



UNIVERSITY
OF WOLLONGONG
AUSTRALIA

1-1-2003

Shaping the Modern Nation: Colonial Marriage Law, Polygamy and Concubinage in Aotearoa New Zealand

Nan Seuffert

University of Waikato, New Zealand, nseuffer@uow.edu.au

Follow this and additional works at: <http://ro.uow.edu.au/ltc>

Recommended Citation

Seuffert, Nan, Shaping the Modern Nation: Colonial Marriage Law, Polygamy and Concubinage in Aotearoa New Zealand, *Law Text Culture*, 7, 2003.

Available at: <http://ro.uow.edu.au/ltc/vol7/iss1/9>

Shaping the Modern Nation: Colonial Marriage Law, Polygamy and Concubinage in Aotearoa New Zealand

Abstract

Feminist scholars and critical theorists have critiqued marriage as a tool for the creation of a private sphere in which women are subordinated to men, and have critiqued the public/private dichotomy (Olsen 1983, 1985, Pateman 1988, Smart 1992, Seigel 1996). Marriage jurisdiction and law also participates in the creation of the public order, including the production of a homogenous nation opposed to cultural and racial difference, and embracing particular notions of gender (Cott 2000: 1–8, Franke 1999, Dubler 1998). Throughout the 19th century colonisation of Aotearoa New Zealand the jurisdictional boundaries of colonial marriage law were increasingly constructed and policed to assimilate the indigenous Maori people to a centralised jurisdiction while simultaneously producing race and gender difference within the nation-state. This boundary maintenance operated through a series of statutes and cases that participated in the production of a raced and gendered nation in two ways. First, this article discusses the cases and statutes that extended the jurisdiction of the colonial courts, and colonial marriage laws, over the indigenous Maori people, assimilating Maori to a centralised, homogenous set of laws and practices, and excluding Maori marriage laws and customs from that jurisdiction, and from the emerging nation-state. These laws were increasingly rigidly applied to fix the boundaries of the nationstate. Second, this article traces the racing and gendering of marriage jurisdiction as a process of the creation of internal difference within the emerging nation-state. As colonisation proceeded, Maori marriage laws and customs were increasingly excluded from the jurisdiction of the colonial courts by associating those laws and practices with pre-modern concepts such as concubinage and polygamy and opposing them to raced and gendered notions of civilisation and progress associated with the modern nation-state. The result was the production of a vessel of marriage jurisdiction that aspired to modernity, purity and whiteness and that was shaped and filled with Victorian notions of gender.

Shaping the Modern Nation: Colonial Marriage Law, Polygamy and Concubinage in Aotearoa New Zealand¹

Nan Seuffert

Introduction

Feminist scholars and critical theorists have critiqued marriage as a tool for the creation of a private sphere in which women are subordinated to men, and have critiqued the public/private dichotomy (Olsen 1983, 1985, Pateman 1988, Smart 1992, Seigel 1996). Marriage jurisdiction and law also participates in the creation of the public order, including the production of a homogenous nation opposed to cultural and racial difference, and embracing particular notions of gender (Cott 2000: 1–8, Franke 1999, Dubler 1998). Throughout the 19th century colonisation of Aotearoa New Zealand the jurisdictional boundaries of colonial marriage law were increasingly constructed and policed to assimilate the indigenous Maori people to a centralised jurisdiction while simultaneously producing race and gender difference within the nation-state. This boundary maintenance operated through a series of statutes and cases that participated in the production of a raced and gendered nation in two ways. First, this article discusses the cases and statutes that extended the jurisdiction of the colonial courts, and colonial marriage laws, over the indigenous Maori people, assimilating Maori to a centralised, homogenous set of laws and practices, and excluding Maori marriage laws and customs

from that jurisdiction, and from the emerging nation-state. These laws were increasingly rigidly applied to fix the boundaries of the nation-state. Second, this article traces the racing and gendering of marriage jurisdiction as a process of the creation of internal difference within the emerging nation-state. As colonisation proceeded, Maori marriage laws and customs were increasingly excluded from the jurisdiction of the colonial courts by associating those laws and practices with pre-modern concepts such as concubinage and polygamy and opposing them to raced and gendered notions of civilisation and progress associated with the modern nation-state. The result was the production of a vessel of marriage jurisdiction that aspired to modernity, purity and whiteness and that was shaped and filled with Victorian notions of gender.

Jurisdiction and national boundaries

Jurisdiction is law's speech (Rush 1997: 150). It is the legal space, or sphere of competence, in which the law speaks (Dorset 2000: 34). Questions of jurisdiction involve the determination of the boundaries of legal space in at least three manners: through territorial boundaries, by defining what is law and what is non-law, and by subject matter. Subject matter jurisdiction is the determination of what is included in the law of property, or contract, or, for purposes of this analysis, what is recognised as marriage (Ford 1999). Notions of modern territorial jurisdiction emerged with the development of the modern nation-state as the bounded territory in which a particular set of laws applied. Modern territorial jurisdiction occupies a definitely bounded area, homogeneously and abstractly conceived. Territorial jurisdiction contributes to the construction of political subjectivity by tying individuals to the fixed boundaries of the modern nation-state. Political subjectivity is produced in part within this bounded area through the consolidation of power in a centralised jurisdiction that represses and excludes difference through homogenisation and assimilation (Ford 1999: 852–5, 905–8).

Seuffert

Nineteenth century notions of nations and states were well summarised by New Zealand's famous jurist, John Salmond:

A nation is a society of men united by common blood and descent, ... speech, religion and manners. A state ... is a society of men united under one government (Salmond 1907: 103).

Salmond went on to suggest that in every nation there is an impulse to develop into a state. He asserts that historically, states have grown out of nations. Where a state encompasses cultural differences it tends to become a nation:

... the unity of political organization eliminates in course of time the national diversities within its borders, infusing throughout all its population a new and common nationality, to the exclusion of all remembered relationship with those beyond the limits of the state (Salmond 1907: 103).

Salmond's language provides a tie between 19th century notions of jurisdiction and nation building. Modern nation-states are territorially bounded, as opposed to 'primitive' notions of states as rule over a group of people (Salmond 1907: 102). As part of the process of colonisation, jurisdiction contributes to nation building by providing a centralised power system for the homogenisation of individual and political identity within fixed territorial boundaries. This centralisation facilitates the erasure, and sometimes violent elimination, of diversity within national boundaries while it simultaneously determines those boundaries. Salmond's use of the seemingly neutral and naturalising term 'impulse' masks a political and often violent process.

Jurisdiction participates in the homogenisation of an emerging nation through a centralised power system. But jurisdiction also simultaneously 'does its most important work, not by repressing local difference, but by *producing* it, by dividing society into distinctive local units that are imposed on individuals and groups' (Ford 1999: 908). Defining the nation in opposition to internal foes, both real and imagined, is integral to the production of national identity (Ford 1999: 908). In the colonial context, it is both through assimilation to the homogeneous norm, and through the production of internal difference, that jurisdiction is closely tied to nation building.

Salmond's reference to the exclusion of remembered relationships, and more recent work on the construction of nations, provide tools for analysing this second aspect of jurisdiction's work. Benedict Anderson argues that nations are imagined political communities (Anderson 1991: 6). As imagined communities, nations are the stories that are told about collective identities, which also shape the stories that are available for individual identities (Harris 1996: 213). The stories both privilege some collective and individual identities and exclude and subordinate others. The boundaries of recognisable identities define the limits of the nation, which may shift over time as stories change. A nation is defined by its boundaries, or limits (Fitzpatrick 2001: 62–5, Stychin 1998: 4), at the same time that the excluded 'other' resides within it (Stychin 1998: 4). Cases participate in nation building by presenting stories of imagined communities that remember some relationships and exclude others (Harris 1996: 214). In the late 19th and early 20th century, colonial marriage cases presented stories defining 'Maori marriage' as foreign and pre-modern. These cases facilitated shaping the emerging nation in opposition as modern and white. This article demonstrates how the extension of marriage jurisdiction and law over Maori operated both to assimilate Maori to the emerging nation-state and to produce Maori laws and practices as different within its boundaries.

