Constitutional myths and the Treaty of Waitangi

By Dr Paul McHugh, Tutor of Sidney Sussex College, Cambridge. His book, The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi, *will be published by Oxford University Press in September.*

This article is a rejoinder to the article by Mr G Chapman published two months ago at [1991] NZLJ 228. It is Dr McHugh's contention that Mr Chapman is out of date in respect of "legal scholarship" on the Treaty. Dr McHugh's article was referred to Mr Chapman. Pressure of work, including having to go overseas at short notice, has meant that Mr Chapman could not respond within the publishing deadline. He advised however that having read Dr McHugh's rejoinder he does not wish to retract any of the points made in his original article. He noted with a little surprise the personal nature of the rejoinder and does not accept the personal implications of some of the criticisms — particularly that most of the points he made were founded on mostly racist suppositions.

A call for scholarship

Guy Chapman's article ([1991] NZLJ 228) is an example *par excellence* of the type of scholarship which for decades has inhibited the legal profession's understanding of the Treaty of Waitangi. His article is based upon an apparent unfamiliarity with the history of British imperial and constitutional practice, recent scholarship and the character of the relevant caselaw. He recycles outmoded orthodoxies without any evident awareness of their infirmity. He perpetuates dangerous and crass generalities from another generation. Most of the points made by Mr Chapman against imbuing the Treaty of Waitangi with legal status have long since been exposed as founded upon dubious (mostly racist) and inaccurate supposition as well as suspect methodology.

The purpose of this article is first to make a general plea for practitioners in the field of Treaty law to make an effort to acquaint themselves more conversantly with the new legal scholarship of the Treaty of Waitangi. This is more than school-masterly self-advertisement: One cannot understand the legal position of the Treaty or its place in Anglo-American constitutionalism simply by reading a few chapters of Claudia Orange's book, Ruth Ross' legally suspect but otherwise excellent article and a few of the cases over the past century in the New Zealand Courts.

Treaty rights as pure policy

An immediate danger of the approach advocated by such as Messrs Chapman and, to a lesser extent, Gerritsen ([1991] NZLJ 138) is that the Treaty is assigned to a legal vacuum, or, more accurately, ghetto, where it is viewed solely and simply as a policy document. It is depicted as a "pact" requiring Parliamentary response, yet one otherwise bereft of legal consequence.

There is in that approach a hidden and ultimately condescending patriarchism. Whatever Maori may have agreed to when they adhered to the Treaty, they certainly did not agree to an absolute Hobbesian authority being vested in the Crown. Moreover the history of the common law, so we are led to believe, is characterised by its interposition between an executive claiming absolute power and the subject. This role is one of the important features of the rule of law described by Dicey — a jurist to whom Mr Chapman, at least, takes instinctive attachment.

One presumes the Maori are subjects of the Crown (per article III of the English version of the Treaty) and one hopes the common law is as equally equipped to protect them as other subjects of the Crown. Yet the theme of Mr Chapman's article is that the Courts should not intervene on Treaty matters so that the Crown's relations with a particular segment of the country's population are placed beyond legal reach.

There is an unwitting irony — one is tempted to use a stronger term — in the approach which would keep Treaty issues solely in the policy realm, out of Court except to the limited (and always read down) extent of Parliamentary response. Mr Chapman says that Judges and academics are building a myth about the events of 1840. Yet he opens his article with a passage from Professor Wade's article ("The basis of legal sovereignty" [1955] CLJ 172) which itself discloses reliance on another myth, namely the events of 1688.

Parliamentary supremacy is not legal doctrine writ in stone. It is an English historical phenomenon to

which the Courts have responded. Its basis in the end is not inflexible, immutable law but the Whig myth of history reduced (speciously) to legal principle by Dicey. Mr Chapman's approach is itself based upon a constitutional myth — the Glorious Revolution — from which we are taught grew the doctrine of Parliamentary supremacy. The myth, like all constitutional myths, has been useful even though it is rapidly becoming overtaken by the facts of modern-day (political) life. It seems rather paradoxical behaviour to debunk one set of mythmaking — that associated with the Treaty of Waitangi — whilst at the same time relying in argument upon another myth.

The constitutional function of myths

The truth is that mythmaking is a vital part of constitutionalism. It is a way in which we make sense of the future through mythologising the past. That is the classic function of mythmaking and it has accompanied every epoch of constitution-making and evolution. Myths are useful. They are vital. They are a part of every framework of government, tribal or post-tribal. There is hardly a system of government in the world which does not resort to some form of myth. They are an inevitable fact of constitutional life.

To put it in a way which Anglo-Saxon lawyers should grasp : Magna Carta (1215) and the Glorious Revolution (1688) have for centuries been exalted as symbolising constitutional predicates fundamental to Westminster government. Yet the historical reality of these events will hardly sustain the myth which has been implanted into them: Historical reality and myth have become severed with identities and histories of their own.

The thrust of Mr Chapman's article is an insistence upon historical purity (and even then his depiction of it is woefully incomplete). That is to say, he mistakes myth for historical reality, not realising that each has its own space or, to paraphrase the Waitangi Tribunal, aura of its own.

Myth-making, then, is not a pejorative term nor a process necessarily to be debunked. It is simply a way of using the past to make sense of and delineate strategies for future governance. It is not rewriting history so much as inventing another.

It is precisely upon this methodology of the myth that the doctrine of the supremacy of Parliament rests. The starry-eyed Whig vision of the potency of representation in the legislature co-opted English constitutional history to this myth. The actual history of English constitutionalism itself defies this Whig superimposition yet that has become unimportant in as much as the myth has acquired a life — and with it, legal stature — of its own.

The mythmaking surrounding the Treaty of Waitangi should be a cause of celebration in that it displays the availability of a source of indigenous constitutionalism. In the end, it may be preferable for the New Zealand legal system to build a myth around the events of 1840 rather than those of centuries previous which occurred in a land with a history from which a sizeable proportion of this country's inhabitants have been excluded. The Treaty of Waitangi, if it is to become mythologised, is at least our own myth and it can so acquire a meaning pertinent to the governance of this country.

This is not a process to be deprecated but a sign of an emergent, independent constitutional identity: As myths which arrived as intellectual baggage of nineteenth century England are shed, others more local and attuned to national circumstances can evolve.

There is, of course, separate from this process the historically pure account of what happened in 1840. But, as the Treaty of Waitangi becomes part of the national constitutional fabric, the known facts of 1840 become less a concern than what it was thought by the treaty parties might ensue from the events of that year. In other words, the values represented by and associated with an event holding such constitutional overtones assume a history divorced from the actual event. Those who resent this process — and would cling instead to their own dying (Anglocentric) myths — seek to curb it by holding up this gulf as emblematic of its inherent bankruptcy. In truth, it is simply another way of refusing to surrender an older, certainly more comfortable myth for the uncertainty of the new emergent one.

There can be no doubt that the Treaty of Waitangi has become "constitutionalised" over the past decade (D V Williams "The constitutional status of the Treaty of Waitangi: an historical perspective" (1990) 14 NZULR 9) and that some vision of the basis of government in this country is being founded upon it. Yet the fact remains that the Crown's sovereignty over the country derives from this document too easily derided as "amateurish" by its detractors — charges as easily applied to any of the major landmarks of Anglo-American constitutionalism. Quite simply: the Treaty of Waitangi is as fundamental to government in New Zealand as Magna Carta and the Bill of Rights.

"Myths for beginners"

It seems rather surprising, but it is perhaps salutary, that with the Treaty discourse at its present stage of intellectual sophistication, certain legal points should need rehearsal. Plainly, these points are not as fully assimilated by the legal community as one would have supposed. Mr Chapman's article illustrates how incompletely legal scholarship on the Treaty has been grasped by the profession.

A good example with which to begin is the exhumed assertion that the Treaty of Waitangi was not a treaty of cession at all.

One need only consult the well-known work of M F Lindley *The Acquisition and Government of Backward Territory in International Law*, a book written in 1926, to negate that argument. Lindley shows how from the first the European powers recognised the treaty-making capacity of tribal polities and used these treaties as the basis of their territorial title. The limitation of treaty-making capacity to so-called "civilised" polities was an invention of an unrepresentative group of English writers in the late nineteenth century. These opinions, although reflected in *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72, were never absorbed into British practice.

Moreover, the foreign affairs prerogative includes the power to

recognise and enter into treaties with foreign potentates. Recognition of the sovereign status of these bodies is entirely a matter for the Crown. The Courts can hardly inform the Crown that it has entered (or proposes entering) into treaty-relations with a nonentity for to do so would be contrary to their accustomed position on matters of foreign policy. In 1840, the Crown recognised the sovereign capacity of the Maori tribes at least to make a cession of that sovereignty. The Crown did not subscribe to any "standard of civilisation" as a basis for its recognition of that treaty-making capacity. Any residual doubts did not alter the fact that the Treaty was concluded.

It is absolutely clear that the Crown regarded Maori consent as a precondition to any formal assertion of sovereignty over New Zealand. The Treaty may have been part of a process, as Mr Chapman indicates, but it was the pivotal part of the process. Without any formal Maori consent annexation would not have occurred. The fact that this was not a rule of law which the Crown's Courts could enforce did not diminish the perception of it as a legal prerequisite.

Legal positivists tend to cast back into the past their own contemporary methodology. In 1840 law was not regarded as the coercive Austinian "command". The regard for the rights of tribal peoples was incorporated into formal British practice from the early seventeenth century and so, as nineteenth century Judges as Chief Justice Marshall and Mr Justice Chapman were to indicate, the common law rules affecting colonies drew sustenance from accepted norms of British imperial practice. This is the common law in its original, "un-Austined" condition, being drawn from practice and usage regarded as binding.

One might also point to long-established tenets of Anglo-Saxon constitutional thought, in particular the anti-absolutist principles emergent from the early seventeenth century. By these the lawful basis of government was seen as resting on the consent of those subject to it. The Treaty of Waitangi is fully in accord with this honourable and noble tradition, yet Mr Chapman would take the absolutist Stuart view: He would depict the Crown's governance over Maori as a divine right. He thereby excludes Maori from centuries of Anglo-Saxon constitutionalism — so much for the promise of the rights of British subjects guaranteed by the third article of the Treaty of Waitangi.

Any denial of the Treaty as an instrument of cession is founded upon unfamiliarity with (a) British imperial practice, (b) the role of Courts in relation to the foreign affairs power, (c) the character of international law (not least its intertemporality and history on the status of tribal societies, (d) deepseated themes of Anglo-Saxon constitutionalism, (e) the limitations of positivist methodology.

The legal status of treaties of cession

The terms of instruments ceding the sovereignty of territory were described as "sacred and inviolable" by Lord Mansfield in *Campbell v Hall* (1774) 1 Cowp 204. This has been taken as describing a limitation of the Crown's executive powers in relation to such territory *save where those powers are derived from Parliamentary authorisation.*

Lord Mansfield did not base his propositions on the "civilised status" of France and Great Britain nor on the fact that neither signatory was giving away sovereign status. Indeed, he criticises the view of Sir Edward Coke in *Calvin's Case* (1606) as "strange" and "extra-judicial". In that case Coke had insisted that treaty relations with infidel societies were unlawful. Lord Mansfield felt this approach was an "absurd exception" better left unmentioned for the memory of Coke. Clearly, then, Mansfield would not have limited his propositions to treaty relations between Christian "civilised" powers.

It is apparent from *Campbell v Hall* that Lord Mansfield's propositions describe the power of the Crown over ceded territory irrespective of the religious or cultural status of the non-British treaty party. The recognition of the capacity of the other party is in itself sufficient.

Mr Chapman has difficulty with extending Lord Mansfield's propositions to the Treaty of Waitangi solely on the discredited basis that it was not an instrument of cession. His conclusion, however, is also implicitly based upon an unfamiliarity with the history of British imperial practice. Throughout this history there are examples of the Crown refusing to exercise a prerogative power in derogation of the terms of any treaty of cession. Such derogative activity required Parliamentary approval.

An example, one predating the Treaty of Waitangi, is the grant of *diwani* (1765) which gave the East India Company powers of governanace in the provinces of Bengal, Bihar and Orissa. Eventually regarded as a cession of sovereignty by the Mugal potentate, this instrument ensured the customary laws and legal systems of the regions. Warren Hastings, as Governor, maintained these indigenous legal systems. When Cornwallis eventually meddled with these laws with his regulations of 1793 he relied not on some supposed prerogative constituent power to erect Courts to discharge English law or a prerogative legislative power in a "ceded colony". Instead he derived his authority from an Act of Parliament (21 Geo III, cap 65, section 23).

This is an example of a treaty of cession being regarded as a limitation of the Crown's powers. The treaty of cession acts as a brake or check upon executive capacity.

The "act of state" cases which demand the legislative incorporation of promises in a treaty of cession do not disturb that conclusion. These cases usually involved an attempt to set treaty rights up against valid legislation or an attempt to revive rights which the act of state had effectively suspended. It does not follow from those scenarios that treaties of cession are completely devoid of legal cognisability. Indeed, a closer inspection of this caselaw rather than the regurgitation of misleading quotable quotes shows that Courts must on occasions consider and give effect to treaties of cession.

This jurisprudence has been explained and analysed elsewhere (see McHugh, *The Maori Magna Carta*, chapter 7). [In fact, virtually all of the arguments Mr Chapman makes against the Treaty are covered in my doctoral dissertation which is lodged in the Davis Law Library at the Auckland Law School. Many of the points made in this brief reply are covered there in more detail.]

Whose fallacies?

Mr Chapman states:

> The "principles of the Treaty", undefined, unstated and unknowable (except by judicial contrivance) as they are, should on no account be elevated to the status of the legally cognisable, let alone to a putative "higher law" status.

There is one difficulty with this comment. Parliament itself, rather than the Courts, has given legal cognisability to the "principles of the Treaty". By the accepted rules of our legal system, the Courts must enforce statutes. If statutes incorporate Treaty "principles" what option do the Courts have but to respond? Should the statutory reference to the Treaty "principles" be disregarded?

