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

* B.A., LL.B. (V.U.W.), B.C.L., Dip. Theol. (Oxon.), Ph.D. (D'Salaam); Senior Lecturer in Law, University of Auckland.

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.

Zealand Government Act 1846, thence to imperial legislation constituting the Colony of New South Wales and its dependencies (9 Geo. IV, c. 83; 3 & 4 Vict., c. 62), and eventually one reaches back to the revolution preceding the Convention Parliament 1688. The constitution of the superior courts in New Zealand is continued by the Judicature Act 1908 (as amended) and may be traced to the Supreme Court Ordinance 1841 and thence via 3 & 4 Vict., c. 62 back along the same norm hierarchy. Likewise one may trace the authority of the Executive Council in various Letters Patent and statutes back to their English historical source. The general law applicable in this jurisdiction since 1840 has always been English law. The English Laws Act 1858 retrospectively declared that the laws of England as existing on 14 January 1840, so far as applicable to the circumstances of New Zealand, were in force and shall be deemed to continue in force in New Zealand. The Imperial Laws Application Act 1988 has now detailed the imperial enactments and subordinate legislation which remain in force and, by section 5, it stipulated that the common law of England (including the principles and rules of equity) shall continue to be part of the laws of New Zealand.

In view of the thrust of these opening remarks, it is of interest to note that section 22 of the Constitution Act 1986 has a notation which explicitly invokes the Bill of Rights (1688). Moreover New Zealanders were firmly reminded of that ancient promulgation of the rights and liberties of the subject when, in 1975, Wild C. J. held that the then Prime Minister had acted illegally in purporting to suspend an Act of Parliament by a public announcement and press statement rather than by the immediate passage of a repealing Act.[4] Yet it is probable that few lawyers and even fewer citizens would be disposed to argue for the legitimacy of the modern nation state of New Zealand on the basis of concepts and norms which assumed the moral legitimacy and indeed moral superiority of laws and values derived exclusively from Britain at the height of its short-lived period as the world's most significant imperial power. However important the Bill of Rights (1688) is for the doctrine of parliamentary sovereignty in a constitutional monarchy which has been inherited here, few would join with Macaulay in seeing it as the foundation or fountainhead of *this* nation's laws and government. Such an entirely exogenous derivation of constitutional legitimacy is no longer acceptable in this South Pacific nation's governing ideology. Such was not always the case.

II. The Loyal Dominion

The Dominion of New Zealand was for a long time content to be "the most loyal dominion" whose governments had no desire to be free of constitutional limitations on their power and authority. Threats to the unity

[4] *Fitzgerald* v. *Muldoon* [1976] N.Z.L.R. 615.

of the British Empire, including the Statute of Westminster 1931 itself, were deprecated. Even after two or more generations had been born in New Zealand, Pakeha settler families spoke of the United Kingdom as "Home" even though they had never visited the "Mother Country". Writing in 1938, the historian Foden argued that the procedure of treating with Maori chiefs for the cession of sovereignty was a matter of "domestic and internal policy" only and that this policy was irrelevant to the legal status of New Zealand as a colony annexed by an Act of State:[5]

> New Zealand joined the Empire as the result of the Act of State by which it was added to New South Wales in 1839. The Act of State was based on the fact of settlement which rendered British intervention a matter of imperative necessity.

The legal instrument Foden was relying upon was the issuing of Letters Patent on 15 June 1839 which enlarged New South Wales to include the New Zealand islands "which is or may be acquired in sovereignty by Her Majesty". The Instructions to Hobson, his commissioning as Consul, his swearing of the oaths of office as Lieutenant-Governor, the Proclamations concerning New Zealand issued by Governor Gipps in Sydney, and the Proclamations issued by Hobson on his arrival in New Zealand all pre-dated the Waitangi hui to consider a treaty.[6] Their validity and the validity of all that has followed in constitutional history were traced by Foden exclusively to the 15 June 1839 Letters Patent.

Politically, economically and socially things have changed, new perspectives on our history have become fashionable and inevitably, though lagging considerably behind, there have been legal and constitutional reforms. New Zealand citizenship has replaced British nationality, the Sovereign is now entitled the Queen in right of New Zealand, the legislature has full power to make laws, and to all intents and purposes the constitution has been "patriated". The person of the Sovereign, the national flag, and the retention of the Judicial Committee of the Privy Council as the court of ultimate resort are vestigial remnants of the old governing ideology of loyalty to the ideals of the British Empire. In the redefinitions and reinterpretations of national history that have taken place as a new governing ideology emerges there has been scope for controversy. A particularly potent source of intense controversy for some years now has concerned the significance and status of the Treaty of Waitangi.

III. Maori Perceptions

Maori perceptions as to the paramount importance of the Treaty of Waitangi have been clear and unambiguous almost without exception from

[5] Foden, *The Constitutional Development of New Zealand in the First Decade (1839-1849)* (1938) 124.

[6] See Williams, "The Annexation of New Zealand to New South Wales in 1840" (1985) 2 (2) Aust. J. of L. & Soc. 41 at 42.

the earliest period of the New Zealand colony to the current era. The resolutions of the national hui held on Turangawaewae marae in 1984 represent the consensus views of the largest and most representative pan-tribal hui to be held in recent times. Three resolutions on the status of the Treaty of Waitangi read as follows:[7]

1. Ko te Tiriti o Waitangi he pukapuka e whakapuaki ana i te turanga o te Maori hei tangata whenua mo Aotearoa.
2. Ko te Tiriti o Waitangi hei kaupapa muru i nga nawe e pa ana ki nga whenua, ki nga wai, ki nga taunga-ika a ki nga tikanga a te iwi Maori.
3. E whakaae ana tenei hui ko to tatou mana tangata, mana wairua, mana whenua kei runga ake i te mana o te Tiriti o Waitangi no te mea ko te Tiriti o Waitangi he tauira kau no te mana Maori Motuhake.

1. The Treaty of Waitangi is a document which articulates the status of Maori as tangata whenua of Aotearoa.
2. The Treaty of Waitangi shall be the basis for claims in respect to the land, forests, water, fisheries and human rights of the Maori people.
3. The Treaty of Waitangi is a symbol which reflects Te Mana Maori Motuhake. We declare that our Mana Tangata, Mana Wairua, Mana Whenua, supersedes the Treaty of Waitangi.

Further resolutions on constitutional reform proposals included:[8]

6. Kia whakaturia he runanga he mea pooti na te iwi Maori, me tauiwi, engari kia taurite nga mema Maori me nga mema tauiwi. Ko te mahi a tenei runanga:
   (a) He takawaenga i te Paremata me te Kawana Tianara kia taurite ai nga ture katoa a te Paremata. Ki te wairua o te Tiriti o Waitangi.
   (b) Ki te whakau i nga tumanako a te Runanga o Waitangi, a, ki te whakatakoto tikanga Kapeneheihana hei whainga ma te Kawanatanga.

6. That a Body fifty percent elected by Maori people and fifty percent elected by the remainder be established:
   (a) to sit between Parliament and the Governor General to ensure that all proposed legislation is consistent with the Treaty of Waitangi
   and:
   (b) to rule on recommendations from the Waitangi Tribunal and to formulate any compensation programmes to be implemented by the Government.

[7] Blank, Henare & Williams (eds.), *He Korero Mo Waitangi 1984* (1985) 2-3.
[8] Ibid., 4-5.

7. That a law be introduced to require that all proposed legislation be consistent with the Treaty of Waitangi.

On the then current proposal to incorporate the Treaty in a New Zealand Bill of Rights along the lines outlined in the 1985 *White Paper*, this was the view expressed:[9]

> E noho awangawanga ana te hui nei mo te PIRE MANA-TANGATA e whiriwhiria nei e te KAWANATANGA, no te mea e ki ana te katoa, he PIRE tonu ta te iwi Maori, ara, ko TE TIRITI O WAITANGI.
>
> This hui is suspicious of the passing of a Bill of Rights because we believe we already have one, i.e. the Treaty of Waitangi.

