

## Introduction

# The Treaty of Waitangi is ‘a simple nullity’

**I**N THE 1840S, THERE WERE A NUMBER OF NGATI TOA SETTLEMENTS along the Kapiti coast, on the offshore islands of Kapiti and Mana, and across the strait in Te Tau Ihu – the northern regions of the South Island. For two decades Ngati Toa had interacted with small numbers of Pakeha whalers, sealers and traders, but from 1840 they began to acquire some new neighbours. The New Zealand Company established formal settlements for British immigrants on the shores of Port Nicholson, and Church of England missionaries began to teach and preach along the nearby Kapiti coast. Unlike the men of commerce before them, these new neighbours desired to obtain possession and ownership of large areas of land. A dispute about one piece of land on the Whitireia peninsula near Porirua resulted in a Ngati Toa rangatira, Wiremu Parata Te Kakakura, taking the Bishop of Wellington, the Rt Rev. Octavius Hadfield, to court in 1877. The court case is known as *Wi Parata v Bishop of Wellington*.

Today in New Zealand, few people know of the plaintiff, the defendant, or the facts of this case. But the *Parata* case has become a landmark decision in New Zealand law for its dismissal of the Treaty of Waitangi. ‘So far indeed as that instrument purported to cede the sovereignty – a matter with which we are not here directly concerned – it must be regarded as a simple nullity,’ went the judgment of James Prendergast, the Chief Justice of New Zealand.

In the Court's view, the Maori chiefs who had signed the Treaty in 1840 at the invitation of representatives of the British Crown were 'semi-primitive barbarians' who did not possess the legal capacity to enter a treaty: 'No body politic existed capable of making a cession of sovereignty.' Instead, 'the title of the Crown to the country was acquired, *jure gentium*, by discovery and priority of occupation, as a territory inhabited only by savages'.<sup>1</sup>

In contemporary New Zealand, the language of the Court and its seemingly casual dismissal of the Treaty of Waitangi as 'a simple nullity' are frequently attacked as reprehensible. David Baragwanath, a judge in the Court of Appeal, in 2008 noted that *Parata* was 'excoriated by this Court in *Ngati Apa*' in 2003 and summarised current legal wisdom:<sup>2</sup>

*Wi Parata* is now known to all law students as a case in which a court, which included a Chief Justice who had been Attorney-General at the time of the land wars, unjustly deprived Maori of their legal rights. A century and a half removed from that era we see the Crown's role differently and as subject to the rule of law.

Some of the commentary on the 'infamous' phrase attributes extraordinarily wide-ranging consequences to the judges' short utterance on the status of the Treaty. Following Prendergast's 'finding', a government museum website concludes, 'From then on, native title to land was non-existent'.<sup>3</sup> A geography academic has written that as a result of Prendergast's statement 'land and food gathering places were progressively removed from tribal control and government regulations intruded into all aspects of tribal life'.<sup>4</sup> In the examination script of a first-year New Zealand law student awarded an A+ grade mark in 2007 the student wrote: 'In *Wi Parata v Bishop of Wellington* in 1877, Prendergast CJ declared the Treaty a simple nullity and in that simple statement sanctioned the theft of Maori land by fraud.' Three words – 'a simple nullity' – have attracted such an avalanche of adverse criticism from a multitude of commentators that legal historian Grant Morris has described the judgment as 'the most notorious in New Zealand's history'.<sup>5</sup>

The attacks on the *Parata* judgment are rooted in our contemporary understandings of the Treaty of Waitangi. Since 1840, the Treaty has been much discussed and colonial legislators on occasion attempted to reflect the Treaty as they understood it in statute law. More frequently, successive

governments evaded or flagrantly breached the terms of the Treaty. After 1987, however, it has become conventional to elevate the legal and political status of the Treaty from the nadir to which, it is said, it had been consigned by *Parata*. Far from being 'a simple nullity', the Treaty of Waitangi is now held up as 'the founding document of New Zealand', 'a grand constitutional compact', 'simply the most important document in New Zealand's history', 'essential to the foundation of New Zealand', 'part of the fabric of New Zealand society', and 'of the greatest constitutional importance to New Zealand'.<sup>6</sup> Sir Robin Cooke (then President of the Court of Appeal and later Lord Cooke of Thorndon) wrote an introduction to a special issue of the *New Zealand Universities Law Review* in 1990. Sitting in the Codrington Library, Oxford, near a statue of the famous common lawyer William Blackstone, Cooke imagined that 'the shade of Blackstone seemed to come down from his statue' and say: 'I do not doubt that your Treaty of Waitangi has become in some sense a grand constitutional compact akin to our Magna Charta'.<sup>7</sup>

