By Chairperson Waitangi Tribunal
Acting Judge Eddie Durie

New Zealand Institute of Advanced Legal Studies
Conference on Treaty Claims: The Unfinished Business
Wellington, 9-10 February 1995

BACKGROUND PAPER

The Tribunal and the Treaty

The Treaty of Waitangi Act 1975 constitutes the Waitangi Tribunal comprised of the Chief Judge of the Maori Land Court as chairperson and up to 16 additional members appointed by the Crown for terms not exceeding three years.

The Tribunal's main function is to inquire into and make recommendations to the Crown upon claims submitted to it by Maori. The claims that may be submitted are, in short, that Maori are prejudicially affected by legislation, policies, acts or omissions of the Crown inconsistent with the principles of the Treaty of Waitangi. If the Tribunal finds any claim is well founded, it may recommend to the Crown that action be taken to compensate for or remove the prejudice. A recommendation may be in general terms or may indicate the specific action which, in the opinion of the Tribunal, the Crown should take. The Tribunal is not restricted to assessing the loss and ordering recovery. An equivalence may be impracticable. Nor is the Tribunal confined to recommending monetary compensation or the recovery of Crown land. It may propose broad policies for long term restoration. In some cases, especially with regard to State enterprise assets and certain Crown forests, the Tribunal may make 'binding recommendations' (but has not yet done so). This resulted from out of court settlements in 1987 and 1989.

The Treaty of Waitangi was an agreement between the Crown and Maori for the colonisation of the country and was a prelude to the proclamation of sovereignty. It sought to provide for settlement while assuring benefits for Maori and the maintenance of their interests. In terms, the Maori or English treaty texts promised protection, the continuance of rangatiratanga, the retention of those things Maori treasured (including their land unless they wished to sell it) and equality before the law. However in applying the treaty, regard is had to both the terms and the treaty's general purpose. In the context of its historical and political significance, it has been held that it is the spirit of the treaty that most counts. Evidence of the surrounding circumstances, statements of the time, expectations expressed and subsequent conduct have been called in aid.

Claims

The claims may be arranged in three categories:

(a) historical (past Crown actions);

(b) contemporary (current Crown actions); and

(c) conceptual ('ownership' of natural resources).

Jurisdiction to handle historical claims was given in 1985. The historic claims may be divided to:

(a) major claims (large tribal losses); and

(b) specific claims (particular losses).

The Tribunal groups historical claims by districts for combined hearings and attaches the specific claims as ancillary to the main inquiries. One inquiry and report may involve as many as 30 claims. This has reduced the workload and has placed specific claims in a larger context. Most claims are presented tribally.

Historical claims cover these broad areas:

(a) the confirmation of pre-treaty purchases;

(b) Crown (and some private) purchases to 1865 under Crown-tribe negotiations;

(c) Crown and private purchases under the Native Land Court system;

(d) confiscations and expropriations (including Public Works);

(e) title arrangements and land development under the Native Land Court system; and

(f) tribal autonomy.

One tribal claim may encompass all or many of these areas.

Contemporary claims include resource management policies, the impact of development works, Maori language, land administration, Maori participation in economic development, judicial systems, administrative structures, Maori land law, the alienation of state assets by the Crown, education, immigration, the status accorded Maori women, intellectual property rights, cultural maintenance, fishing, hunting, foraging and a range of laws and regulations.

Conceptual or 'resource claims' usually contend for a Maori interest in the use and development of rivers, lakes, foreshores, minerals and geothermal resources, or in the outputs from the development of those resources.

From the above categorisation of claims it is considered

- the Tribunal's claims register, of approximately 450 claims, is not an indicator of the workload. The register includes a mixture of major and small claims, most can be grouped for concurrent inquiry and some claims are duplicated. It is estimated that the historical claims could be reduced to some 30 inquiries.

- With adequate resources it would be feasible to report on all historical claims before the year 2000.

In addition the Tribunal has many requests for urgent inquiries. Claimants and the Crown may be heard on whether urgency should be granted. The Tribunal endeavours to hear cases where the action complained of may have some irreversible consequence. It does not grant urgency to accommodate illegal occupations and will not intervene on matters that are or could be the subject of court proceedings.

Other claims are heard as and when the Tribunal considers the research is complete and the claim is ready to proceed to hearing.

The Nature of Historical Claims

The categories of historical claims were considered earlier.

With regard to 'sales' it is usually contended that the Maori and western understanding of transactions were so different that mutuality was unlikely. More particularly it is claimed that Maori transactions were based on alliances for future mutual advantage, not for immediate benefits and not in contemplation of permanent dispossession. As to purchase policies it is argued that the Crown, if ignorant of the nature of Maori transactions, should at least have ensured that the areas acquired were less and the reserves to Maori greater.

Native Land Court tenurial reform appears to have affected all tribes. It is argued that the reforms led to the extinguishment of group interests, tribal polity and tribal economies and that the lands should have been held for the tribe or kept under tribal control.

Confiscations, expropriations (for townships, scenic reserves, public works, rates, survey costs, taxes and duties) and more recent land reform and relocation schemes, are challenged on their merits.

The extent of the historical claims may be guessed at by reference to the outcome. Maori were admitted by the state to have owned all parts of the country, but Maori land comprises today 5% of the national total, much on poorer land and some 7% unworkable. The tribes, as such, are restricted beneficiaries for almost no land is now owned tribally. The spread of Maori land is not even and there is little or no Maori land in some tribal areas. Most Maori have shifted to towns and score below par in statistical counts for health, housing, employment, law observance and education. They are limited participants in business yet once were major market suppliers and were engaged in commercial fishing, shipping, milling and banking.

Inquiries

The Tribunal structure and process is bent to the historical, cultural and legal mix of issues. It is inquisitorial. United State's Claims Court experience suggests the adversary system is slower, more costly, not exhaustive of native issues and

unempowering of the people aggrieved.

The Tribunal is bicultural and inter-disciplinary. There has been criticism from Canada that the courts are insufficiently representative to handle native perspectives and that the legal discipline is overly restrictive of historical and anthropological opinion.

Tribunal members are appointed through the Minister of Maori Affairs for their experience and knowledge of the matters to be considered. Equal numbers of Maori to Pakeha staff the Tribunal constituted for any claim and Tribunal members are qualified in tikanga Maori, law, historical geography, anthropology, history, agriculture, business or industry. There are seven women and nine men. Of the traditional kaumatua members two are women and two men.

Good research is pivotal to the expeditious despatch of the Tribunal's business. Ideally it is completed prior to hearing. The Tribunal may

- commission any person, whether or not a member of the Tribunal staff, to undertake any particular research; and

- authorise (and fund) claimants to commission research.

Research reports are made available to the parties. The parties are generally the claimants, the Crown, other Maori and private interests who may intervene. The Tribunal staff has large tasks in undertaking research, co-ordinating the research of others and maintaining claim management. The Tribunal has the additional task of considering the research required. Conferences are held to define issues before final argument.

Maori are heard on their home marae or tribal meeting places, or at several marae when different tribal groups are involved. They are heard in accordance with traditional kawa which has a formality of its own.

The addition of the power to make 'binding recommendations' in some cases has affected the process requiring a higher evidential standard, loss quantification and more legal argument when substantial Crown assets are in jeopardy.

The Tribunal may refer matters to mediation but experience suggests this should be done only when the facts are largely settled and the issues delineated. Six claims have been referred to mediation. There have been settlements in two cases. Mediation of the major historic claims has now been subsumed by negotiations.

The funding of claimants to conduct their own research has produced some work of substandard quality which has generated extra auditing costs. Controls are imposed on claimant research expenditure. On the other hand the engagement of professionals, while more cost efficient, has had claimants complaining of the capture of their claim by academics. The Tribunal has found it best to marry professional researchers with claimant research committees.

The budgetary allocation of $400,000 for claimant research however has proved to be too limited for the tasks the claimants must perform. There is also no provision for the funding of tribal claim managers although their role in the efficient despatch of claims is important.

For budgetary reasons the Tribunal has reduced the number of hearings to target funds to research. This has led to claimant dissatisfaction and to a process that is seen as less "people empowering". To alleviate this the Tribunal requires that all research be compiled before hearing, that procedural and research issues are settled at preceding conferences and that the hearing of the people's evidence is severed, in hearing, from academic submissions and legal argument.

The inquiry into historical claims involves considerable interpretation. It is important that the Tribunal has a benefit of competent competing arguments. It is much assisted in that respect by Crown Law Office.

In researching, co-ordinating research and claim management certain protocols are observed within the Tribunal and by its staff:

- that staff must develop good working relations with claimant groups but must also protect the Tribunal's independence;

- that the Tribunal must consider the research required but cannot interfere on the formulation of research opinion.

Claim Priorities

The Tribunal has adopted the principle that claims will be heard where the pre-requisite research has been completed to a proper standard.

The Tribunal nonetheless influences the order in which claims are heard through its allocation of research funding. The Tribunal is aware that the seriatim hearing of claims has created inequities, advantaging those whose claims are first heard and reported. Accordingly the Tribunal is endeavouring to advance all historic claims contemporaneously by arranging broad historical surveys according to districts. This is known as the **Rangahaua Whanui Research Project**. The project is well advanced and should be completed in about 2 years.

It serves

- to give equal weighting to all historic claims;

- to ensure that issues germane to several claims are dealt with generically to avoid research duplication;

- to enable a national overview of the claims position to be obtained; and

- to inform the Tribunal when making recommendations on any particular case.

Relationship to Negotiations

The Tribunal sees the maintenance of an effective negotiations policy as crucial to claims resolution, but, while encouraging parties to negotiate, the Tribunal cannot decline to inquire into a claim for policy reasons.

Inquiries on historical claims proceed through two stages. The first is an inquiry on the facts and results in a full report on the claim. If the claim is held to be well-founded the parties may elect to negotiate a settlement. The second step is activated only if negotiations fail or are not preferred. The parties will then be heard on remedies and the Tribunal will report its recommendations.

This process encourages negotiations. It also promotes lasting settlements by ensuring that the parties have the benefit of a comprehensive report covering all aspects before settlements are effected.

Representation

A major impediment to the resolution of claims is the issue of representation. It has three aspects, related yet severable:

(a) Customary representation (which hapu or iwi have customary interests in any particular area?);

(b) Level of representation (what matters should be settled at a hapu, iwi or a national level?);

(c) Modern representation (what bodies or associations should represent any Maori grouping?).

The issue has been brought to the fore by the repeal of the Runanga Iwi Act 1990 but the Tribunal is currently assisted by two statutory mechanisms:

(a) section 6A of the Treaty of Waitangi Act 1975 which enables the Tribunal to state a case to the Maori Appellate Court on (inter alia) the question of customary representation; and

(b) section 30 of the Ture Whenua Maori Act 1993 which enables the Chief Judge of the Maori Land Court (or the Chief Executive of the Ministry of Maori Development) to refer to the Maori Land Court a question of modern representation.

It may be noted:

- The legislation distinguishes between customary and modern representation;
- The use of either section is discretionary. Representation issues may sort themselves out in the course of hearings, or the Tribunal may be able to reach

a conclusion and to make recommendations without recourse to the Maori Land Court or the Maori Appellate Court.

- Representation issues affect negotiations as much as Tribunal inquiries. Tribunal and legal processes have the benefit of affording an open hearing to all interested groups.

- Questions of modern representation are not generally referred to the Maori Land Court except for a specific purpose and on evidence that interested parties are unable to resolve the issues. Questions of modern representation are also not referred to the Maori Land Court where the primary purpose would appear to concern the allocation of fisheries quota. That is a matter to be determined by the Treaty of Waitangi Fisheries Commission.

