The Treaty of Waitangi: *"Do I dare, Disturb the universe?"*

By Nick Gerritsen, a practitioner of Christchurch

It is the author's view that the Treaty of Waitangi concerns values and morality and is therefore more than merely a legal document subject to legal interpretation. However, he suggests that the developing size and complexity of the debate about the Treaty is daunting. He suggests that the issue is now of such a nature that it needs to be resolved by Parliament.

And so they said . . . it's a matter of good faith, let the spirit free . . . and so it was . . . and the land of New Zealand was overcome and haunted by the noblest of spirits .

So, "let us go then, you and I . . ." (The Love Song of J Alfred Prufrock, T S Eliot).

The debate over the Treaty of Waitangi ("the Treaty") necessitates an appreciation of all facets of our society of which values, politics, the law, and new avenues of thought, are but a few. Throughout the intricacy and emotion one must also keep in mind the everyday reality of the debate. It is vitally important to consider how ordinary New Zealanders are affected and how relevant the Treaty is to their everyday lives.

The reality is that a large percentage of New Zealanders cannot afford the luxury of gazing skyward and pondering higher issues. They do though, have views.

If one considers the debate holistically can it be said that concrete progress is being made? Instead of drawing society together in pursuit of harmony, the knives are being drawn. The Treaty is now often used as a justification for acting beyond the ordinary norms of society.

Values

It is a matter not just of justice, but of values. Rational justice is said to be the basis of any sound decision. (*National Bank of Greece and Athens S A v Metliss* [1957] 3 All ER 608) and the driving force behind justice itself is provided by values (R W M Dias, *Jurisprudence*, 1985, p 194) as they link the law and society together "in the widest sense". (ibid, p 219).

But what comes first, the values or the just decision? Plato and Aristotle believed in the educative function of law. Aristotle said that "legislators make citizens good by forming their habits" (Dias, *Jurisprudence*, p 51) — that moral ideas are shaped by legal enforcement and that values are pre-empted educatively. Some "shared morality is essential to the existence of any society". (ibid, p 112) The question is who creates this morality in the first place. Do humans, as sheep, just merely follow?

The Treaty

The Treaty of Waitangi concerns values and morality, more than mere legal interpretation. The question which comes to mind with respect to this issue is who is leading this value based "resolution"?

The majority of New Zealanders are largely too busy surviving to worry directly about the justice of the Treaty of Waitangi. Views are very mixed. In a survey conducted by the *New Zealand Herald* — National Research Bureau in July 1988 "62% of respondents were not satisfied with the Treaty, 34% believing that it should be re-negotiated, and 28% in favour of its abolition. A further 25% supported the Treaty, with 4% saying that it should have the force of law". (*Waitangi*, 1989, ed I H Kawharu p 281). Will it ever be possible to adduce a common view of the Treaty? — so much for a shared morality.

Despite its practical implications for society the Treaty has been adorned with sentiment and, as such, fulfils the dream of many an academic. Perhaps the rats who have amended the original over the years had the right idea, or does this fact merely exemplify serious historical neglect.

Throughout the debate the practical effect of such "Treatytalk" has been forgotten. Everyone is speaking at once, the politicians, the Judges, Maori representatives, European representatives, academics, church leaders . . . . All that arises out of this consummate conversation is a collection of rather inadequate garbled signals.

The Treaty and values

The totality of New Zealand's values is divisible by the current population. Everyone is entitled to hold their own views. There is though, a large degree of common misconception within society with regard to the Treaty, such as the view that the word "partnership" inherently involves a fifty percent sharing. Few people are aware of the restrained meaning that has been placed on this word within this context. Partnership "does not mean that Maori New Zealanders are entitled to fifty percent of all the seats in Parliament; nor to fifty percent of all the tax revenue, . . . And it certainly does not mean that Maori New Zealand is entitled under the Treaty to half of all Crown property in the country". Further, the word "partnership" connotes inherently some form of equality, and must be clearly stated as in the *Te Weehi* decision that ". . . inequality between persons may indicate an overall justice rather than an injustice". (*Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 at 693.) Lest one forget.

... and politics

Social perception is at odds with the approach and interpretation of the law. Who is pre-empting who? This is an issue that all New Zealanders need to be very familiar with if the view of the law is to reflect social values. Politicians are aware of the importance of the Treaty, but also of the dichotomy of views which presently exist. As David Lange said, as Prime Minister, there are "nuts and bolts issues" which can be "identified and quantified" and yet questions which affect all New Zealanders more personally such as "is your quarter acre section safe?" (Chateau Seminar — *Council Brief* 163, July 1989). To such a question it is suggested a politician would reply "totally safe," and a lawyer "good question".

Effective government in modern times means the effective management of limited resources in the best interests of the community. The pivotal question is whether the Treaty of Waitangi should account for a different approach to sharing, and who is to decide? This introduces a subjective element and is at odds with comments such as those of Geoffrey Palmer who, as Prime Minister, said that "clarity and certainty are the foundation stones of our law". (Speech to Wellington District Law Society, December 1989). The Treaty has become the main means of effecting asset redistribution or at least attempting it. Mr Palmer himself noted that the "Maori people are looking for a way out of a whole range of social problems". (ibid) This may be true but any redistribution of assets only goes part of the way to resolving the Maori problem. The real "trick" will be to convert the benefit of this new wealth to the greater good of the Maori community and New Zealand society as a whole.

Resolution?

The current mechanism for resolution ticks over as the hand of some gigantic clock. As time passes, expectations and fears heighten, perceptions sway from the nuts and bolts reality of the Treaty and social values are altered.

The crux of the practical implications of the Treaty is how far New Zealanders will have to go to accept it, or perhaps more pertinently, how far the Government will have to go before the population fully accepts that "*Treatyism*" is a valid aspect of the New Zealand way of life. Will Treaty of Waitangi clauses establish enforceable obligations on the part of Councils and other institutions to become experts in semantics or perhaps scholars of philosophy so as to "*get into the spirit*"? There must come a point where this all becomes superfluous to everyday life. New Zealanders will pick up a basic understanding of the Treaty but it is suggested that any eternal resolution must necessarily involve more than this.[2] The Treaty is all about rights. It is not something which will disappear save all New Zealanders permanently shutting their eyes to it. Paul McHugh has said that "I do not think it beyond the wit of lawyers and Judges to deal with it, or to develop a clear understanding of the Treaty's implications, by the usual process of building a body of common law around it". (in *Lawtalk* 324, April 1990, pp 28-29.) This compares with David Lange's view that the adversarial system of justice is such that the "Courts will never settle and never come close to settling the complex issues of race relations". (Chateau Seminar — *Council Brief* 163, July 1989)

If we are to rely on lawyers' wit (which seems preordained), the issue then becomes how far this innate ability can be used to generate and ensure future justice. Social values, evolving from the Treaty, are developing at a tangent to technical legal interpretation. Some compatibility between the two must be achieved, but who is to make the first move? Can a Court suddenly pre-empt a change in social values or does one wait for a minority group within society itself to generate a change? Where does the responsibility of the Government lie?

New avenues

The most recently resurrected academic ploy is the concept of Aboriginal title. This doctrine continues to gain respectability. It has been described as a "fiduciary-like obligation binding the Crown",[3] and has led to subterranean questions such as those presently faced in Canada, for example; how safe is a Torrens title? (Trainor J in *Hund v Halcan Log Services*).

How many New Zealanders are aware of the *Te Weehi* case which recognises "that an unextinguished non-territorial Aboriginal title may survive over Crown land".[4] Or do we keep these titbits hidden amongst all the other little secrets underneath our gowns.

If the doctrine of Aboriginal title continues to creep into Treaty jurisprudence then so will defences of ignorance as the basis of "unknowledge" of the Treaty of Waitangi. There may exist a positive duty to adhere to the principles of the Treaty but it is a very different issue when it comes to the question of enforcement. How and through what mechanism can you achieve this?

Rights

To guarantee lasting security a moral balance must be achieved. It has been said that

> to promote and maintain a successful scheme of justice requires the promotion of a sense of obligation, requiring amongst other things, a curb on the appetite for rights, especially when this leads to abuse of liberties. (Dias, *Jurisprudence*, p 67)

The fundamental basis is that any "scheme of justice is likely to turn sour if nurtured on ideas of rights alone". (ibid.) Yet the issue of rights forms the core of the arguments, passionate and heartfelt, that are promoted by both sides.

Does this explain the fact that, as the Treaty issue grinds on, one is beginning to hear faint whispers that it should have been filed in the too hard basket? The suggestion that interim settlements may be a "valid option for the future"[5] devalues current efforts and locks society into a confined debate about a document whose words and interpretation have been held to be not as important as the spirit which rises therefrom. The hourglass has already run for 150 years and any suggestion of an interim settlement is akin to turning the glass over to start afresh.

Who makes the first move? — sovereignty

The perpetual question of sovereignty is subsumed within the intoxicating spiritual debate. The

Courts have taken a supervisory position, that is, "a responsibility to supervise Government policy at a high level". (Sir Robin Cooke, [1987] NZLJ 244) The extent of the supervision is the moot point, particularly when it is the view of some people that the Treaty issue "is of a kind which only Parliament can ultimately resolve". (Geoffrey Palmer, Discussion Paper to Wellington District Law Society, December 1989) As an analogy, it is as if the Treaty debate was a tennis match. It is the first set; the Maori Council had the first serve, and the politicians are deciding whether they should go for the volley or slam it. The Courts are the net — stopping some balls but sending others off at a tangent, in a direction unbeknown. So while the Courts, Government and Maori tribal representatives are playing their game, our "plebian" society is left, with bated breath, in a state of tacit uncertainty. The Treaty issue is opaque and it is not the done thing "to call it as you see it".

The Yesterdayness of Todayness

The Treaty has brought about a time of fine words and extremism. It is appealing to think that it is an issue which would go down quite well one afternoon

Before the taking of a toast and tea

under a weeping cherry tree, in a New Zealand country garden. There is a time, though;

Time for you and time for me,
And time yet for a hundred indecisions
And for a hundred visions and revisions

With regard to the Treaty one knows this only too well. Perhaps time is not yet precious enough? (extracts from *The Love Song of J Alfred Prufrock*, T S Eliot).

It has been said

> that majoritarianism has had such an overwhelming influence on policy development that the resurrection of partnership 150 years later, will require a bold departure from accepted views of the state, including its presumption to represent the Maori partner on all accounts. (*Waitangi*, I H Kawharu, p 295)

This sounds rather space-age in comparison with the every day reality of the new found "*Treatyness*". It suggests that the majority has to start all over again in a pseudo-democratic manner.

One is left daunted by the developing size and complexity of the Treaty debate.

There is much misconception, and the reality is that the Treaty is perceived to give rise to a number of "rights"; to deep water fisheries, to whitebait in Canterbury Rivers, to F M radio frequencies, to forests, to a separate Maori justice system . . . and as a practitioner one reads reported cases such as *Reihana v Ruthven* (unreported, High Court, Invercargill, February 1990, AP 9/89, Tipping J) in which the Treaty is used in support of a Family Court custody claim.

Where will it end? Will it end? Some now hold that achieving interim settlements is good progress. The truth may be that some involved in the Treaty debate are making too much money out of it. They cannot "afford" to let it be resolved.

If one was to venture to call it as one sees it, New Zealand is in a mess. A heavy obligation lies on the Government (Parliament) to deal with the issue "now". Any attempt to place it on the "back-burner" will only give rise to greater constitutional issues as the Courts attempt to grapple with the Treaty without adequate guidance. And throughout all this the average New Zealander whoever he/she may be has to pursue an ordinary life.