New Zealand as a nation: imagining beginnings

In the dominant founding story of New Zealand as a nation Maori people freely agreed in the English version of the Treaty of Waitangi 1840 (the 'Treaty') to cede their sovereignty to the British Crown.² Upon the signing of the Treaty, Captain Hobson declared its implications for Maori and for the nation, stating 'we are one nation' (Frame 1995: 109) all British subjects, and all one community.

For most Maori, the Treaty signing did not symbolise the founding of one nation. The Maori versions of the Treaty, signed by most Maori leaders (Ross 1972: 136),³ did not cede sovereignty to the British. In the Maori versions Maori retained their traditional control over their land and people, explicitly recognised in the guarantee of *te tino*

rangatiratanga (Williams 1989: 79), and in oral guarantees of Maori laws and customs (Frame 1981: 106, Williams 1999: 116–9, Durie 1996: 460). In this story Maori simply agreed to allow the ‘lawless’ British to establish a Government to govern themselves. The agreement in the Maori versions of the Treaty is more properly understood as providing for the British to govern the British while Maori retained a parallel control over Maori land and people (Walker 1989).

This story of power sharing is buttressed by the early denial by the British Colonial Office of any intention of ruling over Maori (Moon 2002: 10, Adams 1977: 156):

It was only after the Treaty was signed, and Hobson’s dubious Proclamations of Sovereignty had arrived at London, that the possibility of British sovereignty applying to Maori emerged as a serious consideration (Moon 2002: 185).

This ‘dubious’ status of the British in New Zealand subsequent to the Treaty is reflected in early British policy.

Much of early British policy recognised that Maori retained their right to govern themselves, and that Maori law and custom would continue to apply at least to Maori (Frame 1981: 105–9, Adams 1977: ch 7). For some colonial actors this policy was consistent with continued Maori self-governance. For others it was a temporary measure in the assimilation of Maori to British laws and customs, or in Salmond’s terms, the fusion of two cultures into one nation. In any case, lack of money and resources meant that in the early years the British could at most pretend to govern Maori, a position that induced contempt in Maori who did have contact with the British (Adams 1977: 236, Boast 1993: 136). During these years the simple fact was that the ‘great bulk’ of Maori continued to be governed by their own laws and customs, and were outside the jurisdiction of the colonial courts. British laws and customs simply did not extend to many Maori (Adams 1977: 235–7).

An 1842 editorial in the *Bay of Islands Observer* provides a contemporaneous statement reflecting the two governing and legal systems operating in parallel:

The Maoris are not and cannot be governed by the Crown [italics in original]. Those who signed it [the Treaty] and those who didn't alike disregard it, as far as the Government is concerned ... The sovereignty over them on the part of Great Britain is entirely nominal ... Thus, there are really two distinct communities in this country, living and more or less mingling with each other, governed on different principles, and by different laws and customs, and acknowledging a totally different authority (Quaife 1842).

This quote records the position of many Maori: the idea that they had ceded the power to apply their laws and customs was simply incomprehensible (Walker 1989: 266, Moon 2002: 148, Swainson 1859), and initially at least, the Treaty signing had little or no impact on their lives or actions. According to Salmond's 19th century colonising notions of nation, fusing the two cultures in New Zealand into one nation would require eliminating diversities and creating a common nationality by excluding relationships to those beyond the limits, or boundaries, of the nation.

Early British policy recognising continued Maori self-governance was implemented through colonial laws excepting or exempting Maori from their application and through laws declaring the recognition of Maori laws and customs. Both of these approaches participated in defining the nation.

Exempting Maori from the application of colonial laws defined the limits of the colonial jurisdiction, and positioned Maori outside of the jurisdictional boundaries determining the nation. Soon after his arrival in New Zealand in 1843 Governor Fitzroy, in a speech to 200 Maori leaders, assured them that he did not want to interfere with customs that affected only Maori. He secured the passage of the Native Exemption Ordinance 1844, which provided for European interference with, or responses to, crimes between Maori only upon Maori request. This Ordinance was critiqued on the basis that it allowed Maori to maintain 'their nationality' (Adams 1977: 223–30). This approach positioned Maori in parallel to the emerging colonial nation, implicitly recognising the existence of two nations.

Seuffert

Recognition of Maori laws and customs brought them within the subject matter jurisdiction of the courts, and provided the courts with the power of defining and reshaping those laws and customs (Hohepa & Williams 1996: 46, Williams 1999). This dynamic produced difference within the subject matter jurisdiction of the courts and within the nation. The *New Zealand Government Act 1846* provided for Maori laws, customs and usages to be observed within certain districts in New Zealand. The Royal Instructions accompanying the Act provided for the setting aside of such districts, and provided that such laws should be applied inside the districts to people who were not Maori and outside the districts between Maori. With respect to jurisdiction, the 1846 proposal provided:

The jurisdiction of the Courts and magistrates ... shall extend over the said aboriginal districts, subject only to the duty ... of taking notice of and giving effect to the laws, customs, and usages of aboriginal inhabitants (Frame 1981: 106–7).

The creation of local districts, or sub-territorial units of difference, is one of the ways that jurisdiction may operate to produce difference within the nation. In the colonial context in New Zealand, where British governance was dubious, this proposal simultaneously extended jurisdiction, providing for the fusion of Maori into the British nation, and provided for the determination of difference within that jurisdiction by giving effect to Maori laws. This 1846 Act was suspended, and the districts were never set aside.

However, section 71 of the *New Zealand Constitution Act 1852*, which remained in force until 1986,⁴ also provided for districts to be set apart in which Maori laws, customs and usages would apply between Maori:

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

The language here is couched in the qualifiers ‘may’, ‘expedient’ and ‘for the present’. This type of recognition of indigenous laws and customs was often part of the process of the creation and containment of difference in constructing a colonial nation:

Custom ... was ‘recognized’ solely in subordination to the law of the colonist and denied such recognition where it was ‘repugnant to natural justice, equity, and good conscience’, or ‘contrary to the general principles of humanity’ to take two standard and revealing formulations (Fitzpatrick 2001: 180).

‘Recognition’ of Maori laws that are not ‘repugnant’ to ‘general principles of humanity’ aligns the colonial nation with universalist notions of civilisation and subordinates Maori laws as particularist, producing difference within that nation (Fitzpatrick 2001: 120–5). This site of the determination of which Maori laws would be recognised and applied, and which would be declared ‘repugnant’ to humanity, or civilisation, marks the boundary of inclusion within the jurisdiction of the colonial courts, and the nation. Marriage law and jurisdiction illustrates this process well.

Early marriage laws were consistent with early British policy more generally, positioning Maori at the boundaries of the nation. While the first *Marriage Ordinance* 1842 did not mention Maori,⁵ the second marriage ordinance, passed in 1847,⁶ exempted Maori from its application. After setting out the requirements for a valid marriage and specifying that marriages might be solemnised by a minister of any Christian denomination, the *Marriage Ordinance* 1847 explicitly recognised the fact that Maori law and custom continued to apply at least to marriages between Maori:

Nothing herein contained shall apply to any marriage which may be contracted otherwise than according to the provisions of this Ordinance between two persons both of the Native race.⁷

The passage of this section between the *New Zealand Government Act* 1846 and the *New Zealand Constitution Act* 1852, both of which provided for districts in which Maori law and custom would be applied, suggests that its exemption of Maori was intended to implicitly recognise

the continued application of Maori law and custom. This dynamic places Maori law and custom regarding marriage outside the jurisdiction of the colonial courts while implicitly recognising those marriages, ‘marriages between Maori[s] in accordance with Maori custom were thus permitted to continue and were by implication recognised as valid and legal’ (Robson 1954: 318). Marriages according to Maori law were therefore outside the jurisdiction of the 1847 Ordinance at the same time that they were recognisable in the courts as valid. Positioned at the boundaries of jurisdiction, they also marked the boundaries of the territorial nation.