A similar issue arose in relation to Maori property rights at the beginning of the century. The tribal title to their customary land was, we know, guaranteed by the Treaty. Numerous Imperial and local statutes made references to this "native" or "customary" title yet local Courts still refused to acknowledge that such references gave the property right and legal basis. In *Wi Parata* (1877), Chief Justice Prendergast had said that a statute could not call what was non-existent (Maori rights under the Treaty) into being.

This was an attitude with which the Privy Council expressed extreme impatience in *Nireaha Tamaki v Baker* (1901). Lord Davey said such an argument was "rather late in the day". It was "the duty of the Courts to interpret the statute which plainly assumes the existence of . . . [Maori rights] which is either known to lawyers or discoverable by them by evidence" ((1901) NZPCC 381 at 382).

It seems strange that today a similar argument should be advanced by which Courts are required to ignore the plain words of an Act of Parliament. Mr Chapman would have us believe that a statute cannot call what is non-existent (the "principles of the Treaty of Waitangi") into being. One must reply that if the Courts have ever elevated these principles into a position of priority in the various legislative schemes it can only be a consequence of statutory permission. The various judgments of the Court of Appeal, not least those of Sir Robin Cooke, labour this point.

Mythmaking reconsidered

If the Courts have been making myths through the "principles of the Treaty of Waitangi", it is because Parliament has given them this task. This mythmaking has been no bad thing for it has meant that we have begun to scrape away the Anglo-Saxon surfaces of our constitutionalism. This is a prospect from which both conservatives (such as Mr Chapman) and radicals (such as Jane Kelsey) shy for it shows the law responding to a momentum within society which these groups would leave either as neglected or to burst forth in (a projected) eventual violent upheaval.

Any style of legal reasoning which sees the law as dynamic and responsive is thus disputed by the conservative and radical. Occasionally this dispute is dressed in pseudo-technical language and reasoning. However, when looked at more closely, it is superficial and based upon a poor grasp of historical development and method. It confuses mythology with historical reality.

No one pretends that the language of "partnership" and "fiduciary obligation" was exchanged on the seaside promontory at Waitangi in 1840. The Courts have stressed their construction of what amounts to a contemporary mythology of the Treaty. However, this constructive activity has a sure legal underpinning to it. The Courts are taking legal doctrine into the ghetto, the eyesore which the folks that live on the hill would rather neglect. From this, new mythologies may be arising and, in consequence, old ones dying. Neither human society nor its law is static and that, in the end, is what the conservatives and the radicals in the Treaty discourse resent most bitterly. □

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lender, not because the negative pledge lender has no proprietary interest in the debtor's property, but because pre insolvency, damages are adequate, and post-insolvency, the statutory framework for winding up and schemes of arrangement should prevail. □

1 The duties included a duty to account not only for what he actually received, but for what he might have received without wilful default.

2 If an execution creditor takes subject to the rights of a floating charge debenture holder whose charge has not crystallised, this fact alone should not help the debenture holder in securing the appointment of a receiver as he could hardly say that his security is in jeopardy. However if, as a number of cases state (see *Evans v Rival Granite Quarries* [1910] 2 KB 979), the execution creditor can take priority over an uncrystallised floating charge debenture holder, the levying of execution would put the security in jeopardy and justify the appointment of a receiver.

3 Spry (*Equitable Remedies*, 3rd ed, Law Book Company) at p 325 suggests it was never a necessary requirement at any rate. For example, from the earliest of times, injunctions were issued to restrain defendants from taking action in a Court of law where this would be unconscionable in the eyes of Equity.

4 Notably "upstreaming" and "sidestreaming" of money through Bond subsidiaries to other subsidiaries or to the parent, Bond Corporation Holdings Limited.

5 This is an alternative remedy to a mareva injunction, used to prevent a defendant taking assets out of the jurisdiction. The rationale behind the mareva is that it avoids an abuse of process. The mareva receivership was used in *Derby v Weldon* [1989] 2 WLR 412.

6 Equitable execution is a process by which the Court allows a judgment creditor to obtain payment of his debt by appointment of a receiver where ordinary execution at common law is inadequate.

7 A receiver may be appointed to a deceased estate where the personal representative is mismanaging the estate.

8 The Court cited *Harris v Beauchamp Bros.* [1894] 1 QB 801, 811 and *Bakal v Petursson* [1953] 4 DLR (2d) 449.

9 The Judicature Act in England confers a similar power.

10 However, there are still powers to appoint receivers in certain anomalous situations; for example, to enforce an interlocutory order under R277.2(f) of the High Court Rules.

11 See *Goodeson v Gallatin* (1771) 21 ER 346, where it was stated that the Court took its jurisdiction to grant injunctions from the writ of prohibition of waste.

12 These are unusual, an injunction normally being used.

13 This would appear to be based on the same principle as is used by the Court to appoint a receiver on application of a shareholder, namely, that the personal representative (or directors) are mis-managing the affairs of the estate (company).

14 For example *Hodgson v Duce* (1856) 2 Jur NS 1014, *Parker v Garrison* (1871) Illinois 250 (US).

15 In New Zealand, this is brought into the insolvency code for the winding-up of companies through s 307 of the Companies Act 1955, which incorporates s 104 of the Insolvency Act 1967.

underwriter will employ common sense plus such claims experience information as may be available to him. Common sense will suggest that a higher premium is appropriate in the case of a commercial vehicle because it is likely to be subjected to greater use and therefore at risk for longer periods. A taxicab for example is obviously used more than a private car. Common sense plus claims experience suggest that dwellinghouses unoccupied for a length of time are more likely to be damaged by intruders, that accidents are more likely in single-engine aeroplanes than scheduled airline flights and that loss (in the case of a motor vehicle policy) is more likely if the driver is unlicensed.

In the passage from *Harris* cited above we need not quarrel with the deprecation of "refined analysis in terms of metaphysical enquiries into causation" which is no more than a repetition of the plea for a common sense approach frequently advocated in judicial pronouncements on causation. Nor need we be troubled by the concluding sentences which do no more than restate the relevant part of s 11 in slightly different words. The problem with *Harris* is the rejection in the second sentence of the quoted passage and in the actual decision on the facts of the "but for" approach.

A "but for" approach is surely entirely appropriate where the excluding factor would prevent the use or presence of the insured thing or person in circumstances where the risk of loss can be demonstrated to be greater, and it is incorrect to suggest that such an approach either defeats the purpose of s 11 or is excluded by its terms. There is no reason why factors should not be treated as causing or contributing to a loss where it can be demonstrated that the existence of such factors makes the loss statistically more probable.

Common sense and the "but for" test are not mutually exclusive approaches for –

> the "but for" test, applied as a negative criterion of causation, has an important role to play in the resolution of the question .... The commentators acknowledge that the "but for" test must be applied subject to certain qualifications. Thus, a factor which secures the presence of the plaintiff at the place where and at the time when he or she is injured is not causally connected with the injury, *unless the risk of the accident occurring at that time was greater.* (*March v EMH Stramare Pty Limited* (1991) 65 ALJR 334, 338 per Mason CJ) (emphasis added).

In *Harris* but for the hiring the tractor would not have been where it was when damaged. The risk was increased by the mere fact of the additional use, consequential on the hiring, for which additional risk if not excluded from cover by the terms of the policy the insurer would be compensated by a higher, commercial rate premium.

Bearing in mind the words "or limits" in s 11(a) it is instructive to measure the rejection of the "but for" test against the common industry practice of providing in motor vehicle insurance policies for a higher deductible where the driver is below a certain age. On the statistically supportable premise that drivers tend with age and experience to get better at avoiding loss situations it was possible before *Harris* to resist the striking down under s 11 of such provisions on the basis of such an argument as is suggested in the preceding paragraphs. On the basis of the reasoning in *Harris* it is doubtful whether the higher deductible for drivers under a certain age could survive a s 11 attack.

The decision in *Harris* which in the writer's respectful view was not the inevitable consequence of the wording of the section makes s 11 excessively unfair to insurers. It must be hoped that in a suitable case with properly considered evidence from underwriters the Court of Appeal may be persuaded to reconsider the approach that found favour in *Harris*. Those problems apart it is the writer's view that despite the initial muddying of the waters caused by *Sampson* s 11 is working well. □

Books

The Maori Magna Carta

By Paul McHugh

Oxford University Press, 1991. ISBN 0-19-558226-8 $49.95

Reviewed by Nigel Jamieson

The Maori Magna Carta — Fact or Fiction, Myth or Reality?

We are a book-loving nation – made so in early life by an interminable series of school projects. Consequently Christmas-shopping in New Zealand comes to be associated with book-buying. Writing and publishing are but the vigorously wagging tail-bones of that good dog called "Reading Public" who expects and looks forward to new books for Christmas.

Claudia Orange wrote about the *Treaty of Waitangi* for Christmas 1987. Hugh Kawharu launched his *waka* on *Maori and Pakeha Perspectives* of the same subject for Christmas 1988. Between then and now, Richard Mulgan wrote *Maori Pakeha and Democracy,* Jane Kelsey *A Question of Honour,* Helen Yensen and others – *Honouring the Treaty* and Paul Temm – *The Conscience of the Nation.* Could there be room in this growth industry of Treaty treatises, asks Nicola Legat (*Metro,* June 1990), for more to be written on this topic? The good dog "Reading Public" continues to wag his tail, and out comes Oxford with Paul McHugh's *The Maori Magna Carta* in time for Christmas 1991.

The Maori first arrived in Aotearoa around Christmas. We know this from early songs describing the red blossom which lined the shores of their landfall. Tradition tells us that this colourful welcome was given by the pohutukawa – the New

Zealand Christmas tree. Alas, the McHugh-Chapman controversy ([1991] NZLJ 228, 318) has made it risky to rely on such orthodox views. Traditionalists are liable to be written off by the author of *The Maori Magna Carta* as being "obsolete", "inhibitory", "outmoded", "infirm", "dangerous", "dubious", and "racist" in their perpetuation of "crass generalities from another generation". Aside from how one's own *tupuna* feel in belonging to another generation, we feel ourselves open to being shown by any revisionist historian that things are not as they appear. Perhaps the first red welcome was provided by the southern rata, instead of the traditional pohutukawa, and the first landfall of the Maori in Aotearoa was made around Hogmanay at Otakou rather than around Christmas at Kororareka!

Tribal allegiances among historians aside, the prophetic association of Aotearoan landfall with this time of the year gives pleasure to reading about the Treaty over Christmas, rather than in computing the profits, like Scrooge, from the growth industry of this topic in our age of economic but not very scholarly jurisprudence. So yet another Christmas passes pleasurably enough, this time reading Paul McHugh's *The Maori Magna Carta*. Despite the inexorable march of economic jurisprudence throughout New Zealand, our reading continues into the New Year without a visit from Marley's Ghost. All the same, as Chapman says (op cit. p 228) the myth-making has not come cheap. By March 1990, the 1990 Commission had already spent more than $2.3m on promoting the Treaty. "Well, big turkeys don't come cheap", a reborn Scrooge might pleasantly reply to the way in which Chapman dismisses the celebrations as so much humbug.

Whigs and Tories

Is there any harder topic to write on nowadays in New Zealand than the Treaty of Waitangi? The Chapman-McHugh controversy shows that to summarise the situation of polarised opinion for our own little country of three million inhabitants can be as difficult as divising a new commonwealth for an immense soviet union. Does this mean that one should be more or less tolerant of anyone daring to put pen to paper?

One excuse for academic intolerance on the subject of the Treaty is the rising tide of extremely partisan publications. The paradox is that when Paul McHugh dismisses Dicey's doctrine of parliamentary sovereignty as being that of a Whig (pp 16-19, 37-43) he also invalidates his own view of the Treaty as being either Radical or Tory. Dicey argued for legal as distinct from political sovereignty no less strenuously than he argued for the existence of constitutional law distinct from constitutional history. Does McHugh have any doubts about constitutional law just because its existence was first formulated by a Whig historian?

Another excuse for academic intolerance on the topic of the Treaty is the intensifying politicisation of scholarship in New Zealand. The objectivity of legal argument and its abstraction from political argument is part of our fast-disappearing heritage of Roman Law. It is fast-disappearing because a new generation of scholarship grows up without the rudiments of Roman Law, and sometimes even without any formal training whatsoever in jurisprudence. The fast pace of lawmaking then takes its toll requiring us to study political bills in our law offices and teach them in our universities before they become legal Acts. Chapman is right to express reservations about the way in which Treaty topics have been used to politicise the law. We have become so perversely inclined away from the last generation's scale of abstract legal values that we pride ourselves on being able to incorporate political within legal argument. The result could well be to trash the Treaty without any help from the critical legal theorists (pp 383-385).

Trashing the Treaty has already begun with its trivialisation. What was agreed to at Waitangi is no longer the awesome thing it once was when viewed as the tap-root of our bicultural society. Too much has been spoken and written about the Treaty, and too many petty squabbles have arisen over what its terms mean, for the document to retain much of its original dignity. Like a much contested will, it seems doomed to survive only in the second-order settlements and judgments that so surprisingly reverse the deceased's intentions.

The same trivialisation of the Treaty also results from what, in the present climate of economic jurisprudence, may be called the "panic buying" of its terms. Thus we panic to purchase this or that political consequence for our future from the Treaty often by referring only to its principles as if we were buying but a pig in a poke. The trivialisation of the Treaty — "stepping over the covenant" in Eruera Stirling's terms — is not restricted to the lower ranks. There is a shoddy history of broken political promises and legal compromises in high places. The miracle is that this ongoing process of trivialisation can still give rise, eventually, to something as momentous for our legal system as the Waitangi Tribunal. Here in Aotearoa, with the demise of the Crown, the privatisation of the public service, the end of employment arbitration, the regionalisation of local government, the reorganisation of health and education services, and the fracturing of what we took for granted as the Welfare State, we are no longer an island isolated from the rest of global restructuring. Even if the Treaty were static, the fiercely changing context of society would provoke this topic to reflect our future shock. From this we panic to give voice on the marae, or put Pakeha pen to paper, before the shifting sands of reduced government spending sweep back over and rebury the *taonga* or treasure trove of the Treaty for the next one and a half centuries of our nation's history.

