THE NEW ZEALAND MAORI COUNCIL AND LATIMER v ATTORNEY-GENERAL AND OTHERS

(1987) 6 NZAR 353

Court of Appeal (CA 54/87)
4-8 May; 29 June 1987
Cooke P, Richardson, Somers, Casey and Bisson JJ.

Application

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This was an application for judicial review of the proposed exercise by Ministers of the power to transfer Crown land to State enterprises. The application was removed into the Court of Appeal.

COOKE P. This case is perhaps as important for the future of our country as any that has come before a New Zealand Court. Accordingly, although we have reached a unanimous decision, each member of the Court is delivering a separate judgment setting out his reasons for joining in the decision. What the decision means is stated shortly in the last part of this judgment. • • •

• • • We are here concerned with interpreting a far-reaching Act passed by the New Zealand legislature. Its significance lies partly in the transformation of State undertakings, partly in its express incorporation of the principles of the Treaty in this field of New Zealand domestic law. Obviously, to echo again a phrase given currency by a great British Judge of our era it should not be approached with the austerity of tabulated legalism. A broad, unquibbling and practical interpretation is demanded. It is hard to imagine any Court or responsible lawyer in New Zealand at the present day suggesting otherwise. Having said that, I will try to resist the temptation of side issues, and turn to the ones that we are truly called upon to decide.

Counsel for the applicants did not go as far as to contend that, apart altogether from the State-Owned Enterprises Act, the Treaty of Waitangi is a Bill of Rights or fundamental New Zealand constitutional document in the sense that it could override Acts of our legislature. Counsel could hardly have done so in face of the decision of the Privy Council in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 that rights conferred by the Treaty cannot be enforced in the Courts except insofar as a statutory recognition of the rights can be found. The submissions were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as 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. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty. But the State-Owned Enterprises Act itself virtually says as much in its own field. The questions in this case are basically about the practical application of the approach in the administration of this Act. • • •

• • • *The principles of the Treaty*

The phrase "the principles of the Treaty of Waitangi" is beginning to come into common use in New Zealand statutes. It is found in s 9 of the State-Owned Enterprises Act 1986, s 6 of the Treaty of Waitangi Act 1975 (the first legislative use cited to us), the Long Title of the Environment Act 1986, and s 4 of the Conservation Act 1987. The Maori Affairs Bill at present before Parliament has recitals in the Maori and English languages which may be seen as referring to some of the principles:

> E tika ana hoki, ko te Tiriti o Waitangi te taonga whakatapu i te nohoanga i waenganui i te Iwi Maori me te Karauna. E tika ana ano hoki kia maharatia ake te wairua o te Tiriti o Waitangi: te tuku a te Iwi Maori i tona Kawanatanga, i te whakarite hoki a te Karauna kia tiakina te rangatiratanga o te Iwi Maori. Ko taua rangatiratanga, ko nga taonga tukuiho a te Iwi Maori. A, kia maharatia ano hoki te ahua nei, ko te whenua te turangawaewae o te Iwi Maori. No reira me kaha te pupuri i te whenua me aru tikanga e pumau ai te noho, a, e puta ai he hua ki te Iwi Maori. A, e tika ana, me hanga he ahuatanga hei awhina i te Iwi Maori ki te whakamana i enei kaupapa:
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> Whereas the Treaty of Waitangi symbolises the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of sovereignty for the protection of rangitiratanga embodied in the Treaty of Waitangi be re-affirmed: And whereas rangitiratanga in the context of this Act means the custody and care of matters significant to the cultural identity of the Maori people of New Zealand in trust for future generations:

And whereas, in particular, it is desirable to recognise the special relationship of Maori people to their land and for that reason to promote the retention of that land in the hands of the owners' descent groups, and to facilitate the occupation and utilisation of that land for the benefit of the owners' descent groups: And whereas it is desirable to establish agencies to assist the Maori people to achieve the implementation of these principles:

Section 9 of the 1986 Act requires the Court to interpret the phrase "the principles of the Treaty of Waitangi" when necessary. In doing so we should give much weight to the opinions of the Waitangi Tribunal expressed in reports under the Treaty of Waitangi Act 1975. In the reports made by the Tribunal so far, particular help is obtainable from No. 4, the Kaituna Claim, report dated 30 November 1984; No. 6, the Te Atiawa's Waitara Fishing Claim, report dated 17 March 1983; No. 8, the Manukau Claim, report dated 19 July 1985; No. 11, the Te Reo Maori Claim, report dated 29 April 1986. We have benefited greatly from considering these.