Consistent with these Acts, the 1847 Ordinance also stated that it would come into operation with respect to marriages between Maori ‘in such districts and at such times as the Governor shall by Proclamation from time to time appoint’.⁸ This power to extend the jurisdiction of the courts and marriage laws is the power to assimilate Maori, from a position at the boundaries of jurisdiction, into the colonial legal system, and the nation. Apparently without discussion, section 44 of the 1847 Ordinance was reproduced in the *Marriage Act* 1854 with only the addition of the word ‘aboriginal’ before ‘race’ at the end of the sentence, continuing the positioning of Maori law with respect to marriage.⁹ The section was again enacted without change in the Marriage Acts of 1880 and 1904.¹⁰

The 1850s may be characterised as a period in which colonial legislators attempted to extinguish some Maori laws and customs with Maori consent on the basis that they were contrary to ‘civilized practices’ (Frame 1981: 107–9). The early 1860s saw the shape and boundaries of the nation violently contested in the wars resulting from the confiscation of Maori land by the colonial Government (Mahuta 1995: 67–87, Belich 1988). By 1865 it was still unclear, even to the colonial legislators, whether the jurisdiction of the colonial courts extended to Maori. The *Native Rights Act* 1865 expressed this anxiety explicitly in its preamble, which stated:

An Act in response to doubts about whether the colonial courts have jurisdiction in all cases touching the persons and property of the Maori people.

This Act anxiously declared that the colonial courts had jurisdiction over Maori. It simultaneously provided for the determination of interests in land where Native title had not been extinguished according to Maori law and custom in the newly established Native Land Courts.¹¹ It operated to assimilate Maori to the colonial jurisdiction and to create difference through a sub-jurisdiction in the Native Land Court (Williams 1999: 133–55).

The split in jurisdiction between the two court systems reflected ongoing anxiety about jurisdictional and national boundaries. This boundary anxiety was given voice in an 1878 case in which the Court was required to determine whether all of the owners of a piece of land held under Maori title were capable of entering into a contract with respect to that land. The Court stated that it was ‘quite at sea upon such questions — at sea without chart or compass ... helpless to do anything but refer’¹² to the Native Land Court. This quote reflects the extent to which the Court has internalised notions of even subject matter jurisdiction as power over fixed territorial boundaries. It provides a dramatic image of the Court’s anxiety at a challenge to its ability to speak the law. Without fixed territorial boundaries that map the Court’s jurisdiction onto the boundaries of the nation, the Court is lost at sea. The next section discusses shoring up the boundaries of the nation through the violent re-membering of marriage jurisdiction to exclude Maori laws and customs.

Re-membering the nation

I have argued that the successive Marriage Acts positioned Maori marriage at the boundaries of the nation by exempting it from the requirements of the Acts while implicitly providing for its recognition as valid. In 1888 Chief Justice Prendergast was to ignore the early history of the colony, violently erasing Maori law and custom with respect to marriage, unequivocally excluding it from the boundaries of jurisdiction, and from the nation.

Prendergast signalled this tide change in 1877 in his startling and unprecedented decision in *Wi Parata v The Bishop of Wellington*. The case involved land that had been gifted by Ngati Toa to a Church for use of as a school for local Maori, and had not been used for that purpose. In *Wi Parata* Prendergast, writing for the Full Court, held that the Court had no jurisdiction to avoid the Crown grant, even where it was inconsistent with the original grant (78). In *dicta* he adamantly, and incorrectly, asserted that the British Government had never recognised Maori law and custom because it did not exist (79, Frame 1981: 109, Hackshaw 1989: 113). Prendergast dismissed the recognition of Maori law and custom in the *Native Rights Act* 1865, discussed above:

As if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being (79).

In Salmond's terms, the decision in *Wi Parata* operates to eliminate diversities within the nation's borders. Maori law and custom are 'non-existent', or outside the boundaries of the nation. This characterisation excludes 'all remembered relationship with those beyond the limits of the state'. Prendergast's decision literally re-members the nation by erasing or cutting off not only any recognition of Maori laws and practices in colonial law, but any existence at all of those laws and practices. He recreates the nation as one in which Maori laws and customs never existed.

The language in Prendergast's decision buttressed the erasure of Maori law and custom, creating a new fantasy of an emerging modern nation. The Court categorises Maori as uncivilised barbarians, and the land they inhabited as 'thinly peopled by barbarians without any form of law or civil government' (77). Maori are positioned as uncivilised, dispersed, 'primitive barbarians' without law, in opposition to the civilised unified nations of the world (78). The Court also defines what is meant by civilisation in opposition to the slippery and ill-defined words 'barbarian' and 'savage'. 'Primitive' invokes the pre-modern past, and 'barbarians' connotes inferiority, 'lack of refinement, sensitivity, learning or artistic or literary culture; uncivilized' (Longman 1984). Maori are defined as inferior by their 'lack' and the emerging nation-state is

defined in opposition to its own pre-modern past. Opposition to 'barbarian' positions national identity as an intricate quilt of refinement, sensitivity, artistry, culture and civilisation.

In practical terms, the Court's decision in *Wi Parata* legitimated the Colonial Government in extinguishing Maori title to land without purchasing it. The case was decided during the 'Vogel period' of immigration, between 1870 and 1885, when the central government provided assistance focused on attracting immigrants for public works and development more generally. During the Vogel period the non-Maori population of New Zealand increased from 248,400 to 575,226 (Simpson 1997: 169–80). The Court's reference to an uncivilised past where New Zealand was 'thinly peopled', at a time when there is an influx of settlers to New Zealand, also positions high density population, and colonisation, as an aspect of civilisation. *Wi Parata* facilitated the ongoing confiscation of Maori land, necessary to the financing of the infrastructure of the new state, and demanded by the increasing numbers of settlers. It legitimated over 100 pieces of legislation to 'legalise' Maori dispossession from Maori land. It has been argued that all of these pieces of legislation were enacted in breach of the Treaty (Jackson 1993: 77).

While Prendergast's decision in *Wi Parata* has been the subject of much analysis and debate (Jackson 1993, McHugh 1991, Seuffert 1998: 88, Hackshaw 1989), his application of a similar analysis to the *Marriage Act* 1880 has largely escaped notice (Robson 1954). In 1887 the vast majority of Maori were still marrying according to their own laws, and no doubt assumed that their marriages were valid. In that year only 13 marriages between two Maori people were contracted under the *Marriage Act* 1880. The Registrar General's report on statistics in New Zealand in 1887 simply states that 'the number of marriages does not include those between persons both of whom are of the aboriginal native race, these people being expressly excluded from the operation of the Marriage Act'.¹³

Rira Peti v Ngaraihi Te Paku involved a will that was contested by Te Paku. The second issue in the case was whether the sole legatee

under the will was married to one of the witnesses and therefore could not take under the will.¹⁴ Prendergast acknowledged the provision exempting Maori marriages from the requirements of the 1847 Ordinance and its reenactment in the Marriage Acts 1854 and 1880 (237). He stated that the *Marriage Ordinance* 1842 had not been expressly repealed; it was impliedly repealed by the *Marriage Ordinance* 1847 ‘except as to such marriages as were excepted from the operation of that [1847] Ordinance’. He therefore concluded:

Unless there is some other law on the subject, marriage between persons of the native race is governed by the common law of England as modified by the Marriage Ordinance of 1842 (238).

Prendergast concludes that there is no other law on the subject. The subject matter jurisdiction of the Court with respect to marriage extends only to colonial marriage laws (237). Prendergast extends the jurisdiction of the courts over Maori, bringing them within the purview of a homogenous set of laws. He simultaneously defines Maori as different by subordinating ‘their usages’ to the ‘laws of the land’:

The natives are British subjects, their relations to each other are governed by the laws of the land, and not by their usages, unless, and only so far as these laws have provided for the recognition of their usages (239).

