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

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[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.

to article 1 of the Treaty, and the issue appears not to have been argued. The opinion has nevertheless been consistently adopted in much subsequent commentary.[4] As well, its expression coincided with the general view then held by many international lawyers (after the completion of the European colonisation of the Americas, Asia and Africa) that international law had a narrow geographic scope; it did not extend beyond "the civilised and Christian people of Europe" and those of European origin.[5] That view contradicted that consistently expressed during preceding centuries that the law of nations was universal in its scope.[6] It was as well inconsistent with the very extensive practice of governments, practice recognised for instance by English judges in the first part of the nineteenth century and earlier.[7]

It is enough here to relate several aspects of that wide practice to certain facts about the Treaty of Waitangi. Captain Hobson had a commission from the Queen as Consul—and not simply one as Lieutenant-Governor of territories yet to come under her sovereignty. That was consistent with much other practice, and of course with the preparation and signing by him and by representatives of the Maori tribes of a treaty.

European states and the United States in the nineteenth and earlier centuries similarly concluded a great number of treaties with states and communities outside Europe and the Americas. So, between 1826 and 1910, France, Germany, Great Britain and the United States signed at least sixty-five treaties with island countries in the Pacific. In form and content many of these treaties—like those in Asia and Africa—resembled treaties concluded at the same time among the European powers. Indeed we are able to read and assess them because they were published in the standard treaty series and state papers in exactly the same way as treaties signed within Europe or the Americas. One of the nice coincidences of timing is that right next to the Treaty of Waitangi in the major collection of the world's treaties is the treaty signed the very next day in London between

[4] E.g. Foden, *The Constitutional Development of New Zealand in the first Decade (1839-1849)* (1938) 179-183, Rutherford, *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand 1840* (1949) 20-23, and Robson (ed.), *New Zealand: the Development of its Law and Constitution* (1954) 3, (2nd ed. 1967) and Molloy [1971] N.Z.L.J. 193.

[5] See the valuable summary by Jenks, *The Common Law of Mankind* (1958) 69-74.

[6] E.g. ibid. 66-69.

[7] See especially Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (1967), and "The Afro-Asian World and the Law of Nations (Historical Aspects)" (1968) 123 Hague Recueil 117; and e.g. *Nabob of Carnatic* v. *East India Company* (1792) 2 Ves. 56, 60; 30 E.R. 521, and Sir William Scott in *The Helena* (1801) 4 C. Rob. 3, 5-7; 165 E.R. 515, quoting authority from the time of Charles II to indicate that the North African states had long been recognised, for instance by the conclusion of treaties. The International Court has recognised that practice in a case concerning Morocco's international status and activities from the eighteenth to the early twentieth centuries, *Western Sahara* case 1975, I.C.J. Reps. 12, 45-57; see also 39-40 and 86-99.

Great Britain and Saxe-Coburg-Gotha for Queen Victoria's marriage to Prince Albert. The two treaties, signed on opposite sides of the world 150 years ago, contain interesting parallels in terms of partnership, control, autonomy and the future—issues which others have already developed.[8]

Captain Hobson, in proclaiming sovereignty over New Zealand in May 1840, based the proclamation—so far as it relates to the North Island—on the Treaty. He did not base it on occupation, settlement or discovery.

Finally and importantly there is the content of the Treaty. The content is consistent with practice of the time. While it is not exactly the same as that of other treaties signed elsewhere it does conform with some of them. So, to take just one example, an 1825 British-Sherbro (Gambia) agreement contained three operative provisions.[9] The King of Sherbro with the advice and consent of various named people ceded sovereignty; the King and the other native inhabitants received the protection of the British Government and the rights and privileges of British subjects; and the King and the others were guaranteed the full, free and undisturbed possession and enjoyment of the lands they then occupied. The close parallel to the three Waitangi articles is clear; some of the very same verbs, adjectives and nouns are used.

The Treaty also conformed with long-established colonial practice. The much excoriated judgment in the *Wi Parata* case recognised this:[10]

> So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case.

The recognition of native or aboriginal title in the writings on the law of nations appears as early as the sixteenth century, for instance in Vitoria's *De Indis* (1532). That principle was further developed in practice as well as in doctrine in the following centuries, especially in North America.[11] That is to say, treaties such as those signed in West Africa and New Zealand

[8] For a valuable collection and analysis see Bennion, *Treaty making in the Pacific in the Nineteenth Century and the Treaty of Waitangi* (V.U.W. LL.M. Research paper 1987). The Treaty and the marriage treaty appear in 89 Consolidated Treaty Series 473 and 477. The Treaty had earlier been published in Martens et de Cussy, 5 Recueil Manuel et Pratique des Traités 22 (according to C.T.S.), 29 British and Foreign States Papers 1111, and 6 Herslet's Commercial Treaties 579 (published 1845). In the last volume it is published (together with the British proclamations of sovereignty over New Zealand of 21 May 1840) after British treaties with Mexico and Muscat (both about the slave trade) and before treaties of navigation and commerce with Oldenburg and Persia.

[9] 75 C.T.S. 379.

[10] Supra, n. 3.

[11] For Vitoria see e.g. Nys in the introduction to the Carnegie publication *De Indis et de Iure Belli Relectiones* (1917) 9 and *Francisco de Vitoria: Addresses in Commemoration of the Fourth Century of his Lectures "De Indis" and "De Iure Belli"* (1932). The later practice and the related writing and judicial decisions were well known to lawyers in early colonial New Zealand, see e.g. the references in Law Commission, *The Treaty of Waitangi and Maori Fisheries Mataitai: Nga Tikanga Maori Me Te Tiriti o Waitangi* (N.Z.L.C. PP 8 March 1989) paras. 15.16-15.44. United States legal materials appear to have been

in the first part of last century can be seen as having an almost inevitable general form and content—once, that is, that it is determined that imperial rule is to extend and that the means of achieving such rule is agreement and cession rather than conquest or settlement. That cession and extension of sovereignty (in article 1) has to be matched by the extension to the inhabitants of the new part of the Empire of British subject status and the rights and privileges of that status (article 3); and, in accordance with colonial practice, *ius gentium* and treaty practice aboriginal title and rights would be recognised (article 2)—in theory at least, whatever may have been the practice in many cases.

Against that background the Treaty does not stand out as much as it first appears to. Obligations of the equal citizens and protected aboriginal rights kind would arise—or at least be strongly asserted—whatever the method of establishing sovereignty, and whether the Treaty were considered valid or not. And such obligations of course have in part at least to be assessed and recognised down a long history after sovereignty is established. Their broad scope means they may continue to affect much of the business of government.

It is hardly surprising in the light of the general context, the form of the Treaty and its rather standard content, that an American British Arbitration Tribunal in dealing with a land claim based on pre-1840 purchases from Maori chiefs stated simply and directly that

> Great Britain entered into a Treaty with the native chiefs and tribes of New Zealand, called the Treaty of Waitangi, whereby sovereignty was ceded to the British Crown.