Resourcing

An impediment to the Tribunal's progress has been the lack of adequate resourcing. The Tribunal's budget for 1994/1995 was $3,408,000. This compares unfavourably with the funding allocated to other agencies that advise the Crown on Treaty related issues and has restricted the Tribunal in research, the number of hearings and in report writing. There has been one full-time member, a large voluntary contribution from members and an inability for members to meet as often as required. It is also questionable that Maori have had proper access to process for the hearing of their grievances.

The Minister of Justice has announced an intention to increase funding in this area.

Progress in Reporting

As at July 1993 the Tribunal had completed 42 reports, seven historical and 35 on contemporary issues including five on fishing, four on asset transfers and five on resource use. Recommendations were made in 23 cases. The Tribunal reported the withdrawal of a claim or that a solution had been found in a further 14 cases, and in five cases, recommendations were declined as the claims were not well-founded. Some extensive inquiries did not result in reports as a result of settlements or claimant requests for adjournment.

The inquiry into a number of other claims is well progressed by either or both research and hearings.

The disposal of claims as at 31 January 1995 was as follows:

Claims reported	45
Claims in report writing	8
No further inquiry	39
Withdrawn	6
Deferred	13
In mediation	2

In negotiation	9
Under Tribunal research	19
Under claimant research	74
Research proposals needed	127
In hearing/proceedings	54
Research completed awaiting hearing	23
Referred to Maori Appellate Court	-
Referred to Maori Land Court investigation	-
No action	32
TOTAL	**451**

The Act requires that the Minister report annually to Parliament on progress in the implementation of recommendations. He has reported that of the 116 recommendations in 16 reports as at November 1992, 45 had been fully implemented, 13 had been partly or wholly embodied in legislation, 27 were partly implemented but under further consideration, and eight had been rejected. In only the Radio Frequencies report had all the recommendations been rejected but in that case the Crown proposed an alternative arrangement, probably more beneficial to Maori, that was approved by the High Court.

A value judgment is required of the Crown's performance since some recommendations are in general terms and several years may need to elapse before a recommendation can be implemented.

On the negotiations side it was reported, again as at November 1993, that six agreements had been reached though minor issues remained unresolved on three of them. Of those six, one followed Tribunal hearings (the Railways claim) and two followed Tribunal mediations (Waitomo and Hauai).

Some of the settlements resulting from the recommendations, negotiations and court actions have been well publicised. The State-owned Enterprise and Crown Forest settlements concerned process, enabling the transfer of assets or rights while protecting restitution to Maori in cases subsequently established. They did not transfer assets to Maori, but allowed for that opportunity in proven cases.

The Radio Frequencies and Broadcasting claims led to substantial provisions for Maori after Tribunal and High Court proceedings. The fishing reports and High Court action resulted in a national settlement of all fishing claims, sometimes described as the world's largest fishing settlement for indigenous people. The Rangiteaorere and Orakei claims, and the Waitomo claim mediation, gave rise to land and cash transfers. The Railways claim saw the establishment of the Crown-Maori Congress Joint Working Party to transfer certain railway properties to tribes on account of their claims where research established a prima facie case. Several properties passed over but that group has now been abandoned.

The Courts

The courts have been involved in Treaty matters in various ways:

- where reference to the Treaty or to Maori values has been made in a relevant statute;

- where the Treaty has been held relevant to the interpretation or application of a statutory provision or the exercise of an administrative discretion; and

- where the Treaty is declaratory of rights enforceable at common law.

The courts have had a major role in guiding claim settlements through injunctive relief to restrain the transfer of state assets. This has generally been on the basis of some empowering statutory provision and upon principles of legitimate expectation.

Claims Resolution

There appear to be at least five major issues confronting the formulation of a claims resolution policy. They relate to:

- entitlement (which groups should be dealt with?);

- representation (who represents those groups?);

- comparative equities (how should compensation be apportioned between those groups?);

- Maori input (should, or how should Maori have input to the policy?); and

- limitation (what, if any, limitations should be imposed by way of time restrictions or settlement fund ceilings on account of political and economic imperatives?).

The question of limitation is not covered in this paper. The other matters are touched upon on the sections that follow.

Overview

Some national scoping of the nature, size and extent of claims would appear to be a condition precedent to the finalisation of policy. The Rangahaua Whanui Research Project may be useful in that respect although it was initiated for the other purposes described earlier. It appears historical and contemporary circumstances vary between districts and that the extent and nature of these variations need to be known. Preliminary research also suggests however that there is not one district without a reasonable claim to be heard. Native Land Court tenurial reform alone appears to have impacted in every area, and possibly, or even likely, with deleterious consequences for tribal economies.

Variables

Any policy on historic claims resolution may need to countenance a number of variables and resolve the weight to be given to them. Broadly, some tribes point to 'notorious' Crown actions like confiscations, others to the incremental effect of land purchase policies, reserves policies, land court tenurial reform and the like over an extended period, but for each the eventual outcome may have been much the same.

Some variables for the adjustment of compensation may be argued to include:

- the severity of the action complained of;
- the extent to which the action constituted a treaty breach;
- the impact of the action on the economy and survival of the group;
- the cumulative effect of various Crown actions over time; and
- the eventual outcome as reflected in the current social and economic circumstances of the group.

Basis for Compensation

There is an issue of whether compensation should be adjusted according to an assessment of loss by such variables as those described or whether a broad approach should apply with the objective of restoring the economic base of appropriately large tribal groupings in accordance with certain assumed, original intentions.

It has been proposed that Crown and Maori envisaged the alienation of land for European settlement with Maori benefitting from development opportunities arising from their retention of a fair share. It is argued that a fair share should have been protected to them. Passages from Lord Normanby's instructions and evidence of subsequent Maori responses give some support to this view.

The approach to be taken involves an important question of policy. Is it to be based upon compensation or restoration? If the latter then is a delivery of assets all that is necessary?

Representation

Representation issues in addition to those discussed earlier:

- the extent to which the numerous Maori groups should be aggregated for settlement purposes or dealt with severally;
- the extent to which groups to be settled with should be structured to accommodate internal sub-groups;
- the extent to which that structure should protect individual and sub-group interests through the definition of objectives and through provisions for

accountability.

Customary Representation

Two vexed issues concern the identification of customary groups to be recognised for the purposes of settlements, and the determination of groups with an interest in any Crown lands available for settlement purposes. Customary group formation and dispersal appears to have been fluctuating and dynamic, and this issue may need to be determined by alternative criteria. Relevant factors include:

- the identification of groups according to appropriate scales of economy;
- commitment to the equitable restoration of those groups without undue reference to assumed tribal boundaries;
- adequate protection for and recognition of sub-groups in the settlement structure; and
- recognition that the extent of recovery should not depend upon the accident of current Crown asset locations.

Taura Here

Presumably, the purpose of a claims resolution policy is not merely to pay off debts, but to ensure some lasting and durable benefit for the greater number of Maori who bear the consequences of historic action. It appears many of the ultimate beneficiaries are now resident outside tribal areas and are serviced by or have developed allegiances to taura here, or urban pan-tribal collectives. There are issues of whether and how these are to be accommodated, or how interests are to be adjusted between traditional and modern combinations.

Staged or Final Settlements

Policies for the staged restoration of tribal endowments within economically sustainable limits have often been mooted. Policy in that category has been partly or occasionally implemented in some ad hoc settlements and in the shortlived Crown-Congress Joint Working Party structure that saw the disposal of railway assets in districts conditional upon the transfer of part to Maori on account of claims.

The approach has some advantages:

- the provision of interim relief for disaffected groups;
- the change of group focus from grievance to asset development on the transfer of assets;
- the facilitation of future settlements on evidence of group recovery through good administration of the asset; and

- some relief for tribal leaders in facing their constituencies.

It may be useful to consider as well the land buy-back programmes instituted under the Land Council in New South Wales and funded from an allocation of land tax revenues.

National Settlements

It has been mooted that a national settlement is feasible with the transfer of assets to a Commission to generate land buy-back programmes from income and to review allocations from the fund on the basis of continuing Tribunal inquiries into comparable losses.

Input

Many of the issues bear largely upon the nature of early and current Maori societal structures and upon Maori preferences in formulating their own economic, social and cultural development. There is an issue of whether and if so how, Crown and Maori representatives should research and settle a claims resolution policy between them.

ETJ Durie
February 1995

Wellington, 17 May 1990 General Assembly of the Presbyterian Church

Chief Judge Durie
Chairman, Waitangi Tribunal

THE TREATY CHALLENGE TO THE CHURCH

These are busy days for you, I know, and if your General Assembly is like other, your last day will also be your busiest.

So I will be brief. I can almost hear your ModeratorÕs thoughts that his prayers have now been answered; but I can be brief, for I came here mainly to say ÔthankyouÕ.

Thank you for your support of Maori people. It is indeed support enough that you might examine the issues confronting us, not with the prejudice of presumed wisdom, but with the compassion of Christian concern.

I am grateful too to your immediate past moderator, the very Reverend Neil Churcher, as a contributor to A Church LeadersÕ Statement for 1990. I am grateful, not just for the support of the Waitangi Tribunal there given, nor indeed for that reason at all, but for the scriptural passage it provides for 1990, and which remains for me, the clearest statement of what the Treaty implies for us today.

The Statement concludes: ÒWe offer to the nation what is true for us in the Church:

> God has established a harmony in the body, giving special honour to that which needed it most. There was to be no want of unity in the body; all the different parts of it were to make each otherÕs welfare their common care. If one part is suffering, all the rest suffer with it; if one part is treated with honour, all the rest find pleasure in it. (I Corinthians 12:24-26)
>
> In 1990 this is our confidence and our hope.Ó
>
> The Treaty of Waitangi was a formal way of declaring us a part of one body. The scripture reminds us that for balance and harmony, the bodyÕs different parts must support each other.
>
> The Treaty proposed, at that time, a place for two people, two people of vastly different cultures, in one country. Therein lies the TreatyÕs challenge to the Church. What advice can a church give to get us to that goal, to really make a place for all people?
>
> Quite a lot, I would hope. You see, if one is a lawyer, used to seeking legal answers for most things, one learns little more than that the real world does not quite work that way. The legal approach is only one. The christian ethic provides another.
>
> The law judges what is right and wrong. ItÕs all a matter of mind - the assessment of discernible fact against defined principles. ThatÕs law.
>
> The christian ethic, it seems to me, comes not from the mind but wells up from the human heart, not judging but trying to understand, not condemning but seeking to love. I refer to the gospel of reconciliation and say, the art of reconciliation, in this day and age, can no longer involve an emphasis on right or wrong, but on moving to an outcome that accommodates the values of all sides.
>
> If that be so, then what an enormous space exists for the

christian ethic in our time, and in the resolution of racial problems. What then is your methodology and how can it be made to work in the increasingly complex and lay world of modern times? That is the challenge to the Church.

We simply cannot judge conflicting cultural values. What is right for one person is wrong for another, and what is just depends on the eye of the beholder. Have you noticed how combatants in the war for example, each speak of the justice of their respective causes? Different people have different truths and for so long as each is reasonable, the art of peace is not to find for one or the other but to seek the means of accommodating both.

It is possible for a pluralist society, in my view, to be both socially cohesive and culturally diverse, but it requires not an arbitration but a reconciliation, not a judge, but a statesman and peacemaker. That is the challenge to the church. Can you produce the peacemakers, with the skills appropriate to our age? Is there something in your ancient craft that gives you a ten point lead?

Recently the Court of Appeal determined that reports of the Waitangi Tribunal were not binding on the general courts. I agree that that should be so, for we are different bodies with different, and actually, complementary roles; but the public reaction disclosed for me the sad disparity in Maori and Pakeha understanding, and the presumptions that each side has over the sanctity of their respective legal codes.