Would it detract from the legal status of the Waitangi Tribunal to recount something of its history in terms of party politics? Thirty-four pages on the Treaty of Waitangi Act 1975 in *The Maori Magna Carta* subsume all government activity as the work of the Crown — a surprisingly strict legal account for one who opposes conventional legal theory on partisan grounds. Whether keeping the legal situation that one supports squeaky clean from party politics is or is not a Toryism is impossible for this reviewer to decide, unable as he is to find constitutional monarchy and parliamentary democracy any worse

— or, for that matter, any better — for being Whiggisms.

Breadth versus Depth of Vision

It is debatable whether Gilbert and Sullivan are right in singing that everyone is born either a little Whig or a little Tory. It is true that the conversion experience from one to the other in party politics is rare, but switching allegiance also depends on the stability of the parties. Thomas Carlyle wrote in *Sartor Resartus* "that . . . the English Whig has in the second generation, become an English Radical; who, in the third again, it is to be hoped, will become an English Rebuilder". Of these two — not inconsistent — views of English politics, the first is slight but cynical and the second deeply sociological of what in French politics is simply right and left. The question is what depth and breath of vision do we look for in any academic treatment of something so radical to some and so conservative to others as the Treaty of Waitangi?

The publisher's blurb to McHugh's *Maori Magna Carta* prophesies that "this book will become the standard work on the laws affecting the Maori people". It is always possible that McHugh no more intended his book to be standard than did Orange intend her book to be definitive. After all, McHugh does not deal with the text of the Treaty as a primary source of law at all. Indeed it may not be possible to do so and still credibly deal with the topics in the same way as McHugh has chosen to deal with them. The same goes for legal history — to omit all mention of Marsden's missionary work (without which the Treaty would have been inconceivable to the nineteenth century Maori), to pass over the frequent Maori requests for the inception of English law and order, to fail to deal with slavery and cannibalism outlawed by the new order, and to gloss over nine years of British Residency in one sentence, is going to give a very one-sided, if not perverted view of the Treaty. So, too, the failure to account for the effect of the New Zealand Wars — which comprise a much greater portion of our 150 years of national celebration than our country cares to remember — allows for a manoeuvrability in legal values that would not otherwise be credible.

The author may reply (p xiii) that his book is "not so much legal history as contemporary law". The irony of the author's situation is that this is exactly what Dicey was doing (Preface to the First Edition of *The Law of the Constitution*). And McHugh is right about Dicey — the risk of omitting legal history is that it allows for a lot of unwarranted myth-making (the sovereignty of parliament kept in check by constitutional conventions as opposed to the more conservative concept of parliament as a high Court); but McHugh is doing exactly the same thing with the Treaty as Dicey did with parliament. The outcome is not quite the same thing, however, for where, one may ask, lie McHugh's checks and balances to the interpretation of the Treaty? Dicey might have been a very Whiggish politician but he was a very Radical scholar. Could the same go for McHugh too, once his arguments are analysed? On the contrary, we are probably looking at the reverse relationship between Radical politics and Whiggish scholarship.

Treasure trove

The trouble with *taonga* — treasured things — is that if the Treaty guarantees them, and extends the concept of them beyond property and possessions so that it "combines with *rangatiratanga* to form the basis of non-resource related Maori claims under the Treaty" (p 8), then the argument is circular and self-referential because the claimaint can claim to treasure everything under the antipodean sun. Logically the guarantee extends to whatever is treasured. The psychological temptation is to treasure whatever is withheld but claimed.

The Waitangi Tribunal has gone so far as to advise that *taonga* embrace words (*te reo maori*), thoughts, and actions (*haka* dance movements). As a semi-Scottish pakeha in a state of Anglo-American culture shock, this reviewer can sympathise with doing the most to protect one's roots; but the risk is that the widest possible embrace given to *taonga* inclines its use as a vehicle of wishful thinking, or worse still a weapon of reverse discrimination. This continues to the point of absurdity unless the relevance of *taonga* as a legal concept can be established by knowing what is not *taonga.*

In the same way as an absolute and unlimited concept of *taonga* (corresponding to the cornucopia or treasure trove of unlimited Pakeha resources as seen by eighteenth and nineteenth century Maori) can be risk for bicultural relations in New Zealand, so too McHugh's *Maori Magna Carta*, when read alone, can be a perilous book. Thus chapter 8 deals with "the fiduciary duty of the Crown to the Maori tribes" — but there is nothing at all in the book about the fiduciary duty of the Maori tribes to the Crown. Chapter 3 deals with "the common law source of Maori rights" but not about Maori responsibilities. Chapters 5, 6, 7 and 10 are all similarly rights-orientated and responsibility-diminished chapters upholding Maori freedom. Does the author argue from the Treaty that the Maori people have only rights and no responsibilities? If so would he consider his interpretation of the Treaty terms on that score just as literal or liberal as intepreting the terms *taonga, kawanatanga* and *rangitiratanga?* As the author states (p xiii) he is writing an acount of contemporary law, and there is every excuse afforded to him by his contemporaries (critical legal theorists apart) to indulge in the myth of rights, and to recognise duties only in the abstract, and within parenthesis (p 383).

The danger of emphasising "the contemporary dimension of the law" (p xiii) goes deeper with the author of *The Maori Magna Carta* than merely keeping up to date with one's contemporaries. It may be that Treaty law is moving too fast nowadays for anyone to write a standard work. Treaty law certainly moves too fast to teach it, and the effect of lip-service to Treaty principles in state-restructuring legislation — "this deluge of vagueness" as Chapman calls it — can be enough to bring the entire legal system into disrepute as being "hasty and ill-considered". It is true that the ultimate outcome may be for the general good (that could already be the case with the environmental issues under the Treaty), but usually this can only be attained from having some stable point of reference. Where

contemporary law is chaotic, one usually falls back to one's last held stable ground which is legal history. For Paul McHugh, however, "a thorough legal history of Maori-Crown relations . . . is sorely needed". This reviewer would agree, but also believes that New Zealand's legal history has been blessed with works by Busby, Cowan, Buick, Foden, McLintock and others too numerous to mention. It is fashionable now to denigrate such peculiarly Pakeha pioneering work, much as an Oxford scholar will discountenance Windeyer's *Legal History* as "a bad book", but the fact is that these books are a history in themselves of informed (and in other ways uninformed) views. To denigrate Hugh Carlton (as did McLintock), or to belittle Buick (as does Orange), or to be so ignorant and dismissive of Orange in turn (as does McHugh) is but to prophesy one's own come-uppance. *The Maori Magna Carta* would be much the better book for relying more on Orange's *Treaty of Waitangi*, and its author Paul McHugh would gather wisdom by learning to enjoy reading his opponents' work, for its own sake, rather than just to mirror and advance his own. Legal research is as much an old man's pastoral and agrarian activity as it is a young man's enjoyment of the chase. The author of *The Maori Magna Carta* mistakes what he calls "the Pakeha legal paradigm" for more of an individualistic and less of a collectivist enterprise than it really is. This is not to advocate more footnotes and cross-credits; on the contrary the clearest example of collectivist legal writing in our century (and the very reason for its success) is HLA Hart's *Concept of Law*, which has little or none.

The strength of Paul McHugh's *Maori Magna Carta* lies in its breadth rather than in its depth of vision. "To give a unified and comprehensive account" is the express aim of its author. In its comparative approach, the work is global and cosmopolitan. Here is one of the strengths of the new age movement. One is given a coverage of world affairs from the New Zealand Company on p 25, to the formal Mogul consent to British rule on p 26, to the North American Indian tribes on p 27, to the Papal Bull dividing up the non-Christian world between Spain and Portugal on p 31, through Hume, Bentham and Austin as successors to Coke on p 34, through the secularisation of the *jus gentium* on p 36, to the Whig mythology influenced by Grotius and Vattel on p 37.

As someone who writes in somewhat the same vein, what still makes me, the reviewer, uneasy as well as excited by this panoramic vision? I think I am uneasy as an academic because the whole argument is very tenuous. Geographically it encompasses the globe. Historically it takes place over hundreds of years. Logically, it argues from abstract rather than experiential premises. Rhetorically, it relies on scapegoats — the transport of Te Rauparaha to Akaroa by the English ship *Elizabeth* (p 23), Lord Glenelg's hostility to the New Zealand Association (p 29), the apparent absurdity of the Papal Bull *Inter Caetera* (p 31), James II's huffiness — which his kingdom chose to construe as enforced abdication (pp 34-35), and Whiggism (pp 35, 37). Despite all this, there may be still indeed "a direct road from the Council of Constance (1414-18) to the Glorious Revolution, the American and French Revolutions, the Romantic movement and the Treaty of Waitangi" as the author concludes on p 39. The task is to keep all these enormous events in one's head at once in order to make the conclusion credible. The challenge is as much to the writer's powers of communication as it is to the reader's powers of conceptualisation; but whether "non-lawyers with a strong interest in Maori issues" (p xiii) can cope with the same kind of cosmological argument running throughout the book depends on their amenability to be overawed in its favour or be turned off by it.

Ultimately, global views of fact are accounted for by the spirit in which they are given. If this global account given in McHugh's *Maori Magna Carta* is, to quote from Frank Peretti's *Piercing the Darkness* (1989), more concerned in education "with the facilitation of change . . . the need to change the upcoming generations to prepare them for a global community . . . [in which] a lot of stubborn old ideas about reality are going to have to be cast aside: such notions as nationalism, accountability to some Supreme Being, even the old Judeo-Christian dogma of absolute morality [and] in their place [implanting] a new worldview, a global scheme of reality in which our children realise that all the earth, all nature, all forces, all consciousness are one huge, interconnected, and interdependent unity" then, despite the fact that this new world order is coming from Oxford and Cambridge, Harvard and Yale, this reviewer will have none of it for Aotearoa. In the first place, being pseudo-Maori it is not Maori, and being pseudo-Pakeha is not Pakeha, and in the last analysis it is completely at odds with the spirit of Christianity for Aotearoa in which the Treaty of Waitangi was written.

Te Magna Carta Maori

The main issue of McHugh's four hundred page book is one of comparative jurisprudence. The fascinating failure of the book is the constant refusal of its text to fire in the direction of its expressed target. For the past seventeen years, first-year legal system students at Otago have undertaken some comparative jurisprudence of the sort that McHugh takes to be the title to his book. Every one of those 6000 students, in being asked to explain the relationship between Magna Carta and the Treaty of Waitangi, would have failed the question were they to avoid the issues as the author of *The Maori Magna Carta* has done. The conclusion can only be that McHugh considers comparative jurisprudence to be a matter of legal rhetoric rather than legal logic. He casually mentions the Magna Carta (his chosen topic for comparison with the Treaty of Waitangi) only once or twice in the text. This is a terrible slight to Anglo-Saxons and one that is hardly in keeping with the espoused Pakeha legal paradigm. And *taha Maori* gets no hearing at all in the text — which is a terrible slight to all Aotearoans and hardly in keeping with the espoused reorientation towards those with a particular interst in Maori issues. Once again, the result is symptomatic of the new age movement that its proponents not only fail to hit, but spend all their energy avoiding their chosen target. As a matter of comparative

jurisprudence, the Treaty of Waitangi ends by being no more or less related to Magna Carta than it was before the publication of this book expressly on the subject.

The Treaty of Waitangi is often compared with Magna Carta. Busby first drew the analogy of Magna Carta with the Declaration of Independence made by the Confederation of Maori Tribes in 1835. Buick devoted a whole chapter of his book *The Treaty of Waitangi* to considering the ebb and flow of argument in Waitangi as if it were at Runnymede. This is in keeping with the intentions of those who were privy to the negotiations at Waitangi. In 1840, Williams wrote of "showing to the Chiefs that this Treaty was indeed their Magna Carta".

Others drew the same comparison very differently. Historians took sides. McLintock poured contempt upon the Treaty as being "this blanket-bought missionary Magna Carta". Ross dismissed the desire to demonstrate any resemblance between the two documents as "woolly-mindedness".

So many historians have scorned the Treaty by drawing on or dismissing the comparison between it and Magna Carta that it is barely possible to consider it for what it is — a serious issue of comparative constitutional law. But then this is exactly the same situation with Magna Carta — so many historians have scoffed at its constitutional significance that it is barely possible for lawyers to consider the paradox that it began as a feudal document. We miss out on the resulting revelation for law and society by opting for one extreme view at the expense of the other.

By reason of this intense conflict over comparing something so new as the Treaty with something so old as Magna Carta it is vital to acknowledge first the obvious differences between the two documents. These differences are drawn up in the form of a table by which to recognise the forcefulness of McLintock's contempt for the Treaty as being "blanket-bought", and Ross's dismissal of the desire to demonstrate any resemblance between it and Magna Carta as being "woolly-mindedness". Do these differences explain and substantiate the way in which Paul McHugh is content to treat his title *The Maori Magna Carta* as one of rhetoric?

A Table of obvious differences between Magna Carta and Te Tiriti o Waitangi

Magna Carta	Te Tiriti
1 The Magna Carta is one of three fundamental compacts, the others being the Petition of Right and the Bill of Rights, that constitute, in Lord Chatham's words, "the Bible of the English Constitution".	1 As well as Magna Carta, the Petition of Right, and the Bill of Rights, New Zealand has Te Tiriti o Waitangi as a fundamental compact of this country's constitution.
2 Magna Carta is the first, and perhaps most fundamental of England's compacts. The Petition of Right (1628) explicitly recognises it as "The Great Charter of the Liberties of England". The first version of Magna Carta was signed in 1215.	2 New Zealand's constitution is antipodean — it has been established in reverse chronological order. Te Tiriti, signed in 1840, helps to explain the import into New Zealand of the Bill of Rights (1689), the Petition of Right (1628), and Magna Carta (1215) because these are among the rights and privileges of British subjects introduced by Te Tiriti. Ours is the Magna Carta with hindsight.
3 Signed in 1215, Magna Carta is a complex document of 63 clauses. It is expressed both as a grant and confirmation — words of power in the early days of conveyancing — and takes a broad overview of most issues of government causing concern within the English kingdom of its own time.	3 Signed in 1840, Te Tiriti is comparatively simple, having only three articles relating to sovereignty, land and property, and citizenship. The conceptual complexity of Te Tiriti is concealed by a linguistic simplicity (continental as opposed to common law jurisprudence).
4 Magna Carta is written throughout in Latin. In 1215 that was the language of the law because only the clergy were literate and lawyers were clergymen.	4 Te Tiriti is written in both Maori and English. It was written for the Maori in that language by the clergy because they were the only people conspicuously literate in Maori at that time in New Zealand.