An analysis of colonial marriage law such as the one that I have provided suggests that a marriage according to Maori law *was* indeed a part of the law of New Zealand. However, Prendergast concludes that since ‘[M]aori usages in relation to any other subject than land titles or claims have not been recognized’ (238) Maori marriage law is not a part of the law of New Zealand. This statement ignores 20 years of British policy in New Zealand, and the legislative context and intent of the section exempting Maori marriages from the successive Marriage Acts. Many Maori continued to marry according to Maori law and custom long after Prendergast’s decision in *Rira Peti*; as late as 1936 it was noted that the number of Maori customary marriages were far in excess of those entered into under the successive Marriage Acts.¹⁵

In 1891 the *Marriage Ordinance* 1842 was repealed because the legislature recognised that it had ‘ceased to be in force or become unnecessary’.¹⁶ This statement was consistent with interpreting the exemptions from the Marriage Acts as recognising Maori marriages, rather than as invoking the 1842 Ordinance.

In 1901 in *Nireaha Tamaki v Baker* the Privy Council held that an action to restrain the Commissioner of Land from selling land when the Native title had not been extinguished according to law could be maintained. The Court in *Nireaha* rejected the contention, based on Prendergast’s *dicta* in *Wi Parata*, that no suit could be brought upon a Native title because there was no ‘ancient custom and usage of the Maori people’ (79) on which Native title could be based (384):

Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of ss. 3 and 4 of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that ‘a phrase in a statute cannot call what is non-existent into being’ (382).

The Court states that the legislation of both the Imperial Parliament and the Colonial Legislature is consistent with its view that the *Native Rights Act* 1865 must be interpreted to recognise Native title until it has been extinguished. The Privy Council’s rejection of Prendergast’s statement in *Wi Parata*, combined with the statement of legislative intent in repealing the *Marriage Ordinance* 1842 should have been enough to confirm that Prendergast’s decision in *Rira Peti* was incorrect. However, as *Wi Parata*’s legacy of legislation dispossessing Maori of land, and the cases discussed below, highlight, the colonial courts and legislature were happy to ignore the Privy Council decision (Williams 2003: 12).

The Courts continued to follow the flawed precedent set in *Rira Peti*. In *Rex v Kingi* the Court refused to recognise a Maori marriage, resulting in the extension of the jurisdiction of the colonial courts into the intimate lives of Maori. Wairemu Kingi was married to a Maori woman under the age of 16 in a formal Maori ceremony conducted by rangatira

(chiefs) (372). He was then indicted for having carnal knowledge of a girl under the age of 16. Charging the grand jury in *Rex v Kingi* Chapman J stated:

These parties are referred to as having made a customary Maori marriage. The man took the girl away and lived with her. You cannot take into account the so-called Maori custom. ... A man of either race is responsible to this Court if he has intercourse with a girl under the age of sixteen ... the Court does not recognise the so-called marriages (371).

While the Court does not mention *Rira Peti*, its precedent is followed. Maori laws and customs are again excluded from the jurisdiction of the court, at the same time that criminal jurisdiction is extended over Maori. The result is that this Maori man, important enough to be married in a ceremony by rangatira, is brought within the nation through the extension of jurisdictional boundaries and simultaneously produced as an internal foe of the nation through the criminal law (Fitzpatrick 2001: 180).

The case does not give the age of Kingi's wife. Young women could be legally married at the age of 12 at the time (Robson 1954: 320). European men were therefore not indictable for having carnal knowledge of a young woman between the ages of 12 and 16 if they were married to her under European law, but Maori men married according to Maori law to a young woman under the age of 16 were criminals. It is therefore incorrect for the Court to state that a 'man of either race' is indictable for intercourse with young women under the age of 16. *Rex v Kingi* also holds that as they are not married, Kingi's wife can be compelled to give evidence against him in the case (372–3).

John Salmond also refused to recognise the problems with *Rira Peti* when he drafted the *Native Land Act* 1909 as Counsel to the Law Drafting Office. In his theoretical work Salmond recognises that Courts 'must in general take it absolutely for granted that the legislature has said what it meant, and meant what it has said' (Fitzgerald 1966: 132–3). However, in the *Native Land Act* 1909 he does not adopt the legislature's clear statement that the Marriage Ordinance 1842 was repealed

because it was unnecessary, and conclude that Prendergast's decision in *Rira Peti* was incorrect. Instead he concludes that repeal of the Ordinance was 'apparently in forgetfulness of the fact that, though no longer required in respect of European marriages, it was still an operative enactment with respect to Maori marriages'.¹⁷ Salmond invents a new rule of legislative forgetfulness. His assertion that after the repeal of the 1842 Ordinance Maori can marry either under the *Marriage Act* or the common law of England by a clergyman of the English or Roman Catholic church also ignores the Privy Council's rejection of Prendergast's conclusion in *Wi Parata*.¹⁸

The refusal of the colonial judiciary and legislature to consider the implications of the Privy Council decision in *Nireaha* highlight the tide change from early (British) colonial policy recognising Maori law and practices, to New Zealand's late 19th century emergence from residual British control as a Dominion. The dance of national identity emerging from imperial identity was a complex one. New Zealanders saw themselves and the emerging nation as part of an experiment for the production of a 'Better Britain'. New Zealand considered itself the English colony that remained most faithful to the mother country, and many New Zealanders were proud to identify as British, both culturally and racially (Gibbons 1998: 309, 314). The image of New Zealanders as having a 'special destiny as the vanguard of British civilization', the finest of all civilisations, resulting in New Zealand being dubbed 'God's own country', was strong. New Zealand's national identity was promoted as separate from imperial identity while deriving its coherence and stability from its flexible incorporation of Imperialist ideologies — 'primarily racism and cultural superiority' (O'Neill 1993: 24). Rejecting the Privy Council's decision in *Nireaha* served to both buttress New Zealand's emergence as an independent nation at the same time that it facilitated producing that nation as racially and culturally pure.

Prendergast, Chapman and Salmond were three of New Zealand's most influential 19th century judges (Frame 1995: 11, Hohepa & Williams 1996, Spiller 1991). Salmond's interpretation of *Rira Peti*, and his failure to re-think the flawed precedent it set, contributed to solidifying *Rira*

Peti as a precedent. Chapman repeats this precedent in *Rex v Kingi* and in other judgments, and it is followed in other cases.¹⁹ The erasure of Maori laws and customs in these cases facilitated aspirations to racial purity. Once Maori laws and customs were erased, Maori were assimilated into aspirations to a better Britain with flimsy arguments (Hanson 1989: 892) that they were descended from the same common stock as the Anglo-Saxon (Gibbons 1998: 313, Reeves 1899: 417). In the cases discussed below, Maori are assimilated to the race and gender assumptions of the colonial laws and the emerging nation, at the same time as the cases produce them as different within that jurisdiction and within the nation.

Solidifying difference within the nation

In this section I further explore the raced and gendered operation of marriage jurisdiction in colonial New Zealand. During the late 19th and early 20th centuries, following precedents set by the cases I have discussed, jurisdictional lines were increasingly drawn in ways that solidified race and gender differences within the emerging nation-state, and its emerging identity as a ‘Better Britain’. Difference was produced by ‘racing’ the actions of parties in the cases. Colonial marriage practices and a range of the other actions were labelled European or civilised, and by implication white, while others were positioned in opposition to these traits. Simultaneously, courts worked anxiously to produce gender differences among Maori by projecting Victorian notions of gender onto parties in the cases, especially Maori women.

Tutua Teone v Tipene provides an example of the solidification of the precedent in *Rira Peti*, and of the centralisation of authority through the extension of jurisdictional boundaries. It also participates in producing difference within the nation by dividing society into distinctive local units. The case considers the meaning of common law marriage for Maori. We Teo Tipene and Meri Tipene, married according to Maori law, purported to adopt Robert as husband and wife under the *Adoption of Children Act* 1895. When Teo Tipene died his nephews and nieces sought a declaratory judgment that Robert was not his adopted

son, in part on the basis that Teo and Meri were not married.²⁰ According to Prendergast's reasoning in *Rira Peti*, after the repeal of the 1842 Ordinance Maori were left with the choice of marrying under the *Marriage Act* 1880 or the common law.

The Tipenes were not married under the 1880 Act. The issue was therefore whether they were married at common law. Teo and Meri:

lived and cohabited together nominally as husband and wife for a number of years, living in the midst of the members of the hapu or tribe to which they belonged, and surrounded by their relatives. They were known as Mr and Mrs Tipene (650).

