were not extinguished, except in so far as they were barbarous.

## **VI Assumption of sovereignty**

Scholars continue to differ as to the date of assumption of British sovereignty over New Zealand.<sup>45</sup> The actual means of obtaining sovereignty is also disputed. Swainson, the Attorney-General at the time in question, thought that sovereignty was partly by cession, and that conquest had not occurred, nor usurpation.<sup>46</sup> The Colonial Office, in rejecting Swainson’s view, held that the New South Wales Charter of 16 November 1840 was the legal basis of sovereignty.<sup>47</sup> But the legal foundation of New Zealand as a separate colony can be ascertained with some certainty.<sup>48</sup>

Captain James Cook, Royal Navy, had taken possession of the North Island on 15 November 1769, and the South Island on 16 January 1770.<sup>49</sup> New Zealand had been held to have been constituted a part of the Colony of New South Wales by an Order in Council in 1786 and the first Governor’s Commission for that colony,<sup>50</sup> although this is a rather strained interpretation of the actual authority enjoyed by the government in Sydney.<sup>51</sup> In practice, the British Government declined to exercise jurisdiction in New Zealand.

But circumstances were later to require greater official British involvement in New Zealand. In 1831 thirteen chiefs from Kerikeri petitioned King William IV for protection against the French. As a result of this, and to curb the conduct of visiting ships’ crews and round up runaway convicts, in 1833 James Busby was appointed British Resident in Waitangi, with the local rank of vice-consul.

Busby encouraged the Declaration of Independence by 35 northern chiefs in 1835, in an attempt to thwart the move by Charles de Thierry, the self-styled “Sovereign Chief of New Zealand and King of Nuhuhia”, to set up his own government.<sup>52</sup> The Declaration

of Independence of the United Tribes of Aotearoa in 1835 may have been “politically unsustainable, practically unworkable, and culturally inconceivable”.<sup>53</sup> But for those tribes who signed, the Declaration meant that henceforth the British king was honour-bound to recognise and protect their independence.<sup>54</sup>

Lord Glenelg, in a memorandum of 15 December 1837, made clear the British Government’s recognition of New Zealand’s independence.<sup>55</sup>

His reasoning shows a clear Blackstonian influence. It was only with great reluctance that the Colonial Office changed its policy in the face of overwhelming necessity, to one of British annexation.<sup>56</sup> The acknowledgement of an independent status was more grudging in the final instructions to Captain William Hobson, Royal Navy.<sup>57</sup> The Marquess of Normanby was prepared to depart from the former policy with extreme reluctance.<sup>58</sup> He felt that annexation with the consent of the natives- cession- would be their best protection.<sup>59</sup>

Hobson was instructed to take possession of the country only with the consent of the Maori chiefs. The Treaty of Waitangi was the immediate instrument by which this was to be achieved. As chiefs signed, so local proclamations of British sovereignty were issued, although no formal proclamation of sovereignty over the northern districts was ever issued, as Hobson had to leave for the south in order to control the New Zealand Company settlers in Wellington.

As a result of reports that the New Zealand Company settlers in Wellington (then called Port Nicholson) had issued their own constitution, and had set up a government, Hobson on 21 May 1840 issued two proclamations of full sovereignty over all of New Zealand, which were published in the London Gazette on 2 October 1840.<sup>60</sup> The first was in respect of the North Island, and was based on cession by virtue of the Treaty of Waitangi.<sup>61</sup> The second proclamation related to the South Island (then called Middle Island) and Stewart Island. The proclamations of 21 May were probably effective in showing that New Zealand was a colony by act of State.<sup>62</sup>

The contemporary view was uncertain, as so much of constitutional law was and is. But perhaps it is best to accept that legal authority was acquired by the Crown by discovery and settlement, as had been given as the reason for the English Laws Act 1858<sup>63</sup>. But this was intended by the imperial government to be with the consent of the Maori chiefs, and the chiefs accepted it on that basis. This dual basis for the acquisition of authority led inevitably to future conflict, and remains central to our constitution.<sup>64</sup>

In both settlement and cession pre-existing laws were presumed to survive. In settled colonies as personal laws and property rights, in ceded colonies as private law for the native population. In practice after 1840 Maori laws did not survive as private law. But the Treaty of Waitangi itself guaranteed their property rights, and at least in some respects Maori law survived as personal law, such as adoption. It was not mere custom, but custom recognised as law by the common law.

