HE WHAKAARO HOU – A CRITICAL LEGAL THEORY PERSPECTIVE ON THE FUTURE OF MĀORI LAND LAW REFORM

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Kupu Whakataki - Introduction

On 15th September 1862, the Native Lands Act 1862 was passed into law by the General Assembly of New Zealand. It received the royal assent from the Colonial Office shortly after. The long title of the Act stated it was to "provide for the ascertainment of the Ownership of Native Lands and for granting Certificates of Title thereto and for regulating the disposal of Native Lands…". The practical effect of the legislation was to establish the mechanisms through which individual titles to land could be created in place of customary communal ownership.[1] This was the first occasion of the government legislating on Indigenous land tenure in Aotearoa New Zealand.

On December 20th 2017, 155 years later, the Te Ture Whenua Māori Bill 2016 was officially withdrawn from Parliament.[2] The Bill was intended to completely overhaul the legislative framework for Māori land. However, after reaching the Committee of the Whole House, the Bill lost traction, and was unable to reach its final reading before the 2017 general election.[3] This stall in progress would eventually prove fatal.

The Bill marked the latest instance in a repeating cycle of Māori land law reform that extends back to the Native Lands Act 1862. This cycle is driven by the need to remedy the many challenges burdening the whenua (land). But despite a whole host of successive legislation, the complete solution remains elusive. The most recent failure of the Bill, after the significant effort to develop it, alludes to the complexity of the legislature's task.

The demand for a solution to Māori land law becomes more pressing with each failed legislative solution. Behind each iteration is the belief that substantive changes will provide the solution. As of present day, none of those substantive changes have succeeded in doing so. Yet the future of Māori land law continues to hinge on that belief; that it is only a matter of determining the correct substance in order to 'fix' Māori land law. This dissertation is firmly centred on the opinion that this strict focus is harmful, and that alternative approaches need to be considered.

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[1] Section 7; Section 12.
[2] Heta Gardiner "Ture Whenua Bill has been binned" (22 December 2017) Te Ao Māori News <https://teaomaori.news/ture-whenua-bill-has-been-binned>
[3] "Failure of Māori land bill 'victory for landowners': Whaitiri" *Gisborne Herald* (online ed, Gisborne, 11 July 2017)

Critical Legal Theory invalidates that substantive focus. It provides compelling criticisms of the effectiveness of legal reform. This dissertation aims to apply a Critical Legal Theory perspective to the Māori land law reform cycle, in the hope of identifying an alternative approach to unburdening the whenua. Whether or not this approach will, in reality, provide a solution is unclear. But that is due to a lack of discourse. To provide such discourse, the focus must shift. And for the focus to shift, impetus must be provided. The ultimate aim of this dissertation, therefore, is to contribute such impetus.

Chapter I will describe the history of Māori land law reform. In doing so, the aim is to identify a 'common narrative' that is illustrated in each instance of reform. This common narrative suggests that Māori land law will never successfully provide the solution for the *whenua*.

Chapter II will use the Te Ture Whenua Māori Bill 2016 as a case study for illustrating the common narrative. This will emphasise the inability of legal reform to provide a complete solution as of yet, and build a case for considering alternative approaches.

Chapter III introduces a Critical Legal Theory perspective on legal reform. In particular, it will focus on the theories advanced by Carol Smart and Mari J. Matsuda, as well as respond to Indigenous criticisms of Critical Legal Theory.

Chapter IV will apply this Critical Legal Theory perspective to the Māori land law context. This will first involve acknowledging the colonial hierarchy behind Māori land law. It will then assess the limitations of Māori land law reform under a Critical Legal Theory lens, before briefly exploring what Critical Legal Theory suggests for the future of Māori land law.

The overall research question tying this work together is as follows; is Critical Legal Theory a useful lens to advance understandings of Māori freehold land reform? Based on the research conducted, it would appear this is the first time a Critical Legal Theory lens has been applied to this context.

I The History of Māori Land Law Reform

A. Ko Papatūānuku te whenua, ko Papatūānuku te whaea – The pre-European relationship between Māori and the whenua

Ko au te whenua, ko te whenua ko au.

I am the land, and the land is me.

To properly comprehend Māori land and its languishing state in the 21st century, it is necessary to consider the original relationship between ngā tangata Māori and the whenua. Although many core aspects of this relationship remain, there is clearly a stark contrast between this original relationship and the way Māori land is framed in modern law.

The original Māori relationship with the whenua was centred on whakapapa (geneology), creating a holistic, connected attitude.[4] The whenua was not an independent, lifeless chattel; rather, it is Papatūānuku herself, the mother of all the atua (higher entities) and all living things.[5] The creation narratives of Te Ao Māori explain how Ranginui, the sky father, and Papatūānuku, the earth mother, were separated by their children, casting Ranginui into the sky and establishing Papatūānuku as the land on which they walked. It was from her substance that the first human was also created.[6]

This whakapapa link further demonstrated itself within the tribal area of a hapū. Their specific ancestors manifested themselves in the landscape, and the naming of areas was done in a way that memorialised incidents in the narrative of that hapū.[7] The whenua was their mother, their ancestors, and a tome of their history; thus, the land was a fundamental part of Māori identity.

Rather than a tangible property right, Māori land tenure consisted of communal occupation of an area. The hapū held the underlying claim, despite an individual being able to gain certain rights to certain subareas through their personal labour and occupation.[8] Despite this network

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[4] Ian Kawharu *Māori Land Tenure: Studies of a Changing Institution* (Clarendon Press, Oxford, 1977) at 40.
[5] A.W. Reed *The Reed Book of Māori Mythology* (2nd ed, Reed Books, Auckland, 2004) at 9.
[6] At 11.
[7] Rāwiri Taonui "Tapa whenua – naming places – Exploration and naming" (24 November 2008) Te Ara – the Encyclopedia of New Zealand <https://teara.govt.nz/en/tapa-whenua-naming-places/page-1>
[8] Don Loveridge "The Origins of the Native Lands Acts and the Native Land Court in New Zealand" (research report commissioned by the Crown Law Office, 2001) Wai 1200 [Central North Island] Doc#A72 at 47.

of overlapping internal rights, each hapū member had common responsibilities of labour and protection in relation to the whenua.[9] One did not own the land; one was responsible for the land, as their tīpuna (ancestors) had been before them.

Enduring occupation was the predominant take (claim/right) to the whenua. A hapū group might establish rights in an area through take raupatu (conquest), but such rights struggled to take precedence over a hapū who could establish an ancestral connection created through generations of occupation – known as ahi kā roa (long burning fires).[10] I kā tonu taku ahi, i runga i tōku whenua; my fire has always been kept alive upon my family's land. However, the many take to whenua did not create a system of distinct boundaries between hapū. The whenua was often subject to competing claims of varying strength, based on the multiple occupations and ways different hapū would traditionally use it.[11] These claims were based on what is best described as ownership of rights in the land.

Although the whenua remains a source of identity, culture, and history, Māori interaction with land has become largely dictated by foreign concepts. The role that colonial law played in facilitating that is widely acknowledged. Moreover, the gravity of this change means it is unlikely this original relationship will ever be fully restored.

B. Kua tīmata te panoni i te ture – The beginning of the legislative journey

The Māori land tenure revolution in Aotearoa New Zealand is a familiar odyssey. In short, it involved the customary Māori-whenua relationship passing through a conveyor belt of policy, legislation, and institutional agendas. The Māori land tenure that emerged was devoid of the tino rangatiratanga (ultimate sovereignty) promised to Māori under the Tiriti o Waitangi. Communal rights were replaced by individualised, fragmented titles to land. Due to the alienation that followed, as of June 2019 only 1,402,347 acres of Māori freehold land remain.[12]

This tenurial revolution is a 'colonial experiment' on Māori land. It is an experiment that is still ongoing. Although earlier legislation was responsible for crafting its key characteristics,

[9] Norman Smith *Māori Land Law* (A.H. & A.W. Reed, Wellington, 1960) at 44.
[10] Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast and others *Māori Land Law* (2nd ed, Lexis Nexis, Wellington, 2004) at 54.
[11] Erueti, above n 10, at 43.
[12] Māori Land Court *Māori Land Update – Ngā Āhuatanga o te whenua* (Ministry of Justice, June 2019) at 1.

modern legislation continues to alter Māori interaction with the whenua. This is the cycle of Māori land law reform that Critical Legal Theory aims to challenge.

A comprehensive analysis of the legislative history of Māori land law is beyond the scope of what can be achieved by this dissertation. Instead, the purpose of this chapter is to explain the repeating nature of the Māori land law reform cycle, through identifying the common features shared by significant instances of reform.

C. I whakatū te whare o tāmitanga - Establishing the colonial experiment

Māori land legislation emerged out of an environment of increasing Pākehā settler dissatisfaction. The Crown right of pre-emption had been re-affirmed by the Native Land Purchase Ordinance 1846, which also prescribed severe punishment for those settlers caught engaging in land dealings with Māori.[13] The pre-emptive right was again recognised by the Constitution Act 1852.[14] The Crown Land Purchase Office enjoyed considerable success as a result; over 99% of the South Island, and around 55% of South Auckland had been purchased.[15] But this success was mitigated by growing Māori resistance to sales, as well as slow Pākehā progress with the acreage remaining in regions like South Auckland. A Board of Native Affairs inquiry in 1856 concluded that Māori should be encouraged to change their communal rights into individualised titles.[16] What would follow, their report argued, was an increase in the sale of Māori land driven by the incentive of a secure Crown grant.[17] But it also raised concerns about the problems with translating a system of communal ownership, and the corresponding volume of rights, into a distinct, divisible title.[18] The Colonial Office shared these concerns. The report provided a clear basis for retaining the existing Crown pre-emptive land purchase system.

However, this did not satisfy the settler population. From 1846, the number of European immigrants continued to rise, and Māori opposition to land sales continued to respond

[13] Native Land Purchase Ordinance 1846, s 1-2. Crown preemption was a feature of both versions of the Treaty of Waitangi.
[14] Section 73.
[15] Waitangi Tribunal, *National Overview: volume i* (Rangahau Whānui Series, 1997) at 56.
[16] The Board of Native Affairs "Report on the State of Native Affairs" [1856] I AJHR B3 at [27]
[17] At [26].
[18] At [30].

accordingly.[19] Furthermore, Māori were beginning to recognise that pre-emption did not necessarily result in fair prices for their land, based on the significant profit the Crown would subsequently realise on that same land.[20] Settlers continued to demand a new system that would provide for direct purchases between settlers and Māori.

This pressure eventually resulted in the Native Territorial Rights Bill 1858. The Bill was largely based on the proposals of F. D. Fenton, the future Chief Justice of the Native Land Court. Māori could now apply to receive a Certificate of Title to their land;[21] following this, the Governor could issue an alienable Crown grant.[22] It was a significant step towards a direct purchase arrangement, despite the Crown maintaining final control and prescribing a tax on each acre bought.[23] However, it never received assent from the Colonial Office. Similar legislation submitted two years later was given the same treatment.[24] Despite the failures, both provided considerable momentum.