Lawmakers have turned this lofty rhetoric into some sort of reality through both legislation and case law. From 1975 on, the legislature has incorporated the 'principles of the Treaty of Waitangi' into numerous Acts. And, beginning with the landmark 1987 Court of Appeal case *NZ Maori Council v Attorney-General*, the courts have given interpretative life to the principles of the Treaty and accorded them a significant place in New Zealand law.<sup>8</sup> It is now seen as grossly misguided to doubt that the Treaty is, and always should have been, of central importance in the constitutional life of the nation.

Yet the law found in judgments and reports by the Court of Appeal, the Privy Council and the Waitangi Tribunal since the 1980s does not openly acknowledge that this central role for the Treaty and the rejection of *Parata* is a recent invention. On the contrary, 'This is not a modern revision' wrote Chief Justice Elias in 2003 when the Court of Appeal recognised the right of Maori to have their customary property interests to the foreshore and seabed investigated in the courts.<sup>9</sup> Recognition of aboriginal title, it is now asserted, has a long history in New Zealand common law and the Treaty of Waitangi is the foundation document of the nation that established a partnership between Maori and the Crown. The Treaty partners have a duty to act reasonably and in good faith towards each other and there has always been a duty on the Crown actively to protect Maori rights. From this contemporary point of view, the Prendergast remarks are useful only

in order to show how crass, offensive and incorrect were the opinions of nineteenth-century settler colonial judges.

Was the *Parata* decision really so very wrong? Is the Treaty still not ‘a simple nullity’ in law? Despite my criticisms of the *Parata* judgment in earlier writings, I have felt increasingly ill at ease with the abuse of the *Parata* case in modern arguments concerning the rights of indigenous peoples in common law countries. Few attempts are made to situate the judges’ remarks in their historical context. Seldom is there any attempt to explore what the case actually decided. No attempts are made to find out the facts of the 1877 dispute. This is so even though any direct quotation of the judges’ sentences ought immediately to draw one’s attention to their own explicit caveat: the cession of sovereignty, they wrote, was ‘a matter with which we are not directly concerned.’<sup>10</sup>

An *obiter dictum* – legal jargon for a statement within a judgment that is not crucial to the facts and the outcome of a case – is not binding and such statements are seldom persuasive in future cases according to our doctrine of precedent. Yet the *Parata* ‘a simple nullity’ *obiter dictum* continues to be cited time and time again. It is cited so frequently not in order to apply it in a future case – the normal reason for citing an old statement of non-binding law – but only in order to reject it yet again. Distancing modern law from the colonial past, we seem to want to reject ‘a simple nullity’ as often and as vehemently as possible. In words adapted from those of Shakespeare’s Queen of Denmark in *Hamlet* (Act III, scene ii): ‘The law doth protest too much, methinks.’ This book will show that *Parata* is more important as law and more revealing as history than its critics would allow. By making sense of this one notorious case, I will argue, one can gain new insight into the legal standing of the Treaty of Waitangi and some understanding of the ambiguities in the contested histories of Maori and Pakeha in Aotearoa New Zealand.

As law, *Parata* did not always have such a bad reputation. Prendergast lived in the nineteenth and early twentieth century. Shortly after his death, and half a century after the case itself, the *Parata* decision was cited with favour by a lawyer representing Maori interests. A King’s Counsel appearing in 1927 on behalf of Maori laying their grievances before the Sim Royal Commission on Confiscated Lands invoked it in favour of his clients. Smith

(later a Supreme Court judge), in his opening submissions on the Waitara confiscations, said:<sup>11</sup>

The point of the case is, the Judge assumes, that the natives have rights *iure gentium* which involve two things: first, “that the Crown has pre-emptive rights over land”, and, secondly, “[t]hat the Crown is supreme protector of the aborigines”.

