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MĀORI-SPECIFIC PROVISIONS IN LEGISLATION

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Wider Parameters

All legislation passed in New Zealand has some impact on Māori. However, a number of statutes, either in part or in whole have specifically provided for – and against - Māori. In view of increasing debate about special provisions for Māori there is a need for a systematic approach and some parameters against which progress can be determined.

In this paper four parameters have been identified to facilitate the debate. The first considers underlying political ideologies; a second is concerned with the justification for the provision and the mechanism for converting political will to law; the third is about the objectives of legislative provision; while the fourth parameter is concerned with impacts.

Political Ideologies

While Māori-specific provisions have sometimes arisen from sudden and urgent concerns, more often they have emerged from environments shaped by different political ideologies with contrasting attitudes towards the place of indigenous peoples in modern societies. Moreover, far from being based entirely on principles of justice and righteousness, there have also been elements of pragmatism and political posturing; a balancing of indigenous expectations and opinions against majority demands for a society where being aboriginal might count for no more than historical accident.

In some respects the New Zealand experience, with its long-standing agreement between indigenous people and the Crown, has been envied in other countries.¹ However, there have also been short-comings, not the least of which are related to changing political fortunes and subsequent oscillating attitudes to indigenous peoples. Four major ideological eras provide the background for legislative interventions that have been

directed specifically at Māori. Although the dates suggested are approximate they give some sense of a New Zealand chronology.

Table 1 Political Ideologies – Four Era

<i>Years</i>	<i>Theme</i>	<i>Ideology</i>	<i>Example of Māori-specific legislation</i>
1835 - 1852	Colonial patronage	Humanitarian concerns for aboriginal people	<i>New Zealand Constitution Act 1852 s. 71</i>
1853-1934	Transitions to assimilation	Absorption of Māori into a mono-cultural nation	<i>Native Land Act 1862</i>
1935 - 1974	Universality and the Welfare State	Individual equity. High levels of state intervention	<i>Māori Affairs Amendment Act 1953</i>
1975- 2000	Devolution, the Free Market and the Treaty of Waitangi	Reduction of state control, devolution and deregulation; commitment to the Treaty of Waitangi	<i>Resource Management Act 1991</i>

Table 1 shows that there was a relatively brief era of colonial patronage when humanitarian concerns rivalled a quest for new territories (1835-1852). It was followed by a much longer era of transition to assimilation where Māori absorption was the presumed endpoint (1853-1935). In the third era, shaped by the ideologies of universal equity and an end to class-based inequalities, the emphasis was on equality between individuals, and made assumptions that class, not race or ethnicity, were the major determinants of success. In that era (1936-1974) high levels of state intervention were the rule. Finally in a fourth era, state devolution, privatisation, market forces and limited self governance were linked to positive Māori development and the promise of tino rangatiratanga (1975-2000).

Colonial Patronage – Humanitarian Concerns

In 1839 when Secretary of State, Lord Normanby, presented Captain Hobson with *Instructions* to assist in a process that would lead to the signing of the Treaty of Waitangi, Britain had ethical and moral reservations about its planned systematic colonisation of New Zealand. Nonetheless the Colonial Office had agreed that limited cession of sovereignty over some parts of the country would afford Māori the greatest protection.² The apparently paradoxical argument, to protect Māori by acquiring sovereignty over their lands, hinged on the belief that British rule would sanction British laws which in turn could be used to remedy settler lawlessness.

Two considerations arose in connection with instituting the ‘necessary laws’ into New Zealand. First, there was some doubt, even in England, about the capacity of a system of jurisprudence that had evolved over centuries from English experience, to provide concepts of fairness and justice for Māori. Second, in administering the law, how would Britain’s undertaking to protect Māori be reconciled with wider obligations to all its subjects?

