Judical Activism and the Treaty: The Pendulum Returns

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> It would be fair to say that there has been an increase since the mid-1980's in what some in the legal profession would call judicial activism. There are times when even some of the more reflective Members of Parliament wonder who is making the laws. It would not be unfair to say that there are areas of developing interest, activity and thought in our society where there is little or no direct law or precedent available. In such cases, the judiciary might hesitate to seek to divine and settle the law.
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> The Speaker, The Hon Doug Kidd
> (*The Press*, 21st August 1999)

Judicial activism is sometimes acceptable. It is more acceptable when it deals with merely technical matters. The matters might not even have to be particularly technical if they are less obviously political. Few citizens, for example, might object to judges ameliorating slightly the harshness of the defamation laws, although given that Parliament has from time to time changed or considered changing those laws, it is surely an unsatisfactory argument to say that the courts are entitled to change the law precisely because Parliament has declined to. But where a particular matter is clearly a political one, where there is room for more than one valid point of view, and where a bitter political debate divides the nation, it is not for judges to attempt to be legislators. It may be that in 1987 the Court of Appeal, in making its historic decision in *New Zealand Maori Council v Attorney-General* [1987] 6 NZAR 353, did not foresee the greater levels of bitterness and absurdity that have since appeared. The Court was doubtless moved by noble if naif hopes. That decision was, however, followed by more obviously political ones. Nevertheless the Treaty mania is now abating.

Judges probably have had the same mixture of motives as politicians as they dabble in the Treaty question: compassion, concern, a belief that their decisions will solve genuine Maori problems, gullibility, a desire to feel virtuous, an over-optimistic view of human nature and an excessive view of their own ability to change things. But judges, too, are realising that they cannot do everything, or even much; and especially as the personnel of the Court of Appeal has altered, good sense is returning.

Mr Kidd the Speaker rightly complained of an occasional judicial inclination to rush in where angels have hitherto feared to tread. But we must not be too utterly unkind to the judges. Parliaments and politicians must share the blame. No judge has said – even Sir Robin Cooke did no more than hint in one or two of his last cases, when he was in a distinct minority – that the treaty is, simply in itself, part of our law. The principles of the Treaty have been referred to only when parliament has allowed judges to refer to them. The judges' eagerness to compile a list of principles has been unfortunate, and their list of Treaty principles is unsatisfactory. If it could be better, however, it could also have been much

worse. When, in the making of the State-Owned Enterprises Act, reference was first made to Treaty principles, it was accepted by politicians that this was a task to fall to the judges. Politicians opened the floodgates. If we may believe Mr Richard Prebble in his recent book *I've Been Writing*, they even opened them unwittingly. Mr Prebble describes the consternation in the Beehive, even among well-known constitutional experts, when the Court of Appeal decided in *New Zealand Maori Council v Attorney-General* that section 9 of the State-Owned Enterprises Act was not just the meaningless lip-service which its caring Parliamentary advocates had taken it to be. Since then, of course, politicians have made a virtue of necessity.

The number of reported cases displaying what this author is inclined to consider political tendencies is small. They can probably be counted on the fingers of two hands. They will all be described briefly below. It would be unfair to attribute all these decisions to Sir Robin Cooke or his influences. Even before the 1987 case at least two decisions of the courts, perhaps unexceptional in themselves, had indicated that the wind was blowing in a certain direction.

Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188 concerned a proposed discharge of treated dairy effluent into a tributary of the Waikato River. The Water and Soil Conservation Act gave no guidance at all as to what grounds were valid or invalid ones for objection to such a proposal. Earlier cases had held that purely metaphysical speculations – such as ones arising from the spiritual and cultural relationship of Maori people to the river – were immaterial and invalid grounds. Chilwell J in the High Court held the opposite. The decision itself is a reasonable one; the spiritual relationship was merely one of the matters to be considered, it was not conclusive. But it is perhaps remarkable that such a simple conclusion required a judgment of forty pages, including a very extensive coverage of cases on aboriginal title, (a matter not in any way at issue), and liberal references to international instruments for the elimination of religious discrimination (p. 217). Certain remarks about the Treaty – that it contains promises "which the Crown is obliged to perform" and that its status is "perceivable, if not enforceable, in law", (p. 206) seem to be unsupported by authority. It must be added also that once one accepts that Maori – or any other – religious beliefs may be *considered* in the grant of a water right, it then becomes, as a matter of fact if not of theory, difficult *not* to allow them some degree of binding status – (if it be possible to have a *degree* of bindingness). The alternative, after all, is to say that sincerely held religious opinions may, after due consideration, be ignored; and that proposition is not one which anyone would like to publicise.

Nevertheless, the decisions in *Huakina* and in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 would not have occasioned much remark had they not been the precursors of *New Zealand Maori Council v Attorney-General* [1987] 6 NZAR 353.

The facts of that case are surely sufficiently well known not to require repetition. When Sir Robin Cooke himself (as mentioned below) summarised that decision in several lines in *Wharekauri*, it is not necessary here to give a blow-by-blow account of the nuances of each of the five judgements. In fairness to Sir Robin, who is certainly considered by this author to be the instigator of judicial activism on the Treaty, it must be agreed that all five judges of the Court were unanimous.

We can describe the general tone of the judgments by saying that they considered the Treaty a "solemn compact". The Crown – politically, if not by strict law – obtained sovereignty by it in return for promising protection to Maori. Its principles require its parties to act towards each other reasonably and with the utmost good faith. It is a partnership between races. The Crown would behave honourably. A duly elected government must be free to follow its chosen policy, and to make laws for the whole community. The Crown has a duty of active protection of Maori in the use of their lands and waters. The Crown should grant redress where the Tribunal recommends it. Maori have a duty of loyalty to the Queen, full acceptance of her government, and reasonable co-operation. In certain circumstances there may be a duty on the Crown to consult Maori.

As I have observed elsewhere, few of us would find fault with most items on that list. That is, indeed, part of the trouble. The list is so vague that it means everything and nothing. It could be used to justify any conclusion any court ever wanted to come to. In 1987, the Court chose those items from the list which led it to declare that the Crown's actions were unlawful. But, (even leaving to one side the legal arguments as to why s.9 of the State-Owned Enterprises Act and Treaty principles did not apply in the case of land assets being transferred to State-Owned enterprises) it would have been just as possible for the court to have chosen other items speaking of the Crown's right to govern, and to have decided the other way.