## **VII Treatment of indigenous laws after 1840**

Where there was no civilised system of law the colony received the common law, though it was not strictly a settled colony, and this application had to be deliberate. New Zealand was treated as a settled colony after 1840,<sup>65</sup> though in strict law it was not clearly such (at least so far as the North Island was concerned).<sup>66</sup>

There was indeed some uncertainty as to the application of English law after 1840, leading to the English Law Act 1854, and in particular the English Law Act 1858<sup>67</sup> (later consolidated in the English Law Act 1908, and now replaced by the Imperial Laws Application Act 1988). These combined to provide that the law of England as of 14 January 1840 applied in New Zealand. This was the date that Sir George Gipps, Governor of New South Wales, swore Captain William Hobson, Royal Navy, as his lieutenant-governor and consul, and signed proclamations relating to title to land in New Zealand.<sup>68</sup> This ought not to have affected pre-existing Maori property rights.

Unfortunately for the Maori, the practice of the colonial government, to whom the Imperial authorities increasingly sought to transfer responsibility, was one of widespread disregard for the spirit, if not the terms, of the Treaty after 1840.<sup>69</sup>

The British side thought that the chiefs were making a meaningful recognition of the Queen and of the concept of national sovereignty, in return for the recognition of their rights of property.<sup>70</sup> In contrast, Williams has argued that the Maori text connoted a covenant partnership between the Crown and Maori, rather than an absolute cession of sovereignty,<sup>71</sup> though this may be a strained interpretation.<sup>72</sup> But it is likely that the chiefs did not anticipate that the Treaty would have such far-reaching consequences for them. But claims of legitimacy founded in a completely different value system will be so unclear as to be nearly impossible to distinguish.<sup>73</sup>

In the absence of a voluntary cession of full sovereignty the legitimacy of colonial rule could only be validated over time through the habit of obedience,<sup>74</sup> or legal sovereignty.<sup>75</sup> This approach is based upon European legal concepts, something which has been criticised by some Maori academics.<sup>76</sup> However, legitimation by effectiveness and durability of even a revolutionary assumption of power is a well understood principle of law,<sup>77</sup> even amongst the early Maori.<sup>78</sup>

But the question of the survival of native customary law was more important. As a settled colony, public and private law alike were the common law. Native laws would survive, subject to alteration. Had New Zealand been a ceded colony the common law would have had to be deliberately introduced. Although regarded as a settled colony, this distinction made little practical difference, as the laws of England were expressly declared to be the common law of New Zealand by the English Laws Act 1858.<sup>79</sup>

In practice, Maori customary law was largely supplanted by English law after 1840. This came about largely through the establishment of courts throughout the country, courts to which Maori and non-Maori alike had access. Maori benefitted from this system of courts, and took advantage of them, to the detriment of their own legal system. This development mirrored the extension of English common law in India, which grew from the Mayor's Courts established after 1726. Although the New Zealand Constitution Act 1846 (UK)<sup>80</sup> required the enforcement of Maori laws, customs, and usages, such enforcement was to be in European, rather than Maori courts.

The New Zealand Constitution Act 1852<sup>81</sup> enacts that

It shall be lawful for Her Majesty, by any letters patent to be issued under the great seal of the United Kingdom, from time to time to make provision for the purposes aforesaid, any repugnancy of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.<sup>82</sup>

Section 71 of the New Zealand Constitution Act 1852<sup>83</sup> is merely permissive. There is no requirement that the “laws, customs, and usages of the aboriginal or native inhabitants of New Zealand” be preserved by letters patent. This does not necessarily mean that these “laws, customs, and usages” could not survive without the issue of these letters patent. But the attitude of the colonial government was not favourable to the recognition of any native laws or customs. All were assumed to be superseded by the common law.