At the same time it is necessary to say that the opinions of the Tribunal, expressed in reports under the 1975 Act, are not of course binding on Courts in proceedings concerned with other Acts. It may be noted that, as if to illustrate the desirability of that position, the last-mentioned report, in paragraphs 4.32 to 4.35, does not correctly state the decision of this Court in *Mihaka v Police* [1980] 1 NZLR 453. That case as far as relevant was concerned with the defendant's claim that the whole proceedings should be conducted in Maori, not merely that anything which he wished to say should be said in Maori.

While having to make that reservation, I repeat that the opinions of the Waitangi Tribunal are of great value to the Court. In this case we have also had the advantage of affidavits from an impressive range of persons of the Maori race. They include eloquent and moving passages. The force of the affidavits comes from the insight of the deponents into such matters as the significance of the Treaty for the Maori over the years since 1840; the bond between the Maori and his or her tribal land; the special bond created by the Treaty between the Maori people and the British monarch; grievances, general or particular, resulting from Pakeha attitudes and actions seen or sensed to conflict with the spirit of the Treaty.

As it would be individious to do otherwise, I list the makers of the affidavits as follows. Sir Graham Stanley Latimer, chairman of the New Zealand Maori Council; Sir Henare Kohere Ngata of Gisborne, chartered accountant; Dame Whina Cooper of Panguru, founder of the Maori Women's Welfare League; Sir James Clendon Henare of Moerewa, retired farmer; Hikaia Amohia of Taumarunui, farmer; Mason Harold Durie of Wellington, registered medical practitioner; Harold Charles Evison of Christchurch, retired senior lecturer; Denese Letitia Henare of Auckland, solicitor; Trevor Hapi Howse of Christchurch, researcher; Ian Hugh Kawharu of Reweti, university professor; Benedict William Kingsbury, presently of England, research fellow; Peter Maru Love of Orewa, social worker; Te Kahuiiti Morehu of Rewiti, homemaker; Claudia Josepha Orange of Wellington, historian; John Nathan Pickering of Porirua, proofreader; Harata Riateuira Solomon and Matuaiwi Solomon of Wellington, retired; Huhurere Tukukino of Te Puru, retired; Stephen Taitoko White of Urenui, farmer; Whatarangi Winiata of Wellington, professor of accounting.

The principles of the Treaty are to be applied, not the literal words. As is well known, the English and Maori texts in the First Schedule to the Treaty of Waitangi Act 1975 are not translations the one of the other and do not necessarily convey precisely the same meaning. The story of the drafting of the Treaty and the procurement of signatures from more than 500 Maori chiefs, including some Maori women of appropriate rank — events in which no lawyer seems to have played a part — is an absorbing one, but not within the ambit of this judgment.

Instead of repeating the two texts scheduled to the 1975 Act, I set out what a distinguished Maori scholar, Professor Kawharu, calls his "attempt at a reconstruction of the literal translation" of the Maori text. It was put before us on behalf of the applicants. The Crown likewise accepted it for the purposes of this case:

> Victoria, the Queen of England, in her concern to protect the chiefs and subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order considers it just to appoint an administrator one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands and also because there are many of her subjects already living on this land and others yet to come.
>
> So the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness.
>
> So the Queen has appointed me, William Hobson a captain in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

The first

The chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

The second

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at the price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

The third

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

Signed William Hobson
Consul and Lieutenant Governor

So we, the chiefs of the Confederation and of the substribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and marks thus