These resolutions represent a continuity of Maori understandings about the Treaty which have been expressed throughout the fifteen decades since 1840. A selection of some of the more significant statements putting the mana of the Treaty of Waitangi at the forefront of Maori claims would include the following:[10]

(i) letter to the Queen written by Te Wherowhero and four other Waikato chiefs in 1847;
(ii) the Covenant of Kohimarama and other resolutions of the Kohimarama hui, 1860;
(iii) the Conferences held at Orakei in 1880 and 1881;
(iv) the deputations to Queen Victoria in London led by Taiwhanga (Ngapuhi) in 1882 and by King Tawhiao (Tainui) in 1884;
(v) the Kotahitanga Parliaments in the late 1880s and 1890s;
(vi) another King Movement deputation to London led by King Te Rata, 1913;
(vii) the T. W. Ratana petition to the British monarch, 1924 followed by the Ratana–Labour Party electoral alliance, 1931;
(viii) the Memorial of the Maori Land March 1975; and
(ix) the affidavits of Sir James Henare and others for the Court of Appeal, 1987.

The annual Appendices to the Journal of the House of Representatives bear witness to the sustained efforts of Maori petitioners on a wide range of issues and, whatever the specific issue involved, a general invocation of Maori or tribal rights being derived from the Treaty appear time and time again in these petitions. Only on rare occasions have Maori leaders publicly expressed doubts about Treaty-driven arguments for the betterment of Maori people. Sir Apirana Ngata's 1922 "explanation" of the Treaty texts was meant to encourage Maori to cease "nga wawata" (wishful thinking, day dreaming) and to accept the reality that chiefly authority had been transferred for ever to the government.[11] Mr W. Peters

[9] Ibid., 8-9.
[10] See Orange, *The Treaty of Waitangi* (1987) 128; 145-150; 195; 205-216; 219-225; 228; 232-234; 248 and 254.
[11] Ngata, *Te Tiriti o Waitangi: He Wakamarama* (1922/1963) 21-22.

has expressed similar sentiments recently. Generally, however, even the most conservative Maori leaders have claimed the mana of the Treaty as the proper starting point for all discussions of matters Maori—as, for example, in the New Zealand Maori Council's *Kaupapa, Te Wahanga Tuatahi*[12] which was produced in 1983 to provide guidelines for legislation on Maori land.

IV. LEGAL ORTHODOXY

The paramountcy of the Treaty in Maori understandings of the foundations of governmental legitimacy was not in line with the legal orthodoxy which prevailed until very recently and which contributed to a minimising of the Treaty's significance in the governing ideology. In general, pre-1975 legal orthodoxy took one of two approaches.

First, there was reliance on the Act of State doctrine, which was derived from English law relating to protectorates, whereby it was left to the conscience of the Crown itself to determine what is justice in dealings between the Crown and indigenous inhabitants. This was applied by New Zealand courts in notable decisions such as *Wi Parata* v. *Bishop of Wellington*[13] and *Nireaha Tamaki* v. *Baker*[14] so as to deny a remedy to Maori claimants to land who sought to go behind Crown grants and to impeach the Crown's purported extinguishment of Maori title. In the oft-quoted words of Prendergast C. J., the Treaty of Waitangi was declared to be "a simple nullity". The reasoning in these judgments was deprecated by the Judicial Committee of the Privy Council in several opinions, but *Wi Parata* was not actually overruled and the reversal by the Board of *Nireaha Tamaki* v. *Baker* was itself immediately nullified by an Act of Parliament.[15] It did not suit the Crown's conscience to allow litigious Maori such as Nireaha Tamaki the opportunity for judicial scrutiny of the Crown's land acquisition procedures.[16] Rather, the *Wi Parata* outcome was codified by Sir John Salmond in sections 84 to 86 of the Native Land Act 1909[17] and it remains law to this day in the Maori Affairs Act 1953 (though threatened with repeal in the most recent of the many versions of the Maori Affairs Bill tabled in the House of Representatives over the last twelve years, but not yet enacted). The *Wi Parata* dismissal of the Treaty continued to be relied upon in legal circles in this country despite the Privy Council doubts. Indeed, as late as 1971, the leading article in

[12] New Zealand Maori Council, *Kaupapa, Te Wahanga Tuatahi* (1983) 2-5.
[13] (1877) 3 N.Z.Jur. (N.S.) 72.
[14] (1894) 12 N.Z.L.R. 483.
[15] (1901) N.Z.P.C.C. 371; Native Land Claims Adjustment and Laws Amendment Act 1901, s. 27 and First Schedule.
[16] See the remarkable statutory discontinuance of Supreme Court actions filed by Nireaha Tamaki and others: Maori Land Claims Adjustment and Laws Amendment Act 1904, s. 4.
[17] See Salmond, "Notes on the History of Native—Land Legislation" in *The Public Acts of New Zealand (Reprint) 1908-1931)* (1932) vi, 87 at 88-91.

an issue of the *New Zealand Law Journal* was entitled "The Non-Treaty of Waitangi". It quoted with approval Prendergast C. J.'s simple nullity observation and it concluded with these forthright sentences:[18]

> To summarise: considering only whether it is a binding *legal document* and ignoring any "spiritual" or emotional value it may have, it is submitted that the Treaty of Waitangi is worthless and of no effect. It is a non-treaty. Moreover, if people could desist from casting 130 years into the past for an emotional prop, and show even greater determination in grappling with the present day racial problems of our nation, it would also become, at long last, a non-issue.

Secondly, legal orthodoxy has admitted for the sake of argument that the Treaty of Waitangi either is, or may possibly be, a valid treaty at international law, but that no treaty is enforceable in the ordinary courts of the land as part of municipal law unless and until legislative provision has incorporated it into the domestic law which is applied and enforced by courts. The general proposition was clearly put in the leading case of *Attorney-General for Canada* v. *Attorney-General for Ontario* when Lord Atkin opined:[19]

> [T]here is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations if they entail alteration of the existing domestic law, requires legislative action.

The requirement of legislative incorporation featured in the reasoning of several judgments delivered by the full bench of the Court of Appeal in *Tamihana Korokai* v. *Solicitor-General*. Stout C. J. managed to gloss the *Wi Parata* decision so as to conform it to the legislative recognition rule:[20]

> To interfere with Native lands merely because they are Native lands and without compensation would, of course, be such an action of spoliation and tyranny that this Court ought not to assume it to be possible in any civilized community.
>
> The decision of *Wi Parata* v. *The Bishop of Wellington* does not derogate from that position. It only emphasized the decison in *Reg.* v. *Symonds* that the Supreme Court could take no cognizance of treaty rights not embodied in a statute and that Native customary title was a kind of tenure that the Court could not deal with. In the case of *Nireaha Tamaki* v. *Baker* the Judicial Committee of the Privy Council recognised, however, that the Natives had rights under our statute law to their customary lands.

Then in 1941 the Privy Council put the legislative recognition rule at the core of its reasoning in dismissing an appeal by the paramount chief of Ngati Tuwharetoa who had challenged a statutory charge in favour of the respondent Land Board over ancestral tribal land as *ultra vires* because it was inconsistent with the land guarantees of the Treaty of

[18] Molloy, "The Non-Treaty of Waitangi" [1971] N.Z.L.J. 193 at 196.
[19] [1937] A.C. 326 at 347.
[20] (1912) 32 N.Z.L.R. 321 at 344.

Waitangi.[21] Three statements from the judgment of Viscount Simon L. C. for the Board in that case have been identified by Somers J. in 1987 as expressing the received view of the law:[22]

> It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law . . .
>
> So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him . . .
>
> . . . even the statutory incorporation of the second article of the treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactments.

V. NEW ALIGNMENTS

Two streams of social and cultural development have converged in the last fifteen years resulting in a real questioning of the legal orthodoxy set out above. First, as mentioned in a previous section, the dominant ideology has moved from loyal subservience to the ideals of the British Empire to a celebration of the unique contributions of New Zealand as a separate independent nation state. Secondly, since about the time of the Maori Land March in 1975 there has been a cultural and political renaissance within Maoridom and very strong messages have been delivered to the Pakeha majority that Maori people are no longer content to acquiesce in their marginalised position in the lower peripheries of the socio-economic indicia for success in this society. In particular, a broad spectrum of Maori opinion has expressed exasperation with being treated merely as one among a number of ethnic minorities in a multi-racial society (or, in more current argot—a multi-cultural society). Rather, the status of Maori iwi as nga tangata whenua in a bicultural nation has been insisted upon and a more advanced position of Maori nationalism has gone further in asserting that the sovereignty and rangatiratanga of te iwi Maori has never been ceded. Thus Pakeha and Maori have both honed in on the Treaty of Waitangi—Pakeha seeking an autochthonous legitimation of the existing constitutional structures and Maori seeking group autonomy and self-determination either within or without those structures. It is not surprising, therefore, to find that debates about the Treaty frequently involve people "talking past each other".[23] Pakeha tend to rely almost exclusively on the English language text and in particular on the absolute cession of sovereignty in Article 1. For example the 1989 "Principles for Crown Action on the Treaty of Waitangi" takes as its starting point the principle

[21] *Te Heu Heu Tukino* v. *Aotea District Maori Land Board* [1941] N.Z.L.R. 590.
[22] *New Zealand Maori Council* v. *Attorney-General* [1987] 1 N.Z.L.R. 641 at 691.
[23] Metge and Kinloch, *Talking Past Each Other: Problems of Cross Cultural Communications* (1984).

that "the first Article of the Treaty gives expression to the right of the Crown to make laws and its obligation to govern in accordance with constitutional process".[24] Maori tend to rely upon the Maori text of the Treaty and in particular the guarantee of te tino rangatiratanga in Article II. Nganeko Kaihau Minhinnick, representing Awaroa ki Manuka, writes that:[25]

> . . . the ideal option for tangata whenua would be to have full authority over lands and waterways. This would truly reflect the status of the tangata whenua and recognise their rights in terms of Article II of the Treaty of Waitangi . . .