A list of platitudes is not a helpful guide to anyone. No-one would ever know, in any particular case, what Treaty principles required until the matter had been submitted, at great expenditure of time, money and vexation, to judges who would be justified by the list in making any decision they pleased. References to "Treaty principles" are clearly an open invitation to judicial activism. The interest of the state, the maxim runs, is in the end of litigation; but "Treaty jurisprudence" is a guarantee of litigation.

How can one extract the 'principles' of the Treaty from its terms? It is entirely a speculative and imaginative exercise. The terms of the Treaty are simple. Maori recognise the sovereignty of the Crown, and in return have their possessions guaranteed and enjoy the rights of British subjects. These terms – and such a treaty – are surely little more than meaningless in a settled legal order where the Crown undoubtedly has sovereignty, and where all subjects and citizens are guaranteed the enjoyment of their possessions. To move from this very simple prescription for a legal order to ideas of partnership and special relationships is not done by ineluctable logic but by invention. Paul McHugh (*Constitutional Myths and the Treaty of Waitangi* [1991] NZLJ 316) writes that "No-one pretends that the language of partnership and fiduciary obligation was exchanged ... at Waitangi in 1840. The Courts have stressed their construction of what amounts to a contemporary mythology of the Treaty". The Ministry for the Environment (Resource Management Law Reform Working Paper No 27, 1988) has opined that "Partnership has little or no intrinsic meaning and so can be made to mean whatever it is wished to mean. It is an empty box to be filled by whoever wields power on the day. The concept cannot be found in the words of the Treaty". Indeed, it could well be argued that the concept is a fundamental contradiction of the relationship between sovereign and subject, subjects being what Maoris were after 1840. Explaining the transformation of the terms of the Treaty into a

principle of anything like partnership is a task for a metaphysician, psychiatrist or witch doctor, not a lawyer.

Even Sir Geoffrey Palmer has stated that "some of the scholarship surrounding [the Treaty] is highly suspect, fuelled as it is by political motivation rather than detached analysis" ((1989) 19 VUWLR 335). In the same article, however, he approved of Judge Durie's summing up of the essence of the Treaty – "the gift of the right to make laws and the promise to do so so as to accord the Maori interest *an appropriate priority*".

That treaty principles can lead one anywhere is shown by the multiplicity of views about what the principles mean. Some exponents of Maori sovereignty maintain that the Treaty means that Maori never ceded sovereignty to the Crown and that non-Maori "are permitted to live in peace in this country under the mentor of Maori rule" (Moana Jackson, *The Ralston Report*, 13 April 1994). Some maintain it means separate homelands for each tribe. Some – the Anglican Church, for example – believe that it requires separate legislative institutions for different races. (*Report of the Commission on Constitutional Arrangements*, Proceedings of the 1998 General Synod). This is the same Anglican Church that has already established three legislative chambers of its own on racial lines – Maori, European, and Pacific Islander – and which also has condemned apartheid – in South Africa, anyway – as a heresy.

The applicants and plaintiffs in 1987 proposed principles including the duty "to return land for land" and "to protect the Maori way of life" (See the useful summary in *Environmental Management and the Principles of the Treaty*, Parliamentary Commissioner for the Environment, 1988).

The Waitangi Tribunal has over the years developed its own list, including a Crown obligation to legally recognise tribal rangatiratanga. The Tribunal's list has continued to grow, and the Radiospectrum Report recognises a "right to the development of taonga through technology that has subsequently become available". (This might seem reasonable in the case of fisheries, but less so when the light of the stars is used as a justification for a claim to the radiospectrum.) The Royal Commission on Social Policy (1988) proposed three modest and sensible principles – equality of people, the treatment and protection of Maori as British subjects and mutual respect between equal peoples. In 1990 the Justice Department proposed five reasonably unexceptional principles "for Crown action on the Treaty". But there can be little common ground between the idea of Maoris as British subjects and the idea of them as a forever-superior ruling race. Treaty principles are a very biddable horse which will take any interpreter wherever he wants to go.

Remarkably, in all their adventurous speculations and explorations of what the principles of the Treaty might mean, there is one question that no Court has considered. The 'principles' form a by-now familiar list. We could do worse than take as a summary of them Sir Robin Cooke's words in *Te Runanga and Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 at p. 304:

> an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.

This is the description of the relationship between Maori and the Crown. But it is, surely, also a description of the relationship which should exist between the Crown and all its subjects. By saying that the existence of the Treaty somehow imposes this duty on the Crown with regard to Maori, the courts to that extent imply some sort of 'special relationship' between Maori and the Crown, and imply also that non-Maori subjects are not entitled to the same degree of fair dealing. A special relationship between the Crown and one class of citizens makes all other citizens second class.

At one blow the principle of equality before the law is destroyed. At one blow, also, the third article of the Treaty itself, which declares that Maori are British subjects like everyone else, is rendered meaningless. Unless Sir Robin, then, is considering a right of review of all Crown actions with regard to all citizens, he must be contemplating two different standards by which Crown actions must be judged, depending on the race of the subject.

It must be admitted in the Court of Appeal's defence that ever since 1987 its decision has, in at least one vital respect, been constantly misrepresented by Maori activists and politicians, until now it is difficult for the most careful speaker to avoid repeating the same error. That error concerns "partnership". The Court of Appeal in 1987 did use the words "partners" and "partnership". As Mr Bruce Mason has pointed out, however (Public Access New Zealand Monograph Series No 6, 1993), it used the word "partners" loosely and interchangeably with the word "parties". It was not a precise partnership; it was "something in the nature of" or "a relationship akin to" a partnership. Later Sir Robin wrote of "an analogy" of partnership ((1990) 14 NZULR 5), and in the *Tainui Maori Trust Board* case [1989] 2 NZLR 513 emphasised that the concept of partnership does not mean "that every asset or resource in which Maori have some justifiable claim to share should be divided equally". Even business partnerships can have partners with greater or lesser interests. Perhaps inevitably, though, these little points have been lost sight of as all and sundry simply keep on repeating that Maori and the Crown are partners. The word partner was ill-chosen. It is impossible to reconcile with the clear words – and surely principle – of the Treaty that Maori are subjects. But partnership has taken on a life of its own. Every day it is spoken of and referred to, with the implication of course that the partnership is a genuine one and one of equals. Partnership has turned out to be an attractive idea, among Treaty claimants anyway. Statutes (such as the Ngai Tahu Claims Settlement Act) refer to it. Perhaps the Court of Appeal could not have foreseen this; but the word should never have been used at all.