Later, as a central part of its reasoning, the Tribunal sharply distinguished the sovereignty with which, it said, the Treaty dealt from the lesser matter of ownership—which the American citizen claimed.[12]

The question can properly be asked about the practical relevance today of the international legal status of the Treaty 150 years ago. Is it not now simply a matter of theory of no practical significance? There are two answers to that question. The dismissal of the Treaty until recently by the commentators requires to be balanced by the contesting views as a matter of historical justice. And, when more firmly put in its historical and legal setting, the Treaty can more properly take its place as marking the beginning of constitutional government in New Zealand and as stating promises which can be judged as still valid and relevant. It is not a piece

better known in New Zealand in those early years than in the next 100 years but McHugh and others have more recently reminded us of that long-established body of law (e.g. (1988) 18 V.U.W.L.R. 1, and more generally 18 V.U.W.L.R. 327, 328-329).

[12] *William Webster* case, American and British Claims Arbitration, Report of Fred. K. Neilsen (1926) 537, 541, 543. The case is also reported in 6 U.N.R.I.A.A. 166, and (1926) 20 A.J.I.L. 391, and digested in 3 Annual Digest 83.

of paper designed to humour and pacify savages. It is a critical part of the political, legal and constitutional process by which New Zealand came within the British Empire and our present constitutional system was established. Against that origin and the later history of the Treaty,[13] what is its legal force today?

II. THE CONTENT OF THE TREATY

The question of legal effect must of course turn at least in part on the terms of the Treaty. Much state practice relating to the implementation in national law of treaty obligations recognises that the form and content of the obligations are decisive for implementation. Even those countries whose constitutions provide that treaties once ratified by the executive may become part of the law of the land without further action demonstrate that further action may nevertheless be required to implement particular treaties. In those cases the treaty language is not self-executing; it is too broad, it is programmatic, it requires the support of detailed legislation or of administrative measures, or to adapt a little the words of Lord Wilberforce the treaty provides no judicial or manageable standards by which to judge the matters.[14]

The meaning of the first article—conferring sovereignty in the English and kawanatanga (governorship) in the Maori—is the subject of dispute, both in its own terms and in relation to the recognition of rights and powers of Maori tribes in article 2. But the view taken by the constitution-makers, building on the sovereignty proclaimed in May 1840, has been that Parliament has progressively gained full powers to make law for New Zealand. And within Parliament and existing with its support is the Ministry with its wide range of executive power. What, if any, limit there may be on that law-making power is considered in the next section.

Article 3 is to be seen as a consequence, probably an inevitable consequence, of the extension of sovereignty. Indeed both versions expressly begin by emphasising consequence:

[13] E.g. the reports of the Waitangi Tribunal on particular matters, Buick, *The Treaty of Waitangi* (3rd. ed. 1936), Adams, *Fatal Necessity* (1977), Orange, *The Treaty of Waitangi* (1987), *Report of the Royal Commission on Social Policy* Vol. III Part One, "Future Directions" (April 1988) 79-278, Kawharu (ed.), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989), and the Law Commission's background paper (n. 11 above) and the sources they mention.

[14] *Buttes Gas and Oil Co* v. *Hammer (No. 3)* [1982] A.C. 888 at 938. For instructive United States cases on the concept of self-executing treaties see *Foster* v. *Neilson* (1829) 27 U.S. (2 Pet.) 253 at 314; and *Fujii* v. *State* (1952) 242 P. 2d. 617 at 620-622 (holding that the human rights provisions of the United Nations Charter are not self-executing in a case in which they were invoked to strike down racially discriminatory legislation concerning land ownership); cf. *Re Drummond Wren*, n. 34 below.

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini. (For this agreed arrangement therefore concerning the Government of the Queen, the Queen . . .)[15]

In consideration thereof Her Majesty the Queen extends . . .

The undertaking relates to protection and citizenship:

Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani. Ka tukua ki a ratou nga tikanga katoa rite tahi ke ana mea ki nga tangata o Ingarani. (. . . the Queen of England will protect the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.)

Her Majesty the Queen extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

The extension of sovereignty to new territory involves the extension of the obligation of protection by the new sovereign. As Sir Apirana Ngata put it in 1922 of these "very important and formidable words", in the first place they provide for protection against invasion by foreign powers:[16]

only yesterday we faced up to the Germans and only after a bitter struggle were they defeated; who knows we may have to face up to the Japanese. The might of England has protected us, the King has given us his protection.

The obligation of protection, as both Sir Apirana and the preamble to the Treaty stress, applies as well within the country. Those are matters which for the most part fall within the prerogative and executive powers of the executive. They do not generally involve court enforcement, and any relevant legislation is usually of a broad and enabling type.[17]

It is a different matter when we come to the second part of article 3—the promise of the rights and privileges of British subjects—the part which Sir Apirana saw in 1922 as the most important provision of the Treaty of Waitangi. That promise has a pervasive impact through our general law. It provides as well a standard against which existing or proposed legislation which distinguishes between Maori and others is to be measured. A great number of statutes enacted over the past 150 years bear on it.

In addition, article 2, protecting the special position of the Maori, provides a different and sometimes conflicting standard for that measure:

Ko te Tuarau

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me

[15] The translation is that of Sir Hugh Kawharu, widely used, for instance, in the courts and the Royal Commission on Social Policy; it appears in full in Kawharu (ed.), n. 13 above 319-321.

[16] *The Treaty of Waitangi: An Explanation—Te Tiriti o Waitangi: He Whakamarama* (first published 1922, republished) 11, 25.

[17] E.g. *China Navigation Co. Ltd.* v. *Attorney-General* [1932] 2 K.B. 197, *Glasbrook Bros.* v. *Glamorgan County Council* [1925] A.C. 720, and for legislation from the Crown Colony period e.g. the Constabulary Force Ordinance 1846, the Militia Ordinance 1845 and the Native Force Ordinance 1847.

o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki re ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

The second

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

Article the second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

It is this provision which has given rise to the major controversy over the application of the Treaty. What is involved in the recognition by the article of rights of the Maori? And how is that recognition to be related to the rights conferred in article 3 and to the powers resulting from article 1?

Aspects of those questions arise later. Here I make just one point, returning to the proposition that detailed legislative and administrative measures may be required to give effect to certain treaty provisions. In a Scottish case the plaintiff argued that a particular regulation purported to alter the laws concerning "private right" in a way that was not "for the evident utility of the subjects within Scotland", in breach, he claimed, of those terms of an article of the Treaty of Union (which had been set out in the Acts of Union passed by the English and Scottish Parliaments). Lord Keith reserved his opinion on the question whether the court might rule on certain other alleged breaches of the articles but rejected the particular challenge:[18]

I am, however, of opinion that the question whether a particular Act of the United Kingdom Parliament altering a particular aspect of Scots private law is or is not "for the evident utility" of the subjects within Scotland is not a justiciable issue in this Court. The making of decisions upon what must essentially be a political matter is no part of the function of the Court, and it is highly undesirable that it should be. The function of the Court is to adjudicate upon the particular rights and obligations of individual persons, natural or corporate, in relation to other persons or, in certain instances, to the State. A general inquiry into the utility of specific legislative measures as regards the population generally is quite outside its competence.