I heard Pakeha say the result was not surprising, for the Tribunal is somehow different and operates in a rather strange way. And I heard Maori say the same, only the criticism was of the general courts. You see, justice really does depend on the eye of the beholder.

Our general courts use the adversary system, which means the decision is based on the evidence the contestants adduce. That is not so bad if the parties are roughly equal. You will see at once a problem however, if one side is a pauper seeking food and the other a millionaire. But more importantly, litigation is a social process and court decisions can affect society fundamentally. IsnÕt it more important then, when that is so, to ensure that the case is thoroughly investigated rather than made dependent on the parties own inadequacies in their presentations? It may be odd, in our court way, to adopt the inquisitorial style of the Waitangi Tribunal, but that does not make it wrong. At least it is usual, in German civil law, and it seems to be essential in the TribunalÕs case, in unraveling history.

In similar vein, the general courts are primarily concerned with fault, or, with Ôyou win, I loseÕ situations. We have only recently come to appreciate the contribution of Asian and Pacific Law, were not fault, but mediated solutions, are most sought, a win for both sides. It is a technique that Asians use mainly in commercial law.

Mediation is also the natural methodology on marae, and the Waitangi Tribunal sits on marae, just as often as it sits in courtroom situations.

It is interesting to discover then, that if you tread along another path, and follow in the footsteps of the Maori for example, you will come to see the world another way around. You will come to realise that those court systems we hold most dear, may for others be anathema.

Some criticism of the TribunalÕs operations, really did disclose

for me that our monocultural slip might be showing.

The Tribunal it was said, critically, did not take evidence on oath. But what could be more culture-laden than the techniques societies use to encourage people to tell the truth? The Chinese use saucers and candles. For Maori, nothing so compels an honest stance, than to give evidence on a marae before a large gathering of ones peers and before ones own ancestors. In that setting, it is quite rude to require the oath of an elder; to imply that the elder is prone to lying without providential goading.

The Tribunal does not allow cross-examination, it was pointedly, pointed out. Certainly custom prevents the courtroom type of questioning which is somewhat rude in Maori eyes, but what cultural arrogance it is to suggest that Maori have no way of raising questions, or casting doubts, equally if not more effectively than that achieved by the western courtroom style.

It is said that the Tribunal may be activated only by a letter, and not by a Ôproper Õ statement of claim. A definition of the issues is essential at some stage, but even after a letter, it can still be obtained. More important is to understand that for many cultural minorities, procedural complexity in bringing legal claims is one of the most formidable barristers to ensuring ready access to the law. And it is not enough to say Ôgo see a lawyer Õ, if there are not enough lawyers of your own kith or kind.

I must finally add, by way of comparison, that if the Tribunal errs in this respect, it does so in the good company of the Supreme Court if India where a letter alone may be sufficient to instigate an inquiry.

There is one further criticism which I do not take seriously and trust that you do not take seriously either. It has been suggested that the Tribunal that hears Maori claims must in itself be biased if it is chaired by a Maori. Have you ever stopped to think how often Polynesians have endeavoured to explain themselves to courts and tribunals that know nothing of their ways? Then is there nias? Of course there is, but I say that in no unkind way. We are each and every one of us conditioned by the circumstances of our own upbringing. We are inheritors of the myths and shibboleths of our respective forebears. Whether we are Maori or Pakeha, rich or poor, male or female, will influence our world view. I incline rather to Lord Hewitt Õs opinion that the only true impartiality of which a judge is capable, is that which comes from understanding neither side of a case.

To create true equality then, we must obviously do different things for different people. The key task is not to make assumptions about the absolute goodness of any one system, but to fit the structure to the case to be decided and the client group.

But that is not my main point here. I am not an advocate for the supremacy of the Maori legal system over another or vice versa. Both are treasured in their own culture milieu, and rightly so. The Tribunal, I hasten to add, in fact uses both. It will hear Maori on marae, the general public in general public halls, and lawyers in courtrooms, each in the setting they prefer or where they are most at ease.

My greater concern is to go back to that piece of scripture in the Church Leader Õs Statement for 1990.

God has established a harmony in the body, giving special honour to that which needed it most. There was to be no want of unity in the body; all the different parts of it were to make each others

welfare their common care. If one part is suffering, all the rest suffer with it; if one part is treated with honour, all the rest find pleasure in it.

For Christians, it seems to me, the concern is not to promote a winner or loser situation, but a reconciliation, a just accommodation for all people, a harmony within the body. It is a belief and methodology that is most needed right now, not an undue reliance upon the legal process. There are Maori out there who are feeling aggrieved and Pakeha who feel the world has gone too far. Our concern must be for both, irrespective of their particular views. How then do we go about it?

The ball I suspect, is more in your court than you may care to imagine, but thank you nonetheless for daring to enter the arena.

And a final thought, though it was churlish of me not to mention it at the beginning - congratulations on your birthday.

0580J/mf

Conference: Human Rights in the 21st Century : A Global Challenge

At: Banff, Alberta, Canada
On: 9-12 November 1990

The New Zealand Maori and the Waitangi Tribunal

E Taihakurei Duriel

The thesis of this paper is that New ZealandÕs Treaty of Waitangi promises Maori what human rights conventions have yet to, the recognition of Maori as a separate and indigenous people with rights accruing to them in those capacities. Despite recent advances under the Treaty however, through the courts and the Waitangi Tribunal, the maintenance of Maori rights remains overly susceptible to political expedience and, in the absence of constitutional protections, there is need to develop appropriate international human rights sanctions.

1. Maori Status

Whakarongo te taringa ki te hau raki e pupuhi nei, i takea mai i Hawaiki nui ...

Listen to the north wind blowing from the great Hawaiki ...

The New Zealand Maori descend from South East Asian voyagers who peopled the Pacific some 3,500 years ago, spreading across as many miles of ocean until in the last millennium, Aotearoa (New Zealand) was settled too.

The Maori are an adventurous race whose penchant for history and genealogy has fashioned their strong sense of identity and destiny as a people. They recount the ancient voyages as though they were yesteryear, recalling to mind that the winds that brought the Maori to Aotearoa made their country a part of the Polynesian homeland. Polynesia, or Òmany islandsÓ, belies the customary view that conceptualizes the islands as one home, Hawaiki, and the people as belonging to one family, the family of Hawaiki - or Hawaii, Savaii or Havaiki, as it is variously called.2

Theirs is a developed sense of place and belonging, encapsulated in their description of themselves as tangata whenua, the people of the land. The concept pervades the Pacific, through ÒwhenuaÓ is ÒvanuaÓ in Vanuatu, as ÒtangataÓ is ÒkanakaÓ for the Kanaks of New Caledonia. The feel for a historical belonging to the land of oneÕs birth is emphasized in the Maori metaphorical manner of speaking. ÒWhenuaÓ, or land, means also after-birth, or that which one is born out of.

From belonging comes identity, an identity here established against daunting odds across vast ocean expanses. It is said then, by one tribe, with reference to the place of its origin in Hawaiki:

E kore au e ngaro; he kakano i ruia mai i Rangiatea.

I will never be lost; I am the seed sown from Rangiatea.3

From this understanding of themselves as a people, Maori claim dual status in the modern State, now dominated by persons of another kind, as citizens on the one hand, and as a distinct group with inherent self-governing rights on the other.

What is the authority for such an opinion? Sir Monita Delamere has responded:

Ko te mana kei a tatou ano, he iwi hoki tatou.

The authority is in ourselves, we are a people.4

Sir Monita expresses the historic Maori position that as a matter of mana, their independent status as a people should be upheld. If the constitutional structures of the State cannot cope, it is primarily a problem for the State, that it should be so out of harmony with reality.

So also no natural order can decline the admission of Maori to the family of peoples that comprise humankind. If Maori lack full entry to the family of nations as well, that is a problem for its institutions that they cannot then claim to represent humanity.

It is as a people that Maori should be acknowledged, through at the domestic level they stand according to their numerous kin group associations. Such divisions do not deny a Maori identity when dealing internationally. Despite the western image of Maori led by hierarchical hereditary chiefs within defined tribes, there are in fact few other peoples of greater republican persuasion where the main authority is vested in local family units. Consequentially however, there is no limit on the extent of collectivization.

2. The Significance of the Treaty of Waitangi

The British annexation of New Zealand in 1840 was preceded by a Treaty secured over several months with the leaders of the numerous tribes. It is called the Treaty of Waitangi, after the place where the first meeting was held.

By this treaty it was intended Maori would cede sovereignty, and in return, the Crown would protect them in the ownership of those lands and fisheries they wished to keep, ensuring as well full rights of citizenship.

The Treaty is remarkably brief, and quite properly so considering the cross-cultural circumstances. Its brevity indicates that it is directed to principle rather than detail, and that, like many Oriental transactions, it is founded not on legalism but on a philosophy of good faith.

There is much evidence of the Imperial GovernmentÕs sincerity, influenced as it was by the humanitarian movement of the times. With or without annexation the settlers were coming, and experience had shown the deleterious impact on the natives in the absence of proper controls.5

That same evidence fleshes out the TreatyÕs bare bones. They describe, for example, an intention to regulate land buying to ensure that each tribe retained a sufficient land endowment for its likely future needs.

Accordingly, though the Treaty may be variously seen, it was not the sham some settlers contended it to be.6 Assuming for the moment a western perspective, it may rather be seen as illustrating an early commitment to internationally accepted standards. It acknowledges the international law that no country may take the territory of another without agreement, and the common law rules fir indigenous peoples expounded in North American courts in the preceding 1830s.7

This needs emphasis. Some Commonwealth opinion had predicated a shift to an international common law, as the courts turn increasingly to the standards prescribed by the international community.8 This must question whether the international norm setting process will displace the need for such treaties as that of Waitangi within a StateÕs domestic law.

Many would welcome that prospect, since the status of the Treaty is not secure and its opponents portray it as archaic and imprecise. There is however, another view of the Treaty by the other party to it, and it is presumptuous to consider a cross-cultural treaty from the opinion of one side only. The Maori view casts doubts on the efficacy of any moves to displace the Treaty within the foreseeable term. It has become the talisman of their cause, and is seen to require the recognition of their status as a necessary antecedent to the definition of their rights. It is, for them -

3. The PeopleÕs Treaty

The Treaty of Waitangi has enormous significance for Maori. There is little point in talking with them of human rights if there are no prior obesiances to it. It is more than symbolic. It is he kawenata tapu, or sacred covenant,9 and any challenge to it may be read as an unfriendly act.

Why? The answer is that the Treaty is seen as having acknowledged and affirmed their status as a people; not only because of the words used, but because the event itself provided confirmation of their polity. That recognition in 1840 has not since been given. From then to today, both nationally and within the representative institutions of the world, their recognition as a people, with rights accruing to them in that capacity, has been lacking.10 The historical development of the Maori has rather been characterized as a battle to uphold their independent sovereignty against every endeavour to subdue it.11

Talk of Maori sovereignty was treasonable to earlier generations of Caucasian settlers. Maori were declared rebels and their lands confiscated. It is less threatening today and new attitudes abound, but for Maori the Treaty remains the only document that specifically acknowledges their particular status. Human right norms also abound now, but none is seen to give to Maori the recognition the Treaty provides, and there are no international covenants to which they as a people have been called upon to subscribe.