The Court finds that if two people had been living as the Tipene's had in a British community, openly and notoriously as husband and wife, accepted as lawfully married, there would be a strong presumption at common law that they were lawfully married:

In a British community, amongst British people, persons living as these two were would be regarded as either lawfully husband and wife or living in a state of concubinage. If reputed to be living in the latter state, they would lose caste among their neighbors, and be probably ostracized amongst the respectable members of the community. Their reputation amongst near relatives and friends would be established as a matter of common knowledge, and if that reputation was of a lawful marriage it would be, at common law, strongly presumptive of such a marriage (650).

The Tipene's lived among their relatives and friends, and were respected as lawfully married. However, the Court does not find that they are married at common law. Instead, it notes that the application of the common law in New Zealand is subject to any difference in conditions from Britain (649). Maori marriages are one of those differences. When Maori couples live together openly and notoriously as husband and wife it is not because they are accepted as lawfully married, but instead because they are accepted as married according to Maori custom, which is 'not a marriage in law' (651). The Court holds that the strong common law presumption of marriage is therefore rebutted (649–51). Teo and Meri are identified as internal foes, living *not* 'lawfully as husband and wife', but 'in a state of concubinage'. The Court's determination places

them in the category of people ‘ostracized by the respectable members of the community’, suggesting that the members of the hapu and their relatives are also not respectable members of the community, as they have not ostracised Teo and Meri. Teo and Meri and *their community* are produced as different from, although within, the imagined, respectable community of the nation by virtue of their Maori marriage. The Court’s refusal to recognise Maori marriages participates in producing an image of the nation, or the imagined community, as white and Christian. Marriage law and jurisdiction here operates to police the boundaries of what will be recognised within the nation.

Another case that illustrates the production of difference within the jurisdiction of the nation is *Matiu v Monika Rewiti & Another*,²¹ decided by Chapman in 1907 under the *Marriage Act* 1904. Matiu claimed that he was the husband of Monika and brought the action to dissolve the marriage on the basis that she had committed adultery with another.²² Monika defended the case on the basis that there was no valid marriage between her and Matiu and therefore there could be no adultery.²³ Matiu and Monika were originally married according to Maori law.²⁴ The Court notes that the couple were urged by ‘some ladies who take an interest in improving the moral condition of Maoris’,²⁵ presumably a white women’s church group, to marry before a clergyman of the Church of England. The fact of the church marriage is relevant to whether the marriage is recognisable in the colonial courts under the precedent set in *Rira Peti*, but the motivation for the church marriage is irrelevant. The Court’s mention of the ‘ladies’ recognises the role of white women in shaping the nation to a culturally specific set of moral standards (Brookes 1992: 25, Burton 1994: 82–3, Bland 1992: 43). If Matiu and Monika needed to get married in the church to improve their moral condition, by implication their Maori marriage was immoral. The role of the women’s church group is to shepherd Maori into the moral boundaries of the colonising community. The court’s jurisdiction under *Rira Peti* recognises the marriage only because a clergyman of the Church of England is involved. This recognition follows the moral boundaries, which delineate difference within the new nation. European, white and

Christian are good, moral attributes, while Maori people, laws and practices are 'marked' as immoral and raced as 'other'. Further, by juxtaposing 'ladies' with the 'moral condition of Maoris' and labelling Monika and Matiu's marriage as immoral, the Court is also excluding Monika from the category 'lady'.

While Matiu and Monika were married before a clergyman, they did not obtain a marriage licence. They later separated and Monika entered a relationship with a new partner. Monika, unsure whether her marriage to Matiu presented an obstacle, refused to re-marry until the situation was clarified. They therefore sent a telegram to a solicitor asking 'Can a person legalise a marriage without a marriage certificate?' and received the answer 'No'.²⁶ As there had been no marriage certificate for the marriage with Matiu, Monika concluded that there was no legal obstacle to a new marriage, and married her new partner according to Maori law. Monika's diligence in attempting to ascertain her legal position can only be seen as exemplary.

In considering Matiu's application to dissolve the marriage, the Court noted that the solicitor's reply to Monika's telegram 'satisfied both parties, who apparently failed to observe that the matter of their races was not mentioned in the telegram'.²⁷ The answer to the question that they posed depended on their race. Or, to put it another way, they failed to observe that they were 'marked' by race, and that if they asked the question in a manner that was not marked by race, they would receive an answer that applied only to those 'unmarked' by race, white settlers. The presumption of whiteness in the solicitor's answer to the question, and Chapman's placement of the blame for not realising that they were marked by race on Monika and her new partner,²⁸ also highlights that the marriage jurisdiction of the courts occupies the position of the dominant race, unmarked and white. The Court further emphasises difference between Maori and European by stating that 'the proceedings of the parties were quite unlike what would be expected of colonists of European origin'²⁹ and, 'I think some allowance must be made for people living as these people live ...'³⁰

Matiu v Monika also operates to produce gender difference. Following the reasoning in *Rira Peti* the Court notes that section 2 of the *Marriage Act* 1904 exempts Maori from its application, although the parties were married by a clergyman.³¹ The *Marriage Act* 1904 requires knowing and willing disregard of the requirement for a marriage certificate in order for a marriage to be invalidated (644). The Court therefore frames the issue as whether both parties knowingly disregarded this requirement. It refuses to so find:

Here it is not actually proved that both parties knew of the absence of a [marriage] certificate. The wife may have quite well left all of the preliminaries to the husband to attend to (644).

Here the Court produces a particular type of gender difference by assuming that Monika, as a good passive Victorian wife, would have left all of the marriage preliminaries to her husband, Matiu (Stanley 1989: 4, 14, Fishman 2002: 73). There is no need for the Court to make Monika into a compliant wife to decide this question; the first sentence of the quote above was sufficient to decide the issue. The Court's insistence on constructing Monika as a compliant wife suggests its anxiety with being confronted by Monika's agency and intelligence. Spurred by this anxiety, the Court produces a fantasy of a particular, non-threatening brand of gender difference that domesticates Maori women.

The use of this gender fantasy in *Matiu v Monika* is not an isolated occurrence. It was repeated in 1921 in *Renata Te Ni v Tuihata Te Awhi & Rotia Hini*. There the Court declined to address the issue of whether the exemption from the *Marriage Act* 1880 applied where one of the parties was a 'half-caste' (730). Instead it framed the issue as whether the *Marriage Act* 1880 required that a marriage by a Clergyman of the Church of England was valid without a certificate of registration (730). As in *Matiu v Monika*, the Court noted the requirement of proof that both parties knew that a certificate had not been issued in order to invalidate the marriage (730). It refused to assume that the Maori woman knew there was no certificate, concluding:

It may more reasonably be assumed that this Maori woman left the arrangements for the marriage in the hands of her half-caste husband and believed that all things necessary for the due celebration of the marriage had been duly accomplished by him (731).

Here ideas about both race and gender are operating. It is a 'Maori woman' who is passive in relation to a 'half-caste' husband. The races of the parties are mentioned, as though it is, if anything, 'more reasonable' that a Maori woman would believe that her half-caste husband would duly make the necessary arrangements.

In both of these cases the marriages are found to be valid only to be dissolved as a result of the husbands' petitions for dissolution. The same result would have been reached by the Courts' refusal to assert jurisdiction over these marriages. The Courts might have declined to follow *Rira Peti*. The Courts might have held that marriages between two Maori people were exempted from the Marriage Acts and that Maori laws applied to both their creation and dissolution. Instead the Courts assert jurisdiction over the parties and declare the marriages valid only to dissolve them. These cases solidify the extension of the reach of the law in a manner that legitimises the regulation of the lives and affairs of Maori people. In the process of assimilating Maori to the race and gender assumptions of the colonial laws and the emerging nation, the cases produce them as different within that jurisdiction and within the nation.

Concubinage and polygamy: modernising the nation

Matiu v Monika is one of a series of marriage cases that produce difference within the new colonial nation. A number of these cases produce difference by opposing marriage to concubinage and polygamy, associating marriage with modernity, civilisation, progress and whiteness, and concubinage and polygamy with Maori law and custom, degeneration and backwardness.

