INTRODUCTION

BY THE RIGHT HON. SIR ROBIN COOKE*

In February 1989 the editorial committee of the *New Zealand Universities Law Review* decided to publish in 1990 a commemorative issue to mark the 150th anniversary of the signing of the Treaty of Waitangi. When the convener, Dr Peter Spiller, invited me to write an introduction, my acceptance was subject to a proviso and a caveat.

The proviso was that sufficiently scholarly contributions were forthcoming. The reason for stipulating it flows from the very status of the Treaty, a status not necessarily yet finally determined in any strict legal sense but undeniably growing with the years. The observation of the Chief Justice of 1877 that in relation to the cession of sovereignty the Treaty was a simple nullity probably never was good international law, as Sir Kenneth Keith brings out in his essay, and now stands as a sad and doubtless undeserved symbol of Sir James Prendergast's judicial work. No lawyer would dare to dismiss the Treaty in that way in 1990. And, no matter precisely how it should be categorised in law, it has taken on in fact a vitality and potency of its own. For Maori its mana has always been high. Now there can be few Pakeha who in their hearts scoff at it or underrate its practical significance. Some see it as a threat, and political capital is made out of that point of view; but in truth theirs is a tacit tribute to the Treaty, a reluctant recognition that it has become part of the essence of the national life. Even its critics have to accept that it is a foundation document. It is simply the most important document in New Zealand's history.

Occupying as it does that position of central significance, and concerned as it is with race relations, the Treaty can generate emotional, even passionate, reactions and unbalanced arguments which are far less than intellectually honest. In stipulating for scholarship, I wished to make sure that this *Review* marked the sesquicentenary by contributions objective, well-informed and likely to be of more than transient value. The essays meet these tests, as the calibre of the authors would suggest. All four are carefully written and balanced. They cover much common ground, yet they represent attitudes significantly and in some respects subtly different.

The book review is different again. It is also a very lively contribution to debate. The commemorative issue of the Review would itself have failed to be balanced if it had omitted a fair sample of this kind of approach; I am glad that it has been included.

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The field remains littered with unresolved issues, and experience indicates that the chances of making remarks which will not be quoted out of context are not good. So in an especially acute way the putting together of this introduction presents the dilemma confronting *any* professional judge who tries to answer, within reason, claims that in modern society the judiciary should "speak out" more. On the one hand there are the pointlessness and tedium of the anodyne: on the other there is the risk of compromising judicial impartiality. Let it be clear therefore that what follows is not clothed with the authority of the judicial gown, nor would any opinions expressed or thought to be hinted at necessarily survive the salutary experience, denied to article writers, of hearing the points argued on both sides in court by competent counsel.

The growth in the de facto stature of the Treaty has been accompanied by rapidly increasing interest on the part of practising and academic lawyers of standing. All the essayists are leaders of legal thought about the Waitangi Treaty within New Zealand at the present day. They are not of course *all* the leaders. At the cost of seeming invidious a few other academic names should perhaps be specifically mentioned, such as Professor F. M. Brookfield of Auckland University, Mr R. P. Boast of Victoria University, and among the expatriates Dr Paul McHugh of Sidney Sussex College, Cambridge, and Mr Benedict Kingsbury of Exeter College, Oxford. Their influence is reflected by citations in the essays. Fortunately the specialist practitioners on both the Maori and the Crown sides are in the main so well-known that they will need no advertisement in the pages of this Review. One can safely refrain from the patronage of particulars.

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enough by historians and others in the past. It has since then been used by Parliament in a 1988 Amendment to the Treaty of Waitangi Act 1975 whereby, in considering the suitability of persons for appointment to the Waitangi Tribunal, the Minister of Maori Affairs is directed to have regard to "the partnership between the two parties to the Treaty".

The judges did understand that the parties to the Treaty were not in fact embarking on a business in common with a view to profit. They also understood that shares in partnerships vary. After all, much legal pratice in New Zealand is carried on by partnerships in which the shares are not equal. It seems, though, that the group of officials thought that the analogy suggested otherwise. Instead they formulated "the Principle of Co-operation" of which, it is said, "the outcome . . . will be partnership", and four other principles. Further, Mr Frame's paper analyses co-operation into seven characteristics or conditions, to be supplemented by the ancillary measures of "(A) Inter-party solicitude" and "(B) Various educational and cultural measures". I do not know that the vision of New Zealand as a co-op has any advantage in clarity over the idea of a partnership between races.