Was done at Waitangi on the sixth of February in the year of our Lord 1840

The Chiefs of the Confederation

Points on which that version may be open to debate include the following. The word *rangitiratanga*, here rendered as *chieftainship*, may have no precise English equivalent. Williams' Maori Dictionary gives *evidence of breeding and greatness.* So too with the *kawanatanga* given absolutely to the Queen of England. The version profferred for the applicants renders this as *complete government.* Other alternatives are *governance* and that of the English text schedule to the Treaty of Waitangi Act — *sovereignty* — a concept said to have no equivalent in Maori thinking. *Taonga*, rendered in the foregoing version as *treasures*, is represented in the English text as *other properties* and in Williams' as *property*, anything highly prized. The Waitangi Tribunal has treated the word as embracing the Maori language. The provision that the chiefs "will sell" land to the Queen is treated in the English text as conferring on the Crown an exclusive right of pre-emption, although the meaning of this in the context is itself controversial. The provision in the third article to the effect that, in the words of the attempted reconstruction, the Queen will give the ordinary people of New Zealand the same rights and duties of citizenship as the people of England is commonly rendered as referring to the rights and privileges of British subjects.

The differences between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit. This approach accords with the oral character of Maori tradition and culture. It is necessary also because the relatively sophisticated society for whose needs the State-Owned Enterprises Act has been devised could not possibly have been foreseen by those who participated in the making of the 1840 Treaty. In brief the basic terms of the bargain were that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated. These aims partly conflicted. The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.

The Treaty signified a partnership between races, and it is in this concept that the answer to the present case has to be found. For more than a century and a quarter after the Treaty, integration, amalgamation of the races, the assimilation of the Maori to the Pakeha, was the goal which in the main successive governments tended to pursue. In 1967 in the debates on the Maori Affairs Amendment Bill, a measure facilitating the alienation of Maori land, the responsible Minister, the Hon J R Hanan, saw it as "the most far-reaching and progressive reform of the Maori land laws this century . . . based upon the proposition that the Maori is the equal of the European . . . . The Bill removes many of the barriers dividing our two people" (353 NZ Parliamentary Debates 3657). Another supporter of the Bill expressed the hope that "it will mark the beginning of the end of what still remains of apartheid in New Zealand" (ibid 3659). Such ideas are no longer in the ascendant, but there is no reason to doubt that in their day the European Treaty partner and indeed many Maoris entertained them in good faith as the true path to progress for both races. Now the emphasis is much more on the need to preserve Maoritanga, Maori land and communal life, a distinctive Maori identity.

In 1980 the Royal Commission to which I referred earlier noted in the preface to its report the diversity of Maori opinions and warned that "times and attitudes change, and no man can assert that today's philosophies and urgings will be for ever dominant". The wisdom of that is incontestable. Yet it is equally clear that the Government, as in effect one of the Treaty partners, cannot fail to give weight to the "philosophies and urgings" currently and, it seems, increasingly prevailing.

In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty. It was argued for the applicants that whether in any instance the transfer of a particular asset would be inconsistent with the principles of the Treaty is a question of fact. That is so, but it does not follow that in each instance the question will admit of only one answer. If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer.

I use "reasonably" here in the ordinary sense of in accordance with or within the limits of reason. The distinction is between on the one hand what a reasonable person could do or decide, and on the other what would be irrational or capricious or misdirected. Lawyers often speak of *Wednesbury* unreasonableness, in allusion to the case reported in [1948] 1 KB 223, but I think that it comes to the same thing.

What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. 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 in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. It should be added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.

Not surprisingly the argument for the applicants encountered some difficulty in trying to put such broad propositions into more concrete forms. A duty to remedy past breaches was spoken of. I would accept that suggestion, in the sense that if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it — which would be only in very special circumstances, if ever. As mentioned earlier, I prefer to keep open the question whether the Crown ought ordinarily to grant any precise form of redress that may be indicated by the Tribunal.

A duty "to consult" was also propounded. In any detailed or unqualified sense this is elusive and unworkable. Exactly who should be consulted before any particular legislative or administrative step which might affect some Maoris, it would be difficult or impossible to lay down. Moreover, wide-ranging consultations could hold up the processes of Government in a way contrary to the principles of the Treaty. For the same reason, on full reflection I do not favour granting relief in terms of prayer (b) in the statement of claim or any revised version of it incorporating a fixed time limit as suggested in argument. I think it would savour of granting an opportunity to conceive or even drum up claims where no grievance has previously been voiced.

