THE TREATY OF WAITANGI & THE CONSTITUTION

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1 Confronting the reality

To understand law, especially constitutional law, it is essential to understand its context and the people who make, administer and are affected by it.

The first theme of this address is that the New Zealand constitution, of which the Treaty is the founding document, is based on two cultures - those of Maori and Pakeha. The role of Maori, until recently seen as irrelevant to the constitution, has increasingly, particularly within the last decade, been seen as critical to it and to its future. Hence the title of this seminar. The second theme is the need to face that reality.

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2 Sovereignty and the concept of Aboriginal rights

In *R v Côté* (1996) 138 DLR 385 at 405 Lamer CJ C adopted the following statement by Professor Brian Slattery in *Understanding Aboriginal Rights* (1987) 66 Can Bar Rev. 727 at 737-8

The doctrine of aboriginal rights, like other doctrines of colonial law, applied automatically to a new colony when the colony was acquired. In the same way that colonial law determined whether a colony was deemed to be 'settled' or 'conquered', and whether English law was automatically introduced or local laws retained, it also supplied the presumptive legal structure governing the position of native peoples. The doctrine of aboriginal rights applied, then, to every British colony that now forms part of Canada, from Newfoundland to British Columbia. Although the doctrine was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application in the colony.

The doctrine was part of the English common law in its broader sense, to the protection of which Maori as British subjects became entitled in 1840, even apart from the provisions of Article III of the Treaty.

Aboriginal rights include rights over land and water, described by the Court of Appeal in *Te Runanganui o te Ika Whenua Inc Society v A-G* [1994] 2 NZLR 20 at 24 as

... usually, although not invariably communal or collective ... they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes ... it may be that the requirement of free consent has at times to yield to the necessity of the compulsory acquisition of land or other property for specific public purposes which is recognised in many societies; but there is an assumption that, on any extinguishment of the aboriginal title, proper compensation will be paid ...

But aboriginal rights extend beyond property rights. It has been observed that indigenous customary law is

difficult to define in non-indigenous terms because it covers the rules for living and is backed by religious sanctions. It also prescribes daily behaviour.

Except to the extent of cession (or in other circumstances conquest) elements of an original sovereignty may remain. That is why in the USA where cession has not fully occurred murder committed by one Cherokee Indian upon another within the jurisdiction of the Cherokee nation is a crime not against the United States but against that nation; and why a tribe may impose a severance tax on oil and gas removed from its reservations; although the tribal writ does not run against outsiders. The position is summarised by Professor P P Frickey

[A]lthough sovereignty created by the United States Constitution is indeed dual [viz Senate and House of Representatives], sovereignty within the United States is triadic: American Indian tribes have sovereignty as well ... in a variety of important ways, including having a local police power over their members as well as the authority to regulate non members in certain respects (relating to their reservations).

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3 The initial phase in New Zealand- the period to 1840

In the period prior to 1840 the Colonial Office was well aware of these facts of international law. Three Imperial statutes recognised New Zealand's independence; following the selection of the new Confederation flag on 20 March 1834 it received a 21 gun British naval salute. Hobson's instruction was to secure a cession of sovereignty

of such parts of New Zealand as may be best adopted for the proposed colony. It was recognised that this cession might be difficult.

To the eye of a Pakeha lawyer the English language version of the Treaty effectively expresses the purposes for which it was tendered to Maori. Its form is apt to perform the fundamental task, as the Colonial Office perceived it, of passing sovereignty from Maori to the Crown. It further contains various safeguards which were the subject of James Stephen's draft of Lord Normanby's instructions to Hobson.