In the discussion of *Tutua Teone v Tipene* above I argued that the language that Chapman used in refusing to recognise Teo and Mere's relationship as a common law marriage categorised it instead as 'living in a state of concubinage'. In *Rangi Kerehoma v Public Trustee* Chapman again relied on the concept of concubinage in stating categorically:

There is only one marriage law in New Zealand for all races, and there is no status of concubinage such as is recognized in some countries, and the so-called marriage according to Maori custom is no marriage in law. It results in a voluntary cohabitation: but a man may have several such unions at the same time and may dissolve them at will, and the woman may do the like (905).³²

The Court's reference to 'several such unions' is an allusion to polygamy, tying concubinage and polygamy together. In *Re Wi Tamahau Mahupuku, Thompson v Mahupuku* the Court quotes the language above and makes explicit reference to polygamy:

There is no evidence as to how the sexual relationship in the present case was brought about, but it would appear that in what is termed a 'Maori customary marriage' no formality whatsoever is required, the parties simply live together, and if they tire of each other they separate without formality and enter into fresh relations with others, and that which, if the marriage were a legal one, would be termed polygamy is recognized (1399).

The language the Courts are using here is doing two things. First, it is assimilating Maori laws and practices to known concepts within the common law. This involves reshaping and reproducing Maori laws and customs as the equivalent of concubinage and polygamy, concepts that lie at the boundaries of the common law. At the same time, the Courts are opposing 'modern' colonial marriage to the (immoral) pre-modern practices of concubinage and polygamy, thus reproducing the Maori law and practices as different from, and less than, common law marriage. Positioned in opposition to common law marriage, Maori law is excluded from the nation at the same time that it defines it. This dynamic positions Maori law at the boundary of the nation.

The terms 'concubinage' and 'polygamy' operated in the colonial period in opposition to modernity as 'cohering, "quilting" point[s],

bringing together the disparate dimensions of modern identity' (Fitzpatrick 2001: 65). In order to operate in this manner these concepts had to be both apart from modern identity and yet recognisably related to it, and had to provide opposites to the aspects of modern identity that they were to 'quilt' together (Fitzpatrick 2001: 64). Aspects of modernity might be 'quilted' in opposition to a degenerate or 'savage and barbaric' past, which modernity must guard against (Stychin 1998: 4).

In the British common law system, concubinage has a long history as the opposite of marriage, associated with the unstable early modern period when the law lacked clarity as to what constituted a valid marriage (Stone 1992: 16–7). Those with property to protect were likely to be careful to legalise their unions as part of the formal legal process of dealing with their property. However, large numbers of English men and women, especially the propertyless poor, engaged in a range of informal marriage practices, such as 'broomstick weddings' (Parker 1989: 133) right through the late 18th and into the 19th century. Part of the project of modernity included attempting to regularise sexual and marital behaviour and punish deviants, including minimising recognition for informal marriage practices, the results of which were labelled as concubinage (Stone 1992: 17). This historical process positioned concubinage at the boundary of the common law, used to delineate the difference between pre-modern and modern. The term denoted a set of practices that represented pre-modern uncertainty and instability in the law of marriage, 'quilting' the definition of modern marriage in opposition as clearly delineated and stable.

Concubinage was also practised in 'foreign' colonies. By the end of the 19th century living in 'concubinage' with a local woman was the most common arrangement for male European colonists in the Indies (Stoler 1997: 347–8). 'Concubinage' in this context was used to refer to cohabitation outside of marriage between European men and Asian women; it included sexual access to the woman, demands on her labour and legal rights to her children. European plantation employees, and corporate and government decision-makers were encouraged to find local 'companions' and often prohibited from marrying (Stoler 1997:

348–9). Chapman's reference to the 'status of concubinage such as is recognized in some countries' may have been a reference to these official practices. His statement positions concubinage as foreign, outside of the nation and the jurisdictional boundaries of the Courts. It defines the nation in opposition to concubinage.

Thus in the late 19th century concubinage was positioned as both foreign and pre-modern. The association of Maori marriage laws and practices with concubinage operated similarly to position those law and practices as foreign, pre-modern, and outside the jurisdictional boundaries of the Court.

Polygamy was also a term opposed to modernity. David Hume made this explicit in the mid-18th century, '[t]he exclusion of polygamy and divorces sufficiently recommends our present European practice with regard to marriage' (Hume 1742 in Nussbaum 1994: 149). At the end of the 18th century polygamy was positioned as foreign and outside the boundaries of England as a nation:

England's toying with and ultimate rejection of polygamy near the end of the eighteenth century is part of the nation's defining itself both as distinct from and morally superior to the polygamous Other. Monogamy is instituted as part of England's national definition, and whatever practices its explorers might find to tempt them in other worlds, England asserts its public stance that marriage means one man, one wife, at least in law (Nussbaum 1994: 149).

The 'toying' with polygamy suggests its relation to modern identity at the same time that its rejection positions it in opposition. In the 18th and early 19th century polygamy included a multiplicity of practices, a husband taking more than one wife, marrying after the death of the first wife, or seducing one woman while being married to another (Nussbaum 1994). Modern marriage might therefore also be 'quilted' in opposition to these practices as one man and one 'wife' in a lifetime (Hartog 2000: 95).

In the last third of the 19th century theories of both evolutionism and racial categorisation gained influence. The idea that civilisation itself was a racial trait achieved by whites and handed down by birthright gained prevalence (Cott 2000: 117). Christianity ranked all peoples along

a linear and chronological scale of racial development; from savagism to barbarism, both marked by race, to white civilisation. Christianity linked with the modern notion of progress by assuming that all peoples had the potential to be saved, but the road was longer for those not already white and civilised. Monogamy was associated with Christianity, European descent, and whiteness. Monogamous marriage was touted as a primary distinction between Europeans and Asians, closely associated with the civilisation of the white race. Without monogamous marriage the very being of the white race would be destroyed (Cott 2000: 114).

The modern notion of evolution and the association of polygamy with the pre-modern, pre-civilisation, and tribal practices, were also apparent in New Zealand. These characterisations of polygamy were to be found in Chancellor James Kent's *Commentaries on American Law* (Cott 2000: 114), an American treatise that was influential in the colonisation of New Zealand (Gipps 1840). In 1897 the *Otago Daily Times* published an article reflecting the view of polygamy as a degenerate practice associated with pre-modernity:

According to the rationalistic view, ... marriage is simply an outcome of something inherent in human nature, and is subject to development as other institutions are, such as the family and the State. It is the result of a process of evolution from tribal promiscuity and 'marriage by capture,' through polyandry and polygamy, to the very imperfect form of monogamy now prevailing (MacGregor 1897).

Here the family, state and marriage evolve and progress along familiar late 19th century racial lines, from the savagism of tribal practices to still evolving civilisation of white Europeans. Polygamy is represented evolutionarily as pre-monogamy, and therefore also pre-modern.

Chapman's statement in *Rangi Kerehoma*, quoted above, aligns New Zealand with the project of modernity by clearly delineating the difference between colonial marriage laws that produce valid marriages, and concubinage, polygamy and 'marriage according to Maori custom', all of which are 'no marriage in law'. The idea that polygamy is a pre-modern practice is also reflected in Chapman's decision in *Rex v Kingi*:

If the Maori people were permitted to go back to Maori custom with respect to marriages, and to call those unions marriages, that might include polygamous marriages ... the Court does not recognise the so-called marriages (372).

The reference to going 'back' to Maori custom here places Maori laws in the past, static and not evolving, in the pre-modern, uncivilised era. The possibility of degeneration, or slipping into a 'savage' or pre-modern past associated with polygamy is an evil that modernity must guard against.

The cases discussed in this section further the project of solidifying New Zealand as a white, Christian nation-state by drawing jurisdictional and national boundaries in marriage cases that exclude Maori marriage laws and practices through associating them with the pre-modern, raced concepts of concubinage and polygamy.