Disruption caused by settlement, and the later wars, also contributed to the decline of a Maori legal order. The attitude of the colonial courts was also unsympathetic to the survival, or even the recognition, of Maori customary law.<sup>84</sup> In *R v Symonds*<sup>85</sup> Martin CJ and Chapman J followed a natural law based interpretation of aboriginal title, as applied by Maxwell CJ in the United States Supreme Court in *Johnson v McIntosh*.<sup>86</sup> This approach permitted the acknowledgement of the legal reality of aboriginal title, while admitting the limitations imposed on that title by the doctrine of sovereign pre-emption.

In contrast, in *Wi Parata v Bishop of Wellington*,<sup>87</sup> Prendergast CJ rejected any Maori customary land title, in a judgement confusing title to property, and sovereignty. In *Rira Peti v Ngaraihi te Paku*<sup>88</sup> the Supreme Court declined to recognise Maori marriage laws. For many years New Zealand courts followed this lead.<sup>89</sup> But the Privy Council, taking a broader view, recognised the Maori customary law of adoption, in *Hineiti Rirerire Arami v Public Trustee*,<sup>90</sup> and native customary land title, in *Nireaha Tamaki*.<sup>91</sup> Regrettably, *Hohepa Wi Neera v Bishop of Wellington*<sup>92</sup> showed that the New Zealand Court of Appeal was little inclined to defer to the Privy Council in this matter. When in *Wallis v Solicitor-General*<sup>93</sup> the Privy Council again made clear its belief in the survival of Maori customary title, the New Zealand legal profession responded with the remarkable “Protest of Bench and Bar”.<sup>94</sup>

It was not until the 1980s that *Wi Parata* was directly challenged. In 1986 Williamson J recognised Maori customary fishing rights in *Te weehi v Regional Fisheries Officer*.<sup>95</sup> Since then Maori customary title has been argued, successfully, in a number of cases- and the status of the Treaty of Waitangi re-affirmed.<sup>96</sup> The position now is that New Zealand recognises this law as personal private law.

## VIII Conclusion

New Zealand was held to be a settled colony, under the doctrine of *terra nullius*. An increasing willingness to acknowledge, and recognise, pre-colonial indigenous laws means that New Zealand would probable now be classified as having been a colony by

cession rather than by settlement. Yet the only practical consequence of this would be that the Maori in 1840 were without rights except such as were accorded by the Crown, and that the common law would only extend by deliberate act- as by the English Laws Act 1858.<sup>97</sup> Yet the Treaty of Waitangi itself included the provision that Maori were to be treated as British subjects. But in terms of private law, ‘the ancient laws of the country remain, unless they are against the law of God, as in the case of infidel countries’.<sup>98</sup> It may be seen that the Treaty of Waitangi was also intended to preserve the pre-existing rights of the indigenous inhabitants, something which the common law was generally disposed to do even in settled colonies.

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<sup>2</sup>A land without a settled population, which therefore could have no laws nor legal rights (as of ownership) except that imposed upon the acquisition of sovereignty; Paul McHugh, “Aboriginal Rights of the New Zealand Maori at common law” (1987) University of Cambridge PhD thesis 137-142.

<sup>3</sup>The validity of the last is now questionable, in light of Article 2 (4) of the Charter of the United Nations, and parallel developments in international law.

<sup>4</sup>Elizabeth Evatt, “The Acquisition of Territory in Australia and New Zealand” in CH Alexandrowicz (ed), *Studies in the history of the law of nations* (1970) Grotian Society papers 1968.

<sup>5</sup>*Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 per Lord Mansfield, CJ (KB), following Coke J in the *Case of the Postnati* (1608).

<sup>6</sup>Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History* (2<sup>nd</sup> ed 1973) 76ff.

<sup>7</sup>Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 CBRev 727, 737, drawing on the judgement of Strong J in *St Catharines Milling and Lumber Co v The Queen* (1887) 13 SCR 577, 607-616.