That momentum culminated with the Native Lands Act 1862. The colonial rationale behind its provisions was reflected in the Preamble of the Act. By establishing an individualised Māori land tenure, the legislation alleged that future settlement would be enhanced as well as the continued "advancement and civilisation" of Māori.[25] The Preamble also acknowledged the existing Treaty of Waitangi rights, but used the objectives of the act to justify a waiver on the right of pre-emption. The Act provided the foundations for radical change. Titles could be issued to individuals.[26] Native Land Courts were established to determine what individual/s had the appropriate entitlement to the land under "Native Custom", based on whatever evidence they deemed fit.[27]

This machinery was refined further by the Native Land Act 1865, which emerged out of the renewed conflict between the Crown and Māori in both the Waikato and Taranaki.[28] The

[19] A.H. McLintock *An Encyclopaedia of New Zealand* (Government Printer, Wellington, 1966) at 731.
[20] Bryan Gilling "The Māori Land Court in New Zealand: An Historical Overview" (1993) 13 CJNZ 17 at 19. Gilling describes one Auckland block that was purchased from tangata whenua for £34, which the Crown subsequently sold for £24,275.
[21] Native Territorial Rights Act 1858, s 1-4.
[22] Section 9.
[23] Section 11.
[24] Loveridge, above n 8, at 124. This is referring to the Native Council Act 1860.
[25] Preamble.
[26] Section 12.
[27] Section 4; Section 7.
[28] Vincent O'Malley "Choosing Peace or War" (2013) 47 NZJH 39 at 39.

temporary courts established under the 1862 Act were replaced by a permanent singular judicial body, with the sole jurisdiction to determine title to Māori land, as well as succession in the case of intestate owners.[29] The new Native Land Court was presided over by a sole judge, officially termed the "Chief Judge", who had sole responsibility over administrative affairs.[30] Perhaps most importantly, the legislation imposed a limit of 10 people to be named on the title.[31] The Preamble once again reflected the underlying political and social motivations of the legislators. David Williams summarises this into three key policy elements:[32]

> i) to provide for the ascertainment of 'owners' of customary Maori [sic] land; with a view to:
> ii) the extinction of Maori [sic] custom, which would be replaced by titles to land derived from the Crown; and, to ensure the ongoing impact of the tenure reform,
> iii) to regulate succession to those lands which had been converted to Crown-derived titles but not sold out of Maori [sic] hands.

According to Williams, the respective effect of each was to deny the validity of the original Māori-whenua relationship, reject the tino rangatiratanga promised under Te Tiriti o Waitangi, and dismantle ideas of communal rights by introducing additional layers of European practice.[33] In conjunction, these two statutes were responsible for the primary machinery and institutions that would be used to redefine the whenua through into the 21st century.

D. He tauira tāruarua: the repetitive cycle of reform

The cycle of reform that followed the establishment of the Native Land Court and its processes is not straightforward. This dissertation does not aim to analyse the intention behind each iteration; that is, a psychological evaluation of how colonial agenda determined what was 'best' for Māori. Rather, it aims to identify the common narrative surrounding each incident of Māori land law reform. In short, problems concerning Māori land and the operation of Māori land law were perceived. This eventually manifested itself in changes to the legal doctrine affecting Māori land, sometimes minor, sometimes significant. Regardless of whether these changes

[29] Section 5.
[30] Section 13.
[31] Section 23.
[32] David Williams *Te Kooti tango whenua – The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999) at 142.
[33] Williams, above n 32, at 143.

were genuinely intended to resolve the perceived problems or not, it typically resulted in either a failure to do so, or the creation of new problems.

1. Native Lands Act 1873

One of the first perceived problems with Māori land law concerned the ten-owner rule. The Native Lands Amendment Act 1867 had amended this rule to allow any additional beneficial owners to be recorded on the back of the certificate.[34] But in practice, this rarely occurred; the majority of titles that were issued from 1865 to 1872 reflected the court's preference for acknowledging no more than 10 individuals on the certificate.[35] Whether these individuals held the appropriate mandate, and actually represented the interests of that mandate, varied from title to title. However, the legal implications were the same. These individuals were not legal trustees; they were the exclusive owners of the title, with unrestricted freedom of alienation, and no legal accountability to the hapū who occupied the land.

The situation in Hawke's Bay provided an illustration of the problems this legal position could create. Maurice P. K. Sorrenson critically describes the way in which European purchasers effectively facilitated credit advances to Māori individuals with shares in a block, usually in the form of store goods or liquor.[36] Once a considerable debt had been secured, it was used to command the individual to dispose of their interest. Given the lack of other means to relieve the personal debt, it inevitably followed, without the permission of the wider hapū.[37] The scenario described by Sorrenson was present in many of the 301 complaints concerning land sales in Hawke's Bay from 1865-1873 that a commission of enquiry fielded.[38] The complaint regarding the *Pahou* block breaks down the considerable debt owed by the Māori land owners to local store keeper R. D. Maney, and how much of the consideration for the block was retained against the balances due.[39] Despite the evidence, this was not perceived as a problem with the ten-owner rule. In fact, the chief commissioner C. W. Richmond concluded that "the

[34] Section 17.
[35] "Return of the proceedings of the native lands court of New Zealand" [1872] I AJHR F6
[36] M.P.K Sorrenson "Land purchase methods and their effect on Māori population 1865-1901" (1956) 65 JPS 183 at 186.
[37] Richard Boast "The Native Land Court and the Ten Owner Rule in Hawke's Bay, 1866-1873: An Analysis" in A.H. Angelo, Olivier Aimot, and Y.L. Page (eds) *Droit Foncier et Gouvernance Judiciare dans le Pacifique Sud* (Revue Juridique Polynesienne, Wellington, 2010) 169 at 207.
[38] C.W. Richmond "Report of the Hawke's Bay Native Lands Alienation Commission" [1873] I AJHR G7 at 17.
[39] At 11.

natives appear to have been, on the whole, treated fairly by the settlers and dealers of Hawke's Bay."[40]

The problem that Richmond perceived was that the Native Land Court considered hapū agreement as to the named grantees the same as agreement to extinguishing the native title rights of the hapū.[41] Instead, Richmond correctly identified that in the majority of cases, these figures were intended as quasi-trustees.[42] Assent to these named grantees did not equate to agreeing to provide absolute powers of alienation. Yet this is what the legislation provided to those individuals named on the title.

To resolve this, Richmond recommended a new process that worked to determine "native title as it actually exists…."[43] He was effectively arguing for an extension of the Native Lands Act 1867 'additional beneficial owners' amendment. By doing this, Richmond argued, the complaints which led to such a comprehensive enquiry would not recur.[44]

The legislative answer was the Native Lands Act 1873. Gone was the ten-owner rule. The Certificate of Title was replaced by a 'Memorial of Ownership', which listed every beneficial owners the Court identified, and specified their individual rights in the land.[45] To alienate the land in its entirety, the consensus of all owners was required.[46] It was also required for interest partitions, and the granting of leases.[47] The legislation alone arguably returned Māori land tenure closer to the communal rights structure that originally existed. Moreover, the increased restriction on alienation suggested land sales would also reduce.

However, the administration of succession to Māori land interests made the Memorial of Ownership problematic. The Native Land Court had been given the jurisdiction to determine succession to Māori land under the Native Lands Act 1865.[48] In 1867, the whānau of the recently deceased Ihaka Takaanini Te Tihi brought an application for succession to his interests

[40] At 6.
[41] At 7.
[42] At 7.
[43] At 8.
[44] At 8.
[45] Section 47.
[46] Section 49.
[47] Section 59; Section 62.
[48] Section 30.

in a Crown grant.[49] The outcome was the *Papakura* decision; a pivotal ruling in the tenurial revolution. The starting point was that individuals on a title were considered tenants in common, meaning that the interest of an owner should pass to their next of kin.[50] But Chief Justice Fenton rejected the standard English position of primogeniture. Instead, he determined the most appropriate position according to "native ideas of justice or Māori custom" was to split the interest evenly between the surviving children.[51]

Regardless of whether this reasoning was correct, the practical implication was significant. A Memorial of Ownership usually represented a multitude of interests. Under *Papakura*, each interest was passed downwards, which then splintered into smaller interests. This was a process that was fated to lead to thousands of uneconomic interests in a block. The legislative 'solution' posited by the 1873 Act instead resulted in 3,262,879 total interests today and counting, which continue to burden the administration of Māori land.[52]

2. Native Equitable Owners Act 1886

The legislature also perceived a problem concerning the question of trusteeship. As mentioned prior, there was substantial evidence to suggest that for many blocks, hapū assent to the named grantees was provided assuming this meant they would become trustees for the wider hapū.[53] Once it became clear the grantees had received legal powers beyond what was expected, hapū groups attempted to gain recognition of their original intention in pursuit of protecting their rights.[54] The legislative response was the Native Equitable Owners Act 1886. The Preamble directly acknowledged the disjuncture between original hapū intention and what was actually provided legally.[55] It allowed for hapū, outside those named on a certificate of title, to apply for a declaration of their beneficial interest in the land.[56]. All the beneficial interests that had been discovered post-application were elevated to the same legal status as the existing grantees, as a new tenant in common.[57] The nature of the problem seemed to suggest imposing a

[49] F.D. Fenton *Native Land Court: Important Judgements Delivered in the Compensation Court and Native Land Court 1866-1879* (H. Brett, Auckland, 1878) at 19.
[50] Waitangi Tribunal *Succession to Māori Land 1900-52* (Rangahaua Whānui Series, 1997) at 5.
[51] Fenton, above n 49, at 19-20.
[52] Māori Land Court, above n 12, at 1.
[53] Richmond, above n 42.
[54] Waitangi Tribunal, above n 15, at 75.
[55] See Preamble: "And whereas in many cases such Natives are only entitled and were only intended to be clothed with title as trustees for themselves and others, members of their tribe or hapu or otherwise..."
[56] Section 3.
[57] Section 4.

trusteeship-type scheme upon these titles. But the legislation instead relied on promoting individualisation to recognise the hapū intention. This essentially amounted to opening up all titles granted pre-1873 to the harms of the individualisation regime.[58]

It is important to acknowledge this aspect of the Māori land law reform cycle. Each iteration of the cycle was not necessarily independent from each other. Multiple statutes might all attempt to resolve the same problem. A statute might reinstate a problem addressed by previous legislation, or in the case of the Native Equitable Owners Act 1886, it might exacerbate an existing problem. This interconnectedness constitutes an additional layer to understanding the common narrative.

3. Native Lands Act 1894

This interplay itself would be the source of another Māori land law problem. An extraordinary 560 statutes dealing with Māori land were passed in the period between 1865 and 1909;[59] a significant number of these were within the decade ending 1890. The Rees-Carroll Commission in 1891 was tasked with investigating the legislation's convoluted state.[60] They did not mince their words; in regard to Māori land law's operation, the Commission stated it was "impossible… to follow the windings and intricacies of those laws…" and that "the Legislature has been attempting to continue an unsatisfactory system."[61] It highlighted several of the eight statutes dealing with Māori land passed in 1888 alone. The Native Land Act 1888 and Native Land Court Amendment Act 1888 simply facilitated the trade and transfer of land interests.[62] But both created a raft of complicated litigation, as the Native Land Court attempted to ascertain how each operated in practice.[63] The latter Act was particularly problematic. Described as the "climax of absurdity",[64] it effectively required the court to somehow determine an individual's interests relative to all other Māori individuals on every certificate of title in Aotearoa New Zealand; an impossible task.[65]

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[58] Williams, above n 32, at 173.
[59] J.A.B. O'Keefe *Maori land ownership: introductory readings* (Auckland Law Society, Auckland, 1980) at Part XV
[60] William Rees and James Carroll "Report of the Commission on Native Land Laws" [1891] I AJHR G1 at v.
[61] At xii.
[62] Native Land Act 1888 at s 3-5; Native Land Court Amendment Act 1888 at s 3-6.
[63] Rees and Carroll, above n 60, at xvii.
[64] Rees and Carroll, above n 60, at xvii.
[65] Section 21.