5	Magna Carta was virtually imposed on a recalcitrant Crown by an angered nobility. King John did everything he could to break up the combination of church and baronage against him and so avoid signing the charter.	5 Te Tiriti was to be executed freely and voluntarily on both sides. In the course of explaining the Treaty Hobson felt the opposition too large and was about to pack it in, but Williams told him to wait, that putting the opposing point of view first and as strongly as one could was all part of *kawa maori* – Maori protocol.
6	Magna Carta was put forward as a matter of internal housekeeping – how the kingdom of England should be ruled. Its intention was domestic. (Its effect on Christendom at the time was the reverse, and ever since it has become increasingly international.)	6 Te Tiriti was put forward as a matter of international relations. The first clause of Te Tiriti effects a transfer of sovereignty. The intention and effect of Te Tiriti was published as a matter of international law.
7	Much of Magna Carta (particularly that part which lawyers now ignore) is a feudal document. Its concern for heirs and wards, tower and castle guard, expressly reasserts the feudal law of status.	7 The feudal character of Te Tiriti is implicit, not explicit. On the one hand, it introduces the feudal tenure of land with the Crown holding the allodium as a corollary of sovereignty. On the other hand it puts an end to the status of slavery by explicitly providing for the rights and privileges of British citizenship in New Zealand.
8	Despite the historian's denigration of Magna Carta as a mostly feudal document, some clauses, notably clause 39 against false imprisonment and clause 40 opposing the sale of justice, remain pre-eminently constitutional. Right from the start, whether intentional or not, Magna Carta has constitutional impact.	8 The whole Treaty is constitutional "regarding with royal favour the native chiefs and tribes of New Zealand and anxious to protect their just rights and property, and to secure to them the enjoyment of peace and good order . . . and to establish a settled form of civil government with a view to avert the evil consequences which must result from the absence of the necessary laws and institutions".
9	Magna Carta attempted to reinforce an existing order of things, usually summed up in the coronation oaths of previous kings. It has not the slightest intention of changing the existing form of government in England at that time.	9 Te Tiriti set out to effect a change in sovereignty over New Zealand, the introduction of a new system of land tenure, and the extension of British citizenship. Te Tiriti is more like the Treaty of Union (1707) between England and Scotland than Magna Carta.
10	Magna Carta originally contained provisions for enforcing its observance. If the Crown failed in its royal responsibility to govern the country, then the citizens had a right to rebel in accordance with the procedure laid down in clause 61.	10 No enforcement provisions were included in Te Tiriti securing its observance by the Crown. Furthermore, unlike the Treaty of Union constituting Great Britain, Te Tiriti was not immediately incorporated into any Act of Parliament.

It is only in the face of recognising these differences that we can be struck by the forcefulness with which Magna Carta and Te Tiriti o Waitangi are also similar. These obvious similarities, which, for the purposes of debate, are restricted to the same ten in number as the noted differences are also given in tabular form. For the first time we can see that Williams and Buick are engaged in an enterprise of comparative legislation when they compare Magna Carta with Te Tiriti o Waitangi. Do these similarities demonstrate a comparative jurisprudence by which *The Maori Magna Carta is much more than rhetoric?*

Obvious similarities between Magna Carta and Te Tiriti o Waitangi

1 Both Magna Carta and Te Tiriti o Waitangi are *material things*. They are not events – although they evidence events; they are not ideas – although they express ideas. Given the privilege of doing so, we can see, touch, and hold both Magna Carta and Te Tiriti in our hands. From the legal point of view the things called Magna Carta and Te Tiriti o Waitangi constitute *real evidence*. Were their existence ever in dispute, we should ultimately have to produce them in Court.

2 Both Magna Carta and Te Tiriti are *documents*. They are *written things*. It doesn't matter whether they are written on vellum, parchment, paper or stone. It doesn't matter whether either is written in quill pen, chiselled rune, or laser beam – *both are documents*. This means that roughly the same rules of *documentary evidence* apply to determine what Magna Carta and Te Tiriti each mean, as well as the same rules of *real evidence* as to where each document may be found.

3 As documents, both Magna Carta and Te Tiriti rely on language to communicate their significance. The language of Magna Carta is Latin, whereas Te Tiriti is written in Maori and English. The fact that different languages are used is less significant than the legal value we attach to their both being documents. Both Magna Carta and Te Tiriti are *linguistic things*. They will be construed and interpreted according to *the rules of language*. Because Latin is no longer the language of the law, Magna Carta shares the same problems of *bilingual interpretation* as more explicitly affect the *bilingual texts* of Te Tiriti in Maori and English.

4 Three estates of the realm — church, crown, and barons — were parties to Magna Carta. In theory, the charter relied on the confederacy against the crown of church and baronage. In practice the outcome was decided by the citizens of London siding with the barons and the fact that even Court officials and servants of the royal household turned against the king. Magna Carta relied on a *class confederacy* of clergy, nobility, and citizens against the king. Te Tiriti relied on a similar confederacy. In practice the Treaty could not have been accomplished without the literacy implanted by church missionaries, the co-operation of ruling classes of Maori chiefs, and the service of government representatives such as Busby and Hobson. In the case of the Treaty, the *class confederacy* supported the Crown. The outcome of both Magna Carta and Te Tiriti, whether for or against the Crown, relied on *consensus*. Despite opposition to both documents, the Crown to Magna Carta and several settler societies as well as some Maori tribes to Te Tiriti, it is this *class consensus* among all estates of each realm that characterises each document as being one of *partnership* or *fundamental compact*.

5 Historical cynicism has made a myth of Magna Carta. The same sort of cynicism has operated against Te Tiriti o Waitangi. It is true that many provisions of Magna Carta are feudal in nature — but to think that this was clear to those who drafted them is an anachronism. Te Tiriti o Waitangi is no less feudal in effect (it might well be more so) by its introduction of allodium, tenures and estates. The *legal fictions* by which feudal documents eventually become construed as constitutional documents are common to both Magna Carta and Te Tiriti o Waitangi, and are part of the recognised legal process by which the continuity of law is maintained through a changing society. The most dynamic characteristics of both Magna Carta and Te Tiriti o Waitangi are directly attributable to *legal fictions*.

6 The historical origins of Magna Carta and Te Tiriti o Waitangi are much the same. The Magna Carta can be treated as a treaty of peace to prevent civil war no less than Te Tiriti o Waitangi can be called a great charter of liberties. Each document has served both specific and general purposes, some of which in the course of time have proved somewhat contradictory. Within 50 years, Te Tiriti had put an end to slavery, cannibalism and headhunting in New Zealand, while serfdom lingered on in England for centuries after Magna Carta. Both Magna Carta and Te Tiriti originated in very *similar social situations of law and order confronting lawlessness, with the issue of good government hanging in the balance.*

7 Both Magna Carta and Te Tiriti have *legal status*. Facts and law are not mutually exclusive. Whenever we want to prove the existence of a law we have to find its legal source in material fact. The fact that Magna Carta and Te Tiriti have legal force can be proved by cases and legislation. There are statutes that incorporate the principles of the Treaty of Waitangi. There are statutes that reaffirm Magna Carta in legislative form. There are cases upholding each. Both Magna Carta and Te Tiriti thus have the *authority of law*.

8 Both Magna Carta and Te Tiriti deal with *fundamental legal values*. Law and society are twin trunks of the same tree. Fundamental legal values affecting the administration of *justice*, the constitution of *good government*, the responsibility for enforcing *law and order*, the maintenance of relationships (such as knight service or citizenship) that *integrate the individual with the community*, and the protection of property are all explicitly dealt with in both Magna Carta and Te Tiriti o Waitangi.

9 As with the case of all constitutional documents dealing with fundamental legal values in fast-changing societies, both Magna Carta and Te Tiriti o Waitangi face *problems of legal interpretation and application*. Magna Carta prevented civil war, and so came to be emphasised as a landmark of constitutional values. In the same way as Magna Carta did not prevent later revolutions (including the American War of Independence 1773-1781), so Te Tiriti o Waitangi did not prevent the Maori or New Zealand Land Wars (1845-1872). In each of these crises both Magna Carta and Te Tiriti not only broke down but provided a provocative and pivotal point of dispute. When Magna Carta emerged from the American War of Independence and Te Tiriti emerged from the New Zealand Land Wars neither document was seen the same way as it had been seen before. The constitutional significance of Magna Carta had been heightened to an international level by the independence gained by the American Colonies, the status of Te Tiriti had been lowered to a legal nullity by the outcome of the New Zealand Wars. In between these extremes there is a continual ebb and flow of differing interpretations given to each document.

10 Magna Carta is not a single document. Neither is Te Tiriti. Magna Carta was issued in an age of charters. Te Tiriti was issued in an age of treaties. There are many Magnae Cartae — at least 37 successive versions of the one signed by King John at Runnymede in 1215. How many different versions of Te Tiriti can be found? There are quite a few. Whether we think that this enhances or detracts from the constitutional significance of Magna Carta and Te Tiriti is not just a matter of documentary evidence but of fundamental legal values. After all, the Gospels all differ in their account of the bodily resurrection of Jesus Christ. Does that enhance or detract from their

testimony? Will lawyers and laymen tend to differ in the answer they give to this last question?

Ongoing issues

For some New Zealanders there is a depth of feeling or of thought that can be expressed by comparing Te Tiriti with Magna Carta. Like Johnson's *Rasselas,* they can experience "the seriousness of relating one's own small life" in New Zealand to "the grandeur of creation" in the common law at large. Not so the cynics. Quoting from *Rasselas* again ". . . they laugh at order and at law, but the frown of power dejects and the eye of wisdom abashes them".

So far as the now fundamental law of Te Tiriti requires us to keep faith with the partnership brought about by it, "the frown of new found powers peers out, and the eye of wisdom flashes as never before" from the decision in *New Zealand Maori Council v Attorney-General* (1986) 6 NZAR 353.

Of course not everyone accepts literary jurisprudence as a decision process for legal disputes. For one thing that would mean reading *Rasselas.* At issue are legal and social values, how they relate to each other, and whether a legal system has the task of keeping conflicting social values apart (biculturalism and multiculturalism) or of reconciling them. Do we scoff at Te Tiriti when considered as Te Magna Carta Maori? If so, then what does that express, monoculturalism or biculturalism — and how is it that we can still get different answers to this last question?

What we want is a whole world view of our own country's legal history. Nothing less, whether by way of monoculturalism, biculturalism, or even multiculturalism, will do. This is what is meant by our looking for Te Magna Carta Maori.

Paul McHugh is one hundred percent correct in looking for a whole world view for *The Maori Magna Carta.* In being misled to look for any new world view, however, we overlook the old world view expressed by those committed Christians who drew up Magna Carta and the Treaty of Waitangi. Neither of these documents can be correctly construed by the purely secular mind. Whether one likes it or not, the spirit of each is Christian.

If McHugh is right in claiming, and Chapman is wrong in rejecting the Treaty as fundamental, and if McHugh is right to pursue one world view of the Treaty and substitute this sort of absolute in favour of continuing biculturalism, what sort of issues remain outstanding for the project? We conclude with a table of archetypes which will point these out and summarise them. We seriously suggest that Paul McHugh try to resolve these differences and their consequences for our legal system by recapturing some of the wisdom of the marae and renouncing the secular humanism of Oxford and Cambridge which — at odds with the Treaty and to the detriment of New Zealand — has come to be identified with what it means to be Pakeha.

Archetypal forms of Maori/Pakeha thought and feeling patterns

Te Ao Maori	Te Ao Pakeha
1 Te ao Maori is essentially all one. Common bonds running through the universe count for more than specific differences. This means that the three areas of action — physical, intellectual, and spiritual — are intimately related as one.	1 Te ao Pakeha is essentially particulate. The many outnumber and consequently signify more than the one. Drawing distinctions counts for more than finding resemblances. The body, mind, and spirit are clearly differentiated and kept apart.
2 The essential oneness of te ao Maori gives rise to a cosmic or whole-world view. The many are one. Reality is united and absolute, and only appearances are fragmented and relative.	2 The particulate nature of te ao Pakeha produces multiple views of the world — as seen by the physicist, the physician, the lawyer, and the priest. One is the many. Reality is relative and to search for or rely on absolutes is to be deceived by appearances.
3 Because te ao Maori is essentially all one, then, as in gestalt psychology, the whole counts for more than the sum of its constituent parts. Although one is outnumbered by the many, the many are outweighed by the one.	3 Because te ao pakeha is essentially particulate, the whole cannot count for more than the sum of its constituent parts. The many outnumber the one, and so much count for more.
4 Understanding reality is a process of synthesis. It is brought about by sewing things together — i tuhia i te rangi, i tuhia i te whenua, i tuhia i te ngakau tangata.	4 Because te ao Pakeha prides itself on being particulate, it relies on analysis to understand reality. The whole appearance of things is broken down into its constituent parts — divide and conquer.