Conclusion

This article has demonstrated that cases on marriage laws in colonial New Zealand participate in the production of a particularly raced and gendered nation. Early British policy exempting Maori from colonial marriage laws reflected Maori interpretations of the Treaty of Waitangi, providing for Maori self-governance and the continued application of Maori laws and practices. The Treaty's agreement for power sharing in the governance of New Zealand had the potential to produce new images of community, moving beyond 19th century colonial notions of nation. However, interpretations of marriage laws in the colonial courts by New Zealand's most influential judges failed to recognise that potential. Instead these judgments reproduced 19th century ideas about nations by positioning Maori laws and practices outside of increasingly rigidly defined national boundaries. At the same time those laws and practices, and the political identities of Maori people within the nation's jurisdiction, were produced as different. The decisions in each of these cases involved an historical moment in which the judges exercised an ethical choice to proceed down the path of building a colonial nation based on the violent erasure of the Treaty's agreement of power sharing.

Notes

- 1 I would like to thank all of the participants in the ‘Law, History and Postcolonial Theory and Method’ Symposium held at the University of Waikato in December of 2002 for their stimulating presentations and discussion, which contributed to the development of this article. I would also like to thank Catharine Coleborne for her energy, enthusiasm and unflagging patience in co-organising the symposium and co-editing this special edition of *Law Text Culture*. Finally, thanks to the anonymous referees of this article, who provided kind and helpful insights and advice.
- 2 For the extent to which this dominant story still prevails see Moon 2002: 10: ‘I assumed — like most other people — that there were certain facts about the Treaty that were beyond the reach of challenge even by the most incorrigible historian or analyst. ... One fact in particular stood out clearly ... that the purpose of the treaty was for the British Crown to assert sovereignty over Maori. Yet the more I considered this assertion in the light of evidence I was uncovering, the less it seemed to stand up to close scrutiny.’
- 3 Only 39 of the 541 Maori signatures were to an English text.
- 4 *Constitution Act* 1986 (NZ).
- 5 The *Marriage Ordinance* 1842 was one section long. It extended validity to future and retrospective marriages performed by any minister of any Christian denomination. This ordinance extended religious freedom by modifying the common law of England, which limited valid marriages to those performed by a properly ordained minister of the Church of England or the Roman Catholic Church.
- 6 *Marriage Ordinance* 1847 (NZ).
- 7 *Marriage Ordinance* 1847 (NZ) s 44.
- 8 *Marriage Ordinance* 1847 (NZ) s 44.
- 9 *Marriage Act* 1854 (NZ) s 47.
- 10 *Marriage Act* 1880 (NZ) s 2; *Marriage Act* 1904 (NZ) s 2.
- 11 *Native Rights Act* 1865 (NZ) s 4; *Native Lands Act* 1862 (NZ); *Native Lands Acts* 1865 (NZ).
- 12 *Horomona & Others v Drowner* (1878) Vol IV NS 104, Supreme Court at 107.

Seuffert

- 13 BPP, Colonies, New Zealand, 17, Irish Uni Press Series (1969), Report by the Register General on the Statistics of the Colony for 1887 at 82.
- 14 Te Paku first claimed that the deceased was not of sound mind when he made the will, that it was procured under undue influence, and that in the absence of a will she would be entitled to the property according to Maori custom. The first part of the judgment was not recorded except for a note stating that the judge found against Ngaraihi on those claims: (1888) 7 NZLR 235 at 236.
- 15 *Tutua Teone v Tipene* [1936] NZLR 642 at 651.
- 16 *The Repeals Act 1891* (NZ) Title.
- 17 Introduction to the *Native Land Act 1909*, Public Acts of New Zealand 1908–1931, vol 6 at 92–5.
- 18 In *Parker v Parker* [1921] NZLR 732, Salmond apparently forgot that the *Marriage Ordinance 1842* had been repealed. After noting that the *Marriage Act 1880* exempted Maori from its provisions, Salmond stated, ‘Marriages, therefore, between Maoris might in the year 1897, in pursuance of the *Marriage Ordinance 1842*, be validly celebrated before a minister of any Christian denomination without a Registrar’s certificate or other formal prerequisite.’ Id at 732.
- 19 *Matiu v Monika Rewiti & Another* (1907) 26 NZLR 642 (see discussion below); *Rangi Kerehoma v Public Trustee* [1918] NZLR 903, [1918] GLR 483 (discussed below); *Re Wi Tamahau Mahupuku, Thompson v Mahupuku* [1932] NZLR 1397 at 1399 (citing *Rira Peti*; quoting *Rangi Kerehoma v Public Trustee* at 485); *Tutua Teone v Tipene* [1936] NZLR 642 at 651 (quoting *Rangi Kerehoma v Public Trustee* [1918] GLR 483 at 485).
- 20 The first issue argued was that there was no formal order of adoption. The Court held that despite the fact that a verbal order had been made, the lack of a formal order, apparently due to the oversight of the lawyer, invalidated the adoption under the *Adoption of Children Act 1895*. [1936] NZLR 642, 646; affirmed *Tipene v Tutua Teone* [1937] NZLR 1098. The Court of Appeal did not reach the issue of whether Teo and Meri were married for purposes of the *Adoption of Children Act 1895*.
- 21 (1907) 26 NZLR 642; (1907) 9 GLR 351. The GLR provides a more complete record of the case. References will therefore be made to both reporters.

- 22 (1907) 26 NZLR 642.
- 23 (1907) 26 NZLR 642 at 643.
- 24 (1907) 9 GLR 351 at 352.
- 25 (1907) 9 GLR 351 at 352.
- 26 (1907) 9 GLR 351 at 352.
- 27 (1907) 9 GLR 351 at 352.
- 28 (1907) 9 GLR 351, 352; the Court refuses Monika's partner's request to be released from paying costs 'as he had acted on the telegram and thought he was entitled to marry Monika ... he took the risk arising out of his very imperfect inquiry.'
- 29 (1907) 9 GLR 351 at 352.
- 30 (1907) 9 GLR 351 at 352.
- 31 The Court states that the *Marriage Ordinance* 1842 applies. While the Court does not give the dates of their marriage by the clergyman, presumably its use of the *Marriage Act* 1904 means that they if occurred after that date. If this is the case, then applying the 1842 Ordinance is incorrect, as it was repealed in 1891.
- 32 [1918] NZLR 903 at 905; [1918] GLR 483 at 485.

References

- Adams Peter 1977 *Fatal Necessity* Oxford Auckland
- Anderson Benedict 1991 *Imagined Communities: Reflections of the Origins and Spread of Nationalism* Verso London
- Belich James 1988 *The New Zealand Wars and the Victorian Interpretation of Conflict* Penguin Auckland
- Bland Lucy 1992 'Feminist Vigilantes of Late-Victorian England' in Smart 1992: 43–50
- Boast Richard 1993 'Maori and the Law, 1840–2000' in Spiller et al 1993: 123–86
- Brookes Barbara and Margaret Tennant 1992 'Maori and Pakeha Women: Many Histories, Divergent Pasts?' in Brookes et al 1992: 25–48
- Brookes Barbara, Charlotte Macdonald and Margaret Tennant eds 1992 *Women in History 2* Bridget Williams Books Wellington