In the competing claims to secure the constitutional high ground one is reminded of Lewis Caroll's Humpty-Dumpty principle: "When I use a word it means exactly what I choose it to mean, neither more nor less".[26] Thus the Maori cultural milieu from which the concept of tangata whenua arises has been overlooked by those who claim that Pakeha are now tangata whenua. This is nowhere more evident than in the 1985 White Paper *A Bill of Rights for New Zealand* in its section on "The Treaty and the Pakeha":[27]

> 5.11 For the Treaty of Waitangi is more than just a document of importance only to the Maori. It is part of the essential inheritance of the Pakeha New Zealander also . . .
>
> 5.14 Thus in one sense our right as a nation to legislate, to govern and to dispense justice can be said to spring from the compact between Crown and Maori in 1840. It gives legitimacy to the presence of the Pakeha, not as a conqueror or interloper, but as a New Zealander, part of a new tangata whenua.

Less confusing than the notion of "a new tangata whenua" is the term "tangata tiriti" which has been popularised by Chief Judge Durie and adopted by the New Zealand 1990 Commission.[28] It is used to describe all non-Maori New Zealanders as people with the full right to be in this land by virtue of the Treaty.

Clearly, thinking about the Treaty has moved a good distance from its dismissal as "a simple nullity" or "a praiseworthy device for amusing and pacifying savages". In this sesquicentennial year, New Zealand 1990 Commission publications have spoken of the Treaty as "our founding document" and "the symbol of our life together as a nation".[29] The ideological paradigm shift ought not to be attributed merely to the rhetoric

[24] Department of Justice, "Principles for Crown Action on the Treaty of Waitangi" (1989) 8.
[25] Minhinnick, *Kaitiaki* (1989) 19.
[26] Biggs, "Humpty-Dumpty and the Treaty of Waitangi" in Kawharu (ed.) *Waitangi, Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989) 300 at 304.
[27] *A Bill of Rights for New Zealand, A White Paper* (1985) 36-37. On passage of time being an alternative legitimation of the Pakeha presence as tangata whenua, see Brookfield, "The New Zealand Constitution: the search for legitimacy", in Kawharu, op. cit. 5.
[28] New Zealand 1990, "The Treaty of Waitangi is not just a Bill of Rights for Maori. It is a Bill of Rights for Pakeha too." *New Zealand Herald*, January 24, 1990, section 3, 8; Durie, "A Special Relationship: Tangata Whenua and Tangata Tiriti", in Bower (ed.), *New Zealand 1990, Official Souvenir Publication* (1989) 18.
[29] New Zealand 1990, *The Treaty of Waitangi* (n.d.) 1, 3.

of the fourth Labour Government. In a keynote address to a Planning Council seminar in 1988, Sir Peter Elworthy, a former president of Federated Farmers, spoke on "Pakeha Perspectives on the Treaty" and he expressed this view:[30]

> The Treaty has *now* moved us into a new alignment. It challenges us to affirm common ideals. It is a profoundly moral document and after all the law is the servant of morality and not the other way round.

To what extent, then, has there been a new alignment in legal orthodoxy?

VI. UNCONTROLLED CONSTITUTION

Diverse conceptual labels continue to be applied to the Treaty of Waitangi. In classical Maori thinking it is he taonga tapu, in a Christian understanding it is considered a covenant, some international lawyers declare that it is a treaty of cession, the private law concept of contract has been applied to it, and the political philosopher's notion of social contract has also been used. The focus of the remainder of this article is on public law categories. In 1984 the Waitangi Tribunal claimed that "a remarkable result" of the Treaty of Waitangi Act 1975 had been that:[31]

> From being "a simple nullity" the Treaty of Waitangi has become a document approaching the status of a constitutional instrument so far as Maoris are concerned.

By 1988 the same Tribunal had arrived at the more emphatic statement that the Treaty should be viewed "as a basic constitutional document."[32] Attrill, in a recently completed Harvard dissertation, has reviewed the work of the Waitangi Tribunal and also recent judicial developments in the superior courts. He argues that it is incorrect to sideline these developments "as merely a further application of the debilitating statutory recognition rule". Rather, he writes:[33]

> . . . the new judicial policy towards the Treaty may itself be seen as having a constitutional dimension . . . [The] courts are in the process of elevating the Treaty to the status of a canon of statutory construction on a par with other fundamental liberties and values . . .

In assessing this comment, and putting it into historical context, it is useful to reiterate the flexible nature of constitutional arrangements in this nation. Apposite words may be found in a Privy Council opinion delivered by Lord Birkenhead L. C. in 1920:[34]

[30] N.Z. Planning Council, *Pakeha Perspectives on the Treaty* (1988) 11 (emphasis in the original text).
[31] *Finding of the Waitangi Tribunal on the Kaituna Claim* (Wai. 4) (1984) para. 6.4, 26.
[32] *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai. 22) (1988) para. 10.4, 189.
[33] Attrill, "Aspects of the Treaty of Waitangi in the Law and Constitution of New Zealand" (unpub. written work requirement, LL.M., Harvard, 1989) 86.
[34] *McCawley* v. *The King* [1920] A.C. 691 at 703.

> Some communities, and notably Great Britain, have not in the framing of constitutions felt it necessary, or thought it useful, to shackle the complete independence of their successors.
>
> . . . It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned judges in the Court below said that, according to the appellant, the constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject-matter.

There can be no doubt that the constitution of New Zealand is uncontrolled in Lord Birkenhead's sense, and that in an uncontrolled constitution there is the freedom to amend and develop constitutional norms in a variety of ways including the remoulding of constitutional conventions by reference to political praxis, the development of rules of common law by judicial law reform and legislative enactment. In an uncontrolled constitution, therefore, it is perfectly easy to incorporate new norms into the constitution, and the status of particular rules or documents may change over the course of time. Thus the constitutional status of the Judges' Rules relating to police interviewing and interrogations of criminal suspects does not depend solely on the historical circumstances concerning their original promulgation by English judges in 1912. New Zealand case-law as to their relevance and applicability in this jurisdiction governs current practice as to the admissibility of evidence and, in cases of serious violations, whether convictions may be quashed on appeal.[35] The fact that the Treaty of Waitangi has for most of the sesquicentennial period been considered of no immediate relevance to the constitution of New Zealand does not mean, therefore, that it continues to remain irrelevant.

Apropos the actual example chosen by Lord Birkenhead, one of the least known chapters of New Zealand legal history concerns the Dog Registration Act 1880. The imposition of a dog-tax by that Act was seen as a discriminatory imposition aimed at Maori kainga (villages) in rural areas. Ward states that dog-tax collectors were frequently defied and threatened with violence.[36] Sorrenson records an incident in 1898 when 120 men of the Permanent Force, armed with Maxim guns, were sent to the tiny settlement of Waima on the Hokianga harbour in order to compel Hone Toia and his followers to pay the tax.[37] The lifestyle of Maori kainga with their unfenced vegetable cultivations was again a target of legislation when the Impounding Act 1884 repealed the Cattle Trespass Amendment

[35] Hodge, *Doyle: Criminal Procedure in New Zealand* (2nd ed. 1984) 80-81.
[36] Ward, *A Show of Justice* (1974) 283.
[37] Sorrenson, "Maori and Pakeha" in Oliver and Williams (eds.), *The Oxford History of New Zealand* 188.