Prayer (bb), introduced by amendment, is a different matter. The transfer of Crown lands to State enterprises is such a major change that, although the Government is clearly entitled to decide on such a policy, as a reasonable Treaty partner it should take the Maori race into its confidence regarding the manner of implementation of the policy. The Government has already shown willingness to listen to the Maori point of view, and with dramatic consequences, in as much as ss 9 and 27 have been inserted in the 1986 Act. Now that the Act is in force a further stage of planning and opportunity for comment is needed.

I think that it has now become obligatory on the Crown to evolve a system for exercising the powers under the Act. The need relates to cases not already within the protection of s 27(1). The system should be designed to give reasonable assurance that lands or waters will not be transferred to State enterprises in such a way as to prejudice Maori claims. Safeguards are needed for claims already known to the Crown, whether or not they have yet been submitted to the Tribunal, and also for claims reasonably foreseeable on the basis of information possessed by the Minister or government department concerned. As regards claims made on or after 18 December 1986 the system should aim to ensure, if there is any likelihood that the Waitangi Tribunal will recommend return to Maori ownership, that such a recommendation can be acted upon.

One way of ensuring this would be to provide for handing over the management of assets on terms ruling out their disposal to third parties pending any foreseeable Waitangi Tribunal investigations, so that the assets can be returned readily if need be. Section 23 gives shareholding Ministers a choice of arrangements other than outright transfers. Section 27(1) might be useful as an analogy for claims not submitted to the Tribunal before 18 December 1986. At this stage, however, it would be wrong for us to go further than to indicate the general aim. In the first instance it is for the Court to formulate its proposals.

The Crown's proposed system should be submitted to the Maori Council for agreement or comment. After that, with any changes that may have been agreed to, it should be placed before this Court for consideration as to whether it adequately carries out the intention of the Court. At that stage both sides would have a further opportunity of being heard as far as necessary. There should be a timetable to avoid delay. Three weeks for working out the Crown's proposals should be ample, then the Maori Council should have three weeks to agree or comment.

A reasonably effective and workable safeguard machinery is what is required. Further than that the Crown should not be obliged to go. Any major grievances are likely to have come to the surface in some form by now. The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try to shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation. The first applicant in the proceedings, the New Zealand Maori Council, is at the present day the appropriate body to represent Maori interests for the purpose of any discussion between the partners on major matters of principle under the State-Owned Enterprises Act. If that fails to result in a system acceptable to both sides, the Court will have to settle any outstanding points.

For these reasons I would substantially accept the argument for the applicants in support of prayer (bb), to the extent of granting a declaration that the transfer of assets to State enterprises without establishing any system to consider in relation to particular assets or particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful. This to be supplemented by directions for the preparation of a scheme as just outlined.

For the time being the interim delaration preventing transfers of assets and long-term agreements or arrangements should be renewed, to continue in force until discharged; with leave reserved to the Crown to move for discharge at any time.

Leave has already been reserved to the Coal Corporation to lodge submissions in writing on particular matters affecting it.

The formal orders

In the result these are the proposed orders.

1. A declaration that the transfer of assets to State enterprises without establishing any system to consider in relation to particular assets or particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.
2. Directions as follows:
   (i) Within 21 days from the delivery of this Court's present decision the Crown is to prepare a scheme of safeguards giving reasonable assurance that lands or waters will not be transferred to State enterprises in such a way as to prejudice Maori claims that have been submitted to the Waitangi Tribunal on or after 18 December 1986 or may foreseeably be submitted to the Tribunal.
   (ii) The scheme is to be submitted to the New Zealand Maori Council for agreement or comment as to whether it adequately gives effect to the intention of the Court as stated in the present judgments. Such agreement or comment to be given by the council within 21 days after receipt of the scheme.
   (iii) The scheme as finally proposed by the Crown having regard to the council's agreement or comments is then to be lodged in this Court and an early hearing will be arranged at which the question whether it should be approved will be considered.
3. A declaration that in the meantime the Crown ought not to take any further action, affecting any of the assets referred to in the statement of claim, by way of transfer of assets or long-term agreement or arrangement, that is or would be consequential on the exercise of statutory powers conferred by the State-Owned Enterprises Act 1986. The Crown to have leave to move for the discharge or variation of this declaration at any time.
4. Leave is reserved to the parties to apply in writing for any incidental directions and to the Coal Corporation to lodge submissions on particular matters affecting it.