5 Te ao Maori looks towards integrity as a measure of understanding the world. Data is not so important as what you do with it. Kia kaha kia tu – be strong and stand firm.	5 Te ao Pakeha has an atomic world view. It disintegrates what it views as but the appearance of a whole world into the separated fragmented parts that constitute its reality. Data determines what you do with it. Once again, divide and conquer.
6 Te ao Maori seeks simplicity. If the world is one, then truth is simple.	6 Te ao Pakeha seeks complexity. If the world is many, then truth is complex.
7 Te ao Maori is alive – tihe mauri ora! Even trees and stones have a spiritual life force. The world is vital and dynamic, being in a process of either growth or decay. The life sciences come first – physics tags along behind.	7 Te ao Pakeha is quite inanimate. For the most part, Pakeha can't even understand when the very stones would scream out. Physics comes first. Even God is just an inanimate force, and some theologians who would have once thought Him alive now cover their tracks by postulating His death as some sort of compromise.
8 The oneness of te ao Maori is spiritual. What happens on this world is explicable only in terms of what happens in the other world.	8 Te ao Pakeha is secular. Spiritual explanations are suspect to the secular mind. Because no other world can be proved on this world's terms, there can be no other world.
9 Te ao Maori is divinely created. The outcome of human affairs needs God's grace to keep within His Kingdom. It is senseless to strive as if man were all alone. It is proper to know one's place in the nature of things. Io, the Supreme Creator brought logos out of chaos and raised folk up to be Te Iwi o Te Atua. Te ao Maori is thus deist.	9 Te ao Pakeha is man-made. Man is the measure of all things. Man can pull himself up by his own bootstraps – because that's what man-made bootstraps are for. Man may not have begun by making the world, but that's how he intends leaving it. Te ao Pakeha is thus humanist.
10 In terms of purpose, the Maori mindset is oriented towards the present: sufficient unto the day is the evil thereof.	10 In terms of purpose, the Pakeha thought process is future oriented. Planning for the future takes up a great deal of present effort; you can't go wrong by looking too far ahead.
11 The Maori thought process is holistic. Everything matters. Thus you can tell the state of the tide by looking at the wai korari or honey flow of flax.	11 The Pakeha thought process is partial. It is principled on relevance. Some things are seen as being more relevant than others. Much in life is trivial, and should be relegated to routine. Only a few things are significant, and then only relatively so and not for their own sake.
12 The Maori mindset is heuristic. It searches and explores. It has the advantages of being able to do so often simply for its own sake. As an inquiring mind, the Maori is thus more open to wider searching and exploration than is the Pakeha who is more programmed by purpose. Yet the Maori mindset may ignore or shy clear of formal discovery because it is too definitive and conclusive in curtailing future searching and exploration.	12 The thought process of the Pakeha is predominantly algorithmic. It looks for formulae and is fairly pedantic about how to define them. It finds exactly what it sets out to look for, very often because nothing else matters, and so misses both the point and pleasure of simply being present. This procrustean habit of thought has given rise to the strictures of Eddington and others against modern physics, and science at large.
13 The Maori mindset is ontological. It argues from origins – how things began. Whakapapa tells all.	13 The Pakeha thought process is teleological. It argues towards the end, purpose, or outcome of things. It aims at Utopia, but instead constructs a Brave New World.
14 Because te ao Maori is animate and God-given, it is primarily peopled in a way that makes matter come second. People matter more than things. Te ao Maori is personal. Mana is power, charismatic to the person, not property.	14 Because te ao Pakeha is inanimate and secular, what matters most is matter. People come second. Te ao Pakeha is materialist, his means that the value of a person is measured in material wealth. Law, first and foremost, secures property because power is not personal. Instead, matter is power and power matters.

15 Maori values are experiential. What counts is practical experience. How something functions in fact is more important than how it appears in formal theory. Youth is expected to defer to age as having acquired wisdom from experience.

16 Te ao Maori relies on ancestral custom and tradition. Leaders are kaumatua — those who have lived long enough to have experienced custom and tradition being put to the test of time.

17 Te ao Maori is an oral culture. Language is literally the living tongue. The spoken word best puts truth to the test, for telling the truth is as much an attribute of the living heart as it is of the living mind. One must hear to believe in te ao Maori.

18 Maori social structures are collective: ie sociology is autonomous and determin-ative of psychology.

19 The atomic structure of Maori society is at the level of at least the extended family or whanau, if not indeed at the next highest collective level of hapu.

20 The nexus by which the atomic structure of Maori society is related to the molecular is kinship — whanaungatanga.

21 The molecular structure of Maori society, the iwi, is tribal or tribal-national, or national as seen domestically from the inside. The inside (self-worth) matters more than the outside (what other folk think of you) because life is spiritual tihe mauri ora and God Himself as the Holy Spirit lives within.

22 The Maori mindset is *mythopoeic*. Story-telling is the best means of communication. Data by itself is unintelligible. Every communication has to have narrative to provide continuity. The success of law, physics, religion, and even logic lies in the stories told by lawyers, physicists, priests and logicians. Stories always have to contain some element of the unexpected, and so this satisfies the heuristic searching process. The Waitangi Tribunal provides a campfire for telling stories — and stories go on for as long as the campfire remains alight.

23 Te ao Maori has a *spending* economy. This is subsistence — with the luxury of hakari to use up excess, and *trade and barter as of* everyday. The concept of *sharing* is far more extensive in a spending economy. There is thus nothing to tax — nor any need for taxation; one way or another every asset is shared around.

15 Pakeha values are abstract and academic. Formal credentials count for more than functional performance. Because te ao Pakeha looks forward to the future rather than back to the past and puts formal credentials ahead of practical experience, youth is more valued than age.

16 Te ao Pakeha sets great store by change. What went before is dismissed as being "that's history". Youthful enthusiasm rather than experienced caution is the prerequisite for leadership. Novelty and innovation substitute for custom and tradition.

17 Te ao Pakeha is a written culture. Publish or perish — but thinking and feeling are but trivial incidents in the great academic endeavour. Living thought must first be sacrificed on the altar of dead matter, book-bound and hide-bound, before it can be seen to mean anything.

18 Pakeha social structures are personal: ie psychology is autonomous and determin-ative of sociology.

19 The atomic structure of Pakeha society is individual, increasingly divorced from wife, husband, family, tribe, and even nation.

20 The nexus by which the atomic and molecular structures of Pakeha society combine is rights-related.

21 Pakeha society is nationalistic, internationalistic, and even trans-nationalistic (compare tribal hierarchies with the national, and monocultural, bicultural and multicultural hierarchies). Pakeha society professes to be open in terms of Popper's Open Society and its Enemies. Popper's open society is avowedly anti-tribal. This could merely mean that the Pakeha values the outside (what other folk think of him) more than he values the inside (what he thinks of himself in terms of self-esteem).

22 The Pakeha divides fact from fiction as he does the pursuit of truth from the pursuit of pleasure. This equates the learning process with suffering. The algorithmic mind likes things to be defined. The unexpected has to be reduced to the expected or else the endeavour is seen to be incomplete and inclusive. The highest Pakeha compliment paid to Claudia Orange's book on Te Tiriti is that it is "definitive". From the Maori point of view that means Te Tiriti is told and it is time to let the matter rest and go to sleep.

23 Te ao Pakeha has a *hoarding* economy. This is intensified by a *monetary system* which makes material wealth immune from vagaries of seasonal fluctuation. The concept of *sharing* material wealth is hardly voluntary, but almost entirely imposed through *taxation*. The result of this is that material things are built up as a bigger barrier against sharing life in the spirit (which just has to be free and can never be imposed).

The effect of archetypal thought-feeling patterns on interpreting the Treaty

Te Ao Maori	Te Ao Pakeha
1 The law is *spiritual.* Its sanctions are enforced through tapu and noa. Thus Te Tiriti is kawenata tapu and a sacred covenant. Te Tiriti is written, and the written word came with Te Paipera Tapu – the Holy Bible – which contains two covenants. Te Tiriti is the third – also brought by the missionaries – and itself expressed to be made o to tatou Ariki – in the year of our Lord.	1 The law is *secular.* It has nothing to do with religion. Documents expressly or implicitly dated anno domini have no spiritual significance. That is just legal archaism. Accordingly all the Treaty affords is a secular relationship, which, if broken or dishonoured, can be remedied as so required by a Court of Law – but it has nothing to do with God – that's a primitive and outmoded concept of law in the pakeha world.
2 Law is *enabling.* It extends the scope for action. Everyday activity (that which is noa) is shielded by tapu (that which is sacred) from forces which would otherwise put an end to it. Te Tiriti is tapu: it provides an enabling shield.	2 Law is *definitive.* It restricts and determines rather than encourages and extends. The Treaty is not unique. It merely serves the everyday function of putting blinkers on an unruly horse.
3 Because Te Tiriti is tapu it is not fit for everyday discussion by all and sundry; but a *privileged area* of study for those who are qualified by rank (ariki), expertise (tohunga), or experience (kaumatua) to maintain and guard it. Cf 5.	3 Because the Treaty is common knowledge, its intention and effect is to be decided by political opinion rather than legal expertise. What the Treaty means can be decided by general referendum.
4 As a *taonga or treasure* Te Tiriti is a living document. It grows and develops or declines and decays. Like ratou taonga katoa it has a life of its own. God-given as a kawenata tapu, man must guard, secure, and support its life force. The spirit of the Treaty is entrusted to man, not made by him.	4 The Treaty is a *human artefact.* It records an event in nineteenth century legal history. Apart from figures of speech, there is no such thing as a living language or a living law. To talk about the spirit of the Treaty is entirely metaphorical. Everybody knows that the document, in being legal, contains only the dead letter of the law. Pakeha may thus talk of re-negotiating or even abolishing the Treaty as if it were inanimate. Its effect may be altered by the course of subsequent legislation. For the Maori to re-negotiate is to re-birth, and to abolish is to abort Te Tiriti as a living thing.
5 Law must be considered in context because our world is essentially all one. *Extrinsic evidence* is adducible. *Interpreting Te Tiriti is not a specialised task.* That would defeat its purpose, because it is the common bonds running through law and society that count for more than do the specific differences. Cf 3.	5 Te Tiriti is a world in itself. Only *intrinsic evidence* is adducible. Because it is a legal document none but the lawyer is qualified to determine its significance. The world of law must keep itself apart from religion and politics – even from logic, literature, and science. Maintaining the purity of law is the lawyer's vocation. Herein lies the objectivity of law. *Te Tiriti is a task for professionals.* Philosophers keep out – danger men at work. Cf 3.
6 By being written, Te Tiriti proves an exception to the context of an ongoing Maori *oral culture*, in which what has been said of Te Tiriti – especially what was said surrounding its signature – is every bit as important as its written word on parchment.	6 By being written the Treaty conforms to the criteria for objective communication required by the prevailing *written culture* of the Pakeha. What counts is what is written. What surrounds it is divided off – that is the purpose for which the Treaty was written – to distinguish the rest of what was said and written from the four corners of this document. The danger is that this produces tunnel vision.

7 The partnership brought about by Te Tiriti entails *mutual support*. None in need may be refused — even when those in need are responsible for having brought their need about *sharing resources is always ongoing* in terms of the parable of the prodigal son. Once the consideration for Te Tiriti has been spent, recourse to the continuing resources of the other partner is still a term of the partnership. Te Tiriti is a social compact of *mutual aid.*

8 *Everthing matters* — including the express term of Te Tiriti by which it was executed (at Victoria in Waitangi), and not just at Waitangi. So also Hobson signed the Maori text as both Consul and Lieutenant-Governor.

9 The heuristic mind views Te Tiriti as *an opportunity to extend exploration.* Te Tiriti is to serve an ongoing function rather than satisfy an instant form. This makes Te Tiriti a *dynamic document* with consequences as yet undiscovered at the time of signature.

10 The law is *customary* in Aotearoa. The authenticity of customary law depends on collective observance. This takes Te Tiriti out of the source-oriented legal system in which it began into the response-oriented legal system into which it was accepted. The status of Te Tiriti requires a collective response by way of recognition.

11 Te Tiriti *tells a story.* Law is made round the campfire. It functions like a scriptural parable, posing problems, suggesting answers, changing attitudes, holding the affairs of the day up to the reflective firelight. It can be a touchstone, or just a simple experiment, but it always progresses in parabolic fashion.

12 Te Tiriti is a *success*, because, like truth itself, it is simple and to the point.

7 A partnership requires only *reciprocal relations.* Needs and resources must be kept distinct otherwise all the resources would be consumed. This distinguishes stewardship from hoarding, on the strength of the parable of the talents. *Apportionment* of the estate between the partners to the Treaty, when properly done in the first place, is *final and irrevocable, and not forever re-negotiable* in terms of future needs. The Treaty is a business deal of reciprocal advantages which, once spent, are not ipso facto, re-negotiable.

8 The *principle of relevance applies* — not all words are equally important: nga tangata o Ingarani suffices for British subjects; kawanatanga is near enough to sovereignty as far as that concept could be explained to nga tangata whenua in 1840; and tino rangitiratanga is the full chieftainship that was still exercised after the Treaty until the Maori Land wars.

9 The algorithmic mind expects to find *a legal formula* in the Treaty, the effect of which will be *to determine the status quo.* The consequences are defined by the document, the purpose of which is to delimit the extent of exploration.

10 Law is *legislative* in Nu Tirani. The authenticity of imperative law is the individual will of the sovereign lawmaker. The status of the Treaty is related to the authority of its origin in the willpower of its maker. In the final analysis the way that the Treaty is enforced will determine what it means.

11 The Treaty *expresses a command.* Under this concept of law, even contracts are enforced, if need be, by command of the Courts. Its action is by direct commandment. Commentary is barely allowable as a recognised source of common law — the story-teller must first be dead before what he tells can constitute an authoritative source.