To the dilemma facing all New Zealanders over the Treaty of Waitangi, the words of T S Eliot sing out, simply;

Do I dare
Disturb the universe? □

1 Alex Frame, "A State Servant Looks at the Treaty", [1990] 14 NZULR No: 1, p 89.
2 Michael Batchelor, "Consider the Treaty", *Lawlink* 5 (2) June 1990.
3 P G McHugh, "The Legal Basis for Maori Claims Against the Crown" (1988) 18 VUWLR p 15.
4 Ibid, p 17.
5 "A Challenge to the Profession — become involved", *Lawtalk* 324 April 1990 30-36.

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The Treaty of Waitangi — fertile ground for judicial (and academic) myth-making

By Guy Chapman, BA (Auckland), MA (Princeton) MA (Oxon), Lincoln's Inn, an Auckland practitioner

This article was originally delivered as a law firm seminar paper. It reviews and challenges the "new orthodoxy" of recent years concerning the Treaty, both on historical and legal grounds and calls for urgent legislative remedial action to arrest the present trend of judicial decision-making in relation to alleged "principles" of the Treaty, and generally in relation thereto.

Introduction: Treaty v democracy:

New Zealand has been singularly blessed. It is weighed down by no "higher law" constitution and it is our elective and, as recent history shows, highly accountable, Parliament, which is sovereign, not our non-elective Courts.

By and large, therefore, the Courts do not become involved in larger political questions, or try to set social policy agendas, or entertain political claims, or seek to pre-empt political decision-making, tractable and elastic principles of administrative law notwithstanding.

That is certainly as it should be under our constitutional disposition.

The tendency, noticeable in jurisdictions subject to "higher law" constitutions (whether or not a particular "higher law" constitution also incorporates a "higher law" Bill of Rights), to have Courts override, hedge and circumscribe political decision-making, is one which we in New Zealand, so far, have managed, wisely, to eschew.

Our Courts, by and large, "stick to their knitting" (the adjustment of rights and claims between party and party). As Sir William Wade has put it:

> . . . to a lawyer the boundaries of the law need not be obscure, and his conscience may be easy if, by observing them, he avoids attempting to give legal answers to political questions. (H W R Wade, "The Basis of Legal Sovereignty", [1955] *Camb LJ* 172, at 197.)

We have put our trust, and our trust has not yet been shown to be misplaced, in a democratic system that is flexible, remarkably responsive (with its three year parliamentary term and its "first past the post" electoral system) and generally effective and honest.

With great wisdom, even if it be wisdom born of the unconscious, we have not incarcerated our constitution in a single document, one pronounced at a fixed moment in history, and then, as it were, thrown away the keys, or, still worse, handed them exclusively to some higher Court.

Nor has it ever been generally conceded, in our fledgling but supple democracy, that one or more groups amongst us should be recognised by all others as having special, or antecedent, rights and privileges, whether to Government expenditure, to resources such as the fish in the sea, or radio frequencies, or whatever.

Preferment of groups

For a modern democracy cannot function, happily and equably, if there is legally-sanctioned preferment of groups, or if there is the conferment of privilege and advantage, by law, according to who may have come first, who may be from this or that ethnic group, or, again, howsoever. That approach has been unhappily tried, and its product is now being hastily dismantled, in South Africa. Something similar is now being attempted, shamefully, in Fiji with, again, ultimately predictable results.

The thought that anything remotely akin could be advocated in New Zealand would, for most of our history, have been alien and risible.

Yet, over recent years, there has been a concerted move to elevate, to a status it was never intended to have, and cannot possibly support, for it is a most modest thing, a simple and ingenuous document, as a pseudo-constitutional instrument, and as one ordaining or justifying exceptional rights and privileges for some.

Around this simple document the propagators of myth, and the propagandisers, have gathered, and are even now busily at work. Of late, their effusions have been repeatedly blessed by the Courts, particularly by the Court of Appeal, and over the last few years, at least until last October, they enjoyed the favour and ear, and not least the purse, of Government.

It is not often in political life that such a determined conventicle is seen at work. In the universities, there have been mass conversions and it would now be a brave Court that would do other than genuflect.

Nor has the myth-making come cheap. The taxpayer was truly munificent in 1990. We read that the 1990 Commission, by March 1990, had already spent more than $2.3m on "promoting" the Treaty (*New Zealand Herald,* 19 Mar 1990, p 10), the Commission avowedly aiming to give the public "the facts" about "New Zealand's founding document", as the Commission fondly dubbed it. In releasing, under compulsion, details of its financial expenditure, the Commission opined knowledgeably that "attitudes" to the Treaty had changed markedly in the previous six months.

Whatever the historical and symbolic significance of the Treaty, product as it was of a laudable humanitarian impulse to secure a

measure of legitimation for the acquisition of British sovereignty over New Zealand, there is the greatest danger and folly in trying to give it, in the 1990s, a political after-life, or the status, as Chief Judge E T J Durie, would accord it, of a "Bill of Rights".

The very concept of that modest little document, more than 150 years after its date, according "rights", that is, special rights, to some, on the footing that that "some" are in a never-ending, exclusive and cosy, relationship with the Government ("the Crown"), to which all others are not admitted, must be unacceptable, quite apart from being utterly unworkable.

For that is the road to one set of rules, perquisites and advantages for one group, and another set of rules for the rest. A modern pluralist, multi-racial and multi-cultural democracy will, quite simply, come apart at the seams if such were to be its prescription.

History and the dead

"Special treatment for special needs" is one thing. Few would cavil with that. "Special treatment for some because forebears of some signed a document 150 years ago" is entirely another. History should be left to bury its dead. The Treaty is an historical artefact, to be revered as such. Attempts at reincarnation, so as to gain latter-day advantage, are not only politically unviable, but will make the Treaty, as a vehicle of special pleading, a focus of deep and growing resentment, and division.

Against this background, the not insignificant attempts, of late, by our Courts to give the Treaty some general and special status in our common law, notwithstanding that Parliament has wisely refrained from according it statutory force and effect (this for very obvious reasons, given its utter vagueness, not to say contradictoriness), must give particular cause for concern.

What we have seen has been an endeavour by the Courts (albeit that they have been given encouragement by negative injunctions laid upon the Crown in certain recent statutes ". . . not to act in a manner that is inconsistent with the principles of the Treaty . . .", whatever that might mean, for the document enunciates no "principles"), to set social and political policy, and even to supervise its carrying out, all, assuredly rather the province of Parliament and Government.

Where this may lead the Courts, if it continues much further, who may know. It is a dangerous trend which needs immediate curtailment. Parliament, in the 1983-90 period, opened the door to it, but the Courts have rushed through and are now well and truly in the policy area. It will take notable judicial leadership to shepherd them back to their proper place.

But what then are these myths which have been propagated, nurtured, and which have come to have such strong appeal for some.

It is suggested that they can be categorised into two groups. First, there are what might be called the myths for beginners. Secondly, there are the more advanced myths, or what might be called crypto-legal myths. Whilst they reinforce each other, it is worth attempting to separate them, and take them strand by strand.

Myths for beginners

(I) The cession myth

Plainly stated, this myth has it that, by the Treaty of Waitangi, the Maori people ceded sovereignty over the islands of New Zealand to the British Crown, and that the Treaty is accordingly a ". . . treaty of cession of sovereignty . . ." (P G McHugh, "The role of law in Maori claims" [1990] NZLJ 16, at 17) legally cognisable as such, and thereby "sacred and inviolable".

Like all myths, it has grown upon itself. Plainly, the Treaty of Waitangi was a part, one part and a not insignificant part, of the story by which New Zealand became, in 1840, part of the British Empire and legally a dependency of New South Wales (that is, until its erection into a separate colony as at 3 May 1841).

But the Treaty of Waitangi, of itself, and without more, did not and could not accomplish that. The title of British sovereignty over New Zealand does not rest upon the Treaty, alone. The Treaty, at most, was part of a *process* by which British sovereignty over these islands was acquired.

Historians[1] have painted the background against which evolving British (and particularly Colonial Office) policy in respect of New Zealand in the 1830s was developing. At that time, humanitarian (and evangelical) concerns for the welfare of native peoples were at their height. But at the same time, inexorable pressures for intervention were forcing the official hand, however reluctant it may have been. The number of British subjects living in New Zealand by the end of the 1830s, the need for some effective and settled authority, the not inconsiderable trade with New South Wales, the depredation wrought upon Maori society by the unleashing of the musket in the 1830s, and the consequent social dislocation, and the increasing trade interest of France and the United States, not to mention the presence of a strong and growing colonisation lobby in London (in the form of the New Zealand Company), all played their part.

Assertion of authority

Official steps followed, however uncertainly. The Whig Government of Viscount Melbourne was ultimately not prepared, however, nakedly to assert authority over the New Zealand islands, whatever the inevitability of such an assertion, without securing a respectable showing, on the part of the Maori inhabitants, of their acquiescence and assent. Humanitarian sentiment, and political caution, demanded no less. A treaty was the tool and manifestation by which such measure of assent was to be secured.

Other acts of state, and official emanations, of course preceded it, and followed it. The ground was laid by prerogative instrument. As is well known, the Letters Patent of 15 June 1839 altered the boundaries of New South Wales so as, explicitly, to include ". . . any territory which is or may be acquired in sovereignty by Her Majesty . . . within that group of islands in the Pacific Ocean commonly called New Zealand . . ."

Following the Letters Patent of 15 June 1839, Captain Hobson, on 15 August 1839, received his formal appointments, as respectively HM Consul in New Zealand

> . . . for the purpose of negotiating for the recognition of the Queen's sovereignty by the chiefs of New Zealand . . .

and Lieutenant-Governor

> . . . in and over that part of Our Territory . . . which is or may be acquired in sovereignty in New Zealand . . .

along with his Instructions from the Marquess of Normanby, HM Secretary of State for War & Colonies (from February to September 1839).

These Instructions, dignified as they are with their great rolling periods, show well the essential equivocation in official policy towards New Zealand, redolent as they are with references to obtaining the consent of the aboriginal inhabitants, but at bottom recognising (as did James Stephen, Permanent Under-Secretary, and their principal author), that the time for New Zealand to be gathered into the Imperial fold had come.

Quite clearly, and despite some window-dressing to the contrary in the Instructions, a treaty between "sovereigns" could not be had, as there was no recognisable "sovereign" in New Zealand. All that could be had, and all that was had, was a form of "treaty" or pact between the Crown on the one hand and an "acceptable" number of chiefs (or supposed chiefs, for there were chiefs and chiefs) on the other hand, the status and representative capacities of a number of the chiefs being in some cases unclear. Prima facie, no unified political authority existed in New Zealand capable of giving any form of general or representative assent to the assumption of British sovereignty.

Dispersed and petty tribes

The Instructions in effect recognised this, as witness the well-known passage where Normanby states, the first part of it being most misleading but the second part recognising the reality:

> I have already stated that we acknowledge New Zealand as a sovereign and independent State, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act or even to deliberate in concert. (R McNab (ed), *Historical Records of New Zealand*, Wellington, Government Printer, 1908, vol 1, pp 729-739, at p 731.)