Ordinance 1844. Despite the explicit guarantees of Article II of the Treaty to te tino rangatiratanga in respect of kainga, those in power in the 1880s and 1890s did not consider that the Treaty of Waitangi might be of constitutional significance or, as the Waitangi Tribunal has now put it, that those responsible for introducing new legislation or enforcing legislation that already existed should have to measure their statutes against the principles of the Treaty.

The novelty of the arguments now advanced by Durie, Attrill and others may be gauged by a brief conspectus of New Zealand's major constitutional instruments. Demographic statistics and economic data indicate that in the early 1840s the whole of New Zealand was overwhelmingly dominated by Maori iwi. Pakeha comprised a minuscule proportion of the population, and Maori owned almost all the land and controlled commercial activities. In the North Island, where most iwi lived, it was not until Vogel's immigration policies of the 1870s that Maori became a clear minority within the total population, lost their customary land through the workings of the Native Land Court and became economically marginalised. Yet not only are there no references to the Treaty of Waitangi in the important constitutional instruments which led up to the New Zealand Constitution Act 1852, there are hardly any acknowledgments that a distinctive population of the tangata whenua, with their own laws and cultural values, actually existed at all. A publication of Ordinances printed for the Colonial Government in 1850 very conveniently collects together the imperial Acts of Parliament, Charters and Royal Instructions relating to New Zealand.[38]

The Act 3 & 4 Vict. c. 62 "to extend the Provisions of An Act to provide for the Administration of Justice in New South Wales and Van Diemen's Land, for the more effectual Government thereof" recites that "the Colony of New South Wales is of great Extent" and enacts in section 2 "[t]hat it shall be lawful for Her Majesty by Letters Patent . . . to erect into a Separate Colony or Colonies, any Islands which now are, or which hereafter may be comprised within and be Dependencies of the said Colony of New South Wales". No pre-conditions or stipulations relating to the consent or otherwise of the indigenous inhabitants were apparent in the statute to circumscribe Her Majesty's discretion in "lawful" erection of a new colony. The remainder of the Act, the Charter of 16 November 1840 and the Instructions of 5 December 1840 are almost exclusively concerned with the powers and procedures of the Legislative Council to make laws for the peace, order and good government of the colony. The renaming of Northern Island, Middle Island (now South Island) and Stewart's Island as New Ulster, New Munster and New Leinster respectively features more prominently than any specific provision for the tangata whenua, but between a clause on Bills of Credit and another on Public or Private Lotteries was clause 15:[39]

[38] *The Ordinances of New Zealand, A.D. 1841 to A.D. 1849* (1850).
[39] Ibid., 14.

> And we do further enjoin and command you not to propose or assent to any Ordinance whatever, by which persons not of European birth or descent might be subjected or made liable to any disabilities or restrictions to which persons of European birth or descent would not also be subjected or made liable.

In 1846 an entirely new constitutional structure was provided for in the New Zealand Government Act 1846 and in a new Charter and set of Instructions. This would have put in place, if it had been fully implemented, a grandiose structure of colonial, provincial and municipal governments based upon boroughs which were defined as "[s]uch parts of the Islands of New Zealand as are or shall be owned or lawfully occupied by persons of European birth or origin".[40] Thirteen chapters of the 1846 Instructions deal with governmental structures for the Pakeha settlers and with measures to deem all "waste lands" to be desmesne lands of the Crown and thus available for settlement by colonists. The final chapter (XIV) briefly empowers the Governor-in-Chief to set apart "as he shall see occasion" particular districts as "Aboriginal Districts" within which "the laws, customs and usages of the Aboriginal Inhabitants, so far as they are not repugnant to the general principles of humanity, shall for the present be maintained".[41]

Finally, the imperial parliament passed the New Zealand Constitution Act 1852 which (in part at least) remained in force until repealed by the Constitution Act 1986. This Act confirmed the entire exclusion of Maori from direct participation in the political processes of the colony which had been a feature of the constitution from the foundation of the colony in spite of the guarantees of the Treaty. The only sections explicitly dealing with Maori people (in an enactment comprising eighty-two sections) were sections 71 and 73. The monopoly right of the Crown to purchase Maori land and to retain the profits from on-selling to settlers was called Crown pre-emption in the English text of the Treaty. Though hokongo in the Maori text contained no connotation of a monopoly right, the notion of Crown pre-emption was an element of the Treaty which had received judicial recognition in *The Queen* v. *Symonds*[42] and legislative recognition in the Native Land Purchase Ordinance 1846, and it was incorporated into the constitution enacted in 1852 as section 73. Section 71 was in similar terms to chapter XIV of the 1846 Instructions declaring it to be lawful for Her Majesty to set apart particular districts in which the laws, customs and usages of the aboriginal or native inhabitants should be observed. Despite strong pleas that section 71 should be invoked, especially from the Kingitanga movement in respect of the district which we still call the

[40] Ibid., 48.
[41] Ibid., 63.
[42] (1847) N.Z.P.C.C. 387 (S.C.). The Maori text of the Treaty was abruptly dismissed as irrelevant, per Martin C. J. at 397.

King Country,[43] Her Majesty and her heirs or successors have never exercised this statutory delegation of power. There was no such reluctance to implement the sections establishing the General Assembly and Provincial Councils and providing for elections. Section 7 detailed the franchise qualifications as follows:

> The members of every such Council shall be chosen by the votes of the inhabitants of the province who may be qualified as hereinafter mentioned; that is to say, every man of the age of twenty-one years or upwards having a freehold estate in possession situate within the district for which the vote is to be given of the clear value of £50 above all charges and incumbrances, and of or to which he has been seised or entitled, either at law or in equity, for at least six calendar months next before the last registration of electors, or having a leasehold estate in possession situate within such district, of the clear annual value of £10, held upon a lease which at the time of such registration shall have not less than three years to run, or having a leasehold estate so situate, and of such value as aforesaid, of which he has been in possession for three years or upwards next before such registration, or being a householder within such district occupying a tenement within the limits of a town (to be proclaimed as such by the Governor for the purposes of this Act) of the clear annual value of £10, or without the limits of a town of the clear annual value of £5, and having resided therein six calendar months next before such registration as aforesaid, shall, if duly registered, be entitled to vote at the election of a member or members of the district.

Almost every adult male citizen would have fitted into one or other of the property qualifications except for those Maori living in their kainga whose property rights were in tribal land held under communal tenure—that is to say, virtually every Maori male in the country did *not* qualify to vote. This situation might have been changed after the Native Land Court commenced its operations in 1865 because certificates of title awarded by the court were freehold titles. The legislative solution to the "problem" of the potential influence Maori voters would then have had in parliamentary elections was to pass the Maori Representation Act 1867 which limited Maori representation in the House of Representatives to the four electoral districts still provided for in section 23 of the Electoral Act 1956, regardless of the downs and ups of the Maori population relative to the total population.

Between 1852 and 1986 there were constitutional developments from representative government to responsible government to Dominion status. The 1852 Act had most of its provisions repealed, the legislative disabilities imposed by the Colonial Laws Validity Act 1865 were removed and the potential difficulties of the "peace order and good government" formula were eliminated. Eventually the constitutional crisis in the days following the 1984 general election led to reports of an Officials Committee on *Constitutional Reform*.[44] A decision was made to "patriate" the constitution and the Constitution Bill 1986 was introduced. The Bill excited very little

[43] Orange, op. cit., 211-216.
[44] Department of Justice, *Constitutional Reform* (1986).

interest attracting, according to Palmer, only eight submissions to the select committee which scrutinised it.[45] The present author was one of the eight. In my submissions I argued that the Bill should be declared to be part of the supreme law and should be entrenched against repeal by an ordinary parliamentary majority. I urged, on the basis of resolutions from the Turangawaewae hui of 1984, that the proper place to consider insertion of the Treaty of Waitangi was in this Bill rather than in the then proposed Bill of Rights so that what is now section 15 should have read:

> The Parliament of New Zealand continues to have full power to make laws subject however to the requirement that laws shall not be inconsistent with the terms of the Treaty of Waitangi 1840.

I also reported the desire expressed at a Tainui hui I had recently attended for the recognition of Maori law and custom under section 71 of the 1852 Act to be implemented. I therefore urged that section 71 should be modified and re-enacted rather than repealed. None of these submissions was accepted. Since then, of course, the idea of a Bill of Rights as supreme law has been dropped by the government and the Treaty of Waitangi has no place at all in the New Zealand Bill of Rights Bill 1989.