Seuffert

- Burton Antoinette 1994 *Burdens of History: British Feminists, Indian Women, and Imperial Culture, 1865–1915* University of North Carolina Press Chapel Hill
- Cott Nancy F 2000 *Public Vows: A History of Marriage and the Nation* Harvard University Press Cambridge
- Dorset Shaunnagh 2000 “‘Since Time Immemorial’: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry” *MULR* 26: 32–59
- Dubler Ariela 1998 ‘Governing Through Contract: Common Law Marriage in the Nineteenth Century’ *Yale LJ* 107: 1885–1920
- Durie E T 1996 ‘Will the Settlers Settle? Cultural Conciliation and Law’ *Otago Law Review* 8: 449
- Fishman Laura 2002 ‘French Views of Native American Women in the Early Modern Era: The Tupinamba of Brazil’ in Hunt and Lessard 2002: 65–78
- Fitzgerald P J 1966 *Salmond on Jurisprudence* Sweet & Maxwell London
- Fitzpatrick Peter 2001 *Modernism and the Grounds of Law* Cambridge University Press Cambridge
- Ford Richard 1999 ‘Law’s Territory (A History of Jurisdiction)’ *Michigan Law Review* 97: 843–930
- Frame Alex 1995 *Salmond: Southern Jurist* Victoria University Press Wellington
- 1981 ‘Colonising Attitudes Towards Maori Custom’ *New Zealand Law Journal* 17 March 1981: 105–10
- Franke Katherine 1999 ‘Becoming a Citizen: Reconstruction Era Regulation of African American Marriages’ *Yale J L & Humanities* 11: 251–309
- Gibbons P J 1998 ‘The climate of opinion’ in Rice 1998: 308–36
- Gipps, Governor Sir George to Lord John Russell, 16 August 1840, BPP, Correspondence and Other Papers Relating to New Zealand 1835–42, Colonies, New Zealand, Vol 3, 1968, 200
- Hackshaw Frederika 1989 ‘Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi’ in Kawharau 1989: 92–120
- Hanson Allan 1989 ‘The making of the Maori: culture invention and its logic’ *American Anthropologist* 91: 890–902
- Harris Angela P 1996 ‘Comment: Seductions of Modern Culture’ *Yale J Law & Humanities* 8: 213–39

- Hartog Hendrick 2000 *Man & Wife in America: A History* Harvard Cambridge
- Hendricks Margo and Patricia Parker eds 1994 *Women, "Race," & Writing in the Early Modern Period* Routledge London
- Hohepa Pat and David Williams 1996 'The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession' Law Commission Working Paper New Zealand Law Commission Wellington
- Hume David 1663 'Of Polygamy and Divorces' (1742) reprinted in *Essays Moral, Political and Literary* Oxford University Press Oxford 185–95
- Hunt Tamara L and Micheline R Lessard eds 2002 *Women and the Colonial Gaze* New York University Press New York
- Ihimaera Witi ed 1993 *To Ao Marama 2: Regaining Aotearoa* Reed Auckland
- Jackson Moana 1993 'Land Loss and the Treaty of Waitangi' in Ihimaera 1993: 77
- Kawharau I H ed 1989 *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* Oxford University Press Auckland
- Longman Dictionary of the English Language 1984 Merriam-Webster Essex
- McClintock Anne, Aamir Mufti and Ella Shohat eds 1997 *Dangerous Liaisons: Gender, Nation and Postcolonial Perspectives* University of Minnesota Press Minneapolis
- MacGregor J 1897 'Marriage and Divorce: The Ecclesiastical and the Rationalistic Conceptions of Marriage Contrasted' *Otago Daily Times* 7 October 1897
- Mahuta Sir Robert Te Katahi 1995 'A Case Study of Direct Negotiation' in Treaty Settlements: the unfinished business, New Zealand Institute of Advanced Legal Studies and Victoria University Wellington 67–87
- McHugh Paul 1991 *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* Oxford Auckland
- Moon Paul 2002 *The Path of the Treaty of Waitangi: Te Ara Ki Te Tiriti* David Ling Publishing Auckland
- Nussbaum Felicity 1994 'The Other Woman: Polygamy, *Pamela*, and the prerogative of empire' in Hendricks and Parker 1994: 138–62
- Olsen Frances E 1983 'The Family and the Market: A Study of Ideology and Legal Reform' *Harv LR* 96: 1497–578
- 1985 'The Myth of State Intervention in the Family' *U Mich J L Reform* 18: 835–64

Seuffert

- O'Neill Phillip Raymond 1993 'Unsettling the empire: postcolonialism and the troubled identities of settler nations' unpublished PhD thesis New York University
- Parker Stephen 1989 'The Marriage Act 1753: A Case Study in Family Law-Making' Oxford University Press Oxford
- Pateman Carole 1988 *The Sexual Contract* Stanford University Press Stanford
- Quaife Barzillai 1842 'Editorial' *Bay of Island Observer* 10 March 1842
- Reeves William Pember 1899 *The Long White Cloud: Aotearoa* Horace Marhsall & Son London
- Rice Geoffrey W ed 1998 *The Oxford History of New Zealand* 2d ed Oxford Auckland
- Robson J L 1954 *New Zealand: The Development of Its Laws and Constitution* Stevens & Sons Ltd London
- Ross Ruth 1972 'Te Tiriti o Waitani: Texts and Translations' *New Zealand Journal of History* 129
- Rush Peter 1997 'An Altered Jurisdiction: corporeal traces of law' *Griffith Law Review* 6: 144–68
- Salmond John W 1907 *Jurisprudence or The Theory of the Law* 2ed Steven and Haynes London
- Seigel Reva 1996 "'The Rule of Love": Wife Beating as Prerogative and Privacy' *Yale LJ* 105: 2117–207
- Seuffert Nan 1998 'Colonising Concepts of the Good Citizen, Law's Deceptions and the Treaty of Waitangi' *Law Text Culture* 4/2: 69–104
- Simpson Tony 1997 *The Immigrants: The Great Migration From Britain to New Zealand, 1830–1890* Godwit Auckland
- Smart Carol ed 1992 *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality* Routledge London
- Spiller Peter 1991 *The Chapman Legal Family* Victoria University Press Wellington
- Spiller Peter, Jeremy Finn and Richard Boast eds 1993 *A New Zealand Legal History* Brookers Wellington
- Stanley Mary Lyndon 1989 *Feminism, Marriage, and the Law in Victorian England, 1850–1895* Princeton University Press Princeton

- Stoler Ann Laura 1997 'Making Empire Respectable: The Politics of Race and Sexual Morality in Twentieth-Century Colonial Cultures' in McClintock et al 1997: 344–73
- Stone Lawrence 1992 *Uncertain Unions: Marriage in England 1660–1753* Oxford University Press Oxford
- Stychin Carl F 1998 *A Nation by Rights* Temple University Press Philadelphia
- Swainson William 1859 *New Zealand and its Colonisation* Smith, Elder and Co London
- Walker Ranganui 1989 'The Treaty of Waitangi as the Focus of Maori Protest' in Kawharau 1989: 263–79
- Williams David 1989 'Te Tiriti o Waitangi — Unique Relationship Between Crown and Tangata Whenua?' in Kawharau 1989: 64–91
- 1999 '*Te Kooti Tango Whenua*': *The Native Land Court 1864–1909* Huia Wellington
- 2003 'An Adventure in Aotearoa New Zealand' A paper derived from a presentation at the British and Irish Legal History Conference, University College, Dublin (on file with author), *forthcoming* in Brand Paul, W N Oborough and Kevin Costello eds 2005 *Adventures of the Law* Four Courts Press Dublin

Statutes

- Marriage Act* 1854 (NZ)
- Marriage Act* 1880 (NZ)
- Marriage Act* 1904 (NZ)
- Marriage Ordinance* 1842 (NZ)
- Marriage Ordinance* 1847 (NZ)
- Native Lands Act* 1862 (NZ)
- Native Lands Acts* 1865 (NZ).
- Native Rights Act* 1865 (NZ)
- New Zealand Constitution Act* 1852
- New Zealand Government Act* 1846
- Repeals Act* 1891 (NZ)

Cases

Horomona & Others v Drowner (1878) Vol IV NS 104, Supreme Court, 107
Matiu v Monika Rewiti & Another (1907) 26 NZLR 642; (1907) 9 GLR 351
Nireaha Tamaki v Baker (1901) NZPCC 371
Parker v Parker [1921] NZLR 732
Rangi Kerehoma v Public Trustee [1918] NZLR 903; [1918] GLR 483
Re Wi Tamahau Mahupuku, Thompson v Mahupuku [1932] NZLR 1397
Renata Te Ni v Tuihata Te Awhi & Rotia Hini [1921] NZLR 729
Rex v Kingi (1909) 29 NZLR 371
Rira Peti v Ngaraihi Te Paku (1888) 7 NZLR 235
Tutua Teone v Tipene [1936] NZLR 642
Wi Parata v The Bishop of Wellington (1877) 3 NZJR (NS) 72