

CHAPTER 12

**CONSTITUTIONAL ISSUES**

**12.1 INTRODUCTION**

In this concluding chapter, we deal with the nineteenth-century constitutional issues raised by the Wai 121, Wai 312, Wai 508, and Wai 733 claimants. These concern the possibility of Māori governance in separate ‘native districts’, as provided for in section 71 of the Constitution Act 1852, and the lack of representation in the Legislature for Māori after 1840. We deal with each issue in turn.

**12.2 MĀORI GOVERNANCE**

The claimants in both the Wai 121 and the Wai 508 claims asserted an independent Māori sovereignty, rangatiratanga, which they claim was recognised by the Crown in the Declaration of Independence signed at Waitangi in 1835. In his evidence for the Wai 121 claim, Mohi Manukau focused on the mana of ‘Nga Rangatira o te Whakaminenga’ or the ‘Confederation of United Tribes’ derived from traditional rangatiratanga and tikanga Māori.<sup>1</sup> For the Wai 508 claim, Whititera Kaihau stated that the declaration constituted a legitimate recognition of Māori sovereignty, necessary in order for Māori to accept the Treaty of Waitangi.<sup>2</sup> Both claimant groups asserted that the Crown’s failure to implement section 71 of the Constitution Act 1852 was a failure to recognise this independent Māori sovereignty. Before addressing this assertion, we provide some historical background to the declaration.

**12.2.1 Historical background**

In 1832, before the Treaty of Waitangi was signed, the British Government had appointed James Busby, an officer in the colonial government of New South Wales, as British Resident in the Bay of Islands. Busby’s principal task was to keep the peace among visiting seamen and local Māori. One of his first public actions in New Zealand was to suggest that locally built trading vessels should be registered in New Zealand and sail under a New Zealand

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1. Document K10, pp 4–6

2. Document K11, p 55

ensign. This proposal was duly approved by the British Government. Busby called a meeting of about 30 local rangatira, held on the lawn in front of his house at Waitangi, in March 1834. The new flag was raised and thereafter New Zealand-built ships were registered in the name of ‘the Independent Tribes of New Zealand’.<sup>3</sup>

There is some doubt whether the assembled rangatira fully understood the implications of these proceedings, but the hui marked the beginning of the concept of a confederation of Māori tribes which held some sort of sovereignty. This concept was expressed in a document described as a ‘Declaration of the Independence of New Zealand’, which was signed at another hui organised by Busby in October 1835. The 35 rangatira who signed or made their marks on it were described by Busby as ‘Hereditary chiefs or Heads of tribes, which form a fair representation of the tribes of New Zealand from the North Cape to the latitude of the River Thames.’ The principal statements included a declaration of ‘an Independent State, under the designation of the United Tribes of New Zealand’. In the Māori version, this read ‘Ko te Wakaminenga o nga Hapu o Nu Tirenī’. In this confederation (whakaminenga) resided ‘All sovereign power and authority’, translated as ‘Ko te Kingitanga, ko te mana i te wenua’. The declaration also stated that the rangatira would meet annually ‘in Congress at Waitangi’ to frame laws for maintaining peace and good order and for regulating trade. It was also agreed to send a copy of the declaration to the King of England and, ‘in return for the friendship and protection’ to be extended to British subjects, ‘entreat that he will continue to be the parent of their infant State, and that he will become its Protector from all attempts upon its independence’. In the Māori version, ‘independence’ was translated as ‘Rangatiratanga’.<sup>4</sup>

The ‘congress’ of rangatira proposed in the declaration never met. The rangatira retained their independent mana, and no confederated Māori decision-making body emerged out of the transaction, which had been largely engineered by Busby. Historians see the declaration as Busby’s way of thwarting an attempt by Baron de Thierry to establish a French settlement in the Hokianga. But it did recognise a stage in the movement toward the establishment of a British colony and the growing influence of the humanitarian movement on colonial policy.<sup>5</sup>

The 1835 Declaration of Independence had no effect in law, since it was transacted before the proclamation of New Zealand as a British Crown colony in 1840. It also had no practical effect for Māori in the 1830s. However, it served as a reminder of an undefined Māori

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3. Alexander McLintock, *Crown Colony Government in New Zealand* (Wellington: Government Printer, 1958), pp 21–23; Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland: Auckland University Press, 1977), pp 63–68

4. ‘Declaration of the Independence of New Zealand’ enclosed with Busby to Under Secretary of State, 2 November 1835, in Henry Hanson Turton, preface to *Facsimiles of the Declaration of Independence and the Treaty of Waitangi* (Wellington: Government Printer, 1976)