THE TREATY OF WAITANGI AND MAORI INDEPENDENCE — FUTURE DIRECTIONS

Jane Kelsey
Senior Lecturer in Law
Auckland, New Zealand

Currently Senior Lecturer in Law, Jane Kelsey was appointed a lecturer at the Law Faculty, Auckland University, in 1979. She has the degrees of LLB (Hons) (Well); BCL (Oxon); M Phil (Crim) (Cantab). She is the author of a recent book on the New Zealand Labour Government and the Treaty of Waitangi, "A Question of Honour? Labour and the Treaty 1984–89". She was the report writer for the International Mission of Jurists Investigations into ISA detention in Singapore (1987) and vigilante killing in the Philippines in 1988.

III The judiciary and the treaty

The court cases on corporatisation[24] and fisheries[25], and later on privatisation of forestry[26] and coal[27], have been widely acclaimed as victories for Maori. And to the extent that colonial courts had never before upheld Maori argument based on the treaty, they were. But in the climate of the mid-1980s it would have been difficult for the courts not to adopt a more flexible and sympathetic line to Maori claimants. There had been major international law initiatives to recognise the rights of indigenous peoples. A rediscovery of the common law doctrine of aboriginal title cast existing case-law in an unfavourable light. And the divergence between the procedures and attitudes to the treaty in the Waitangi Tribunal and the Pakeha courts was exposing the latter to accusations of institutional racism. A failure by the courts to respond would have entrenched Maori hostility to a Eurocentric legal system. It would also have alienated many Pakeha, including some lawyers and judges, who acknowledged Maori grievances as valid and advocated a more positive legal response to the treaty.

Yet behind the "victory" rhetoric the implications of the treaty cases for *tino rangatiratanga* were very serious. Starting with the corporatisation case the Court of Appeal had avoided dealing with the treaty itself and the guarantee of *tino rangatiratanga*.[28] Instead they had seized on the reference in the *State-Owned Enterprises Act* to the "principles" of the treaty. This, they said, involved the spirit, not the words, as adapted to today's changed circumstances — essentially, a partnership based on reasonableness and good faith. But that meant different things for each partner. The government enjoyed the ultimate or sovereign power to govern and make policy, including economic policy. In doing so government had a duty to make informed decisions on the impact of those policies on Maori treaty rights. Where necessary Maori should be consulted, but the final decision remained with the Crown. Government should also provide a forum for addressing treaty grievances. In return, Maori were to be loyal to the Queen, recognise her ministers and government and be reasonably co-operative.

Via the device of the "principles" the court had thus avoided the crucial issue of *tino rangatiratanga* and had instead confirmed Crown sovereignty and Maori political and economic subordination. It was within these parameters that the limited arrangement to protect SOE land under treaty claim was agreed. When the fisheries negotiations produced no agreement the government exercised its sovereign power, as confirmed by the court, and imposed a solution. By the time it decided to privatise the state forests and the Coal Corporation government appeared unwilling even to consult. Maori went back to court seeking to force negotiations or at least a continuation of the limited SOE protections.[29]

The appeal court, irritated by government's attempt to circumvent the intent of the SOE decision, found in their favour.[30] But all that Maori secured from these cases was a similar promise to return the assets if, at some time in the future, the Waitangi Tribunal ordered it to do so.[31] Indeed, the President in both cases drastically read down the absolute property rights guaranteed in both texts of the treaty. "Partnership does not mean that every asset or resource in which Maori have some justifiable claim to share must be divided equally", especially where non-Maori initiatives have made the greater contribution to its value.[32] Yet even in the Tainui coal case, where the resource originally belonged to Tainui and their people had played a key role in its development, Cooke P put their entitlement at "considerably less than half". If that is the outcome in such a strong case,

redress due to claimants over land, fisheries or exotic forests where they have been excluded from their use and development will be negligible.

While obiter, such comments clearly signal to the politicians, the Waitangi Tribunal and the lower courts the likely outcome of future litigation on treaty claims — and hence the standard to be applied in reaching settlements. So it came as little surprise when Cooke P in the recent fisheries litigation implied that the 1989 *Maori Fisheries Act*, although initially an interim measure, may well provide a "sufficient translation or expression of traditional Maori fishing rights in present-day circumstances" — so long as all acknowledge that "it is not necessarily an ultimate solution".[33] There now seems little point in Maori continuing their costly litigation. But their bargaining position in future negotiations has been seriously undercut. There is unlikely to be any significant change to the government's unilateral 1989 "settlement" in the foreseeable future, if ever. In effect, the court has validated the modern-day confiscation of the fisheries which were guaranteed to Maori in both texts of the treaty.