But did the Treaty of Waitangi in fact give this recognition? The standard western view is that any such recognition was momentary, for while the independent sovereignty of Maori was acknowledged from 1836, in 1840 the Treaty took it away?12

That is not the Maori understanding. How Maori viewed the Treaty at the time it was signed is necessarily speculative but it has not generally been seen by them as ceding sovereignty. Such record as exists of what Pakeha thought Maori have said, points naturally to a range of opinion and expectations.13 From the Maori text however,14 read in light of the culture and the peopleÕs subsequent conduct, it is doubtful Maori saw themselves as ceding sovereignty, or of understanding what that culture-laden concept meant.15 It seems rather Maori saw themselves as affecting an alliance in which the queen would govern for the maintenance of peace while Maori would continue as before to govern themselves.16 Certainly it seems doubtful, having regard to the Maori character, that Maori would have accepted any Treaty that was thought to diminish their own mana or status.

Courts and politicians now characterize the relationship as a partnership, denoting the joining of distinct persons in common enterprise for mutual benefit.17 This is closer to the Maori view of the Treaty as an alliance. Such a concept was unthinkable earlier, since the maintenance of State sovereignty, in the sense of absolute, ultimate power, was seen as essential. Future discussion on the relationship between Maori and the Crown need no longer be restricted by fundamental legal views on sovereignty however, as increasingly State sovereignty is constrained by the reality of world economics, political and economic alliances, ratification of United Nations conventions and the introduction of domestic constitutional instruments. The concept of a partnership has since been adopted in numerous Government publications and policies, and there are now some statutory utterances in support of it too.18

Not all Maori are enamoured of these opinions of course and there is a continuing debate. The point here, however, is that the Treaty is seen as providing more than a bagatelle of individual rights. It gives instead the recognition of Maori as a people, and, by virtue of their prior occupation of the land, a special relationship with the State beyond that which might be claimed by other citizens. Though it is less explicit, still it provides for Maori that which is but a proposal with the United Nations Working Group

on Indigenous Populations. It further creates a situation in which Maori rights are seen to flow from their circumstances as a group, where their culture has dignity on that basis, and where Maori as a people can advocate the greater recognition of group rights, as an antidote to the deleterious impact of the current emphasis given to individuals. Unless and until human rights catch up, the Treaty will likely maintain priority in the hearts and minds of Maori.

It does not follow that there should be a Treaty rights - human rights contest, for the TreatyÕs vulnerability suggests the maintenance of one may depend on the influence the other can provide.

4. Post-Treaty Changes

The Treaty lost profile in New Zealand at the time that the Maori numerical superiority was reversed (in the mid 1850s). It was also then that Britain passed responsibility fro self-government to the colony.19 War was the immediate result, and, with it, native land confiscations.20 The allotment of the remaining lands in dispersed parcels fragmented the peopleÕs former solidarity.21 Amalgamation policies, well known to indigenous people throughout the world, followed quickly, and were continued into current times. Nonetheless, a massive State machinery for cultural displacement did as much to evidence the resilience of the native order as it did to achieve its purpose.

The historical process exposed the fragility of the Treaty without special sanctions. For well over 100 years, Maori pleaded their treaty-based cases to no avail, before every judicial, political and popular forum available. The courts held the Treaty had no legal status without Parliamentary ratification, and Parliament was unwilling to intervene.22

A remarkable feature of the last decade is that the Treaty has been resurrected from its former obscurity as a declared Òlegal nullityÓ, and has taken a position of pre-eminence in national affairs. Jurists and politicians now describe it as a document of fundamental constitutional importance. It has been depicted as the most important document in New ZealandÕs history, as that which marks the foundation of our modern State and as that which gives legitimacy to the GovernmentÕs right to govern.23

This change of heart may be due to the growing awareness of human rights principles as well the work of the Waitangi Tribunal. Equally significant, New ZealandÕs new Treaty consciousness has been taken to the schools and the general public, due in large part to the centrality given to the Treaty by 1990 Commission, a body established by the Government to co-ordinate New ZealandÕs sequi-centennial celebrations.

Despite all that however, the incorporation of the Treaty into particular statutes and its acknowledgment in modern court decisions, the TreatyÕs position remains vulnerable. The reality is that it is not entrenched in the domestic law, and an attempt by the then Minister of Justice in 1985 to incorporate the Treaty into a Bill of Rights failed for want of public support. The need for the international acknowledgment of the rights of indigenous peoples in colonized countries is still very much apparent.

5. Current Position and the Waitangi Tribunal

The statutory provisions for the Waitangi Tribunal represent the New Zealand GovernmentÕs resolve to recognize the distinctive position of the indigenous New Zealanders.24 It falls short of the recognition given aboriginal tribes in entrenched and constitutional documents in Canada and the United States, but the Treaty has had an impact nonetheless. Shortly it will be considered why that might be so.

The Tribunal was founded in protest. Demonstrations in the 1960s and Ô70s drew attention to the extent of Maori land losses and grievances. An erudite Maori leadership spoke also of the destruction of the tribal economic base

and of the impact of enforced change on cultural maintenance and social stability. Once more, the Treaty was argued as authority for an alternative order where two societies stood alongside.

The protests engendered some public sympathy, which, in coalescence with a growing concern with the low Maori socio-economic status, was sufficient to goad the Government to promise some relief.25 In 1975 it established the Tribunal, with its authority at that time limited to reporting on claims that the Treaty was not being honoured in current or proposed government policies and laws. It was not empowered to deal with those old land claims that were the main source of unhappiness.

With limited powers of recommendation only, few claims were put to the Tribunal in the first eight years. Change came in 1983 when the Tribunal reported on a complaint of prejudice to a tribeÕs fishing grounds from certain major industries that the government was promoting.26 Its findings that the Treaty promised Maori a priority of consideration in areas of conflict and cast a duty on the Crown to actively protect their interests, led to conclusions that the Crown had failed to live up to its treaty obligations, and to recommendations for major scheme changes.

Those recommendations won public acclaim. Aided by the coincidence of interests with environmental and economic lobby groups, the recommendations were adopted by the Government, and though it had earlier been sceptical of the TribunalÕs role and of any priority of treaty for indigenous people.

A new Government the following year professed greater sympathy for Maori claims, now linked in many minds to environmental matters, and to opine that the findings of such an independent and expert body as the Tribunal ought generally to be followed. More claims came in, moving beyond environmental concerns to aspects of central and local administration, and to such matters as national policies affecting the status and promotion of the Maori language.

Through the handling of these claims the Tribunal came to acquire a better image. In 1985 its membership was increased and its jurisdiction extended to enable it to deal with those outstanding old claims that had been the main source of Maori grievance.

Several factors contributed to the enhancement of the TribunalÕs standing. It appeared the power of recommendation should not be underestimated, at least when supported by a balanced assessment of exhaustive research and an honest endeavour to find practical solutions. There is also a sense in which the reporting and recommendatory role has an advantage. Effectively the public, not opposing legal counsel or a court of review, becomes the TribunalÕs target audience, leading to reports in suasive rather than legal style, and hopefully, increasing public awareness of the issues and of the data base on which decisions must be made.

It has assisted further that the Tribunal is comprised of both Maori and Caucasian members, in roughly equal numbers, each holding professional or leadership positions. Matters about the Treaty, history and current policy thus fall to be determined by representatives of both Treaty partners. Accordingly, in portraying both Maori and Pakeha perspectives on any issue, the Tribunal has promoted the growth of a bicultural national development, exposing Maori culture, practice and history to an increasingly receptive white audience. A move to bicultrualism is now encouraged and provided for in schools and in the public service.

It follows further that the Tribunal adopts both Maori and western protocols in the conduct of its inquiries, never assuming that only Anglos have laws and legal processes. The claimantÕs case is usually presented on traditional marae, the proceedings following customary laws under conduct of the TribunalÕs Maori members. Likewise the general public may be heard in public halls, and the Government response and legal argument in courtrooms so that all are heard by the rules and in the surroundings of their choice.

Significant too is the TribunalÕs quasi-judicial character and its relationship with the general courts in the development of a treaty jurisprudence. This embraces more than the fact that the Tribunal is presided over by judges and that a number of retired judges and lawyers are included in its membership. The Tribunal is structured as a Commission of Inquiry, able to organize research to lay the facts bare and to promote bicultural understandings about them. Although it cannot make binding orders, except in a special class of case,27 it makes important findings of fact and interpretation. Those findings, arrived at judicially and open to challenge in a court of review, are an essential step in the disposal of complex historical and cross-cultural issues. They serve to settle matters that might otherwise remain in contention, just as the TribunalÕs reports ensure that the facts, the range of opinions and variety of options for the provision of redress are fully and sensitively described and made known.

The general courts are also involved indirectly through interpolating the Treaty, examining the public interest, and directly where Parliament has required consideration of the Treaty in the implementation of specific statutes.28 The courts have significantly influenced the public Treaty debate, lending weight to the TribunalÕs operations. Nonetheless, though they have the power the Tribunal lacks to make final orders, the opportunities for judicial intervention are more limited than in Canada, for example, where claimants have recourse to a Charter of Rights and Freedoms. They have also used final orders sparingly, no doubt aware of the practical exigencies, and instead, through injunctions and the retention of a supervisory role, have sought to goad the parties to realistic settlements.29

6. Current Issues

An essential feature of the court and Tribunal role is that the resolution of native claims is related to the delivery of justice and the maintenance of a fair society. That may be an assumed position in some countries, but not so in New Zealand where, until recently, those matters were dealt with solely at a political level, very much to Maori prejudice, and settlements were effectively on a take it or leave basis. Time has proven graphically that justice for Maori cannot depend on political whim alone, or reasonable settlements reached with a gross inequality of bargaining power. I do not think it has been or is appreciated by most New Zealanders that Maori have been denied recourse to the courts for their particular grievances, and have thus been denied rights that other New Zealanders take for granted.

The sad irony is that now legal rules are insufficient to deal adequately with the variables that time and changed circumstances have imposed, so that political solutions are still necessary. Large-scale land returns are impracticable in New Zealand, and the economy does not permit of the full monetary amends the law would require. There must be a compromise, a negotiated settlement that is in fact a second best. It then becomes nonsense to talk of compensation or full and final settlements if full legal recompense cannot be given. Long term strategies for a better future are rather to be sought, and claims must be resolved not so much to end the past, even assuming that can be done, but to create a new beginning.

Recent government policy has given cause for optimism. For the first time, following a century of Maori pleas, Government has provided a statutory base for tribal self-management,30 which, though primarily intended for the devolution of government services through tribal bodies, dovetails well with the claims-settlement process, offering the structure for compensation to provide the independent economic base for tribal development programmes. Those programmes may benefit the nation as much the Maori in the future, and represent a cost-saving in the longer term.

The catch is that the will to promote reasonable settlements remains dependent on political motivation. Through its recommendations the Tribunal provides pressure, and services the essential role of removing the

determination of facts and the proof of a claim from the political or bureaucratic arena. In reality, however, the Tribunal itself is reliant on government policy for its own continuance. It currently exists in an environment where limitations on its role, and the termination of the recent provisions for tribal self-management, have been proposed by members of the new Government elected in October 1990. While those opinions may or may not be effectuated by the new Government, they serve nonetheless to show the uncertain status of the New Zealand native claim process.

Should it be part of our modern world ethic that indigenous minoritiesÕ claim to justice should so depend on domestic political circumstance? I do not think so. In the absence of constitutional safeguards, or satisfactory conventions on indigenous peoplesÕ rights in domestic law, Maori must seek a role in developing the common law of humankind. It is that which promises the greater influence on local political action.

It does not follow, that their reliance on the Treaty of Waitangi is misplaced. Its new found status in domestic law could prove tenuous, but its existence cannot be denied and as such it proclaims standards the international community has yet to aspire to. Those who see a contest, however, miss the point. The Treaty provides concrete evidence for Maori of the value of the norm setting process to condition national governance. The international criteria provide in addition the force of persuasion the Treaty may be seen to lack. Both may work in concert to provide for the more equitable participation of Maori in the national life.