Nor could Hobson, devoted servant as he was of his Instructions, rely entirely, or exclusively, upon them, or upon what they may have intended. He had also to take into account the local situation and political reality. For one thing, the boundaries of New South Wales were by proclamation of the Governor-in-Chief of New South Wales, Sir George Gipps, dated 14 January 1840, extended to include ". . . any territory which is or may be acquired in sovereignty by Her said Majesty . . . within that group of islands . . . called New Zealand . . .". In short, an act of state, somewhat ambiguous, to be sure, in its terms, proximately preceded the treaty-making (and it has of course been this date, namely, 14 January 1840, which, in our statutory law, has traditionally, and rightly, been taken as the date of the reception, into New Zealand, of English law, including the common law; see the English Laws Act 1858 and the English Laws Act 1908 (the latter Act remaining in force until 1 January 1989); see also the Judicature Act 1908, s 18, a provision still in force). And of course the day after his arrival in the Bay of Islands (he having arrived on 29 January 1840), Hobson proceeded, on Thursday 30 January 1840, to the Anglican Church at Kororareka where he read, inter alia, the Queen's commissions extending the boundaries of New South Wales and appointing him Lieutenant-Governor (his commission as Consul, under which he was supposed to treat with the chiefs for the recognition of the Queen's sovereignty over New Zealand being, however, apparently not read).[2] In short, Hobson made it known that he was proceeding, in his public acts, in the character, not of a consul, but of a Lieutenant-Govenor, and he was duly feted and treated as such. (The Treaty, however, he did, more cautiously, sign as "Consul and Lieutenant-Governor").

An amateurish document

The fact that the Treaty, in the way it was brought into being, and in itself, was and is an amateurish and hasty document, initially put together by Hobson and others on HMS *Herald*, with some subsequent input from Busby, and then translated into missionary Maori on the evening of 4 February by Henry Williams (possibly assisted by his son Edward), with the Maori version then being signed by the great majority of the signatories (although 39 did sign an English version, at Waikato Heads and Manukau harbour, in March and April 1840 respectively), but with a number of other English versions being given currency by Hobson at the same time, is all relatively well-known, and the Maori version, are not direct translations of each other (the Maori version having been translated from an initial English version which has been lost), and the fact that the gathering of signatures for the Treaty occupied, in all, a period of some eight months, through until the middle of October 1840.

Mrs Ruth Ross, who has written extensively as to the detail of the treaty-making process, has concluded:

> However good intentions may have been, a close study of events shows that the Treaty of Waitangi was hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution. To persist in postulating that this was a "sacred compact" is sheer hypocrisy. (R M Ross, "Te Tiriti o Waitangi, Texts and Translations" (1972) 6 *NZJ Hist* 129, at 154)

Well before the Treaty had acquired its final tally of signatures, a tally which was always noticeably deficient as far as the interior areas of the country (Waikato, Taupo, etc) were concerned, and certainly before Hobson knew the outcome of Major Bunbury's quest for signatures in the southern districts of New Zealand, Hobson acted, on 21 May 1840, to proclaim British sovereignty over the whole of New Zealand. He did so pre-emptively, concerned with other issues (in particular restiveness at Port Nicholson, and reports of the expected arrival of the Nanto-Bordelaise Company's settlers from France).

Guardedly, his proclamation in respect of the North Island did make obeisance to the Treaty (although the adherence of chiefs over wide areas of the southern and eastern parts of the Island had either not been obtained, or was not

then known by Hobson to have been given, where such had been given). The proclamation in respect of the South and Stewart Islands simply asserted a right ". . . on the grounds of Discovery . . .". The Secretary of State for War & Colonies, by then Lord John Russell, on receiving a despatch from Hobson attaching copies of the Proclamations, had them printed in the *London Gazette* on 2 October 1840, thus formally completing the legal steps by which sovereignty was acquired.

Treaty only one step

Drawing the historical threads together, it can be seen that the Treaty was no more than one step, one act of state, along the path to complete and full annexation. To set it up as being the beginning and the end of the matter is an obvious travesty of the facts, and an errant injustice to what, inevitably, was a complicated train of events. The Treaty was part of the drama but by no means the sole or final Act.

Equally, and as much a travesty, is it wrong to treat of the Waitangi pact as if it were a treaty of cession between sovereign nations and, as such, ". . . sacred and inviolable . . .", to use the language of Lord Mansfield in *Campbell v Hall*, (1774) 1 Cowp 204, 98 ER 1045, at 208, 1047. That case concerned the peace treaty of 10 February 1763 between Great Britain and France, the "Peace of Paris", which brought the Seven Years War to an end, and in terms of which France ceded the sovereignty of Grenada (which the case concerned), along with that of Canada, Senegal, St Vincent, Tobago, Dominica & Minorca, to Great Britain.

To draw an analogy between that Treaty, and the Waitangi pact, is, it is submitted, quite fallacious. Yet McHugh argues, after citing *Campbell v Hall*, and the "sacred and inviolable" dictum:

> From this we get the legal restraint on the Crown acting in an executive capacity inconsistent with any promises in a treaty of cession of sovereignty such as the Waitangi document. (P G McHugh, *op cit*, p 17.)

It is respectfully submitted that we get no such thing from *Campbell v Hall*, which dealt with an internationally cognisable treaty, a wholly different thing from a domestic act of state such as the Waitangi pact, where the sovereign authority, for domestic and policy reasons, sought the affirmation of representatives of ". . . dispersed and petty tribes . . ." judged by the Marquess of Normanby as being ". . . incompetent to act or even to deliberate in concert", to an act of state, or state policy, namely, the assumption of British sovereignty over the New Zealand islands.

It might also be worth recalling that very clear judicial pronouncement as to the matter contained in the dictum of Prendergast CJ, in *Wi Parata v Bishop of Wellington*, (1877) 3 NZ Jur (NS) 72, SCt. There, Prendergast CJ stated, with reference to the Treaty:

> So far indeed as that instrument purported to cede the sovereignty — a matter with which we are not here directly concerned, it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist. (p 78)

That statement has stood the test of time. In its clarity of exposition, and basic soundness of judgment, it is fitting testimony to the quality of that most learned Chief Justice's judicial work.

To summarise, treaty of cession, No; legitimising pact of affirmation and allegiance, Yes.

(2) The "Treaty as law" myth

It was always agreed and settled in our law that obligations undertaken in terms of a treaty (that is, even a legally cognisable treaty, quite apart from a mere domestic pact with a non-sovereign and unrepresentative group of persons), ". . . cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law." See *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*, [1941] AC 308, PC, per Viscount Simon LC (delivering the advice of the Board), at p 324.

To similar effect a whole line of cases, before and after, of which well-known examples are *Nabob of Arcot v East Indian Company*, (1793) 4 Bro CC 180, 29 ER 841 (Lord Commissioner Eyre); *Doss v Secretary of State for India in Council*, (1875) LR 19 Eq 509, Malins V-C; *Blackburn v Attorney-General*, [1971] 1 WLR 1037, CA, per Lord Denning MR, at p 1039; *& British Airways v Laker Airways*, [1985] AC 58, HL(E), per Lord Diplock, at pp 85-6.

The rule has always been that acts of state under which the Sovereign acquires territory (and treaties made as part of that process are themselves acts of state) are not cognisable or enforceable in law, as such and without more. They are obviously, and intrinsically, "political" in nature. As Professor R Higgins QC has stated it:

> An unincorporated treaty . . . has no formal standing at all in English law.[3]

The myth-makers, however, would clearly have it otherwise. By various means, they have been striving to find ways by which degrees or species of enforceability, and/or some legally cognisable status, might be given, at least to the "principles" of the Treaty, or perhaps even to the Treaty generally. This notwithstanding that the New Zealand Parliament has never been prepared to give direct legislative force to the Treaty, and indeed could not do so without rending the whole fabric of our law, both our common law and our statutory law.

A now familiar route taken by those contending for legal cognisance of the Treaty, or for some general common law recognition thereof, all contrary to the basic rule just cited, is to point to the proliferation (during the 1984-90 period) of statutory provisions in various enactments to the effect that the Act in question is to be interpreted and administered as to give effect to ". . . the principles of the Treaty of Waitangi." Apart from the State-Owned Enterprises Act 1986 (s 9), examples are the Long Title to the Environment Act 1986 and s 4, Conservation Act 1987. To these should be added provisions giving the Waitangi Tribunal direct (as opposed to merely recommendatory) powers, such as those set out in the Treaty of Waitangi (State Enterprises) Act 1988 (Parts I & II) and the New Zealand Railways Corporation Restructuring Act 1990 (Part IV).

Also of significance in this connection is the new Part IIIA of the Fisheries Act 1983, as inserted by s 74, Maori Fisheries Act 1989 (which section contains a provision referring directly to "Article II of the Treaty of Waitangi", but whether to the Maori version or to one of the English versions is not stated).

Having pointed to this legislative outpouring, this deluge of vagueness, the contenders for direct enforceability, or for some general common law recognition of Treaty "rights", in effect say:

> All these legislative references to, and invocations of, the "principles" of the Treaty, collectively amount to something, and accordingly confer a status upon the Treaty in our law.

Just what that status might be remains of course elusive. It would seem that it must be something immanent and pervasive, something contextual, infusing (perhaps) the law of New Zealand in some general way. After all, the ". . . principles of the Treaty . . ." (to take the now oft-used statutory phrase) are themselves unstated and elusive, so anything erected upon such elusive materials must indeed be enigmatic and mysterious (or as Churchill said of the policy of Russia, in a 1939 broadcast address: "It is a riddle wrapped in a mystery inside an enigma".

But the foregoing is indeed how the builders (the myth-makers) have reasoned in their creative work.

Treaty "principles" and "spirit"

To draw upon certain of the leading statements as set out in *New Zealand Maori Council v Attorney-General*, [1987] 1 NZLR 641, Heron J, and Court of Appeal ("the New Zealand Maori Council case"), the approach seems to be one of separating, and distancing, the "principles" from the Treaty itself, a most consummately metaphysical exercise to be sure. Thus we find Bisson J stating:

> With the advent of legislation invoking recognition of the principles of the Treaty no longer is it to be regarded as a 'simple nullity' (as in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72) and the application of its principles does not involve the enforcement of the Treaty itself as if totally incorporated in municipal law (cf *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 at p 324). (p 715, lines 37-42)

As to the interpretative approach which the Court adopts, we find Cooke P contending, not unfamiliarly, for a ". . . broad, unquibbling and practical interpretation . . ." (p 655, lines 43-4). After discussing the problem posed by the different texts of the Treaty, and the different shades of meaning which these contending texts embody (these problems being, in fact, truly insoluble), Cooke P states, somewhat disarmingly:

> What matters is the spirit. This approach accords with the oral character of Maori tradition and culture. (p 663, lines 46-7)

This approach, however, conveniently overlooks the fact that the Treaty is a *written* document (both in English and Maori) or rather a collection of different (and textually irreconcilable) documents, not a mere matter of "spirit" and certainly not something oral, or akin to the oral, or of an oral character. The distillation of its "spirit" is certainly no easy exercise; that assuredly may be granted.

No literal interpretation

In short, literal interpretation, the Court is saying, can have no place (the practical difficulties with a literal interpretation being, it seems, fully realised). Rather, the Court has plumped for a much different, and very loose, canon of interpretation. This is illustrated by Bisson J (at p 714, lines 13-15), with reference to a dictum of Lord Wilberforce in *James Buchanan & Co Limited v Babco Forwarding & Shipping (UK) Limited,* [1978] AC 141, HL(E). That was a case concerned with the interpretation of the Convention on the Contract for the International Carriage of Goods by Road, where Lord Wilberforce stated, at p 152 of the report, that the approach to be adopted should be one

> . . . unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation.