12 The Treaty is a *failure* because it lacks detail and so is intellectually naive and too uncomplicated to be able to tell the truth; consequently we must pretend it tells the truth and by spinning a yarn or creating a myth contradict our initial reticence to tell a story because fact is more important than fiction even if we do have to use a fiction to find the facts. □

Sealords and sharks: The Maori Fisheries Agreement (1992)

By Dr P G McHugh, Fellow and Tutor of Sidney Sussex College, and Lecturer at the University of Cambridge

The recommendations of the Waitangi Tribunal regarding fisheries claims by Maori are reportedly concluded by agreement. It is not clear who the agreement is with since "Maori" are not a separate political, legal or corporate unit. However, the government has made a commitment and is spending a substantial sum of public money in the expectation that the issue will now be closed — subject of course to Carter Holt Harvey selling its Sealord interest. In this article Dr Paul McHugh discusses a number of technical legal (and political) issues that the agreement raises. Dr McHugh's recent book The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi *was reviewed at [1992] NZLJ 101. Dr McHugh acknowledges and is grateful for the comments of Mr A Shaw on an earlier draft of this article.*

1 Introduction

On Wednesday evening 23 September 1992 Ministers of the Crown and Maori representatives signed a Deed of Settlement regarding Maori fishing claims. The agreement immediately became hailed as an "historic pact" (*The Dominion*, 24 September 1992). The Minister for Justice Doug Graham reported to Parliament and, after "an emotion-charged speech" (ibid, 25 September), was given a standing ovation by both sides of the House. Even before the Deed of Settlement was signed dissentient clouds had appeared within Maoridom. The Maori negotiators had spent two weeks taking the proposal to marae throughout the country for discussion and, it was hoped, tribal endorsement. In the end this endorsement was far from complete but sufficient, it was evidently felt, for the agreement to proceed to signature. The dissenting tribes, including the Chatham Islands' te iwi Moriori, Ngati Kahungunu and Ngati Toa, responded immediately and strongly. These responses included an urgent claim to the Waitangi Tribunal and, separately, as this article is being written, possible legal action.

What, then, is to be made of this "historic pact"? Former Prime Minister David Lange was extremely cautionary even before signature. He saw the term "historic" as a "doleful portent". The Government has been lulled, he argued, by the warming prospect of a full and final settlement of Maori fishing claims without grasping (let alone educating the public on) the inherent impossibility of finality: "Justice cannot be frozen", he warned (*The Dominion*, 7 September 1992), advising that what may seem "just" to a present generation may not appear so to another. Previous claims settlements, such as those which had resulted in the statutory constitution of Maori Trust Boards were today, barely two generations on, no longer viewed as adequate redress.

History, with its shifting sense of justice, will probably overtake the fisheries agreement, Mr Lange predicted. He might have underlined this prediction by referring to two recent major multi-million dollar settlements in North America. Neither the Alaska (United States) nor James Bay (Canada) Agreement are today regarded as having achieved the lasting settlements contemplated at their respective moments of settlement under twenty years ago. (Contrariwise one might also add that past settlements had been concluded without anything resembling full Maori agreement, an aspect which at least sets the fisheries agreement apart).

With a former Prime Minister seeing "justice" in a broad sense as an unattainable panacea and dissentient tribes finding "justice" in a more specific sense to be absent from the "historic pact", what, one may ask, is the character of the "Treaty justice" achieved by the Deed of Settlement?

2 Maori fishing claims: Background to the Agreement

Maori fishing claims against the Crown have been made continually throughout the past 150 years. The history of these claims has been described by the Waitangi Tribunal in its *Muriwhenua Fisheries* and *Ngai Tahu Sea Fisheries* Reports. The process which has resulted in the 1992 Deed of Settlement began in the mid-1980s. The Fisheries Act 1908, s 77(2) had provided that nothing in the Act regulating sea fisheries affected "any existing Maori fishing rights". The Courts had interpreted this phrase as meaning any fishing rights *conferred by statute: Waipapakura v Hempton* (1914) 33 NZLR 1065. This attitude was conditioned by what was then (and remained until 1985) the standard legal response to Maori claims to traditional rights associated with the Treaty of Waitangi. These rights were considered as bereft of any legal meaning and subsisted as "moral" claims against the honour of the Crown: *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72. In 1985, however, a Maori individual fishing according to tikanga Maori successfully invoked common law aboriginal title as a defence under the successor section to

the 1908 saving, s 88(2) of the Fisheries Act 1983: *Te Weehi v Regional Fisheries Officer* [1986] NZLR 682 (HC).

The Maori position until then appears to have been one of resignation and reluctance to use the Courts given the outcomes of a generation ago. Several cases during the late '50s and early '60s had, in the end, done no more than lend slightly more latterday sophistication to the *Wi Parata* approach. However *Te Weehi* indicated to Maori that their fishing claims had a legal as well as "moral" or purely political basis. The case and this attendant realisation also coincided with the emergence in the mid-1980s of the Waitangi Tribunal as a potent force in Crown-tribe relations: This meant that fishing claims could now proceed, and indeed did proceed, on two fronts — in the Courts and before the Tribunal. A form of mediation — the Working Party on fishing rights (1987) — did not assist the process in the way initially contemplated. With the threat of legal proceedings and the associated encouragement from the bench as well as the publicity of Tribunal recommendations, the Crown found negotiation unavoidable. It was from these negotiations, conducted against a backdrop of Court and Tribunal, that the Deed of Settlement emerged.

Court and Tribunal

From a legal point of view the availability of two fora, Court and Tribunal, wherein Maori fishing claims could be presented, had the effect of muddying the precise legal character of Maori fishing rights. The Tribunal's jurisdiction has always been governed by the "principles of the Treaty of Waitangi", whereas Courts cannot derive the tribal right directly from the Treaty but must point to some permissive common law rule or statutory provision. That meant the Tribunal's position on fishing rights was not curtailed by strict legality. But the threat of this strict legality's intervention was always there, implicitly encouraging negotiation lest either side, Crown or Maori, by judicial determination end up with less than agreement out of Court might secure. The constantly postponed judicial ascertainment of the legal scope of Maori fishing rights has finally now been cancelled by the Deed of Settlement (third schedule).

The legal character of Maori fishing rights was muddied by the inability or, perhaps, unwillingness of District Courts hearing s 88(2) defences to distinguish Treaty-based rights from common law aboriginal title. If this section were to be seen as a statutory recognition of Maori fishing rights under the Treaty then this would have required judicial reversal of *Waipapakura v Hempton* (supra). *Te Weehi* did not purport to achieve that. Even so, it was always open for a Court to see s 88(2) as incorporating both Treaty and common law aboriginal title fishing rights, however this is a possibility of which the District Court caselaw shows scant awareness. Some commentators even saw s 88(2) as requiring a choice between either possible sources: RP Boast "Treaty rights or aboriginal rights?" [1990] *NZLJ* 32. It appears, however, from recent comments made by former Labour Ministers, that it was the threat of a judicial recognition of a common law aboriginal title over the sea fisheries which spurred the Crown on to negotiation. Whether a Court would have awarded Maori more than the 26% of the commercial sea fisheries which we are told will eventually ensue from the 1992 Agreement must remain speculative. Indeed, a casual knowledge of the above background uncomplicated by an inspection of the Deed would suggest that the figure of around 26% is a happy medium with which both Crown and tribe could be happy.

The Deed of Settlement preserves what has probably been a convenient legal mulch of Treaty-based right and common law aboriginal title. Clause 5.1 provides:

> Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary title and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights have been the subject of recommendation or adjudication by the Courts or Waitangi Tribunal.

The Agreement has been sold to Maoridom on the basis that it secures a significant interest for Maori in the national commercial sea fisheries (which are, the country is often reminded, a dwindling resource in need of careful conservation and management). It is a commercial opportunity for asset and resource accumulation which Maori should take and have taken, the country is told. The Deed of Settlement makes that plain in the clause where Maori endorse the Quota Management System (QMS) as a "lawful and appropriate regime for the sustainable management of commercial fishing in New Zealand" (cl 4.2).

In addition, Maori have been guaranteed, the media tells us, accepting this representation as correct, that the tribal rights to their traditional non-commercial fisheries will not be affected by the Deed of Settlement.

One might ask, first, how this "commercial opportunity" is being taken and if its promise has been adequately secured by the Deed of Settlement. Secondly, one should consider the effect which the measures contemplated by the Deed would have for the traditional non-commercial fisheries. The allegation that these rights are unaffected is simply not true for the Deed contemplates a fundamental relocation of the lawmaking power over tribal fisheries.

3 Commercial fisheries

The Deed of Settlement provides for the Crown to advance a sum of money (the "Settlement Amount", identified in clause 1.1.17 as $NZ 150 million) to enable Maori in joint venture with Brierley Investments Limited (BIL) to purchase a 100% interest in Sealord Products Limited. The Deed ends automatically in the event of the non-formation of the joint venture or, once formed, its failure to acquire Sealord (cl 2.2).

This scenario — the Crown acting as broker between tribe and corporation — has historical resonances, the irony of which will

not escape those who have read the Tribunal's *Ngai Tahu Report* or are even casually aware of the activity of the New Zealand Land Company 150 years ago. Responsibility for a large proportion of the short term and possibly long term future of race relations in this country is being handed over to the market place. One wonders whether even race relations are being corporatised.

And even given that, one does not have to be any sort of a financial genius to ponder the wisdom of the joint venture going to the negotiating table for the acquisition of Sealord in a situation where its financial capacities have been put on public display. If that does not compromise the effectiveness of the joint venture overtures, then surely the interest which which BIL has in Carter Holt (which is selling Sealord) would suggest that one joint venture partner is not exactly free from at least the potential for a conflict of interest. Is BIL's vendor's interest in securing the highest possible price for Sealord to prevail or is it to be subordinated to its joint venture purchaser's interest in securing the lowest possible price for Sealord?

Introduction of legislation

The Deed further provides that the Crown will introduce legislation to authorise the allocation to Maori of 20% of any new quota issued under the QMS. Maori are also to participate on fisheries statutory bodies which are divided into two categories in the second schedule to the Deed, namely those where existing legislation allows for Maori representation and those where it could be achieved without amending legislation but where (nonetheless) such is felt desirable. Examples of the first category include the Fisheries Management Advisory Committee (s 7, Fisheries Act), the Fisheries Authority (s 13, Fisheries Act) and the Conservation Authority and Boards (ss 6D and 6P, Conservation Act 1987). The Fishing Industry Board is an example of the second category (s 3, Fishing Industry Board Act 1963).

The Maori Fisheries Commission is to be reconstituted as the Treaty of Waitangi Fisheries Commission with Ministerial appointments made in consultation with the Maori fishing negotiators and Maori. This Commission, the Deed stipulates in broad and rather open-ended terms, "will be accountable to Maori as well as to the Crown in order that Maori are to have better control of their fisheries guaranteed by the Treaty of Waitangi" (cl 3.4.3).

The Commission will develop "after full consultation with Maori" the proposals of Maori for a new Maori Fisheries Act consistent with the Deed of Settlement. This proposal must be reported within 90 days of the date of settlement. Most importantly, it must develop a procedure for the "identification of beneficiaries and their interests in accordance with the Treaty of Waitangi and a procedure for allocation of the benefits . . . to them in accordance with the principles of the Treaty of Waitangi." (cl 4.5.4.2). The Deed appears to contemplate that the ambit of the new Commission's powers will be limited to commercial fisheries. Although the jurisdiction of the Waitangi Tribunal is otherwise ousted in relation to commercial fisheries claims (see above, cl 5.1), it is preserved for tribes unhappy with the mechanisms for distribution embodied in any Bill proposed by the new Commission.

By now it can be seen that much of the Deed of Settlement rests upon an agreement by the Crown to introduce and secure Parliament's passage of legislation. To the extent that the Deed purports to require the enactment of legislation it is, of course, utterly ineffective. There is simply no legal wherewithal for New Zealand Courts to intervene and require the passage of legislation. The enactment of legislation is within the undisputed and undisputable province of Parliament and completely beyond any form of judicial review. (Given that these important and central provisions of the Deed are legally unenforceable, one notes with a little irony the "choice of law" and jurisdiction clauses recognising New Zealand law and Courts — cls 6.3. and 6.4).

One might have expected, then, some provision for arbitration or other intervention in the event of the Crown and tribes disagreeing over some aspect of the interpretation and application of the Deed of Settlement. Any jurisdiction which the Waitangi Tribunal might claim is to be removed and, it has been seen, any jurisdiction which a Court might exercise cannot be anything other than, at best, partial. Where there is a conflict between Deed and statute then the latter will prevail.

The non-legal vacuum

Given that, one cannot avoid observing that Maori have ironically agreed to locating (major parts of) this agreement in the non-legal vacuum associated with the *Wi Parata* case. In *Wi Parata* it was held that deeds of cession by which Maori relinquished their Crown-recognised customary property rights in exchange for a Crown-derived title were judicially unenforceable. By the 1992 Deed of Settlement Maori are giving up their claim to a traditional property right in exchange for a title under the QMS derived from statute. Many of the conditions attached to this transaction are unenforceable (given their reliance on the unreviewable exercise of the legislative power). It is almost as though history were being agreed to repeat itself.

The passage of legislation giving effect to the agreement will wipe away all legal causes of action in relation to tribal fisheries. Realising that, several dissentient tribes have indicated an intention to commence litigation challenging the capacity of the signatories to the Deed (as distinguished from the capacity of Parliament) to agree to extinguish the rights of non-signatory tribes. The argument here is that these legal rights are tribal and any cession or relinquishment must be made by the body (the tribe) in which those rights are vested by Maori customary law.

This argument is novel in that it is unlitigated (so far as I am aware) but it is a logical consequence of the common law aboriginal title. The aboriginal title recognises the legal continuity of tribal property rights upon the Crown's acquisition of sovereignty over their territory, these rights being extinguishable by cession (sale or relinquishment) or statute. Cession, however, must be made by the traditional owners whose title is established by reference to Maori custom. From this it would seem to follow that one tribe cannot relinquish the aboriginal title of another.

Of course, it is intrinsic to the agreement that changes to the law will be required and that this must

be accomplished through Parliament. The non-justiciability of this important aspect of the Deed is an inherent and inescapable feature of it. Any anxiety over that aspect may be seen as unnecessarily viewing the agreement as adversarial and doubting the commitment of all parties to an arrangement concluded and expected to be carried out in good faith. One hopes that the concern noted above with the Deed's reliance on the passage of legislation (for what else could have been the case?) is unwarranted, especially given the imminent exclusion of the Tribunal's jurisdiction as an overseeing conscience in this matter.