[18] *Gibson* v. *Lord Advocate* 1975 S.C. 136, 144. He also noted, but did not consider, another issue critical for parliamentary sovereignty, the question of the validity of later national legislation alleged to be inconsistent with European Community legislation (at 144-145).

The preliminary note to the legislation on "Natives and Native Land" in the 1931 Reprint of Statutes states that the Treaty (which is published with the legislation) "may be regarded as the foundation on which rests the whole of the legislation with respect to Natives".[19] That volume contains within 320 pages just some of the relevant legislation then in force. While in some circumstances the provisions of the Treaty may be capable of direct application or effect—as we shall see later—the mass of legislation and related administrative measures adopted over the last 150 years demonstrates that the words of the articles alone cannot bear the whole burden. In the American phrase they are not, in general, self-executing. In significant part they are framed as promises of future action by the Queen (or now by the New Zealand Government). To put it more broadly, "the Treaty provides an important basis for the ordering of the future relationship—a developing social contract which is of inestimable value to both parties".[20]

III. THE CONSTITUTIONAL STATUS OF THE TREATY

The international status and legal effect of the Treaty is one thing. A distinct matter is its significance in the constitution and law of New Zealand.

The House of Lords recently reaffirmed the basic proposition that:[21]

> The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty.
>
> A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.

[19] 6 The Public Acts of New Zealand (Reprint) 1908-1931 (1932) 77. Volume 8 of the Reprinted Statutes published in 1981 has about 850 pages of legislation concerning Maori Affairs.

[20] The Report of the Bicultural Commission of the Anglican Church on the Treaty of Waitangi: Te Ripoata a te Komihana mo te Kaupapa Tikanga Rua mo te Tiriti o Waitangi (1986) 19. The point is made in a legal context in *New Zealand Maori Council* v. *Attorney-General* [1987] 1 N.Z.L.R. 641, 663 and by the Tribunal in the *Motonui-Waitara Report* (1983, 2nd. printing 1989) 52.

[21] *J. H. Rayner Ltd.* v. *Department of Trade* [1989] 3 W.L.R. 969 at 980. See also the classic statement of Lord Atkin for the Privy Council in *Attorney-General for Canada* v. *Attorney-General for Ontario* [1937] A.C. 326 at 347-348. Hastings has provided a valuable update of the New Zealand position, "New Zealand Treaty Practice with particular reference to the Treaty of Waitangi" (1989) 38 I.C.L.Q. 668.

The New Zealand courts have adopted this position specifically in respect of the Treaty of Waitangi. So Myers C. J. in the Court of Appeal in *Te Heuheu Tukino* v. *Aotea District Maori Land Board* said:[22]

> A treaty only becomes enforceable as part of the municipal law if and when it is made so by Legislative authority, and that has not been done in the case of the Treaty of Waitangi, although the Treaty has in certain ways received legislative recognition.

And on appeal in that case the Privy Council was persuaded by Mr A. T. Denning K.C. that:[23]

> 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.

That is not however the end of the matter. For one thing, we have to consider the approach of the courts to legislation which *does* incorporate the promises of the Treaty in one form or another. For another, a treaty can be relevant to the resolution of an issue of law in ways which do not call for the direct *enforcement* of its provisions, especially if the interpretation of legislation is involved.

The following two sections of this essay take up those matters. This section touches on a more basic constitutional issue. The Royal Commission on the Electoral System said in 1986 that the Treaty marked the beginning of constitutional government in New Zealand and recognised the special position of the Maori people.[24] Others have gone further, claiming for example that the Treaty is the founding constitutional document for New Zealand.[25] What do such statements mean? Can they have a specific legal significance for instance in suggesting restraints on legislative power in an extreme case? Or is their significance political and historical?

Debate in the United Kingdom about the Treaty and Act of Union between England and Scotland allows a comment or two on this fundamental matter—but certainly not a final answer.[26]

[22] [1939] N.Z.L.R. 107 at 120.

[23] [1941] N.Z.L.R. 590 at 596-597, [1941] A.C. 308 at 324. The statement is of course mentioned in later cases, notably *New Zealand Maori Council* v. *Attorney-General* [1987] 1 N.Z.L.R. 641 at 655, 667-668, 691, 715.

[24] Report of the Royal Commission on the Electoral System, *Towards a Better Democracy* (1986) para. 3.102.

[25] See e.g. the views of Maori hui recorded in *A Bill of Rights for New Zealand* A.J.H.R. 1985 A6 paras. 5.5, 5.8 and 5.9 and the summary of submissions in "Interim Report of the Justice and Law Reform Select Committee, Inquiry into the White Paper—a Bill of Rights for New Zealand" A.J.H.R. 1986-87 I8A, 124-133.

[26] See the terms of the Treaty of Union as set out in the Union with Scotland Act 1706 (especially articles XVIII and XIX), considered in *MacCormick* v. *Lord Advocate* 1953 S.C. 396 and *Gibson* v. *Lord Advocate* 1975 S.C. 136 (also referred to above, p. 43) and discussed for instance by Smith, "The Union of 1707 as Fundamental Law" [1957] *P.L.* 99. See also cases in Commonwealth courts in which the mandates (in treaty form) in respect

The first is that the fully sovereign character of the law-making power of the Queen in Parliament in relation to fundamental conditions set out in the Treaty of Union has never been clearly established. In 1953 the Lord President said that "the principle of the unlimited sovereignty of parliament is a distinctively English principle which has no counterpart in Scottish constitutional law".[27] A related point is that that matter shows that such fundamental issues can remain unresolved for very long periods. It is not necessarily constitutional wisdom to force their resolution. They might be better left to legal commentary, with the occasional passing comment by judges and those with political responsibility.[28]

The position of United Kingdom legislative power in relation to the European Community illustrates those two comments and introduces a third: the constitutional significance, which may be revolutionary, of the growth of the power of international, even supranational organisations.[29] Such major developments mean that the simple proposition attributed to Dicey about the supreme law-making powers of Parliament is being altered from outside as well as from within.[30] Law-making power is being moved away from the level of the nation state.

IV. THE TREATY AS A DIRECT SOURCE OF RIGHTS AND DUTIES

The traditional authority is clear: rights and duties stated in treaties

of League of Nations mandated territories were held to have constitutional significance by directly widening the legislative and other powers of Australia, New Zealand and South Africa ("International Law and New Zealand Municipal Law" in Northey (ed.), *The AG Davis Essays in Law* (1965) 130, 144-145).

[27] *MacCormick* v. *Lord Advocate* 1953 S.C. 396 at 411.