Given the Aboriginal rights that Maori would possess in accordance with settled common law principle there was no need for the promises of Articles II and III except perhaps for the pre-emption provision of the former. But constitutional law is not only about law but about politics and power. Stephen was well aware of the tragic history of the settlements in North America and Africa, later expressed in a Times leader published in England at the height of the land wars

There is, indeed, we fear, little hope for [the natives of New Zealand]. Ultimately the greater energy, enterprise and we must add, we are afraid, the unscrupulousness of the colonists cannot but eventually supplant them, and gradually to dwindle before the advance of the Europeans will probably be their happiest fate. But while an irresistible law of nature is producing this melancholy result the only tolerable condition for the Maories will be to leave in peace under the equal protection of our Government ...the Maories would fare badly if they were left to the tender mercies of the settlers ...

And of course the Colonial Office was not the only player. In New Zealand constitutional history there have been four others of critical importance, some of them overlapping. They are

- Maori
- the missionaries

- the colonial settlers
- the later settlers and the descendants of settlers, including the current generation of Pakeha.

At 1840 the power of one crucial current player - the non Maori New Zealander - was relatively insignificant. It is anachronistic to describe the Pakeha then resident in the country as a Treaty partner of Maori. Their partner was, and was seen to be, the British Crown.

The Colonial Office was under pressure from Wakefield and his adherents demanding a more interventionist policy. Dandeson Coates, the lay secretary of the Church Missionary Society of which Stephen and his Parliamentary Ministers were members, sought to leave the resident missionaries a free hand for evangelisation, emphasising the damage wrought on Aborigines in British settlements elsewhere. The total result was a departure by the Colonial Office from its reticence about involvement in New Zealand and a reluctant instruction to Hobson to secure such cessions as could be achieved. His work at Waitangi was succeeded by further signing ceremonies at various other places throughout New Zealand. The result of the signings was to provide a basis for the subsequent formal acts described by Somers J in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 690.

Even from the standpoint of the Colonial Office there were certain differences between the plan and its realisation. Hobson was not altogether unfamiliar with New Zealand. He had visited New Zealand as Captain of the Rattlesnake in 1837 and reported to the Government. But he was neither Maori scholar nor lawyer. He relied for preparation of a Maori translation on the missionary Henry Williams who advocated the intervention of the British with a substantial sanctioning force. The ineptness of the translation has been a source of grievance to Maori ever since.

Further, leading Chiefs including Te Whero Whero of Waikato and Te Heu Heu of Tuwharetoa refused to sign.

It is not for a member of another culture to offer comment on what the Maori language version meant to the Maori signatories. Professor Sir Hugh Kawharu translates the First Article as

The chiefs of a Confederation and the chiefs all also [who] have not entered that Confederation give absolutely to the Queen of England forever the Government all of their land.

A footnote adds

there could be no possibility of the Maori signatories having any understanding of Government in the sense of 'sovereignty' ie understanding on the basis of experience or cultural precedent.

He translates the Second Article

The Queen of England arranges [and] agrees to the Chiefs, to the sub-tribes to people all of New Zealand the unqualified exercise of their Chieftainship over their villages and over their treasures all ...

He adds the footnote

'unqualified exercise' of the Chieftainship would emphasise to a Chief the Queen's intention to give them complete control according to *their* customs. 'Tino' has the connotation of 'quintessential'. ... As submissions to the Waitangi Tribunal concerning the Maori language have made clear, 'taonga' refers to all dimensions of a tribal group's estate, material and non-material - heirlooms and wahi tapu, ancestral lore and whakapapa, etc.

It is tantalising to be unable to identify just what these words, with such explanation as was provided by Henry Williams, must have meant to the signatories, 70 years after contact with Cook and following the ever increasing dealing with Europeans that followed. The Dictionary of New Zealand Biography reproduces the famous antithesis ascribed to Nopera Panakareao - at the time of the Treaty

what have we to say against the Governor, the shadow of the land will go to him but the substance will remain with us

and a year later

he thought the shadow of the land would go to the Queen and the substance remain with them but now he fears the substance of it will go to them and the shadow only be their [the Maori] portion.