Mr Alex Frame has suggested that the idea of partnership cannot provide any guide to action for state officials. There is, he says, "a likelihood that officials will see 'partnership' as something purely abstract, unrelated to day-to-day operations of government agencies ..." Mr Frame suggests that the idea of *co-operation* offers a more practical concept with administrative relevance. "Most people know at everyday level what co-operation is and can recognise its presence or absence with considerable accuracy". (*A State Servant Looks at the Treaty* (1990) 14 NZULR 82). But again, co-operation between Crown and subject is surely an ideal for all government, not just for the government of one race.

Sir Robin suggested, in his 1987 judgment, without expressing a final opinion on the matter, that "if, on any successful claim, the Tribunal were to recommend that land be returned to Maori ownership rather than that ... other compensation be provided, it might be inconsistent with the principles of the Treaty for the Crown to act inconsistently with that recommendation". (p. 366) On p. 370 he opined that if the Tribunal "finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would be only in very special circumstances, if ever." In other words, despite the clear words of the Treaty of Waitangi Act 1975, which establishes the Waitangi Tribunal, and which (subject to the then unamended State-Owned Enterprises Act) clearly declares that the Tribunal can make recommendations only – recommendations which, by the very meaning of the word, are not binding – Sir Robin, desiring to rewrite the statute and the meaning of English words, thinks that in some situations recommendations *may* be somehow binding. Sir Robin also derived great assistance from the opinions of the Waitangi Tribunal (p. 367) in discovering what Treaty principles are.

Sir Robin seems later to have had second thoughts about this generous impulse, for in *Te Runanga and Muriwhenua v Attorney-General* [1990] 2 NZLR 641 at p. 651 he was careful to say that Tribunal recommendations 'are not binding on the Crown of their own force. They may have the effect of contributing to the working out of the content of customary or Treaty rights, but if and when such rights are recognised by the law it is not because of the principles relating to the finality of litigation". In the light of recent Tribunal recommendations, that was a very wise thing to say.

The activities of the Waitangi Tribunal are outside the scope of this paper and indeed to consider the historical soundness of all its reports would require volumes of study at least as long. Doubtless much of its history is sound. But even if all of it were, that would not, as a simple matter of logic, mean that all its conclusions were. The Tribunal considers merely the question of whether some breach of Treaty principles – judged, inevitably, by the standards of the present day – has occurred in the past. If such a breach did occur, then that may well mean that some redress of some sort should now be made. But there are many things which the Tribunal does not, and cannot, consider. It does not consider the interests of other New Zealanders, Maori and European, beside the claimants. It does not consider even the factual question of possible benefits acquired by the claimants as a result of European settlement and assistance over many years. It does not consider the question of whether claimants who may, in some cases, have only a small proportion of Maori blood have actually, in their own lives, been disadvantaged. Rather, its process is a strange mixture of history and legalism; the existence of an historical wrong requires the restoration of something approximating the *status ante quo* with little regard to what has happened in the meantime. "Waitangi Tribunal history", Mr Richard Boast says, is "Whig history with a vengeance, in that the actions of people in the past are being judged not by their standards but by ours." Mr Boast observes that "in determining the "principles" of the Treaty, the Tribunal's stance has been determinedly present-minded. There has been no attempt to search for, say, a nineteenth-century understanding of what the "principles" of the Treaty may

have been and to judge the actions of the Crown in the past by such a historically-relativist understanding. Rather, the Tribunal has preferred to construct a set of standards which it perceives as valid and relevant at the present day, and to judge the Crown's actions in the past by those standards ... Historians involved in the ... process are therefore engaged in a process which is in a fundamental respect profoundly unhistorical." (Lawyers, Historians, Ethics and the Judicial Process, (1998) 28 VUWLR 87). The Tribunal is therefore almost inevitably inclined to make unrealistic recommendations. And it is in various ways becoming – or revealing itself as – less and less an impartial commission of inquiry and more as a lobby group with little sense of proportion. Perhaps its unfortunate statements are a small minority. But the mere fact that they exist at all inevitably clouds all assessment of its utterances. The Tribunal found in its Ngai Tahu report that Stewart Island and its outlying islands were acquired without any breach of Treaty principles, but nevertheless made a recommendation that certain of those outlying islands desired by Ngai Tahu be "returned" to them. Would we consider a judge unbiased who ruled a claim unfounded but nevertheless desired that the defendant compensate the plaintiff?

The Tribunal has produced the first "interim" volume of its Taranaki Report without actually hearing the evidence of the Crown "on many matters", and in it has described Taranaki history as an "ongoing holocaust", evidently to be compared to Europe under the Nazis. The Tribunal has just ruled that because Maori used the stars for navigation and "incorporated them in their own philosophical world view" therefore the electromagnetic spectrum is a "taonga" guaranteed by the Treaty, and there is a Treaty principle giving a "right to the development of that taonga through technology that has subsequently become available" (Wai 776 Report). Of this decision the editor of *Capital Letter* has observed (20th July 1999) that it may "come to be seen as a watershed in Waitangi jurisprudence and the credibility of the Tribunal ... the logic ... is elusive .... Some [may] see the Tribunal's report as confirmation of the intellectual and political bankruptcy of the Waitangi process. But we should always appreciate those who contribute significantly to the sum of the local human comedy".

(Mercifully, in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 the Court of Appeal considered that however liberally Maori customary title and treaty rights might be construed, they were never conceived as including the right to generate electricity by harnessing water power; but Cooke P did not miss the opportunity to suggest that any legal extinguishment of native title which was nevertheless, even in retrospect, "unfair", might well be in breach of a fiduciary duty "increasingly recognised" – recognised, that is, by judges such as himself.)

It is of interest, however, to note Sir Robin's 1987 statement, at p. 371, that "any major grievances [of Maori] are likely to have come to the surface in some form by now". This might be taken to suggest that he might have approved of the recent bill of Mr Derek Quigley M.P., rejected overwhelmingly by the House, to introduce a cut-off date, one or two years in the future, after which no further claims before the Tribunal could be lodged. It may be that Sir Robin's view of an 'evolving' Treaty relationship did not involve many further claims, but rather merely the exploration of existing ones. That is not the way things turned out however.

It is all very well to criticise, but criticism is more convincing if an alternative course of action can be offered. Faced with section 9's reference to Treaty principles, what should the Court of Appeal have done?