It was the cumulative effect of the constant changes in legal doctrine which contributed greatly to the problem of costs. The cost of the Native Land Court was a problem that had afflicted Māori land law since the creation of court process in 1865. Fees payable by Māori included £1 to commence an investigation of claim, to bring a defence or counter claim, to receive a certificate of title, and to receive a Crown Grant.[66] Fees were also payable to give evidence, to swear in a witness for such testimony, and for interpreters.[67] Most importantly, £1 was charged to each party for each day that an investigation took.[68] The associated costs of surveying the land and court attendance compounded this burden to the extent that in many cases, the cost of the process outweighed the total value of the investigated land. In his submissions to the 1891 Commission, the Tūranga-nui-a-Kiwa rangatira Wi Pere drew attention to cases in Cambridge and Waipiro where "the expenses were so great that the value of the land was absorbed in… the sittings of the Court."[69] If court fees could not be paid, then the Court would not hear a claim, which created injustice by excluding legitimate claims to blocks. In further frustrating court process, the legislature was compounding these issues.

The Native Land Court Act 1894 was enacted in response. It was, in part, motivated by the vast number of petitions received by Parliament between 1880 and 1890 concerning Native Land Court process.[70] The Act provided much-needed consolidation; the Act repealed nine statutes that had been enacted in the preceding 13 years, including the aforementioned Native Land Court Amendment Act 1888.[71] It also established an appellate court,[72] intended to provide a cheaper replacement to the onerous Native Land Court 're-hearings'.[73] These changes undoubtedly mitigated the issue of costs. However, the legislation also reinstated the Crown right of pre-emption, which had been waived since 1862.[74] This right was already operating at a regional level, with Crown pre-emption in the King Country and Rotorua region prior to the Act's enactment.[75] Even in an open market, the Crown engaged in dishonest methods in facilitating Māori land purchases. The tangihanga (funeral) process was a common opportunity utilised by land purchase officers. They replicated the system in Hawke's Bay by advancing

[66] Native Lands Act 1865, s 62.
[67] Gilling, above n 20, at 21.
[68] Gilling, above n 20, at 21.
[69] Rees and Carroll, above n 60, at 9.
[70] Rees and Carroll, above n 60, at xi. Over 1000 petitions were received in this period.
[71] Section 114; see Schedule 1 for a list of the repealed acts.
[72] Section 79.
[73] Māori Land Court *150 Years of the Māori Land Court* (Ministry of Justice, 2015) at 49.
[74] Section 117.
[75] Māori Land Court, above n 73, at 49.

the goods required for a tangihanga and gaining a hold over the land in return.[76] In one instance, a land purchase officer was found to have committed outright forgery of store account vouchers 'signed' by Māori.[77] The reinstatement of pre-emption provided extra dimension of leverage to these existing practices. It effectively meant that if you were to sell, or more likely pressured into selling by government methods, it was exclusively on the government's terms – or not at all. This problem manifested itself in the mass alienation of over 2.7 million acres of Māori land to the Crown in the following six years.[78]

The focus of Māori land law legislation shifted at the turn of the century; centring on the administration of what Māori land remained. The problems relating to Māori autonomy over their whenua would come to the fore of Māori land law discourse during this period. Despite the different focus, once again, the legislative attempts over the 19th century would largely fail to create satisfactory outcomes.

4. Māori Land Administration Act 1900

The worrying trend of Māori land alienation had become of paramount concern. As previously mentioned, the Native Land Court Act 1894 had facilitated this by enhancing unscrupulous Crown purchasing methods with a monopoly on the land purchase market. However, the Crown appeared to have come to understand the social and economic consequences of this on ngā tangata Māori. To mitigate these consequences, the Māori Land Administration Act 1900 was enacted to develop the remaining Māori freehold base. To do so, the Act established Māori Land Councils.[79] Each Council was to have a Māori majority, a combination of elected representatives and government appointees.[80] Their primary responsibility was to administer any land voluntarily transferred to it by Māori landowners.[81] These entities were posited as the vehicle of improvement, through their powers of lease, reservation, mortgage, as well as direct links to public finance.[82] But the legislation did not recognise the nature of the problem it was addressing. By this stage, Māori distrust of the legislative framework was tremendous. This

[76] Williams, above n 32, at 218.
[77] Sorrenson, above n 36, at 190. Sorrenson describes the practices of a government purchase agent of J.C. Young and his track record of deceitful dealings.
[78] Tom Brooking, "'Busting Up' The Greatest Estate of All: Liberal Māori Land Policy, 1891-1911" (1992) 26 NZJH 78 at 78.
[79] Section 6.
[80] Section 6.
[81] Section 29.
[82] Section 29.

was unsurprising, given their experience under the preceding 35 years of Māori land legislation. It was in this context that the Māori Land Administration Act effectively asked Māori to hand over what autonomy they had left over their whenua. It received an underwhelming response; the majority of Māori did not seize upon the opportunity to vest their land in their local Māori Land Council, despite instances of it in the King Country and Whanganui.[83] Failure to tailor the reform to the political landscape would mean the failure of the reform itself; the Māori Land Councils were abolished after only five years, in pursuit of more radical alternatives.[84]

5. Native Land Amendment and Native Claims Adjustment Act 1929

Despite the aforementioned failure, the development of Māori land remained the firm focus of the legislature. A Department of Māori Affairs report in 1920 repeated the importance of doing so; acknowledging that of the Māori land suitable for settlement, "there is barely sufficient for the requirements of the Natives themselves."[85] The government also recognised that a greater burden would fall upon it later if they continued to let Māori land languish.[86] The efforts of Sir Apirana Ngata, as Minister of Māori Affairs in the late 1920s, finally led to significant development action. The Ngāti Porou rangatira had been urging for government assistance in development from as early as 1907, through the Stout-Ngata Commission. The Native Land Amendment and Native Claims Adjustment Act in 1929 provided the legislative framework for Ngata to realise his development policies. It provided him, as Minister of Māori Affairs, with the ability to personally dictate development of a block of land, and delegate a number of development powers to a Māori Land Board or the Native Trustee.[87] Thus these bodies could provide a mortgage over Māori land,[88] order the preparation for and construction of farm infrastructure,[89] and even authorise the purchase of livestock.[90] A number of development schemes were subsequently established.

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[83] Stout-Ngata Commission "General Report on lands already dealt with and covered by interim reports" [1907] I AJHR G1C at 6.
[84] See the Māori Land Settlement Act 1905, which established the controversial Māori land boards and their compulsory vesting powers. This was followed by the Native Land Act 1909, which was the largest consolidating statute until the Te Ture Whenua Māori Act 1993.
[85] Under-Secretary of the Native Department, "Report on the working of the Native Land Courts, Māori Land Boards, and Native Land Purchase Board" [1920] I AJHR G9 at 3.
[86] Māori Land Court, above n 73, at 62.
[87] Section 23(3).
[88] Section 23(7)(a).
[89] Section 23(3)(a).
[90] Section 23(3)(c).

Ngata likely envisaged the mass recreation of the Ngāti Porou farming scheme he had helped develop on the East Coast, prior to the legislation. After over 20 years of effort, the iwi owned nearly 250,000 sheep; and had established their own finance and dairy company.[91] This economic revival also worked to empower Te Ao Māori; the scheme firmly centred the Māori worldview.[92] Contrary to European views that rejected Māori farming capacity, Ngata showcased what could be achieved if the capital was available.

But the legislation mostly failed to deliver these aspirations. The structures put in place were all underpinned by a level of Department control over their operation. Much of the land placed in development schemes was done unilaterally by the Minister or Māori Land Board. However, it was unclear whether owners of these lands necessarily consented to this transfer.[93] Once land was in a scheme, owners could not interfere or obstruct the development work. They instead had to rely upon the commitment of the Department manager assigned to the scheme. This was often more hit than miss. In the case of the Taurewa Development Scheme, the owners apportioned considerable blame to the "lack of forceful and imaginative management"; in their words: "The managers didn't have to perform – they just had to stay in the job long enough and not cause ripples."[94]

Consultation with the owners fluctuated, but often extended only to updates on the scheme's progress, rather than real decision-making opportunities. This was significant in light of the administration's practice in charging loans against the development land. Although this secured financing for the development scheme, it was often done to a level that did not reflect the economic yield of the scheme.[95] Schemes were therefore restricted by the need to discharge the mortgage over the land. Regardless of tangata whenua involvement in the scheme, the overarching supervision of the Department prevented Māori from taking independent control and responsibility of developing their whenua. The terms of their autonomy were instead dictated to them. They were essentially "little more than employees of the Department."[96]

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[91] G.V. Butterworth, "A Rural Māori Renaissance? Māori Society and Politics 1920 to 1951" (1972) 81 JPS 160 at 163.
[92] Butterworth, above n 91, at 163.
[93] Waitangi Tribunal, above n 15, at 109.
[94] Waitangi Tribunal *The Taurewa Development Scheme* (Wai 1130, 2006) at 107.
[95] Aroha Harris "Māori Land Development Schemes, 1945 – 1974, with two case studies from the Hokianga" (MPhil Thesis, Massey University, 1996) at 28.
[96] Harris, above n 95, at 109.

6. Māori Affairs Act 1953

Subsequent reform took a more drastic approach to development. The Māori Affairs Act 1953 consolidated existing statutes and confirmed the role of the state in controlling development. It also introduced the conversion process, which targeted the fragmentation of interests in Māori land blocks. It was state opinion that successful Māori farming development required significant changes to the structure of Māori land titles.[97] They pointed to title fragmentation as preventing the creation of effective farming units; rather than facilitate productivity, the Māori ownership regime was cost-heavy.[98] The conversion process prevented the Māori Land Court from vesting an 'uneconomic interest' in a beneficiary.[99] Following the findings of the Prichard-Waetford Reports in the early 1960s, an 'uneconomic interest' was eventually defined as any beneficial interest with a value not exceeding £50.[100] The Māori Trustee gained the ability to compulsorily acquire these interests.[101] Additionally, the Act also allowed the Māori Land Court to change the status of a land block from Māori freehold to General land, provided that there were less than five owners, and that they had been notified.[102] This represented a massive addition to the administration power of both the state and the judiciary.

Despite its intentions, the legislation equated to an outright denial of the Māori-whenua relationship. Māori were more than willing to accept the problems that multiple titles presented. But as troublesome as it was, it still echoed their relationship with the whenua. As Māori MP Matiu Rata put it, although the law had greatly distorted the original relationship with the whenua, it still reflected the "Māori tradition of tribal ownership and association with a specific area of land."[103] Regardless of how uneconomic an interest might be, it still provided an individual with connection to, and rights in, their whenua. In turn, this served to recognise their iwi/hapū connection and rights.