5. McLintock, p 25

sovereignty, sufficient to be referred to obliquely in the Treaty of Waitangi as ‘the Chiefs of the Confederation of the United Tribes of New Zealand’. The declaration has thus been seen by many Māori as Crown recognition of the independent authority or rangatiratanga of Māori, and it is referred to in those terms in the evidence for the Wai 121 and Wai 508 claims. It is doubtful, however, whether the kind of independent Māori sovereignty spoken of by the claimants was intended in the original declaration. In any case, the Tribunal is concerned with the Treaty of Waitangi, which was an agreement between Māori and the Crown to establish a government, to protect rangatiratanga for all Māori, and to extend the rights and obligations of British citizenship to both resident Māori and incoming settlers.

Both claimant groups cite as a grievance the failure of the Crown to implement section 71 of the Constitution Act and to provide for Māori governance in ‘native districts’. The Act provided for the establishment of representative government in New Zealand – that is, a separate New Zealand Parliament to govern the country. Section 71 set out an option for the governance of Māori:

And whereas it may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed.

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.

This provision remained on the statute book until it ceased to have effect under section 26 of the Constitution Act 1986.

#### 12.2.2 Claimant submissions

Counsel for both Wai 121 and Wai 508 produced a similar closing submission for each claim. A memorandum on section 71 of the Constitution Act 1852 produced for Wai 121 was also attached to the Wai 508 submission. We review both claims together here. In closing submissions, counsel suggested that section 71 of the Constitution Act embodied ‘a constitutional issue. But it is also a Treaty issue.’ Counsel suggested that the section outlined two separate forms of governance:

- a) Māori could use their *laws, customs and usages* in all their dealings with each other – ie for the *governance of themselves*.

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- b) The second part of the section provides for special districts to be set aside in which such *laws, customs and usages* should be observed. [Emphasis in original.]<sup>6</sup>

Counsel then submitted that, under the first form, Māori could govern themselves according to custom anywhere, and that the setting aside of ‘special districts’ under the second form referred to areas set aside where Māori custom applied to everyone. The failure of the Crown to set aside such native districts and to ‘recognise the right of Maori to govern themselves’ was, he claimed, a breach of the Treaty ‘of particular significance to rangatira, whose responsibility it was to govern according to tikanga.’<sup>7</sup>

In his memorandum, counsel discussed two phrases in section 71 which were ‘seemingly superfluous.’ The first was ‘And may be expedient’, but expedient for whom was not defined or qualified. The second was ‘for the present’, and this ‘present’, it was argued, would last for as long as the statute endured. Counsel maintained that both phrases were ‘vague and ambiguous’ and ‘should be read in a way that allows the spirit of the legislation to have effect.’<sup>8</sup>

**12.2.3 Crown submissions**

Counsel for the Crown made no submission on issues relating to the interpretation of the Declaration of Independence 1835 or section 71 of the Constitution Act 1852.

**12.2.4 Tribunal comment**

We received no evidence on the historical context of the passing of the Constitution Act 1852 by the British Parliament that might guide us in our consideration of section 71. We are aware, however, that in New Zealand there is a long history of pleas from Māori, in *kōrerō* on marae and in petitions to Parliament, for Māori forms of governance, along with efforts to create pan-tribal confederations.<sup>9</sup> We do not intend to review this history here, since that would take us well beyond the scope of our inquiry into the Kaipara claims.

We have sought an answer to the question of why the Crown did not choose to implement section 71 of the Constitution Act 1852. We found part of the answer in the phrase ‘it may be expedient’. Claimant counsel described this phrase as superfluous. We see it as significant, because it suggests that the new government proposed in the 1852 Act was not required to implement this provision, but that it was empowered to do so if it were deemed ‘expedient’

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6. Document Q11, p 6; doc Q12, pp 3–4

7. Document Q11, p 6; doc Q12, p 4

8. Document K13, p 2

9. See, for example, John Williams, *Politics of the New Zealand Maori: Protest and Cooperation, 1891–1909* (Seattle: University of Washington Press, 1969), and Lindsay Cox, *Kotahitanga: The Search for Māori Political Unity* (Auckland: Oxford University Press, 1993).

in whatever undefined circumstances. The New Zealand Government did not consider it expedient to set aside any 'native district'. Instead, it chose the policy option of requiring all Māori to comply with British law and New Zealand statutes, including special legislation to establish a Native Land Court and to translate Māori customary land tenure into titles cognisable in British law.

