

TE KORERO TUATAHI

Foreword

*Ko wai ra, ko wai ra
Ko wai ra te tangata tutu taua kaore koa
Ko Hau, ko Nuiho, ko Nuake, ko Manu, ko Weka
Ko Toroa, ko Ruaihona, ko Tahinga o te ra
Tenei te maro ka hurua, huruhurunui no Manu no Weka
Ka tutapori atu ka tutapori mai
Weronoa weronoa nga rakau whakaiaia
Na nga tipuna i tikina ki ra waahi
Hai homai mo taku waka te Waimihia
Te mata o nga rakau a Tukariri, te mata o nga rakau a Tukaniwha
Te mata o nga rakau a Tukai taua
Whano whano haramai te toki, haumi e, hui e, taiki e.*

In 1893 as he lay dying, the prophet Te Kooti Arikirangi Te Turuki exhorted his supporters to pursue legal remedies for their grievances:

*Ko te waka hei hoehoenga mo koutou i muri ahau ko te ture
Ma te ture ano te ture e aki*

*The canoe for you to paddle after me is the law
Only the law can be pitched against the law*

Implicit in his kupu whakaari or prophetic saying was the notion that the pathway to redress for Maori claims was via legal processes. As is well known, Te Kooti had considerable first hand knowledge of both armed conflict and the legal system, and suffered injustice as a result. Despite those experiences he remained committed to the ideal of Maori aspirations being realised through legal means. His remarks seem apposite even today. However, once Chief Justice Prendergast, in 1877, had rendered the Treaty of Waitangi “a simple nullity” and the Privy Council in 1941 had determined that the Treaty was of no effect until incorporated into municipal law, Maori legal and constitutional matters remained for the most part irrelevant to the wider community. Despite the array of cases involving Maori being heard before superior courts - immortalising for the litigants’ names like Wi Parata, Tamihana Korokai, Mere Roihi, and Nireaha Tamaki - such issues often remained at the fringe of serious critical analysis. The principal exception was the

continuing alienation of Maori land and resources. Until the late 1970s, with limited exceptions, such issues did not feature significantly on the legal and political landscape.

In the 1980s events occurred that altered that position irrevocably. One was the appointment of Edward T J Durie as Chief Judge of the Maori Land Court and Chairperson of the Waitangi Tribunal. Under his inspired leadership the Tribunal gained a new relevance and credibility. The amendment to the Treaty of Waitangi Act 1975, permitting claims back to 6 February 1840, was equally significant. The Tribunal became the forum within which Maori historical claims at last found expression, and in some cases, reached settlement. Running parallel has been the revival of Maori language, culture and identity, which have renewed a consciousness in Maori social, political and legal issues. Maori broadcasting, Maori print media and the revival of wananga have provided new fora for debate on kaupapa Maori (Maori philosophy). Tertiary institutions have also contributed by producing more Māori graduates, including those with legal qualifications. Maori legal graduates involved in the public and private sector, politics, academia and the judiciary are greater in number than ever before.

During the 1980s, a series of seminal judgments on Maori customary rights and Treaty of Waitangi matters raised the profile of Maori legal issues even further. They include *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 and the landmark *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641. Those and other related decisions have refined the concept of “the principles of the Treaty of Waitangi” and have also delineated the limitations of Maori customary rights. The Privy Council, for example, has even determined that *iwi* means “traditional tribes”. In the wake of *Ngati Apa v Attorney General* [2003] 3 NZLR 643 it may yet pronounce on another important legal issue affecting Maori and the wider community. The 1980s and early 1990s also witnessed the inclusion of “Treaty clauses” in an array of legislation concerning conservation, resource management, education and the health system. Compliance with those provisions required central and local government agencies to consult with Maori as to their interests. This has resulted in the development of a new body of law on the consultative process.

In the context of Maori legal issues, the impact of the Waitangi Tribunal cannot be underestimated. It is largely through Tribunal processes and subsequent legislative and judicial responses that the entire body of

jurisprudence surrounding the principles has developed. There is little doubt that the decision to include section 9 in the State Owned Enterprises Act 1986 had its genesis in the *Muriwhenua* Inquiry. Similarly, the enactment of the Fisheries Settlement Act 1992 and the consequences flowing from that legislation are linked to Maori fisheries claims, the reports of the Tribunal and the decisions of superior courts. It is through claim processes such as these that the transfer of several billion dollars of public assets into private Maori ownership will be effected in the near future. With few exceptions, the assets and resources returned in settlements will be placed under the stewardship of kin-based governance entities. At the same time, what may be labelled “the Maori economy” has improved and the assets of Maori trusts and incorporations continue to grow. It is inevitable that, as occurs in the Pakeha arena, there will be disputes over the administration and management of such resources.

In response to some of these developments, various reviews have recommended expanding the jurisdiction of the Maori Land Court to enable it to deal with the resolution of disputes involving Maori assets and resources. As a result, the Fisheries, Aquaculture Reform and Foreshore and Seabed Bills currently before Parliament contain provisions that will expand the jurisdiction of the Maori Land Court. Many of the proposals also stress the need for a range of options to dispute resolution beyond adjudication before courts and tribunals.

Against this backdrop, Maori legal issues have expanded into a significant niche of their own. They are no longer questions at the periphery of academic debate. In short, the landscape has changed dramatically. In recent times, Maori issues, including those of a legal nature, have taken centre stage in New Zealand. The need then for a journal of Maori legal writing seems even more acute. This latest initiative of the Faculty of Law and the International Research Institute for Maori and Indigenous Education at the University of Auckland is, therefore, particularly welcome. While there have been a plethora of seminar papers, articles and texts on a host of legal matters affecting Maori in the last decade, this publication must be one of the first periodicals published by a New Zealand university that has as its principal focus, Maori legal issues. Unsurprisingly, the articles submitted for this first edition address Maori custom law and notions of mana and *tuku whenua*, geothermal resource claims and the mammoth Ngai Tahu claim. These are issues that affect everyone, not just Maori. It is entirely appropriate then, that the contributors are both Maori and Pakeha. Regardless of what perspectives might be proffered, the key

point is that debates are occurring. And beyond the narrow slogans of headlines. In time the Journal of Maori Legal Writing may yet become a major forum for discussion on what are often vexed issues. The development of Maori custom law principles by courts, tribunals and the litigants that appear before them will require scrutiny and analysis. This journal will undoubtedly provide such commentary as the limits of such principles are explored to ensure the issues they concern remain relevant to the 21st Century.

A new initiative like this requires the tautoko (support) of not only law students and academics, but also practitioners, policy makers and judges, and the general community whose interests it affects.

Finally, in considering the occasion of this publication of this first issue I am reminded of the whakatauki of one of my iwi, Ngati Awa: *he manu hou ahau, he pi ka rere – I am like a new born bird, a fledgling that has just learned to fly.* Let us hope then that the journey now begun will be fulfilling and far reaching in the days yet to come.



L R Harvey
*Ngati Awa, Rongowhakaata, Te Aitanga a Mahaki,
Te Whanau a Apanui, Ngati Kahungunu.*
Judge, Maori Land Court
Rotorua
6 September 2004

SECTION A:

TE TAHA MOANA ME TE TAKUTAI MOANA

**THE FORESHORE AND SEABED OF
AOTEAROA/NEW ZEALAND**