[28] We have of course a recent instance in New Zealand with the speech of the Prime Minister of 14 December 1989 on the "Treaty of Waitangi Constitutional and Procedural Issues" relating in part to a comment made by the President of the Court of Appeal in *Tainui Maori Trust Board* v. *Attorney-General* [1989] 2 N.Z.L.R. 513 at 529; the Prime Minister's answer to a Parliamentary Question, Order Paper 21 February 1990, 53; and the comment made by five judges of the Court of Appeal in *Te Runanga o Muriwhenua* v. *Attorney-General*, judgment of 22 February 1990, C.A. 88/89, 26. That series of comments is to be put against the background not just of British debates going back over centuries but also of questions raised more recently about the extent of the law-making powers of the New Zealand Parliament now stated in the Constitution Act 1986 s. 14, commented on in a series of cases leading to *Taylor* v. *New Zealand Poultry Board* [1984] 1 N.Z.L.R. 392, and the subject of government proposals for an entrenched and now an interpretative New Zealand Bill of Rights.

[29] See e.g. Wade and Bradley, *Constitutional and Administrative Law* (10th ed. 1985) 136-138 and the references there. The European Community provides the most dramatic current example, but the point can be made much more broadly. About one-quarter of all New Zealand public statutes of general application appear to be affected in one way or another by our international obligations (Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (1987) para. 41 and appendix B).

[30] For qualifications to Dicey's basic proposition see e.g. *Introduction to the Law of the Constitution* (1960 10th ed.) 68 n. 1, and Dicey and Rait, *Thoughts on the Union between England and Scotland* (1920) 242-244, 252-254 and also 99-100.

cannot be enforced by domestic courts until the legislature has intervened. That proposition exactly conforms of course with long-established principle about executive law-making. In general the executive—which has the monopoly of treaty-making—cannot alter the law except through or with the authority of Parliament.[31]

Treaties nevertheless can be relevant to the resolution of legal issues in the absence of legislation (1) by evidencing customary international law and (2) by establishing relevant public policy. These matters call for little discussion in this particular context. Customary international law is part of New Zealand law, to the extent at least that it has not been excluded by legislation. The legislature recognises this as do the courts. (The next section begins with legislation which acknowledges the existence of such customary rights.) We have already noticed that in the *Wi Parata* case the Supreme Court accepted that the Treaty could be *evidence* of the relevant ius gentium—but with no practical consequence in the particular case. More recently the argument that customary or aboriginal rights have survived legislation relating to land and water has been more vigorously pressed.[32] In New Zealand the argument might be bolstered by the Treaty being used as evidence of the customary rules.[33]

The public policy use of treaties was dramatically demonstrated in a Canadian case in which a racially-restrictive covenant relating to land was struck down. In reaching that conclusion the court relied on a series of treaty and other documents condemning racial discrimination.[34] A New Zealand court has similarly read statutory powers in a narrow way, finding the relevant public policy in treaty and related documents condemning sexual discrimination.[35]

The most striking relevant example of this is to be seen in the willingness of Chilwell J. to require a body exercising statutory powers of decision to have regard to Maori values even although neither the Treaty of Waitangi nor Maori values were expressly mentioned in the relevant

[31] E.g. *Case of Proclamations* (1611) 12 Co. Rep. 74. But see the cases on British Empire mandates, n. 26 above and consider as well the *Kauwaeranga* judgment of Chief Judge Fenton of 1870 (1984) 14 V.U.W.L.R. 227.

[32] See especially McHugh, nn. 1 and 11 and his other writing referred to in those sources and Kent McNeil, *Common Law Aboriginal Title* (1989). Also of great interest is the Australian Law Reform Commission's Report, *The Recognition of Aboriginal Customary Laws* (1986), and see Brennan and Crawford, "Aboriginality, Recognition and Australian Law: Where to from here?" (1990) 1 P.L.R. 53.

[33] So the Vienna Convention on the Law of Treaties has been used as a statement of the relevant law although not technically applicable and not the subject of incorporating legislation in the House of Lords, *Fothergill* v. *Monarch Airlines* [1981] A.C. 251 at 276, 282-283, and the Court of Appeal, *New Zealand Maori Council* v. *Attorney-General* [1987] 1 N.Z.L.R. 641 at 682 (where the UN Charter is also mentioned for its emphasis on good faith).

[34] *Re Drummond Wren* [1945] D.L.R. 674 (Ont. H.C.) not followed however by the Ontario Court of Appeal, *Re Noble and Wolf* [1949] 4 D.L.R. 375.

[35] *Van Gorkom* v. *Attorney General* [1977] 1 N.Z.L.R. 535 at 542-543, affirmed [1978] 2 N.Z.L.R. 387.

statute.[36] That case is more conveniently considered at the end of the next section.

V. THE RELEVANCE OF THE TREATY TO THE INTERPRETATION OF LEGISLATION

Over the past 150 years a vast number of statutes bearing on Treaty of Waitangi issues have been enacted. It is not possible here to do more than mention a small selection. That can indicate something of the range of the legislative forms and of the differing approaches taken by the courts over that time to their application and interpretation.[37]

The extent of legislative reference has increased significantly in recent years—as seen for instance in the enactment of the Treaty of Waitangi Act 1975 establishing the Tribunal, the reference to the relationship of the Maori people with their ancestral land in the Town and Country Planning Act 1977, and the settlement and pardon recorded in the Tauranga—Moana Trust Board Act 1981. In 1986 the government gave a much more general direction. Cabinet[38]

> (i) agreed 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) agreed that departments should consult with appropriate Maori people on 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) noted that the financial and resource implications of recognising the Treaty could be considerable and should be assessed wherever possible in future reports.

This decision built on the specific practice. Much more, it reflected major changes in broader public and political perceptions of the Treaty and Maori issues—changes which were and remain controversial.

A review of some statutes indicates that legislation might state that it is not to affect the customary or Treaty rights, which are saved; implement an aspect of the Treaty in a particular way, with the rights it states being

[36] *Huakina Development Trust* v. *Waikato Valley Authority* [1987] 2 N.Z.L.R. 188.

[37] Others have provided much more extensive treatment than is possible here, e.g. the studies by McHugh, McNeil, the Law Commission and in the Kawharu volume mentioned in nn. 1, 11 and 32, the papers by Baragwanath Q.C. and Blanchard to the New Zealand Planning Council seminar in 1988, Temm Q.C. to the New Zealand Law Society Seminars in 1989, and Chief Judge Durie and others to the Commonwealth Law Conference in April 1990; see also the papers given to the Australasian Universities Law Schools Association conference in July 1989 in (1989) 19 V.U.W.L.R. 335 and a valuable Harvard LL.M. paper by Attrill, *Aspects of the Treaty of Waitangi in the Law and Constitution of New Zealand* (1989). Most of the cases mentioned have also been the subject of comment in the law reviews and journals.

[38] Set out in Legislation Advisory Committee, n. 29 above, para. 38. Consistent with that is the direction to the Law Commission that in making its recommendations it shall take into account te ao Maori (the Maori dimension) (Law Commission Act 1985 s. 5(2)(a)).

enforceable in courts or tribunals; require or permit a person exercising statutory power to have regard to the Treaty; or be silent about the Treaty.

1. *Saving provisions*

The earliest legislative instruments included important savings provisions. The first Charter for the Colony of New Zealand of 16 November 1840 provided that nothing in it:

> shall affect or be construed to affect the rights of any aboriginal natives . . . to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any Lands . . . now actually occupied or enjoyed by such natives.