The Court of Appeal clearly finds such an approach irresistible with Treaty "principles" and has embraced it with ardour.

Fundamental rights?

Equally disquieting, as showing even more, a disposition on the part of the Court to elevate, by judicial fiat, the Treaty, or its disembodied "principles", into "higher law", is this passage, again from the judgment of Cooke P:

> The submissions [for the applicants] were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty. (pp 655-6)

It is submitted that this passage exemplifies a number of quite striking fallacies. The first is the fallacy that the Treaty is a document which in some manner relates to "fundamental rights". Yet there are no "fundamental rights" stated in, or to be derived from, the Treaty. The Treaty may be declaratory of certain things, but it does not give "rights", fundamental or otherwise. Only the law confers rights. It is neither a Bill of Rights nor even a "Clayton's Bill of Rights". Without direct incorporation by statute, in our municipal law, there is no part or provision of it which can be enforced. And what cannot be enforced via the front door should not be enforced via the back door.

If the contention is that its so-called "principles", that is, things judicially invented and pronounced, may bespeak rights, or "fundamental rights", then that is equally fallacious, because the "rights" then cannot be said, in truth or at all, to proceed from the Treaty, but rather from what people (Judges) today would like the Treaty

to be or say (when in reality it neither is nor says what *they* want).

Fallacies

Fallacious too because ". . . subsequent developments of international human rights norms . . ." are neither here nor there, in this context. With the Treaty, we are dealing with an instrument which, like it or not, is fixed in time, a time when modern concepts of "human rights" were largely, or even wholly, unconceived, slavery in the British Empire, for example, having only been abolished seven years before.

Fallacious too because Parliament has not seen fit to enunciate the surprising presumption that its legislation (*all* its legislation) must be interpreted so as not to permit conduct ". . . inconsistent with the principles of the Treaty . . .", "principles" which Parliament has never itself enunciated. If such a sweeping and vague, but potentially significant, presumption were to exist, one would expect to find it stated, by Parliament itself, in the Acts Interpretation Act. To impute to Parliament, by judicial creation, such a clog, shackle or fetter upon its workings is no mean feat of judicial legislation. And what if Parliament did legislate contrary to the "principles" of the Treaty? Would the Courts then develop this novel presumption further and purport to strike such legislation down?

Either the Treaty is law or it is not law. And plainly it is *not* law. 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. That is taking judicial licence too far.

Whilst it can fairly be said that what has happened has occurred because Parliament allowed it to occur, even invited it to occur, by enacting, in various statutes, provisions referring to the ". . . principles of the Treaty . . .", the only effective response to this must be for Parliament now to remove the excuse by repealing those very provisions. That should be done as a matter of policy as they do our law no credit whatsover and have spawned a judicial creation which, feeding upon itself, must likely grow and grow, and continue to mutate, unless a complete and swift stop is put to it. Already, more than the mere excision of the provisions concerned in the various Acts may be necessary. But at least the excision of such provisions would cut the ground from under the framework so far (judicially) erected.

We have already seen, in *Attorney-General v New Zealand Maori Council* (unreported, Court of Appeal, CA 247/90, 1 November 1990) ("the radio case"), the Court of Appeal sustain a declaration granted by the High Court against the sale by tender of management or transmission rights or licences, in the AM & FM frequencies, for a period calculated to allow the Waitangi Tribunal to inquire into a claim ". . . that Maori have a need for a share or better share, of FM frequencies" (p 2 of the judgment of Cooke P), this in relation to a statute, namely, the Radiocommunications Act 1989, which contains no reference whatsoever to "the principles" of the Treaty.

In other words, the judicial wave has already broken upon new ground, and taken pure common law form. The radio case should accordingly serve as a warning and portent. If the trend is not stopped, by speedy and effective legislative action, the problem will surely only magnify and compound.

For we have not voted in this country for a judicially-created Bill of Rights, let alone for a Bill of Rights designed to advantage but one section of society. In the circumstances, only Parliament can call a halt to what is occurring, but it must act quickly.

(3) The "evolving Treaty" myth

This myth would have it that the Treaty is a "living instrument" (Cooke P, in the *New Zealand Maori Council* case, at p 656, line 2) or ". . . an embryo rather than a fully developed and integrated set of ideas" (Cooke P, also in the *New Zealand Maori Council* case, at p 663, line 55). Richardson J, in the same case, states, at p 673, lines 35-39:

> Whatever legal route is followed the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise.

For another statement which should set off further warning bells, reference may be made to the judgment of Cooke P in *Tainui Maori Trust Board v Attorney-General*, [1989] 2 NZLR 513 (CA) ("the Tainui Case"), at p 530:

> The principles of the Treaty have to be applied to give fair results in today's world.

Finally, reference should also be made to the judgment of the Court, delivered by Cooke P, in *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA), at p 656:

> The position resulting from 150 years of history cannot be done away with overnight. The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change.

These statements rather say it all. It is as though the Court believes that the Treaty is an ever-speaking, ever-changing constitutional instrument, a chameleon document for all seasons, capable upon interpretation of delivering beneficial results (for the lucky some) indefinitely into the future, a fructuous tree indeed and bountiful with it.

How far from reality. How far from that modest, hasty, simple, time-bound, document of February 1840; how far from that act of state designed to legitimise the assumption of British sovereignty. Would Hobson, or the chiefs to whom presents were distributed after signatures were obtained, have ever, remotely, believed that they were subscribing to a Bill of Rights for all time.

This myth is myth indeed. It is the very epitome of myth and of the apparent wishful desire of some of our Judges for a "higher law" constitution which, fortunately for the rest of us, does not exist and, with continuing good political management, will never be imposed upon us.

The more advanced, or crypto-legal, myths

Turning now to the more advanced, or crypto-legal myths, these appear to have, as a common feature, the somewhat touching belief that an act of state such as the Waitangi pact, or the elusive "principles" thereof, can be interpreted, and should be given effect, by analogy with private law duties existing between persons in certain everyday, juridically recognised, relationships.

Accordingly, these myths characteristically suffer from the defect which comes from proceeding upon the basis of a wholly inappropriate analogy.

The myths in question can be outlined with relative brevity.

(1) The partnership myth

This myth, whilst judicially embraced, is also one not infrequently heard in common parlance. To talk of "the Treaty partners" is jargon of the day much employed, for example, by bodies such as the Waitangi Tribunal and the erstwhile 1990 Commission.

For a judicial statement of the myth, what better than to quote again from Cooke P, in the *New Zealand Maori Council* case, at p 664, line 1:

> The Treaty signified a partnership between races . . .

For a statement from the Waitangi Tribunal, it may suffice to quote from the *Muriwhenua Report* (1988), para 10.5.2:

> It was a basic object of the Treaty that two people[s] would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.

These statements, and many more could be given, are notable for never, never, pointing to any such concept as having been expressed in the terms of the Treaty itself, whether in any of the English versions, or in the Maori version.

Indeed it may be hazarded that such a concept would have been quite foreign to those who signed the document in 1840. It was certainly no part of the Imperial ethos, and the British Empire was then approaching its zenith, to enter into "partnerships" with subject peoples.

What shares of "partnership"?

In any event, the concept surely falls to pieces when it is asked: in what shares do the "partners" participate? Cooke P, in *New Zealand Maori Council v Attorney-General*, [1989] 2 NZLR 142 (CA) ("the forests case"), gives this explanation:

> Partnership certainly does not mean that every asset or resource in which Maori have some justifiable claim to share must be divided equally. There may be national assets or resources as regards which, even if Maori have some fair claim, other initiatives have still made the greater contribution. For example — and it is only an example — that might well be true of some pine forests (p 152, lines 40-44)

Pondering on the same question, in the *Tainui* case, in respect of coal and rights to mine coal, Cooke P further "explicated" the matter, in these terms:

> Perhaps that [inequality of shares as between partners] applies to the national coal mining enterprise. The existence of coal was known to Maori before the Treaty and apparently they made some domestic use of it; but the planning of the development of the industry would appear to have been essentially the result of Pakeha needs and endeavours. Still, many Tainui people have worked in the mines and expertise has been acquired. To take a single example, the present first plaintiff, now a university director, worked as a trucker and a miner in the Huntly coalfields for six years as a young man. Not only have Tainui made an important contribution to the growth of the industry but the industry is of course wholly built on the exploitation of a natural asset which was part of their land. In that way the coal case differs to some extent from the use of land for growing exotic pine forests. It also differs of course from sea fishing as the nature of the resource is not truly comparable. [1989] 2 NZLR 513, (CA), at p 527, lines 38-49.

Where, might it be asked, as a practical question, does this lead us or leave us, or indeed where does it leave the law, other than in a state of well-meaning confusion and obscurity.

Partnership, as a practical yardstick, or as a useful analogy, is a non-starter. It is a myth without a basis. Never, historically, did Maori and Pakeha (for Cooke P does speak of a "partnership between races") agree upon a "partnership" as such, whether a 50/50 partnership or a partnership of some other division, in relation to resources or anything else. Peoples do not enter into partnerships. The concept is utterly, and woefully, inappropriate, on every count. And as a metaphor, it serves nought but to confuse and raise impossible, and unfair, expectations.

(2) The "fiduciary duties" myth

Perhaps apprehending that the partnership analogy is a defective one, the Court of Appeal, in the *New Zealand Maori Council* case, and subsequently, has probably laid greater stress upon the notion that a fiduciary relationship exists between the Crown and the present-day Maori people.

In the *New Zealand Maori Council* case, Cooke P put it in this way:

> What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. (p 664, lines 38-43)

Needless to say, the Waitangi Tribunal has quickly, and most fully,

adopted this concept. See, for example, the *Muriwhenua Report*, para 10.5.4, p 193.

Emotive invocations

Associated with the principal statements as to this matter are numerous emotive invocations of good faith, co-operation, loyalty, and even honour.

Such statements have a long lineage. For the Treaty has always evoked questioning, and such questioning has tended to draw forth official statements asserting that good faith underlays it. The most famous imputation upon the Treaty was probably that delivered by Joseph Somes, a govenor of the New Zealand Company, in 1843. He stated:

> We have always had very serious doubts whether the treaty of Waitangi, made with naked savages by a consul invested with no plenipotentiary powers, without ratification by the Crown, could be treated by lawyers as anything but a praiseworthy device for amusing and pacifying savages for the moment.[4]

Lord Stanley's official rejoinder, as Secretary of State for War and Colonies, is also well known and of course defensively asserted complete and absolute good faith on the part of the Crown.

But where does good faith, or the absence thereof, get us? That an act of state was made in good faith does not of course mean that good faith as such is, by virtue of its presence at the relevant historical moment, thereby mysteriously transmuted into an on-going, never-ending, incident of a whole complex web of relationships between the Government (the Crown) and a particular section of society. That is to draw a very long bow.

One would hope that our Government considered itself to be under a generalised duty to act in good faith towards *all* citizens.

It is unnecessary, and unwarrantable, to use the Treaty, or to seek to formulate a "principle" therefrom, in such a way, or so as to have an effect, as would cast upon successive Governments a perpetual obligation to act towards one section of society ". . . with utmost good faith . . ." (to use an expression of Cooke P, at p 664, line 47, in the *New Zealand Maori Council* case), regardless of the interests of all other sections of society, given that correlative duties (if there are any "duties" in issue) must surely, and equally, be owed to those sections of society as well and as much.

And again, there is of course no basis for such reasoning in the Treaty itself. It is also distasteful to speak of a generalised obligation of good faith as being owed by the Government (the Crown) to a particular section of society only.