At present, if one looks at statutes such as the Constitution Act 1986, the Electoral Act 1956, the Judicature Act 1908, the Civil List Act 1979 (and, of course, the imperial constitutional laws still in force here such as Magna Carta, the Petition of Rights, the Habeas Corpus Acts and the Bill of Rights), one cannot find any reference either explicit or implicit to the Treaty of Waitangi. What, then, is the evidence for the proposition that the Treaty is being elevated to the status of the constitutional instrument? In what sense is it the founding compact for the nation? How can Chief Judge Durie say:[46]

> . . . we must not forget that the Treaty is not just a Bill of Rights for Maori. It is a Bill of Rights for Pakeha too. It is a Treaty that gives Pakeha the right to be here. Without the Treaty there would be no lawful authority for the Pakeha presence in this part of the South Pacific.

VII. A NEW STATUS FOR THE TREATY

Apart from developments over the last fifteen years, there is only one somewhat enigmatic legal instrument which may be pointed to by those who now describe the Treaty as "our founding document". This is Hobson's Proclamation of Her Majesty's sovereignty with respect to the North Island. On 21 May 1840 the Lieutenant-Governor received reports that settlers at Port Nicholson (now Wellington) had set up a form of self-government. He viewed their actions as tantamount to treason and in

[45] Palmer, *Unbridled Power* (2nd ed. 1987) 3.
[46] New Zealand 1990, loc. cit.

defiance of the Queen's authority over British subjects and this prompted him formally to proclaim British sovereignty. The grounds for the Proclamation in respect of Middle and Stewart Islands were not recited, but the North Island Proclamation referred to the Treaty signed at Waitangi on the 5th day (sic) of February 1840, asserted that the Treaty had been "further ratified and confirmed by the adherence of the Principal Chiefs of this Island", and proclaimed British sovereignty by virtue of the Treaty's cession of all rights and powers of sovereignty absolutely and without reservation. In his despatch to his superiors in the Colonial Office Hobson justified this proclamation on the grounds that there had been "the *universal* adherence of the native chiefs to the Treaty of Waitangi". This was patently untrue, and this lack of universal adherence was to become an acute embarrassment later on when members of some of the largest and most militarily significant tribes asserted that they were not, and never had been, British subjects.[47] Historians such as Rutherford have downplayed Hobson's breach of the 1839 Instructions by proclaiming sovereignty over tribes who had not given their intelligent assent to the Treaty. In any case, Rutherford notes that the publication of the Proclamations in the official *Gazette* in London on 2 October was a legal sanction of Hobson's action.[48] The Governor of New South Wales, on the other hand, had already proceeded to arrange for the passage of legislation (3 Vic., no. 28) applying New South Wales law to the New Zealand dependency *before* news of the Proclamations had reached Sydney. If constitutional significance should have been attached to the Treaty because of its inclusion in the North Island Proclamation, then one would have expected the Treaty's contents to have influenced the Acts, Charters and Instructions which were subsequently drafted by the Colonial Office. As has been noted above, however, that did not occur.

The *fons et origo* of the legal developments enhancing the status of the Treaty began only fifteen years ago. In the Treaty of Waitangi Act 1975 one finds for the first time in the country's legal history that an English[49] and the Maori text of the Treaty were incorporated in full into the domestic law of the land. By this enactment the laws, policies and practices of the Crown (including omissions) could be measured against the principles of the Treaty in claims brought by Maori to the Waitangi Tribunal.

Other contributors to this special issue cover in some detail the reports and the workings of the Waitangi Tribunal and there is comment on the sudden flood of superior court decisions since 1987 which have broken the arid drought of Treaty non-recognition which was still firmly fixed

[47] See Williams, loc. cit., at 43-44.

[48] Rutherford, *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand* (1949) 53-54.

[49] There were several variant English texts—see Orange, op. cit. 268-260. The legislature chose the Waikato Heads/Manukau English text as the "official" version.

in the 1960's decisions of the Court of Appeal on the bed of the Wanganui River and on the Ninety Mile beach.[50] This article will briefly review some of the more important of these reports and judgments in order to highlight the process of constitutionalising the Treaty which Attrill has written about.

Claims by Te Atiawa hapu in respect of Waitara fishing grounds, by Ngati Pikiao relating to the Kaituna river and by Te Puaha ki Manuka on matters relating to the Manukau harbour and its environs, resulted in three Waitangi Tribunal Reports in the 1983 to 1985 period.[51] The radical reinterpretation of the history relating to Maori grievances, in these Reports, had a seminal influence on current legal thinking. Unfortunately for the claimants the government's response to the actual recommendations in these and other reports has been, according to the Parliamentary Commissioner for the Environment, inadequate to comply with the principle that there should be a right of redress for breaches of the Treaty.[52] Nevertheless statements in the Reports have been frequently cited with approval by superior court judges. The breaking of the non-recognition drought mentioned above is sometimes attributed to Holland J.'s decision in *Royal Forest and Bird Protection Society* v. *W. A. Habgood Ltd.* His 31 March 1987 judgment was important for its overruling of Planning Tribunal decisions which had restrictively interpreted "ancestral land" in section 3(1)(g) of the Town and Country Planning Act 1977. His Honour's approach was based on giving an ordinary meaning to the words to be interpreted, but the ratio decidendi (if not the actual result) was a signal of a possible change of attitude on the bench towards matters affecting Maori. These sentences stand out in the judgment:[53]

> There may be a danger in interpreting what a European would describe as his or her ancestral land. What is required to be determined is the relationship of the Maori people and their cultures and traditions with *their* ancestral land.

Much more significant from the point of view of the overt process of constitutionalising the Treaty was Chilwell J.'s lengthy judgment in *Huakina Development Trust* v. *Waikato Valley Authority*. In this case also a series of Planning Tribunal decisions were overruled and it was held that Maori cultural and spiritual values could and should be taken into account when assessing "the interests of the public generally" under the

[50] *In re the Bed of the Wanganui River* [1962] N.Z.L.R. 600; *In re the Ninety Mile Beach* [1963] N.Z.L.R. 461.

[51] *Report Findings and Recommendations of the Waitangi Tribunal . . . in relation to Fishing Grounds in the Waitara District* (Wai. 6) (1983); *Finding of the Waitangi Tribunal on the Kaituna Claim* (Wai. 4) (1984); *Finding of the Waitangi Tribunal on the Manukau Claim* (Wai. 8) (1985).

[52] Parliamentary Commissioner for the Environment, *Environmental Management and the Principles of the Treaty of Waitangi* (1988) 9.

[53] (1987) 12 N.Z.T.P.A. 76 at 80 (emphasis in the original text).

jurisdiction conferred by the Water and Soil Conservation Act 1967. Chilwell J.'s conclusions on the status of the Treaty were forthright:[54]

> . . . the authorities also show that the Treaty was essential to the foundation of New Zealand, and since then there has been considerable direct and indirect recognition by statute of the obligations of the Crown to the Maori people. Among the direct recognitions are the Treaty of Waitangi Act 1975 and the Waitangi Day Act 1976, both of which expressly bind the Crown. There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

The ordinary or plain meaning approach to statutory interpretation and the resort to extrinsic material were both juridical techniques relied upon by the Court of Appeal judges in their *New Zealand Maori Council* v. *Attorney-General*[55] judgments delivered later in the same month as the *Huakina* decision. Although there was unanimity in the conclusions reached by the full bench of the Court of Appeal in that case, there were diverse paths to the agreed result in favour of the applicants. Somers J. did not find it necessary to disturb the received view of the Privy Council in *Te Heu Heu Tukino* v. *Aotea District Maori Land Board* and of Turner J. in *In re the Bed of the Wanganui River* that a treaty right was not enforceable at the suit of any private person without statutory incorporation,[56] but Bisson J. distinguished the *Te Heu Heu Tukino* decision because "the application of its principles does not involve the enforcement of the Treaty itself as if totally incorporated in municipal law". Bisson J. preferred to endorse the Waitangi Tribunal's notion expressed in its *Te Atiawa* report that the Treaty "was not intended as a finite contract but as the foundation for a developing social contract".[57] Cooke P. and Richardson J. chose however to move to the constitutional plane in a number of remarks. The President accepted as correct the applicant's submissions[58]

> . . . 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.