That provision limited especially the power of the Governor in Council to make ordinances for the peace, order and good government of the colony. The second ordinance made by Governor Hobson under that power, the Land Claims Ordinance 1841, contained a similar saving for the rightful and necessary occupation of unappropriated lands by the aboriginal natives. Those provisions and their successors are of course dependent on the courts or relevant tribunals giving content to the saved rights.

Others have examined this matter in great detail. It is enough here to illustrate shortly the swings in judicial attitude to those and successive provisions. In 1872 the Court of Appeal said this:[39]

> The Crown is bound, both by the common law of England and by its solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it.

That view, supported by very long-established doctrine, the Treaty and the early legislation, was short-lived. Only five years later a Supreme Court of two judges said of savings provisions referring to "the Ancient Custom and Usage of the Maori people" in the Native Rights Act 1865 that a phrase in a statute cannot call what is non-existent into being.[40] But at the end of the century the Privy Council returned to the earlier position. For the Judicial Committee there were the express words of the legislation—including the 1865 Act:[41]

> It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence.

The practical question now of course is whether this doctrine, so well rediscovered in recent years, is likely to be of real utility. So can it provide a basis for claims less than ownership, notwithstanding a Torrens title?

[39] *Re "The Lundon and Whittaker Claims Act 1871"* (1872) 2 N.Z.C.A. 41, 49.

[40] Supra n. 3 at 79-80 (commenting on the Native Rights Act 1865).

[41] *Nireaha Tamaki* v. *Baker* (1901) N.Z.P.C.C. 371 at 382.

Might it support an action in nuisance? Or are other remedies—in the Tribunal, in courts, or in negotiation—likely to be more helpful?[42]

The early legislative saving has of course later been complemented (some say undermined) by the very extensive Native and Maori land legislation. That complex and controversial legislation proceeds on the assumption that aboriginal or customary title exists and predates the acquisition of sovereignty.

Other important savings provisions relate to fisheries. Since 1877 fisheries legislation has expressly excluded Maori rights from its operation. But it is only in the last few years that the saving has been given real consequence. The two relevant provisions are to the following effect:[43]

> Nothing in this Act shall affect any Maori fishing rights.

This provision might for instance provide a defence to someone charged with breaching the general legislation regulating fishing, as Williamson J. held in 1986. A customary right (established by evidence given by Maori elders) to take shell-fish for personal food supply came within the scope of the provision and accordingly the taking of toheroa in a closed season was not an offence.[44] The customary right, the judge stressed, was not based on ownership, it was not exclusive, it was not territorial, and it had not been expressly extinguished by statute.

Imperial Laws Application Act

The more general qualifying language in the English Laws Act 1908—that the law of England was part of New Zealand law only so far as applicable to the circumstances of New Zealand—allowed the recognition of the Treaty in a case concerning the ownership of whales. An old English statute providing that whales were royal fish and part of the royal revenue was not consistent with practice in New Zealand and could not possibly be claimed "against the Maoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with".[45]

What of the *assertion* of fishing rights, especially of major commercial fishing, *against others*? This issue has been brought to the fore by several factors, among them the great development in recent years of commercial fishing and the changes in the law to introduce something akin to a property right, the individual transferable quota entitling the holder to a defined catch. The courts in the last few years have had a major part in the complex process, outlined by Mr Frame in his article, which has led to the passing

[42] E.g. Boast [1990] N.Z.L.J. 32.

[43] Fisheries Act 1983 s. 88(2) and Conservation Act 1987 s. 26 ZH (as enacted in 1990) (relating to freshwater fisheries). The latter reads "Nothing in *this Part of* this Act . . .".

[44] *Te Weehi* v. *Regional Fisheries Officer* [1986] 1 N.Z.L.R. 680; see also *Ministry of Agriculture and Fisheries* v. *Hoki Campbell* [1989] D.C.R. 254 and *Ministry of Agriculture and Fisheries* v. *Hakaria* [1989] D.C.R. 289.

[45] *Baldick* v. *Jackson* (1910) 30 N.Z.L.R. 343.

of the Maori Fisheries Act 1989 and to further amendments to that in the Fisheries Amendment Act 1990.

In one important set of interim proceedings the evidence indicated to the judge that:[46]

> what had been done in the promulgation and the operation of the quota management system has been done without taking into account the Maori rights in fisheries, at least in the sense that I have concluded on this interim basis these rights exist.

Accordingly, declarations were made by reference to the Fisheries Act 1983 that the relevant Minister ought not to take any further action in respect of certain aspects of the system. That was a critical spur to the negotiations which resulted a full two years later in a fifty-page statute designed, according to its title,

(a) to make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi,
(b) to facilitate increased Maori participation in the business and activity of fishing, and
(c) to better conserve and manage the rock lobster fishery.

This is a case of the direct and specific implementation of the Treaty rights by legislation (and related administrative and financial action). It is not a case of undefined rights simply being allowed to stand unaffected by the relevant legislation. Some at least of the rights could be directly enforced in the courts. Accordingly the Act belongs under the next heading.

2. *Direct implementation; rights judicially enforceable*

As indicated already, a huge volume of legislation relates to the provisions of the Treaty. It is not possible to begin to produce even a sample of that legislation and to observe its operation and interpretation in the courts.

There is for instance the whole body of the general law of New Zealand which, in terms of article 3 and the doctrines reflected in it, is in general applicable to all Maori as to all other New Zealanders. The General Assembly made that clear in the Native Rights Act 1865, mentioned earlier. The preamble to that Act refers to the desirability of removing the doubts whether certain persons of the Maori race are natural-born subjects of Her Majesty and whether Her Majesty's Courts of Law have jurisdiction in all cases touching the persons and property of the Maori people. The General Assembly therefore declares and enacts as follows:[47]

[46] *Mahuta* v. *Attorney-General*, Greig J., oral judgment of 2 November 1987, CP 614/87, reproduced in appendix F(6) to the Law Commission background paper, n. 11 above.

[47] Sections 4 and 5 dealt with land issues and required that questions be decided according to Maori custom and usage, for the most part in the Native Lands Court. The Supreme Court in 1877 and Privy Council in 1901 commented on these provisions in the cases mentioned earlier, p. 49.

2. Every person of the Maori race within the Colony of New Zealand whether born before or since New Zealand became a dependency of Great Britain shall be taken and deemed to be a natural-born subject of Her Majesty to all intents and purposes whatsoever.
3. The Supreme Court and all other Courts of Law within the Colony ought to have and have the same jurisdiction in all cases touching the persons and the property whether real or personal of the Maori people and touching the titles to land held under Maori Custom and Usage as they have or may have under any law for the time being in force in all cases touching the persons and property of natural-born subjects of Her Majesty.