Sovereignty and the law are not necessarily synonymous, and in theory at least Māori could have become British subjects without being subject to British law. In any event the law should be able to meet differing concepts of justice. Lord Stanley for example considered that British law should be framed in a manner to suit Māori prejudices; Māori needs should be reflected in the system of justice and if necessary the law altered to reflect custom and common experience.³

To some extent section 71 of the *New Zealand Constitution Act 1852*, passed in the British Parliament also recognised the shortcomings of British law in respect of Māori. Section 71 of the Act allowed for districts where Māori custom and law would continue to be observed.⁴ Certainly the Act intended an ultimate process of assimilation but the admission of Māori laws was an indication that statutes were not seen as culture-neutral but as culture-bound. The imperial legislators had been essentially motivated by humanitarian concerns and saw the provision as a way of providing limited tribal rule at least until there had been time to adapt to a new legal system. However, the opportunity contained in section 71 amounted to little; it was never implemented.

Transitions to Assimilation

Within the new colony a dynamic shift was emerging that made the provision for separate Māori districts inoperable. Whereas humanitarian concerns had dominated much of the planning within the Colonial Office between 1835 and 1852, with the passage of the New Zealand Constitution and the institution of self- governance by the settlers, as well as the greatly increased number of migrants to New Zealand, the focus quickly shifted away from the deliberations of the Colonial Office towards settlers and their own agendas. The possibility of a legal system that might accommodate Māori custom alongside English custom and law quickly gave way to their expectation that there should be one law – English law - for all.

Acquisition of land became a driving force for legislative programmes in Parliament. A raft of statutes was enacted from 1862 creating land titles out of customary land and replacing collective ownership with individual title.⁵ The *Native Land Acts* of 1862 and 1865 prepared the way for large-scale alienation of land and in the process dismantled a system of social and economic organisation that had rested on collective ownership, undermined the authority of tribal leaders and introduced incentive for fraud and misappropriation.⁶ A series of Amendments and the *Native Lands Fraud Prevention Act 1870* attempted to bring some redress. But they did little to reduce the pace of alienation or provide for a greater measure of integrity in the way settlers acquired land.⁷ Tribal resistance was simply met with further legislation. When for example the Tainui tribe took up arms after an invasion by imperial troops, their land was confiscated under the provisions of the hastily passed *New Zealand Settlement Act* and the *Suppression of Rebellion Act* in 1863.⁸ During similar wars in Taranaki the *Māori Prisoners Trial Act 1879* gave the Crown rights to imprison Māori dissidents without trial and the *West Coast Peace Preservation Act 1882* allowed for indefinite imprisonment without trial while offering indemnity to settlers who committed offences while dealing with the Taranaki ‘difficulties’.

Other Māori resources were appropriated by legislation that either assumed there was no Māori interest or at the most a marginal interest. The *Oyster Fisheries Act 1866*,

the first fish law in New Zealand, provided for the leasing of oyster beds for commercial purposes. It did not make specific provisions for Māori but by excluding foreshore oystereries it acknowledged a Māori interest. However the exclusion was limited to 1874 by which time ‘the Natives’ would have ‘acquired other tastes’.

An act that clearly discriminated against Māori was passed in 1907. The *Suppression of Tohunga Act*: made it an offence for traditional healers, tohunga, to practice and similarly outlawed the ‘foretelling of Māori futures’. Tohunga and prophets like Rua Kenana were regarded as obstacles to amalgamation.⁹

Not all legislation in the late nineteenth and early twentieth centuries diminished Māori standing. First, when arrangements for political representation within New Zealand were amended in 1867, Māori distinctiveness was conceded through the *Māori Representation Act 1867* that provided for four Māori seats in the House of Representatives. It is not clear whether the motivation for the Act was linked to a genuine desire to give voice to a Māori electorate or whether it was a peace offering after the Taranaki and Waikato land wars, an attempt to maintain a North Island majority within parliament,¹⁰ or an interim measure until assimilation had run its course.¹¹ But whatever the rationale, the Act recognised Māori as a protected group who had claim to a distinctive constitutional position.