Given that a good legal argument existed that the general words of section 9 could not displace the self-contained code in section 27 of the State-Owned Enterprises Act; given also that it is quite reasonable to construe the Act in that way, for, as Sir Robin himself says, "Certainly the Act extends to a range of assets other than Crown land" (p. 363) and he accepts that Members of Parliament "who took part in the final debate thought that the Act would have the effect now contended for by the Crown" (p. 364); given all of this, it would not have been unreasonable to hold that, just as Parliament intended and said, section 9 of the Act did not apply to this situation. After all, Sir Robin has opined that "... it is the duty of the courts, their constitutional role, to ascertain the democratic will of the people as expressed in Acts of Parliament" (*Fundamentals*, [1988] NZLJ 158). This is a perfectly legally acceptable conclusion. It is surely the legally preferable one. It is not unreasonable to say "whatever the principles of the Treaty may be, it is clear that section 9 does not apply in this case".

Given the number of remarks in the judgment to the effect that the treaty is "an embryo rather than a fully developed and integrated set of ideas", whose full meaning must be worked out as it evolves over generations, it would not, surely, be unreasonable to have let it evolve, rather than laying down a groundplan now. There was no need, in the very first case on the subject, for the Court to leap in with a blueprint. Even if it was inclined to hold that section 9 were to apply, it could have been rather more laconic in its statements about Treaty principles. Given that Sir Robin seems inclined to see himself as the partner of Parliament in the making of law, it would not, surely, have been unreasonable if the Court had made some slightly petulant remark about how more guidance was needed from Parliament on the question of what "Treaty principles" were. The law, after all, had never heard of them until this case. Suggestions could easily have been made – Parliament surely would not have objected – that the courts would be reluctant to consider this essentially political matter without rather more guidance.

The 1987 case continued in *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142. This decision centred largely on procedural questions; but at the end Cooke P observed both that "Partnership certainly does not mean that every asset and resource in which Maori have some justifiable claim to share must be divided equally" and also, expanding confidently on the 1987 decision, that it had somehow become "really clear beyond argument" that "the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues".

Let us run through the other activist decisions.

The eventual decision in *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, that land included mining interests therein, is not unreasonable. It is good, too, to read (p. 527) that partnerships are not always of equals.

Sir Robin reiterated (p. 518) that a 'broad, unquibbling and practical interpretation' of the legislation was required. Practicality we all desire; but, although we do not desire *excessive* hairsplitting, fine points of law are the stock-

in-trade of lawyers and appeal judges. Condemnation of "quibbling" is coming close to a condemnation of law itself, and a preparedness to replace legal interpretation with something else. Sir Robin, however, disapproved of the Crown for being uninfluenced by earlier remarks, in 1987, condemning quibbling. The last three pages of his judgment are mere politics and "personal suggestion", and his statement that "the principles of the Treaty have to be applied to give fair results in today's world" indicates that, once the Treaty can be grasped as a justification, any law can be rewritten for "today's world".

It is worth noting the very language used by Sir Robin, in particular, in his judgments. It sounds much more like the language of a politician – or a statesman, of course – than of a judge. It is difficult to convey the full flavour of the language without lengthy extracts. But in the *Tainui* case Sir Robin's legal judgment ends three or four pages before the end of his printed judgment. The last three pages (528-530) are a political exploration and speech, finishing with "a personal suggestion".

A political speech has no place in a judicial decision. Very well, the politics mention the claims of both Maori and European; it is a balanced political speech. Sir Robin has, to employ a phrase he has used extra-judicially, followed a "middle path". But it is not for judges to follow any path other than law. If the law leads them to either side of the middle, that is where the judges should go. The middle path is for politicians.

In *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 he spoke of how, in the *Muriwhenua* case, the decision, "reached after taking into account how comparable problems had been dealt with in other jurisdictions, [held] that the ongoing and evolving Treaty obligations might be seen ... as met for the time being by this significant advance". The court in this case had been told by the Minister of Justice that "the deed has the support of a representative and authoritative cross-section of Maori opinion. That advice", Sir Robin went on, "must have a significant bearing on constitutional and fiduciary issues. It cannot foreclose them; the Court would fail in our [sic] duty to all citizens, including both Maori and Pakeha, if we were to rule otherwise ..... All that can be said now is that a responsible and major step forward has been taken." These, and many other statements, are more appropriate to a politician's speech than a judge's judgment.

Just as Sir Robin has, in fact, elevated Maori to the status of 'partners' with the Crown, so he seems to desire to elevate judges to the status of partners with Parliament in running the country.

In two paragraphs in the 1987 decision Sir Robin comes to the conclusion that all previous final settlements of the Taranaki claim have been inadequate and that it is time for another one. There is no suggestion that he heard any evidence from the Crown on that matter. There is no evidence at all as to whence he derived that opinion. But "the only question would seem to be whether the monetary compensation ... should be much increased or whether some other mode of belated extra compensation such as land should be offered even at this stage". This, too, displays perhaps an excessive generosity with one's opinions.

Te Runanga o Muriwhenua Inc v Attorney-General [1990] 2 NZLR 641, contains the welcome and wise statement that the Waitangi Tribunal is not a court, and

has no jurisdiction to determine issues of law or fact conclusively. Its reports were inadmissible in evidence at common law and under various statutes, but could be admissible as standard works in general literature under section 42 of the Evidence Act. Tribunal reports are then, as Mr Boast has said, regarded by the courts as "just a kind of authoritative history book", although this analysis, he says, is inaccurate, given that the Tribunal exists to draw conclusions and make judgments about the past; its reports are not just big demanding history books. ((1998) 28 VUWLR 87.). Even in Canada, the Court observed, treaty rights are limited by the rights of others. On the other hand, "Treaty obligations are ongoing", and "will evolve from generation to generation as conditions change. The North American experience is instructive. The Courts there have so exercised their jurisdiction as to bring about or encourage changes with ..... all deliberate speed". Sir Robin referred to American fisheries schemes where, over the years, "community attitudes gradually changed in the direction of genuine sharing", and suggested, rather daringly perhaps, that recent existing legislation was possibly only interim, although "a significant advance" and that Parliament might like to review it in future.