<sup>8</sup>*R v Vaughan* (1769) 4 Burr 2494; 98 ER 308, 311; *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045; Paul McHugh, “Aboriginal Rights of the New Zealand Maori at common law” (1987) University of Cambridge PhD thesis 164-166; George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* (1814) vol 1, p 203 (Law Officers’ Opinion of 1724).

<sup>9</sup>Scotland, whilst part of the United Kingdom, enjoys a substantial degree of influence of Roman civil law, in particular in land and contract. Criminal law jurisprudence is based on the common law, however.

<sup>10</sup>Kent McNeil, *Common Law Aboriginal Title* (1989) 165-179.

<sup>11</sup>*Mabo v Queensland (No 2)* (1992) 175 CLR 1. Native title to land survive the Crown’s acquisition of sovereignty and radical title, but the native title was exposed to extinguishment by valid exercise of sovereign power inconsistent with the continued right to enjoy native title.

<sup>12</sup>For example, see *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR51 India Appeals 357.

<sup>13</sup>(1992) 175 CLR 1.



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<sup>14</sup>*Secretary of State for India v Bai Rajbai* (1915) LR42 Ind App 229, 237, 238-239; *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR51 Ind App 357, 360, 361; *Secretary of State for India v Sardar Rustam Khan* [1941] AC 356, 370-372.

<sup>15</sup>*In re Southern Rhodesia* [1919] AC 211 (PC); *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 880; [1957] 2 All ER 788 (PC).

<sup>16</sup>Paul McHugh, “Aboriginal Rights of the New Zealand Maori at common law” (1987) University of Cambridge PhD thesis 62.

<sup>17</sup>*In re Southern Rhodesia* [1919] AC 211, 233-234 (PC).

<sup>18</sup>*Walker v New South Wales* (1994) 182 CLR 45 (HCA).

<sup>19</sup>Kent McNeil, *Common Law Aboriginal Title* (1989) 181.

<sup>20</sup>*Blankard v Gally* (1693) Holt 341; 90 ER 1089 (KB). The doctrine came too late to apply retrospectively to the American colonies, despite the insistence otherwise by colonial constitutionalists; Paul McHugh, “Aboriginal Rights of the New Zealand Maori at common law” (1987) University of Cambridge PhD thesis 123-132. It was only really clear after *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 per Lord Mansfield, CJ (KB).

<sup>21</sup>*Pictou Municipality v Geldert* [1893] AC 524; *Cooper v Stuart* (1889) 14 App Cas 286.

<sup>22</sup>Malcolm Shaw, *Title to Territory in Africa* (1985) 31.

<sup>23</sup>Vitoria, Soto, La Casas, Ayala, Gentilis, Selden, Grotius; Sir Mark Lindley, *The Acquisition and Government of Backward Territories in International Law* (1969, reprint of 1926 edition) 12-14.

<sup>24</sup>*Mabo v Queensland (No 2)* (1992) 175 CLR 1, 34 per Brennan J.

<sup>25</sup>Emmerich de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle* trans Charles G Fenwick (1916 facsimile of 1797 ed) Bk I, pp 37-38, 85-86, 100-101.

<sup>26</sup>Sir Mark Lindley, *The Acquisition and Government of Backward Territories in International Law* (1969, reprint of 1926 edition) 17.

<sup>27</sup>John Westlake, *International Law* (1904-1907).

<sup>28</sup>Paul McHugh, “Aboriginal Rights of the New Zealand Maori at common law” (1987) University of Cambridge PhD thesis 137-142.

<sup>29</sup>*Mabo v Queensland (No 2)* (1992) 175 CLR 1, 36 per Brennan J.

<sup>30</sup>(1992) 175 CLR 1.

<sup>31</sup>*Sammut v Strickland* [1938] AC 678, 701 (PC); *Campbell v Hall* (1774) 1 Cowp 204; 20 State Tr 239, 328-9; 98 ER 1045 (KB).

<sup>32</sup>Frederika Hackhsaw, “Nineteenth Century Notion of Aboriginal Title” in Sir Hugh Kawharu, (ed), *Waitangi* (1989) 92. See Sir Mark Lindley, *The Acquisition and Government of Backward Territories in International Law* (1969, reprint of 1926 edition).