And if the answer to this is that such an obligation is owed to all, then it may be wondered (correctly) what the Treaty has to do with the matter.

Perhaps this supposed "duty" is no more than flim-flam and flummery. It certainly has every such appearance.

Again it is a transposition from the language of private law relations which, in the public and constitutional sphere, makes nonsense or worse (for if it be a basis for favouring one group, then it becomes positively dangerous).

At another point in his judgment in the *New Zealand Maori Council* case, Cooke P confuses the matter by speaking of the Pakeha and Maori as the Treaty partners and as owing ". . . towards each other . . ." a duty to act ". . . reasonably and with the utmost good faith . . ." (p 667, lines 8-10).

Now it is not the Crown (Government) which owes the "duty" but Pakeha and Maori, reciprocally. Once again, such generalised talk makes little or no sense, except as well-intentioned rhetoric.

(3) An emergent myth — a "duty to consult"

In the *New Zealand Maori Council* case, such a duty was postulated, but firmly rejected. (See Cooke P, at p 665, lines 5-14; Richardson J, at p 683, lines 13-27; and Somers J at p 693, lines 34-7.)

But in *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) ("the forests case"), Cooke P, for the Court, states:

> It may be as well to add some observations, in the hope of helping resolution of the problem. In the judgments in 1987 this Court stressed the concept of partnership. We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument. (p 152, lines 29-33)

It would therefore seem that the Treaty has of late given birth, following an earlier miscarriage, to this yet further "duty".

How, literally, the ". . . parties to the Treaty . . ." could carry out this duty requires particularly vivid imagination. The Court, surely, got it right, the first time, in the *New Zealand Maori Council* case. Such a formless "duty" is indeed ". . . elusive and unworkable . . ." (per Cooke P [1987] 1 NZLR 641, at p 665, line 6), and for the reasons which he so rightly stated in that case.

Concluding remarks — the Treaty and myth-making

The call needs to go out that a practical, unembellished, and down to earth view should be taken of the Treaty. We need to stop dreaming and embroidering. Equally, we must stop mythologising the Treaty and trying to make it into what it is not.

Richardson J, in the *New Zealand Maori Council* case, put it well when he stated:

> It was a compact through which the Crown sought from the indigenous people legitimacy for its acquisition of government over New Zealand. (at p 681, lines 3-4)

That, in truth, is what it was, and what it was all about.

It is *not*, and never will be, a Bill of Rights or a constitutional document of any kind. Its modesty, its purpose, and its non-legal character, together preclude this. Nor can such a document ever grow into such a thing, or be prodded, or conjured, into becoming such.

Its mana revolves around its historical and symbolic significance. We can all share in that.

But to seek to "politicise" the Treaty, and give it present-day political currency as an agenda-setting instrument for advancing particular claims or purposes for a particular section of society, as was certainly attempting to be done

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Void dispositions and bank accounts

By Andrew Borrowdale, Lecturer in Law, Canterbury University, and Paul Kellar, a practitioner of Christchurch

It is suggested in this article that banks may be acting too cautiously in freezing company accounts when winding-up proceedings are commenced by a third party. The authors analyse the relevant case law and point out that the Australian legislation protects banks acting in good faith in the ordinary course of business.

Banks frequently respond to the commencement of winding up proceedings against a corporate customer by freezing the company's account. This ensures that the bank does not fall foul of s 222 of the Companies Act 1955 which provides that in a compulsory winding up disposition by a company of its property after the commencement of winding up is void. Winding up proceedings may of course be quite unrelated to the solvency or otherwise of the company. Accordingly a financially healthy company may find itself with substantial assets beyond reach in a frozen account.

Under s 222 the Court may validate any disposition at any time. But even assuming that a Court is prepared to give a blanket validation in advance of all transactions through the account, this involves the expense and delay of an application. It is possible that banks have reacted with an excess of caution where the account in question is in credit, and that the payment of cheques drawn on the account does not fall within s 222.

Payment of cheque by bank where account is in credit

The weight of authority suggests that there is no disposition of the company's property by the bank in paying a cheque drawn on it by the company when the account is in credit. This is because either the bank is merely the conduit through which the disposition is made or payment does not amount to a disposition of company property at all.

In *Re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq)* [1974] 1 NSWLR 254 an account was operated between the date of commencement of winding up and the date of the order. At all times the account was in credit. A total of $13,000 was paid out of the account on cheques drawn by the company. The bank sought a declaration that the payment of these cheques did not amount to a disposition of the company's property. The declaration was granted. Street CJ in Eq said:

> The word "disposition" connotes in my view both a disponor and a disponee. It does not operate to affect the agencies interposing between the company, as disponor, and the recipient of the property, as disponee . . . The intermediary functions fulfilled by the bank in respect of paying cheques drawn by a company in favour of and presented on behalf of a third party do not implicate the bank in the consequences of the statutory avoidance prescribed by [s 222] (at p 258).

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during the 1984-90 period, whether by legislative action (slipping into statutes a "principles of the Treaty" clause), or by the manipulation of public opinion by propaganda campaigns (as were seen last year), is mischievous. That the Courts have chosen to run with the political flow, over this period, has been disappointing.

For by inflating the Treaty, and by generating Treaty "principles", all aimed at advancing the interests of one section of society, as opposed to society as a whole, the matter generally will be seen by the rest as unfair and unjust. Indeed, by many, it is probably already seen in this way. See, for example, the well-judged remarks of Mr R J S Munro, MP for Invercargill, concerning the "radio case". He is reported as saying that ". . . legislative changes must be made to prevent such "politically charged" matters being finally determined by non-elected judges".[5] That is a statement by a Government Member of Parliament reflecting concerns that are clearly now "out in the open".

And if the interests of one, or any, group in society, are properly to be advanced, whether preferentially or generally, there are other, and far better, fairer, and more neutral, ways of achieving that.

To say, at the end of the day, that the Treaty involves a special relationship between one section of society and Government, in which others sections do not share and from which, ipso facto, they must therefore be excluded, is to follow an effective recipe for social decohesion. □

1 See, for example, A H McLintock, *Crown Colony Government in New Zealand*, Wellington, Government Printer, 1958; Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen & Unwin New Zealand Limited, 1987; J Rutherford, *The Treaty of Waitangi & the Acquisition of British Sovereignty in New Zealand 1840*, Auckland, Auckland Univ College Bulletin (No 36), History series no 3, 1949.
2 McLintock, supra, pp 56-7.
3 Professor R Higgins QC, chapter on treaty-making and enforcement under UK law, in F G Jacobs and Shelley Roberts (eds), *The Effect of Treaties in Domestic Law*, London, Sweet & Maxwell Ltd, 1987, Ch 7, p 129.
4 McLintock, supra, pp 68-76.
5 *New Zealand Herald* 6 May 1991, p 2.

not, or under which any question or matter is to be decided by one or more persons to be appointed by the contracting parties or by some person named in the agreement (see eg *Hunt v Wilson* [1978] 2 NZLR 261).

In short, an arbitration agreement must be written to be enforceable under the Act. A formal agreement whereby the arbitrator is appointed and the precise questions or questions in dispute are formulated is not required. All of the statutory provisions come into play if the parties have agreed in writing to refer any of their disputes to arbitration (see eg, *Hieber*, supra).

Nevertheless, parties to an arbitration agreement are advised to document the issues to be referred to arbitration. If an issue involves a question of law, it should be phrased with care and accuracy. The parties should also appoint the arbitrator(s) and specify any desired expansion or limitation of the arbitrator's statutory powers so that they will know from the outset who will arbitrate and by what standard they will conduct the arbitration.

Drafting precise and comprehensive arbitration agreements is vital for two reasons. First, an arbitration agreement, unless a contrary intention is expressed, is irrevocable (s 3 Arbitration Act 1908). It has the same effect as a Court order, which means it can only be revoked by leave of the Court. Second, an arbitration agreement, unless a contrary intention is expressed, is deemed to include the provisions specified in the Second Schedule of the Act so far as they are applicable to the reference under the arbitration agreement (s 4 Arbitration Act 1908). These implied provisions are as follows:

1 If the arbitration agreement does not refer to arbitrators, a single arbitrator will be assumed;

2 If it refers to two arbitrators, they must choose an umpire;

3 If two arbitrators can not agree, then the umpire enters into the arbitration;

4 The parties must submit to examinations by the arbitrators or umpire and produce all evidence as required;

5 Witnesses may be examined under oath;

6 The award is final and binding, although interim awards may be made;

7 Costs will be determined by the arbitrators or umpire and paid according to their discretion;

8 The arbitrators or umpire have the power to order specific performance of any contract except contracts dealing with an interest in land; and

9 They also have the powers given to the Courts pursuant to s 6 Contractual Mistakes Act 1977, ss 4, 6, 7(6), 7(7), and 9 Contractual Remedies Act 1979, and s 7 Contracts (Privity) Act 1982.

To avoid these provisions, the arbitration agreement must be drafted in a manner which expressly, or by operation, makes these provisions inapplicable. In addition, arbitration agreements should contain detailed statements of the procedures to be used in and the issues subject to arbitration. The effect of an agreement depends very much upon its terms.

Arbitration agreements should also contain a provision concerning the choice of law to be used to resolve the dispute in question. This is particularly important with respect to agreements entered into by parties from different legal jurisdictions, which is increasingly likely given the promise of Closer Economic Relations.

Furthermore, lawyers must be certain that the contract which contains the arbitration agreement does not contain provisions which reserve common law or contract remedies with respect to an issue the parties have agreed to arbitrate. These provisions can rob the Courts of their discretion to stay the proceedings. The Courts will also refuse to stay the proceedings if the Courts determine that the arbitration agreement is invalid.

Conclusion

The arbitration process has the potential of being quicker, less expensive, and more equitable than the formal legal process in its resolution of commercial disputes. As a result, commercial arbitration is an increasingly popular means of resolving disputes among business-persons. Consequently, lawyers cannot afford to ignore the implications of an arbitration agreement.

To derive full advantage from the arbitration process, the arbitration agreement must be carefully drafted to ensure its validity and to meet the needs of its parties. If the arbitration agreement is inadequately drafted, the Courts may declare the agreement invalid or may subject the parties to the statutory arbitration procedures set out in the Second Schedule of the Arbitration Act 1908. □

Correction and apology

In last month's issue of the *New Zealand Law Journal*, [1991] NZLR 233 there is a misprint in the article by Mr Guy Chapman on "The Treaty of Waitangi". In the second to last paragraph in the first column on p 233 there appear the words "on on account". As the context makes clear this should read "on no account". The error by transposition of the two letters is regretted, particularly since it appears to reverse the meaning of the sentence which is intended to emphasise a negative. An apology is tendered to Mr Chapman. For the sake of clarity the whole paragraph, as it should read, is reprinted below:

> Either the Treaty is law or it is not law. And plainly it is not law. 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. That is taking judicial licence too far.

There is a further complicating factor in this whole issue of the right of audience. In *Re G J Mannix* [1984] 1 NZLR 309 the Court of Appeal stated that Courts have a residual discretion to allow unqualified advocates in particular cases but that non-professional representation should be rare. This was in accordance with a decision of the Privy Council in *O'Toole v Scott* [1965] AC 939. All three Judges in the *Mannix* case (Cooke, McMullin and Somers JJ) emphasised the undesirability and the very restrictive use that should be made of this discretion. Cooke J went so far as to indicate it should be used in emergency situations only, and specifically referred to the decision of Hardie Boys J in the earlier *Mihaka* case. The District Courts Act 1947 s 57, permits rights of audience to be allowed to unqualified persons "under special circumstances". We all know from experience however that what is a special circumstance and rare today is a commonplace tomorrow, once something has been admitted as permissible in principle.