4 Traditional non-commercial fisheries

The above features of the Deed of Settlement might well have been acceptable throughout Maoridom were the agreement limited solely to commercial sea fisheries. The impression conveyed in the media that traditional fisheries are untouched and will remain unimpaired is completely misleading.

Maori have never taken to the regulation of their traditional fishing grounds by Pakeha law and its administration by fisheries officers. Prior to the *Te Weehi* case accounts of incidents and Maori prosecutions under fisheries regulations were commonplace. The 1983 Act had been enacted on the supposition that in point of law *any and all* traditional fishing rights emanated from statutory licence. Section 88(2) was (wrongly) not seen as upsetting that view until the *Te Weehi* case.

The significance of *Te Weehi* was to remove the regulatory power over tribal fisheries and fishing from Departmental hands into the hands of the tribal authorities. The case established the primacy of Maori customary law in establishing the immunity of a Maori individual from the Fisheries Act's regulatory scheme. If an individual can prove he is collecting fish in accordance with local Maori custom then a prosecution cannot be made. If the fishing is outside the scope of the right, that is to say it is being exercised contrary to Maori customary law, then the defence of s 88(2) is not available.

This means, then, that the tribes are legally recognised as holding a regulatory power over their tribal fisheries. For example, a *rahui* (banning order) might be placed over a particular location and a Court is able to give effect to the customary law. This law is established before the Court as a question of fact. The legitimacy of the law affecting tribal fisheries is thus derived from the local tribe itself – it emanates from "flaxroot" level with the Pakeha Court simply taking a responsive, facilitative position (by ensuring that only those individuals in breach of or beyond the reach of the customary law are prosecuted).

As a consequence of *Te Weehi* a nascent jurisprudence has been emerging in the District Courts on questions of Maori customary law affecting tribal fisheries. This jurisprudence is still in an extremely formative stage; its position, for example, on the relationship of *kaumatua* evidence to the hearsay rule of evidence being unclear. Nonetheless it has offered strong sign of an incorporative legal pluralism consistent with, albeit not necessarily derived from, the Treaty of Waitangi. Most notably, in giving tribal authorities legal status and power to regulate their traditional fisheries it ensured true consultation and co-operation from Department officials. This caselaw's evolution of a pluralistic legal culture (albeit in a particular and rather limited area) will be truncated upon passage of the legislative changes contemplated by the Deed of Settlement.

Question of tribal control

The tribal aspect of the regulation of tribal non-commercial fisheries will be severely compromised once the Deed of Settlement is given legislative effect. The Deed quite clearly demonstrates an intention to revert to the centralised, bureaucratic and non-tribal control of fisheries which marked the pre-*Te Weehi* period. District Courts processing fisheries prosecutions will no longer be required to resort to Maori customary law but must enforce rules formulated by pakeha officialdom. These rules may well include a dimension of trial control but this control must now justify itself by reference to Pakeha legal concepts of vires rather than through the inherent legitimacy of the customary law over its own tribe and resources. In other words the source of the regulation of tribal fisheries will be taken from the tribe and given back to officialdom. Whilst assurances have been given publicly that a regime of *taiapure* fisheries will be established, it cannot escape remark that the Deed provides for no more than consultation with Maori. No guarantee is given by the Deed that anything resembling the present system of regulation by customary law will be preserved.

Clause 3.5.1.1 of the Deed agrees to the repeal of s 88(2) of the Fisheries Act. At the same time as this repeal an amendment will be made to s 89(1) by the insertion of a new paragraph (o) empowering the making of regulations recognising and providing for customary food gathering. The new paragraph will also recognise the special relationship between the tangata whenua and those places which are of customary food gathering importance to the extent that such food gathering is not commercial nor involves pecuniary gain or trade.

Media coverage of the Agreement indicates that the eventual regulations will establish a large component of tribal control over the fisheries. One must doubt severely, however, the likelihood of regulations drafted by a central, governmental bureaucracy commanding the same responsiveness as that generated within the tribal community itself. Maori control of their resources must again defer to the historical pattern of adaptation to structures whose lawfulness derives from permissive Pakeha law rather than from tribal society itself. These structures, the country has been informed, will be responsive to and will be constructed consonant with Maori customary arrangements. There is nothing in the Deed of Settlement which makes that plain other, perhaps, than the provision for consulation with Maori in their drafting.

The removal of the source of regulatory power from tribal to bureaucratic aegis is revealed in the first schedule of the Deed. Amendments to the Fisheries (Amateur Fishing) Regulations 1986, regulation 27 are contemplated pending the eventual

enactment of new regulations under the new paragraph in s 89 of the Fisheries Act. This regulation has been a dead letter since *Te Weehi* but will be revitalised to allow fish to be taken for hui, tangi "or traditional non-commercial fishing use *approved by the Director-General*" (emphasis added). Here in the plainest of terms is an indication of how Maori custom is being usurped by Pakeha institutions and decision-makers. In the hiatus, then, between repeal of s 88(2) and enactment of the new regulations the Deed envisages a return to the pre-*Te Weehi* law (with minor qualification in regard to bag limits). While there may be some scope for the judicial review of these regulations, with its essentially Pakeha concept of vires it can never reinstitute or replace the previous customary regime.

These aspects of the Deed disclose what seems a fundamental intention to return to the pre-*Te Weehi* law so far as non-commercial traditional fisheries are concerned.

The power of Maori over their traditional fisheries is diminished to a right to be consulted as to the content of the new regulations. The law generating power has been taken from the tribal level and restored to a central, governmental and non-Maori body with scant safeguards in the Deed itself to ensure that Maori do not, as a result, suffer diminution of their present control over tribal fisheries.

5 Treaty of Waitangi settlement fund

Clause 4.6 of the Deed of Settlement is a remarkable provision which potentially has momentous consequences for all outstanding Maori claims:

> Maori recognise that the Crown has fiscal constraints and that this settlement will necessarily restrict the Crown's ability to meet from any fund which the Crown establishes as part of the Crown's overall settlement framework, the settlement of other claims arising from the Treaty of Waitangi.

Doubtless the Maori negotiators were drawn to this settlement, and so agreed to the above clause, believing it necessary for Maori to obtain some immediate financial muscle given the relatively meagre results (in terms of major financial return to Maori) of the past decade of the claims process. There is something pragmatic, an unabashed opportunism about the Agreement. Still one wonders what those tribes less keen about this settlement feel about the concession that the fisheries deal may affect any settlement funds available for other, more keenly felt claims. The Agreement has an in-built divisiveness which has been revealed even before signature.

6 Historical resonances

The Deed of Settlement is an historic document in at least that it is a contemporary document which literally reflects the terms of the English version of the Treaty of Waitangi. The Treaty of Waitangi confirms the Maori possession of their property rights in their traditional fisheries and secures for the Crown the "pre-emptive right" to acquire that property whenever Maori wish to sell or cede it. The Deed of Settlement achieves that end: in return for relinquishing any aboriginal claim to the fisheries Maori receive money from the Crown and Crown-derived rights over both commercial (through the QMS) and non-commercial (through the contemplated regulations under s 89, Fisheries Act) traditional fisheries.

This is history repeating itself and in that sense, if no other, the pact is indeed "historic". There are, however, enough areas of uncertainty and non-justiciability to put at least a question mark around many aspects of the Deed. The Maori negotiators include wily and astute men who have led their tribes with distinction to positions of strong financial wellbeing which cannot but be enhanced by the Agreement. They have signalled the willingness of Maori to compete and participate not only in the national but a larger transnational economy. In pure commercial terms (uncomplicated by questions of legal enforceability and the non-commercial element), the Agreement is doubtless as good as may ever have eventuated.

The Fisheries Agreement could, with tidier drafting and more careful consideration, have limited itself solely to the tribal commercial fisheries. There was no pressing need, other perhaps than a bureaucratic one, for the traditional non-commercial fisheries to have been absorbed into the pact. The Deed does not guarantee that any new regime for the non-commercial tribal fisheries will not prejudice the present system of Maori customary law. If any feature of the Deed of Settlement is to sink the agreement and to incur the wrath of future generations, it will be that. For all its defects regarding commercial fisheries, it would be a leaner and more resilient document much better equipped to swim with the transnational sharks had the non-commercial element been omitted. □

Plain and user-friendly legal drafting

In the Canadian publication The Lawyers Weekly *for 17 July 1992 there is a piece about the happy greeting cards industry; and the suggestion is made that the style could be adapted to fit legal documents to make them user-friendly — just like computer software is supposed to be. One of the best suggestions reads:*

YOU'RE INVITED to be a PARTY!

When? July 17, 1992

Where? Saskatchewan Court of Queen's Bench

What's the occasion? Remember that banana peel on your steps last April, when I was taking all reasonable precautions to make sure I was outside the zone of danger but you had breached your duty of care as host and occupier and pushed three drinks on me, and you didn't bother to turn on the porch light, which would have been reasonable in the circumstances, if you hadn't been too busy kissing my wife, which, we submit additionally, was a sexual assault?

BYOB (Bring your own barrister).

A new role for the Maori Courts in the resolution of Waitangi claims?

By P G McHugh, PhD (Cantab), Fellow and Tutor of Sidney Sussex College, Cambridge

In this article Dr McHugh discusses the Maori Land Act 1993 otherwise known as Te Ture Whenua Act 1993 which comes into force on 1 July 1993. The Act entrenches (in the sense of digs in) the demand for separatism among many Maoris and which has the strong support of the author. Others might find the views of the McCarthy Commission of 1980 more socially attractive. The author sees the Act as granting further substantial legal rights to Maoris on the ground of race and maintains that the Courts have an obligation to ensure that the Act is interpreted in this way.

Te Ture Whenua Act 1993 will come into force on 1 July this year. The Act, which can also be known as the Maori Land Act 1993, is the long-awaited overhaul of the Maori Affairs Act 1953. As the Minister for Maori Affairs, the Hon Doug Kidd emphasised during the Second Reading in November 1992, the Act is designed to counter previous legislative policy which encouraged fragmentation of title and the alienation of Maori freehold land. Instead the retention of Maori land in Maori ownership is at the heart of the Act. This policy is reflected in the legal recognition of the concept of taonga tuku iho, which allows land to be held in trust for the collective benefit of the owners, their whanau, hapu and descendants.

The philosophy of the Act is consistent with views long held about the character which reform of Maori freehold land would need to take. These views have cut across party political lines despite the badly needed reform having been an invariable casualty of the changes of government since the late 1970s. However the political will has at last been found and the new Act is about to come into force after an intensive period of consultation, a process which the Minister went to lengths to recount to Parliament so as to justify expeditious passage of the Act. These iterations of the process of consultation and substantial Maori consent reinforce the belief that such a process has become obligatory as a constitutional convention where the passage of Maori affairs legislation is concerned.

Maori Land Court

The Maori Land Court lies at the centre of this revised philosophy. No echo is heard in the new Act of the *Report of the Royal Commission of Inquiry into the Maori Land Courts*

continued from p 228

the transaction, should be proved and not simply imputed.

Not every surety who provides security for the debts of her husband should be entitled to relief just because she does not have, and was not provided with, an adequate understanding of the transaction. Yet that is the effect of the *O'Brien* decision on its facts. Such a wholesale imputation of vulnerability to wives vis-a-vis their husbands is not only unreflective of reality, it also results in the unwarranted protection of wives such as Mrs O'Brien. This flaw in the decision considerably weakens its persuasive value.

9 Conclusion

On the level of doctrine, the advantage taking principle can be seen as simply the doctrine of unconscionability (of the variety applied in New Zealand, Australia and Canada) applied for the first time in English law to the context of non commercial surety contracts. In terms of its function, *O'Brien* is a positive development in countering the unduly restrictive effect of the traditional two step approach when applied to those sureties who stand in close personal relationships with the debtors. It addresses more directly and accurately the real concerns about securities given for the benefit of a debtor who, to the knowledge of the creditor, has the incentive and is well placed to exercise improper persuasion to ensure the surety's consent.

The immediate questions surrounding the advantage taking principle is whether it will survive the appeal of the *O'Brien* decision to the House of Lords. The current "legal conservatism" of the House of Lords observed by Sir Robin Cooke ("An Impossible Distinction" (1990) 107 LQR 46 at 49) would put its survival in serious question. Yet is is to be hoped that any reversal in the Lords will be confined to the questionable *application* of the principle to the facts in *O'Brien*, rather than to the principle itself which has much to commend it. If the principle survives, not only will it provide a more realistic approach to the problems arising from non-commercial surety contracts, but English law will have a ready made principle against advantage taking which, like its counterpart doctrine of unconscionability in New Zealand, has the potential for wider application beyond contracts of surety. □

(1980). The Royal Commission, chaired by Sir Thaddeus McCarthy, had envisaged the eventual disappearance of the Court once title reform had been completed and when Maori freehold land was fully assimilated into the land transfer system of registration (at pp 73-4). The Commission had been quite clear in its view of the function of the Court:

> The Maori Land Court should be a *Court of Justice* with traditional judicial standing and independence. But if it is to be that, it must strive to be predominantly a judicial and less of an administrative body. Once a Court involves itself substantially in administrative action, especially in areas which are traditionally the fields of State administration, it places in jeopardy its claim to independence and sows the seeds of conflict between itself and the machinery of State. Furthermore, it runs a real and substantial risk of being not only interfering, but of being partisan in its rulings, not consciously but by allowing itself to become promoter of its own opinions about the use of land to the exclusion of those of the litigants before it. (at p 81).

Te Ture Whenua Act 1993 does not subscribe to this outlook. Instead the Act reflects the views of the Maori Land Court Judges whose submissions to the 1980 Commission had stressed an "overriding social and therapeutic approach" to the Court's jurisdiction (at p 80).