With respect to interpretation of section 9 of the State-Owned Enterprises Act 1986 (which stipulates that "Nothing in this Act shall permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi") he held not only that the wording was "plain and unqualified" but also that in "its ordinary and natural sense the section has the impact

[54] [1987] 2 N.Z.L.R. 188 at 210.
[55] [1987] 1 N.Z.L.R. 641.
[56] Ibid., at 691.
[57] Ibid., at 715.
[58] Ibid., at 655-656.

of a constitutional guarantee within the field covered by the State-Owned Enterprises Act". Richardson J., in speaking of the honour of the Crown and mutual obligations of good faith between treaty partners, asserted that under the Treaty of Waitangi Act and the State-Owned Enterprises Act the Treaty resides in "the domestic constitutional field".[59] Whilst Cooke P. did not disagree with the Privy Council's general approach to statutory incorporation of treaties, he was obviously anxious to downgrade the significance of the Board's remarks on the Treaty of Waitangi. Only "by past standards" could the *Te Heu Heu Tukino* case have been called "the leading case" on the Treaty, and the hope was expressed that "it should never again be possible to put aside a Maori grievance" in the way it had been in that case.[60]

By present standards there can be no doubt that the Court of Appeal's own 1987 decision is now the leading case on the Treaty. Twice it has been vindicated by the Court of Appeal itself in 1989 litigation relating to the Crown's forestry assets and coal assets.[61] The Planning Tribunal has relied upon the court's reasoning on principles of the Treaty in recommending that conditions concerning wahi tapu and co-operation from the tangata whenua be included in a prospecting licence issued pursuant to the Mining Act 1972.[62] The Waitangi Tribunal has respectfully considered and applied the court's view in subsequent reports.[63]

It seems that legal orthodoxy has now resiled from both the major pre-1975 propositions discussed above. Certainly the *Wi Parata* notion that the Treaty is a "simple nullity" has been exorcised. This was adverted to by the Waitangi Tribunal in the *Kaituna Report*[64] and the point was directly made by Bisson J. in the 1987 State-Owned Enterprises Act case.[65] Orthodoxy concerning the *Te Heu Heu Tukino* view on the rule of legislative recognition must now be supplemented by, and perhaps will be supplanted by, a body of opinion which distinguishes the Treaty of Waitangi from other treaties because it was essential to the foundation of the nation and because it has now acquired (or is acquiring) recognition as a constitutional instrument.

Judicial enhancement of the Treaty's status has not altogether escaped the notice of leaders of the executive branch of government and it has seemed to the Prime Minister currently in office that the judiciary is seeking

[59] Ibid., at 682.
[60] Ibid., at 667-668.
[61] *New Zealand Maori Council* v. *Attorney-General* [1989] 2 N.Z.L.R. 142; *Tainui Maori Trust Board* v. *Attorney-General* [1989] 2 N.Z.L.R. 513.
[62] *Application by Winstone Concrete Ltd.* (1987) 12 N.Z.T.P.A. 257.
[63] *Report of The Waitangi Tribunal on the Orakei Claim* (Wai. 9) (1987); *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai. 22) (1988).
[64] Wai. 4, 26.
[65] [1987] 1 N.Z.L.R. 641 at 715.

to enhance its own constitutional status *vis-a-vis* the other branches of government. Early this year Mr Palmer wrote as follows:[66]

> The Crown represented through the Executive, has obligations. Its actions must be scrutinised, tested, and finally agreed to by Parliament.
>
> The courts have the obligation of interpreting the legislation which Parliament passes. They must do justice in individual cases. But there has arisen in New Zealand a feeling that somehow all the fundamental decisions about how the Treaty of Waitangi will be honoured will be made by the courts. This is not the case. It cannot be so.
>
> The courts are an essential part of New Zealand's constitutional arrangements. They have provided in recent years justice for Maori claims against the Government. Some imaginative and constructive resolutions have been achieved.
>
> These should not be forgotten, nor should they be rejected. The courts are important. They will continue to be important. But the courts interpret the law, they do not legislate, they do not govern. The Executive governs.
>
> It must be made clear that the roles of Parliament, the Government and the courts are understood, and certain. It must be made clear that the Government will make the final decisions on treaty issues.

There is nothing very unusual about the constitutional theory espoused in these comments but it is singular indeed that the author of those words was the Minister of Justice who in 1985 introduced and extolled the virtues of a New Zealand Bill of Rights which would have permitted the courts to scrutinise all legislation and would have enshrined the Treaty of Waitangi as supreme law. Be that as it may, the Prime Minister's reconversion on the appropriate balances in the constitution were undoubtedly sparked by his interpretation of what Cooke P. had said in *Tainui Maori Trust Board* v. *Attorney-General*. In a lengthy conclusion to his judgment the President offered "a personal suggestion" (in rather more detail but along similar lines to obiter dicta in the 1989 *New Zealand Maori Council* v. *Attorney-General* decision on forestry assets) as to an application of the principles of the Treaty "to give fair results in today's world".[67] The government is, of course, just as free to disregard obiter dicta of Cooke P. as it is free to refuse to accept Waitangi Tribunal recommendations. However Mr Palmer seems to have taken umbrage at this comment:[68]

> In the end no doubt only the courts can finally rule on whether or not a particular solution accords with the Treaty principles.

That statement is entirely accurate, it is submitted, in any litigation governed by section 9 of the State-Owned Enterprises Act 1986. An example of the court exercising this power is to be found in the Minute

[66] Palmer, "Treaty of Waitangi Issues Demand Clarity, Certainty" *New Zealand Herald*, 2 January 1990, section 1 at 4.
[67] [1989] 2 N.Z.L.R. 513 at 530. See also Cooke, "Fairness" (1989) 19 V.U.W.L.R. 421 at 424-425.
[68] Ibid., at 529.

of the Court of Appeal dated 9 December 1987.[69] Nevertheless editorial comments in *The Capital Letter* are indications of the controversy which has arisen.[70] Further to that controversy, one might also note more than a hint of judicial impatience with Crown counsel taking full advantage of the adversary system in opposing Maori applicants whose causes of action seem to be entirely compatible with statutory requirements for the government to act consistently with the principles of the Treaty:[71]

> . . . I have no doubt that the subject-matter of the statutes, concerned as they are with the Treaty, demands a broad, unquibbling and practical interpretation. With appropriate resignation it must be acknowledged that what was said to that effect in the judgments in that [1987] case had no obvious influence on the thorough arguments that we heard presented ably for the Crown in the present case.

This year a Court of Appeal judgment on preliminary matters raised by litigation on the law relating to Maori fisheries has reiterated the constitutional position that under the State-Owned Enterprises Act "the ultimate function of statutory interpretation falls on the Courts".[72] Moreover, in language unfamiliar to those who adhere to legal orthodoxies of the past, the court described a statute – the Maori Fisheries Act 1989 – as "an interim measure" and stated that "Parliament has clearly left it to the courts and the [Waitangi] Tribunal to determine how far the Act goes in discharge of any obligations falling on the Crown".[73]

VIII. Further Steps in the Constitutionalising Process

Seldom before has constitutional law in New Zealand been so central to important political and economic controversies. The nature of the uncontrolled constitution, however, means that there is no simple definitive answer to questions about the present constitutional status of the Treaty. Different contributors to this special issue may arrive at various conclusions. I have no doubt that Attrill has accurately perceived a process of constitutionalising the Treaty. In mid-1987, when the judiciary first became engaged in this process, there was a relatively short list of statutes to point to as legislative indicia for the Treaty's enhanced legal status. Chilwell J. relied only on the Treaty of Waitangi Act 1975 and the Waitangi Day Act 1976. The judges of the Court of Appeal in the first State-Owned Enterprise Act case pointed to the long title of the Environment Act 1986 and section 4 of the Conservation Act 1987 as well as section 9 in the Act

[69] [1987] 1 N.Z.L.R. 719.
[70] (1989) 12 T.C.L. 45/1; (1989) 12 T.C.L. 48/1; (1990) 13 T.C.L. 1/5.
[71] [1989] 2 N.Z.L.R. 513 at 518.
[72] *Te Runanga o Muriwhenua Inc.* v. *Attorney-General*, unreported, Court of Appeal, 22 February 1990, C.A. 88/89, per coram by Cooke P., 26.
[73] Ibid., 19 and 39. See also *Ngai Tahu Maori Trust Board* v. *Attorney-General*, unreported, Court of Appeal, 27 February 1990, C.A. 42/90.

subject to interpretation in that litigation. Reliance was also placed on the preamble to the Maori Affairs Bill 1987 (which incidentally still remains before the Maori Affairs Select Committee in 1990, having first been introduced to Parliament in an earlier draft in 1978, then in a draft similar to the present in 1984, then in its present form in 1987). Since 1987 there has been a complex interplay of court judgments and minutes, various political negotiations involving the Crown, Maori and certain other interested parties, and legislative outcomes. Taylor has aptly spoken of this as a "legislative dance":[74]

> Courts decide particular disputes on the basis of generalised principles which may well represent developments from other principles, or innovative uses of accepted principles. Such decisions are normative, creating rules of legality and proper conduct applicable generally. They are legislative, as is a statute or regulation, though in a different way. There arises from statute, regulation, judicial legislation, and administrative application, a complex interplay of powers. No statute can be considered immune from judicial legislation in the form of interpretation, and an unjust law will usually find amelioration in the courts. The opposite is true of judicial decisions. All the players in this legislative dance must recognise the others' right to be there and their value to the overall pattern. But in the end, if the Government this day claims to have honoured the Treaty, it has often been because judicial willingness to legislate has driven it to this point.