Perhaps the clearest statement of Crown policy in New Zealand was the response to a petition to Queen Victoria signed by King Tāwhiao and others and taken by them to London in 1884.<sup>10</sup> The petitioners did not see the Queen but were received by the Colonial Secretary, the Earl of Derby, who referred the petition back to the Governor of New Zealand for comment. The petition contained numerous complaints about the New Zealand Government, including non-compliance with the Treaty of Waitangi, confiscation of land, operations of the Native Land Court, and inadequate Māori representation in Parliament. The first request to Queen Victoria for remedy was:

that you will resolutely consent to grant a government to your Maori subjects, to those who are living on their own lands, on those of their ancestors, and within the limits of Maori territory, that they may have power to make laws regarding their own lands and race, lest they perish by the ills which have come upon them; that they may be empowered so to direct themselves and their own lands, lest they be altogether destroyed by the practices of the government, unknown and not evident to the Maoris; and that also the Maoris possessing lands contiguous to the Europeans should have those lands brought under the direction of the said Maori Government, for there are many tribes who thus own land.<sup>11</sup>

Tāwhiao was seeking, in particular, a native district for the King Country. But he also acknowledged that a 'Maori Government' would help retain the lands of other tribes who had suffered.

The New Zealand Governor, Sir William Jervois, responded in due course, enclosing a memorandum signed by the Premier and Attorney-General, Sir Robert Stout, which stated, *inter alia*:

As to the provisions of section 71 of the Constitution Act, 15 & 16 Vict Cap 72, Ministers would remark that it appears from the very terms of the section that the Imperial Parliament contemplated that that section should only be used for a short time and under the then special circumstances of the Colony. The words used in the Section are, 'It may be expedient.'

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10. The principal source of the following account is *Correspondence Respecting a Memorial Brought to this Country by Certain Maori Chiefs in 1884*, British Parliamentary Paper c-4413 (1885). A continuation of this correspondence is in *Further Correspondence Respecting a Memorial Brought to this Country by Certain Maori Chiefs in 1884*, British Parliamentary Paper c-4492 (1885). Both papers are reproduced in BPP, vol 17, pp 105–179. See also the New Zealand publication, AJLC, no 11, 1886, and the Māori language version in AJLC, no 11A, 1886.

11. 'Memorial of the Maori Chiefs Tawhiao, Wiremu Te Wheoro, Patara Te Tuhi, Topia Turoa, and Hori Ropihana', 15 July 1884, BPP, vol 17, pp 111–112

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‘Should for the present be maintained.’ So far as allowing the laws, customs, and usages of the Natives in all their relations to and dealings with each other to be maintained, Ministers would point out that this has been the policy of all the Native Lands Acts. The Courts that have to deal with native land, and it is the land that to the Natives seems the most important, decide according to Native customs and usages. Vide Native Land Courts Act, 1880, section 24; see also sections 5 and 6 of the Native Lands Frauds Prevention Act, 1881, and Section 6 of the Native Land Laws Amendment Act, 1883.

Copies of these Acts were enclosed with the memorandum. The relevant provisions cited referred to the Native Land Court investigation of title according to Māori customs and usages. Stout’s memorandum also suggested that:

the county of Waipa is practically a Native district, and if the Natives desired such a form of local government as the Counties Act affords, there would be no difficulty in granting their request by the Colonial Parliament. What, however, the Petitioners desire is really the setting up of a Parliament in certain parts of the North Island which would not be under the control of the General Assembly of New Zealand. Seeing that in the Legislative Council and the House of Representatives the Natives are represented by able Chiefs, and that they have practically no local affairs to look after that cannot be done by their committees, local bodies recognised by the Government, Ministers do not deem it necessary to point out the unreasonableness and absurdity of such a request.<sup>12</sup>

In other words, no separate Māori government was to be tolerated. The only option was local government under either the Counties Act 1876 or the Native Committees Act 1883 – that is, under statutes passed by the New Zealand Parliament. The memorandum concluded: ‘Ministers do not consider that there is any allegation in this petition that has not been before the Imperial Government, replied to by the Colony, and dealt with before.’<sup>13</sup> Meanwhile, on 13 August 1884, the Colonial Office wrote directly to Tāwhiao acknowledging receipt of the petition and noting that it had been sent to the New Zealand Government for comment. The letter explained that ‘Her Majesty’s Government are not able to require the Government of New Zealand to interfere with the Land Courts, which are duly established by law’.<sup>14</sup>

The provisions of section 71 of the Constitution Act were mentioned in other petitions, often by implication, but this appears to be the clearest exposition of why that section was never used. It was intended to provide only a short-term, expedient measure, and was made redundant by the Native Lands Act 1862 and subsequent Acts. It was never envisaged as a long-term arrangement, although it was not repealed until the passing of the Constitution Act 1986.