Second, the *Fish Protection Act 1877*, was the first comprehensive fisheries control measure in New Zealand and it recognised the Treaty. According to section eight ‘Nothing in this Act shall be deemed to repeal, alter or affect any of the provisions of the Treaty of Waitangi ...’ But although the Act had recognised a Treaty obligation on the Crown, it had also assumed that Treaty fishing rights (though not explicitly defined) were limited in some way.

Third in 1900 two acts sought to give Māori greater authority and control. The *Māori Councils Act* provided for limited local Māori authority by establishing nineteen elected Māori Councils with responsibilities for sanitation, the control of liquor sales to minors and the ‘suppression of customs deemed to be pernicious such as tohungaism’.¹² In 1900 also the *Māori Lands Administration Act* provided for the establishment of Māori-dominated Land Councils to control the leasing of Māori land. While both acts enabled Māori greater say in social and economic affairs, they were limited and of short

duration. After the demise of Paremata Māori, funding for the Māori Councils ceased. As for the Māori Land Councils, because they had successfully curtailed the leasing of *Māori land* a *Māori Land Settlement Act* was passed in 1905. Māori Land Councils were replaced by Land Boards whose predominately non-Māori members reversed the trend ensuring that there was again a conduit for the leasing of Māori lands to Europeans.¹³

Universalism and the Welfare State

By 1935 when the foundations of the welfare state were being laid, universalism in the law and in human rights became a dominant New Zealand theme. Within that context Māori social and economic disadvantage gained the attention of politicians and the State assumed responsibilities for the provision of a wide range of services as well as a raft of social transfers. There was support for Māori to enjoy higher standards of living albeit at government expense, but little legal recognition of Māori as an indigenous people.

Legislation focussed on reducing disadvantage through state control and centralised administration. Inevitably there was a shift in the balance of authority between tribes and communities in favour of a more powerful state and a reduction in the already greatly diminished levels of Māori autonomy. The trend was mirrored in legislation involving physical resources. Of particular concern to Māori was the *Petroleum Act 1937* through which Māori claims sub-surface rights were effectively blocked.

An expanded role for the state in Māori affairs was also evident in the *Māori Social and Economic Advancement Act 1945*. Although the Act attempted to return some Māori land after the expiry of leases, state control over the transactions was retained. And although the Act also established tribal committees to promote social, economic, spiritual and cultural advancement, there was an expectation that they would work closely with state agencies, especially the reformed Department of Māori Affairs which assumed high levels of oversight. The *Māori Welfare Act 1962*, reacting to the rapid progression of urbanisation, replaced tribal committees with Māori committees and instituted a national representative body, the New Zealand Māori Council. The Council was able to promote advances for Māori in many areas but when it began to challenge policy, especially the

findings of the Pritchard Waetford Report (1965) that had proposed a rationalisation of ‘idle Māori land.’, its relationship with Government deteriorated.¹⁴

Greater state control over Māori land had also been an objective of the *Māori Affairs Act 1953*. Provision had been made for the Department of Māori Affairs to purchase land where there were uneconomic interests or a failure to develop the land for economic advantage. In 1967 a further act to consolidate the powers of the state, the Māori Affairs Amendment Act, extended the power of the Māori Trustee to purchase any interest less than fifty pounds and to change the status of land where there were fewer than four owners from Māori land to general land.¹⁵

Devolution, the Treaty of Waitangi and Tino Rangatiratanga

The fourth era against which Māori-specific provisions in legislation can be usefully considered began with the passage of the *Treaty of Waitangi Act 1975*. Although the Act’s main purpose was to establish the Waitangi Tribunal so that there was a formal mechanism for inquiring into Crown breaches of the principles of the Treaty of Waitangi, the impact of the statute was to have much wider ramifications; it was ‘a bridgehead upon which progress could be built.’¹⁶ But it also marked a change in legislative provisions for Māori. Up until then, in so far as Māori interests were acknowledged at all, the trend had been for legislation to make grudging concessions or, more frequently, to assume that Māori would be best served if customary ways were abandoned in favour of a universal approach to rights, lifestyle and culture.