Consequently one can now point to the Treaty of Waitangi (State Enterprises) Act 1988, the Crown Forest Assets Act 1989 and the Maori Fisheries Act 1989 in furthering the elevation of the Treaty to constitutional status. The last-mentioned Act contains for the first time ever a statutory incorporation (other than by a Schedule) into substantive municipal law of an element of the Maori text of the Treaty. Section 74 inserts a Part IIIA in the Fisheries Act 1983 which commences as follows:

> TAIAPURE-LOCAL FISHERIES
>
> 54A **Object**—The object of this Part of this Act is to make, in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapu either—
>
> (a) As a source of food; or
>
> (b) For spiritual or cultural reasons,—
>
> better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi.

Additionally, however, there are other instances of Treaty recognition which may be pointed to. Since a Cabinet decision of 23 June 1986 the guidelines on process and content for legislative change have included:[75]

(i) that all future legislation referred to Cabinet at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty of Waitangi;

(ii) that departments should consult with appropriate Maori people on

[74] Taylor, "Limits for Courts on the Treaty" (1989) 12 T.C.L. 45/1.

[75] Department of Justice, *Legislative Change* (1987) 22.

all significant matters affecting the application of the Treaty, the Minister of Maori Affairs to provide assistance in identifying such people if necessary; and

(iii) that the financial and resource implications of recognising the Treaty could be considerable and should be assessed whenever possible in future reports.

In 1988 a Treaty of Waitangi Policy Unit was formed in the Justice Department and that Unit assisted in preparing the "Principles for Crown Action on the Treaty of Waitangi"[76] issued by the Prime Minister in July 1989. At the end of 1989 a Cabinet-level Crown Task Force on Waitangi Issues was created to streamline the government's handling of Treaty issues.[77] Kelsey has convincingly argued that the Executive's initiatives on Waitangi issues since 1987 have largely been driven by a desire to limit the damage to the economic reforms and moves towards corporatisation (then privatisation) which has been caused by the Labour Party's pledge to honour the Treaty.[78] There can be no doubt that the "Principles for Crown Action" document is remarkable for its careful selection of Treaty principles which stress the legitimacy of the existing constitutional processes and which require the least concession by the government to Maori claims. Nevertheless it has to be said that the Treaty is now accorded a place in the bureaucratic structures of government which it did not have before. The same applies in the field of education. By a *Gazette* Notice of 11 January 1990 the Minister of Education has specified certain guiding principles, goals and objectives and codes of conduct to be core charter elements which are deemed by section 61 of the Education Act 1989 to be part of the charter of every state and integrated school in the country. One of the guiding principles reads as follows:

> *Treaty of Waitangi*
> The board of trustees accepts an obligation to develop policies and practices which reflect New Zealand's dual cultural heritage.

Further, a specific goal for each board and principal is:

> To fulfil the intent of the Treaty of Waitangi by valuing and reflecting New Zealand's dual cultural heritage.

Further references to the Treaty are to be found in the Runanga Iwi Bill 1989 which is now before the House and in a draft bill set out in the government's discussion paper on Maori Advisory Committees which are proposed for regional and local government authorities.

Finally, in the list of current developments having an impact on the legal status of the Treaty, mention must be made of the Resource Management

[76] Department of Justice, "Principles for Crown Action on the Treaty of Waitangi" (1989).

[77] Palmer, loc. cit.

[78] Kelsey, *A Question of Honour?* (1990) passim.

Bill 1989 which is now before a special select committee of the House of Representatives. A Maori secretariat within the Ministry for the Environment, now known as the Maruwhenua Unit, played a significant role in the consultations and drafting processes which have resulted in this massive bill. The Treaty of Waitangi is specifically acknowledged, albeit in a clause which seems to be primarily hortatory:

> 6. *Treaty of Waitangi*—In achieving the purposes of this Act, all persons who exercise functions and powers under this Act have a duty to consider the Treaty of Waitangi.

A glance through the Bill indicates that lawyers and others will have to come to an understanding of many terms of Maori law. Thus words in the interpretation clause include maataitai, mahinga maataitai, mana whenua, tangata whenua, taonga raranga, and tauranga waka. There is also a reference to tikanga Maori which is of particular relevance in the present context because that is a concept which is central to the Maori text of Article III in the Treaty. The former section 3(1)(g) principle is now clause 5(1)(f) and will require that regard shall be had to the importance of:

> The relationship of Maori and their culture and traditions with their ancestral lands, waters, sites and other taonga.

Another Maori text Treaty term, taonga, will thus find a place in municipal law if this is enacted. Geothermal energy used in accordance with tikanga Maori is permitted by clause 11(3)(d), national coastal policy statements may state policies about a number of things of special value to the tangata whenua (clause 48(b)), and one of the purposes of a water conservation order is for the protection of characteristics of any water body of special significance in respect of Maori historical, spiritual, and cultural values (clause 164(c)).

Chilwell J. was prepared to incorporate the Treaty of Waitangi into interpretation of the distinctly unpromising provisions of the Water and Soil Conservation Act 1967. By the beginning of the new decade in 1991, judges are likely to have a plethora of statutory provisions to interpret which will require them to take into account a wide range of Treaty-driven submissions which will be relevant to resource management law.

IX. Diverging Responses

The passage of the Constitution Act 1986 as an ordinary statute and the decision not to proceed with the New Zealand Bill of Rights 1985 means that for the foreseeable future the Treaty of Waitangi will not be anchored to the firm rock of supreme law in the constitution of this nation. Rather, the shifting sands of political expediency will tend to determine when, and if so, how the Treaty of Waitangi is to be incorporated into statute law.

One cannot avoid mentioning, also, 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. At the inferior court level there have already been examples of distinctly diverging responses to similar submissions put forward on behalf of Maori. Thus the Planning Tribunal (chaired by Judge Sheppard) recommended against a mining exploration licence in *Application by City Resources (N.Z.) Ltd.* In its report the Tribunal said:[79]

> However we find that, by enabling exploration parties to enter land which is held sacred by the tangata whenua and to disturb the soil, without their consent, the grant of the exploration licence would be incompatible with their traditional and cultural relationship with their ancestral land; and that for a Minister of the Crown to grant a licence enabling them to do so would not, with respect, be consistent with the Crown's duty to protect their exclusive and undisturbed possession of their lands, forests, fisheries and other properties which they wish to retain in their possession. The disturbances of the soil may be minor in a physical sense, and would be made good. That diminishes, but does not remove, the effect. The affront to the relationship with the land would remain.