Once again, the government did not understand the nature of the problem they were responding to. Māori wanted reform to focus on making the multiple owners regime workable; this was

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[97] Waitangi Tribunal, above n 94, at 18.
[98] Richard Hill, *Māori and the State: Crown-Māori relations in New Zealand/Aotearoa, 1950-2000* (Victoria University Press, Wellington, 2009) (#11) at 31.
[99] Section 137.
[100] Maori Affairs Amendment Act 1967, s 119.
[101] Māori Affairs Act 1953, 119.
[102] Section 6.
[103] Hill, above n 98, at 159.

made very clear when consulted by the Hunn and Prichard-Waetford commissions.[104] But the Government response instead focused on why they believed it was unworkable, and how to break it down; at the expense of the fundamental connection between ngā tangata Māori and their whenua.[105] The wave of protest in response to this legislation would eventually see some aspects repealed in 1974, as the legislature attempted to shift focus to promoting Māori at the helm of development.[106]

Summary

Given the vast amount of legislative reform regarding Māori land law between 1862 and 1993, it can be difficult to recognise common themes linking every instance to each other. However, the preceding discussion has arguably shown that there is a common narrative to the Māori land law cycle. Each of the described statutes encountered the same three stages of this narrative; problem perception, legislative response, followed by an unsatisfactory outcome. This occurred regardless of their unique contextual differences. It is because of this common narrative that there should be real concern about the future of Māori land law.

[104] See J.K. Hunn *Report on the Department of Māori* Affairs (August 1960) at 52-59; see also Ian Kawharu "The Prichard-Waetford Inquiry into Māori Land" (1967) 76 JPS 205 for a critical analysis of the commission's report.
[105] Hill, above n 98, at 157.
[106] See the Māori Affairs Amendment Act 1974, which abolished the compulsory conversion and consolidation regimes.

II The Te Ture Whenua Māori Bill 2016

The Te Ture Whenua Māori Bill (TTWM Bill) 2016 is the most recent iteration of attempted reform. The Bill was never enacted, due to a range of criticisms regarding both form and process. Aotearoa New Zealand had never been better positioned to consider the legislative question of Māori land law. An educated awareness of the legislative history, alongside greater access to information and first-hand accounts of land owners, created real potential to break the cycle. Yet the TTWM Bill ended up being just another illustration of the common narrative. If anything, the Bill's failure is a positive outcome; the problems it was predicted to generate were not able to manifest. However, it only reemphasises those concerns about the future of Māori land law. This chapter focuses on discussing the current law and the significant changes proposed in 2016.

A. Te Ture Whenua Māori Act 1993 – The existing framework

The Te Ture Whenua Māori Act (TTWM Act) 1993 had operated for 23 years before the introduction of the TTWM Bill. It was enacted after a significant period of political activism that developed the relationship between Māori and the Crown. The Act's core foundations were provided by a New Zealand Māori Council report titled *Kaupapa: Te Wahanga Tuatahi*, which described both the cultural and economic significance of the Māori-whenua relationship. Given this, they recommended that "the law must provide for the retention of Māori land to the fullest extent possible", as well as provide the means to recognise that potential through policies that "emphasise and consolidate Māori land ownership."[107]

The dual aspects advanced by the Council paper are affirmed in the Preamble to the Act:

> ...to recognise that **land is a taonga tuku iho** of special significance… to promote the **retention** of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to **facilitate the occupation, development, and utilisation** of that land for the benefit of its owners, their whanau, and their hapu…
>
> (emphasis added)

[107] New Zealand Māori Land Council *Kaupapa Te Wahanga Tuatahi* (1983) at 10.

According to Te Puni Kōkiri (TPK), the replacement to the Ministry of Māori Affairs, the Act provides "Māori people a greater say in Māori land matters."[108] A number of key provisions attempt this. First, any proposed land alienation must first be offered to the "preferred class of alienees."[109] In short, this refers to the broader whakapapa group of the block.[110] It also became more difficult to change a block's status from Māori freehold to General land. [111]

Decision-making is governed by strict voting and quorum requirements for all proposed dealings with the whenua; resolutions to sell and grant long term leases require the support of 75% of the ownership of the land.[112]

Most importantly, the Māori Land Court has to confirm any dealing or transaction with the land after technical requirements are met by owners. Confirmation is based on the merits of the proposal; the Court must be satisfied that it will facilitate the objectives identified under s 17, s 2, and the Preamble.[113]

B. The first stage: problem perception

There are two strands to the 'problem' that the Te Ture Whenua Bill 2016 was responding to. The first is relatively uncontentious: that the Māori landbase, as a whole, is underperforming economically. This is not a novel problem belonging to the 21st century; Māori land has continually been burdened by development restrictions that prevent recognition of economic potential.

The Crown emphasised this concern in government reports produced by the Ministry of Agriculture and Fisheries (MAF) and the Ministry of Primary Industries (MPI), in 2011 and 2014 respectively. The former estimated that over 80% of Māori land was currently unfit for arable farming, and that the economic output of freehold land enterprises was around 60-70%

[108] Te Puni Kōkiri *Te Ture Whenua Māori Act 1993: A Summary* (1993) at 5.
[109] Section 148.
[110] Section 4.
[111] Part VI.
[112] Māori Assembled Owners Regulations 1995, reg 33-34.
[113] Section 17 outlines a number of specific objectives that the Court **must** promote in exercising its jurisdiction and powers under the Act; for example, sees 17(2)(d), concerning the Court's objective to assist in protecting minority interests in a block. Section 2 further provides that the Act's provisions be interpreted in a manner that best furthers the principles set out in the Preamble. The Court is essentially engaging in a balancing act when considering whether to provide confirmation.

of the national production average.[114] The MPI report repeated this production level value, and further claimed that a $3.4 billion increase in GDP could be achieved if the performance of Māori land improved.[115] Despite the concerns expressed by both Justice Layne Harvey and the Waitangi Tribunal as to the reliability of the data, both still concede that the reports were correct in classing Māori land as economically underperforming.

Māori land owners have also been voicing these concerns from as early as 1998, mainly through a number of reports. A Te Puni Kōkiri (TPK) report in 1998, based on 18 consultation hui around the motu, noted that most participants identified barriers to land development as a major issue. Paper roads, rating, land valuations, the Resource Management Act 1991 and landlocked lands were among those barriers identified.[116] The Waitangi Tribunal identified at least five other reports where these concerns were repeated.[117]

The second strand of the perceived 'problem' was the operation of the existing TTWM Act. Of the reports that involved consultation, most identified some level of Māori desire to gain greater autonomy in managing their whenua. A Federation of Māori Authorities (FOMA) report in 1997, for example, found that 63% of their respondents were unhappy with the powers and discretion exercised by the Māori Land Court.[118] This was reiterated in a 2011 TPK report on owner aspirations, which also provided examples of court process impeding development. The discretion of the Court in determining whether attendance requirements had been adhered to was one such example.[119] Despite criticisms regarding the representativeness of these reports, each one provided 'evidence' of Māori desire for legislative change, at least from a government perspective. This opinion was repeated in the government commissioned MAF and MPI reports. Both were clear in allocating blame to the Act for playing a key role in restricting economic development.

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[114] Ministry of Agriculture and Forestry *Māori Agribusiness: A Study of the Māori Freehold Land Resource* (2011) at 7.
[115] Ministry for Primary Industries *Growing the Productive Base of Māori Freehold Land – further evidence and* analysis (2014) at 32. This increase was dependent on a $900 million investment. The report did not clearly identify where this would come from.
[116] Waitangi Tribunal *Initiation, Consultation and Consent: Chapter 3 of Report into Claims concerning Proposed Reforms to Te Ture Whenua Māori Act 1993* Pre-Publication Version (Wai 2478, 2016) at 26.
[117] Waitangi Tribunal *He Kura Whenua Ka Rokohanga – report on claims about reform of Te Ture Whenua Māori Act* 1993 (Wai 2478, 2016) at 106. Identified is the 1996 investment group report, the 1997 FOMA survey, the 1998 McCabe Committee, the 1999 Māori Land Development Group report, and the 2006 Hui Taumata report.
[118] Federation of Māori Authorities *Māori Land Court and Land Utilisation Options under Te Ture Whenua Māori Act 1993* (Te Puni Kōkiri, 1997) at 20.
[119] Te Puni Kōkiri *Ko Ngā Tumanako o Ngā Tangata Whai Whenua Māori: Owner Aspirations Regarding the Utilisation of Māori Land* (2011) at 34.

In light of these, a Review Panel was established in 2012, tasked with investigating the TTWM Act "with a view to recommending legislative amendments… unlocking the economic potential of Māori land."[120] Following 20 consultation hui and 189 written submissions from a variety of Māori perspectives, their final report in 2014 effectively restated that the existing legislative framework was seen as barrier to unlocking economic potential. The Panel claims to have encountered broad Māori support for their propositions; despite debate on particular aspects, hui participants indicated their support for reducing the supervisory and dispute resolution role of the court, empowering the decision making ability of owners, appointment of external land managers where appropriate, and changes to governance models.[121]

At this stage, it is important to acknowledge the extensive criticism of the review process. This has focused on, for example, the Panel's decision to not conduct its own research, and whether the information provided at the consultation stage adversely affected understanding of the five propositions. This naturally led to criticism of the Panel's conclusions. The Waitangi Tribunal has examined this in depth;[122] but for the purposes of this dissertation, engaging in this analysis is not relevant for the purposes of establishing the common narrative. The impetus behind the 2016 reform, even if misguided, demonstrated that a problem was perceived with Māori land law.

C. The second stage: presenting the legislative solution

The proposed solution was a sizeable one. At the time of its withdrawal, the TTWM Bill took up over 400 pages, with 16 Parts, and 12 Schedules. Because of this, the intention was to divide the Bill into three separate pieces of legislation.[123] The key changes are described below.

Firstly, a new participating owners model for decision making was introduced. In short, this shifted decision-making power from all owners to those who actually participate in the decision. Different quorum requirements were established for each different kind of

[120] Review Panel *Te Ture Whenua Māori Act 1993 Review Panel Report, Poutū-te-rangi* (2014) at 3.
[121] At 4-13; see Propositions 1-4.
[122] See Waitangi Tribunal *He Kura Whenua Ka Rokohanga – report on claims about reform of Te Ture Whenua Māori Act* 1993 (Wai 2478, 2016). It concluded that the reform proceeded based on inadequate information, that Crown consultation breached the common law standard and would breach Treaty principles, and that a number of problems existed with the Bills provisions.
[123] Te Ture Whenua Māori Bill 2016 (126-2) (explanatory note) at 2; see also Supplementary Order Paper 2017 (278) Te Ture Whenua Māori Bill 2016 (126-2).

decision.[124] It constituted a significant decrease in the owner engagement previously required. However, some decisions still required the majority of all owners; such as the sale of land.[125] Participating owners could also hold a second-chance decision making process, if they did not meet quorum requirements at the first instance.[126] Threshold requirements would not apply in this instance.

Under Part 5 of the Bill, ahu whenua trusts, pūtea trusts, and Māori incorporations were replaced by the rangatōpū governance regime. Bodies already existing were protected; but any new bodies would be a rangatōpū in the form of a private trust or a body corporate.[127] The previous spread of duties was condensed into a standardised form. Whānau trusts survived under the Bill; but they also became the default regime where an owner dies intestate and is survived by more than one eligible beneficiary.[128]

All dispositions of Māori freehold land were to be governed by a new, highly prescriptive regime.[129] Court confirmation was not required for all of these. Furthermore, the Court no longer had to consider the overall merits of a disposition; it only had to confirm that the technical requirements for the disposition were met.[130] Its role in dispute resolution was also essentially reduced to considering questions of law; all other issues were to pass through a compulsory dispute resolution service provided by the Māori Land Service, the proposed administrative body for the Bill.