Cooke P concluded in the coal case that "Maori must recognise that ... both the history and the economy of the nation rule out extravagant claims in the democracy now shared. Both partners should know that a narrow focus on the past is useless. The principles of the Treaty have to be applied to give fair results in today's world". The overall effect of treaty litigation in the 1980s on the right to *tino rangatiratanga* has been no less devastating than that of the preceding 140 years. It has simply been more subtle.[34]

Much has been made of the tensions between the government and judiciary over the treaty cases. Yet each had dealt with the challenge to its legitimacy in its own way. Government's strategy was dictated by economic priorities and the electoral climate. The judiciary's response was designed to maintain its own credibility. At times this brought the two into conflict. The courts did reject the government's narrow interpretation of the Crown's treaty obligations, and the government sought to circumvent even the minimal obligations imposed on it by the courts. Yet this was done without undermining the essential legitimacy and stability of the state. Government's outrage over Cooke P's comments in the coal case on judicial review of settlements[35] ignored the court's major contribution in reducing the treaty to terms compatible with Crown supremacy. It also shows just how little interference with its economic programme the Labour government was prepared to accept in the name of the treaty.

THE PRICE JUSTICE

Middle New Zealand's current nightmare is a rampaging Maori gang: drunk, disorderly and hell bent on rape, loot and pillage and not enough police or prisons to cope.

The desirable solution for such gross and obnoxious behaviour is to get the gangs into court, then prison: out of sight and out of mind for as long as possible. That's what the British judicial system is there for: a formalised process, steeped in tradition, designed to intimidate and punish with all due solemnity and silence in court!

Milder versions of the nightmare feature any other young Maori in a denim jacket who might be hanging around the streets as well. Never mind why they're offending. What the hell were the parents doing? And anyway, whatever happened to taking responsibility for your own actions — Maori aren't any different; they've had 150 years to get used to our way of doing things.

THAT'S not how Maori see it. A fast read of Moana Jackson's report, The Maori and the Criminal Justice System, He Whaipaanga Hou — A New Perspective, based on hui and interviews with nearly 6000 Maori takes a very different view. Headlines since the report appeared have suggested that Maori want a completely separate system of justice, resulting in this small country having two of everything — resulting in gangs getting a soft option — but they're wrong.

The report offers a new approach to law and order that suggests that justice is justice, by whatever methods, or "process", the new buzz word, it's arrived at, and some ways might just create a kinder society along the way.

Of course, the report contains the usual guilt-inducing bits that make Pakeha, in the form of The Crown look pretty shabby, but it tries to debunk some of the fondly-held notions we have about Maori offenders being beyond redemption.

It gets past all the stuff about a pre-European legal system having more to do with cannibalism and revenge than justice, and establishes clearly that Maori didn't live "under" law, they have always lived with it; it was absorbed as part of everyday tribal life and was fair and binding.

A person was tied through religion to the ancestors from whom the precedents for behaviour came.

The most important players in any case of wrong-doing were always the victim and the victim's family. At root was the concept of muru: restitution to the victim from the offender and his family. Moana Jackson thinks that concept could be used far more in our legal system, which has room for improvement. Even Pakeha question the value of punitive incarceration for long periods and ask whether violent retribution is a suitable way of dealing with all criminal offending.

The Bible says that the "namer of names is the father of all things" and for Jackson when Pakeha "experts" defined Maori culture and history, a lot of things were misunderstood, ignored or not acknowledged.

The partnership of the treaty fell apart. While it gave the Crown the right to be here, it also acknowledged the pre-existing rights of Maori, which made the two groups equal but separate and different. Therefore neither party had the right to impose its system on the other, but through colonialism and sheer force of numbers, the Pakeha way became dominant.

Maori have not forgotten their ways of achieving justice, just as the ideas that underlie their spirituality have never been lost, despite the best efforts of the missionaries. They're still intact because they're the threads that bind Maori society together, an intrinsic part of the culture, subdued but not dead.