The astuteness of Chiefs such as Kawiti, who eventually signed the Treaty, and of others who did not must not be underrated; James Belich describes Kawiti's generalship, which requires consummate understanding of what

an opponent is thinking. Judith Binney cites the report dated 5 March 1840 of Father Servant, a French Catholic priest who attended the 5 hour debate at Waitangi on 5 February

the governor proposes to the tribal chiefs that they recognise his authority; he gives them to understand that this is to maintain good order, and protect their respective interests; that all the chiefs will preserve their powers and their possessions.

I do not doubt that the use of the strong word *rangatiratanga* to record what rights would be retained by the chiefs was of quite fundamental importance to the actual decisions to sign. As Belich observes in his latest book *Making Peoples* (page 194)

The notion that 500 Maori chiefs woke up one morning brimful of loyalty to Queen Victoria and blithely gave away their authority is, and should always have been, ludicrous.

Maori historians may debate whether, after 7 decades of increasing European contact, such leaders as Nopera were wholly unaware of the brutal facts of life of European settlement elsewhere. One element of his signing, and of Kawiti's change of mind, may have been the desire to secure the honourable promise intended by Stephen even while suspecting, if not fearing, the results of a European advent seen as inevitable.

But at the least Maori were exposed to a dilemma - to accept or reject submission to some governmental role involving the British Crown, which would certainly be seen as undertaking to deliver on the promise in the preamble translated by Sir Hugh

... Victoria, the Queen of England in her concern to protect the Chiefs and the sub-tribes of New Zealand in her desire and to preserve to them their Chieftainship and their land and to maintain continually also the peace to them and the quiet living ... so the Queen desires to establish the Government so that no evil will come to the people Maori [and] to the European living law without (p 319)

and also that of Article II.

Resolution of the dilemma must have been assisted by the fact of the Crown promises. Professor Brookfield summed the matter up in the words of St Augustine

set justice aside then, and what are kingdoms but fair thievish purchases? Because what are thieves' purchases but little kingdoms?

In taking the *sovereignty* referred to in the English version of the Treaty, the British took more than the *kawanatanga* - governance - of the Maori version but time has passed, and the element of thievish purchase can no longer be corrected by re-creating the old chiefly order or taking the particular measures that might have solved the problem last century ...

But *compensation* for the grievances, however old they may be, is another matter. If legislation one way or another bars individual claims, common-sense morality does not. Thus, though the Pakeha can claim a legitimate place in the country partly under the Treaty, and partly from the passage of time, time does not bar the Crown's obligations to give effect to the Treaty and to remedy things done inconsistently with its principles, by compensating where restoration has become impracticable. (pp 14-16)

There can be no doubt that at the time of commitment of both sides to the Treaty different perceptions were held. The Colonial Office believed that sovereignty had been secured for the British Crown on terms that would provide protection for Maori from the colonists. Maori at the least expected that in return for the pax Britannica they would secure protection of their assets, control over their own affairs, their guarantee of important values, and a significant place in the new society. As time passed and the players changed the differences intensified.

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4 ⌟ ⌟ The second phase- the colonisation period

t this present time of settlements with Tainui, Whakatohea and Ngai Tahu the abuse of Maori by the colonists has assumed sharp focus.

It is not difficult to understand the polarisation that occurred. In 1868 there had been three major Maori victories under the generalship of the chief Titokowaru; that year Bishop Williams wrote

the number of reverses we have received during the last six months is truly astonishing. There have been a great number of them and not a single success to put on the other side. What does this seem to indicate, but that God's hand has been turned against us ... Unless it should please God to check the progress of the natives ...

there will be no settlers living in the country except in the towns.

The Manukau (Wai 8 1985), Ngai Tahu (Wai 27 1991) and Taranaki (Wai 143 1966) reports of the Waitangi Tribunal are among those that have brought the enormity of colonial conduct to public attention. Most extreme, although only in degree, was the raupatu - the confiscation of tribal land following the land wars, themselves sparked by the colonists' greed. The land was greatly prized by the settling colonists. But any student of aboriginal issues, or reader of the Tribunal reports, or the evidence in the *Maori Council* case, now realises that land loss was more devastating than the considerable loss of Maori life.