The very generality of this approach (even with the custom qualification in section 3) was controversial at that time and since. Thus at the end of 1863 Henry Sewell, the first Premier of the Colony, writing to Lord Lyttleton in the context of arguments that the Maori engaged in the Wars were in a state of rebellion and that attempts to establish native self-government were necessarily treasonable and criminal, asked:[48]

> Did the New-Zealanders, any more than the American Indians, imagine that by placing themselves under the guardianship of the British Empire they forfeited their inherent rights to govern themselves according to their own usages, and to retain the ownership of their land? As to the latter the treaty of Waitangi expressly reserves to them their territorial rights. As to the former, it is true they surrendered to the Queen the "Kawanatanga"—the governorship—or sovereignty; but they did not understand that they thereby surrendered the right of self-government over their internal affairs, a right which we never have claimed or exercised, and could not in fact exercise. The acknowledgment of sovereignty by the New-Zealander was the same in effect as in the case of the American Indians. It carried with it the exclusive right of pre-emption over their lands, and the exclusion of interference of foreign nations. No doubt it imposed on us the right and the duty of extending our law to them so soon as they should be able and willing to understand and accept it; but it could not authorise us to inflict on them, as ordinary citizens the penalties of laws which they never heard of, expressed in language of which they are ignorant. It could not for instance subject them to the penalties of Popish Convict Recusants for refusing to take the oath of allegiance, as has been absurdly argued in this colony; a doctrine which has even received countenance from the Supreme Court.

Parliament has recently recognised the force of such arguments in two statutes. In the first, enacted in 1981, it declared that the character and reputation of members of the Ngaiterangi, Ngati Ranginui and other tribes who fought in the Battle of Gate Pa and Te Ranga shall be the same as if a full pardon had been granted to them in respect of all matters connected with the battles.[49]

[48] *The New Zealand Native Rebellion, Letter to Lord Lyttleton by Henry Sewell* (1864, reprinted Hocken Library Facsimile No. 14, 1974) 5, 9. This view has interesting consequences in terms of the law of war: see the references in the letter to treaties of peace, rights of belligerents, prisoner of war status and rules for the conduct of warfare, 9-10, 34, 35, 45. For an early recognition of the need to gain Native concurrence to legislation, see the Sale of Spirits Ordinance 1847, preamble and ss. 5 and 6.

[49] Tauranga Moana Maori Trust Board Act 1981 s. 7 (see 440 N.Z.P.D. 2647 at 2648 for some background). See similarly Te Runanga o Ngati Awa Act 1988 s. 11 (490 N.Z.P.D. 5461 at 5468, 495 N.Z.P.D. 8583). The latter Act is one of several relating to Maori Trust Boards designed to strengthen tribal authority. See also the Runanga Iwi Bill 1989 and the 1990 interim report of the Maori Affairs select committee on it. For another statute of that time which also has an important symbolic element, see Mount Egmont Vesting Act 1978.

Much legislation in the early years of the colony and later has also made different provision for the Maori notwithstanding the equality emphasised in article 3. Indeed the argument can be made that article 3 allows such difference. Legislative practice, supported by international standards, has long recognised that affirmative or special action may be appropriate even in the face of general equality guarantees.[50] Indeed the comment has been made that the effective exercise of article 3 rights, in part through special measures, may be critical to the operation of the rights protected by article 2.[51]

The argument for different law, including legislation, can of course be made more strongly by reference to article 2. Henry Sewell's letter shows that. The very extensive detailed legislative practice which can be related to article 2 also shows that for the most part that provision has not been seen as capable of standing on its own. Particular legislative application rather than simply general references to the Treaty is usually the better method of implementation. But a general reference to the Treaty can be critical too.

The very important 1987 case, *New Zealand Maori Council* v. *Attorney-General*, relating to state-owned enterprises and the legislation enacted following it, illustrates both points.[52] The Court of Appeal in June 1987 called on the Crown to prepare a scheme of safeguards giving reasonable assurance that lands or waters would not be transferred to state enterprises in such a way as to prejudice Maori claims made to the Waitangi Tribunal (in the future as well as the past). It was able to give that direction because of (1) the inclusion in section 9 of the State-Owned Enterprises Act 1986 of the prohibition on the Crown acting in breach of the principles of the Treaty and (2) the lack of a system for testing proposed transfers against the principles. Following five months of negotiation a Bill which became the Treaty of Waitangi (State Enterprises) Act 1988 was introduced. The title to the Act says that among other things it is to give effect to the agreement and to ensure compliance with section 9. The preamble recites as well the course of the judicial proceedings, the negotiations, and the discharge by the Court of Appeal of the directions and the interim

[50] E.g. International Convention on the Elimination of all forms of Racial Discrimination 1965 article 2(2), Convention on the Elimination of all forms of Discrimination against Women 1979 article 4, and I.L.O. Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989 (No. 169) articles 2(2)(c) and 4; also "Race Relations and the Law in New Zealand" (1973) 6 H.R. J.L. 329 at 341-351.

[51] Report of the Royal Commission on the Electoral System, n. 24 above, paras. 3.20-25, 99-111.

[52] *New Zealand Maori Council* v. *Attorney-General* [1987] 1 N.Z.L.R. 641 and Treaty of Waitangi (State Enterprises) Act 1988.

declaration as a consequence of the process. The Act confers new powers (including exceptional powers of decision) on the Waitangi Tribunal. The general reference in the 1987 Act gave a sufficient basis for the court to *stop* executive action, and that proceeding led to the more specific 1988 Act, which *requires* particular executive action.

That new Act used the relatively mundane term "interests in land". Were coal-mining rights or licences such interests, with the consequence that the rights would be protected under the new Act? The question became a matter of dispute between Tainui and the Crown. The affirmative answer, favouring Tainui, is in large part based on the history of the phrase in land and mining legislation and the nature of coal-mining rights and licences at common law and in that legislation. But the judges had regard as well to the character of the 1988 Act:[53]

> the subject matter of the statutes, concerned as they are with the Treaty, demands a broad, unquibbling and practical interpretation.
>
> it is important to have regard to the history and purpose of the [1988 Act] . . . The interpretation should facilitate, not frustrate, those broad purposes.

It is in respect of land and other natural resources that the issues of direct legal enforcement of the Treaty provisions have largely arisen. But there are other areas as well. I take just two—the recognition of the Maori language and the establishment of official procedures which recognise Maori interests.

In 1978 and 1979 the courts held that Maori defendants in criminal matters had no general right to have their cases conducted in Maori.[54] English was held to be the language of the courts. The courts further held that the matter would be different and interpreters would be provided if a party or witness were to be prejudiced through lack of knowledge of English; and that Parliament could of course make different provision. The next stage was a report by the Waitangi Tribunal proposing different provision,[55] and the contemporaneous introduction by the government of a Bill to declare Maori an official language and to confer the right to speak Maori in certain legal proceedings. The preamble to that legislation[56] reflects its article 2 origins: the Maori language was a taonga guaranteed and confirmed by the Treaty.

One consequence is that there are now relatively precisely defined and enforceable rights to use the language in courts and tribunals. Another important consequence, running beyond the strict letter of legal right and obligation, is the practical support, given in part through the Maori Language Commission set up under the legislation, to the promotion of

[53] *Tainui Maori Trust Board* v. *Attorney-General* [1989] 2 N.Z.L.R. 513, 518, 535.
[54] *Mihaka* v. *Police* [1980] 1 N.Z.L.R. 453, S.C. and C.A.
[55] *Te Teo Maori Report* (April 1986).
[56] Maori Language Act 1987, Te Ture o te Reo Maori 1987.

the Maori language as a living language and as an ordinary means of communication.

