Chapter Eleven
Treaty of Waitangi: Only Good Intentions?

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"The Treaty is moving in as surely as the tide. In the statutes of our Parliament, in bureaucratic operations, in the level of the administration of the courts and in local authority planning, the Treaty is now well known. You know when we stand at the foreshore we do not always see the movement of the tide. We see no more than the regular breaking of the waves, as if no painful inch is gained. But look back to the creeks and inlets. There, silently, it is plain to see the tide running at full flow ..." (Edward Taihakurei Durie, 1989, Chief Judge of the Maori Land Court and Chairman of the Waitangi Tribunal).

Summary

This paper is a situation report for Australians on the claims of indigenous people in New Zealand. It argues that the claims have surfaced as a flood tide of race discrimination. That tide is propelled by many of the forces evident in other countries – a combination of understandable grievances about cultural arrogance and abuses of state power, with majority group guilt, charitable intent and radical chic. In New Zealand, as elsewhere, academics give "reverse racism" a spurious legitimacy with their theories of post-colonialism.

In addition, New Zealand has a unique element – the *Treaty of Waitangi* between the Crown and many Maori chiefs in 1840. It provided for, and assumed, eventual assimilation of legal equals. Much of the law being minted elsewhere to reassert indigenous self-determination is a poor fit in New Zealand, at least for those who simultaneously want to use historicist legitimacy to advance Maori political claims. Yet even the *Treaty* has been pressed into service by those fostering race discrimination.

This paper suggests that in New Zealand at least, legislating for indigenous privilege is now close to its high water mark. There may be some low lying marsh areas still to flood, and the full tide may hold for some time yet under pressure from a strong but local onshore political breeze. But out in the main channel, if it is not slack water, the ebb has started.

This paper will:

- Record the approach New Zealand has taken to the UN's *Draft Declaration of the Rights of Indigenous Peoples*.
- Outline New Zealand's 1840 *Treaty of Waitangi*.
- Review the political history of the *Treaty*.
- Summarise the current political status of the *Treaty of Waitangi.*
- Review the Courts' *Treaty* jurisprudence.
- Consider the current authority of the Waitangi Tribunal.
- Outline the reasons for extensive litigation and tension among claimants.
- Focus on shifting positions on these matters by significant politicians, including New Zealand's main opposition party (the National Party).
- Outline the valuable role the *Treaty* could fill in constitutional terms, by acting as New Zealand's guarantee of respect for property rights.
- Identify what needs to come next in New Zealand's political debate.

The paper urges a revived power for the values that drove many New Zealanders who campaigned to end apartheid in South Africa. Those values would be easily recognised by the earlier generation who produced the universal *Declaration of Human Rights*, and the *United*

Nation's Covenant for Elimination of all forms of Racial Discrimination. Those values were drawn from our common inheritance, the work of men such as Thomas Paine, John Locke, Edmund Burke, the founding fathers of the United States, JS Mill, and myriad other western intellectual forebears.

They underpin the rule of law Maori bargained for, and got, when they signed the *Treaty of Waitangi*. It was not universal franchise democracy. The core elements were individual rights and property rights. They give the fundamental assurance of freedom necessary to sustain and restrain the tolerant state operating under a colour-blind law.

Many of the people and their arguments for indigenous rights are fundamentally hostile to the Enlightenment values. For a modern state that wants to uphold its founding values there may be little room for compromise with them.

New Zealand and the *Draft Declaration of the Rights of Indigenous Peoples*

New Zealand has been an active member of the UN Working Group on Indigenous Populations. It has promoted efforts to establish the Permanent Forum on Indigenous Issues to function as an advisory body to the UN Economic and Social Council. New Zealand claims to be "firmly committed to achieving a declaration on the rights of indigenous peoples".[1]

We appear to have been relatively uncritical supporters of the promoters of the *Draft Declaration*. Whether that has been a matter of conviction, or instead of calculated alignment for diplomatic advantage, it is not clear.

We have not, for example, been prominent with the US, the UK, France, Japan and The Netherlands in seeking amendments to the draft to uphold individual rights of members of indigenous people groups, instead of group or collective rights. Our approach has been to see potential coexistence of collective and individual rights. It appears New Zealand did not press the United States' concern that collective rights can be exercised in a manner detrimental to individual rights. The US was willing to support wording that allowed persons to exercise their rights "individually as well as in community with other members of their group".[2]

In relation to draft article 3 that would guarantee indigenous peoples the right to self-determination, New Zealand was with the countries that required qualifications to protect against secession arguments. Exactly what the reservations would mean in wording terms appears not to have been detailed.

Clearly there is tension between demands for self-determination by indigenous peoples and official UN policy. It argues that self determination should:

> "… not authorise or encourage any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of legal rights and self determination of peoples … and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".[3]

On the contentious issue of definition of "indigenous peoples", New Zealand supported proceeding without a definition. This is effectively support for self-identification. This is consistent with the New Zealand Government's current approach to Maori status in New Zealand law. Entitlement to vote on a Maori electoral roll or to qualify for various services confined to Maori, is largely based on self-identification. The New Zealand Government is, nevertheless, helping the governing structures of traditional tribes (*iwi*) to establish registers that will enable conclusive determination of *iwi* membership. $600,000 was allocated in last year's Budget to facilitate access to the government electoral roll to keep track of *iwi* members, and to help people to apply. *Iwi* leaders will decide whether applicants for registered membership of *iwi* are entitled by descent.

In the result, the Working Group on the *Draft Declaration* failed to present its report on the anticipated date of 15 April this year. It may never get much further.

New Zealand supported the establishment of the Permanent Forum that met for the first time last month. We urged that it have a permanent mandate and permanent funding, against the objections of countries (including many in Asia) that wanted it more limited.