Any Maori hopes or expectations arising from that outcome were soon dashed. Another division of the Planning Tribunal (chaired by Judge Treadwell) unequivocally rejected the logical outcome of the above reasoning, namely, that Maori ancestral land is totally protected from exploration unless the tangata whenua consent. There was a careful scrutiny of all the relevant case-law on the enhanced legal status of the Treaty of Waitangi and Maori rights of objection but still a firm recommendation in favour of granting exploration licences in *Application by Stacey*[80] and in *Application by Freeport Australian Minerals Ltd.*[81] Interestingly, however, that same division of the Planning Tribunal was prepared to rely upon Treaty-driven arguments to quash Opotiki District Council scheme changes (supported by the Minister of Conservation) which would have made the felling of native trees a conditional use in a zone where it had hitherto been permitted as of right. The tribunal wrote:[82]

> We record that we are not enunciating the principle that Maori land owners should be entitled to do what they wish with their land regardless of the general pattern of land uses laid down by district schemes under the provisions of the Town Planning Act or in defiance of the general law of New Zealand. General community cohesion in terms of land use planning appears to find acceptance with the Maori peoples of the Opotiki district. However they take exception to the fact that when they wish to develop their lands in accordance with that general pattern of development they are then further constrained and interfered with by conditional use procedures. They value the protection they are given by the Treaty of Waitangi whereby, in the English version, they are permitted

[79] (1988) Decision A 26/88, 14.
[80] (1989) 13 N.Z.T.P.A. 302, 306-307.
[81] (1989) 13 N.Z.T.P.A. 348.
[82] *New Zealand Forest Owners Assn.* v. *Opotiki District Council* (1989) 13 N.Z.T.P.A. 325 at 336.

> undisturbed possession of their lands. They in particular appear to resent land being tramped over and investigated by outsiders for the purpose of deciding whether they, as owners, should be able to clear indigenous forest. They consider themselves to be eminently suited to judge the value of those forests and its fauna. Our reference to the Treaty is not to be construed however as a recognition that it is an overriding factor in determinations of this Tribunal. We have commented upon it as part of the general background.

There can be little doubt that the Planning Tribunal will continue to be the key judicial forum in which legal issues arising from the constitutionalising of the Treaty will be argued. If the Resource Management Bill is passed in anything like its present form, then one can also expect that the Court of Appeal will be asked at some time in the future to go further in the direction indicated by its approval of the *Habgood* ruling in *Environmental Defence Society* v. *Mangonui County Council*,[83] where Maori interests in respect of Karekare Peninsula were held (by a majority) to have been given insufficient weight in the Planning Tribunal hearing.

X. Concluding Remarks

In conclusion, it is submitted that there have indeed been significant changes in recent years to the governing ideology and legal orthodoxy concerning the Treaty of Waitangi. It is a fact beyond peradventure that the Treaty has a significance and status today which it did not possess prior to 1975. The Treaty has always been of paramount importance in Maori perceptions. The Crown and Pakeha generally, who have always been, according to Richardson J.,[84] "the lagging partner", have now been forced to face up to Waitangi issues. Many Pakeha prefer to avoid serious contemplation of the Treaty's implications even when they purport to uphold the Treaty's principles. Yet the Treaty is not likely to return to its former status in the dominant ideology as an historical curiosity of no continuing relevance to modern life. It is my estimation that Maori pressure in favour of upholding the Treaty will continue regardless of changes in the composition of the government and the bench which may or will occur.

Two personal observations are offered to complete this article. First, the process of constitutionalising the Treaty which has been described inevitably has put the superior courts at the forefront of Treaty interpretation and application. Yet a genuinely bicultural partnership ought surely to entail that important decisions concerning the Treaty are within the jurisdiction of a body which is itself genuinely bicultural in its membership and its procedures. That was called for by the 1984

[83] (1989) 13 N.Z.T.P.A. 197.
[84] [1987] 1 N.Z.L.R. 641 at 672.

Turangawaewae national hui and its seems to me a reasonable step to establish such a body or else to enhance the status of the Waitangi Tribunal. Secondly, the winning of legal victories in courts and tribunals is no guarantee of practical outcomes favourable to Maori litigants. *Auckland District Maori Council* v. *Manukau Harbour Maritime Planning Authority*[85] has a good claim to being the case which began the recent line of authority giving recognition to Treaty-based legal submissions. Having taken Treaty factors into account, however, the eventual outcome was the same as it would have been without that step in the reasoning—Maori objections were of insufficient weight to prevent the planning approval sought by developers. The same applies to the *Habgood* case. The *Karekare Peninsula* case saw a victory in fact for the Maori/environmentalists' coalition because the seemingly endless litigation had exhausted the developer on that occasion, but the Court of Appeal could only order a rehearing—not a refusal of planning permission.

The legal victories in the State-Owned Enterprises Act saga have only prevented the Crown from carrying out their proposed asset-transfers. The prospect of actually returning land to Maori claimants as a result of a binding recommendation from the Waitangi Tribunal has led the Crown and the State-Owned Enterprises to seek for ways and means of avoiding the Treaty of Waitangi (State Enterprises) Act 1988 altogether. The closest one comes to a successful practical outcome following legal proceedings is the Maori Fisheries Act 1989. The costs of litigation and negotiation on this issue have been extremely high in financial terms (and in many other ways) for the Maori claimants. The outcome is that exclusive Maori property rights to fisheries, which were guaranteed by the literal terms of the Treaty but confiscated without compensation by the quota regime established under the Fisheries Amendment Act 1986, have now been replaced by a mechanism to achieve a ten percent quota for Maori. This *is* a practical outcome with economic advantages for some iwi at least, but it does seem to be a very long way from te tino rangatiratanga spoken of in the Treaty and indeed referred to in the 1989 Act but only in relation to local fisheries. Commercial sea fishing interests clearly weigh a good deal more heavily on the scales used by the government to balance competing interests than do Treaty guarantees. It is to be hoped that the Court of Appeal has rightly categorised that Act as "an interim measure" only.

Without more (and more successful) practical outcomes on other issues in the intermediate term future, however, it is likely that the faith of Maori litigants in the courts and tribunals will evaporate. Whether the Treaty is viewed as a constitutional instrument or not will be quite irrelevant to the future in that event. The recent influx of Maori concepts into the

[85] (1983) 9 N.Z.T.P.A. 167.

mainstream of the official legal system may also be problematic. When a legal system, which has historically operated in a monocultural manner, takes steps towards legal pluralism, there is a distinct danger that the meanings and values attached to Maori concepts, when used in an iwi or hapu context, will be distorted and amenable to manipulation by others when they are used in the official discourse of the state legal system. The future will tell whether there has been a genuine paradigm shift in the New Zealand common law or merely an adjustment of old legal orthodoxies to the modern context.

THE TREATY OF WAITANGI IN THE COURTS

BY SIR KENNETH KEITH*

This article addresses the question: what effect does the Treaty of Waitangi have in the courts? A related way of putting the question is to ask: what effect does the Treaty have in law?

The article considers answers to the questions under the following headings:

the Treaty in international law,
the content of the Treaty,
the constitutional status of the Treaty,
the Treaty as a direct source of rights and obligations, and
the relevance of the Treaty to the interpretation of legislation.

All are questions on which much has been said and written recently.[1] King Solomon three millenia ago provided valuable warnings:[2]

> Not everything that man thinks must he say; not everything he says must he write, but most important not everything that he has written must he publish.

The questions are as well big ones—but it is, I think, a time to try to take a steady view of the whole.

I. THE TREATY IN INTERNATIONAL LAW

The status of the Treaty in international law has been the subject of controversy for more than 100 years, at least since the Supreme Court in 1877 in the *Wi Parata* case commented that so far as the Treaty purported to cede sovereignty it was a simple nullity.[3] The reason the two judges gave for that view was that no body politic existed capable of ceding sovereignty. As the court said, the comment was an aside, it related only

* LL.M. (V.U.W.), LL.M. (Harv.), K.B.E. Deputy President, Law Commission, Professor of Law Victoria University of Wellington. The subject-matter makes it the more appropriate that I should acknowledge the real contribution to my thinking on the issues I touch on in this essay made over the years by many colleagues in different contexts. They include Harold Miller, the Librarian for many years at Victoria University; Bill Parker, Ngati Porou, and V.U.W. Continuing Education and Maori Studies Departments for many years until 1986; Quentin Quentin-Baxter, V.U.W. Law Faculty 1969-1984; Pihopa Manuhuia Bennett, Arawa and former Bishop of Aotearoa; John Towle, an Auckland solicitor for many years and Chancellor of the Diocese of Auckland; and Whatarangi Winiata, Ngati Raukawa and V.U.W. Accountancy Department.

[1] See the very extensive bibliographies in the documents referred to in nn. 13 and 37 below and in McHugh, *The aboriginal rights of the New Zealand Maori at Common Law* (Cambridge Ph.D. thesis, 1987).

[2] Quoted by Lasson in his excellent "Scholarship Amok: Excesses in the Pursuit of Truth and Tenure" (1990) 103 Harv. L. Rev. 926. Solomon speaks consistently in Ecclesiastes 3:7-8.

[3] *Wi Parata* v. *Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) S.C. 72 at 78.