Groups may participate in the exercise of power in a variety of ways—they might have the power of decision themselves, they might be represented on the decision-making body, their consent might be required, or they might have rights to be heard or to be consulted.[57] All processes can be seen in our history, and the Waitangi Tribunal has increasingly called attention to the need for local government and planning legislation to provide for the adequate involvement of Maori interests in part through consultation. The legislature has begun to respond to this call and to do that in a great variety of contexts.

One such context is the sentencing of offenders. The Criminal Justice Act 1985 included a new provision enabling the offender to request the court to call any person "to speak" about the ethnic or cultural background of the offender, the way the background may relate to the offence, and the positive effects the background may have in helping to avoid further offending. Was the person speaking under the provision to be put on oath, enter the witness box and be subject to cross-examination, or could the person simply speak from the body of the court? In one case, the District Court took the former view, but on appeal the High Court took the latter.[58] The material before the High Court showed that the section had its origins in a strong concern about the high rate of imprisonment of Maori and the need to place more emphasis on the use of alternatives to imprisonment for Maori offenders. Smellie J. referred to:

> a growing (and some would say long overdue) recognition that the Court system in the country based as it is on the Anglo-Saxon tradition of the common law is not always flexible enough to ensure fair and appropriate treatment for all New Zealanders.

In the judge's mind the beneficial and remedial aspects of the new process, associated as it is with the new community-based sentences, called for the interpretation he gave.

The matters just mentioned relate mainly to process. Parliament has also of course included references to the Treaty or to Maori interests among the matters to which the decision-makers are to have regard. That legislation is better considered under the next heading.

3. *Legislation requiring or permitting decision-makers to have regard to the Treaty*

The legislation considered under this head does not in general provide

[57] See e.g. the Report of the Royal Commission on the Electoral System, n. 24 above, paras. 3.106-111, the licensing ordinance, n. 48 above, for an instance of consent to new legislation being emphasised, and the Waikato—Maniapoto Maori Claims Settlement Act 1946 for legislation confirming a full settlement and discharge of confiscation claims. A recent United States Supreme Court case considered the varying scope of the zoning powers of a tribe, *Brendale* v. *Confederated Yakima Nation* (1989) 106 L. Ed. 343.
[58] *Wells* v. *Police* [1987] 2 N.Z.L.R. 560.

for the direct judicial recognition or enforcement of rights of the Maori arising from the Treaty. Rather it requires or allows those exercising the powers conferred by the particular statute to have regard to the Treaty or some relevant matter.

The legislation contains three variables:

(i) the status of the provision; does it have priority over other matters relevant to the decision or rank equally with or lower than them?

(ii) the strength of the verb; is the decider bound by the matter, obliged to have regard to it, or free to have regard to it (or not)?

(iii) the statement of the matter: general ("the Treaty of Waitangi" or its "principles") or more specific (such as "the relationship of the Maori people and their culture and traditions with their ancestral land").

The Conservation and Environment statutes provide an interesting contrast on the first matter, the ranking of the provision. The title to the Environment Act 1986, enacted on 18 December 1986, provides that it is an Act to set up an office and Ministry and to:

> ensure that, in the management of natural and physical resources, full and balanced account is taken of . . .
> (iii) The principles of the Treaty of Waitangi.

In all, five matters are listed (including all values placed by individuals and groups on the quality of the environment). The Act clearly gives no express priority. Nor do sections 17(c) and 32 which list among the several matters to which the Commission and Ministry are to have regard (where appropriate) the fact that areas are part of the heritage of the tangata whenua and contribute to their welfare. By contrast the Conservation Act 1987, passed three months later, gives the Treaty priority. A provision which stands alone requires that the Act:[59]

> shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

In two cases where there was doubt about the relative ranking of the reference the Court of Appeal has found in favour of the Maori interest. In *New Zealand Maori Council* v. *Attorney-General*,[60] the Crown argued that the specific provisions of section 27 of the State-Owned Enterprises Act 1986 protecting certain Maori interests which could be damaged by the transfer of the assets of the enterprises was a self-contained code regarding land claims based on the Treaty. The Court of Appeal

[59] As already noted in n. 43, the Act also contains an express savings provision for Maori rights in respect of freshwater fisheries and provides for the regulation of their management. That is to say, within the 1987 Act, as within the 1986 Act, the third variable is to be seen—the relative specificity of the matter to be considered.

[60] Supra n. 52.

unanimously rejected that argument. It gave priority to the statement in section 9 of the Act (included among the general principles) that:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

For Sir Robin Cooke P.:[61]

> Any other answer to the question of interpretation would go close to treating the declaration made by Parliament about the Treaty as a dead letter. That would be unhappily and unacceptably reminiscent of an attitude, now past, that the Treaty itself is of no true value to the Maori people.

Section 3 of the Town and Country Planning Act 1977 includes among seven listed matters of national importance which shall in particular be recognised and provided for in the preparation, implementation and administration of schemes "the relationship of the Maori people and their culture and traditions with their ancestral land". Section 4 then sets out the general purposes of planning—the wise use and management of the resources and other matters. The earlier legislation had simply set out the two predecessor provisions with no indication of their relative significance and the Supreme Court had held that the considerations under one were simply to be weighed against the considerations in the other. The 1977 Act by contrast provided expressly that section 4 was "Subject to section 3" (and at the same time added the reference to Maori ancestral land). For the Court of Appeal the plain words, and the 1977 changes, indicated that the matters of national importance set out in section 3 carry greater weight than those in section 4.[62] That still of course left the question of the weighing of the factors *within* section 3—a matter on which the court divided.

The second matter noted at the beginning of this section is the strength of the verb. The statutes and cases mentioned already indicate some of the variations in wordings and in the resulting interpretations. They also show that the ranking and the verb may interact in terms of result. The statute book includes the following range of verbs:

> This Act shall be so interpreted and administered as to give effect . . .
> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent . . .
> [certain matters] shall be recognised and provided for
> shall take into account . . .
> shall give consideration to . . .

The third variable identified at the beginning of this section is the matter to which regard is to be had. The matter might be general: the principles

[61] Ibid., at 661; see similarly 678-680 (Richardson J.), 694-696 (Somers J.), 700-704 (Casey J.) and 716-717 (Bisson J.).

[62] *Environmental Defence Society* v. *Mangonui County Council* [1989] 3 N.Z.L.R. 257, 260, 272, 279, 284, 289-291.

of the Treaty, the Treaty itself, rights under the Treaty or custom and usage. Or it might be more specific, as with the provision already mentioned from the Town and Country Planning Act 1977, or be even more concrete, as with the 1988 State Enterprises amendment, the 1981 and 1988 pardon statutes, and the 1987 languages legislation mentioned earlier.