In *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129, one of several cases concerning the Maori language, broadcasting and in particular the sale of radio frequencies under the Radiocommunications Act 1989, Sir Robin makes some of his most surprising remarks. Supported by Casey and Bisson JJ, he opined (p. 135) that "at the present day the Crown, as a Treaty partner, could not act in conformity with the Treaty or its principles without taking into account any relevant recommendations by the Waitangi Tribunal". Admittedly, the phrase is "taking into account", and not "complying with", but the line between the two is becoming obscured. Sir Robin remarked also (p. 135) that "in the context of a much later development such as broadcasting it probably makes no practical difference whether one speaks of the Treaty or the principle of the Treaty". Given the difference between the Treaty's terms and principles, this is a perplexing utterance. But the most important point to note is simply that the Radiocommunications Act 1989 contains no provision similar to section 9 of the State-Owned Enterprises Act requiring Treaty principles to be taken into account. Yet even without a statute the Court of Appeal (Richardson & Hardie Boys JJ dissenting) can consider the Crown bound to have regard to Tribunal recommendations, and allow the Tribunal a reasonable time for carrying out its inquiry.

Cooke P felt obliged to dissent from the majority judgment in *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576, which involved the sale of broadcasting assets under the State-Owned Enterprises Act. The Maori Council did not claim these assets themselves, but claimed that the transfer, without adequate inquiry as to the extent of the Crown's Treaty obligation to protect Maori language and culture through broadcasting, was unlawful. The Crown had accepted that Maori language and culture were 'taonga' guaranteed to Maori under the Treaty. But, a majority held, section 9 of the State-Owned Enterprises Act ("Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty ...") is merely a fetter on executive action. It cannot fetter the legislative power of Parliament or the policies expressed in legislation. These particular assets to be sold were not essential for Maori

broadcasts, and it was not for the Court to review the legislation which restructured broadcasting, nor to direct the Crown on matters of policy.

As Hardie Boys J said (p. 588) ... "the Crown's capacity to honour its obligation lies not in whether the broadcasting assets are retained by it or passed over to the corporations, but in its willingness to exercise its statutory power, and in the effectiveness of those powers. The latter turns on the legislation, the former on government policy. Both are beyond the purview of this Court ...".

Sir Robin quoted the Royal Commission on Social Policy's concern for the Maori language – attempting, perhaps, to embarrass its author – he invoked the unanimity of the 1987 decisions – but all in vain. As a matter of record he set out the declarations and orders he would have liked to have seen, had the majority of the Court not taken a different view; but this case marks the point at which Cooke P can no longer draw any other judges with him. Judicial activism, as a mainstream influential activity, will go no further.

(For the sake of completeness we should mention that the Privy Council, although disagreeing as to the precise powers of the Courts to question government policy, nevertheless affirmed the Court of Appeal's decision, recognising that any Treaty obligations of the Crown were not absolute and unqualified (which would be inconsistent with the Crown's other responsibilities as the government of New Zealand) and that in practice the Crown could exercise much indirect control over the manner in which a state-owned enterprise could use those assets. (*New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513)).

We might consider also at this point the changing meaning of the word "taonga", used in the Treaty's second article. In several reports the Tribunal has accepted that 'taonga' means anything highly prized, and can therefore include rivers, the 'mauri' or life-force of rivers (*Manukau Report* 1985) and intangible things such as language and customs (*Te Reo Maori Report*, 1986). This is all a change from 1844, when the Reverend William Williams translated taonga simply as 'property' in his dictionary of the Maori language.

Sir Robin, in the 1992 decision, emphasised the word 'guarantee' in the second article of the Treaty's English version, as imposing upon the Crown a duty to take active steps to protect the language. Mr Denis Hampton has argued however, (*Otago Daily Times*, 1 February 2000) that if as much attention had been devoted to the word "exclusive" in Article II, it would be realised that it is impossible nonsense for the Crown – or anyone – to guarantee exclusive ownership of such intangibles as language or customs. Language and culture cannot be exclusive; they are available to all of us. No-one indeed, can "own" them at all. The word "exclusive" confirms that 'taonga' must really mean tangible property. The whole equation of "taonga" with "anything treasured" fails. But so far, this point has eluded the judges.

Finally, in *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140, a case involving a rather complicated factual and legal situation and much careful statutory interpretation; a case, moreover, where the Court recognised that the Crown had already done a significant amount to offer protection to the Maori language; the Court held that it could not review a policy decision to sell in the future nor a decision to introduce legislation into Parliament. A dictum of Sir

Robin Cooke in *Te Runanga O Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 was quoted in support.

In *Wharekauri* Sir Robin's judgment also reads largely like the speech of a politician – or, of course, a statesman – rather than of a judge. His remarks on the Treaty are largely obiter, for the appeal of the plaintiffs, who were representatives of iwi opposed to the deed between Crown and Maori negotiators executing the "Sealords Deal", was dismissed. But here Sir Robin refers to one Australian and one Canadian case on the question of aboriginal title and announces that that means that "there is now a substantial body of Commonwealth case law pointing to a fiduciary duty". He goes on to say that "in New Zealand the Treaty" – which, of course, has no legal status in itself, and whose *terms* are now more or less irrelevant – "is major support for such a duty". Very surprisingly he announces that earlier Court of Appeal treaty decisions "left open" the "fundamental questions [about] the place of the Treaty in the ... constitutional system". Of the "established principle of non-interference by the Courts in parliamentary proceedings", he suggests that that, although sometimes seen as "a matter of jurisdiction", is "more often ... seen as a rule of practice". It is not difficult to suppose that such a remark is no mere discussion of the history and theory of the constitution, but a preparation for a change in practice in future.

This author has elsewhere ([1996] NZLJ 164) been unkind about the Court of Appeal's decision in *Ngai Tahu Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 – the "whale-watching case". The Court itself may have felt ashamed of it, for Cooke P prefaced his judgment by saying that the case's "precedent value ... is likely to be very limited". Certainly the case's logical and legal value is. A plausible argument against the Court's decision was raised briefly, without refutation, in Cooke P's judgment, and never mentioned again. Other legal arguments were also mentioned with no attempt at refutation. Section 4 of the Conservation Act, which refers to "this" Act being interpreted and administered so as to give effect to Treaty principles, was held to apply to a dozen other Acts as well. Some of those Acts had their own Treaty sections, surely a reason why section 4 should not apply to them; but that argument was left for the future. The Court admits that Ngai Tahu's claim to whalewatching is "distinct from anything envisaged in or any rights exercised before the Treaty", but nevertheless, "such issues ... not to be approached narrowly", was granted under Treaty principles. This author described the case as "a ragbag of slipshod reasoning and political meddling", and he sees no reason to revise that opinion now.