On the face of it the position set out in *R v Leicester City Justices, ex parte Barrow* might seem clear enough. But there are undoubtedly many problems yet to be faced. *McKenzie v McKenzie* [1971] P 33, [1970] 3 All ER 1034 for instance was particularly significant for the fact that the husband who was unrepresented sought to be assisted in England by an Australian barrister. On that authority therefore it would seem possible that a barrister or a solicitor could act as a friend without appearing as an advocate and having the professional responsibilities that go with that role. What if the party pays his friend a fee that has been agreed beforehand? Will the profession regard this as unethical, will the Courts regard it as an abuse of procedure? And what of the unqualified person who is very experienced in a particular field, and who is prepared to act as a friend for strangers for a fee? Will this be a way of getting advice in a specialised area of the law on the cheap from an expert during the course of the proceedings? And how long can the party take to get the assistance — after each question, once or often in respect of a particular witness, continually during an address to the Court, or what?

The refinements are fascinating to contemplate, if they cannot be reasonably described as causing the party to waste time, advising the introduction of irrelevant issues or the asking of irrelevant questions. Lord Donaldson said at p 947 that any unfairness, whether apparent or actual and however inadvertent, strikes at the root of justice. But surely any decision against a lay party will seem to that party as clearly being apparent unfairness. Despite some of the dicta in the judgments making light of practical difficulties, there are problems and issues of principle yet to be faced. They are likely to arise sooner rather than later in our divided society, and add considerably to the pressures already on the Courts to do what the most vociferous party, and the news media, and the politicians (for passing popularity purposes) will describe as fair.

P J Downey

Correspondence

Dear Sir,

Mr Chapman's article on the Treaty of Waitangi (1991 NZLJ 228) has been answered by Dr McHugh at page 316.

I would add a further comment.

Speaking of emotive invocations in the context of ". . . good faith, co-operation, loyalty and even honour . . ." Mr Chapman describes as "the most famous imputation upon the Treaty" that delivered by Joseph Somes, a Governor of the New Zealand Company in 1843. Mr Chapman offers the following quotation from that statement:

> We have always had very serious doubts whether the Treaty of Waitangi, made with naked savages by a consul invested with no plenipotentiary powers, without ratification by the Crown, could be treated by lawyers as anything but a praiseworthy device for amusing and pacifying savages for the moment.

There should be added the official rejoinder of Lord Stanley, Secretary for State for the Colonies. The relevant part of Lord Stanley's reply is as follows:

> . . . I repudiate with the utmost possible earnestness, the doctrine maintained by some, that the treaties which we have entered into with (the Maori people) are to be considered as a mere blind to amuse and deceive ignorant savages. In the name of the Queen I utterly deny that any treaty entered into *and ratified by Her Majesty's command*, was or could have been made in a spirit thus disingenuous, or for a purpose thus unworthy. You will honourably and scrupulously fulfil the conditions of the Treaty of Waitangi . . . (emphasis added)

The New Zealand Company was, at the time of Somes' speech, doing its best to undermine the Treaty. Its policies were later adopted by the settler government and prosecuted with great success.

Yours faithfully,
David Baragwanath QC

Chapman is wrong

By Joe Williams, an Auckland practitioner

This article is a further reply to the article by Mr Guy Chapman on the Treaty of Waitangi, published at [1991] NZLJ 228. Mr Williams argues that the Treaty conferred rights or benefits on both Maoris and settlers. He argues that the Treaty is not a nullity in legal terms. Furthermore, he says, the honour of the Crown is at issue, and the Treaty is now firmly embedded in our legal system.

Mr Chapman's article ("The Treaty of Waitangi — fertile ground for judicial (and academic) myth-making" [1991] NZLJ 228) is so full of serious errors of law and interpretation that the record must be put straight lest his attempts at myth breaking generate, in publication and repetition, some erroneous myths of their own.

The Treaty and discrimination

Chapman argues that to treat the Treaty seriously is to sanction the (obviously racist in his view) preferment of one group within society over others. That is presumably because (again in his view) all of the benefits under the Treaty accrue to the Maori. That argument is historically and legally incorrect. The British Crown acquired on behalf of its burgeoning and impoverished working and lower middle classes the right to secure land in New Zealand to settle and make a new life. The Treaty of Waitangi was the instrument by which that right was acquired.

The practical benefits which have accrued to Pakeha New Zealanders (immigrants and their descendants) have been immense. They were given access to millions of hectares of land available at ridiculously low cost. They were accorded the opportunity to establish a system of responsible Government among themselves free from the straitjacket of British class chauvinism. Further the Crown was, by securing the right of pre-emption in Article 2 of the Treaty, able to fund early colonisation without undue strain on the Imperial Treasury. It is said that the proof of the pudding is in the eating, and the fact that 85% of New Zealand's population is now non-Maori is ample evidence that the Treaty should be seen by non-Maori New Zealanders as benefiting them directly.

The rights particularly secured to Maori by virtue of the Treaty were rights in property (exclusive possession of lands' forests, fisheries and other properties) and powers of internal Government (*tino rangatiratanga*). These rights did not accrue to Maori because they were Maori. The Treaty guarantees simply recognised the obvious status quo. No one, and least of all Captain Hobson, would have suggested on 6 February 1840 that the Maori did not *in fact* own New Zealand. Nor would anyone have suggested that the tribes were not *in fact* self-governing. Any attempt at the time of the Treaty's signing to take land without purchase or supplant tribal government without consent would have led to war with little doubt as to the victors. Article 2 of the Treaty did no more than recognise the status quo and protect it against non-consensual change.

The Treaty, in other words, did not create any rights, it simply recognised them. It is true that all of those rights were held by Maori but that is only because before pakeha contact all land was owned and all Governmental power exercised by tribes consisting exclusively of Maori. To suggest that the protection of those rights improperly prefers one group within the community over others is about as insightful as arguing that free antenatal care in New Zealand is unfair because men can't get it.

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continued from p 372

understandable cynicism, others say any forum is better than no forum and any rights, however pusillanimous, better than none. As a result, a very unequal struggle (in resources terms) is joined and fought out in Tribunal and Court.

As the Tribunal's powers are strictly limited and its role primarily recommendatory, the Maori struggle for justice continues to largely fall on the barren and stony ground of democratic fairness and bona fide.

A report from the Commissioner of the Environment on implementation of Tribunal recommendations to 1988 underlines this point.

In terms of access to real justice, when stripped of cosmetic rhetoric, many Maori see the Tribunal as little more that a stream vent, tied to a facility for tribal research and a publicity platform of sorts.

At the end of the day the only path to change, open to Maori, short of armed insurrection, is dependent upon increasing levels of knowledge, awareness, goodwill and understanding from the majority. In acquiring these things the majority should not feel threatened or even insecure, for surely a balanced and fair society is in the *common good.*

As to whether Guy Chapman is right and various eminent Judges, professors, constitutional lawyers and others wrong, is a matter for readers to decide for themselves on both the evidence presented and I hope, further inquiry.

From this Maori's perspective he is clearly "myth-taken".

Kia ora koutou katoa.

□

The Treaty and cession

Whether the Treaty was a treaty of cession is a perennial argument apt to ambush the unaware. The school of thought to which Mr Chapman subscribes would have it that sovereignty in New Zealand was *created* by the British, not *given* by the Maori. The explanation proffered is that the Maori had no governmental institutions capable of exercising it. The proposition is unsustainable. Every society in the world has institutions of government and rules by which the society is ordered. Maori society was no exception. Maori government was, in traditional times, tribally based, small scale, and within its own terms very efficient. What Mr Chapman and his deceased protagonist, Prendergast CJ, really mean is that the Maori did not have government *in the way that the British had Government* — that is a central government with a legislature, executive and judiciary. No one would argue with that, but it is difficult to understand why that should be a basis for saying that the tribes were not, each of them, independent and sovereign. Europe does not yet possess a single structure of government but no one suggests as a result that a multilateral treaty entered into by its constituent states is a nullity. That being so it is ethnocentrism in the extreme to suggest that each of the 539 chiefs who signed the Treaty of Waitangi could not bind his or her tribe to that multilateral international agreement.

The British Parliament (see the Murderers Abroad Act 1817 57 George III Chap 53 preamble), the Colonial Office (Lord Normanby's instructions), the Anglo-American Arbitral Awards Tribunal (*Re William Webster Claim*), the Privy Council (*Hoani Te Heu Heu Tukino v The Aotea District Maori Land Board* [1941] AC 308) and Her Majesty Queen Victoria herself (Treaty of Waitangi) *all* agreed that the chiefs who signed the Treaty had the capacity to do it. It is a little late in the day for Mr Chapman to suggest otherwise. The *Wi Parata* obiter in that regard has not stood the test of time as Chapman suggests. It was wrong even in its own time.

Chapman continues that the Treaty was only one step in a much longer process in which law making power was formally acquired. That must of course be right. It was however the essential step. For there were already people living on the land owning it and governing it (albeit separately and tribally) in accordance with established customs and usages. What possible basis can there be in British Colonial law for the argument that the British Crown could legitimately ignore that reality and proclaim law making power for itself without first acquiring the consent of those already there? The obiter of Chief Justice Marshall eight years prior to the signing of the Treaty of Waitangi, is particularly apposite in this regard:

> The extravagant and absurd idea that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. (*Worcester v Georgia* (1832) 31 US 6 Pet. 315 at 350).

Orthodox acquisition theory has it that sovereignty can be acquired by cession, conquest, or settlement of terra nullius. New Zealand was certainly not terra nullius and the history books reveal no war of conquest between Britain and the inhabitants of New Zealand on or before February 1840. That leaves acquisition by Treaty of cession as the only legitimate basis for acquisition of law making power in New Zealand.

Prendergast CJ in the *Wi Parata* decision cited by Chapman made reference to s 3 of the Native Rights Act 1865 in these terms:

> The Act speaks further as to the ancient customs and usages of the Maori people, as if some such body of law did in reality exist. *But a phrase in a statute cannot call what is non-existent into being.*" (at p 79) (emphasis added).

If His Honour, so roundly praised by Chapman, was correct in saying that a statute cannot make real what is apparently fictitious, a fortiori Governor Gipps on 14 January 1840 could not, by proclamation, create British sovereignty in respect of New Zealand if the British had not in fact acquired it. The fact of the matter is Governor Gipps knew that and worded his proclamation of 14 January accordingly — that is British sovereignty applied only to any territory which "is or may be acquired" by the Crown in New Zealand. In other words it fully contemplated that acquisition of sovereignty required something more than the proclamation itself in order to be effective. Without that extra element, the effectiveness of British sovereignty in New Zealand could rightly have been questioned. It follows that Chapman is wrong in his conclusion that the Treaty is a simple nullity as, with respect, was the former Chief Justice. The Treaty was an essential ingredient in fact and *in law* in the process by which the Crown acquired sovereignty in New Zealand.

The rather more important question is that which logically follows from the conclusion that the Treaty is not a nullity. If it truly was the legal vessel by which the Crown acquired law making power (sovereignty/*kawanatanga*), can it not be said that the Crown acquired no more than that for which it bargained — that is it could not exercise its newly acquired right in a manner inconsistent with the obligations owed by it under Article 2 of the Treaty. That the rights of *rangatiratanga* and exclusive possession were and remain a burden upon the powers vested in the Crown. Parliament appears to have accepted this proposition by enacting provisions (such as s 9 State Owned Enterprises Act) which prohibit executive action in breach of the Treaty.