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1 Chief Judge of the Waitangi Tribunal, Wellington, New Zealand.
2 For this perception of Maori as a part of the Polynesian family see Sir James Henare in The Polynesian Heritage Trust (1984).
3 From Ngati Raukawa, which includes the author, and who descend from Hoturoa, captain of the Tainui canoe that left from Rai-atea in the Cook Islands about 1350. The soil carried from there is now at Rangiatea church in New Zealand.
4 Sir Monita Delamere, Maori elder and Waitangi Tribunal member, in Hui Manawhenua, brochure for an indigenous peoplesÕ gathering in New Zealand in February 1990 to mark the 150th anniversary of the Treaty of Waitangi.
5 Annexation was influenced by the Report of the Aborigines Committee of the House of Commons, 1836, sought by humanitarian and evangelical lobbyists. The report emphasized the dangers of uncontrolled colonization for aboriginal people. The British GovernmentÕs concerns are spelt out in the instructions for a Treaty from the Colonial Office, 14.8.1839.
6 The Treaty was described as a sham by prominent settler, E G Wakefield. Others gave similar descriptions.
7 For an opinion that the Treaty expresses the common law doctrine of aboriginal title and a review of the North American decisions. See P G McHugh The Aboriginal Rights of the New Zealand Maori at Common Law 1987 Thesis (Ph.D), University of Cambridge.
8 The development of an international common law is presaged in England by Sir John Donaldson MR in DST v Raknov [1987] 2 All ER 769, 777-9, in New Zealand by Sir Robin Cooke in Dynamics of the Common Law, the opening paper to the 9th Commonwealth Law Conference 1990, and possibly by Professor Weeramantry of Australia in a paper to the same conference.
In NZ Maori Council v Attorney-General, [1987] 1 NZLR 641, 655-656, Sir Robin further considered that Ò... the Treaty (of Waitangi) is a document relating to fundamental rights; (and) that it should be interpreted widely and effectively as a living instrument taking account of the subsequent developments of international human rights norms ...Ó.
9 The late Sir James Henare, a notable Treaty proponent of recent times, regularly referred to his forebears description of the Treaty as a sacred covenant. That opinion was adopted in a resolution of some 1000 Maori at the Ngaruawahia treaty hui in 1984.
10 That perception may soon change. New Zealand has now ratified the Optional Protocol to the International Covenant on Civil and Political Rights with effect from August 1989. Articles 1 and 27 of the Covenant give some recognition to the rights of peoples within a State, and the Protocol

would appear to enable Maori to make claims as Maori to the Human Rights Committee. At present, however, Maori appear more interested in the revised ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries (though the Convention, and the preceding Convention No. 107, have never been ratified in New Zealand) and in the Drafts for a Universal Declaration on the Rights of Indigenous Peoples proposed by the United Nations Working Group on Indigenous Populations.

11 See for example, MPK Sorrenson, historian and Tribunal member, in A History of Maori Representation in Parliament, appendix to the Report of the Royal Commission on the Electoral System (1986), GovnÕt Printer, Wellington, NZ.

12 Maori leaders executed an 1835 Declaration of Independence, following which the Colonial Office acknowledged their independent sovereignty in 1836. It made the Treaty a pre-requisite to annexation.

13 Recorded Maori views at the many signings are collated by Claudia Orange in The Treaty of Waitangi (1987), Allen and Unwin NZ Ltd.

14 There are English and Maori texts of the Treaty and one is not an exact translation of the other. The Maori version was probably based on an English draft then modified to fit Maori expectations. It received little official attention in the past, but (with one exception) was the text that was taken about the country and signed, and is the text on which Maori have relied. The Tribunal is required to consider both texts, the Governor relying on the English version.

15 The Maori text gives a right of national governance (kawanatanga) to the Crown on an undertaking to uphold the independent authority (rangatiratanga) of Maori.

16 The classic Maori position was expressed by Paora Te Ahura in 1857 with reference to the establishment of a Maori King - ÒThe [Maori; King on his piece, the [English] Queen on her piece, God over both and love binding them to each otherÓ. See New Zealander 6.6.1857.
Maori may also have expected however that they would govern not just themselves but settlers resident in their districts - see Rigby-Koning Report to the Waitangi Tribunal (1990) in the Muriwhenua Land Claim.

17 The Treaty relationship between Maori and the Crown was characterized as a partnership by the Court of Appeal in NZ Maori Council v Attorne-General [1987] 1 NZLR 641 following historical evidence from Claudia Orange. The Waitangi Tribunal used similar descriptions in Manukau Report [1985] 8.3 and Te Reo Maori Report (1986) 4.2.8.

18 See s2 Treaty of Waitangi Amendment Act 1988.

19 At 1840 there were probably about 2,000 British and 100,000 Maori. By 1858, Maori were outnumbered 59,000 to 56,000 disease reducing one, migration swelling the other. In 1896, after the wars, Maori were estimated at 42,000 but numbers have consistently increased since. Maori are now 294,000 or about 12% of the population. Non-Maori are overwhelmingly of British stock.

20 The main wars were 1860-1867. Confiscation of the lands of ÔrebelÓ tribes was provided for in the New Zealand Settlements Act 1863.

21 Native land legislation from 1862 to the present day has so insisted on title individualization that now no Maori land is held in the communal ownership customarily preferred. Maori were generally opposed but unable to stop the process. The object was stated plainly in Parliament Ò... to destroy, if were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Maori race into our social and political systemÓ [1870 IX NZPD 361]. It also helped the sale of Maori land, removing the tribal veto that had been the bulwark to settler land acquisition.

22 The authoritative case is Te Heuheu Tukino v Aotea District Maori Land Board [1941] NZLR 590 (Privy Council).

23 For the Treaty as NZÕs most important historical document, see, eg Sir Robin Cooke, President of the Court of Appeal, Vol 14 No 1 NZULR 1 (June 1990); as the foundation of our modern State, see Minister of Justice White Paper on a Draft Bill of Rights presented 1985; and as legitimizing the GovernmentÕs right to govern, see Prof. F M Brookfield inaugural lecture on appointment as Dean of the Law Faculty, Auckland University, 1985.

24 See Treaty of Waitangi Act 1975.

25 In socio-economic terms Maori rank as underprivileged - more than twice as likely to be unemployed or totally welfare dependent and only half as likely to own their own homes. Those earning earn less (80% of the national average). Only 4% Maori men are self-employed compared with 21% non Maori men. 63% Maori as cf 28% non Maori leave school without formal qualifications and Maori are less than 1% of those in professions or major business.
While the number of non Maori indicated in the courts doubled between 1961 and 1984, the Maori increase was six-fold, and Maori now comprise nearly half the prison population.
Maori land holdings have been substantially eroded, less than 5% the total land area. Much is on poorer country, about 7% being undevelopable. The spread of ownership is uneven so that some tribes are landless, contributing to a substantial move to towns. Maori in urban areas were in 1936 - 11.2%, and in 1981 - 79%.
26 Motunui Report, Waitangi Tribunal, 1983.
27 Where a claim is proven, the Tribunal may order that Crown land or forest assets sold after 1986 be reclaimed for Maori ownership - see Treaty of Waitangi (State Enterprises) Act 1988 and Crown Forests Assets 1989.
28 Recent intervention by the courts is reviewed by Sir Kenneth Keith in The Treaty of Waitangi in the Courts and by E Taihakurei Durie and Gordon S Orr in The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence in Vol 14 No 1 NZULR (June 199).
29 This is apparent, for example, in two Court of Appeal decisions, NZ Maori Council v Attorney-General [1987] 1 NZLR 641, and Tainui Maori Trust Board v Attorney-General [1989] 2 NZLR 513.
30 See Runanga Iwi Act 1990.

University of Waikato seminar series on ÔJustice, Biculturalism and the Politics of DifferenceÕ, School of Law, Hamilton, March-April 1993

Justice, Biculturalism and the Politics of Law

Chief Judge E T Durie

Maori Land Court, Waitangi Tribunal

2 April 1993

Tipu ake te pono i te whenua

I titiro iho te tika i te rangi

(Truth springs out of the earth

and righteousness looks down from heaven)

Psalm 85 verse 11, given by Sir Monita Delamere as a favourite saying of Te Kooti Rikirangi. It is quoted at the beginning of the Muriwhenua Fishing report

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This contribution dwells on indigenous peoples in colonised territories, and Maori in particular.

Overview

The perspective is that of a lawyer, but is premised by some general opinions. The first is that one culture should not be judged by the standards of other. The first is that one culture should not be judged by the standards of another. Each must be appreciated on its own terms. Resolution of cross-cultural conflicts requires, therefore, either fair negotiations with equality of bargaining power, or a biculturally competent adjudicatory body.

The second general opinion is that particular settlements or judicial determinations provide only transient relief, assuming they give any relief at all. Ultimate justice for indigenous peoples depends on political power-sharing through constitutional reform.

Pluralism

It is hopefully uncontroversial to consider that justice, in the broad sense of fairness, requires respect for all peoples. That must include respect for other peoplesÕ laws. A plural legal order may therefore be necessary in many cases, with tribal courts for example. National cohesion may prefer a unitary jural system; but I should imagine a special case exists for the recognition of indigenous laws.

What is law but the enacted or customary rules of a community; and what communities must most qualify for national recognition of their laws than those that are the nations found peoples. Maori, in this context, are cognisable not as a race or cultural group but as a people with constitutional status arising from prior occupancy.

Maori law is thus the original lex situs. It springs from the earth. Other races depend for the recognition of their law upon some valid importation, and thus British law, as it was then called. British law entered through a proclamation of sovereignty that was in turn dependent for its validity on the Treaty of Waitangi.

This distinguishes Maori from other minorities whose concerns are reflected in such human rights instruments as the International Covenant on Civil and Political Rights. Maori are a domestic constitutional entity entitled to special recognition. This underlies my approach to justice, biculturalism and the politics of differences in New Zealand. Custom is a source of law for all people. Tikanga Maori or Maori customary law is included, has been here since time immemorial and has status in law in my view, even without Parliamentary recognition. It is part of the law of the land because it always has been. It grew from out of this earth.

I dispose briefly of a subsidiary matter, bearing in mind that judicial statements in academic for have no precedent value and are not authoritative in legal proceedings. The third article to the Treaty of Waitangi has been cited to support the view that one law for all was agreed. The Maori text may not be equivalent to the English however and may be translated to read that the Queen guaranteed to Maori their own laws (tikanga), just as the English are guaranteed theirs. Contemporary Maori statements, admissible under indigenous treaty law, show how Maori expected the Treaty to protect their own tikanga and the third article may be lawfully interpreted in that light.

There seems room therefore to recognise Maori law. There appears no legal impediment to doing so and the question is only whether or not one has any need to, nowadays, and if so, then as a matter of pragmatics, the extent to which one should.

Initially it was though Maori law would apply in certain districts. It was permitted at the GovernorÕs discretion, rather than provided for, in section 71 of the Constitution Act 1852. Soon after however judicial opinion that Maori were incapable of completing a valid treaty, carried an implication, popularly held at the time, that they were also without any law. I refer to PrendergastÕs well known description of Maori as savages and primitive barbarians.

In fairness, anthropology was not known as a science at the time. It is incontrovertible today however that the former judicial opinion cannot now be sustained on the facts.