I suggest incidentally that the proper scope of section 4 of the Conservation Act is rather more limited than many believe. McMullin J, in *Environmental Defence Society and Tai Tokerau District Maori Council v Mangonui County Council* (1989) 12 NZTPA 197, considering the meaning of the phrase 'ancestral lands' in the Town and Country Planning Act, agreed that that phrase covered far more than merely lands owned by Maori now, but suggested that if there had been a free and voluntary alienation of those lands, "the considerations made relevant by [that section of the Act] may be considerably diminished in their impact". This is entirely reasonable. If one has freely sold lands, one cannot claim continued rights over them forever. Fair purchase extinguishes aboriginal title. It extinguishes rangatiratanga, as the Dunedin Ngai Tahu Maori Law Centre agrees (*Otago Daily Times*, 6 September 1997).

That principle, however, has a wider application. Section 4 of the Conservation Act requires that the Act's words be so interpreted and administered as to give effect to the principles of the Treaty. Those "principles", as we know, involve the right of the Crown to govern and expect reasonable co-operation; and the duty of the Crown in various ways to protect Maori interests. If, however, there has been a free alienation of land – or if, later on, there has been a voluntary and amicable settlement of a claim concerning that land – then there is surely no Maori interest to protect, and section 4 simply cannot apply. Section 4 cannot mean that Maori must be involved at all (let alone as an equal party) in each and every conservation decision. They are to be involved, over and above ordinary involvement by any member of the public, only if Maori interests are involved. If there are no such interests – if lands, and the plants and animals on them, have been freely sold – then no treaty principle says that, in effect, Maori can renege on that sale. After the 1998 Ngai Tahu settlement, then, it must be that any special rights which Ngai Tahu have over the conservation estate will arise not from section 4, but simply from the words of this latest "full and final" settlement – or, of course, one of the earlier "full and final" settlements.

Only one other disappointing case need be mentioned. *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 concerned a proposed adoption, either within an extended Maori family or to adoptive parents who were members of another *whanau*. The eventual decision, to respect the mother's wishes and allow the adoptive parents to take the child, is unexceptionable; so too is the principle that the child's welfare is paramount, and so too is the idea that culture is relevant to the child's welfare. To harmonise Maori concepts of the family and concern for the child's welfare, as was done in *Re M* [1994] 2 NZLR 237, is perfectly sensible. It is reassuring to hear Gallen and Goddard JJ say that, despite a "changed climate with regard to Treaty and Maori values ... any amendment of the [Adoption] Act is a matter for Parliament". But they also say that "since the Treaty ... was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private, and ... for purposes of interpretation of statutes it will have a direct bearing, whether or not there is a reference to the Treaty in the statute ... [A]ll Acts dealing with the status, future and control of children are to be interpreted as coloured by the principles of the Treaty." There is no justification in the law, or even other parts of their judgement, for this.

Against these activist decisions we must set other and more recent cases. All of them are legally sound; none can be said to be twisting the law in favour of a conservative political conclusion. In *McRitchie v Taranaki Fish and Game Council* [1998] 3 NZLR 611 and [1999] 2 NZLR 139, both the High Court and Court of Appeal found that section 26ZH of the Conservation Act 1987 (as amended) – "Nothing in this Part of this Act shall affect any Maori fishing rights" – did not allow someone of Maori descent to fish for trout or salmon, introduced fish, without a licence. It was clear that Parliament, even before trout and salmon were introduced, had provided a special statutory scheme to cover all matters relating to their capture, and they could not therefore simply be lumped in with all other fish. The Court of Appeal also wisely observed that aboriginal and customary rights are highly specific. One cannot simply speak of, essentially, a right to take any fish at any time in any place. Customary rights are to take

particular fish at particular times in particular places, and those questions are ones of fact to be carefully examined in each particular case.

Such was also the approach of Judge Noble in the Greymouth District Court decision in *Department of Conservation v Tainui* (5th November 1998). The judge found himself there caught between local Arahura (West Coast) Ngai Tahu and the central Te Runanga o Ngai Tahu, both of whom claimed the sole right to authorise "customary fishing". His Honour was fortunately able to decide the case without adjudicating on this matter; but at several points in his judgment adverts to the question of what fishing customs were on this particular creek, by these particular people, and for this particular species. Customary fishing rights are indeed customs; they may change, but they cannot just be created, or defended by mere assertion. The judgment contains suggestions, also, that customary fishing cannot impinge upon the conservation and sustainability of the resource.

Watercare Services Ltd v Minhinnick [1998] 1 NZLR 294 involved a plan to put a major sewer pipeline across an archaeological site, the Matukuturua Stonefields. All landowners had consented to the designation; on none of several occasions for public discussion over many years had anyone ever objected to the plan; and at a Maori cultural ceremony at which many iwi were represented the proposed works were blessed. The Court of Appeal held that designations gave clear authority to do what was in accordance with the designation and that the principles of the Treaty (referred to in section 8 of the Resource Management Act) do not give any individual the right to veto any proposal, however much one might respect his right to his own point of view. Nor did the Treaty help Mike Smith in *Smith v Auckland City Council* [1996] 1 NZLR 634. Prosecuted under the Resource Management Act for his chainsaw attack on the tree on One Tree Hill, he attempted to include in his defence various Treaty and Maori matters, relying on the various references to them in Part II of that Act; but those matters were held to be relevant only when drafting plans, considering resource consents and so on; prosecutions moved on from the point at which these plans already existed. In *Berkett v Tauranga District Court* [1992] 3 NZLR 206 Fisher J held that Mayor Island was, by virtue of New Zealand and Imperial statutes, part of New Zealand, regardless of whether its chief had signed the Treaty in 1840; that Parliament and its statutes were supreme, regardless of whatever beliefs, assumptions or procedures might have led to particular enactments, and that statutes did not derive their authority from the Treaty.

In *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 Cooke P and the Court of Appeal held unanimously that a statutory requirement to notify Maori voters had been adequately fulfilled, that a requirement of reasonable notice for Maori voters was implicit in the statute and did not need to rest upon the Treaty or any Treaty principles, and that a government decision to reject Waitangi Tribunal recommendations was, on the facts, not unreasonable. *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 held that the wide words of the Maori Land Act, giving it jurisdiction "to determine for the purposes of any proceedings in the [Maori Land] Court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity ..." had to be limited to granting relief consistent with the Maori Land Act's purposes, and was not intended to refer to General land or Crown land. This was the only possible decision; the

clear implication of the statute required it, and it was impossible to believe that Parliament could have intended anything else. In *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 the Crown, as referred to in section 9 of the State-Owned Enterprises Act, was held to mean the Crown, and not state-owned enterprises as well. The statutory settlement approved by the Court of Appeal at the end of the 1987 case was held to be, indeed, valid, and, in all but the most exceptional cases, an adequate fulfilment of Crown obligations under section 9. *Ryder v Treaty of Waitangi Fisheries Commission* [1998] 1 NZLR 761 is an absolutely sound and unexceptional procedural decision, in which the three Maori plaintiffs (a community worker, a solo mother and a Kaumatua) were not granted representation orders to represent, essentially, all Maori in New Zealand not closely connected with traditional tribes. *Paku v Ministry of Agriculture and Fisheries* [1992] 2 NZLR 223 held that it was lawful for a fisheries officer to inquire into fisheries matters, and even stop and check fishers claiming to be the holders of traditional rights, and their vehicles, to ensure that they did indeed hold such rights and that the law was not abused. Hammond J, in *Police v Knowles* A 123/97 refused to recognise a customary Treaty right to use cannabis. *Re Stubbing* [1990] 1 NZLR 428 held that Maori custom no more overrode the Family Protection Act than did European custom.