Principles of the Treaty

Parliament saw fit in 1975 to enact legislation creating a body (the Waitangi Tribunal) whose job it would be to discern the "principles of the Treaty". The reference to "principles" rather than "terms" reflected a perception at the time that conflicts between the English and Maori texts were such that reference to the actual terms of the Treaty would have been unworkable. Since then thinking has changed somewhat and the Waitangi Tribunal in particular has taken the view that the two texts supplement each other rather than conflict. Since 1975 references to Treaty

principles have proliferated in legislation and in policy. Most Maori commentators have argued against the use of the principles of the Treaty for fear that they would be used as a mechanism for dilution of the Treaty's plain terms. The problem is neatly stated in the Muriwhenua Fisheries Report:

> No one seriously contended that "full, exclusive and undisturbed possession" [of fisheries] means other than what it says . . . It was apparent that the only difficulty with the words is the inconvenience they present. The meaning is altogether too clear. "Exclusive" means "Exclusive" . . . (at p 202).

In opposing the adoption of the concept of Treaty principles, Chapman is at one with most of Maoridom and with such well known and confirmed reactionaries as Jane Kelsey and Moana Jackson. Even a cursory analysis of current writing in the area would have encouraged Mr Chapman to support rather than oppose the use of Treaty principles. The fact of the matter is that the cold hard terms of the Treaty are likely to be far less palatable to those of Mr Chapman's ilk than its rather more pliant and dilute principles.

Partnership, fiduciary obligations and judicial activism

The Court of Appeal in the *Maori Council* case took the view unanimously that the central principle of the Treaty was the principle of partnership. The two important elements of that principle were, in that case, the duty of utmost good faith and the presence of responsibilities akin to fiduciary duties. For findings such as these the Court of Appeal is accused of rampant activism. Perhaps when compared with the obiter of Prendergast CJ that, in the context of Maori rights, the Crown "of necessity must be the sole arbiter of its own justice" (at 78), the Court of Appeal is taking a robust approach. But in truth that Court's findings are at best unsurprising. A duty to act in good faith is hardly breaking new ground. Whoever suggested that the Crown was entitled to act in bad faith? The existence of a fiduciary obligation is rather more novel, but only in New Zealand. In the United States, the trust relationship between the Federal Government and Indian "nations" can trace its lineage back to the Cherokee cases of the 1830s (eg, *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1, *Worcester v Georgia* (1832) 31 US (6 Pet) 515) and is generally regarded as the linchpin of modern Federal Indian law (see eg Cohen, *Handbook of Federal Indian Law* (1982 ed) 207 FF).

The Canadian Supreme Court in *Guerin v The Queen* (1985) 13 DLR (4th) 321 held that the Crown owed a fiduciary duty to Indians when dealing with land the subject of aboriginal title on behalf of Indians. The duty was not to be found in any express legislative provision but had its roots in the concept of aboriginal title and the statutory scheme established for the disposal of Indian land (at p 334). The recognition of the existence of a fidudiary relationship between the Canadian Crown and native Canadian tribes has become one of the most important principles of Native law in Canada. Thus, those who take the view that our Court of Appeal has been guilty of unwarranted and highly imaginative judicial activism are quite wrong. Our Court of Appeal is not only following an impeccable line of judicial authority on the question of application of concepts of trust and fiduciary obligation in the context of indigenous rights, it is also the last Court in the three jurisdictions mentioned to have done so.

The honour of the Crown.

The most disturbing aspect of Mr Chapman's dissertation, all "flim, flam and flummery" aside, is its basic argument. That is that the Crown with all of its superior knowledge, resources and expertise, could enter into a Treaty with the indigenous inhabitants of this or any other land, receive substantially all of the benefit to accrue to it by virtue of that Treaty and then, having failed to fulfil its own obligations, later denounce that same Treaty, citing legal principles in support, as a quaint historical anachronism. Such an approach is unlikely to engender harmonious race relations in this country or respect for the rule of law. Maintenance of the honour of the Crown is an enduring doctrine in indigenous rights jurisprudence whatever Mr Chapman's view of the imprecision of that concept.

> The principles to be applied to the interpretation of Indian Treaties have been much canvassed over the years. In approaching the terms of a Treaty, quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned . . . (*Regina v Taylor & Williams* (1981) 62 CCC (2d) 227 at 235 per MacKinnon ACJO (Ont CA)).

In the final analysis matters have simply progressed too far for us ever to return, as Mr Chapman proposed, to the racist doctrines of the latter half of the 19th century. For all of its humble beginnings and its inconsistencies, the Treaty of Waitangi is now firmly embedded in our legal and constitutional firmament. This writer for one is of the unshaken belief that our judiciary has too much integrity to allow it to be dislodged at this late stage.

Fiat justitia ruat coelum! □

Tribunals Division Change of address

The Tribunals Division of the Department of Justice advises that from 29 October 1991, the new Wellington address for the Division will be:

Tribunals Division
District Court Building
49 Ballance Street
WELLINGTON

Postal Address

P O Box 5027
Lambton Quay
WELLINGTON

Telephone Numbers

(04) 472-1709
(04) 471-1263 (Fax)

Trick or Treaty

By Pita Rikys, Lecturer in Law, Auckland Institute of Technology, and Chairman of the Legislation Committee of the New Zealand Maori Council

This is a response to the article by Mr Guy Chapman [1991] NZLJ 228. The article takes a different approach to the response published last month from Dr Paul McHugh at [1991] NZLJ 316. It is Mr Rikys' contention that Mr Chapman is wrong in his approach and that the New Zealand inheritance of English law is valid only to the extent it is not inconsistent with indigenous conditions. Secondly he claims that it is contrary to the most primitive concepts of fairness and justice if rules preserved in the nation's founding document are not automatically justiciable in the Courts.

Mr Rikys is reported as one of those whose interpretation of the Treaty requires all New Zealanders, who themselves or their ancestors arrived here after 1847, to apply now to Maori authorities for permission to stay in New Zealand as they are aliens.

The article on the Treaty of Waitangi in the July *Law Journal* [1991] NZLJ 228, replete as it is with dogmatic statement and position-taking deserves a response and elucidation from a different perspective. What follows therefore is from the perspective of a Maori, with some knowledge of the jurisprudential and constitutional contexts of the debate.

It is clear from the article's opening paragraphs that Chapman sets himself up as defender of the (white) democratic majority's right to rule. The idea of that right being qualified in any way, eg by Treaty obligations . . . is clearly anathema to him, but in taking that stance he fails to explain why such constraints *must* necessarily be contrary to those interests. In reality there are a number of arguments based on concepts of fairness, equity, justice and the need for culturally balanced decision making, that bring us to a contrary conclusion.

The real imperatives glaring out from between the lines, are economic ones, protection of the economic power-base of the same majority. Even in the economic context there are arguments in favour of re-distributing the economic resources of our society (fisheries are only one example) to enable Maori to contribute more effectively, *in the interests of the whole.* The fact that we deal with historical injustices at the same time is really a bonus. Finding ways of reducing the negative costs in our economy and society (eg the cost of a prison system) and making more efficient and effective use of our resources — particularly our human resources, is a highest priority. The Treaty debate when viewed from a balanced, informed and unemotional perspective has a major role and contribution to make in these areas.

The opening paragraph states that Parliament is "highly accountable" — a statement I suspect most thinking New Zealanders would take issue with. Certainly, Governments are accountable at the polls every three years but our recent experiences have shown that in the interim they are prepared to ignore the loudest expressions of public disapproval in the myopic pursuit of (Treasury's) economic goals regardless of social cost. Our "generally effective and honest" system has a long tradition of electing minority Governments and a penchant for abuse of both the functions of the executive and the legislative process itself.

What is abundantly clear is that the democratic system has not been "effective" in protecting the interests of or meeting the needs of the indigenous people. It should also be remembered, lest we conveniently forget, that in first setting the franchise, essentially the same interest group Chapman seeks to protect by discrediting the Treaty, had no qualms about abandoning democracy or later, in manipulating it (eg with the establishment of the four Maori seats) to meet their own ends.

At some stage, even within a whole society, it is in the interests of all, that justice be seen to be done.

The real questions then are, if the system is "highly accountable" — *to whom* is it so accountable. And if the system is "generally effective and honest" *for whom* does it function in such a laudable manner. Certainly not the indigenous people.

Later on the same page in the article (228) the author baldly states . . .

> nor has it ever been generally conceded in our . . . democracy, that one or more groups amongst us should be recognised by all others as having special or antecedent rights or privileges.

Aside from the obvious point that the people of the various Maori First Nations clearly thought so (and still do) at a time when they constituted the majority in the fledgling democracy, the Treaty aimed largely at establishing that very position. Furthermore, the statement appears more than a little inconsistent with the following quotation from (now) Sir Geoffrey Palmer, a notable constitutional lawyer with some experience of government, at [1987] NZLJ 314 –

> as the Royal Commission on the Electoral System said in its report, the Treaty marked the beginning of constitutional Government in New Zealand. Under its terms, the Crown formally recognised the existing rights of the Maori and undertook to protect them. It is in this sense that *Maori people have a special constitutional status* whatever recognition

governments and the legal system may have accorded them at various times in our history (emphasis mine).

The author then attacks the 1990 Commission's treaty promotion as "myth-making". How the cost of it, at $2.3m is relevant, is difficult to grasp. Both the Human Rights Commissioner and Race Relations Conciliator have called for public education programmes on the Treaty, without response from Government. For their part, more and more Maori are becoming aware of the "mushroom syndrome" as a Crown strategy. In addition the more aware and liberal sections of our society have undertaken their own "consciousness raising" although it is worth noting that the vast majority of available material is still based on *tauiwi* perceptions.

Government's reluctance in this respect is curious, given their predilection for opinion-shaping; and this tends to suggest that the answer to "why not" is rhetorical, and self-evident.

To describe the 1990 Commission programme as propaganda (by innuendo) does it a disservice both in terms of quality of content and intent. It seems to me that the intended outcome could not be described as much more than "warm fuzzies". Perhaps at the end of the day that is a sufficient result from roughly 10% of the Commission's total budget.

At this point the author gets into the serious work of attempting to discount and marginalise the Treaty. We are told that such a "modest little document" creating rights 150 years after execution was "unacceptable" and "utterly unworkable". This, in the same manner presumably that the Magna Carta, another modest little document of much earlier vintage, could not possibly create rights.

We are not given any reasons to support these statements beyond the incantations themselves, other than the curious conclusion that to admit otherwise, somehow threatens an espoused ideal of "multi-cultural democracy". The multi-cultural red herring has been so over-used in cultural politics that it has almost become a cliche.

The statements are, to us an often unappreciated word, *purest twaddle*. Implicit within them however are concepts of assimilation which have been intellectually discredited for so long that it is a source of some amazement to see them being reinterred, like some vampire, from the grave. Perhaps someone should pass around the garlic.

Maori prior to 1840 had a long history of treaty making between *First Nations (iwi)*; enforced by the mana of the participants. The Treaty did not create rights; it preserved, guaranteed and protected them, as consideration (in contractual parlance), for the right to colonise. It was signed by the ceding parties almost exclusively in their own language. Subsequent historical evidence makes it very clear that their intention in so doing was unequivocal; namely to facilitate the advantages of controlled settlement and to preserve their *tino rangatiratanga* (very chieftainship) an indivisible part of which was their mana, their *sovereignty*, reiterates and reinforces this point.