The Permanent Forum may be seen as a compensatory sop. Perhaps opponents of expanded indigenous rights expect it to be an ineffectual talking shop. The New Zealand Government must suspect from its experiences with New Zealand Maori that large conferences and meetings on indigenous peoples' issues will infrequently result in concrete decisions and action.

New Zealand may have felt insulated from some of the potential costs of a *Declaration of Rights of Indigenous Peoples* because it will not have much relevance to New Zealand. If our *Treaty of Waitangi* is regarded as a valid treaty of cession, and New Zealand Maori are recognised as having largely assimilated, as contemplated by that Treaty, most of the *Declaration's* "rights" are spent. On that view, it was costless for New Zealand to pose as a sympathetic supporter of indigenous peoples.

Alternatively, New Zealand's diplomacy was conducted without proper regard to the contradictions with our constitutional position and elevation of the *Treaty of Waitangi*. There is good reason to consider that New Zealand's position is constitutionally unique.[4] Many of the troublesome doctrines and the ballooning jurisprudence from Canada and the US relating to first nations are not applicable to New Zealand.

This leads us to the *Treaty of Waitangi*.

Treaty of Waitangi

In 1840 the British signed with over 400 Maori chiefs a short three-article treaty. Article 1 purported to cede sovereignty to Britain. In Article 2, Maori were assured respect for their property rights and rights of self-determination in relation to their property, and in Article 3 they were assured the rights and privileges of British subjects, thus extending the rule of law to all New Zealanders.

There is much learned (and not so learned) disputation about the proper interpretation of the Treaty. Whether, and to what extent, it extinguished aboriginal or indigenous rights may turn on this dispute.

It was signed in an English version and a Maori version. The versions are clearly different. For example, the Maori version omits the English version's express assurance to Maori of the exclusive possession of their forests and fisheries. The Maori version refers in Article 2 to *tino rangatiratanga*, or the chieftainship of Maori chiefs and individuals over their land and property. Chieftainship is said to mean many things. Professor Ranganui Walker of Auckland University claims:

> "The guarantee … is in effect a guarantee of … the sovereignty of the chiefs. … Therefore the second clause of the Treaty was diametrically opposed to the first clause of the English version".[5]

An alternative view, also from a writer sympathetic to Maori aspirations, refers to chieftainship as "a kind of authority" operating "across that domain of meaning inhabited by such phrases as 'authority over' (people), 'authority on' (a subject matter), 'authority with' (certain people), 'property in', 'rights in and over things', 'rightful power', 'rightful control', 'leadership', 'stewardship', 'trusteeship', and so on". He resolved the sovereignty/chieftainship tension, saying:

> "The autonomy [many Maori] claim … is like the autonomy of the sixteenth-century English justice of the peace: self government at the Queen's command".[6]

The Maori word *taonga* in Article 2 was translated in the early days as meaning possessions or valuable property. More recently it has been asserted to mean "treasures", and to cover intangibles such as language, customs and spiritual values. In a current claim before the Waitangi

Tribunal (WAI 262), given significant credence by supporters of an expansive role for the Treaty, Maori want the ownership of intellectual property rights in indigenous flora and fauna.

Background

From 1810 to 1840 Maori had endured a holocaust of war. War was customary for Maori. But the casualty rates and the displacement increased dramatically as grievances and vendettas old and new were pursued using muskets. Though there were probably no more than 2,000 Europeans in New Zealand in 1840, Maori were amongst those seeking the intervention of the British Government to ensure an end to war. Over that thirty-year period as many as half of the population had died, and vast areas had been depopulated. Expeditionary forces conducted operations with a ferocity more savage than reported recently from Rwanda and Bosnia. Cannibalism was common.[7]

Many Maori also wanted from the Treaty certainty of tenure to enable land trading. Those who understood the British system wanted transferable titles because they wished to attract Europeans amongst them. European (*Pakeha*) trade was widely seen as both an assurance of prosperity and some underpinning of access to weapons. They knew they were stepping into a new world in which British religion and customs would contend for their souls.

The Treaty through the years

In the absence of significant military force, the British rule of law extended only slowly throughout New Zealand. There were early breaches of the Treaty by tribes. This resulted in the landing of British troops and significant battles within a few years of signing.

After 1860 there were sustained land wars as the settler Government pressed for land transfers. Maori increasingly resisted because of the huge rate of European immigration.

By 1877 the Chief Justice of New Zealand[8] described the Treaty as a simple nullity. In 1941 the Privy Council confirmed what by now was the conventional approach, namely that it was of no legal effect, except to the extent it was expressly incorporated in domestic New Zealand law by deliberate act of Parliament.[9]

Throughout the latter half of the 19th Century Maori sold land. After 1865 a Maori Land Court individualised titles in a process that made sale easier and more land available for settlement. Demoralisation and disease reduced Maori numbers to as few as 40,000 by the 1890s. At the turn of the century a New Zealand politician felt able to describe government efforts for Maori as "smoothing the pillow of a dying race" because Maori seemed so debilitated.

Maori communal land holding meant that few Maori would have qualified to elect parliamentarians under a land holding criteria. Instead, four seats were reserved for Maori after 1867. When the land holding qualification was dropped, this segregation served to reduce the settlers' fears that Maori voters would swamp *Pakeha*.

In the early decades of the 20th Century a renaissance revitalised Maori. It was led by some extraordinary men, very well educated in both Maori custom and European scholarship. They adapted traditional structures within new legal frameworks to overcome some of the disadvantages of communal land holdings, and to use remaining Maori land better. They pursued political power within Parliament, to improve health, and to extend education more widely.