The High Court's ruling, in *Wanganui District Council v Tangaroa*, [1995] 2 NZLR 706, that Wanganui's Moutua Gardens were indeed the property of the council, was very careful and evenhanded, respecting both the right to protest within the law and the right of litigants to obtain remedies they are entitled to, in order, for example, to protect their own private property.

In this unexciting pedestrian list of cases no mention has been made of recent cases concerning the 1992 fisheries settlement and the question of what an 'iwi' is. That is so for the simple reason that this question, of a distribution of fisheries profits and assets which would be acceptable to all Maori, is simply insoluble.

One cannot really consider any of those decisions dealing with the question of what an 'iwi' is, for the purposes of the distribution of the proceeds of the fisheries settlement, to be political. Indeed, in *Te Waka Hi o Te Arawa v Treaty of Waitangi Fisheries Commission* 1998, HC, Akld, CP 395/93 evidence was accepted by the court that fisheries and other resources were anciently held and managed not by 'iwi' ("tribes") at all, but rather by 'hapu' ("sub-tribes") or even 'whanau' (families). Thomas J, in the most recent Court of Appeal proceedings ([1999] NZCA 232) refers to this same evidence. Nevertheless, Parliament's 1992 legislation requires ("very circuitously" as Mr Richard Boast has said, 1999 NZLJ 123) that assets must be distributed to iwi. What can a poor court do?

There has very recently been a political admission that the 'iwi' question is insoluble. It is to be found in the announcement by a previous Minister of Maori Affairs, Mr Henare, in 1999 that very shortly legislative changes were to be made enabling and requiring Treaty of Waitangi Fisheries Commissioners to be elected in future by all Maori, rather than being appointed by the Crown as at present. We may have some little fears that such an elected institution might foreshadow some separate Maori parliament. But such an institution is also a distinct step away from never-ending tribal disputation towards a system of distribution based on population and modern interests and needs; a movement from *per stirpes* to *per capita*.

The only possible legally correct decision on the iwi question has to be the 1998 High Court decision that 'iwi' means 'tribes', and tribes existing and recognised in 1840. Nevertheless for once this author has some sympathy with Cooke P in the Court of Appeal's decision in *Te Runanga o Muriwhenua et al v Treaty of Waitangi Fisheries Commission et al.* [1996] 3 NZLR 10 (later overturned by the Privy Council: [1997] 1 NZLR 513). There he held that people of Maori descent unable to establish a tribal affiliation were still entitled to benefit from a settlement intended for all Maori. "This is required by the Treaty and its principles applied as a living instrument in the light of developing national circumstances ..." This is a sensible recognition that things have indeed changed since 1840. But it is still, of course, an approach with dangers; for the Waitangi Tribunal has hinted that any voluntary grouping of Maoris – churches, welfare groups, cultural groups and even gangs – may possess the characteristics of iwis, and therefore be entitled to demand recognition, and funding. If Sir Robin was keen to recognise realities, it might have been better for the court to recognise the genuine reality that tribal structures are out of date; and, since it is unable properly to do that because of the statute's insistence that iwi receive the benefits, it should have stuck to genuine iwi and left it to Parliament to grasp the nettle of creating a system which perfectly recognises modern realities.

It is comforting, also, to read Sir Robin's perhaps slightly weary observation that "we can only hope ... that ... progress ... will continue with no or minimal involvement of the Courts. It is the responsibility of Maori and a test of Maori to rise to the challenge of working out a solution for Maori of this difficult but surely not insuperable problem". That case has not, however, been the end of litigation, and given that numerous decisions of Cooke P have been greatly encouraging of litigation we might perhaps interpret this as some sign of eventual regret.

More recently, the matter has come again before the Court of Appeal in an appeal against Paterson J's judgment (1998 H CP 395/93) that the Waitangi Fisheries Commission should provide for the allocation of its assets solely to "iwi" and to bodies representing iwi, and that "iwi" means only traditional Maori tribes. The Court of Appeal ([1999] NZCA 232, CA 209/98) after much careful analysis of a by now most tangled question, by a majority affirmed that decision. The majority judgment, delivered by Blanchard J, observed also that "it is a great pity that so much time, effort and money has been expended upon [this] preliminary question when the real issue should be whether the scheme to be promulgated by the [Waitangi Fisheries] Commission will adequately meet the fundamental requirement ... that ultimately all Maori are to share in the benefits ... [I]t is unfortunate that the parties have led themselves into the present expensive and time-consuming litigation." Gault J, dissenting, still observed that the questions put to the court "reflect futility", and Thomas J also described the interlocutory proceedings as "futile", and "an unnecessary costly and time-consuming skirmish around and away from the real issue. The Courts", he went on, "are being used to resolve the underlying and deep-rooted division among Maori ... when history and experience confirm that the legal solution is not what is required and not what will endure." Nevertheless, at the time of writing the Court of Appeal has granted leave to appeal to the Privy Council. A report in the Christchurch *Press* (14th December 1999) contained an estimate that the

Waitangi Fisheries Commission alone had already spent over $6 million on the case. One appellant maintained that "the flight to the Privy Council shows that the fishermen in the Maori economy have been taken over by the lawyers", although that does not seem to be Thomas J's view, and lawyers cannot always be blamed for the disagreements of their clients.

Such – omitting questions arising out of the Resource Management Act – is the law concerning the principles of the Treaty. It must remain a mystery how entire law courses can be devoted to the subject. Well, it is not really a mystery; such courses spend a great amount of time on historical background, and also a great amount of time on speculation as to what the future may hold for the law and our country's political and constitutional arrangements. But it is all speculation, and most of it coloured by politics and wishful thinking.