By 1984 the fourth Labour Government had incorporated a commitment to honouring the Treaty of Waitangi into its wider economic and state reform programmes and introduced the Treaty into both legislation and policy. However, the incorporation of the Treaty of Waitangi into legislation had mainly been confined to resource areas (land, fish, minerals, the environment), and it was not until 2000 that a Treaty provision was included in social legislation - the *Public Health and Disability Act*. There were concerns that a Treaty clause could mean Māori might be about to receive higher priorities for medical and surgical treatment. Section 4 of the Act, however, made it clear that the intention was not to instigate preferential treatment for Māori individuals but to place an

obligation upon district health boards to involve Māori in joint planning and shared vision.

Customary Māori values, and balance between individual and group rights are provided for in the *Children Young Persons and Their Families Act 1989* and a requirement in the *Law Commission Act 1985* to ‘take into account te ao Māori (the Māori dimension), and to also give consideration to the multicultural character of New Zealand society encourages the recognition of Māori custom in law. Law Commission Reports such as the 1989 Māori Fisheries Report¹⁷ and the a report detailing the experiences of Māori women within the justice system¹⁸ have attempted to reflect that dimension and a past President of the Commission has urged the legal profession to use Māori norms when deciding Māori issues. ‘Counsel have not performed their task where they have failed to identify some relevant Māori custom, not excluded by the cession or a statute, which therefore subsists as a matter of New Zealand law.’¹⁹

Two acts have been passed to secure Māori customary assets threatened by extinction or total alienation. *The Māori Language Act 1987* declares Māori language to be an official language of New Zealand, establishes a Māori Language Commission and enables the use of Māori in courts. *Te Ture Whenua Māori Act 1993* (Māori Land Act) sets out to retain Māori land in Māori hands by balancing individual rights in land with group rights and reducing the likelihood of further alienation.

Recognition of a special Māori constitutional position was implicit in the *Māori Representation Act 1867* and the *Electoral Reform Act 1993* but of greater potential constitutional significance was the 1985 White Paper on a Bill of Rights. It recommended the entrenchment of the Treaty of Waitangi as part of the fundamental law of New Zealand, a step that was opposed by many communities including for different reasons some Māori communities. In the event the Bill of Rights was passed as ordinary law and without any special acknowledgement of the Treaty or Māori interests.²⁰

Legislation to facilitate Treaty of Waitangi settlements has accompanied the claim process. Several statutes have been passed to formalise agreements reached by Māori and the Crown where a Crown Treaty breach has been demonstrated. The *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992* and the *Waikato Raupatu Claims Settlement Act*

1995 both contain remedies and also limit further claims to either the Courts or the Waitangi Tribunal.

Mechanisms and Justification

Justification for Māori-specific provisions can be linked to three main arguments. First, the rationalisation may be based on the ‘national good.’ The *Suppression of Rebellion Act 1863* for example was justified on the basis of a threat to national security, or at least to the security of Auckland. Balancing a perceived national good with other rights is, in the end a political responsibility and continues to challenge governments especially in relationship to natural resources and affirmative action programmes. But sometimes the national good is confused with majority sway and may amount to little more than a sophisticated form of tyranny by the majority.

Another justification for Māori specific provisions is based on the principles of the Treaty of Waitangi. However, it is not always clear whether the Treaty obligation is based a special relationship between Māori and the Crown (e.g. *Resource Management Act 1991*) or a longstanding relationship with the natural environment (e.g. *Conservation Act 1986*), or Māori as a disadvantaged minority (e.g. *Health and Disability Services Act 1993*) or a culturally different client group (e.g. *Children, Young Persons and their Families Act 1989*), or an indigenous people with a distinctive culture (e.g. Māori Language Act 1987), or a group with a distinctive constitutional rights (e.g. *Electoral Reform Act 1993*).