Maori participated in New Zealand expeditionary forces to South Africa during the Boer War (though they had to Anglicise their names to avoid a British edict that Maori should not participate in a white man's war). The First World War saw Maori pioneer units, as well as service by Maori using the now recognised route of Anglicisation. In the Second World War the Maori Battalion brought martial glory for Maori generally.

In the first six decades of the 20th Century the expectation on both sides was generally for assimilation. The extent of accommodation or respect for Maori culture was seen as more a matter of courtesy or good manners than a requirement suitable for reflection in law. Various

long-pursued complaints of breaches of the *Treaty of Waitangi* were investigated between 1920 and 1950. So called "final settlement" agreements were reached and legislated for between 1943 and 1946, usually involving compensation by way of annual payments to trust boards established for the claimant tribes.

Consistent with the assimilatory ambition of the times, in 1971 New Zealand passed a *Race Relations Act* as part of its effort to implement the *Covenant for the Elimination of All Forms of Racial Discrimination*. The language of the *Covenant* and the *Race Relations Act* reflect the common commitment to work toward a state and a society in which race was officially irrelevant, and race distinctions would become illegitimate.

The four Maori Members of Parliament had over many years pressed long-standing Maori grievances over Treaty breaches. But they were also concerned about the vulnerability of Maori land to new depredations. Maori ownership was often widely dispersed, and resulted in land being undeveloped. As such it was often a prime target for taking for public purposes. In 1975 the third Labour Government, to which the four Maori MPs belonged, established a Waitangi Tribunal to consider claims of Treaty breaches from that date.

Around this time a new generation of young Maori were debating decolonisation theories. Renascent Maori consciousness began to show itself in political activism. Among the young this was associated, as elsewhere, with anti-establishment left-inspired activism. It often amalgamated opposition to patriarchal hegemony, and to capitalism or the market economy, with anti-colonialism.[10]

These young enthusiasts emboldened older folk. They disliked continuing land sales, and the social consequences in traditional tribal areas of rural depopulation when people followed work to the cities.

By 1981 the rhetoric of the young activists had developed strong separatist characteristics. At the same time the majority of left/liberal activist New Zealanders were tearing the country apart over opposition to sporting contacts with South Africa. They demanded "one person, one vote" and "colour blind law" to end apartheid in South Africa.

In 1985 the fourth Labour Government, in a burst of idealism following a promise that had not gone through the party's correct policy-making process, extended the jurisdiction of the Waitangi Tribunal. It was now empowered to consider grievances dating back to the signing of the Treaty in 1840. But the Tribunal was instructed not to make decisions affecting private land. Though the Tribunal's powers largely confined it to making non-binding recommendations to the Government, Pandora's box was opened.

In 1987 that Labour Government ran into trouble when it corporatised State trading businesses. Leading Maori saw an opportunity for tactical use of the courts. They wanted to bring urgency to the Government's consideration of certain Treaty breach claims. As a political compromise, section 9 had been inserted in the *State Owned Enterprises Act*. It declared that the Act could not authorise anything that would be in conflict with the "principles of the *Treaty of Waitangi*".

When Maori went to court, the judges had to start working out what to make of these references to principles.

Current legal status of the Treaty

The legislative dam having broken, references to the so-called (and largely undefined) "principles" are now scattered liberally in New Zealand legislation. There are few references to Treaty provisions themselves (notably a reference to Article 2 of the Treaty in Part 3A of the *Maori Fisheries Act* 1985).

By way of example, significant laws with Treaty references now include:

- The *Resource Management Act*. Local authorities must have regard to Maori concerns when considering building consent and other land use applications. Maori

are paid consultants' fees. Maori groups can withdraw culturally based objections in return for compensation. This effectively gives local Maori groups all over the country an opportunity to extract Danegeld. As an observer described it:

> "The Danegeld industry probably adds a race tax of tens, if not hundreds of millions of dollars a year to the economy's cost base in an uncontrolled and unaccountable manner".[11]

- After a considerable political furore, the *Health and Disability Services Act* 2000 reserves seats for Maori on the new boards providing local health services. The Bill initially required that Maori health services have priority over services provided to other New Zealanders. That was modified but not eliminated.
- The *Hazardous Substances and New Organisms Act* 1996 requires the Environmental Risk Management Authority to have regard to Maori concerns. These include animistic superstitions. The Chief Executive of the Authority interprets its task as to take "account of the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, *wahi tapu* (sacred places), valued flora and fauna and other *taonga* (treasures)".

Other official developments may not include direct Treaty references, but they rely on the general impetus:

- In 2000, a Royal Commission on Genetic Engineering urged the Government to make all speed in responding to a Maori declaration of property rights in all indigenous flora and fauna.
- An Act last year authorised one regional territorial authority to establish a separate Maori electoral roll. From it, Maori will elect members of the local authority in proportion to Maori population in the area. A new *Local Government Bill* will extend that system across the country.
- Maori were granted rights to a quarter of radio spectrum auctioned in 2000. The Government established a trust for the rentals they will derive from it.
- A current tax reform grants to Maori owned companies and trusts a tax rate of 19 per cent, whereas all other taxable corporations pay 33 per cent.
- A proposal to abolish New Zealanders' right of final appeal to the Privy Council in London will involve the establishment of a new Supreme Court. At least one judge selected on race or cultural grounds is to be a requirement.
- New Zealanders are becoming inured to periodic scandals as students or public servants suffer discrimination for failure to render ritual obeisance to Maori culture, particularly in classes designed to engender support for the theories that underpin legal privilege for Maori. The term "cultural safety" covered the replacement of 20 per cent of the curriculum time in nurse training with indoctrination by teachers of Maori culture. Some of this has involved unmistakeably racist hostility to things European.

The Treaty and the courts: the living document

The courts have taken up with enthusiasm Parliament's invitation to develop new law when it referred to the "principles of the Treaty". Notably, they ordered the Government not to dispose of radio stations without ensuring adequate resources to promote Maori language broadcasting.