It is not only the choice made under each variable which affects the scope of power of the decision-makers (and possibly also affects the review power of the courts). It is also the combination of the particular choices: thus if the Treaty interest is just one of several, if the verb is relatively weak, and if the matter is broad, the power will be relatively unconstrained. Over time practice may give such a power greater definition, or it may appropriately vary in its meaning and application as judgment and public opinion evolve.

The issues presented by the legislation and its interpretation are large and important. The material already mentioned suggests some comments and questions.

The first relates to legislative method. In some areas there does seem to be a tendency towards greater specificity. The 1988 state enterprises, 1989 Crown forests and 1989 fisheries legislation are all, as a consequence of litigation, much more precise than the general provisions originally enacted in 1877 and 1987. The many relevant provisions of the Resource Management Bill can also be compared with section 3(g) of the Town and Country Planning Act 1977. But much other legislation continues to be general. And the courts have shown that such references can place a real constraint on political power, to the extent at least that those with the power must address the general matter.

In the *Maori Council* case the evidence was clear that the Crown had not taken steps to ensure that it complied with its obligations under section 9. The court did not as part of its formal order give "the principles" a particular meaning. All that that order required was that the Crown establish a system. It was essentially left to the parties to the litigation and, as it happened, the Crown through Parliament, in accordance with the agreement of the parties, to establish that system and give it content. But can the courts go further and on the basis of the incorporation of such general references in legislation fully and specifically interpret, apply and enforce the phrase? The Treaty of Union case mentioned earlier suggests caution. So too do cases about public interests in the defence area.[63] And the rich United States experience of "political questions" is illuminating.[64]

The judges in the 1987 case did of course provide important and

[63] E.g. *Chandler* v. *D.P.P.* [1964] A.C. 763. And cf. also the reference to *CREEDNZ Inc.* v. *Governor-General* [1981] 1 N.Z.L.R. 172 in the *Maori Council* case supra n. 52 at 678.

[64] E.g. *Baker* v. *Carr* (1962) 369 U.S. 186.

interesting commentary on the general phrase (whether required for the decision or not). Many others, especially the Waitangi Tribunal (given its important statutory responsibilities) and also the government have contributed to that process as well. The phrase is obviously not one which produces clear, easy answers. To quote Benjamin Cardozo, these are principles for an expanding future, not rules for the passing hour.

This is not the occasion to add to all that commentary, but to ask a question about judicial review. Will the court review fully the meaning given by statutory decision-makers to the principles, or the relative weighing of aspects of the principles, or their application to a particular situation? The last matter might require an assessment not only of the applicability of the principles but also of the appropriate extent of the response. What do the principles require, for instance, in respect of the teaching of Maori in schools? Or what is the degree of judicial supervision of the actions of a chief executive under the State Sector Act 1988 in providing a personnel policy which recognises "the aims and aspirations of the Maori people"?

More specific legislation is in general subject to closer judicial supervision. The *Mangonui* case[65] helps make the point. There the Court of Appeal went a step further than in the *Maori Council* case. It agreed that as a matter of interpretation the ancestral land referred to in the phrase "the relationship of the Maori people and their culture and traditions with their ancestral land" is not confined to land now owned by Maori people. It held that if, even after sale, a special Maori relationship has continued down the generations that is a matter to be weighed. That is to say it gave an interpretation to the phrase, binding on the planning authorities. But that is only the first step. Who in a particular case decides whether the relationship has in fact continued and, if it has, the weight to be given to it?

4. *Legislation which makes no reference to the Treaty*

Courts have always been able to draw on principles and material outside the text of particular statutes when considering the interpretation or application of the statutes. They do this for a variety of purposes—for instance on the one side to determine the purpose of the legislation or the mischief it is designed to meet, or on the other to protect and promote other principles and values, which are external to the statute.

Is it appropriate for the courts in interpreting a statute to permit or even to require reference to the Treaty of Waitangi or Maori interests although the statute makes no reference to it? The most notable positive answer to the question was given in 1987 by Chilwell J. in his lengthy and closely-reasoned judgment in the *Huakina* case:[66]

[65] [1989] 3 N.Z.L.R. 257 at 261, 277, 287, 291.

[66] Supra n. 36.

> 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.

He thought that such reference was proper in the case of the Water and Soil Conservation Act 1967; indeed that it was *required* in the circumstances.

The judgment has several notable elements (including an extensive and valuable review of many of the cases considered in this article). These include the statements that the Treaty is not part of the law in the sense that the Treaty itself gives rights enforceable in the courts, legislation can be interpreted and the common law developed by reference to other statutes even although they are not directly in point, the Treaty has had significant statutory recognition, the broad language of the Water and Soil Conservation Act is not confined purely to physical considerations and the Act relates to the Planning Act, it does not specify criteria for the application or for objection, and courts increasingly take account of treaties and other international instruments even if the statute does not mention them.

The case is a striking example of the changing attitude of courts, counsel and the wider public to Treaty of Waitangi issues. It reflects as well changing methods of statutory interpretation, with an increased willingness to read legislation in its wider context. The case emphasises in addition the width of choice of technique available to courts interpreting legislation. So it is possible to argue that the Water Act is clear in its own terms; what is the reason to go outside it especially to *require* reference to Maori values? Parliament has included Treaty and other references in many other statutes and done that progressively, but not in this one; is not that silence significant? The case appears to reflect a general public perception of the Treaty; what if that changes markedly? What is the application of the proposition in this case that the law is always speaking? And in the end is not the Treaty being enforced—are not rights and duties being recognised—contrary to the general principles about treaties and to particular decisions on the Treaty over many years?

A Concluding Comment

The major agencies of the state and many others within the wider community are engaged with Treaty of Waitangi and related issues to an extent almost unprecedented in our history. That intensity of concern must have an effect on the law and the courts. The courts cannot stand apart and not be affected. Their contribution is plainly of major importance. But the judicial contribution does of course have a special character. It does have to be related to the role of Parliament and the executive and

other agencies. The Court of Appeal in the *Maori Council* case indeed acknowledged that its role there was based on the legislation introduced by the government (following the urgings of the Tribunal). And we have had most interesting interactions between the courts and other bodies.

The available experience now helps us address somewhat more clearly the question of which institutions and procedures (or combination) are the most apt to handle a problem. We can now stand back a little. And in addition to those procedures we must now have in mind those increasingly available in the wider international community.[67] These issues—as they did 150 years ago—once again have an international component.

[67] See especially the Racial Discrimination Convention, n. 50 above, the International Covenant on Civil and Political Rights, and the Optional Protocol (New Zealand has accepted all of them), and the new I.L.O. convention concerning Indigenous and Tribal Peoples in Independent Countries 1989 (no. 169).

The Human Rights Committee has just published its decision of 26 March 1990 on the case brought on behalf of the *Lubicon Lake Band* against Canada. The Committee held inadmissible the claim made for a breach of article 1 of the Covenant relating to self-determination but did find a breach of article 27 relating to rights of members of minorities. The Committee recorded that Canada proposed to rectify the situation by remedies the Committee considered appropriate (CCPR/C/38/D/167/1984). The finding of inadmissibility arises from the fact that the right of petition under the optional protocol is concerned with the protection of the rights of individuals; they do not include the right of self-determination.