There is also a distinction between legislation containing clauses that require some action in respect of the Treaty (such as the *Hazardous Substances and New Organisms Act 1996*) and legislation that contains a Treaty reference that does not amount to a direction to act (such as the *Ngai Tahu Claims Settlement Act 1998*).²¹

Some of the difficulty in rationalising the basis for a Treaty obligation arises from a requirement in legislation to observe the principles of the Treaty. Because the practice is not to define Treaty principles in legislation, those who must administer the law have a degree of discretion and may interpret the provision in a unique or personal way. In any event there is room for assumptions to be made about the Treaty clause. In contrast to other Treaty clauses, however, the *Public Health and Disability Act 2000* goes someway

to offering greater clarity about the meaning of the Treaty clause by directing district health boards to establish relationships with Māori for decision-making and strategic purposes.

Despite its wide-ranging meanings, the insertion of a Treaty clause, and the national good, are not the only ways that Māori interests can be recognised. Four other reasons for providing especially for Māori are also shown in Table 2 and include the protection of a customary asset, fairness and social well-being, a Māori constitutional dimension, and the settlement of Treaty of Waitangi claims.

Table 2 Justification for Māori-Specific Interests in Statute

<i>Basis for a Māori-specific provision</i>	<i>Effect of statutory provisions</i>	<i>Examples of Statutes</i>
The National Good	Māori interests are subsumed in favour of perceived wider cause	<i>Suppression of Rebellion Act 1863</i>
The Treaty of Waitangi	The Treaty becomes enforceable when it is incorporated into legislation	<i>State Owned Enterprises Act 1986</i> <i>Conservation Act 1986</i> <i>Resource Management Act 1991</i>
Protection of customary assets	Māori language and Māori land are afforded protection	<i>Māori Language Act 1987</i> <i>Ture Whenua Māori Act 1993</i>
Fairness and social well being	Requirement to consider Māori social networks, Māori cultural processes, and Māori custom	<i>Children Young Persons and their Families Act 1989</i> <i>Health and Disability Services Act 1993</i> <i>Law Commission Act 1985</i>
Māori constitutional position	Māori representation in Parliament is guaranteed	<i>Electoral Reform Act 1993</i>
Settlement of Treaty of Waitangi claims	A process for investigating claims against the Crown is established; the terms of settlement cannot be varied except by repealing the law	<i>Treaty of Waitangi Act 1975</i> <i>Treaty of Waitangi (Fisheries Claim) Settlement Act 1992</i> <i>Treaty of Waitangi (Tainui Waikato) Settlement Act 1995</i>

Source: Durie (2003)²²

Objectives of Māori-Specific Legislation

It can be seen from the preceding review that Māori-specific provisions in legislation have had wide ranging and quite contradictory goals. An analysis of Māori-specific provisions suggests three broad objectives: limitation, restoration, protection. They are summarised in table 3.

A first objective of a Māori-specific provision in legislation, more frequently observed prior to 1975, can be to limit or extinguish Māori interests. The second objective, evident especially after the establishment of the Waitangi Tribunal and the formalisation of Government processes for settling grievances against the Crown, is to restore a resource or provide compensation for losses sustained. The third objective, more apparent since 1984, is to protect or develop a Māori interest.

Table 3 Objectives of Māori-specific Provisions in Legislation

Purpose	Objectives		
	<i>Limitation</i>	<i>Restoration</i>	<i>Protection</i>
	Limit or extinguish Māori interests	Restore a resource or compensate for loss	Protect or develop a Māori interest
Examples	Native Lands Acts 1862, 1865 Māori Affairs Amendment Act 1967	Treaty of Waitangi (Fisheries Claim) Settlement Act 1992	Resource Management Act 1991

Three main mechanisms have been used to limit Māori interests within the law. The first substituted Māori understandings for British concepts and processes. The 1862 and 1865 *Native Land Acts* for example replaced traditional forms of land tenure with British systems thereby accelerating the alienation of tribal estates. In the second approach Māori interests were acknowledged but marginalised to avoid conflict with the laws' wider provisions. Under the *Oyster Fisheries Act 1866* Māori rights to oyster beds were recognised but it was (wrongly) assumed that those rights were at subsistence levels only. The third way of negating Māori interests through statute, was simply by prohibiting

aspects of custom. Traditional healers and political leaders were expressly outlawed in the *Tohunga Suppression Act 1907*.²³