<sup>33</sup>See a discussion of the dichotomy of nineteenth century theory and practice, see Paul McHugh, “Constitutional Myths and the Treaty of Waitangi” [1991] NZLJ 316.

<sup>34</sup>SL Cheyne, “Search for a constitution” (1975) University of Otago PhD thesis.

<sup>35</sup>See the *Report of the Privy Council on the project of a Bill for the better government of the Australian Colonies*, dated 1 May 1849; *R v Symonds* (1847) NZPCC 387 (SC). See also the English Laws Act 1858 and s 5 of the Imperial Laws Application Act 1988.

<sup>36</sup>Ian Brownlie, *Treaties and Indigenous Peoples* ed FM Brookfield (1992) 12.

<sup>37</sup>*Phillips v Eyre* (1870) LR 6 QB 1 per Willes J (Exch Ch).

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<sup>38</sup>Examples where treaties with native peoples were regarded as binding in international law include those with the Cherokees, 20 September 1730; J Almon, *A Collection of all the Treaties of Peace* (1772) vol 2, p 13; J Dumont, *Corps universal diplomatique de droit des gens* (1726-32) vol 8 part 2 p 162.

<sup>39</sup>HA Smith (ed), *Great Britain and the Law of Nations* (1932) vol 1, p 131; Ian Brownlie, *Treaties and Indigenous Peoples* ed FM Brookfield (1992) 11.

<sup>40</sup>Paul McHugh, "Aboriginal Rights of the New Zealand Maori at common law" (1987) University of Cambridge PhD thesis 98.

<sup>41</sup>Lord McNair, *The Law of Treaties* (1961) vol 1, pp 52-54.

<sup>42</sup>The Privy Council, in *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590, 596-597; [1941] AC 308, 324 held that the Treaty was a valid international treaty, and therefore not enforceable in domestic law.

<sup>43</sup>Whether pre-existing indigenous legal rights automatically survived settlement or cession, or were dependent upon Crown recognition was only settled comparatively recently in favour of the continuing legality of native rights; Kent McNeil, *Common Law Aboriginal Title* (1989) 196.

<sup>44</sup>The Judicial Committee of the Privy Council in *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590, 596-597; [1941] AC 308, 324 had held that the Treaty was a valid international treaty, though not enforceable in domestic law. This, at least, appears to be generally accepted; *Waipapakura v Hempton* (1914) 33 NZLR 1065 (SC); *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA); and *Nireaha Tamaki v Baker* (1901) NZPC 371 (PC).

<sup>45</sup>David Williams, "The Use of Law in the Process of Colonialization; An Historical and Comparative Study with Particular Reference to Tanzania (mainland) and New Zealand" (1985) University of Dar es Salaam PhD thesis 67ff. There have been many works covering the events both prior to and immediately after the signing of the Treaty of Waitangi.

<sup>46</sup>Whether the sovereignty of the United Kingdom Parliament was legally and/or politically grounded in the Treaty of Waitangi has been answered in the affirmative by Paul McHugh, "Constitutional Theory and Maori Claims" in Sir Hugh Kawharu, (ed), *Waitangi* (1989) 25, 42, 47.

<sup>47</sup>"Charter for erecting the Colony of New Zealand, and for creating and establishing a Legislative Council and an Executive Council"; *British Public Papers- Colonies, New Zealand* (1970) Sessions 1835-42, 153-5. Sir James Stephen, Under Secretary of State for the Colonies, felt that the acquisition of British sovereignty was complete by act of State, whatever the morality of this or the intentions of the parties in 1840; Opinion of 27 December 1842, Great Britain: *Parliamentary Papers* 1844/556, p 471 (Appendix No 19), Colonial Office Papers 209/16, pp 487-94.

<sup>48</sup>In modern popular mythology, the Treaty of Waitangi is taken to be the foundation of New Zealand. The legal significance of the 6 February 1840 is, however, rather less according to the general and settled imperial law of the mid-nineteenth century: *R v Symonds* (1847) NZPCC 387 (SC).