If more regard had been paid to the *Parata* court’s recognition of the Crown’s duty to act as ‘supreme protector’ of Maori interests, and less ink spilt on ‘a simple nullity’, then a more balanced perspective on the case’s contribution to New Zealand law might have been possible. Indeed, the Crown’s ‘duty of active protection’ that appears in many late twentieth-century court judgments and Waitangi Tribunal reports on the ‘principles of the Treaty of Waitangi’ might, if anyone had thought about it, quite properly be sourced in part to the *Parata* judgment.<sup>12</sup>

In 1963, nearly ninety years after the judgment was delivered, *Parata* was cited without adverse comment in Court of Appeal judgments on the extinguishment of Maori customary rights over foreshore land. One member of the Court, North, mentioned the case as ‘weighty authority’ for the proposition advanced by the Solicitor-General that British sovereignty derived from annexation and settlement. Another judge, T. A. Gresson, cited it for the principle that it is for the Crown to determine the nature and incidents of the title which it conferred. He quoted with explicit approval the words of Prendergast that the Crown ‘of necessity must be the sole arbiter of its justice’.<sup>13</sup>

The fact is that Prendergast was not always ‘infamous’ and the Court’s judgment in *Parata* was not always ‘notorious’. The positive view taken of the case in a 1927 commission hearing and a 1963 appellate court judgment seems completely out of kilter with the plethora of adverse critical comment now associated with any mention of the 1877 judgment, and the inevitable association of Prendergast with his ‘a simple nullity’ remark. Therefore it seems an important task to uncover the legal history of *Parata*. What were the facts of the case? Who were the litigants and lawyers involved? What do we know about the judges of the Court – apart from their involvement in this one decision? Does New Zealand law still adhere to any of the propositions laid down by the Supreme Court in 1877?

In this book I will inquire into these questions and seek to provide some answers. I argue against the received wisdom that the contemporary doctrine of aboriginal title in New Zealand law can be drawn from the *Symonds* case in 1847 and that *Parata* was therefore wrongly decided. Rather, I suggest that aboriginal title as common law and the central role given to the Treaty in New Zealand law was an invention of the 1980s. A good invention – but an invention nonetheless. And I will argue that in that decade the judges were slower off the mark than both the executive and the legislature in moves to enhance the legal status of Maori as tangata whenua and the Treaty of Waitangi as a foundational document for the nation. A close analysis of the history of this one notorious court case may help to adjust our understanding of the past and also the future of New Zealand law.

Just as *Parata* is more important in law than legal scholars have allowed, a study of the historical context of the litigation also gives us some insights into the history of Maori and Pakeha interactions in New Zealand. Advocacy history on behalf of claimants in Waitangi Tribunal hearings, to which I have made a number of contributions, often looks uncomfortably similar to nineteenth-century theories of the 'fatal impact' of colonisation on indigenous peoples. The reason is obvious enough. The Tribunal's jurisdiction as set out in the Treaty of Waitangi Act 1975 depends on claimants proving that Crown acts or omissions have caused prejudice to the claimant community. The words of section 6 in that Act grant the Tribunal the jurisdiction to inquire into and report to the government on claims only 'Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected' by legislation, statutory instruments, policy or practices and acts or omissions of the Crown, that are 'inconsistent with the principles of the Treaty'. If such a claim is made, then 'he or she may submit that claim to the Tribunal under this section'. The focus of Tribunal hearings on claims about historical injustices is necessarily directed to finding that the imperial government, Pakeha officials and colonial governments have been in the wrong, and that Maori people and communities have suffered prejudice as a consequence. Given the history of New Zealand, it is not hard to find such evidence.

The danger is, though, that Maori always appear only as victims in this history. The forensic requirements of adversarial inquiries leave us with a starkly un-nuanced version of history – the Crown was bad; Maori were wronged. Maori rangatira of the past seldom appear as active participants in the ebbs and flows of the historical circumstances that affected them and their tribes. Rather, they are people who have been duped, cheated, marginalised and demeaned. Even if there is no blame attached to their victimhood, such narratives tend to obscure the fact that Maori were major and powerful players in the politics and economics of the first decades of colonial rule.