D. The final stage: the solution that would have failed

Criticism of the Bill itself had existed since its first draft exposure in 2015. The key themes of this included a focus on potential land loss, the reduced role of the Court in facilitating this, and the failure to address the real barriers to Māori land development. These themes manifested in both the Te Ture Whenua Māori Reform: Summary of Submissions in 2015 as well as the additional submissions made to the Select Committee in 2016.

[124] Clause 51A.
[125] Clause 100(4)(a).
[126] Clause 51B.
[127] Clause 158(1)(c)(iii).
[128] Clause 247.
[129] Clauses 96-141.
[130] See clause 100(5)(a) for sale of Māori freehold land, which states "The sale must be conditional on the court making an order of confirmation that it complies with the requirements of Parts 1 to 9..."

The participating owners model was one of the most criticised features of the Act. Submissions made characterised it as a means for the minority to bind the majority without their consent.[131] Submissions also acknowledged that engaging non-participating owners was difficult, but this did not justify legislative measures that excluded their rights and undermined collective ownership of the land.[132] As the Māori Land Court bench explained, the Court is unable to ensure any decisions are in the interests of all owners; thus a minority ownership could bind the land at the expense of other owners.[133] It was also argued a lack of accountability to other owners would result in poor-decision making by the minority ownership.[134]

The second decision-making process outright undermined the protection of owners' rights. As Justice Harvey confirms in his analysis of the judges' submission, it completely removed the already reduced standard of protection under the Bill, making such protection meaningless in the first place.[135] In attempting to free up utilisation, this provision would have attacked the core rights of the Māori relationship with the whenua.

Then Minister Te Ururoa Flavell, the then Member of Parliament in charge, had constantly referred to the "greater autonomy over land, mana motuhake" that the Bill provided.[136] However, the default whānau trust provision was ideologically inconsistent with this. The provision effectively limited the ability of Māori landowners to self-govern their interests. Many submissions expressed that creating a trust should be the decision of the owners; one submission even identified the Māori Appellate Court regarded the full consideration and consultations of the owners as necessary.[137] The Ngāi Tahu Māori Law Centre even claimed that this provision constituted a breach of the tino rangatiratanga promised under Article 2 of Te Tiriti o Waitangi.[138] Also cited was the risk for creating dysfunctional trusts,[139] and a

[131] Te Puni Kōkiri *Te Ture Whenua Māori Reform: Summary of Submissions* (September, 2015) at [220].
[132] Otonga Whānau Trust "Submission to the Māori Affairs Committee on the Te Ture Whenua Māori Bill 2016" at 2; Te Rūnanga o Ngāti Awa "Submission to the Māori Affairs Committee on the Te Ture Whenua Māori Bill 2016" at [3](i).
[133] Judges of the Māori Land Court "Te Tari o te Kaiwhakawā Matua o te Kooti Whenua Māori / Submission of the Judges of the Māori Land Court on the Te Ture Whenua Māori Bill" at [23].
[134] Judges of the Māori Land Court, above n 133, at [26].
[135] Layne Harvey "Would the proposed reforms affecting ahu whenua trusts have impeded hapū in the development of their lands? A Ngāti Awa perspective" (Doctoral thesis, Auckland University of Technology, 2018) at 163.
[136] Office of Te Ururoa Flavell "Te Ture Whenua Māori Bill – next steps" (press release, 15 April 2016)
[137] Te Puni Kōkiri, above n 131, at [530].
[138] Ngāi Tahu Māori Law Centre "Submission to the Māori Affairs Committee on the Te Ture Whenua Māori Bill 2016" at [96].
[139] Judges of the Māori Land Court, above n 133, at [150].

subsequent difficulty to terminate these.[140] The provision intended to reduce the harms of fragmentation; but it would have severely detracted from existing Māori autonomy.

This criticism was repeated regarding the compulsory dispute resolution process. The Waitangi Tribunal labelled it as inconsistent with Treaty principles and owner autonomy.[141] The process did not require any consideration of the owners' preferences. Disputes would instead be forced to go through a system lacking the experience of the Court, despite submissions pointing to the Court as being best qualified to determine whether a case should even go to alternative dispute resolution.[142] This highlighted the doubts about the capabilities of the new Māori Land Service in performing its functions. The lack of concrete information regarding its operation was a serious concern for some submitters.[143] At the second reading of the Bill, Ikaroa-Rāwhiti MP Meka Whaitiri emphasised this concern, also citing the lack of a transitional plan and loss of senior Court managers as issues.[144]

The overall decrease in Court power was significant. Despite the gains in owner autonomy, removal of the Court's discretionary powers equated to the complete removal of "a well-understood system of protections, which have guaranteed land protection over the past two decades."[145] The benefits of autonomy did not negate the risks that came with removing these retention safeguards. Despite nearly all of the submissions on the exposure draft emphasising the need for sufficient safeguards, the final draft dramatically opened the ability to alienate Māori land.[146]

The Bill also received criticism at a more general level. Dr Paerau Warbrick was particularly concerned by the Bill's complexity in his analysis of the proposed reforms. In his opinion, the need for a 52 page explanatory section alone was testament to this complexity.[147] However, he also identified the new decision making regime as an example of a poorly drafted portion, due

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[140] Te Rūnanga o Ngāi Tahu "Land bill courts controversy" (7 October 2015) Te Rūnanga o Ngāi Tahu <https://ngaitahu.iwi.nz/our_stories/land-bill-courts-controversy/>
[141] Waitangi Tribunal, above n 117, at 251 [4.6.1].
[142] Te Hunga Roia Māori o Aotearoa "Submission on review of the Te Ture Whenua Māori Act 1993" at [6.6]; The Collective "Submission to the Māori Affairs Committee on the Te Ture Whenua Māori Bill 2016" at [122].
[143] Belinda Sharp "Submission to the Māori Affairs Committe on the Te Ture Whenua Māori Bill 2016" at 1.
[144] (13 December 2016) 719 NZPD (Te Ture Whenua Māori Bill – Second Reading, Meka Whaitiri)
[145] Waitangi Tribunal, above n 117, at 263.
[146] Te Puni Kōkiri, above n 131, at [67].
[147] Paerau Warbrick "A cause for nervousness: The proposed Māori land reforms in New Zealand" (2016) 12 *AlterNative* 370 at 375.

to its excessive prescription of details.[148] Toni Love likewise confirms that despite the "cosmetic" redrafting, areas like this were difficult to navigate and understand.[149]

Summary

Although this does not account for every criticism of the Bill's substance, this discussion illustrates that many perceived that the Bill would have created adverse consequences, at both a technical and an ideological level. In doing so, these concerns reflect the final stage of the common narrative. The contemporary approach to Māori land law is evidently incapable of breaking the reform cycle; the question of how to do so remains glaringly open.

[148] At 375.
[149] Toni Love "Review of Te Ture Whenua Māori Act 1993 – 2017 progress of Te Ture Whenua Māori Bill" (2017) MLR. See her discussion under the heading "Ownership Interests".

III Critical Legal Theory on Reform

Given the need for practical solutions, a jurisprudential approach to Māori land law reform does not seem appropriate. However, the need to consider alternative approaches continues to rise as the Māori land reform cycle continues. Critical Legal Theory (CLT) perspectives construct a compelling argument against the notion of reform. This chapter focuses particularly on the arguments of theorists Carol Smart and Mari J. Matsuda, due to their focus on reform.

A. The predominant perspective – An introduction to legal positivism

Legal positivism is a popular theses in legal philosophy.[150] This school of thought is centred on the notion that law is a social construction. [151] What constitutes law is not based upon its merits; rather, it is a matter of what is socially recognised as being an authoritative source of law.[152] Political and moral considerations do not define the limit of the law.

However, they are key forces behind legal reform. This does not challenge legal positivism's core thesis because legal reform is considered a distinct analysis; it is an exercise of what the law **should** be.[153] The separation between law and political and moral thought provided, as summarised by Jeremy Bentham, an objective standpoint from which to evaluate the descriptive law.[154] It meant society was best placed to critique and redesign what the law was. Legal positivism was seen to enhance the effectiveness of legal reform.

B. Critical Legal Theory – General perspectives on reform

Critical Legal Theory was a school of thought that emerged out of the late 1970s.[155] It incorporates a range of theories (including Feminist Theory, Critical Race Theory, LGBTQ Theory), and arose as a reaction to the "legal liberalism" that had been ongoing since the

[150] Jeffrey Kaplan "Attitude and the Normativity of Law" (2017) 36 Law & Phil 469 at 469.
[151] Leslie Green "Legal Positivism" (3 January 2003) Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/legal-positivism/>
[152] Green, above n 151.
[153] Giorgio Pino "The place of Legal Positivism in contemporary constitutional states" (1999) 18 Law & Phil 513 at 525 and following.
[154] Frederick Schauer "The Path Dependence of Legal Positivism" (2015) 101 Va L Rev 957 at 962.
[155] Legal Information Institute "Critical Legal Theory" Cornell Law School <https://www.law.cornell.edu/wex/critical_legal_theory>

1930s.[156] CLT firmly rejects the idea that law is neutral from political and moral discourse.[157] This separation conceals that illegitimate hierarchies are responsible for legal outcomes, rather than objective, neutral means.[158] Thus Critical Race Theory advances that in America, white privilege forms the basis of the core legal structures.[159] The idea that the law serves everyone equally is refuted, as that institutional racism instead works against people of colour.

Given this, CLT approaches legal reform differently. Whereas legal positivism considered reform an effective means of improving the 'neutral' edifice of law, CLT questions this effectiveness, since reform activity is actually engaging with a biased edifice.[160] Legal reform can resolve problems with the existing legal order that political, social, and moral considerations identify. But if the law itself promotes a prejudiced hierarchy, is this reform really resulting in fundamental change? This is the primary problem that CLT theorists have with the effectiveness of reform.

Feminist Legal Theory (FLT) demonstrates this criticism. Reform has undeniably achieved significant results for women's interests. Through the activism of the suffragette movement, Aotearoa New Zealand became the first self-governing state to grant women the legal right to vote.[161] Further reform continued to improve the position of woman; the Married Women's Property Act 1884 finally gave women legal existence and the ability to hold property of their own.[162] This trend was continued through a number of acts addressing these historic inequalities.[163]

However, FLT also identifies that law emphasises certain patriarchal themes. Modern rape law is one such context. In many jurisdictions, modern rape law describes the offence as occurring when a person penetrates another person's genitalia with their penis.[164] Theorist Ngaire Naffine

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[156] Alan Hunt "The Theory of Critical Legal Studies" (1986) 6 OJLS 1 at 5.
[157] Allan Hutchinson and Patrick Monahan "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stan L Rev 199 at 207.
[158] Hutchinson and Monahan, above n 157, at 210.
[159] UCLA School of Public Affairs "What is Critical Race Theory?" UCLA School of Public Affairs <https://spacrs.wordpress.com/what-is-critical-race-theory/>
[160] Margaret Davies "Legal theory and law reform" (2003) 28 Alt LJ 168 at 170.
[161] Patricia Grimshaw "Politicians and Suffragettes: Women's Suffrage in New Zealand, 1891-1893" (1970) 4 NZ Journal of History 160 at 175.
[162] Section 3(1).
[163] The Divorce Act 1898, Joint Family Homes Act 1950, and Guardianship Act 1968 were examples of these.
[164] See Crimes Act 1961 (NZ), s 128; Sexual Offences Act 2003 (UK), s 1; Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (SA), s 3; Code Pénal (FR).

argues that presenting the man as the initiator and the woman as a helpless victim in the law reinforces a classical understanding of sexual relations; that women were merely submissive objectives demanding to be possessed.[165] Feminist legal theorists are equally critical of the legislative responses. The Australian approach in various states was to de-sex rape law provisions.[166] Practically speaking, this made the law neutral and recognised the respective ability of woman to rape and be punished for it. But as Naffine recognises, de-sexing rape law does not change that it is still predominantly men who rape women.[167] Recognising an equality in sexual capacity does not target that behaviour. Thus the reform implicitly reinforces that patriarchal theme of possession in modern society.[168] This theme will inevitably be reintroduced as modern interpreters engage with the new law. This context broadly demonstrate the issues surrounding the law and legal reform.