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Such a classification allows room for a document which in fact brought about the foundation of the state but may not hitherto have been accorded any special status in law, or indeed any status in law at all, to become elevated into an approximation of a fundamental charter. Only an approximation, presumably, for in the uncontrolled constitution further change or adjustment is never ruled out. While this theory and its implications are not easily formulated or grasped, they can be said to be no more difficult and no less logical than the theory that the New Zealand polity today depends essentially on events that occurred in England in 1688.

Dr Williams complements his theory by some empirical thoughts. He thinks that the composition of the High Court and the Court of Appeal

benches may well have an influence on how much further the judicial contribution to constitutionalising the Treaty will be taken. It is a possibility that, regrettably, can probably not now be ignored and one that lends strength to the argument for a Judicial Commission concerned at any rate with appointments. He predicts nevertheless that Maori pressure for upholding the Treaty will continue irrespective of changes in government or on the bench. He draws attention to a risk that without continual practical successes Maori litigants will lose faith in the court and tribunal system. Perhaps that thought expressed by him should be balanced by saying that I see not the slightest likelihood that the bench, however composed, would be blackmailed into decisions against the merits by any such consideration. It has not happened in Canada or the United States.

In her stimulating book review Annie Mikaere evidently approves of the concept of partnership but she shoots a flight of arrows at various contributors to Sir Hugh Kawharu's collection of essays, at the courts, the Waitangi Tribunal, and even at such academics as Dr McHugh—whom she charges with careful tailoring. Commonly it is thought appropriate for judgments to make reference to the arguments and evidence presented to the court, and the judges of the Court of Appeal did so in 1987 in relation to the terms of the Treaty. In the course of the judgments the Kawharu translation, differing from the official English version, was set out in full and attention was drawn to the opinions of previous authorities (including Chief Judge Durie) that there were ambiguities and unsettled questions. Non-judicial readers of this review may gain a sense of the pitfalls of judicial work if they consider one of Annie Mikaere's comments: "in rather similar fashion to many of the Pakeha contributors to this book, the judges bandied about terms such as rangatiratanga, almost as though they were qualified to decide what they meant". Still, she adds spice to the mixture.

* * *

This introduction is written in Oxford, within the hospitable walls of All Souls, the College of Blackstone, Dicey, Anson and Simon, all of whom expressed opinions having a distinct (and in Viscount Simon's case direct) bearing on the Treaty of Waitangi and the law. In introducing his *Commentaries*, Blackstone wrote, on the one hand, instancing the crime of murder:

> Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

Bruce, Just in case you haven't got it

Hugh

NZ U Law Review 1990

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Such a classification allows room for a document which in fact brought about the foundation of the state but may not hitherto have been accorded any special status in law, or indeed any status in law at all, to become elevated into an approximation of a fundamental charter. Only an approximation, presumably, for in the uncontrolled constitution further change or adjustment is never ruled out. While this theory and its implications are not easily formulated or grasped, they can be said to be no more difficult and no less logical than the theory that the New Zealand polity today depends essentially on events that occurred in England in 1688.

Dr Williams complements his theory by some empirical thoughts. He thinks that the composition of the High Court and the Court of Appeal

benches may well have an influence on how much further the judicial contribution to constitutionalising the Treaty will be taken. It is a possibility that, regrettably, can probably not now be ignored and one that lends strength to the argument for a Judicial Commission concerned at any rate with appointments. He predicts nevertheless that Maori pressure for upholding the Treaty will continue irrespective of changes in government or on the bench. He draws attention to a risk that without continual practical successes Maori litigants will lose faith in the court and tribunal system. Perhaps that thought expressed by him should be balanced by saying that I see not the slightest likelihood that the bench, however composed, would be blackmailed into decisions against the merits by any such consideration. It has not happened in Canada or the United States.