There is another lesson from this, however, that one culture cannot be judged by the norms of another, and each must be seen in is own terms. That comment would be unworthy of mention today were it not for the decision of a single judge of the High Court of British Columbia in the recent case of Delgamukw. It concerned the Gitskan and Wetsuwetan people whose culture is remarkably like the Maori. The Court finding, after years of native, anthropological and historical evidence, was little different in substance or even terminology from the Prendergast view; and this was in 1991. The effect may be seen as horrendous by a modern human rights lawyer, for it was to deny the Gitskan-Wetsuwetan that most basic right of humans to own their own property; and those rights were denied in respect of an area about half the size of the North island. It seems not unreasonable to repeat in that context, that one culture cannot fairly be judged through the eyes of another.

This leads to the second opinion, that adjudication, where cultural values are in competition, requires at least a bicultural understanding.

Biculturalism

Lord Hewart considered the only impartiality of which a judge is capable is that which comes from understanding neither side of a case. Judges like all people, see the world in terms of their own upbringing and cultural experiences which naturally colour their thinking., The reality would seem to be, that there can be no true impartiality where questions of culture are involved. As judges are not without culture and culture pervades most things, it is difficult to see how justice can be provided in cross-cultural

conflict cases by recourse to the courts in the usual way.

Cross-cultural negotiations provide an expedient court but not a complete answer. Sustainable settlements depend on equality of bargaining power, and where political determinations are involved, as upon the resolution of outstanding treaty claims, there is no equality in fact if there is no equality of influence over governance. Alternatively, there must be ready recourse to an independent adequately resourced and competent, adjudicatory body. There is no settlement out of court if there is no competent court to settle out of.

The Waitangi Tribunal, with its bicultural composition, might be seen as such a body in those cases where its power of final determination in respect of certain Crown assets, provides and adequate recompense. According to yesterdaysÕ news however, the National Maori Congress considers the Waitangi Tribunal is neither adequately resourced nor independent of the Crown. I suspect there is some truth in that opinion.

The problems of a monocultural legal order are endemic. Maori live with the bad results of the cultural presumptions of western judges. Judgments of the early Native Land Courts for example, clearly demonstrate in my view, the consequences of Pakeha misconceptions of Maori tikanga resulting in the disinheritance of large numbers of Maori of their ancestral entitlements. For some the impact of loss has been no less than that now occasioned by the Gitskan Wetsuwetan.

Monoculturalism, in the Maori Land Court, continued into this century. Some decades ago a Maori elder appeared before the Court and did no more than sing a song of the Whanganui River, on a claim tot he ownership of the river bed. The court noted that he sang a song but had nothing to say.

Of course it was usual for a people without a Land Transfer Office to assert their ownership in other ways and the old man was simply singing his title in customary style. His song was a declaration of ownership.

Nowadays we better understand the society of tribal peoples, even without anthropological training. The popular travel writer, Bruce Chatwin, captures the sense well enough in his book called ÒSong linesÓ, on the land rights and practices of Australian Aboriginals.

Most judges of colonised countries remain monocultural however. No criticism is intended of judicial officers but it is a reality with which indigenous people must contend. The consequences remain large, as Delgamukw illustrates. From what I have read, most Canadian academics consider the decision demonstrates the inability of a judicial officer to come to terms with a different cultural mind-set. Apparently the Court had not read Song lines.

My own Maori Land Court, now quite different from its Native Land Court predecessor, is not immune from criticism. Recently, following a reference in terms of the Treaty of Waitangi Act 1975, the Maori Appellate Court determined against the recognition of customary land rights for the Rangitane people in respect of a part of the South Island. The Privy Council declined to accede to the Rangitane appeal however, the Maori Appellate Court being seen as a specialist court in this area. But is it? Is it much better in this respect than that which was established in 1865? The reality is that like their judicial predecessors, the current Maori Appellate Court judges have had no formal training in tikanga Maori. How then can they judge it? Their training is entirely in Te Ture Pakeha.

Today, compared with formerly, some of the Maori Land Court judges are Maori, but being Maori would seem to be not enough. It must surely denigrate tikanga Maori to assume that one need only be Maori, or worse, to have had Maori friends, in order to know it all. How many Pakeha qualify as judges of Pakeha law?

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The synchronization of English and Maori law in modern academic training would seem an essential pre-requisite to legal biculturalism, assuming an adequate course for the latter can be arranged. Hopefully, future Maori Land Court judges will hold those qualifications that were unavailable to the current bench during their University years.

A Maori dimension is equally needed in other jurisdictions, the Planning Tribunal and Family Court for example. The need may be greater there, for those courts must actually balance competing cultural interests. Any misunderstanding, though understandable, must still be regrettable. It might be considered for example, that Ôwhanau Õ is not a cultural equivalent for the English Ôfamily Õ; and the Maori concept of Ôancestral land Õ (under the former Planning Act) is a political concept to be understood in terms of territory, not tenure, in the way it is used in the International Labour Organisation Convention (Number 169) on indigenous people.

In the meantime, I have just been made aware of a curious anomaly. While an increasing number of courts and institutions are now statutorily bound to exercise their jurisdictions having regard, amongst other things, to Maori values, the same is not explicitly required of the Maori Land Court, under the new Maori Land Act 1993. This is an Act for the judicial administration of that most dear to the ancient Maori heart - the land. In exercising jurisdiction under the Act, the Court is called upon, but section 46, to effectuate the wishes of the owners. The Court is not equally charged to consider tikanga Maori however.

Most modern Maori land owners live away today, and some may show little cognisance of customary considerations. The interests of those with Ôahi ka Õ as distinct absentees, the customary weighting to genealogical lines connected to the land as against other connections, and the primacy of kin associations, are examples of tikanga Maori that are not provided for. They are now at risk as the increasing majority come to live outside the traditional ethos.

That recalls a point earlier made. Tikanga Maori exists as law, in my opinion, and unless abrogated, may be brought into account without statutory direction.

This is not a recent opinion. It was applied judicially in 1975, thought not precisely in those terms, in the Maori Appellate Court case of Tikouma 3B2, in considering kin group obligations on the transfer of Maori land interests under section 213 of the old Maori Affairs Act 1953. It was the first appeal case I had heard and I am happy to say I was then in the majority. The question now however, is whether prescriptions in the new Act actually oust tikanga Maori, where owners wishes and tikanga are in conflict.

That last dilemma will probably be resolved on a nice legal reconciliation of sections 2 and 46 of the new Act, or on some learned divining of Parliamentary intent. It is good stuff for lawyers but not much good for Maori when those things essential to their identity as a people are seen to depend upon legal technicalities in statutory interpretation.

Judges may also be right or wrong in their perception of tikanga Maori. I have suggested that Maori Land Court judges had it seriously wrong once and without proper training may well get it wrong again; and despite the good intentions of the judges of the general courts, one must question the ability of anyone to order priorities between the competing values of dissimilar cultures.

I feel more confident of progress in the Treaty area. The Waitangi Tribunal performs a vital function in relaying the mores of a minority culture to Ôthe power cultureÕ, to use what Tipene OÕReganÕs expression. It can also properly be called a specialist body in that it is inquisitorial, not restricted to the evidence adduced by parties, has its own research facility, and is bicultural and multi-disciplinary in composition. It is able to expose a bicultural perspective and to readily compile in sensible

form a mass of historical and other material relevant to Maori claims. On the other hand the Tribunal lacks powers of final determination and the wider, inherent jurisdiction of the superior Courts. The relationship between the Tribunal and the Courts is therefore symbiotic. It works well, in my view, for the judicial determination of cross cultural issues.

The question remains however, should there be a more fundamental and constitutional protection for indigensÕ interests?

Constitutionalism

A plain and unalterable fact is that the indigenous peoples of colonised countries exist. Again, that trite opinion needs to be stated. It took the Australian Courts over 200 years to accept they exist, at least in both fact and law.

The indigens exist and have existed from the very constitution of their respective national states. They were germane to the formation of those state and as one of the founding peoples, they exist as constitutional entities.

In their own graphic terms, as they invariably put it, they were born of the earth mother.

Indigenous law is the same. Like the common law it arises from the earth too. It requires no Parliamentary validation for judicial recognition.

Increasingly we are coming to see that constitutions arise in the same way. Be it the English, French or American, each is a product of its own history and particular circumstances. Now the Canadians would acknowledge such roots on the repatriation of their constitution, with proposals for an order of aboriginal self government.

As Te Kooti was fond of saying, citing the psalmist,

Truth springs out of the earth

And righteousness looks down from heaven;

Today the church Te Kooti founded is represented in certain elders including Sir Monita Delamere. Sir Monita added, for Hui Manawhenua, in 1990,

Ko te mana kei a tatau ano, he iwi hoki tatau.

The authority is in ourselves - we are a people.

These insights from ancient and modern Ringatu leaders assist the international development of an indigenous peoplesÕ jurisprudence.

For few branches of law are so mixed with power politics as that governing the standing of indigenous people in relation to the State. Here the law may be seen dispassionately, as having little to do with fairness and more with the maintenance of political power over those whose claims threaten the stateÕs control of the countryÕs resources. In such a highly political context, justice threatens to become the servant of power; but in an emerging constitutional approach, apparent in some dicta in the New Zealand Court of Appeal for example, we are reminded that the ultimate truth is in fact the power of justice. I suspect that Te Kooti was driving the same point, when, in the fact of state military oppression, he found accord with the psalmist.

Thus, the late Eddie Mabo was an Australian Torres Strait Islander who sought recognition of a legal right to certain property inherited from his ancestors. In 1992, seven judges of the High Court of Australia wrote lengthy decisions to declare in his favour. The case has been celebrated as

a landmark.

Indigenous people may wonder at the celebration. The right of people to own their own property is so basic to most democratic law that only its denial would ordinarily attract attention. Yet celebrated it is, and this for the reason that until then, land rights had been denied Australian Aboriginals.

Previous legal opinion had considered the aboriginals so lacking in society as to be legally non-existent,. Mabo reversed this. The Aboriginals are now perceived as having always existed, and as human beings, capable of havings and owning land. Thus they have land rights, but these they enjoy, according to this same law of aboriginal title, only for so long as it can be said that the State has not by some action or other, taken those rights away. (ÒExtinguishmentÓ is the usual legal word for this. It recently achieved some interest in New Zealand with respect to its application not to land rights, but to the settlement of fishing claims.) On MaboÕs remote island off Australia, it could not be said that aboriginal land rights had been extinguished, and so Mabo enjoyed legal recognition of his ancestral entitlement.

Meanwhile Delgamukw of CanadaÕs British Columbia was plotting a similar action to that of Mr Mabo in Australia - at about the same time, but without the same success. The British Columbian High Court held that such rights to own property as Delgamukw and his people may have had, assuming they were capable of having any at all, were extinguished simply by the assumption of British sovereignty some long time ago, and the passage of inconsistent State laws.

Despite the different results for the immediate plaintiffs, the overall consequence for the aboriginals they represent, is the same. In both cases, the native claimants challenged the CrownÕs right to resources, which, if upheld, portended large consequences for the country as a whole. The effect of the decisions is to guarantee the land rights not of the aboriginals, but of the State. Aboriginals have land rights (in MaboÕs case), or may possibly have had land rights (in the case of Delgamukw), but cannot challenge the unfettered power of the State to simply take those land rights away, which, it appears, the State has already done, in British Columbia, and which it has probably done, for the greater part by far, of Australia.

These cases did not arise 50 years ago when our eyes were still dimmed. Both were decided in the last two years. Yet they appear repugnant to modern human rights laws, when the Courts can regard property rights as capable of such arbitrary extinguishment, without proof of purchase or essential public work, in the usual way. Few people, possessed of effective voting power, would tolerate such an intrusion on their civil and political rights to retain their own properties. No government would withstand the outcry. But indigens are a political minority.

The decisions then, illustrate not justice in the broad sense, but the maintenance of State power by the judicial branch of the State. They favour the political convenience. They are built not upon justice but the politics of power.