For Maori to go back to the old ways of justice isn't what the report wants. Pre-European Maori, for example, used banishment from the iwi as one punishment, which meant the offender had to live off the land as best he could, with no outside help, till he died. Such a sanction was absolute. Impossible today.

What's wanted instead, is not a set of punitive measures, but a process which is truly Maori, ending with both Maori and Pakeha confident that justice has been seen to be done. Moana Jackson knows it means a long period of research to re-establish and adapt the ideals of the past.

But Maori culture is not fossilised, it's had to adapt just as Pakeha law has changed over time: witnesses are no longer dipped in burning oil to see if they are telling the truth. Jackson says he'd have no problem incorporating aspects of British law either, which, after all, is an amalgam of many ideas, from the stoics of Greece onwards. The philosophy underlying any sort of parallel judicial process would be Maori — stressing rehabilitation of the offender, restitution to the victim and the reasons for the crime, as well as the imposition of a suitable sanction — all adapted to suit the contemporary situation.

"If Pakeha spent more time asking why so many Maori commit violent acts and come before the courts, they'd see that the young offender can't be separated from everything that has happened to his people since the Crown cheated on their side of the treaty", says Jackson.

"If the Europeans had been the good Christians they claimed to be they wouldn't have broken the terms of the treaty. Maori can quote dozens of statutes passed to alienate Maori land and regard them as things that've made them landless in their own land. Today's Maori offender lives within a depressed social, cultural and economic environment which fosters a sense of criminal vulnerability as a result of the last 150 years".

History's never been fair, of course, and Jackson doesn't deny it, but cites the Maori proverb that says "do not bow down lest it be to a lofty mountain".

"I don't believe if you're pursuing the question of right or justice, any mountain you encounter is so lofty that you have to bow down to it; if history shows a trail of broken promises, what the Cherokee call 'the trail of tears', it also shows that eventually justice wins out. When our ancestors signed the treaty they never believed their people would be stranded in some dreadful situation of domination or cruelty or injustice", he says.

Jackson recalls Sir James Henare saying several years ago, "the treaty has never and will never go away" and though the Crown has dismissed it several times and treaty principles were "redefined" yet again just days ago, for Jackson, the basic rightness of the treaty will never go away.

Whether history's to blame or not, the young Maori offender hurts himself, his people and society.

HOW does it start? Jackson gets angry when he hears talk about "irresponsible Maori parents" because he says the tragedy for so many young Maori is that they're caught up in the whirlwind of events shaped by recent history. Simply being born in the city in a nuclear family, separated from the important whanau group and its support system, coping with unemployment because the education system didn't provide the skills to survive either as Maori or as a worker, and seeing the constant demeaning of things Maori by society and the media, has an inevitable effect.

"When I took a break from the law a few years ago and went teaching one of the difficulties I had was getting teachers to show respect for the kids by getting the pronunciation of their names right; every time a radio announcer gets it wrong, he unwittingly shows a disrespect for the value of that language and while young Maori can't articulate that, how can they respect something that is so often dismissed as not worth getting right?" Jackson says.

Young Maori encounter racism in schools as well, both personal and institutional, because of the underlying belief that the British system of law, education, and so on, is superior. When the normal teenage challenge to authority is overlaid with a sense of cultural and socio-economic loss because they're Maori, that's a mix that exacerbates the normal questing aggression of young people.

Once, the extended family network meant that there was always someone keeping an eye on what the kids got up to so there was far less chance of naughtiness. Its quite a different concept of caring nurturing and disciplining kids.

Jackson doesn't question the skills available in education but the inappropriate way they're transmitted. One just needs to look at studies of kohanga reo "graduates" who've gone straight into primary schools where there are "total immersion" programmes in the Maori language; those six-year-olds have a reading age of eight or nine, but many Maori kids going straight into a Pakeha system become slow learners.

Another study of Maori at eight and later 10 years of age showed that well over half "wanted to be pakeha" because everything positive was associated with that.

The carry-on about "how many of them are really Maori anyway" Jackson sees as part of the way the definition of who is Maori has been usurped by Pakeha. To be part Maori is still often seen as a negative. He cites the example of Kelly Evernden whose mother is Jackson's cousin.