Lord Cooke of Thorndon, when he was President of New Zealand's Court of Appeal, accepted submissions that:

> "[the Treaty] should be interpreted widely and effectively and is a living instrument taking account of the subsequent developments of international human rights norms; and that the court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty".[12]

The just retired President of the Court of Appeal, Sir Ivor Richardson, was a member and stated in the same Case:

> "Whatever legal route is followed the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise".

In another case in 1989 Cooke P said "the principles of the Treaty have to be applied to give fair results in today's world".[13] In a 1990 case he said:

> "The position resulting from 150 years of history cannot be done away with overnight. The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change".[14]

The author of a *New Zealand Law Journal* article, after noting that Cooke P described the Treaty as "an embryo rather than a fully developed and integrated set of ideas", commented:

> "It is as though the courts believe that the Treaty is an ever speaking, ever changing constitutional instrument, a chameleon document for all seasons, capable upon interpretation of delivering beneficial results (for the lucky some) indefinitely into the future, a fructuous tree indeed and bountiful with it. … It is the very epitome of myth and of the apparent wishful desire of some of our judges for a 'higher law' Constitution which, fortunately for the rest of us, does not exist and, with continuing good political management, will never be imposed upon us".[15]

Since that was written we have acquired a *New Zealand Bill of Rights Act* 1990. Initially it was to have incorporated the *Treaty of Waitangi*. That became too controversial. In hindsight that is regrettable, for our *New Zealand Bill of Rights Act* omits property rights. The Treaty might have supplied that want. Those who signed our Treaty would never have expected the general law to stop respecting classical property rights.

Many Commonwealth Constitutions were framed during the baleful intellectual reign of the post-War Fabians at the London School of Economics. Independence leaders often saw property rights as an unfortunate impediment to "land reform". Yet only Singapore among Commonwealth countries fails to make any provision for property rights.

The significance of this omission, and the extraordinary New Zealand ignorance of its importance, can be seen in Tom Allen's comprehensive work, *The Right to Property in Commonwealth Constitutions*.[16] New Zealand does not even have an index entry. Of the hundreds of case citations, only four are New Zealand cases, none upholding property rights. Among over 200 works in his bibliography there is only one with any recognisable New Zealand connection.[17]

So despite the Treaty's assurance of property rights to Maori, and its consistency with mainstream understanding of fundamental rights, there is no New Zealand constitutional entrenchment of property rights. Yet the courts have not endeavoured to extract or assert property rights as one of the principles now proliferating in our legislation. It is not even mentioned judicially as part of the spirit of the Treaty.

Tino rangatiratanga as property rights

After more than three hundred years of painful post-feudal political growth, British common law asserted:

1. The law should be no respecter of persons, treating the great and the small alike;
2. Property rights must exclude the arbitrary power of the state to requisition or interfere with the exclusive possession, use and enjoyment of property (absent war or extraordinary exigency); and
3. Judges should enforce contracts freely entered by adults, not substitute their view or the State's view of what contracting parties ought to have decided.

That was the law extended by the Treaty to Maori and *Pakeha* alike. Accordingly, *tino rangatiratanga* need be no mystery. Article 2 of the Treaty is not in conflict with sovereignty.

"The Englishman's home is his castle" summarised the jealously guarded right of the British citizen to do as he would inside his private property without interference from princes, priests or any other despots. Sir Edward Coke (d.1634) expressed it in his Report on *Semayne's Case*:

> "The house of everyone is to him as his castle and fortress, as well for his defence against injury and violence as for his repose".

That was the full chieftainship assured to "all the people of New Zealand", both *rangatira* and ordinary Maori.

Properly understood, the first part of the Second Article merely expresses the classical features of property rights. Full and undisturbed possession is the right to keep others out. The right extends without consideration of rank or status, so that the weak are protected against the strong.

Ownership also gives the right to the fruits or benefits of the property, to receive the income. It must include the right to transfer the property to others, whether by inheritance or by sale.

The Crown's right of pre-emption in the Treaty conflicted with that. In the English version, it is a "right of first refusal" qualification, not a negation. But in the Maori version, and in Governor Hobson's opinion, it was an exclusive right to the Crown to buy. This was both paternalistic and potentially exploitative. And exploitation ensued, though arguably less of it than would have accompanied unrestricted trading. In either case, pre-emption conflicted with the equality of rights promise to Maori in Article 3.

This "property right description" solution to the debate about *tino rangatiratanga* is elaborated by the author in a paper presented to the New Zealand Law Conference in October, 2001.[18]

Instead of extracting conventional fundamental rights of property, the courts in New Zealand have extracted a partnership principle. This was so convenient for those who wanted to advance the Treaty for political use that it has passed immediately into the vernacular. Without defining shares, or how far the parties could bind each other, or what the analogy was supposed to achieve other than as a rhetorical device, the Court of Appeal stated, "The Treaty signified a partnership between races".[19]

There is nothing in the text or in the context of the Treaty to suggest that the Crown, or Maori, contemplated what we are now told is partnership. Even if it had, they could only have been multiple partnerships, each between the Crown and a signatory tribe or chief, because Maori were hostile separate tribes. David Lange, Prime Minister at the time the Court invented this partnership, has since expressed to the writer his view of what the Court extracted from the statutory reference to the "principles":

> "I am not an expert in Victorian history, but I do not believe for one moment the Queen ever thought her loyal servants were signing her up to a partnership with 400 thumb prints".