<sup>49</sup>British courts have held that an unequivocal assertion of sovereignty by the Crown must be accepted by a domestic court, even where the claim would not be recognised under international law: *Sobhuza II v Miller* [1926] AC 518, 522-5 (PC).

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<sup>50</sup>Issued 12 October 1786 to Captain Arthur Phillip, Royal Navy, and appointing him “Captain-General and Governor-in-Chief in and over our territory called New South Wales ... “. The commission, which was amplified on 2 April 1787, was publicly read at Sydney Cove on 26 January 1788.

<sup>51</sup>JL Robson (ed), *New Zealand: The Development of its Laws and its Constitution* (1967) 2; AH McIntock, *Crown Colony Government in New Zealand* (1958) 9.

<sup>52</sup>AH McIntock, *Crown Colony Government in New Zealand* (1958) 24; JD Raeside, *Sovereign Chief* (1977).

<sup>53</sup>Jane Kelsey, “Restructuring the Nation” in Peter Fitzpatrick (ed), *Nationalism, Racism and the Rule of Law* (1995) 178-179. It was “laughed at” in many circles; GBPP 1838/680 p 11 evidence of JL Nicholson.

<sup>54</sup>Jane Kelsey, “Restructuring the Nation” in Peter Fitzpatrick (ed), *Nationalism, Racism and the Rule of Law* (1995) 179; Interview with Sir Douglas Graham, 24 November 1999.

<sup>55</sup>Lord Glenelg, memorandum 15 December 1837; Great Britain: *Parliamentary Papers* 1844, Colonial Office papers 209/2: 409.

<sup>56</sup>Paul McHugh, “Constitutional Theory and Maori Claims” in Sir Hugh Kawharu, (ed), *Waitangi* (1989) 125.

<sup>57</sup>Lord McNair, *The Law of Treaties* (1961) vol 1, p 729.

<sup>58</sup>Marquess of Normanby to Captain William Hobson, 14 August 1839; Great Britain: *Parliamentary Papers* 1844, 16/37.

<sup>59</sup>Marquess of Normanby to Captain William Hobson, 14 August 1839; Great Britain: *Parliamentary Papers* 1844, 16/37.

<sup>60</sup>*British Public Papers- Colonies, New Zealand* (1970) Sessions 1835-42, 140-1

<sup>61</sup>Carter and Keith however argue that the Treaty was a legally valid treaty of cession: B Carter, “The Incorporation of the Treaty of Waitangi into Municipal Law” (1980) 4 AULR 1; Sir Kenneth Keith, “International Law and New Zealand Municipal Law” in JF Northey (ed) *The AG Davis Essays in Law* (1965).

<sup>62</sup>Robson thought it was by occupation, but Foden (in the minority viewpoint), thought settlement; JL Robson (ed), *New Zealand: The Development of its Laws and its Constitution* (1967) 4-5; NA Foden, *The Constitutional Development of New Zealand in the First Decade* (1938) 38. In Foden’s view, the letters patent of 15 June 1839 are the *fons et onjo* of British sovereignty. cf J Rutherford, *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand* (1949).

<sup>63</sup>*Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 78 per Prendergast CJ.

<sup>64</sup>Interview with Georgina te Heuheu, 7 December 1999.

<sup>65</sup>Indeed, the Colonial Office was treating New Zealand as having the common law status of a settled colony from as early as January 1839; Paul McHugh, “Aboriginal Rights of the New Zealand Maori at common law” (1987) University of Cambridge PhD thesis 142; Sir James Stephen, Under Secretary of State for the Colonies, minute, 21 January 1839, Colonial Office Papers 209/4, pp 193, 196.

<sup>66</sup>It is perhaps little wonder that this was so, given the needs of the settlers and the developments in the classifications of a colony at common since the American Revolution; Paul McHugh, “Aboriginal Rights of the New Zealand Maori at common law” (1987) University of Cambridge PhD thesis 147.