C. Carol Smart

Carol Smart considers reform from her perspective as a feminist sociologist. She does not deny the power of the law to secure significant victories for feminism. Her argument is instead centred on understanding the true consequences of engaging with the law in this way.

Smart avoids re-describing the 'true nature' of law, other than to reiterate that the law's components are "fundamentally anti-feminist."[169] Take legal procedure; the law defines what is within its realm of adjudication, what is of relevance in determining a legal issue, and case analysis should be used in making judicial decisions.[170] Feminist criticisms of this can simply be labelled irrelevant factors, meaning there must be a choice between being a good feminist, or being a good lawyer.[171] If feminist engagement with the law cannot dispel the notion of neutrality, this then qualifies the successes of feminist reform and the practical solutions they provide.

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[165] Ngaire Naffine "Possession: Erotic Love in the Law of Rape" (1994) 57 Modern Law Review 10 at 21.
[166] Criminal Code Act Compilation Act 1913 (WA), s 324D. This gives a wide definition to "sexual penetration" as well as "any person".
[167] At 25.
[168] At 25.
[169] Carol Smart *Feminism and the Power of Law* (Routledge, New York, 1989) at 160.
[170] At 22.
[171] At 22.

To Smart, the primary consequence is that by resorting to reform, the feminist movement is affirming law's legitimacy as the solution-provider.[172] Each successful instance of feminist reform provides 'evidence' that law's power is justified, and in doing so, bolsters the patriarchal hierarchy that lies behind the law. Furthermore, using the law to express feminist legal criticisms undermines the true essence of the critique; feminist ideals are distorted and simplified by legal expression.[173]

Smart also describes the "juridogenic potential of law."[174] This is the potential of legal reform to generate new negative outcomes,[175] which Smart demonstrates via rape law. The law identifies consent as the only relevant legal question to answer at trial. However, this standard is flawed; it equates consent to some intimacy as consent to every act, and establishes a tough legal standard for non-consent.[176] Failure to meet this standard effectively means the victim is treated as having lied about everything. Determining consent also requires the victim to relive the encounter through questioning, and endure rigorous cross-examination challenging their account. These are examples of the negative outcomes that are generated due to law's juridogenic potential.

Armed with an understanding of these consequences, Smart argues, feminism should be able to recognise law reform alone will not result in fundamental change. What Smart proposes is to shift feminist attention from law reform to challenging the power of the law itself. It is fundamental to recognise the consequences of engaging with the law and affirming its power. But this in itself does not preclude any engagement at all. Rather, armed with this awareness, feminism should couple this engagement with a concerted effort to de-centre the power of law. Smart identifies this as two distinct issues: recognising law as a force for good, and recognising "law as a force at all."[177] Recognising the former should not automatically recognise the latter; yet feminism's current engagement with the law is implicitly doing so. To change this, feminism should be presented as a legitimate solution-provider in its own right; not incorporated into law, but seated alongside it. However, beyond identifying the need to

[172] At 161.
[173] At 115.
[174] At 161.
[175] A.R. Ascano and Joseph Meader "Juridogenic Harm and Adverse Childhood Experiences" (2017) 62 SD L Rev 797 at 797.
[176] Smart, above n 169, at 34.
[177] At 12.

challenge the normative power of law as opposed to the substance of it, Smart does not suggest what this might look like in practice.

D. Mari J. Matsuda

Smart's discussion is developed further by Mari J. Matsuda, a leading voice for Critical Race Theory. Matsuda focuses on 'outsider' perspectives; those of subordinate groups who have been excluded from shaping the law. Introducing these perspectives will result in a new, more representative jurisprudence.[178] This applies to the perspectives of both feminists and people of colour. Emphasising their voices in legal discourse will work to undo the historical exclusion that has contributed to the situation they live in today.

She explains this by showing how an individual can draw upon different consciousness in different settings. Thus a person with a woman of colour consciousness may be able to discuss violence against women with other white women; but the consciousness that wishes to attack the issue of white privilege, in that setting, can be left unutilised.[179] Yet each is equally as valuable and relevant as the other in determining what justice looks like.[180] These outsider experiences present completely different conceptualisations of what justice should be defined as. These concepts are "concrete and substantive"; tangible outcomes such as access to jobs, no children in poverty, control over your own body.[181] These contrast greatly with classic philosophical proposals concerning notions of distributive justice, theories of sentencing, and the rule of law.

In the context of legal procedure, these multiple consciousness manifest themselves in what Matsuda describes as "characteristic duality."[182] Like Smart, she acknowledges there is an inherent tension between using reform to achieve practical solutions and the way in which reform affirms the illegitimate hierarchy that excluded the outsider perspective in the first place.[183] But to stick to a single position is untenable, practically speaking. The power of law

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[178] Mari J Matsuda "On Identity Politics" in *Where is Your Body? And Other Essays on Race, Gender, and the Law* (Beacon Press, Massachusetts, 1996) at 15.
[179] Mari J Matsuda "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1992) 14 Women's Rts L Rep 297 at 298.
[180] At 298.
[181] At 298.
[182] At 298.
[183] At 298.

to help correct social injustice means it should be employed as a necessary tool.[184] But feminism needs to also express the other consciousness that challenges law and the patriarchal hierarchy it supports. Through utilising each consciousness, feminism can continue to work within the law to achieve significant outcomes, without unconditionally affirming the law and its power. Where Smart aims to raise awareness about the anti-law consciousness, Matsuda aims to raise awareness about how we can switch between that and the pro-legalism consciousness to best further the feminist agenda.

In doing so, Matsuda confirms the inability of legal reform alone to achieve fundamental change for outsider movements. It is not enough to effect change along the internal front alone. In order to truly recognise the outsider perspective, there needs to be external critique of the law and its foundations. Feminism within the law need not be restricted by theoretical loyalty to its own ideals; moreover, it cannot be if fundamental change is to be achieved.

E. Indigenous criticisms of Critical Legal Theory – Gordon Christie

This dissertation does not aim to posit CLT as the salvation of the whenua in Aotearoa New Zealand. Despite the compelling perspective it can offer on the Māori land reform cycle, it is still important to acknowledge criticisms of CLT, and more specifically, its applicability to Indigenous legal issues.

The Indigenous legal scholar Professor Gordon Christie focuses his criticism on the disjuncture between what CLT advances and the beliefs of Indigenous value systems. He does not question the core thesis that the law reflects the interests of an illegitimate hierarchy; indeed, he points to how colonisation employed the law in Canada to undermine First Nations and their traditional systems of living.[185] Restoring mana to these systems should be the overarching goal.[186] However, Christie argues that the way CLT proposes to do so is not consistent with the 'true Aboriginal vision'.

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[184] At 298.
[185] Gordon Christie "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 68 at 110. See also his further work; Gordon Christie "Indigenous Legal Theory: Some Initial Considerations" in Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law Comparative and Critical Perspectives* (Oxford University Press, New York, 2009); Gordon Christie "Culture, Self-Determination and Colonialism: Issues Around the Revitalisation of Indigenous Legal Practices" (2007) 6 Indigenous LJ 13; and Gordon Christie "A Review of Turner, D., This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy" (2007) 50 Can Pub Admin 317 for further discussion of critical legal theory in the indigenous context.
[186] At 110.

The CLT approach involves attacking what liberal theory says about the individual. The latter proposes that an individual is a fixed, independent entity; that they hold beliefs and thoughts rather than be constituted of them; that this fixed independence exists irrespective of the multiple cultures they may be a part of.[187] CLT refutes this and instead describes the individual as a "fluid and dynamic" entity, not in any way fixed or determinate.[188] An individual is not an objectively defined entity; they are characterised by their values and beliefs, all of which are theoretically capable of changing. Thus a tangata Māori disconnected from their culture since birth can begin to shape a new idea of self, as they adopt more and more of their traditional tikanga belief system.

Christie's description of Indigenous belief systems and their core concepts is inconsistent with this CLT characterisation of self. To him, these systems are clearly defined realms of knowledge, which in turn "provide essential guidance in the task of living good lives…."[189] Simply put, an Indigenous belief system operating as it was meant to provided purpose, fulfilment, and most importantly, happiness to an individual within it. Central to these systems is a notion of responsibility.[190] If an individual is not instilled with a sense of responsibility to the system and to the other individuals within it, then the system will fail to continue providing guidance to a 'good life'. This sense of responsibility, given its importance, thus constitutes a fundamental part of an individual's identity.[191] But if CLT allocates an individual with constant freedom to characterise their identity, how can mandatory obligations of responsibility avoid restricting that freedom? This is the primary problem Christie identifies with CLT in an Indigenous context. His interpretation of Indigenous value systems stresses that Indigenous identity is not completely free; it is restricted by the responsibilities central to the relevant Indigenous belief system. What CLT argues directly challenges that fundamental notion; therefore applying CLT perspectives to Indigenous legal discourse actually works against restoring mana to Indigenous belief systems.

Christie is correct in how he generally characterises Indigenous belief systems. In the Māori context, this core notion of responsibility can be seen through the traditional expectation of

[187] At 105.
[188] At 105.
[189] At 108.
[190] At 109.
[191] At 109.

strict adherence to tikanga, and the shared understanding that to breach tikanga resulted in negative outcomes for not just the individual, but the wider whānau and hapū. However, in regards to his position that CLT prevents full recognition of a traditional belief system, this can be likened to the position of Smart in attempting to raise awareness of the consequences of feminist engagement with the law. Awareness of Christie's critique is necessary to best inform CLT's application to Indigenous legal issues; but alone, it does not exclude CLT completely. Indeed, Christie himself identifies it remains an open question whether Critical Legal Theory can recognise this issue and develop an approach that accommodates this cultural difference.[192]

Summary

The arguments of Smart, Matsuda, and CLT in general provide a fresh perspective that denies the ability of legal reform alone to achieve fundamental change. Despite criticisms as to its applicability to Indigenous legal issues, there remains value in applying this perspective to the Māori land law situation, given the implications of what it argues.

[192] At 112.

IV Applying the Critical Legal Theory lens to the whenua

A. The 'colonial experiment' – The product of an illegitimate hierarchy

To apply Critical Legal Theory perspectives on reform, its core thesis must first be recognised; that the law of Aotearoa New Zealand represents the interests of colonisation. An examination of this assertion is worthy of its own dissertation; however, this dissertation proceeds on the basis that, at least in the case of Māori land legislation, this is the case.