Some provisions had dual objectives, either intentionally or by implication. For example the *Resource Management Act* provides for the recognition of a Māori environmental ethic but limits the application of that ethic by an over-riding requirement for sustainable development. The *Māori Representation Act 1867* protected a Māori political interest but limited Māori participation to four seats when, on demographic grounds alone, more than ten seats might have been expected.

Domains of Impact

The impacts of Māori-specific provisions in legislation can be categorised according to their impacts on property, culture and a Māori polity. These three domains of impact are shown in Table 4.

Table 4 Domains of Impact

	Domains of Impact		
	<i>Property</i>	<i>Culture</i>	<i>Polity</i>
Scope	Physical properties e.g. land, waterways, fisheries, forests	Māori values e.g. whānau roles and responsibilities Māori knowledge Māori language	Māori political organisation e.g. tribes. Māori representation at local, regional and national levels
Justification for a Māori-specific provision	National good Treaty of Waitangi. Indigenous rights	Treaty of Waitangi Indigeneity	Treaty of Waitangi Indigenous rights

Most striking has been the impact of Māori-specific provisions on the property domain. Until 1993, most legislation, apart from a few exceptions such as the *Māori Land Administration Act 1886*, was drafted to speed up alienation of Māori land. But while

land loss was severe, there was at least a more-or-less shared understanding about a fundamental right to own land.

Greater conceptual confusion arose as other property rights fell under discussion. When the Crown assumed a property right over fish for example and invited the fishing industry to tender for quota, Māori responded by maintaining that they had customary rights that were being ignored in the quota management system. Contrary to government assertions, Māori fishing interests were not confined to subsistence interests but had a commercial basis.

Property rights relating to harbours, the foreshore and seabed, waterways and intellectual property have proved even more difficult to resolve. Māori views on customary rights to property did not fit with the traditions of England, where Crown ownership over harbours and waterways had become an acceptable practice. In that vein Māori claims to ownership of rivers were disregarded by the *Coal Mines Amendment Act 1903* when the government vested the beds of navigable rivers in the Crown despite an assurance earlier in the year that such a provision would be subject to ‘other rights lawfully held.’²⁴ Property rights over harbours, the foreshore and seabed have been even more problematic for Māori and the Crown. While sometimes sympathetic to a customary ‘use interest’ and a ‘value interest’, an ownership interest has been unacceptable to the Crown and to opposition parties.

Impacts of Māori-specific legislation on culture and custom have mainly affected Māori language, now protected under the *Māori Language Act 1987*. But provisions for gazetting marae under *Ture Whenua Māori 1993* remain important since marae continue to act as bastions for Māori culture. Further, in addition to requiring a consideration of Māori values by officials involved in resource management, the recognition of Māori world views in social policy is included in the *Children Young Persons and Their Families Act 1989*; it requires social workers to recognise tribal arrangements and Māori family relationships.

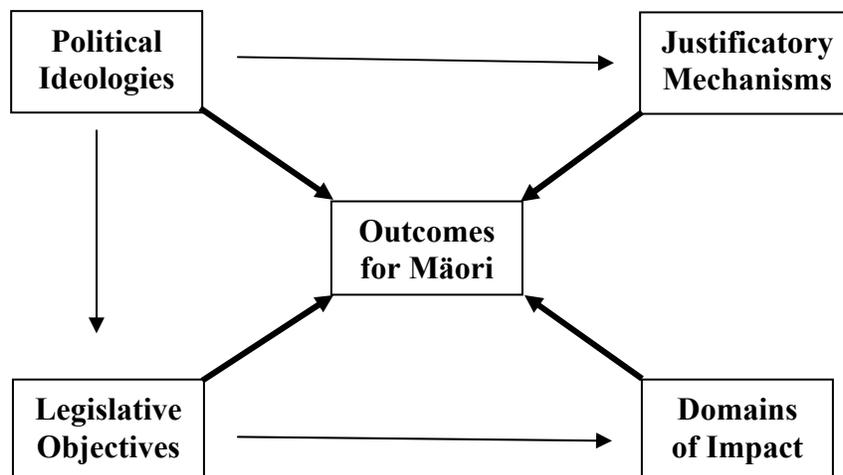
The third domain of impact is on a Māori polity. It is clear from Part VII of the Draft Declaration on the Rights of Indigenous Peoples that indigenous peoples can expect to organise their own forms of governance and political authority.²⁵ Despite opposition to the Kingitanga (Māori King movement) movement and Paremata Māori (Māori