There is no greater incentive to extreme conduct than fear for self, family and security; and the colonial backlash against Maori is intelligible.

But the colonists' conduct was simply unlawful throughout.

The British Crown, for its part, progressively abdicated the responsibility it had assumed, by action and inaction passing its authority to the very colonists against whose selfish interest the Treaty was supposed to provide protection. Far from delivering on its promise of protection, it weighed in on the colonists' side with military and naval forces.

Its judicial branch, in the form of the Privy Council, took another view. In *Nireaha Tamaki v Baker* [1901] AC 561; (1901) NZPCC 371 the application in New Zealand of the principles of aboriginal title was confirmed, overruling a judgment of the Court of Appeal in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, reversing the decision in the instant case (1894) 12 NZLR 483, and approving the earlier first instance decision of Martin CJ and Chapman J in *The Queen v Symonds* (1847) NZPCC 387. The effect of *Nireaha Tamaki v Baker* was however retrospectively legislated away in 1909. In *Wallis v Solicitor-General* [1903] AC 137; (1903) NZPCC 23 the Privy Council was sharply critical of the Court of Appeal, attracting the celebrated protest of bench and bar of April 25, 1903, reported in NZPCC Appendix p 730.

During the ensuing colonial period Maori rights were, with some exceptions, very much at a discount. In *Hoani Te Heuheu Tukina v Aotea District Maori Land Board* [1941] NZLR 590 the Privy Council held that the Treaty did not give rise to rights enforceable by the Courts. To the new generations of Pakeha the past was of little interest; for Maori their treatment by the Crown remained a burning issue.

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5 The third phase- the present era

The Second World War provided a watershed in terms of Eurocentricity. The loss of Singapore was followed in rapid succession by the independence of India, Pakistan and the other countries of the new Commonwealth. Questions arose whether the conduct of the old Empire had been altogether honourable.

In New Zealand old attitudes took time to change and in many cases remain unaltered.

The enormities that led to the United Nations and its covenants resulted for a time in focus on the individual and individual rights; as a newly independent nation New Zealand acceded to the International Covenant on Civil and Political Rights and its Optional Protocol and to the International Covenant on Economic Social and Cultural rights.

It is the view of some major thinkers such as Thomas Sowell that individual rights are enough; his 1996 Sir Ronald Trotter lecture *The Quest for Cosmic Justice* argues against differential treatment of indigenous people.

So the US Supreme Court recently in *Adarand Constructors v Pena* 115 S. Ct. 2097 (1995) retreated from its decision in *Regents of University of California v Bakke* 438 US 265; 98 S. Ct. 2733 (1978) which had appeared to acknowledge the legitimacy of reverse discrimination to mitigate past wrongs. In *Hopwood v State of Texas* 78F 3d 532 (1996) the United States Court of Appeals, Fifth Circuit, has gone far to eliminate the concept of reverse discrimination.

Increasingly however it is realised that in relation to indigenous issues recognition of individual rights, and democratic processes, are not enough; that de Tocquville's warning about the tyranny of the majority is not obsolete. Lord Irvine QC in a perceptive comment on Sir John Laws' paper *The Constitution: Morals and Rights* [1996] Public Law 622, which offers a moral basis for the English constitution, - reminded the audience that Hitler had secured power by an overwhelming plebiscite.

The rights of indigenous people are increasingly seen as entitled to protection; and from more than one perspective.

One is the development at international law of norms recognising not only individual human rights but also those of minorities and increasingly those of indigenous peoples. New Zealand is still considering its position on the UN draft declaration on the Rights of Indigenous Peoples 1993; the steady trend in all civilised states is to greater recognition of indigenous values. The importance of land, waters and other natural resources to indigenous people is increasingly recognised as not substitutable by money.

The fact that Maori are in no position to secede at international law accentuates the moral responsibility of the Crown.