This is clearly illustrated through the early legislation. The Native Lands Act 1862 emerged from years of discourse as to how customary Māori land tenure could be deconstructed, in favour of a tenure that facilitated the settlement of Aotearoa New Zealand. The legislature did not attempt to hide this intention either, as can be seen in the Preamble to the Act, as well as MP Dillon Bell's introduction of the Bill.[193] The legislation that followed continued to facilitate the colonisation of the country, at the expense of the Māori-whenua relationship. As Williams astutely notes, government policy always assumed that the settler demand for land had to be met; not once did it attempt to stymie the settler influx to reduce that demand.[194] Through measures such as distinct titles, individual interests, and the establishment of the Māori Land Court to administer these, the legislature successfully served these demands. The way in which early legislation supported the colonial hierarchy is best summed up by the politician Henry Sewell, when reflecting on it some years later: [195]

> The object of the Native Lands Acts was twofold: to bring the great bulk of lands in the Northern Island… within the reach of colonisation. The other great object was the detribalization [sic] of the Natives – to destroy, if it were possible, the principles of communism... upon which their social systems were based… which stood as a barrier… to amalgamate the Native race into our own social and political system.

This explicit attitude has been significantly moderated in times since. However, this does not change that Māori land legislation continues to promote a dominant colonial hierarchy; albeit more incidentally. The Ngāi Tahu Research Centre Whenua Project, through their *He Kokonga Whare* research, provides two reasons to support this. The first is that regardless of Māori input, the law remains a settler construct that will continue to express itself according to the settler

[193] Richard Boast "Evolution of Māori Land Law 1862-1993" in Richard Boast and others *Māori Land Law* (2nd ed, Lexis Nexis, Wellington, 2004) at 72.
[194] Williams, above n 32, at 82.
[195] (29 August 1870) 9 NZPD 361.

worldview.[196] Simply put, the colonial experiment of Māori land tenure is just not capable of expressing the Māori reality. The second reason explains that alterations to Māori land law cannot change that it was responsible for destroying the original Māori-whenua relationship.[197] It is the law that removed Māori autonomy, and even now continues to make decisions for Māori relating to their whenua. Based on this reasoning, continuing the colonial experiment will, in turn, continue to implicitly legitimate the colonial hierarchy responsible for it.

B. The inherent problems of Māori land law reform

The CLT perspectives of Smart and Matsuda work to explain the common narrative of Māori land law reform, illustrate the harm in continuing the colonial experiment, and propose ways of avoiding this harm. The ways in which they do so have been divided into the following.

1. Whakamihia te mana o te ture – Affirming the legitimacy of law

Based on Smart's argument, the principal problem with Māori land law reform is the act of engaging with the law itself. Yet, in reality, this concern has barely been raised. Māori advocates of Māori land law reform are firmly focussed on discovering how to provide much-needed practical solutions; so it is unsurprising that considering the bigger picture of their legal engagement is bottom of the priorities. This is the lack of awareness that Smart alludes to. It is through understanding the consequences of their engagement with the law, according to her reasoning, that Māori legal advocates should realise that Māori land law reform alone will not result in fundamental change.

The starting point is acknowledging the true nature of Māori land law. As demonstrated above, CLT allows ngā tangata Māori to argue that Māori land law represents, both intentionally and incidentally, the interests of an illegitimate colonial hierarchy.

The next step requires Māori legal advocates to understand that supporting legal reform of Māori land works to empower the law itself. This does not deny the ability of substantive legal reform in securing significant outcomes for Māori in regards to their whenua. The Māori

[196] Ngai Tahu Research Centre Whenua Project *The Colonising Environment: An Aetiology of the Trauma of Settler Colonisation and Land Alienation on Ngāi Tahu Whānau* (May 10 2017) at 24.
[197] At 25.

Affairs Amendment Act 1974 is one such example, responsible for abolishing the controversial conversion regime negatively targeting Māori interests.[198] Even the statutory acknowledgement of retention and development in the TTWM Act Preamble marked a significant victory for Māori.[199] However, what Smart's argument emphasises is that each time Māori engage in Māori land law reform, they are affirming the law's role in resolving Māori land problems.

The TTWM Bill illustrates this. The extensive debate throughout the Bill's lifetime either focused on the operation of its proposed provisions, or the operation of the TTWM Act; that is, whether overhauling the existing legislation was even necessary. But the common theme underpinning this debate was the idea that the law could provide fundamental change; it was just a matter of determining the right substance. Not one submission challenged whether the law should be regulating Māori land. This type of engagement can be seen at nearly every stage of the Māori land law reform cycle. Each instance of reform thus serves to legitimate law as the solution provider, and strengthen the idea that law is the means of 'fixing' Māori land.

This represents the core problem identified by Smart. Māori advocacy in land law reform empowers a construct that is antithetical to Māori interests. Continuing to alter the colonial experiment of Māori land tenure gives power to the hierarchy that created it in the first place. Thus it does not logically follow that Māori land law reform can achieve fundamental change for the whenua, irrespective of the practical solutions it can provide.

2. He tikanga tūturu? The distortion of Māori concepts

Another problem that both theorists identify is that law, practically speaking, is not a good tool for change. Smart explains this in the feminist context as follows:[200]

> The aim of 'fitting' feminist ideas … into a legal framework that might be 'workable' (in narrow legal terms) or politically 'acceptable', means that many of the subtle insights and complexities of feminist analysis are necessarily lost.

[198] Section 52; See Chapter I at 16 for a description of the conversion regime.
[199] Rāwiri Taonui "Te ture – Māori and legislation" (20 June 2012) Te Ara – the Encyclopedia of New Zealand <https://teara.govt.nz/en/te-ture-maori-and-legislation>
[200] Smart, above n 169, at 115.

Attempting to accommodate Māori perspectives on the whenua into the legislation has been treated as an ongoing objective. Flavell broadly emphasised this in identifying mana motuhake and taonga tuku iho as two of the overarching kaupapa of the recent Bill.[201] There has also been a concerted effort to alter the colonial experiment at a smaller scale, through specific recognition of Te Ao Māori. But CLT argues that overall, this approach is problematic because it distorts the essence of core whenua Māori values.

The individualisation of ownership created under the Native Lands Act 1873 demonstrates this. Irrespective of the colonial motivations behind it, it served to legally recognise the connection of all Māori to their whenua. The fact that this concept remains a major part of Māori land law corroborates Rata's earlier claim; that it is the best reflection of the Māori-whenua relationship.[202] But this legal recognition corrupts fundamental whakapapa links. The whenua is Papatūānuku, responsible for birthing humankind. To be able to own one's mother, to divide her up and sell her is unthinkable in Te Ao Māori; yet this is what the legislation resulted in.

More recent reform has involved a push towards recognition of tikanga and te reo Māori. The problems with statutory incorporation of tikanga can be inferred from the most recent Māori land law reform. In the TTWM Act, the term was afforded a very general definition.[203] In the TTWM Bill, it was not defined at all. The Māori Affairs Committee themselves acknowledged that codifying tikanga in the Māori land law context would be inappropriate. They preferred it to be established via evidence, rather than prescriptive interpretation.[204] Despite the legislature's prudent actions, it still recognises that legal recognition of tikanga is difficult. Furthermore, choosing not to define tikanga results in practical interpretation issues further down the line.[205]

In terms of te reo Māori, Justice Harvey provides an example by pointing to the use of kaitiaki in the TTWM Bill. The term was introduced to essentially describe a trustee or managing director, in relation to governance bodies.[206] It replaced the existing equivalents with a "catch all" term, which must have been intended to introduce a Te Ao Māori element. But given the ordinary meaning of kaitiaki in Te Ao Māori, Justice Harvey cannot understand why it has

[201] See Office of Te Ururoa Flavell, above n 136.
[202] See Hill, above n 103, for Rata's comments on the Māori Affairs Amendment Act 1967.
[203] Te Ture Whenua Māori Act 1993, s 4. Tikanga is defined as "Māori customary values and practices".
[204] Te Ture Whenua Māori Bill 2016 (126-2) (explanatory note) at 2.
[205] See Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) for a general discussion on accomodating tikanga in the law and the problems that accompany this.
[206] Te Ture Whenua Māori Bill (126-2), cl 4.

been applied to these roles.[207] It is an unsuitable reflection, that in turn leads to misunderstanding of the original concept of kaitiakitanga.

The participating owners model provides the final example. Through shifting more decision-making power to those owners actually engaging with the land block, the model sought to empower the take whenua of ahi kā roa.[208] The majority of these engaged owners are living in and around the block, actively maintaining it, and more likely to feel the direct effects of its underperformance. But it was common for the development aspirations of the engaged owners to be overruled by the conservative majority of absentee owners.[209] Many submissions therefore acknowledged that the new model established the correct balance between the rights of both types of owner.[210] However, the model reconceptualised this take whenua. As outlined in Chapter One, ahi kā roa was the paramount means by which a hapū could establish their rights in an area, usually overruling all other take whenua. But this was a means of protecting hapū interests from the external interests of other hapū. The participating owners model instead provides a means of favouring the interests of some hapū members over those of others. In other words, ahi kā roa was distorted into a take that applied internally to a Māori social structure. The concept was used to deny the rights of some owners, rather than protect them all. The model ultimately discourages collective tino rangatiratanga.[211] These examples all indicate that Māori land legislation is never going to be able to properly express Te Ao Māori in its entirety.

3. Ngā hua o te ture - Juridogenic potential

The final CLT criticism of legal reform is the juridogenic potential of law that Smart describes. In attempting to solve Māori land problems, her argument suggests that Māori land legislation is capable of generating unexpected, often negative effects, regardless of how well intentioned the legislation is.

This is what the 'common narrative' surrounding Māori land legislation illustrates. Each of the six statutes described in Chapter One went through the same stages. First came the perception

[207] Harvey, above n 135, at 194.
[208] See Chapter I at 4 for explantion of the different take whenua.
[209] Waitangi Tribunal, above n 117, at 87.
[210] Te Puni Kōkiri, above n 131, at [212-213].
[211] Nga Rangahautira "Submission to the Māori Affairs Committee on the Te Ture Whenua Māori Bill 2016" at [3.3].

of problems; concerning matters like the ten-owner rule,[212] the convoluted legislative landscape,[213] the overall development of Māori land.[214] These problems invariably warranted a legislative response, which would follow soon after. But the most important stage of the narrative was the outcome. All of those statutes were responsible for adverse effects; albeit at varying levels of severity. The Native Lands Act 1873 is arguably responsible for the most serious of these. The individualisation of interests remains one of the most significant burdens on Māori land in contemporary times. It stands as a barrier to facilitating development, to simple and effective administration, and also works to implicitly distort the Māori-whenua relationship. Furthermore, after nearly 160 years of individual ownership, a complete reversal of this is unlikely to occur; as Dion Tuuta suggests, it would be "tantamount to confiscation."[215]

These negative effects can be both practical and conceptual. In the case of the Native Land Court Act 1894, the reinstatement of Crown pre-emption had primarily practical consequences; in short, facilitating Crown alienation of the Māori land base. By contrast, the Māori Affairs Act 1954 resulted in denial of a core Te Ao Māori concept. Through preventing the vesting of 'uneconomic' interests, the Act prevented recognition of the rights every Māori individual acquires by virtue of their whakapapa relationship with the whenua. The juridogenic potential of Māori land law can also result in both types of effect coming from the same statute. The provisions of the TTWM Bill 2016 not only opened up the practical ability to alienate Māori land, they also significantly limited the concept of owner autonomy in certain instances.[216]

In the Māori land law context, this juridogenic potential also accounts for the exacerbation of existing problems. The Native Equitable Owners Act 1886 did not generate a novel negative effect in the way that the Natives Land Act 1873 did. Instead, the act's primary consequence was to boost legal recognition of individual interests in titles, thus extending the harms created by its predecessor. However, this does not mean these types of negative effect are any less severe than their novel counterparts.