Parliament) in the latter half of the nineteenth century, this principle has been recognised in New Zealand for more than a century and a convention of consultation between Māori leaders and Ministers of the Crown on significant issues has become an accepted tradition. Although Māori self governance at a national level has not been confirmed in legislation, the *Electoral Act 1993* and its predecessor the *Māori Representation Act 1867* have provided for a separate Māori polity in the form of a Māori electoral roll. In addition several statutes have provided for tribal governing bodies, sometimes in association with Treaty settlements but often simply to conduct tribal business (e.g. *Te Runanga o Ngati Porou Act 1988*).

A Framework for Considering Māori-Specific Provision in Legislation

On the basis of New Zealand experience it is possible to construct a four-part framework for considering Māori-specific provisions in legislation. The framework is built around political ideologies, justificatory mechanisms, legislative objectives and domains of impact.

Figure 1 A Framework for Considering Māori-Specific Provisions in Legislation



Within the framework the dual influence of Māori-specific provisions can be shown in relationship to the three major objectives and the three broad domains of impact. Table 5 contains examples of legislation where the objectives have been paired against the domains of impact.

Table 5 Māori-specific Legislation, Domains of Impact and Objectives

Objectives	Domains of Impact		
	<i>Property</i> e.g. land, forests, waterways, fisheries.	<i>Culture</i> i.e. Māori values, custom, language, knowledge, and social arrangements	<i>Polity</i> i.e. Māori tribal and political organisation.
Provisions that limit or extinguish Māori interests	<i>Māori Affairs Amendment Act 1953</i> <i>Coal Mine Act 1903</i> <i>Oyster Fisheries Act 1866.</i>	<i>Tohunga Suppression Act 1907</i>	<i>Māori Representation Act 1867</i>
Provisions that restore or compensate for losses	<i>Treaty of Waitangi (Fisheries Claim) Settlement Act 1992</i>	<i>Māori Language Act 1987</i>	<i>Te Runanga o Ngai Tahu Act 1999</i>
Provisions that protect and develop Māori interests	<i>Ture Whenua Māori Act 1993</i>	<i>Children Young Persons and their Families Act 1989</i> <i>Resource Management Act 1991</i>	<i>Runanga Iwi Act 1990</i> <i>Electoral Act 1993</i>

Conclusions

Limitation of Māori Interests

Inconsistent political priorities for Māori have resulted in oscillations between policies of assimilation and policies that support the retention and development of Māori interests. By far the greatest impact of Māori-specific provisions in legislation, mostly enacted in the nineteenth century, has been to limit or extinguish Māori interests. As a result a range

of compensatory mechanisms became necessary more than a century later. Some of the motivation for limiting Māori interests can be tracked to different understandings of customary rights and the relative bluntness of a system of law derived from English cultural experience to address Māori systems of tenure and organisation. Even in modern times there is a great deal of uncertainty as to whether a determination of Crown ownership over natural resources would be consistent with modern interpretations of indigenous property rights.