In New Zealand, Maori had the benefit of the Treaty, a document of high constitutional import as our founding national charter but one that historians consider, became increasingly inconvenient to the settler government. The subsequent judicial finding, that the Treaty has no status in the domestic law except to the extent that Parliament provides for it, represents the received legal position in New Zealand to this day. Again one may hear the ring of convenience, not the resounding chord of justice. Maori learnt last century, moreover, what Mabo and Delgamukw have only just found, that the CrownÕs claim to the ownership of any land cannot be challenged by Maori in the courts. The CrownÕs acquisition is an act of state. The Courts must abide the CrownÕs simple declaration that it holds. Indeed it has been statutorily provided that the Maori Land Court cannot investigate the ownership of land without the CrownÕs say so (see s155, Maori Affairs Act

so much imported, but arise from the countryÕs own historical events and circumstances. Like the psalmists depiction of truth, they spring from out of the earth. Nor are they entirely dependent upon Parliament writing out the words. They arise too, from the common law.

In the New Zealand Treaty cases described, the President of the Court of Appeal has left a thread hanging. The place of the Treaty in the New Zealand constitutional system has been left open, he has said, and the foundations of the New Zealand constitutional system remain unargued. The question is whether the New Zealand courts will eventually pick up the thread and weave it into an autochthonous legal fabric.

1990 STOUT CONFERENCE - TE TIRITI O WAITANGI: ONE TREATY AMONG OTHERS?

STOUT RESEARCH CENTRE, VICTORIA UNIVERSITY OF WELLINGTON, 31 AUGUST 1990

SESSION ONE THE TREATY IN MAORI SINCE 1840

Chief Judge Durie1

SCOPE

This paper introduces the Treaty of Waitangi, its purpose and terms. It considers the susceptibility of the Treaty to competing constructions by different groups and dwells more particularly on its reception by Maori.

No conclusion is drawn on whether the Treaty is unique or but one of many of similar kind from the imperial past. That is left to the panel session at the end of the programme after other treaties have been examined.

THE TREATY OF WAITANGI

As opening speaker it falls to me to introduce New ZealandÕs treaty, and though they be well known to New Zealanders here, to explain its purpose and terms.

Treaties are agreements between independent sovereignties. The Treaty of Waitangi was an agreement between the British Crown and the sovereign Maori tribes 150 years ago. There has been a substantial Maori opinion that it was intended to effect some sort of alliance. The words Acompact@ and Apartnership@ have recently been used to describe it. It was called a Treaty because of the particular status of the parties. The British Crown had formally acknowledged the independent sovereignty of the Maori tribes since 1836

The precise terms of the Treaty are printed in a footnote2. You will observe their brevity. Three short articles secured governship for the Crown, autonomy for Maori and citizenship for all. The articles must be read with a preamble predicting the arrival of many settlers and the need for peace and good order, and in the context of an epilogue which serves to remind that, somewhat like Oriental transactions, it is founded not on legalism but on a philosophy of good faith.

The succinctness tells of how the Treaty is directed more to principle than detail. It is not
unusual for statements of important principle to be comparatively brief, like the Universal Declaration of Human Rights or for that matter the Ten Commandments. The Treaty of Waitangi is briefer again prescribing no more than the broad principles for a joiner. It has none of the detail of a business contract. For some that is its weakness while for others it is its strength.

Two more features need special mention. The first is that the Treaty was in Maori, signifying that it must especially be seen through Maori eyes3. It was drafted by the English, in English and then translated to Maori.

The second is that, unlike Africa, Asia, the Pacific and the Americans that have many treaties, we have admitted to only one (although to continue some trans-Tasman rivalry, we are at least one Treaty ahead of the Australians)4. We acknowledge only one because in the Treaty as seen from the Imperial view, Maori ceded sovereignty. It follows that later transactions between the tribes and Crown agents could not be called treaties. They were called Deeds. Similar dealings between Indian tribes and the government in USA are called treaties however for there tribal sovereignty was maintained American treaties are thus directed to dividing districts and apportioning

jurisdictions between the sovereign tribes and the Government without affecting the independent status of the parties. The Treaty of Waitangi has been differently seen. Is has usually been called a treaty of cession.

How Maori viewed the Treaty at the time it was signed is necessarily speculative but it has not generally been seen by them as ceding sovereignty. Such record as exists of what Pakeha thought Maori to have said, points naturally to a range of opinion and expectations5. From the Maori text however, read in light of the culture and the people=s subsequent conduct, it is doubtful Maori saw themselves as ceding sovereignty, or of understanding what that culture laden concept meant. It seems more likely Maori saw themselves as entering into an alliance with the Queen in which the Queen would govern for the maintenance of peace and the control of unruly settlers, while Maori would continue as before, to govern themselves6.

Courts and politicians now characterise the relationship as a partnership, denoting the joining of distinct persons in common enterprises for mutual gain7. Whatever the historians view of that, it at least seems clear that Maori were keen to establish a working relationship with the Queen and her people. To have Pakeha in the district was seen as promoting the economy, influence and prestige of the tribes. It was nothing like a treaty of surrender. It may have been rather like an agreement to respect the integrity and authority of each other, as was, and still is, the essential element of Maori customary alliances. To put it another way, it seems doubtful having regard to the Maori character that Maori would have accepted any treaty that was thought to diminish their own mana or status8.

In the second article the English treaty proceeds to recognise the inherent land rights of the indigenous people. This has been seen as a simple statement of the common law rights of native people then prevailing9. In my view however, the Maori text goes beyond that. By guaranteeing instead the tino rangatiratanga (full authority) of Maori in respect of their lands and villages it added to the common law position rights of development and self-government10. In this respect the Maori Treaty does more than affirm old law. It is also the harbinger of some of the more important provisions of the draft Universal Declaration of the Rights of Indigenous Peoples11.

There is then a provision that Maori would have the same rights as the people of England. I presume that was meant kindly as conferring an advantage but strangely counsel appearing before the Waitangi Tribunal have yet to argue its effect. In one respect it may be seen as presaging the United Nations covenant on civil and political rights. I simply wonder what sense Maori made of it however since presumably, they have little or no knowledge of the rights then applying in England.

Quite apart from the different opinions of colonial authorities and Maori on the meaning and interpretation of the Treaty=s terms, we have also to consider the development of subsequent opinion about the Treaty.

THE TREATY OVER TIME

Scholars of many disciplines contribute to our understanding of the Treaty. Whether they be trained through western institutions or through the tribe, historians, anthropologists, linguists, lawyers and political scientists have each many perspectives to provide.

Our understanding of the Treaty has been constrained however through being closeted in legal cupboards for most of its 150 years. The legal position was soon established that the Treaty, being a treaty between independent sovereignties, is not part of the domestic law except to the extent that Parliament has provided 1213. Parliament however, has not provided for it except for particular purposes of limited circumstance. What historian, anthropologist, linguist or practising lawyer of earlier years then, would have sought or devote much study to a Treaty that seemed doomed at the time to have no practical implication for the country=s future?

The legal opinion particularly stymied the exposure of a Maori view. If the Treaty was irrelevant, through non-ratification, any Maori opinion was regarded as doubly so; for another legal theory, reflecting a particularly Euro-centric view, was that the acts and attitudes of only Acivilised@ nations mattered, which meant of course the European states, the natives being assumed to be uncivilised1415.

In any event the Maori view was generally unknown outside Maoridom. Generations grew up even unaware that the Treaty was in Maori. Most people, I suspect, knew little more than that there was a picture of a Treaty signing on the ten shilling note.

Yet in our time the Treaty has come to a pre-eminence in the legal, political and social life of the country. That could not have happened in my view, but for the most dogged determination on the part of Maori never to allow the Treaty to slip from view and despite the aspersions cast upon it by lawyers. It is a remarkable story, well worth the telling, especially in this 150th year of the Treaty. It should dwell for example, on the deeply moving Treaty advocacy of such 19th century politicians as Hone Heke, Taiaroa and Wi Parata and this century of Carroll, Ngata, Buck, Pomare and Henare. It ought not to be forgotten by those who would do away with the Maori seats either, that the Maori Members kept the conscience of the Treaty before the House in the face of public hostility, and in a way that no one could have done while representing a general constituency. It should then be remembered too that it was eventually the member for Northern Maori who introduced the Treaty of Waitangi Act 1975 to establish the Waitangi Tribunal and the member for Western Maori who amended the Act to extend the Tribunal=s powers to consider claims back to 1840.

The story may then be told of the great pan tribal treaty gatherings that began under Tuhawere of Orakei in the 1860s and 1870s with over 200 chiefs attending, even in those early years, from throughout New Zealand. These were followed by hui at Waitangi with Parore throughout the 1880's and in gatherings all over New Zealand of the Kotahitanga Movement starting at Waipatu, under Tomoana, in 1892. Maori Treaty hui have since been regularly held, through to last May16.

Barely a year went past too without at least one Treaty based petition to Parliament or one Treaty based case to the Courts, despite the costs and the fact that the cases were rarely successful. I consider however, that Maori knew they occupied the moral high ground, and had an unswerving belief that that which to them was tika, or proper, would eventually prevail. I think it was also appreciated that the lack of formal recognition of the Treaty was not primarily a problem for Maori. Despite the legal and political opinions, the Treaty was a fact that could not be cancelled out. If neither the Queen=s judges nor her cabinet ministers could bring themselves to uphold the solemn promises undertaken on the Queen=s behalf, then they diminished not Maori honour but their own. Every petition and every court case that failed, also succeeded in driving that point home.

Did Maori opinion about the Treaty change throughout this time? In my view it did. The Treaty became in the course of the struggle a sacred covenant, equating the promises of God and a taonga, a treasure passed down from revered forebears.

I can find no evidence that those opinions were held at the time of the original signings and there is some evidence to suggest they were not, but that does not detract from the subsequent opinions in my view. As with saints, the value of a noble compact may be more apparent to a later age.

Some views clearly changed. Te Wherowhero of Waikato declined to sign the Treaty, yet subsequent Maori Kings were to be its most staunch supporters, taking the Treaty petitions to England twice last century and again in 1914. Te Heuheu Tukino did not sign either, yet it was his successor who took the leading case to the Privy Council in Britain in the Treaty=s 100th year, to

have the Treaty recognised17. Nor did Te Arawa sign yet it is their proud boast to have fought with the Crown in every war from those in New Zealand in the 1860's to those in Europe in World War II18.

THE TREATY IN CONTEXT

The maintenance of a Maori treaty position, against official and legal obstacles, came to be aided, and abated in a sense too, by several academic disciplines. Though I do not imply collusion as well, their combined opinions came to overthrow the old regime. This sesqui centenary is a proper time to acknowledge their achievements.

The historians reconsideration of the record to give bicultural views has reshaped our understanding of ourselves throwing light not just on where we have been, but on where we might best be heading. These histories may or may not have dwelt on a Maori understanding of the Treaty, but they have clarified how past events and monumental occasions have each different meanings for different people and that each has integrity and is valid in its own context. The consequential exposure of particular Maori views has had enormous impact.

To name some of the historians involved would offend too many. I can refer however, by way of illustration, to other speakers here. I think it fair to say Professor Sorrenson has won some acclaim for capturing what for many Maori is the essence of their modern history, that it is marked by a dogged determination to uphold tribal authority, identity and autonomy against every obstacle. In addition, Professor Sorrenson has related that to a particular Maori view of the Treaty. Certainly there has been debate about the value of fish and the price of land but first and foremost the Treaty has been about authority - that which the Treaty and young Maori call >rangatiratanga=, and older Maori call Amana Maori motuhake@19.