The general discourse surrounding the TTWM Bill illustrated this juridogenic potential in two ways. The first is that the impetus for the Bill was based on criticism of the existing TTWM

[212] See Chapter I analysis of Native Lands Act 1873.
[213] See Chapter I analysis of Native Lands Act 1894.
[214] See Chapter I analysis of Māori Land Administration Act 1900.
[215] Dion Tuuta "Innovative thinking needed on land ownership" *Taranaki Daily News* (online ed, New Plymouth, May 20 2013).
[216] For example, the removal of court discretion equated to a removal of practical alienation safeguards. In comparison, the imposition of a default whānau trust regime attacked the broader concept of owner self-determination.

Act. Whether this criticism was founded is unclear due to the lack of empirical research; but in some instances, there appeared to be a general consensus that the Act was responsible for new issues. The strict quorum and voting requirements is one such example; the difficulty in engaging enough of the beneficial ownership commonly frustrates development efforts.[217] But the TTWM Bill, in attempting to respond to these problems, realised its own juridogenic potential.[218] What is most worrying about modern Māori land law reform is that there continues to be no acknowledgement of this risk. The legislature remains confident in the law being able to generate the solution. Yet the extensive legislative history clearly demonstrates that the law also generates problems. It is entirely possible that in future, a problem on par with the severity of individualisation could be generated.

The CLT argument of juridogenic potential suggests that the cycle of Māori land law reform will never stop. The history of the cycle up until this point largely corroborates that suggestion. Accepting this provides another reason to challenge the ability of reform to enact fundamental change for the whenua.

C. Propositions

In conjunction, these CLT criticisms construct a compelling case against Māori land law reform. But Aotearoa New Zealand is not looking for more reasons to give up on the whenua; it is looking for solutions. Fortunately, Smart and Matsuda accompany their criticisms with alternative approaches to enacting fundamental change, which also acknowledge the limitations of reform. These are not concrete solutions; but they provide a firm base from which practical methods can be conceived.

1. Me huri ki Te Ao Māori – De-centring the legal 'truth'

Acknowledging the limitations of reform does not mean that Māori should outright reject Māori land law. However, it does mean that Māori engagement needs to involve more than just

[217] Waitangi Tribunal, above n 209.
[218] See Chapter II, section titled "The final stage: the solution that would have failed" for description of the problems many perceived the Bill would create.

pursuing substantive changes to Māori land legislation. Based on Smart's argument, the future of the whenua lies in de-centring the law's power to provide solutions for it.

Māori land law is undoubtedly a "force for good."[219] Māori have recognised and accepted this in continuing to seek practical solutions through legislation. However, in doing so, Māori are automatically accepting the sole power of Māori land law to tell the 'truth' about the whenua. Whether this should be the case is yet to suffer real scrutiny; but without such scrutiny, law will continue to be treated as the central means of defining the whenua and its problems, and in turn, addressing these problems. For the reasons stated earlier, this is problematic. To change this, new 'truths' need to be suggested. Doing so will challenge and redefine Māori land law's "supposedly legitimate place in the order of things."[220]

In the Māori land law context, Te Ao Māori provides this alternate 'truth'. What Smart is arguing goes beyond merely incorporating Te Ao Māori values into Māori land law. This only legitimates the central position of law; that these values are only given weight if Māori land law includes them in its definition. Te Ao Māori instead needs to challenge the normative position of Māori land law. It must be recognised as possessing its own powers of definition, based on a values system that is valid in its own right. Thus whenever Māori land law seeks to assert its definition of the whenua, Te Ao Māori can provide alternative assertions. Where Māori land law defines a lack of owner engagement, Te Ao Māori can define a lack of identity. When Māori land law determines restrictive measures are necessary to prevent alienation, Te Ao Māori instead advocates for greater understanding of kaitiakitanga. The underperformance of Māori land and its failure "to recognise economic potential" is redefined as the historical failure to recognise the tino rangatiratanga of Māori over their whenua.

Through successfully establishing Te Ao Māori as an alternate truth, it will lead to the fundamental change for the whenua that evolution in legal doctrine alone cannot provide, by virtue of its limitations. This is because what happens to the whenua would now, in part, be defined and determined by a force that truly promotes Māori interests. The discourse on Māori land therefore needs to focus its attention on developing practical ways to pursue this approach.

[219] See Smart, above n 177, for explanation of difference between recognising law as a force for good, and recognising law as a force at all.
[220] Smart, above n 169, at 12.

2. Kei roto, kei waho – Working both inside and outside the law

Matsuda's proposal arguably represents the most feasible path forward towards solving Māori land issues. It captures the importance of Smart's theoretical arguments, whilst also acknowledging the practical reality facing Māori land. From a Māori perspective, it provides more coherent direction as to how to enact fundamental change for the whenua. Finally, elements of the proposal are already being performed, making it less difficult to understand in its entirety.

Essentially, Māori need to pursue fundamental change along the 'two fronts' that Matsuda describes. Both require equal effort; they are co-dependent on each other in realising this change. The first front demands an external critique of Māori land law. Much as Smart describes, it requires challenging law's normative power, and calling attention to the colonial hierarchy that Māori land law maintains. This serves to mitigate the consequences of engaging with the law for purposes of substantive reform. It also allows the 'outsider' perspectives of Māori to come to the forefront of legal discourse concerning the whenua.

The second front requires Māori to continue pursuing substantive legal reform in Māori land law. Matsuda explains that Māori cannot deny legal reform is a powerful tool capable of achieving positive outcomes for the whenua. Māori engagement with the law shows recognition of that capability; as Justice Williams expressed it "Ka kuhu au i te ture, hei matua mō te pani; I seek refuge in the law, for it is a parent to the oppressed."[221] Regardless of the limitations of legal reform, Māori land legislation is the best respondent to many issues burdening Māori land. The external critique of Māori land law is part of a slow-moving, broad symbolic shift in treatment of the whenua. It cannot provide the immediate, real outcomes that Māori land demands, such as the repeal of the conversion regime by the Māori Affairs Amendment Act 1974. Hence all effort cannot be directed into the change pursued by the first front.

Through constructing a hypothetical, 'ideal' TTWM Bill, this proposed approach can be viewed in practice. The Bill's provisions can be used to prescribe practical solutions to an issue such as owner engagement in decision-making. But this use is conditional, as it is coupled with an awareness that Māori land legal reform is significantly limited. The provisions therefore are

[221] Joe Williams, Judge of the Supreme Court of New Zealand "Ka kuhu au ki te ture, hei matua mō te pani" (Te Hunga Roia Māori hui-ā-tau, Te Puia, Rotorua, 13 October 2018)

designed to provide outcomes that are as robust as possible and minimise any juridogenic potential. Furthermore, the provisions will take a cautious approach to the incorporation of Te Ao Māori concepts, due to the understanding that it will likely result in their distortion. Most importantly, the construction of the Bill will take place in a legal discourse characterised by increasing calls for the recognition of Te Ao Māori alongside Māori land legislation.

In short, it is impossible for Māori to stick to a single position regarding Māori land law. Despite the apparent hypocrisy in dividing effort between these two fronts, it remains that this proposal provides clear direction towards overcoming the limitations of substantive legal reform and achieving fundamental change for the whenua.

Hei whakatepe - Conclusion

On 19th September 2019, just four days after the anniversary of the Native Lands Act 1862, the Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Bill was introduced to Parliament. It is the first instalment of the "small and targeted amendments to the Te Ture Whenua Māori Act" Māori Development Minister Nanaia Mahuta had promised earlier in the year.[222] As the short title suggests, it is primarily concerned with improving the succession and trust matter process, as well as introducing a voluntary dispute process administered by the Māori Land Court.[223] The Regulatory Impact Statement (RIS) provided to Cabinet again apportions blame to the operation of the TTWM Act and the "layer of complexity and compliance" that it prescribes in these areas.[224] The early reaction seems to indicate that the Bill is targeting the right areas;[225] but it remains too early in the hour for a comprehensive dismantling of what it proposes.

As an additional point of interest, the RIS claims that the qualitative evidence supporting these amendments is based on the problems identified by Māori land owners consulted in the TTWM Bill process, which were also "confirmed by those involved with the Māori Land Court."[226] This is an interesting decision, given that so many criticisms with the TTWM Bill concerned the 2012 Panel's failure to conduct empirical research on whether it was the TTWM Act that actually created these problems.

Nevertheless, one thing is certain; the reform cycle continues. These incremental amendments are only the first stage of planned changes to Māori land tenure; the Te Arawhiti Committee Cabinet paper notes there are two stages to follow, although the details are redacted.[227] Aotearoa New Zealand continues to position reform at the heart of its efforts to help Māori land owners unlock the economic potential of their lands. This is despite 157 years of legislative history strongly indicating we need to stop flogging a dead horse.

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[222] Te Puni Kōkiri "Reform of whenua Māori" (press release, 3 February 2019)
[223] Te Puni Kōkiri *Public Commentary on the Te Ture Whenua Māori (Succession, Disputes Resolution and Related Matters) Amendment Bill* (2019) at [8], [21]
[224] Te Puni Kōkiri and Ministry of Justice *Regulatory Impact Statement on Te Ture Whenua Māori Amendment Bill* (2019) at 1.
[225] "Land Law reform falls short" *Waatea News* (online ed, Auckland, 26 September 2019)
[226] Te Puni Kōkiri, above n 223, at 6.
[227] Te Puni Kōkiri *Paper 1: Te Ture Whenua Māori (Succession, Dispute Resolution and Related Matters) Amendment Bill* (2019) at 1-2.

In concluding, this dissertation employs two whakataukī to stress the importance of shifting focus to alternative approaches. The first is the challenge of Kingi Tāwhiao Pōtatau Te Wherowhero:

Ki te kāhore he whakakitenga, ka ngaro te iwi.
Without foresight or vision, the people will be lost.

Continuing to put blind faith in legal reform only serves to increase the risk for the whenua in future. Given the failures of the past, it seems wise, and indeed prudent, to begin expanding the range of possible approaches to Māori land beyond reform alone. The Critical Legal Theory perspective provides a forceful case in support of this attitude. The inherent limitations of Māori land law reform that it identifies should be reason alone to pursue alternatives. Furthermore, it does not require Māori to completely abandon the familiar method in favour of an abstract system lacking a proven track record. Yet this continues to be neglected in the legal discourse. In considering the consequences of waiting for a natural shift in focus, the second whakataukī can be expressed:

He waka eke noa.
A canoe we are all in, without exception.

The physical and spiritual wellbeing of the whole of Māori society is firmly tied to that of the whenua. The implications of what happens with the whenua extend far beyond changes in economic production statistics and the number of cases passing through the Court. Thus it is clearly imperative that fundamental change is achieved for the whenua as swiftly as possible. Ahakoa kāore e whakapaia ngā raru o te whenua e tēnei tuhinga roa, ko tōku tūmanako māhaki ka āwhina tēnei mahi i ngā tangata Māori kia kite i te whakatakoto tika.

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