The Treaty did not assume, and nor was it followed by, any mechanisms by which the Maori partner or partners could act as such. In 1852 the *New Zealand Constitution Act* contemplated regulations to preserve application of Maori customary law in particular districts, but it was not followed by significant implementation. In 1860, needing to secure majority Maori neutrality in the looming war with Waikato Maori, the Government convened an assembly of Chiefs. The Chiefs were given some hope (which proved to be vain) that it would be a regular occurrence. They entered into what is called the *Covenant of Kohimarama*, affirming the Treaty.[20]

On the other side, the Crown party no longer has a character that is suitable for domestic political partnership. To New Zealanders there is now no Crown in the sense of an embodied counter party. In a democracy we are all participants in "sovereignty". It is hard to see how

some of us (claiming Maori descent) can be in partnership with all of us including themselves, when we all collectively determine what the Crown can or must do. Governor Hobson's repeated greeting to each signatory at Waitangi after signing was "*He Iwi Tahi Tatou*" – "we are now one people". That cannot be twisted into any notion of constitutional partnership.

Nevertheless, partnership rhetoric can help New Zealanders focus on the positive side of the expectations that motivated the signing of the Treaty. The fears that also propelled it are equally important. Neither gives rise to principles that justify racism – that is, privileges and special power conferred by historical brownness rather than by ordinary principles of property succession.

The founding document?

Another claim of substantial political significance has been that the Treaty is essential to the legitimacy of *Pakeha* presence in New Zealand. Clearly it does now have constitutional significance in a political sense. It also legitimised the Rule of Law applied by the British in New Zealand, from the perspective of many Maori.[21] In this New Zealanders have a gift that few other peoples have. The near universal human experience of different peoples trying to share one geographical area is of seizure of authority and occupancy by force of arms (or treachery), and subsequent legitimisation by practical demonstration of effective control.

For at least 130 years New Zealand's government has been legitimate in legal terms because it has enjoyed the obedience of the people. Accordingly, though the Treaty provides useful evidence of legitimacy very early, it is neither necessary nor conclusive to those who want to contest our unitary sovereignty.

Historicism and appeals to legitimacy have a powerful and often baleful influence. They lead to an extraordinary investment in debate over the circumstances of the signing, which is the authoritative text, the extent of common understanding or the meeting of minds, and 150 years of Maori/Government and Maori/European transactions.

Yet unreported discourse and radio talkback suggest many ordinary New Zealanders sense a hopelessness in trying to remedy grievances so old, or even in determining conclusively the rights and wrongs of the dispute. So far those views have not prevailed against political and judicial fascination with at least the rhetorical force of legitimacy and historicism.

Positive duty of active protection

One of the principles extracted by the Courts has been Treaty partner responsibility "analogous to fiduciary duties". Cooke P said:

> "Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people and use of their lands and waters up to the fullest extent practicable".[22]

He says *Pakeha* and Maori owe a duty to act toward each other "reasonably and with the utmost good faith".[23]

This responsibility has become a justification for positive discrimination and privileges of many kinds. A group launched in 1986 by the then Governor-General called "Project Waitangi" was officially sponsored to promote "understanding" of the Treaty. It describes the Crown promise as being "to guarantee and actively protect Maori absolute authority (*tino rangatiratanga*) over Maori systems, possessions and resources".[24]

This perception of a duty to achieve partnership is so pervasive that many territorial local governments now think it is stated somewhere in law. In Wellington, for example, both layers of local government have self-nominated representatives of local Maori *iwi* (tribes) on the payroll, as members of consultation committees. Most councils have so far resisted demands that these unelected persons be given voting power equal with, or superior to, elected members, but in status and influence these consultation organs can have real power.

From this so-called fiduciary principle has emerged a duty to consult Maori. In 1988 the

Lange Labour Government issued a statement of the "Principles on which the Crown Proposes to Act" in relation to the *Treaty of Waitangi*. Principle 4 is "the principle of co-operation". It stated:

> "Reasonable co-operation can only take place if there is consultation on major issues of common concern and if good faith, balance and common sense is[sic] shown on all sides. *The outcome of reasonable co-operation will be partnership*". (emphasis added).

While the duty to consult has been expressly held not to constitute a veto power, in practice consultation rights can interact with procedure in many spheres so as to create a *de facto* veto power. If Maori undertake not to exercise rights of objection, that forbearance can cost them money.

The current status of the Tribunal and the Treaty claims process

The Treaty now has talismanic powers. Its penumbra in the so-called principles extends into many statutes. The Waitangi Tribunal is grinding through more than 900 claims for redress for alleged historical breaches by the Crown of the Treaty. Only a handful of settlements has been concluded. They include some with tribes that have previously had full and final settlements, several times before. To date the Crown has paid, or provided for payment of, over $500 million (excluding fisheries settlements). It has signed formal apologies and acknowledgments of fault. It has established special guardianship status for Maori in respect of areas of public land and undertaken to co-administer some sites of significance, and to give rights of first refusal over Government asset sales within tribal areas.

Many millions of dollars have been expended in historical research, much of it funded by the Crown or from a body called the Crown Forestry Rental Trust, which receives cutting rights revenue from land over which state forest plantings were established in the 1930s.

The Waitangi Tribunal has enjoyed official and media respect. It has determinative power on few matters. Generally it can only recommend to the Government.

That respect is now fraying. It is not seen as the independent "truth commission" envisaged by the more well meaning Labour Ministers who in 1985 extended its jurisdiction back to 1840. One of them, the Hon Dr Michael Bassett, since 1994 a member of the Tribunal, and a reputable historian, recently caused uproar by publicly describing one Tribunal report as "extravagantly written", and containing " a lot of very tendentious words". He was referring to a claim that Maori in one area had suffered a "holocaust" as a result of Crown actions in the 1860s. Maori had been displaced, but the casualties were few. In comparison with the Scottish clearances and the ethnic cleansing among the same Maori only two decades earlier, the "holocaust" claim indicated a serious lack of perspective on the part of the Tribunal.