Indigeneity

To date no government or political party has endorsed a separate Māori state but many have favoured assimilation, often using arguments based on equality between individuals. In that approach, the Māori interest is narrowed to focus on the status of Māori as citizens as if individual need were the sum total of a Māori interest. In fact the case for recognising Māori interests rests not so much on disadvantage or the circumstances of Māori individuals but on the concept of indigeneity and the standing of indigenous populations as minorities in their own lands. A Māori polity, Māori custom, and Māori rights to property are essential markers in the indigenous spectrum. The justification for their retention in modern times does not rest on the needs of disadvantaged individuals but on the established right of indigenous peoples, strengthened in New Zealand by the Treaty of Waitangi. The central question is not so much about laws that advantage or disadvantage Māori as individual New Zealanders but laws that recognise or negate indigeneity.

Māori Individual Advantage

When Māori-specific provisions in legislation are considered, none have been primarily written to advantage Māori individuals over other New Zealanders except perhaps the *Electoral Amendment Act 1975* and the *Electoral Act 1993* both of which enable Māori individuals to exercise an option between enrolling on the Māori electoral roll or the General electoral roll, a choice not available to other citizens. On the other hand *Te Ture Whenua Māori Act 1993* and the *Māori Reserved Land Amendment Act 1996* both compromise the rights of Māori individuals. In the first case, *Te Ture Whenua Māori*

reduces the freedom of Māori land-owners to dispose of their interests as they might wish. Instead they must take into account a list of preferred alienees. In the second case the *Māori Reserved Land Amendment Act* locks individual Māori land-owners into a system of perpetual leases that do not apply to other New Zealander land-owners.

A number of social policy statutes including the *Education Act 1989*, the *Broadcasting Act 1989*, and the *Mental Health (Compulsory Assessment and Treatment) Act 1992* make specific provisions for Māori. But contrary to popular opinion, the inclusion of a Treaty clause into legislation or the addition of another Māori-specific reference is not generally based on granting additional rights to Māori individuals but on ensuring that the same rights (such as the right to receive a sound education that does not sideline Māori perspectives, or to enjoy television programmes in one's own language, or to receive an adequate psychiatric assessment) can be guaranteed, taking into account Māori cultural values, processes, and protocols. For the most part, the majority population takes those rights as givens.

One Law or Two

The possibility of two sets of laws in New Zealand has found little favour with politicians or jurists. Instead the New Zealand tradition has been to incorporate Māori interests into a single national system of laws. It is apparent from the Māori-specific Framework that more often than not the single system has severely compromised the delivery of justice to Māori, since most Māori-specific provisions have limited or extinguished Māori interests. But there is also evidence that over time a New Zealand system of jurisprudence with the potential to endorse indigeneity has emerged. While it would be premature to say that the system is yet perfect or that there is consistent political commitment to advance it, progress has been made in recognising that indigeneity for Māori is primarily about being able to participate fully in the Māori world and to enjoy a Māori heritage, while at the same time being able to participate fully in the wider society and economy.²⁶

The question for the country is not so much about Māori individuals having privileges that are denied other New Zealanders – if anything outcome studies suggest the reverse – but whether it is reasonable for Māori, as an indigenous population, to expect that full participation might encompass two worlds – the wider New Zealand society

where universal provisions operate and te ao Māori, the Māori world. Underlying the implementation of that aspiration is the question of New Zealand's commitment to celebrating indigeneity and endorsing the rights of indigenous peoples.

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- ¹ Steven C. Bourassa, Ann L. Strong, (1998), *Restitution of Property to Indigenous People: the New Zealand Experience*, Real Estate Research Unit Working Paper No. 7, University of Auckland, Auckland, p. 99.
 - ² Claudia Orange, (1987), *The Treaty of Waitangi*, Allan and Unwin & Port Nicholson Press, Wellington, pp. 28-9.
 - ³ Peter Adams, (1977), *Fatal Necessity British Intervention in New Zealand 1830-1847*, Auckland University Press & Oxford University Press, Auckland, pp. 220-1.
 - ⁴ Lindsay Cox, (1994), *Kotahitanga The Search for Māori Political Unity*, Oxford University Press, Auckland, pp. 34-7.
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