My focus, in looking at the background to the *Parata* case, concerns the 1840s. In that decade the British settlers were a small proportion of the total population, te reo Maori was the dominant language of the land, and English law applied effectively only in the few Pakeha settlements. Maori tribes possessed a considerable arsenal of weaponry with which to defend themselves and, on occasion, to attack others. Of all the iwi in the land, few if any were of more significance than Ngati Toa and Ngati Raukawa led by the famous warrior chiefs Te Rauparaha and Te Rangihaeata. Within the younger ranks of rangatira in these two tribes, there were two men in particular who actively interacted with the new possibilities of a world changed first by foreign traders, then Christian missionaries, and then by the British colonial state. Their birth names were Katu and Te Whiwhi. In this book I would like to stress the fact of indigenous agency of people like Katu and Te Whiwhi in the affairs of Maori tribes. I seek to understand what motivated these younger rangatira in their relationships with missionaries and with representatives of the colonial state during the 1840s.

As well as stressing indigenous agency, this book will look at issues other than those between Maori and the Crown. Contemporary political activism to advance Maori rights, and the consequent development of Treaty of Waitangi jurisprudence, have meant that the *Parata* case is always cited exclusively for its denigration of the Treaty of Waitangi and as an exemplar of Pakeha prejudice against Maori in the colonial past. What is thereby totally overlooked is that the outcome of the case, and its aftermath, were of vital importance to a range of tensions and conflicts *within* the colonists' society. The question of Whitireia and the Porirua College Trust was of pivotal importance in late nineteenth- and early twentieth-century disputes concerning the role of churches in the provision of education.

Church/state and religious/secular issues tend to be of peripheral interest, or of no interest at all, in contemporary New Zealand. It was not always so. In many of the very numerous parliamentary debates, royal commission reports, select committee inquiries, petition hearings and court cases that concerned Whitireia between 1875 and 1905, the context of Maori claims was often largely invisible. Frequently there were no Maori participants in the proceedings at all. The focus was on contests for power and authority in the world of the far-from-homogenous settler communities.

The invisibility of Ngati Toa in these legal proceedings can be explained, if not perhaps excused, by the fact that the subject of the disputes concerned what if anything could be lawfully done to unravel an educational charitable trust relating to a specific piece of land. The focus of attention was on whether or not the government should wrest back from the churches the lands granted to them pursuant to the Education Ordinance 1847 in the early years of the colony. Many politicians were staunchly committed to provision of an entirely secular education for all New Zealand children. Efforts were made to advance the secularist cause at the expense of the churches. Church leaders and some politicians valiantly defended the virtues of education in schools dedicated explicitly to inculcating Christian beliefs and values in pupils. Usually the church leaders were on the defensive. If it were not for the difficulty of varying or overturning charitable trusts under English law, the secularists would probably have succeeded in their various efforts to have Whitireia, and many other blocks of Crown-granted land and income, brought under government control. It is highly unlikely that any nineteenth- or early twentieth-century government would have returned any of these blocks of land to Maori control, but most certainly there was a very real possibility that they might have been removed from church control. The position taken by Bishop Hadfield in the *Parata* case, and by Hadfield and his successors as Bishop of Wellington in the subsequent court cases and inquiries, cannot be understood without reference to historical questions about the appropriate relationship between church and state in New Zealand, and legal questions about the dismantling of charitable trusts.

There will be interesting turns along the way as the story of the *Parata* case unfolds: the gaoling of Parata's lawyer for contempt of court shortly after the case was decided; the persistence over many decades by successive generations of Ngati Toa leaders to regain the Whitireia block; and the infighting in settler society over the proposed confiscation of church lands.

I will demonstrate, too, that many of the facts of the dispute are incorrectly stated in the law report, and that it was not Prendergast but Richmond who was the primary author of the judgment. I turn first, though, to the beginning of the story. The gifting of Whitireia to the Church of England in 1847 and 1848 arose from the enthusiastic adoption of Christianity by key leaders of tribes on the Kapiti coast in the early years of the 1840s.