When Evernden started to play tennis he used to throw little tantrums because McEnroe was one of his heroes. There was a headline in the local paper: "Maori Tennis Star Throws Tantrum". A year later he got a scholarship to go to the States and the headline said: "Part Maori Wins Tennis Scholarship". Then when he won his first big tournament he was billed as "New Zealand Tennis Star".

"One of my kaumatua at home is a retired freezing worker who has no money or status in the Pakeha world, but he is a repository of much of our mana because of his knowledge. The models that are held up to our kids are not people like him but people like Brierley, so if the culture is not

held up as worthy of respect, kids will not respect it".

Maori men today have absorbed the notions of Victorian patriarchy and confuse being "real men" with machismo, two very different concepts. Violence in the home, no money and criminal behaviour all stem from colonialism, in Jackson's view, and when faced with the Pakeha justice system, things often go from bad to worse.

"The justice system deals with Maori offenders in a way that is inappropriate", says Jackson. "By isolating them from the whanau it adds to an existing sense of unworth, reinforces the Pakeha status quo and just aggravates the alienation that caused the offending, without finding out why the offence took place."

PAKEHA who claim that sitting round and talking about the whys and wherefores is the soft option anger Jackson, and show an appalling ignorance of how a Maori systen would work. He thinks that the fuss that greeted his suggestion of a parallel process is an almost deliberate obfuscation.

"A senior barrister has dismissed a parallel system as being 'unworkably bizarre' — how could you have a parallel High Court or Court of Appeal — but that isn't what we want. Comments like that confuse the sanction that might be imposed with the efficacy of the process itself. The most important thing is that the victim feels that justice has been done and his or her case has been properly dealt with.

"The justice system provides a sense of order and security within the community. But if you question the mystique of an exclusive profession with its own language, you arouse feelings of antagonism. Talk of a parallel system seems to be challenging the mythical ideal of 'one law for all' but we've always said that justice is justice.

"Pakeha confuse the law itself with the process of achieving justice, so for them, one law means one process. We believe we shouldn't talk about one law in terms of process but in terms of justice and there are different ways of achieving justice".

Wouldn't a separate judicial process for Maori mean the world would scream apartheid? Jackson refutes that because, he says, to be separate can also mean to be unique and different and for Maori to exercise their own procedures and processes is simply to claim a difference that the treaty acknowledged, recognised and respected.

If both Maori and Pakeha get to a just outcome, even by slightly different routes there is still equality before the law and one law for all.

What happens when "crosscultural" offending occurs? The American Navajo Indian people offer a solution. If the victim and offender are Navajo, the crime is dealt with in a Navajo court. If the offender is Navajo and the victim Pakeha then the victim chooses the legal process, either Navajo or state, and if the offender is Pakeha and the victim Navajo it's tried in the state court.

There are some variations and permutations and through negotiation there is now a statute called the Major Crimes Act which allows for serious crimes to be tried by the state, no matter what.

"I believe that it's possible for the two parties to the treaty: the iwi and the Crown to sit down and work out similar guidelines for New Zealand", says Moana Jackson.

He's optimistic it might happen because despite the negative reaction to the report from the Pakeha power structure, he knows it's being talked about on marae all over the country.

Would such a system break the pattern of violent offending? Jackson maintains that if a young person is surrounded by his own people when he is called to account for his offence, even if he later goes to prison, it will have an effect on his re-offending. A judicial system can't solve chronic offending but it can attempt to provide the environment: a mixture of shame and whanau involvement in which subsequent offending may be less likely.

Creating a parallel process will take some years. People have to be trained and a proper structure needs to be set up.

Jackson sees it as the only way for the problem of Maori crime to be addressed.

"One of the old people said to me that we have to remember that Maori never breached the treaty, the Crown did, so most of the redress has to come from the Crown. Also we are stuck with two unchanging facts: we are all here and neither group is going away, so if we don't make it work the consequences are just too horrible to contemplate.

"Making it work doesn't seem to be a difficult process — it's just one party recognising the just claims and rights of another party. If they're not recognised then any notion of law is a farce and I don't believe any society can continue to function on the basis of injustices that are not being addressed, so change will come or it'll be trust upon us".