In the forty years since the 1953 Act was passed, however, the legal landscape of Maori claims has changed dramatically. In particular, the statutory jurisdiction of the Waitangi Tribunal has provided a forum for the hearing of tribal claims against the Crown, and there has been a growth in awareness of the common law background to such claims. These were developments which occurred in fora beyond the Maori Land Court. Indeed, as the high-profile Treaty claims reached the Tribunal and litigation proliferated in the ordinary Courts, the Maori Land Court was left to languish. Drained of its Judges who had been co-opted onto the Tribunal, the backlog of appeals and various applications for orders under its special jurisdiction, as well as such needed reforms as changes in the Rules of Court, were left outstanding.

As the claims process in the Tribunal and, to a much lesser extent, the Courts proceeded, however, it became clear that the Maori Land Court provided a pool of expertise versed in a unique jurisprudence with a stature in the Maori community which could assist the resolution of tribal claims associated with the Treaty of Waitangi. Rather than being left as an outside agency in such matters, the Maori Land Court became incrementally and gradually, but quite surely nonetheless, drawn into the claims process.

1988 Amendents

The Treaty of Waitangi Amendment Act 1988 (s 4) inserted a new s 6A into the principal Act. This new section gave the Tribunal power to state a case for the Maori Appellate or Maori Land Court on questions concerning Maori custom or usage, those relating to customary law principles of "take" and occupation or use, and the determination of tribal boundaries.

This amendment was a result of a counter-claim in the Ngai Tahu hearings. Rangitane and Ngati Toa claimed that land incorporated into the Ngai Tahu claim, the land purportedly encompassed by the Arahura (21 May 1860) and Kaikoura (29 March 1859) Deeds of Purchase, was not within the traditional boundaries of Ngai Tahu. The Maori Appellate Court held that at the date of the deeds the land was held according to Maori customary law by Ngai Tahu (decision of 12 November 1990, text in Waitangi Tribunal *Ngai Tahu Report* 4 WTR 598, app No 4).

It can be noted parenthetically that this Maori Appellate Court decision deftly sidestepped application of the "1840 rule". This was the rule adopted by the Maori Land Court during the nineteenth century (see Chief Judge Fenton *Orakei Block* case (1869) in Norman Smith *Maori Land Law* (1960) at 88-9) during its transmutation of customary title into Maori freehold title. The rule required the Court to transmute the title according to the traditional ownership as it existed in 1840. In stifling the possibility of a peaceable change of tribal boundaries after 1840 by operation of Maori customary law, it could be argued that the "1840 rule" breached the recognition of rangatiratanga in the Maori version of the Treaty of Waitangi. This would mean that it violated the "principles of the Treaty of Waitangi" which are the basis of the Tribunal's jurisdiction (but not that of the Maori Courts as constituted under the 1953 legislation). This, in turn, raises the question of whether the Maori Land Courts are subject to the "principles of the Treaty of Waitangi". The 1953 legislation never made plain the relation of the Court's jurisdiction to the Treaty, an uncertainty which does not reappear in the 1993 Act. The Preamble and s 2 of Te Ture Whenua Maori Act make it plain that the principles of the Treaty of Waitangi are to be embodied into the administration of the Act. Whereas previously the Court's references to the Treaty of Waitangi tended towards the somewhat timorous and almost apologetic, the new regime makes such acknowledgement central to the interpretation of the Act.

The conferral of this special jurisdiction on the Maori Courts to assist the resolution of Tribunal claims hearkened back to the Court's nineteenth century role in determining traditional "ownership" of Maori land. This was something of an excavation of an historical role, since these days the Court's determination of customary title and its transmutation into Maori freehold land involves a very rarely invoked jurisdiction.

In 1988 the Ngai Tahu claim was at the outset. However the claims relating to the proposed corporatisation of Crown land and other assets at that time were at their most intense. As part of the settlement negotiated in the wake of the *Maori Council* judgments of the Court of Appeal [1987] 1 NZLR 641 the Treaty of Waitangi (State Enterprises) Act 1988 inserted new sections 8A – 8I into the Treaty of Waitangi Act 1975. These provisions gave the Tribunal power to recommend the resumption under s 27B of the State Enterprises Act 1986 of land vested in a State-Owned Enterprise where a well-founded Treaty claim had been made out and such measures were appropriate. The 1988 Act also amended the Maori Affairs Act 1953 to give the Maori Courts jurisdiction to determine whether any such resumed land should be set

aside as a reservation under s 439A of the 1953 Act.

These two amendments to the jurisdiction of the Maori Courts during 1988 signalled some incorporation into the claims process. The provisions of Te Ture Whenua Act 1993 indicate that this process is to continue. Indeed, it can be argued that the Act contains provisions which could thrust the Court into a controversial position, even potentially having consequences for privately owned General (ie non-Maori) land of the type which the Minister informed Parliament he had gone to lengths to avoid.

To understand the implications which the new Act may hold for the role of the Maori Courts and the situation of non-Maori land vis-a-vis tribal claims, it is necessary to recount some common law principles and other provisions of the Act.

Aboriginal title

Most of those with even a passing knowledge of Maori claims will be aware of the common law doctrine of aboriginal title. This doctrine characterises the Crown's sovereign title to land as "burdened" by the tribal property rights. This aboriginal burden is "fiduciary" in character and cannot be extinguished other than by voluntary relinquishment of the tribal owners to the Crown (the "right of pre-emption" found in the English version of the Treaty of Waitangi) or by explicit expropriatory legislation. This doctrine has underpinned Maori claims to fishing rights in tidal waters (see (1984) 14 VUWLR 247 and Law Commission, Preliminary Paper No 9, 1989). It was also a backdrop to the corporatisation negotiations through the late 1980s in as much as the Crown land being vested in State-Owned Enterprises arguably remained subject to "aboriginal servitudes" (unextinguished incidents of an aboriginal title, such as foraging and access rights).

Fiduciary duty

An aboriginal title protects extant tribal use rights over ancestral lands which are exercised according to customary law. The fiduciary duty, however, is a standard of accountability incumbent upon those who have a regulatory and discretionary (including, perhaps, the legislative) power over assets subject to an aboriginal claim. A claim against the Crown based upon the fiduciary duty might involve an alleged, past violation of aboriginal title or a related claim concerning a failure to comply with the terms of any transaction by which it was purportedly (and then but partially) relinquished. These dealings are known in Canada, perhaps misleadingly, as "treaties" whereas in New Zealand they are represented by the Deeds of Purchase such as those affecting the South Island.

As the capacity to abrogate an aboriginal title lies initially and constitutionally with the Crown, the accountability in (equitable) damages for breach of a fiduciary duty also lies with the Crown. Hence, the form of the new Act at first reading failed to deal with the effect of the repeal of the provisions of the 1953 Act which had insulated the Crown from an action for breach of fiduciary duty in relation to its nineteenth century dealings with tribal owners for the extinguishment of their aboriginal title (see (1988) 18 *VUWLR* 1).

The new Act was altered during the Committee stage so as to prevent this scenario occurring. The Minister readily acknowledged the conundrum that was faced: It was agreed that the provisions preventing Maori suing the Crown for breach of its fiduciary duties in relation to the customary title were discriminatory and contrary to the principles of the Treaty of Waitangi. However, there was some anxiety that the reopening of these transactions would expose the Crown to judgment in its Courts potentially involving millions of dollars and might also have consequences for privately-owned land. Consequently s 406B of Te Ture Whenua Act 1993 provides that customary land is no longer exempt from the limitation of action rules in the Limitation Act 1950.

The inclusion of s 406B in the new Act indicates the tokenism of the repeal of the controversial provisions in the Maori Affairs Act (ss 155-159) preventing actions against the Crown for its dealings in relation to Maori customary land. There is clearly a hollowness in retrospectively legislating the running of a limitation period against tribal owners during a period through the previous century when the New Zealand Courts were denying the justiciability of their claims. The Government had found itself caught between a rock and a hard place so far as its position on this matter was concerned. The Minister for Maori Affairs acknowledged this with admirable openness during his Second Reading speech, although it is surprising the provision has found its way into the new Act without any apparent controversy.

It should be noted that the new Act simply renders inactionable any litigation based upon an alleged violation outside the limitation period of the Crown's fiduciary duty in relation to Maori customary land. The Act does not render inactionable claims in the Courts regarding Maori customary title which fall within the limitation period (an unlikely scenario). Nor, more importantly, does it affect actions based on a fiduciary duty associated with any residual aboriginal title. In short, the Act does not eliminate any action based upon what is known as a "non-territorial aboriginal title", or, to use another phrase, "aboriginal servitudes". These servitudes may continue to lie over Crown or State-Owned Enterprise held land as well, more trickily, as privately owned land (refer (1986) 16 *VUWLR* 313).

Aboriginal servitudes

The status of these aboriginal servitudes awaits judicial ascertainment. The favourable reception of the judgment in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682 (HC) suggests that some such recognition might eventuate. That judgment specifically adopted the distinction between "territorial" and "non-territorial" aboriginal title, albeit in a particular context of tidal land (vested in the Crown).

The *Ngai Tahu Report* (1991) considered the vestiges of customary usage practised by Ngai Tahu throughout their traditional territory in Te Wai Pounamu. These rights of "mahinga kai" had been intentionally excepted from the tribal land cessions of the nineteenth century (at para 17.6.1). The Report noted:

> . . . the tribe still continues to forage for their flora and still collects herbs for medicinal purposes as well as pingao, kuta and harakeke for traditional weaving and decorative art. Trees of the forest such as totara are important for carving. There are other mahinga kai resources which Ngai Tahu continue to gather such as puha and watercress.

The *Report* proceeded to note the absence of a mechanism for these rights to be protected by incorporation into the Torrens system of the Land Transfer Act. The Tribunal suggested that

> Parliament should consider amending the [Land Transfer] Act as to make the title of the registered proprietor subject to those subsisting traditional incidents of Maori tenure (at para 17.7.2).

This de jure recognition of traditional rights exercised de facto has not eventuated as reform of the Land Transfer Act. However there is a significant change to the general jurisdiction of the Maori Land Court in s 47(1)(e) of the new Act. This new provision gives the Maori Courts jurisdiction to

> determine for the purposes of any proceedings in the Court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order.

This confers a new general jurisdiction on the Maori Courts. It is clear that the clause was designed to cover informal transactions affecting Maori freehold land, so as to confer jurisdiction on the Maori Land Court where some informal arrangement has been made concerning such land. The subsection allows the Maori Land Court to deploy a proprietary remedy (by way of constructive trust) to give effect to such arrangements. However, the clause has possibilities which go beyond that situation and it is those prospects which may well mean its interpretation could become a matter of some controversy.

In the first place, it is suggested that the clause is sufficient to permit the Maori Land Court to make an order recognising aboriginal servitudes over any land, Maori freehold or otherwise. In that regard s 47(1)(e) of Te Ture Whenua Act 1993 may well accomplish the result informally recommended by the Waitangi Tribunal. It has been seen that a fiduciary duty is an aspect of a subsisting aboriginal title. Consequently those landowners who have a fiduciary duty in relation to traditional incidents of tribal title may be exposed to an order of the Maori Land Court under this section. At the least, this amenability will extend to Crown land and state-owned enterprise land. Those public bodies which are associated with state enterprise — what European Law in the United Kingdom would call an "emanation of the state" — might also find the fiduciary duties of the Crown have devolved onto their land titles. The likelihood of that will be underlined, enhanced even, with regard to those public and/or corporatised enterprises which are statutorily enjoined to adhere to the principles of the Treaty of Waitangi. Since the jurisdictional clause applies to "any land" it is conceivable that it may even reach privately-owned land. The implications that that would hold for titles under the Land Transfer Act are unclear.

Further, it may be suggested that s 47(1)(e) of the new Act extends beyond protection of surviving aboriginal servitudes to cover historic Treaty claims against land held by the Crown or other "emanations of the state" subject to "Treaty principles". This possibility arises from a combination of the use of the terms "fiduciary" and "any specified land" in s 47(1)(e) and the various statutory subjections of state instrumentalities (corporatised or otherwise) to Treaty principles.

It has been seen that the term "fiduciary" has a wide meaning in the context of a statutory recognition of Treaty principles (*Maori Council,* supra at p 664 per Cooke P). This wide use of the term may venture beyond the precise doctrinal confines of Equity, but, in New Zealand law at large the elasticity of the concept appears established: *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 at 36 per Cooke P.

Given the centrality of the fiduciary concept to the jurisprudence of aboriginal rights in this country and North America as well as our Courts' extension of "elasticity" to it, one wonders what Parliament had in mind in incorporating the concept into the Act and Maori Land Court's jurisdiction as section 47(1)(e). One cannot avoid at least speculating on the conclusion that the provision confers a jurisdiction on the Maori Land Court to grant proprietary remedies against those who by common law (non-territorial aboriginal title) or by statute ("the principles of the Treaty of Waitangi" or suchlike phraseology) have a fiduciary duty in relation to tribal rights. The language of the new Act is broad enough, it is suggested, to bear this interpretation.

If the above interpretation of the jurisdiction given the Maori Courts by Te Ture Whenua Act is adopted judicially then the Maori Courts will indeed assume a central role in the resolution of tribal claims. The Maori Land Court will be able to rule that certain bodies hold their title to land subject to fiduciary duties (Treaty and/or common law-derived) in relation to tribal persons. The Court has available to it a proprietary remedy (vesting order) which can specify the nature of this duty and the basis upon which the title to the specified land is held. Since the fiduciary concept straddles Treaty principles and residual common law aboriginal title the consequences of this for the claims process are potentially significant, disruptive even. If Parliament did not intend that result then it may be wondered how a buzzword in the jurisprudence of aboriginal rights slipped so unnoticeably into the new legislation. □

Wigs and gowns again

I'm more controlled on screen than off, I guess. It's a bit like you don a uniform, really. Like a lawyer dons a wig and gown. You never forget the dignity of the profession you uphold — that's why lawyers still have wigs and gowns. Because I'm there to do a specific thing. I'm not there for me.

Anita McNaught
The Listener
20 February 1993