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12. ‘Memorial of the Maori Chiefs’, p 115

13. Ibid, p 116

14. Ibid, p 114

We do not believe that the failure of the Crown to implement a provision in a statute which empowers, but does not require, the Crown to do something is of itself a breach of the Treaty. The fundamental question is whether the New Zealand Government should have implemented a separate structure of Māori governance in native districts set aside under section 71 of the 1852 Act.

What form that structure might have taken must be pure speculation. The claimants have produced no specific evidence of possible alternative forms of governance put forward by Māori in the Kaipara district in the nineteenth century. A central theme of much of the evidence in the Kaipara claims was the cooperation and good will that existed between Kaipara Māori and the Crown. There were also complaints about loss of land and control of resources, of course, and these form the substance of our inquiry.

We therefore make no finding on section 71 of the Constitution Act 1852 and related matters in the Wai 121 and Wai 508 claims. We have received insufficient evidence on matters which might affect all Māori and which might raise constitutional issues that are well beyond the scope of our inquiry into the southern Kaipara claims.

### 12.3 MĀORI REPRESENTATION

A later addition to the Wai 733 Ōtakanini Tōpū statement of claim set out as a grievance the failure of the Crown to provide representation for Māori ‘in the legislative councils and/or administration set up or created by the Crown from 6th February 1840 until 1867’ and, further, ‘the failure to provide effective representation’ for Māori from 1840 to the present day.<sup>15</sup> The Wai 312 statement of claim alleged that the Crown, among other obligations, failed to provide ‘political equality’. The result was that Ngati Whatua have ‘suffered the destruction or erosion of their economic base, social patterns and traditional leadership structures’, and their ability ‘to exercise tino rangatiratanga’ had been ‘consistently undermined’.<sup>16</sup>

#### 12.3.1 Claimant submissions

In closing submissions, counsel for Wai 733 sought compensation for the ‘lack of effective representation’ for Māori since 1840, including the failure of the Crown to respond to Māori requests for representation, and suggested an immediate remedy in ‘a reform of the seating of what is now (since the Constitution Act 1986) the Parliament of New Zealand’. Counsel also submitted that advice from tangata whenua to the Crown had been ‘peripheral, informal, minimal and unequal’.<sup>17</sup> He referred to the hui of Māori leaders at Kohimarama in

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15. Claim 1.29(b)

16. Claim 1.10(a)

17. Document Q3, p18

1860 and to Dr Loveridge's comment that 'What they wanted was to be placed on the same footing as their fellow British subjects in all respects, including legislative representation, treatment by the Courts and land tenure'.<sup>18</sup>

Counsel also emphasised the 'special nature of Ngati Whatua', who, having 'persuaded the new Governor Hobson to site his capital in Auckland . . . probably enjoyed a position of political strength not found in any other iwi before or since'. From 1840 until the capital was shifted to Wellington in 1865, Ngāti Whātua leaders 'had the ear of the Governor of the day'. They were able to participate fully in the developing economy and became more affluent than most other tribes at that time. The move of the capital to Wellington was a 'serious setback' and meant that Ngāti Whātua, lacking effective representation in Parliament, now 'had less control and ability to lobby'.<sup>19</sup>

When the four Māori seats in Parliament were established under the Māori Representation Act 1867, Ngāti Whātua's interests were not seen to be adequately represented by the single member for Northern Māori, who was from Ngā Puhi. Counsel rejected Dr Loveridge's view that a group of only about 300 or 400 Ngāti Whātua could not expect separate representation, describing it as an attempt 'to provide for cultural advancement according to numbers – a modern definition of "democracy" – in a tribal society' that subscribed to different values. In other words, it was claimed that the Crown should have found a way to incorporate the values of tikanga Māori in Government decision-making.<sup>20</sup>

In closing submissions, counsel for Wai 312 also cited the Crown's failure to 'afford Ngati Whatua direct involvement in governance' and, in particular, its failure to follow up the initiatives set out by the Māori participants in the hui at Kohimarama in 1860. The Constitution Act 1852 provided the opportunity for the New Zealand Parliament, which became fully operative in 1856, to 'involve Ngati Whatua and other Maori in the governing of the colony and the administration of the law'. The Crown had 'refused' to involve Māori, and the existing 'franchise qualifications effectively excluded most Maori from involvement' in the General Assembly in Wellington or in provincial councils.<sup>21</sup> Counsel then cited the comments of Professor Alan Ward on Governor Grey's failure to ensure that Māori were given an equal place in the new constitutional arrangements: 'a frank inclusion of the Maori leadership in state power was just what Grey and the settlers could not make.' Grey's practice was to exert Government control of Māori by 'a variety of devices designed to manage and placate them, without open discussion of the fundamental questions about land, law, police power or political representation'.<sup>22</sup> Counsel also quoted Paora Tuhaere's plea at the Kohimarama hui:

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18. Document 04, p96

19. Document Q3, pp19–20

20. Ibid; doc 04, pp98–99

21. Document Q1, pp39–40

22. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1974), p86

let us be admitted into your councils. This would be the very best system. The Pakeha have their councils, and the Maories have separate councils, but this is wrong. The evil results from these councils not being one. I therefore say let Maori chiefs enter your councils . . . There would then be but one law for both Pakehas and Maories, and the understandings of both people would be exercised in council.<sup>23</sup>

Counsel submitted that, because Māori were not given adequate representation in either central or provincial government, ‘Government thereby denied Ngati Whatua not only the means of self-advancement, but the means of accessing the same institutions and systems under which Pakeha worked and local development depended’. Although there was Māori representation in Parliament in 1867, ‘four Maori representatives against forty-one Pakeha representatives meant neither Ngati Whatua’s views nor the views of Maori in general would be able to be heard’. Counsel concluded that Ngati Whatua ‘were not equal’ because they were not ‘afforded an equal share in Pakeha power and the institutions that supported it.’<sup>24</sup>

### 12.3.2 Crown submissions

In respect of franchise issues, Crown counsel made brief submissions:

In New Zealand, once representative institutions were introduced with the Constitution Act of 1852, the franchise for British subjects was based on the tenure of property whose title was recognisable in English law. This meant that Maori holding land under customary tenure were not eligible to vote.

The lack of representation for Maori in the House of Representatives was recognised as a problem during the 1850s, but efforts to find a way around it were not successful.

Counsel then suggested that one of the factors leading to the Native Lands Act 1862 was the need to enfranchise Māori by creating ‘a mechanism whereby customary tenure could be converted into a title recognisable by the Crown.’<sup>25</sup>

Crown counsel concluded with the comment that all adult male Māori could vote for the four Māori representatives in Parliament:

This was the first application of universal male suffrage in the British Empire. The same principle was not applied to Europeans in New Zealand until 1879 (men) and 1893 (women).

Ngati Whatua hoped for, but did not get their own representative in Parliament. It is submitted, however, that no group of this size could realistically expect to be guaranteed their own member in the House.<sup>26</sup>

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23. Document Q1, p 43

24. Ibid, pp 46–47

25. Document Q16, pp 101–102

26. Ibid, p 102

**12.3.3 Tribunal comment**

The Crown submission connecting the enfranchisement of Māori in 1867 with the passage of Native Lands Acts was challenged by counsel for Wai 312, who pointed out that, under the 10-owner system of the Native Lands Act 1865, many Māori would have been disenfranchised.<sup>27</sup> We have not been presented with detailed evidence on the Māori Representation Act 1867 and the context of its passage through Parliament.<sup>28</sup> We have no evidence that the Crown intended deliberately to exclude Māori from the franchise. We do note, however, that the Government was somewhat tardy in devising a way to achieve Māori franchise within the existing property-holding qualifications that enabled men to vote. Until 1893, women could not vote or hold office in Parliament, and they rarely held property in their own name anyway. We agree with counsel that representation of Māori in the Pākehā male councils of the land was inadequate.

Neither the Wai 733 nor the Wai 312 claimants provided sufficient evidence for us to determine with any clarity just how far Ngāti Whātua were or were not prejudiced by this. These claims also raise more general constitutional issues affecting all Māori – indeed, all citizens of New Zealand – which are well beyond the scope of our Kaipara district inquiry. For these reasons, we make no specific findings on the issue of the alleged Crown failure to ensure adequate Māori representation in the governing bodies of New Zealand.

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27. Document Q27, p 50

28. For background, see Ward, p 209, and MPK Sorrenson, 'A History of Māori Representation in Parliament', in *Report of the Royal Commission on the Electoral System* (Wellington, Government Printer, 1986), app B.

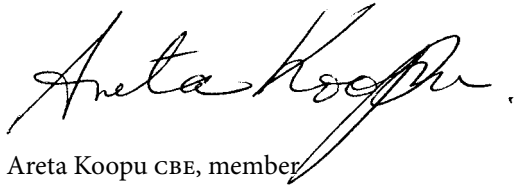
Dated at *Wellington* this *9<sup>th</sup>* day of *January* 2006



Dame Augusta Wallace, presiding officer



Brian Corban QSO, member



Areta Koopu CBE, member