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- <sup>67</sup>David Williams, “The Foundation of Colonial Rule in New Zealand” (1988) 13(1) NZULR 54.
- <sup>68</sup>*British Public Papers- Colonies, New Zealand* (1970) Sessions 1835-42, 123-5.
- <sup>69</sup>Amounting to what Brookfield calls a revolutionary seizure of power; FM Brookfield, *Waitangi and Indigenous Rights* (1999).
- <sup>70</sup>Dame Catherine Tizard, *Colonial Chiefs, 1840-1889* (1995) 14.
- <sup>71</sup>David Williams, “Te Tiriti o Waitangi” in A Blank et al (eds), *He Korero Mo Waitangi 1984* (1985); David Williams, “The Constitutional Status of the Treaty of Waitangi: an historical perspective” (1990) 14(1) NZULR 9.
- <sup>72</sup>The *contra proferetem* principle, that a document is to be construed against the party who drafted and put it forward, leads to the conclusion that the Maori version is definitive.
- <sup>73</sup>Dame Catherine Tizard, *Colonial Chiefs, 1840-1889* (1995) 10.
- <sup>74</sup>FM Brookfield, “The New Zealand Constitution” in Sir Hugh Kawharu, (ed), *Waitangi* (1989) 1.
- <sup>75</sup>Paul McHugh, “Constitutional Theory and Maori Claims” in Sir Hugh Kawharu, (ed), *Waitangi* (1989).
- <sup>76</sup>Annie Mikaere, Review of *Waitangi* (1990) 14 NZULR 97, 98.
- <sup>77</sup>RWM Dias, “Legal Politics” [1968] CJ 233, 237.
- <sup>78</sup>Moana Jackson, *Maori and the Criminal Justice System* (Part 2) (1988) 35-44; Moana Jackson, “Maori Law” in Young, *Mana Tiriti* (1991) 15-16.
- <sup>79</sup>21 & 22 Vict no 2.
- <sup>80</sup>9 & 10 Vict c 103, s 10.
- <sup>81</sup>15 & 16 Vict c 72 (UK). Repealed in New Zealand by the Constitution Act 1986 s 26(1)(a), (2) and (3), and in the United Kingdom by the Statute Law (Repeals) Act 1989, s 1(1) schedule 1 part VI.
- <sup>82</sup>s 71.
- <sup>83</sup>15 & 16 Vict c 72 (UK).
- <sup>84</sup>A Frame, “Colonising Attitudes towards Maori customs” [1981] NZLJ 105; Paul McHugh, “Aboriginal Rights of the New Zealand Maori at common law” (1987) University of Cambridge PhD thesis 168-180.
- <sup>85</sup>(1847) NZPCC 387 (SC).
- <sup>86</sup>(1823) 8 Wheat 543.
- <sup>87</sup>(1877) 3 NZ Jur (NS) SC 72.
- <sup>88</sup>(1888) 7 NZLR 235.
- <sup>89</sup>Paul McHugh, “Aboriginal Title in New Zealand Courts” (1984) 2 Canterbury Law Review 235, 247-248.
- <sup>90</sup>(1919) NZPCC 1.
- <sup>91</sup>(1900-01) NZPCC 371, 382; cf *St Catherines Milling and Lumber Co v The Queen* (1887) 13 SCR 577, 607-616 (PC).
- <sup>92</sup>(1902) 21 NZLR 655.
- <sup>93</sup>[1903] AC 173 (PC).
- <sup>94</sup>25 April 1903, in [1840-1932] NZPCC App 1730. See also David B Swinfen, *Imperial Appeal* (1987) 166-167.

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<sup>95</sup>[1986] 1 NZLR 680; PG McHugh, “From Sovereignty Talk to Settlement Time: The Constitutional Setting of Maori Claims in the 1990s” in Paul Havemann (ed), *Indigenous Peoples’ Rights in Australia, Canada, and New Zealand* (1999) 458.

<sup>96</sup>Most significantly in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

<sup>97</sup>21 & 22 Vict no 2 (NZ). This was a New Zealand Act of Parliament, and therefore perhaps could not of itself extend the common law, an act which only the imperial authorities were competent to take.

<sup>98</sup>Sir William Blackstone, 1 Com 100.