For although several examples of judicial activism have been striking and unfortunate, there are not many of them. Nearly all date from the time of Sir Robin Cooke's presidency of the Court of Appeal. Since that spokesman for fresh exciting new directions for New Zealand law retired from the court to spend much of his time participating in the deliberations of a recently partially reformed medieval institution in a foreign jurisdiction, the judgments of the Court of Appeal and the High Court have been marked by an acceptance that the place of Maori interests in New Zealand society is largely a political question properly left to politicians. Judges have taken seriously Sir Robin's remark in 1987 (at p. 370) that "times and attitudes change, and no man can assert that today's philosophies and urgings will be forever dominant". Indeed, it might conceivably be that even had Sir Robin Cooke still been here he would have come to the same conclusion. It is becoming increasingly clear that there is no simple answer – and certainly no answer in the law – to the strange mixture of cultural aspirations, grudges, genuine grievances, absurd expectations, deeply-established poverty, ill-health and poor education with which New Zealand is wrestling.

It is clear that the Waitangi Tribunal is becoming a Maori lobby group increasingly divorced from reality. It is clear that the generous spirit of the Court of Appeal's 1987 decision and certain later ones has not been matched by any sense of responsibility or self-restraint on the part of Maori claimants. It is clear that Maori leaders themselves do not consider the latest round of full and final settlements any more full and final than previous rounds. (The Waitangi Tribunal itself has declared that "Maori should not be required to sign a full and final release for compensation. How tribes can legally sign for a fraction of their just entitlement is beyond us". (Sunday Star-Times, 31st August 1997)). Indeed, Paul McHugh has reproved European New Zealanders for their "naïve" view that there can be full and final settlements; the "realistic and pragmatic" Maori view is that the Treaty question is an ongoing one about the "management of relationships" (National Business Review, 9th July 1999). It is clear that generous Treaty settlements may well do little or nothing to alleviate the ills of poverty, ill-health, unemployment, poor education and all the rest which afflict so many Maori; Sir Robert Mahuta, for example, declared in the 1997 Tainui Trust Board annual report that, regardless of the latest Tainui settlement, it was the Crown, and not the tribe, who had the duty to provide proper health care, welfare, housing, employment and all the basic needs of Maori people. As litigation

concerning what exactly an "iwi" is, for the purposes of the Treaty of Waitangi Fisheries Commission, continues its stately and repetitious tours of all the superior courts, it is surely becoming increasingly obvious that any answer to the question is going to displease one half or another of Maoridom. Some problems, we must reluctantly conclude, are insoluble. No method of distribution of fisheries profits will please everyone. Poverty and disadvantage, whether Maori or European, have no simple solution. Perhaps even Sir Robin would realise that even judges cannot transform society singlehanded.

There has been worrying judicial activism; but we should not, perhaps, worry unduly. It was largely - not entirely – the work of one man. It has certainly brought the judiciary into disrepute, and it has certainly encouraged unrealistic expectations. Even without these decisions, however, feelings would have run high; and perhaps, on the whole, it may even have been good for the legal system to reveal that it is not simply the tool of the white man's oppression. But that activism has subsided. The principles of the law concerning the Treaty remain the same as ever they were. The Treaty has of itself no status in New Zealand law. It is part of the general social background which no judge can ignore, and when its principles are referred to by a statute the court is of course bound by that statute. But that is all. Probably, Treaty activism has done little lasting harm to the legal fabric.

It must be added that, outside the scope of reported judgments, we see grounds for concern. We read in the newspapers of a Maori man who did violence to his wife being discharged without conviction by a District Court judge because of his "mana" (*Press* 14 June 1999). A man who almost killed a woman by pushing a crucifix and a piece of wood up her nose and who was convicted of attempted murder was not even sent to prison at all because he believed himself to be in the grip of a "makutu", or Maori curse, placed on him by his mother-in-law (*Press*, 24 March 1998). A District Court judge, provided with clear evidence of the poaching of the native wood pigeon, has discharged a Maori accused without conviction, saying that he did not regard the defendant as a criminal (*Forest & Bird*, February 1993). But perhaps, given the mania of the times in which we live, such absurdities would have occurred anyway.

Rather more worrying – both for our country, and for the judiciary itself – must be the public perception, however misconceived, that judges will be active in giving scope to their political biases in future.

The new Chief Justice was described by the then Leader of the Opposition at the time of her appointment as being "prepared to push the boundaries of case law". Maanu Paul, a Treaty claimant, has described her as 'our best weapon'. She has shown little interest in inquiring into the accusations that Justice Durie (formerly Chief Judge of the Maori Land Court and therefore chairman of the Waitangi Tribunal) "was [not] entirely correct", in the words of the *National Business Review*, 20th August 1999, "in certain actions he took in relation to cases which came before the Waitangi Tribunal when he was the presiding chairman". It would indeed be a disaster for the country if any doubt at all were to linger about the absolute integrity and impartiality of the bench.

In many ways over the centuries the common law has favoured the principle that each generation should be the master of its own law. Parliaments were not

bound by their predecessors. The rule against perpetuities, devices for barring the entail and various common law rules and presumptions in favour of early vesting were intended to go some way towards freeing living land-owners from the rule of those long-dead. Tom Paine may have been considered a revolutionary, but his insistence that the Revolutionary Settlement of 1688 was not the last word in constitutional development, and that every generation should be master of its own law, was in principle perfectly orthodox. But acceptance of the Treaty as a source of law is a step away from that principle. Acceptance of the Treaty as a legal force means that to that extent we are to be ruled forever by what was written down over one or two nights, over one and a half centuries ago, by half a dozen men in a ship's cabin. No, it is worse than that; for even an old and out of date document can be clear and detailed. The Treaty is not. Its terms are simple and now irrelevant. It is not a constitution, a bill of rights or an environmental charter. The discovery and application of "Treaty principles" is a political, imaginative and unpredictable activity, and rule by "Treaty principles" must inevitably have something about it of rule by secret law, never known until it is revealed in particular decisions. It may well be unwise for us to weigh ourselves down with a detailed written constitution, for that would transform many essentially political questions into legal ones, as essentially the Bill of Rights Act has done already. But how unwise it would be to be tied to this vague modest little document, surrounded by so much propaganda, myth and controversy. The judges have done well to have heeded Sir Robin Cooke's own occasional opinion that these matters are best left to politicians and parliaments, and to have returned to the wise view that it is not for them to attempt to solve political problems with their own inappropriate judicial solutions.