When interpretative canons such as contra proferentum are applied, the vagueness and uncertainty debate over the meaning of the text evaporates.

It is equally clear that from the British Crown's perspective there were no options . . . a contract or covenant had to be made with the indigenous people to secure the right to colonise. They could not afford to conquer and from General Cameron's subsequent experiences had they done so, the likelihood was that they would have been thoroughly thrashed.

As an aside, one could argue that from a constitutional viewpoint — as the consideration for the covenant has never been paid, the contract is at least voidable; see Professor F M Brookfield — "The Constitution in 1985: The Search for Legitimacy" (19 September 1985).

Similarly, however much one tries to deny reality by arguing that Maori in 1840 were not in European terms, a sovereign people, "a body politic" — the reality is that they collectively exercised all of the functions implicit within those concepts.

To suggest that Britain initiated the Treaty for humanitarian reasons and because of a sort of political safety-first, while true in part — really misses the point. Even if they had wanted to, they could not "nakedly assert authority" over Aotearoa in 1840, because they couldn't enforce it, if they did. The 2,000 or so settlers clearly existed under the mana of 120,000 — 150,000 *tangata whenua*.

Thus it is such arguments of "asserted" sovereignty as Chapman espouses, based as they are on specious logic — that are the real mythology in this debate.

It is equally clear, from a Maori perspective that the Treaty did not "cede sovereignty" but something significantly different and more qualified in nature — *"Kawanatanga"*.

The Treaty, not "as a vehicle for special pleading", but as a contract between sovereign peoples, is, has been and will continue to be the "focus of deep and growing resentment" until such time as the contract is honoured and the goods paid for.

Moana Jackson writing in the *Listener* 19 November 1988 defines the steps necessary to facilitate payment. He writes that

> many people redefine the Treaty not in terms of rights but of property interests. This realpolitik evades the critical issue: the equitable distribution of property can only be achieved if the rights and status of the participating parties are clearly defined. This is not the case in Treaty negotiations because one party assumes that it can determine the interests of the other.
>
> That stance is consistent with the claim that Maori ceded sovereignty under article one of the English version of the Treaty. The fact that the corresponding article of the Maori version does not say this is ignored. So too are the written and oral traditions which show that Maori did not cede their mana . . . and that *rangatiratanga* ensured the retention of their authority.
>
> These differing perceptions cannot be dismissed . . . or ignored through the unquestioned acceptance of a Pakeha interpretation. They are the basis of unsatisfied grievance and the well-spring of continuing injustice. Until the Treaty debate moves from the present Pakeha parameters the injustice will continue and the harmonious co-

existence envisaged by the Treaty will be unattainable.

Maori find it morbidly amusing that the much vaunted British justice system, based, we are told, on precepts such as equity, fairness, natural justice and Christian morality cannot deliver any of these values in the context of the rights of indigenous people.

Thus the "founding document of our nation" (National Government policy statement 1991) remains a dishonoured and broken covenant which will continue to sour relations between our peoples until such time as the democratic majority via the Crown, can act with honour and integrity.

Attempts to capture and marginalise the Treaty debate from positions of limited and/or monocultural perceptions, confuse and delay the moral and consciousness-raising processes necessary to achieve this objective. Debaters in this category tend to be mean-spirited defenders of vested interest groups, entrenched positions and positions of privilege our society can no longer afford.

What the Treaty offers us in positive terms, is an unfulfilled promise for our nation and *all of its peoples*. A promise of a functionally bi-cultural society. Within that promise are two treasure houses of knowledge. One, our present society acknowledges, promotes, values and nurtures throughout its institutions. The other, is largely ignored or at best paid lip-service to. As a people, we are infinitely poorer as a result.

As to the attempt at legalistic marginalisation some detailed comments are required.

The Treaty may well have been an "inexpertly drawn document" but the bona fides of both parties have never been questioned. An objective study of later events, makes it abundantly clear that the intentions of the ceding party, the Maori, *as expressed in their language in the document they signed*, are crystal clear and remain unwavering to this day. Certainly until at least 1847 (see *R v Symonds*, NZPCC 387) the Treaty was recognised and honoured.

As power shifted to settler governments, so the urgent need arose to put the natives in their rightful place. This need was as much a product of colonisation as anything else and certainly was not unique to Aotearoa.

Thus the pronouncements of Prendergast C J in *Wi Parata v The Bishop of Wellington* in 1877, come as no surprise, emanating as they do from settler need, and the First Nation Peoples of Aotearoa are quickly reduced by judicial process to "primitive barbarians" (p 77 of the judgment). There are parallel statements from other colonies eg *R v Syliboy* (1929) 1 DLR 307, which exemplify the same dichotomy. Compare statements about "savages" and a "handful of Indians" in one, with earlier recognition which can be found in the words of Marshall CJ in *Worcester v Georgia* (1832) 31 US (6 Pet) 350 at 358.

Both Joe Williams and Eddie Durie traverse this ground thoroughly in papers presented to the Indigenous Rights Session of the 1990 Commonwealth Law Conference.

Thus Prendergast's statements about the lack of a body politic to cede sovereignty need to be seen in their context, both judicial and political to be seen as statements of cultural and judicial arrogance, promoted, it has been suggested by more than a degree of class or racial self-interest ascribed to a shift in legal climate in the colony.

Again as a statement of reality it is clear and obvious nonsense. The leaders of the First Nations of Aotearoa had no doubt in their minds as to who exercised mana in their *rohe* (lands and territories).

The evolution of Treaty jurisprudence from 1975 on, and clarification via academic research, suggests that the Prendergast decision should now be regarded as *per incuriam* — see F M Brookfield, *The New Zealand Constitution — Waitangi — Maori & Pakeha perspectives* (1989, Oxford pp 10-11).

The next weapon in the arsenal of the legalistic marginaliser is the incorporation doctrine. Here the author wants to have his legal cake and eat it too by arguing for a diminished Treaty concept "an amateurish document" in one breath and resurrecting it to full Treaty status in the next, so that the incorporation doctrine can be applied to deny it domestic justiciability. Such jurisprudential gymnastics are more than a little transparent.

The incorporation doctrine itself —in essence that a Treaty can have no formal standing at law until incorporated by statute, is the linchpin for majority Treaty control and rule as long as the white majority dominate the legislative process.

There are two major flaws in this argument. The first is that the doctrine is an inviolate part of our constitutional law. But as Dr J B Elkind from the Law Faculty, Auckland University points out on this issue, writing in the *NZ Herald* 23 May 1989, the doctrine, while part of English Constitutional law, is not universal. West Germany is cited as a state that automatically incorporates its treaties into domestic law.

One of the fundamental conditions of our inheritance of English law as reflected in the various English Laws Acts for example, is the adoption of those laws *unless inconsistent with indigenous conditions.*

Automatic incorporation of treaty commitments between First Nations clearly created such an inconsistency and the doctrine should have no application here as a result.

The second flaw reinforces the first. While purporting to have a society, and legal system based on equity, fairness and Christian ethics, how can we countenance a doctrine that rules rights preserved in our nation's founding document are not automatically justiciable in our Courts? This would seem to be contrary to the most primitive concepts of fairness and justice. This leads into question the very value structure of our society.

When the article discusses judicial and Tribunal "myth making" sudden accord is unexpectedly found with the Maori position.

Many Maori see judicial interpretation of the Treaty as unilateral redefinition by an agency of the Crown. Similarly many reject the "principles" concept on the basis that their *tupuna* did not sign principles of the Treaty of Waitangi but rather Te Tiriti-o-Waitangi. Others see the total exercise as little more than damage control by the Crown. Notwithstanding this

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Chapman is wrong

By Joe Williams, an Auckland practitioner

This article is a further reply to the article by Mr Guy Chapman on the Treaty of Waitangi, published at [1991] NZLJ 228. Mr Williams argues that the Treaty conferred rights or benefits on both Maoris and settlers. He argues that the Treaty is not a nullity in legal terms. Furthermore, he says, the honour of the Crown is at issue, and the Treaty is now firmly embedded in our legal system.

Mr Chapman's article ("The Treaty of Waitangi — fertile ground for judicial (and academic) myth-making" [1991] NZLJ 228) is so full of serious errors of law and interpretation that the record must be put straight lest his attempts at myth breaking generate, in publication and repetition, some erroneous myths of their own.

The Treaty and discrimination

Chapman argues that to treat the Treaty seriously is to sanction the (obviously racist in his view) preferment of one group within society over others. That is presumably because (again in his view) all of the benefits under the Treaty accrue to the Maori. That argument is historically and legally incorrect. The British Crown acquired on behalf of its burgeoning and impoverished working and lower middle classes the right to secure land in New Zealand to settle and make a new life. The Treaty of Waitangi was the instrument by which that right was acquired.

The practical benefits which have accrued to Pakeha New Zealanders (immigrants and their descendants) have been immense. They were given access to millions of hectares of land available at ridiculously low cost. They were accorded the opportunity to establish a system of responsible Government among themselves free from the straitjacket of British class chauvinism. Further the Crown was, by securing the right of pre-emption in Article 2 of the Treaty, able to fund early colonisation without undue strain on the Imperial Treasury. It is said that the proof of the pudding is in the eating, and the fact that 85% of New Zealand's population is now non-Maori is ample evidence that the Treaty should be seen by non-Maori New Zealanders as benefiting them directly.

The rights particularly secured to Maori by virtue of the Treaty were rights in property (exclusive possession of lands' forests, fisheries and other properties) and powers of internal Government (*tino rangatiratanga*). These rights did not accrue to Maori because they were Maori. The Treaty guarantees simply recognised the obvious status quo. No one, and least of all Captain Hobson, would have suggested on 6 February 1840 that the Maori did not *in fact* own New Zealand. Nor would anyone have suggested that the tribes were not *in fact* self-governing. Any attempt at the time of the Treaty's signing to take land without purchase or supplant tribal government without consent would have led to war with little doubt as to the victors. Article 2 of the Treaty did no more than recognise the status quo and protect it against non-consensual change.

The Treaty, in other words, did not create any rights, it simply recognised them. It is true that all of those rights were held by Maori but that is only because before pakeha contact all land was owned and all Governmental power exercised by tribes consisting exclusively of Maori. To suggest that the protection of those rights improperly prefers one group within the community over others is about as insightful as arguing that free antenatal care in New Zealand is unfair because men can't get it.

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understandable cynicism, others say any forum is better than no forum and any rights, however pusillanimous, better than none. As a result, a very unequal struggle (in resources terms) is joined and fought out in Tribunal and Court.

As the Tribunal's powers are strictly limited and its role primarily recommendatory, the Maori struggle for justice continues to largely fall on the barren and stony ground of democratic fairness and bona fide.

A report from the Commissioner of the Environment on implementation of Tribunal recommendations to 1988 underlines this point.

In terms of access to real justice, when stripped of cosmetic rhetoric, many Maori see the Tribunal as little more that a stream vent, tied to a facility for tribal research and a publicity platform of sorts.

At the end of the day the only path to change, open to Maori, short of armed insurrection, is dependent upon increasing levels of knowledge, awareness, goodwill and understanding from the majority. In acquiring these things the majority should not feel threatened or even insecure, for surely a balanced and fair society is in the *common good.*

As to whether Guy Chapman is right and various eminent Judges, professors, constitutional lawyers and others wrong, is a matter for readers to decide for themselves on both the evidence presented and I hope, further inquiry.

From this Maori's perspective he is clearly "myth-taken".

Kia ora koutou katoa.

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