Dr Bassett stated on nationwide television:

> "It is true there are a lot of agendas at the Tribunal, and the dominant one is a feeling that one detects quite early in the piece that the staff are there on behalf of the claimants rather than making an historical judgment that will come to the truth …
>
> "The balance is missing, and what worries me is that too many people just start from the assumptions that Maori are always going to be right and the settlers … who benefited from the land are always wrong. That worries me because while it's true some of the time it ain't true all of the time".[25]

Maori applicants immediately took proceedings to have Dr Bassett excluded from hearing a claim before the Tribunal.

New Zealand's fisheries quota management system was being established when Maori claims to compensation for loss of customary fishing rights came to a head. Broadly, Maori obtained a half share in New Zealand's major fishing company and quota rights, which together amount in value to over $1 billion.

The fisheries claims offer an interesting example of debatable scholarship by the Tribunal.

In its *Muriwhenua* report the Waitangi Tribunal held that Northland Maori had been deprived of their fisheries in breach of the Crown's duty actively to protect them. The report was widely lauded. Boiled down it says: Maori once could have fished all the fish in the adjacent seas. Now they can't. The Crown must compensate them.

Cases and legislation have recognised common law customary rights to fishing. These may be distinguished from the broad Aboriginal or indigenous rights which may be more familiar to Australians. It is not denied that the Crown has the right to control fisheries by statute. The common law customary rights are accordingly interstitial, applying where permitted by express exception, or by absence of statutory prescription.

But the *Muriwhenua* report failed to explore *ahi ka*, a custom that governs Maori customary title. Title can be lost through voluntary lack of use – the situation prevailing among many Northland Maori pursuing the *Muriwhenua* claim.[26] This was pointed out by an expert practitioner in Maori land law, Marcus Poole, but ignored then and since.

In the ten years since the fisheries fund was established, little if any benefit has been seen by ordinary Maori. The fund has accumulated. Fishing rights have been leased to foreign operators. The highest public profile for the Treaty of Waitangi Fisheries Commission has been for the litigation in which it has been embroiled. Essentially it is litigation over the distribution model.

Who gets the spoils: tensions among claimants

The Treaty was with Chiefs as representatives of their tribes. But most Maori now no longer live in their tribal areas, and more than a third have little or no connection with, or perhaps even knowledge of, their tribal descent. If the settlement assets are distributed to traditional tribal leaders, three things are likely:

- For some *iwi* there will be continuing dispute over who has authority now for those purposes. Tribal elders or *kaumatua* are recognised by custom, but new corporate or trust structures are needed to hold the assets. They need a process for establishing a mandate. There is argument over whether those processes must be democratic, or whether traditional methods of conferring leadership authority, and determining succession, can still work.
- Corporate tribalism is largely rurally based. There is tension between tribe members who have stayed around the traditional areas, and those who now visit from their urban homes. Some of the best qualified are living in cities, and many thousands in Australia.
- There is considerable debate over how the spoils should be distributed. Some want permanent endowment, some tradeable rights or shares for beneficiaries, some want to engage in business specifically employing beneficiaries, and others favour "commercial" investment policies.

If Treaty settlements are treated in accordance with principle as compensation they should go to tribes(*iwi*). *Iwi* are the successors of those whose rights were breached. If proceeds are instead put in some kind of trust for detribalised urban Maori generally, they could be going to descendants of Maori who assisted the Crown in land seizures or other activities that gave rise to the claims.

Some of the most active and forward-thinking Maori leaders come from urban areas. John Tamihere, a Labour Member of Parliament, came to public attention for his leadership of the Waiparaira Trust, which had a range of contracts with the Crown for delivery of training and health and employment services. These urban authorities have been strongly challenging the proposed distributions to the successors of traditional *iwi* leaders. This issue is unresolved.

The Treaty has thoroughly permeated official New Zealand. Solemn statements purporting to uphold the *Treaty of Waitangi* are found everywhere. It has particularly penetrated academia. For example, the charter of Auckland University of Technology sets out "Guiding Principles".

After committing to “international standards of scholarship, learning, teaching, and research, excellence, innovation and creativity”, they commit to “The *Treaty of Waitangi* and the aims and aspirations of the Maori people”.

The University’s stated goal number 2 is “To give effect to the *Treaty of Waitangi* within the context of university education”, and goal 3 is “To effect equitable opportunities and *outcomes* for the diverse communities the university services”.[27] (emphasis added).

Such preferences and race distinctions multiply. New Zealand was an early signatory of the *International Covenant for the Elimination of all forms of Racial Discrimination,* but the *Covenant* is now an embarrassment, not a guide. The writer has not seen the threshold test for positive discrimination[28] applied for any official purpose for many years.

Recent politics

The National Government in power from 1990 to 1999 attempted to confine Maori expectations of windfalls from the Treaty claim process. They set a $1 billion maximum total envelope for claims. The Labour Government that took power in 1999 has formally repudiated the envelope, but to date claim settlement negotiations appear still to be working within its constraints. The Waitangi Tribunal and Maori representatives frequently refer to claim amounts as being acknowledgements, or tokens of good faith, and not true damages compensation, because they are so much smaller than the claimed losses. Some claimants talk openly of the next generation’s claims, despite this round requiring acknowledgement of “full and final settlement”.

In 1997 the ACT Party was described as radical, and was attacked as racist, for a Bill which would have set a time limit on the receipt and handling of claims to the Waitangi Tribunal. This became National Party policy early this year.