In her stimulating book review Annie Mikaere evidently approves of the concept of partnership but she shoots a flight of arrows at various contributors to Sir Hugh Kawharu's collection of essays, at the courts, the Waitangi Tribunal, and even at such academics as Dr McHugh—whom she charges with careful tailoring. Commonly it is thought appropriate for judgments to make reference to the arguments and evidence presented to the court, and the judges of the Court of Appeal did so in 1987 in relation to the terms of the Treaty. In the course of the judgments the Kawharu translation, differing from the official English version, was set out in full and attention was drawn to the opinions of previous authorities (including Chief Judge Durie) that there were ambiguities and unsettled questions. Non-judicial readers of this review may gain a sense of the pitfalls of judicial work if they consider one of Annie Mikaere's comments: "in rather similar fashion to many of the Pakeha contributors to this book, the judges bandied about terms such as rangatiratanga, almost as though they were qualified to decide what they meant". Still, she adds spice to the mixture.

* * *

This introduction is written in Oxford, within the hospitable walls of All Souls, the College of Blackstone, Dicey, Anson and Simon, all of whom expressed opinions having a distinct (and in Viscount Simon's case direct) bearing on the Treaty of Waitangi and the law. In introducing his *Commentaries*, Blackstone wrote, on the one hand, instancing the crime of murder:

> Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

Yet, on the other hand, referring to all forms of government, he wrote:

> However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside.

One day, as I sat at a reading desk admiring the matchless vista of the Codrington Library, the shade of Blackstone seemed to come down from his statue. "I must own", he said, "that I did not presume to enter upon the business of reconciling these truths. Pray remember that my lectures were composed for gentlemen, such as should understand that it may be neither becoming nor wise to enter far into the most profound of questions. And if the parliament and the judges are forever mindful of the restraint on the part of either which is fitting to preserve equilibrium in society, those questions may safely remain unagitated. I do not doubt but that your Treaty of Waitangi has become in some sense a grand constitutional compact akin to our Magna Charta".

"Would you add anything, Spirit?" I ventured. "Only", he replied before vanishing, "something concerning that American professor, connected in some manner with a place Chicago, who wrote in introducing a facsimile of the first edition of my *Commentaries* that I was undoubtedly a dull man and an undistinguished and uninteresting judge. Be it known that my lectures were not for such as he".

THE CONSTITUTIONAL STATUS OF THE TREATY OF WAITANGI: AN HISTORICAL PERSPECTIVE

BY DAVID V. WILLIAMS*

I. 1688 AND ALL THAT

> Having therefore an intire confidence that his said Highnesse the Prince of Orange will perfect the deliverance soe farr advanced by him and will still preserve them from the violation of their rights which they have here asserted and from all other attempts upon their religion rights and liberties. The said lords spirituall and temporall and commons assembled at Westminster doe resolve that William and Mary Prince and Princesse of Orange be and be declared King and Queene of England France and Ireland and the dominions thereunto belonging to hold the crowne and royall dignity of the said kingdomes and dominions to them the said prince and princesse . . .
>
> Bill of Rights (1688).

The above quoted resolution from the Bill of Rights (1688) was probably the most important step in the process whereby the de facto authority exercised by the Prince of Orange, after the flight of King James II, was transmuted into an assertion that King William and Queen Mary were the lawful sovereigns of England. There is an argument, convincing to many legal positivists, that the ultimate constitutional norm for what is now known as the United Kingdom may be traced to the events of the "Glorious Revolution" and the actions of the Convention Parliament which met in January and February 1688.[1] As Macaulay put it:[2]

> It was plain that the Convention was the fountainhead from which the authority of all future parliaments must be derived, and that on the validity of the votes of the Convention must depend the validity of every future statute.

If one adopts Kelsen's analysis of the formal structure of law as a hierarchical system of norms, then one may trace the validity of the constitutional structures of present-day New Zealand back to England in 1688 without any breaks in the links of the norm structures.[3] Thus the legislative powers of parliament set out in the Constitution Act 1986 depend for their validity upon earlier New Zealand enactments such as the New Zealand Constitution Amendment Act 1973 and the Statute of Westminster Adoption Act 1947. They also depend upon imperial enactments such as the New Zealand Constitution (Amendment) Act 1947, the Statute of Westminster 1931, the New Zealand Constitution Act 1852 and the New

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1 Until the Calendar (New Style) Act 1750 the year legally commenced on 25 March. It is incorrect to date the Bill of Rights as 1689.

2 Quoted in *Lloyd's Introduction to Jurisprudence* (5th ed. 1985) 333, n. 67.

3 *Pace* doubts expressed as to whether Queen Elizabeth II was, being female, the sole heir to King George VI: Farran, "The Law of the Accession" (1953) 16 M.L.R. 140.