

The Three Most Important Features of My Country's Legal System that Others Should Understand from the Perspective of an "Indigenous" Lawyer

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1. The legal system of Aotearoa/New Zealand is English-based and does not "naturally" reflect the social reality/values and interests of the (indigenous) Maori people of Aotearoa and their system of law (tikanga Maori)

Maori are the tangata whenua or indigenous peoples of Aotearoa NZ. Maori are 15% of the overall population, in a NZ society that is rapidly diversifying due to immigration.

Maori is a collective society: "whanau"; "hapu" and "iwi" are natural groupings whose primary relationships are determined by links to specific whenua (lands) and whakapapa (ancestry) descent.

Maori society traditionally focused on collective responsibilities arising from land-based relationships rather than discrete rights held by individuals

Maori society has at its base a worldview that links all aspects of the environment through whakapapa, into a whanaungatanga (interrelated) framework that is a series of reciprocal relationships (utu) between hapu and iwi and their environment

those relationships are based on broad notions of mana "power and authority"; tapu "sanctity"; mauri "life-force" and their supporting principles

The distinctive nature of Maori society means that people ask different questions of the New Zealand legal system when dealing with Maori issues:

students, practitioners and judges who operate New Zealand's formal legal system ask "what is the status of Maori people and their aspirations/claims within the overall framework of New Zealand law?"

Lawyers representing Maori clients ask, "How far can I stretch the principles/rules of the formal legal system to include basic principles of tikanga Maori and gain the outcome my clients want?"

Maori people ask, "How is it we keep losing our land and authority while judges continue to pepper their decisions with "fairness", "justice", "equality" and "good faith"?"

2. Te Tiriti o Waitangi/the Treaty of Waitangi signed in 1840 is asserted as the legal foundation for introducing the English legal system into Aotearoa/New Zealand.

Te Tiriti/the Treaty has two texts: An English version signed by Lt Gov. Hobson for the British Crown and 39 Maori rangatira (leaders); a Maori text signed by approximately 500 Maori rangatira.

From an English legal point of view:

- The signatory rangatira spoke for the entire territory of “Niu Tirini” (NZ)
- Maori ceded sovereignty to the British Crown, and, as a consequence and immediately afterwards, the Crown granted bare property rights in lands and fisheries and “other treasured possessions” back to Maori
- Maori gained the rights (and obligations) of British citizenship

From a tikanga Maori point of view:

- Maori retained “tino rangatiratanga” (absolute chieftainship ie. sovereignty) over everything they possessed and treasured (taonga)
- Maori granted the British Crown the right to make and uphold laws
- Maori gained the benefits and protections of British citizenship

Maori claim that the Queen’s settler government actions since 1840 have considerably overstepped the boundaries set by te Tiriti/the Treaty

Maori claim that:

- the English legal system justified the Crown’s actions by adopting and upholding a series of legal fictions, reinforced by international law principles, while ignoring local facts, tikanga Maori (indigenous laws), and te Tiriti/the Treaty of Waitangi
- te Tiriti/the Treaty of Waitangi is the correct constitutional foundation for the formal New Zealand legal system
- the English principles and rules imported into Aotearoa/New Zealand are constrained by te Tiriti/the Treaty of Waitangi.

Since 1840 Maori have actively resisted the loss of territorial resources under New Zealand laws affecting their territories without their consent by:

- Establishing the Kingitanga (Maori monarchy) in 1858 as a parallel unitary sovereign-type governance structure to match the British Crown
- Entering into warfare against the Crown to protect iwi lands and territory
- Making ongoing protests to Parliament regarding breaches of te Tiriti/the Treaty of Waitangi (including a royal deputation to England in the 1800s)
- Making challenges in the general courts of the formal NZ legal system
- Embarking on localised protests and occupations

The response of the New Zealand legal system has been to continue to restate the 1840 position that:

- te Tiriti/Treaty has no legal force except when incorporated by domestic legislation
- te Tiriti/Treaty is a source of legitimacy for the cession of sovereignty to the British Crown
- te Tiriti/Treaty does not legally constrain the actions of Parliament

3. Despite the above, the control of the New Zealand legal system over Hapu and Iwi territorial resources by legislation has changed in focus over time from facilitating acquiring of resources by the Crown, to settlement of property claims for breaches of te Tiriti/the Treaty, to incorporation of Maori concepts into the formal legal system:

i. Gaining control of Maori territory and lands

1862-1865 Native Land Acts. Collective Maori land holdings were individualised and sales could only be made to the Crown. The tikanga Maori-law-based system of relationships to the land was undermined as more and more people became disenfranchised in successive generations. Maori society and tikanga structures disintegrated and people moved out of their territories to urban centres to seek a livelihood for their families.