When the current Labour Government took office their stated intention was to propound new principles for dealing with claims. In the end they simply restated the principles outlined by the Lange Labour Government in the 1980s. More significantly, Labour planned to develop principles on which to approach so-called contemporary issues. These claims arise essentially:

- from political partnership or shared sovereignty notions;
- from the Court-evolved notions of positive duty on government to propagate Maori language and culture; and
- from the claims of continuing breaches, through failure to ensure Maori health, wealth and happiness.

The promised elucidation of principles for contemporary claims has not been seen. Instead, *ad hoc* arrangements are developed by different ministries and Ministers, to deal with particular pressures at particular times. For example, a long delayed reform of our trademark law now requires the Commissioner of Trademarks to cancel, without compensation, marks for which there is evidence of cultural offence to Maori.

The Labour Government began office making a programme of “closing the gaps” its flagship policy. The gaps were those alleged to exist between Maori and *Pakeha* wealth and well-being. With an initial specific Budget allocation of over $240 million per year, and a requirement for a “whole of Government focus” on advancing Maori, it soon ran into both credibility and achievability problems. Promised objective measurements of results and progress have never been applied, or even defined. Officials questioned about the measurements have prevaricated. The Government no longer uses the term “closing the gaps”.

The primary torpedo of the “closing the gaps” policy was the release of analysis[29] by a Dr Simon Chappell, an official in the Labour Department. He reviewed statements attributing disadvantage to race and appears to have established that race was not the appropriate discriminant. Conventional socio-economic class factors were a much better predictor of disadvantage. Put simply, there are plenty of *Pakeha* who are poorer than average, and plenty of Maori who are better off than average.

Dissolving political consensus

From 1985 through to 2000 there was very little mainstream inter-party political debate about Treaty matters. Labour had boasted the Maori MPs since the 1930s. Labour was responsible for inserting Treaty clauses in legislation generally, and for extending the Waitangi Tribunal's jurisdiction.

National had a long tradition of respect for aristocratic Maori leadership, and ministerial championship of Maori concerns, though it was generally hostile to Maori irredentism. Sir Douglas Graham, who was the Minister of Justice and the Minister in Charge of Treaty Settlements, seems to have found in the redress of Maori grievances an emotionally satisfying cause for which he could crusade within his Party. A liberal in the US sense, he publicly speculated about the possibility of parallel justice systems.

The consensus among the political élite meant that *Pakeha* expressions of concern about the direction of policy were characterised by both main political parties and the media as "back lash" at its most innocuous, and "racism" in general rebuttal.

Winston Peters, MP, a Maori, in 1996 performed the almost magical political feat of separating Maori voting support from the Labour Party. His New Zealand First Party secured a position in a Coalition government with National. His electoral power base comprised disaffected and grumpy superannuitants, conspiracy theorists who saw National and Labour as having conspired with business and the privileged in applying economic rationalist policies, and Maori disappointed with the pace of the Treaty settlement process. Mr Peters has periodically criticised the "sickly white liberals" who promoted the Treaty industry. Because he was Maori, news media felt able to publish his statements even while they suppressed similar sentiments from others. As a consequence, Mr Peters has enjoyed an enduring respect from concerned *Pakeha* who believe he is the only politician with the courage "to tell it like it is".

Over the three years from 1996 to 1999 Mr Peters' party squandered its electoral support as his members became engulfed in a series of minor scandals. They showed his Maori Ministers and Members of Parliament as trivially venal, arrogant, and focused on Maori constituency development to the exclusion of general New Zealand interests. New Zealand First was severely punished in the 1999 election, losing all its Maori seats back to Labour.

Over the past two years the cosy political consensus has evaporated. Throughout 2001 the *Bay of Plenty Empowering Bill*, to enable a region to establish segregated voting for local authority positions, was debated for many hours. The debates were scheduled on Wednesday fortnights. Though broadcast as part of normal parliamentary coverage, they went unremarked. By the end of that debate, National, New Zealand First and of course my party, ACT, had made very plain our apprehension about what segregation could portend.

For the ACT Party none of this is new. For advocating a colour blind equality before the law we have been frequently attacked as racist and insensitive to Maori, though one of our nine members, Donna Awatere Huata, MP, the author of *Maori Sovereignty*,[30] was one of the most fiery radicals two decades ago.

But the National Party seems now to be re-positioning itself with an intellectual foundation to reject the cult of Treaty worship. Their Leader, Bill English, delivered an important speech last month.[31] He:

- Urged that the Treaty be approached on a more contractual basis, looking at its actual words and context instead of the "spirit" and "principles" favoured by earlier National Party politicians.
- Emphatically endorsed the view that it permanently ceded or confirmed cession of sovereignty to a unitary state. Maori and *Pakeha* were integrated as subjects and eventually citizens.

- Challenged the *contra proferentum* rule in application to resolving differences between Maori and English versions of the Treaty, by citing both contemporaneous circumstance, and the United Nations 1969 *Vienna Convention of the Law of Treaties*, ratified by New Zealand in 1971.
- Cautiously rejected arguments that there is an unextinguished aboriginal right to self-government. He therefore also implicitly rejects the relevance of North American precedent, and its tensions between equality before the law and collective self-government by indigenous folk.

The speech has not received enough attention. It is the foundation for a major repositioning of National. It is possible that we will see during the campaign leading up to the election on 27 July, 2002 a genuine debate between the two main parties about the role of race discrimination and the Treaty.

Valuable contemporary role for the Treaty

The ACT Party sees a very strong and positive role for the Treaty. It was a compact to establish the rule of law and to recognise and secure property rights. Both sides sought those blessings from it in 1840. Property rights remain essential to equality before the law. The Treaty was a crystallisation of the finest work of our 19th Century forebears. It envisaged the primacy of individual liberty, and contract, over status and a classical Lockean view of property rights.