There are others to be acknowledged, anthropologists, sociologists, ethnologists and linguists, whose discussions of ancient and modern Maori social structures have enabled us to rethink the capability of contemporary social and political institutions to accommodate Maori people. They have added too, to an appreciation of the cultural mores affecting the Maori understanding of the Treaty and a variety of land transactions as well. I would not name individuals except that at this marae of this University, it would be churlish not to mention Dame Joan Metge and her outstanding promotion of cross cultural awarenesses; and, because it is our Maori way to acknowledge the recently departed, I mention too the late John Rangihau. Te Rangihau=s explanations of the Maori psyche were exceptionally perceptive. I recall for now, his discourse on Arangitiratanga@ as appearing in the Treaty and why for him this coined word meant not >chiefly authority= but >the authority of the people=20.

Regrettably, the impact of anthropologists and sociologists in New Zealand has yet to be made in the development of indigenous law, a law that in the opinion of some Maori is also Treaty guaranteed21. The contribution of these disciplines to the development of custom based law in Vanuatu, New Guinea and amongst the aborigine of Australia has yet to be emulated here. We should welcome to this conference then the presence of speakers and commentators from those places. You may appreciate that as a Judge of the Maori Land Court I cannot be other than acutely conscious of the injustice that unless when the law of one culture is imposed on another without amelioration and why community based legal systems are important, in the judicial administration of Maori lands no less than in other areas.

In New Zealand however, we have had the benefit of a most significant and advanced discourse on the maintenance of a custom based law, though not from an anthropologist, but from an historian, and not recently but a while ago. I refer to the work of another speaker here, to Alan Ward=s A Show of Justice. For me personally, his text is not just a history book but a historical landmark in its own right.

It was a while ago too that Dr Ausubel wrote the Fern and the Tiki, drawing attention to the wide disparity in Maori and Pakeha perspectives. We are more conscious of the different viewpoints today and more determined to reconcile them, but I must mention here the voluble but valuable criticism of the emerging treaty jurisprudence in New Zealand, from many political scientists.

COMPETING TREATY CONSTRUCTIONS

So it is then that different disciplines contribute in district ways to our understanding of the Treaty and other past transactions. For reasons of their own, each has its separate techniques and methods for reaching conclusions.

The law is one such discipline. It has its own rules for the interpretation of treaties. Despite its past and present pre-eminence in fixing the Treaty=s fate however, the legal approach is imperfectly understood by many lay commentators.

Historians it seems to me, give meaning to an amorphous mass of facts. They see the patterns and thus locate the essential principles and the developing societal norms. For lawyers operating in the lego-political world of treaty interpretation, the process is the other way around. They assess the facts against norms already prescribed, that is to say, against a given law. The alternative approaches give different conclusions.

Like all legal rules for construing documents, the rules of treaty construction are directed to ensuring fairness, especially where it appears the parties may not have been equal. They are also directed to the maintenance of law and order and thus, the integrity of the state. The consequence is that legal opinion in this area, as also with constitutions and international declarations, is substantially directed to upholding both the security of the nation and the natural rights of its members.

Thus one may ask, was the Treaty honestly intended. The historian may search for the facts, in a pile of Colonial Office papers. No decent lawyer however would deign to be so muddied. To the extent that the law allows the lawyer to look at the Treaty at all, for reasons of Parliamentary sovereignty, the lawyer would conclude that no complexion should be placed upon it that calls into question the honesty or integrity of the Crown or that demeans the solemn undertakings made on the Queen=s behalf. The Crown=s intent will be presumed to have been proper. So it is that on this particular occasion, whatever may have been the fact will be less important than recourse to the essential principles for the maintenance of the state=s integrity.

Similarly, if the Maori text alone applied, a question would arise whether fisheries were protected, for the Maori text does not specifically mention them. An historian may seek out references to fisheries in the record of the treaty negotiations to determine whether they were meant to be there. The lawyer would more likely inquire of the importance of fishing in the Maori economy for no practice essential to a people=s survival will be deemed to have been jeopardised by treaty, unless the Treaty expressly so provides. The state is thus presumed to be anxious to protect the interests of its members and not to countenance any restriction on their chances of survival.

So it is that lawyers have seen the Treaty as a document of fundamental constitutional importance22, where lay observers might reserve judgement in the light of some settler opinion that the Treaty was a sham23. The preamble may serve to remind a lawyer that even today one cannot occupy the territory of another without a prior arrangement24, while others will in reliance on the factual circumstance will contend that treaty or not, the settlement would have happened anyway. Similarly the lawyer may see in Article 1 the authority for the government to govern25, in Article 2, a declaration of the natural rights of indigenous peoples, and in Article 3, a declaration of the civil and political entitlements of all people. Others again will not see beyond the actual words.

It needs to be understood that lawyers will deem what historians cannot countenance. It is unkind to call it myth making, but lawyers will admit to legal fictions and some to a role in nation-building. I think it also helpful to know some of the more particular legal rules for the interpretation of indigenous peoples= treaties and thus to understand better, some conclusions of the Waitangi Tribunal and of the general courts.

> 1 Treaties should be interpreted in the spirit in which they were drawn taking into account the surrounding circumstances and any declared or apparent objects and purposes. In other words a broad and liberal interpretation is required and it is appropriate to read the Treaty in the light of such other things as Lord Normanby=s extremely significant instructions.
> 2 The party=s understandings of the Treaty may also be inferred from their subsequent conduct and practice.
> 3 Treaties with native groups should be construed in the sense in which they would naturally be understood by the native people. In North America this applies even to treaties in English and has resulted in some unexpected interpretations. Thus provisions to supply a schoolteacher and nurse on a reservation last century, have been taken to require in this century the delivery of a full educational and health care system.
> 4 Where there is doubt as to a meaning, the Treaty will be construed against the drafter, or in this case against the English view.
> 5 The custom and practices of the native people, their history and oral traditions are also relevant in determining a native treaty view.
> 6 Oral promises made when the Treaty was signed may also form part of the Treaty especially when one party is reliant on an oral tradition26.

Many do not appreciate that the Treaty of Waitangi is thus not limited to the written text as they quibble over particular words. In this regard, Maori appear better informed. In the Reo Maori (Maori Language) Claim Northern Maori drew attention to the Governor=s Treaty promise that Maori customs, with other religions, would all be respected. It was described to the Tribunal as Athe fourth article@27.

Another verbal promise was to investigate prior purchases and to return lands unjustly held. That undertaking is now relevant to a claim currently in hearing that the lands unjustly acquired were not returned to Maori but kept by the Crown28.

A MAORI UNDERSTANDING OF THE TREATY

In the Motunui-Waitara Report29 the Waitangi Tribunal considered

> A Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place.

The Court of Appeal in NZ Maori Council c Attourney-General30 came to much the same conclusion. ÒWhat matters is the spiritÓ were the words of the President, with epio-brevity. Again the Waitangi Tribunal described the Treaty in these broad terms

> The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. It made us one country, but acknowledged that we were two people. It established the regime not for uni-culturalism, but for bi-culturalism. We do not consider that we need feel threatened by that, but rather that we

should be proud of it, and learn to capitalise on this diversity as a positive way of improving our individual and collective performance.

The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract31.

The Court of Appeal in the case just described, had much the same opinion, the President again observing

The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.

The Maori and legal approaches have much in common. Both look to the TreatyÕs broad purposes and objectives and are not unduly pre-occupied with the detail of the words. While Maori may see a sacred covenant and the lawyer a document of fundamental constitutional importance, there is a sense in which they see the same thing.

This seems hardly surprising in the Maori case since presumably in 1840, much more attention would have been given to the spoken words and the general statements made than to the details of that which was written.

The Maori and legal approaches have this in common that they look to the broad purposes and objectives.

Quite a deal has been recorded of Maori discussions about the Treaty but there is little record of a debate over the TreatyÕs precise meanings before the emergence of those academically trained. The earlier debate is mainly about broad concepts, like the maintenance of Maori authority and status. In that respect the position was clearly seen. It was put this way by Te Heuheu of Tuwharetoa in addressing the Select Committee of the House of Representatives on the Native Lands Settlement and Administration Bill in 189832.

What we understand and what we have always understood is this, that Section 2 of the Treaty of Waitangi assures to the Natives all their rights, title and the management of their own affairs

In fact there seems to have been some ignorance of the precise terms. In the well recorded Orakei conferences for example there is much talk of the importance of the Treaty with allegations of government breaches, especially in relation to fishing and land-taking but still no discussion on the precise meaning and application of different parts. There is however, quite a number of references to things not actually there. There are claims by right of the Treaty to the ownership of particular harbours and seas for example though the Treaty does not mention the waters. Yet, to my mind, Maori would have seen the seas as being theirs, having regard to their parabolical way of thinking (kupu whakarite). The Treaty protected their traditional authority. Their authority extended to the seas. It matters not if the Treaty said land but not seas. That is a mere trivia. Authority (or rangatiratanga) was the key and that was clearly understood.

This recourse to important principle and not to the precise words, has had special value in enabling Maori to conceptualise, far better than others I would contend, the application of the Treaty to circumstances not in contemplation when the Treaty was signed and has enabled the Treaty to develop as a living document relevant to all ages. But that is a point I would take no further at this stage. Suffice it to say, the Waitangi Tribunal is about to commence an inquiry into a claim that there is a treaty right in respect of the airwaves and radio frequencies33.

The main task is still to capture the spirit. A claim for the protection of the Maori language succeeded before the Waitangi Tribunal on the ground that the language was a taonga (or treasure) to use the TreatyÕs very word. That was but one ground however. The Treaty was directed to ensuring a place for two peoples, the Tribunal found, and it questioned whether the broad objectives of the Treaty could be achieved if there was not a recognised place for the language of one of the partners34.

Recent Maori discussions has focused more on the TreatyÕs words. Some consequential criticism of the TribunalÕs statutory requirement to consider the principles of the Treaty may be misguided however. The criticism may be better directed not to the statutory requirement but to the identification of a principle so as to water down a clear term. I think it is that that Maori most fear. One must seek the general principle, if the Treaty is to be relevant to new circumstances, as the Broadcasting claim may prove, but that ought not to be seen as a license to rewrite the Treaty so as to circumvent provisions that might subjectively be regarded as inconvenient35. In that respect, I do not think it was a good idea for the Crown to publish a list of Treaty principles by which it would be guided, firstly because it diminishes the importance of the terms, which is wrong, and secondly, because recourse to principles should be mainly for the purpose of dealing with circumstances not covered of contemplated when the Treaty was signed. The principle must then be seen in the circumstances of the particular case to which it was applied.

Modern Maori discussion has focused also on the sovereignty issue, which of course it should, but the depiction of kawanatanga (Crown governance) versus rangatiratanga (Maori authority) as a contest, to my mind misses the point. There is and always has been, some tension between the two, and indeed there has been outright warfare in earlier years over this very issue. Kawanatanga stands opposed to rangatiratanga in this depiction and yet the essence of the traditional Maori view has been not to promote one above the other but to provide adequately for both. That I thought was classically expressed by Paora Te Ahura in 1857 with reference to the establishment of a Maori King. He left us with the image of

> The [Maori] King of his piece, the [English] Queen on her piece, God over both and love binding them to each otherÓ36.

I would conclude by drawing attention once more to the contributions of many disciplines to our understanding of New ZealandÕs founding treaty, and by thanking the Stout Research Center for providing us yet again with a living example of the benefits of its highly acclaimed multi-disciplinary approach.

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1 Chief Judge Durie, BA LLB, LLD (honoris Causa) Wellington, is Chief Judge of the Maori Land Court and Chairman of the Waitangi Tribunal. He is a member of Ngati Raukawa and Rangitane.