2004 Foreshore and Seabed Act. Ownership of the foreshore and seabed vested in the Crown. Recognition of Maori customary title reduced to “uninterrupted since 1840” use rights.

ii. Settling Historical Grievances under te Tiriti/the Treaty of Waitangi

The Treaty of Waitangi Act 1975 marked a significant turning point in the Maori/Crown relationship and heralded as “a new orthodoxy”.

Waitangi Tribunal established to look into breaches of the Principles of the Treaty of Waitangi by the Crown in its practices and policies and to assess legislation for conformity with these principles. The Tribunal makes recommendations to the Crown for redress if claims are upheld.

o Examples of Generic/global claims heard by the Tribunal include:

Te Reo Maori Claim – Maori claimed that the crown in its education policies had failed to protect/actively undermined the Maori language which was a “taonga” of the Maori people under te Tiriti/the Treaty. The claim was upheld and the Maori Language Act 1987 was passed as a consequence making Maori an official language of Aotearoa/NZ. Broadcasting resources were allocated for the future dissemination/protection of Maori language on radio and television. Education in Maori language and tikanga now also receives some state funding. Maori television has been established.

Fisheries – The statutory settlement of Maori rights to fisheries under te Tiriti/the Treaty was influenced by the Tribunal hearing of a Maori claim to the resource that was taking place at the same time as the Crown was introducing a new individual transferable quota system in the 1980s. Consultation with hapu and iwi leaders led to a Memorandum of Understanding and then legislation establishing a Maori Fisheries Commission, \$150 million, quantifying Maori entitlements to commercial fisheries quota and preventing future litigation by Maori. There have been several court cases about allocation of fisheries quota and assets to Hapu and Iwi.

Flora and Fauna – Intellectual property claims to Maori knowledge and resources. The unique aspect of this claim is that claimants have used Maori concepts and principles to articulate their entitlements. The claim also includes an international law aspect, as the Crown has entered into several external trade agreements that include a Treaty clause. The claim is about domestic protection of Maori culture and products. The Tribunal has yet to publish its report - but it could lead to the formation of a unique Maori/Crown body responsible for establishing guidelines for intellectual property in Maori-claimed resources.

- Several individual Iwi have negotiated directly with the Crown to settle historic claims for breaches of te Tiriti/the Treaty of Waitangi. These claims have resulted in legislation giving formal legal recognition to Iwi.

Waikato/Tainui – These iwi in the upper central north island had their lands confiscated by the Crown when they resisted invasion in the 1860s. The Waikato Raupatu Settlement Act 1995 includes a formal Apology; \$170 million to buy back confiscated lands and income from forestry rentals. In return Waikato/Tainui gave up future confiscation claims, mineral and forests claims and 47,000 acres of conservation land. Waikato have established a unique governance structure that is based on iwi principles, constructed around iwi/hapu relationships on the land, and which also has an economic arm.

Ngai Tahu – This iwi’s territory extends over 7/8’s of the South Island. The iwi has also established a representative governance framework, Te Runanga o Ngai Tahu, and settled their Tiriti/Treaty grievances under two lots of legislation. Their governance structure has recently been realigned to deliver better social/cultural and economic outcomes for its people.

- The result of the above is that:

Fisheries and Iwi settlements have provided impetus for modern Maori governance structures based on Maori principles and values

The same settlements have provided an economic base for Maori

The Kingitanga is once again being promoted as a central rallying point for Maori society

Maori principles are re-emerging as tikanga standards for internal iwi governance and in Maori education.

The perpetuation of tikanga Maori in Maori-based institutions and via the media is increasing.

- iii. Integrating Maori concepts into the formal legal system into other areas of general New Zealand law

The 1993 Resource Management Act includes reference to several Maori concepts in Part 2 , which sets out the overriding principles of the Act

The formal legal system has also adopted Maori concepts and principles in the Youth Court - where Family Group Conferencing is a part of the process of youth justice; and in the Criminal Courts where a successful trial for Restorative Justice has recently been completed.

The most important ongoing issue facing Parliament and the Courts in New Zealand is how to recognise te Tiriti / the Treaty as the foundational constitutional document for the territory of Aotearoa/New Zealand and Maori as tangata whenua. As a nation, we are still working through it.