It extended to its signatories what was then an internationally *avant-garde* protection of personal and property rights. The ownership assured to both Chiefs and ordinary Maori over their property was a reflection of the English law aphorism, “Every man’s home is his castle”.

The framers of our *Bill of Rights* in 1992 funked it when they omitted the fundamental assurance of property rights. For all New Zealanders the Treaty can, at the insistence of Maori, remedy that deficiency. In that sense, the Treaty’s true constitutional significance can become equivalent to the “takings” provision of the American Constitution. *Iwi* or tribal successors to the signatories of the Treaty could be the guardians of that feature of our Constitution, to the benefit of us all.

What next?

If National has the courage of its scholarship, it will now undertake to support ACT’s policy of eliminating from our law all references to the so-called principles of the Treaty of Waitangi, and to restore certainty to our law. Any references must be to the actual text of that agreement.

It is not enough to just assert that we are one people incorporating two or more cultures, without setting out a vision for the kind of people we are, and the Constitution we will have to protect our cultural freedoms.

Will we continue to encourage Maori down the blind alleys of collective institutional responses to problems? Tribal government and communalism have already failed in this country and everywhere else. Will we stand up for our inheritance of a tolerant, colour blind, democratic state? That will require eliminating the statutory privileges created for Maori superstition. Will we continue to excuse usurpation of resources for “porkbarrelling” to Maori electors? That will require our state to stop delegating authority and giving resources sourced from taxpayers to unsuitable Maori people and institutions that do not adhere to hard won standards of stewardship for all. Can we reassert personal responsibility as the foundation for a healthy society in the face of romantic tribalism or communalism?

Will we support a rule of law that restrains the government, genuinely respects freedoms, allows Maori and *Pakeha* to choose the kind of education their children will have, who they work for and on what terms, and how they want to express themselves about others, so that we all may live our various beliefs and cultures?

Will they join the ACT Party in restoring and building the New Zealand envisaged by Hobson and the Treaty signatories, where we are all equal under the law?

Endnotes:

1. www.mft.govt.nz.foreign/humanrights/overview.html

2. Reported by Julie Debeljak, *Barriers to the Recognition of Indigenous Peoples' Human Rights of the United Nations*, Monash University Law Review, Vol.26 (2000), pp.159-84.

3. General Assembly resolution 2625(XXV). Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970).

4. For an accessible summary of this viewpoint, see former New Zealand Cabinet Minister Simon Upton's 23 May, 2002 commentary at http://www.arcadia.co.nz/

5. From a contribution to *New Zealand in Crisis? A Debate About Today's Critical Issue*, GD Publications, 1992, p19.

6. Andrew Sharp in *New Zealand in Crisis*, *loc.cit.*, pp.27 and 30.

7. Crosby RD, *The Musket Wars – A History of Inter-Iwi Conflict 1806-45*, Reed, 1999.

8. *Wi Parata v. Bishop of Wellington*, (1877) 3NZJur (NS) 72.

9. *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] AC 308.

10. See, for example, *Maori Sovereignty*, (1984) Broadsheet, Auckland, the youthful work of Donna Awatere Huata, MP, now a colleague in the ACT Party.

11. Michael Coote, *The Free Radical*, December, 1999 – February, 2000, p.9.

12. *NZ Maori Council v. Attorney-General*, [1987] 1 NZLR 641 on appeal at p.655.

13. *Tainui Trust Board v. Attorny-General*, [1989] 2NZLR 513 (CA) at p.530.

14. *Te Runanga O Muriwhenua Inc v. Attorney-General*, [1990] 2 NZLR 641 (CA) at p.656.

15. Guy Chapman, *The Treaty of Waitangi – fertile ground for judicial (and academic) myth-making*, in *New Zealand Law Journal*, July, 1991, p.228.

16. Cambridge University Press, 2000.

17. That is an essay by Michael Taggart in Forsyth and Hare (Eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade, QC*, Oxford: Clarendon Press, 1998, pp.91-112. Michael Taggart is also acknowledged as having read a draft of Chapter 7 of Allen's book.

18. Shortly to be published in the *New Zealand Law Journal*. Simon Upton's reflections on the unique consequences of the Treaty (*supra*, note 4) includes what he calls a "lament" from Herman Merivale, Permanent Under-Secretary of the Colonial Office (taken from *The Colonial Office: A History*, Henry L Hall, Longmans, 1937). The lament very clearly shows the British view that what the Treaty conferred was property rights, an outcome Merivale deplored.

19. *NZ Maori Council Case*, *loc. cit.*, p.664.

20. See Orange, Claudia, *The Covenant of Kohimarama*, in the *New Zealand Journal of History*, XIV, 1 (1980), pp.61-82.

21. Records of debate at the Kohimarama Conference evidence this view.

22. *New Zealand Maori Council Case*, p.664.

23. *Ibid*., p.667. It may be quibbling, but one would hope a government would feel an equal responsibility to act in good faith toward all its citizens.

24. Undated Project Waitangi pamphlet.

25. Transcript of TV One *Assignment* interview published in *National Business Review*, 10 May, 2002, pp.35-39.

26. Marcus Poole, *Maori Fishing Bill and the Interpretation of Article 2*, Law Talk 307, 1 (22 June, 1999). Mr Poole cites Norman Smith, *Native Law and Custom*, (1936) p.57.

27. For amusement, note that guiding principle 5 is "Equity of access, experience and *outcome*". (emphasis added).

28. The provisos in Articles 1.4 and 2.2 of the *Covenant*, which permit even positive discrimination only if it is temporary.

29. *Maori socio-economic disparity*, Paper for the Ministry of Social Policy, September, 2000. The paper can be accessed at: http://www.act.org.nz/content/20887/maorisocioeconomicdisparity.pdf.

30. *Loc. cit*..

31. http://www.national.org.nz/wcontent.asp.