The leading English international law scholar and judge Rosalyn Higgins, a member of the International Court of Justice, has warned against drawing a sharp line between civil and political rights, which may be seen as true law and economic, cultural and social rights which have long been regarded as moral pieties. There are necessarily differences of degree of a considerable order verging on difference of kind. The former are more readily considered in courts of law; the latter are in general better managed by the Executive which has the opportunity, skills and experience to weigh competing priorities for valuable public resources.

But there are certain minima which in *Wednesbury* language it would be irrational for a state to infringe when allocating resources. In present conditions New Zealanders generally have increasingly accepted and then supported the allocation of public funds and assets to provide a Maori economic base and tackle the social statistics in the fundamentals, health and life expectancy among others.

No single initiative, whether allocation of money or any other will meet the requirements of the Treaty, of international legal norms and the common humanity which underlie each.

That indigenous rights are different is recognised even by a member of Nozick's school of political philosophy David Lyons in his *The New Indian Claims and Original Rights to Land* . His essential thesis even on Nozick's Lockean, approach which is inconsistent with the basic premises of the welfare state, is that wrongful dispossession of property requires undoing past damage to indigenous peoples.

Another factor is the increasing maturity of the former colonial societies now prepared to look honestly at the past, permitting decisions such as *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 1421 ALR 129. It overlaps with increasing recognition that the concept of human dignity is a fundamental human right: see *State v Makwanyane* [1995] 1 LRC 269 (the South African death penalty case) and Avishai Margalit *The Decent Society* (Harvard University Press).

In New Zealand we have our own recent history. The land march which led to Matiu Rata's Treaty of Waitangi Bill and its enactment in 1975 resulted in the Tribunal's reports which for the first time brought facts well known to Maori to the attention of the wider New Zealand community. The Court's responses in the *Maori Council* case [1987] 1 NZLR 641, the forests case [1989] 2 NZLR 142 and the coal case *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, led to Parliamentary action, in enacting the Treaty of Waitangi (State Enterprises) Act 1988, the Crown Forests Assets Act 1989, the Crown Minerals Act 1991 and to the settlement implemented by the Waikato Raupatu Claims Settlement Act 1995.

The Tribunal's *Muriwhenua and Ngai Tahu* Fisheries Reports resulted in Greig J's 1987 judgments restraining further use of the quota management system, the Court of Appeal's fisheries decisions including *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641, and the Maori Fisheries Act 1989 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The Maori Language Act 1987 recognised that language as a taonga. Litigation in the New Zealand Courts in respect of radio and television frequencies to protect the language culminated in the decision of the Privy Council in *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, which records the obligation and capacity of the Crown to conform with Treaty principle in relation to State owned enterprises, including Television New Zealand. The progressive development of Maori radio and television, with all its continuing difficulties, is the latest stage.

A glance at the statute book evidences the change in political attitude in recent times. I list, without elaborating upon, the Conservation Act 1987, the Resource Management Act 1991, the Crown Research Institutes Act 1992, the Education Act 1989, the New Zealand Railways Corporation Restructuring Act 1990.

Behind these are wide ranging changes to practice in all aspects of the public sector.

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6 Where to from here?

The last decade has been dealing with specifics and teaching painful lessons of what has gone wrong, with some real effort at recompense.

While in broad conceptual terms there is some value in the approach of the law of contract - where would Maori be had the Treaty been honoured?, such approach is simplistic. If one were dealing merely with legal rights the short and brutal answer would be available that any period of limitation has long passed. Moreover, as well as Maori values and interest there must be brought into account those of non Maori - both the predominant European settlors and New Zealanders of other races and cultures as well.

To see the whole picture it is necessary to move beyond rights, to the values emphasised by Chief Judge Durie in his recent Guest lecture "*Will the Settlers Settle?*" and by Sir John Laws. It is simply unjust that Maori having accepted and substantially performed their Treaty obligations, other New Zealanders should avoid responsibility for the Crown's breach. The Maori perception that generosity of spirit brings inevitably in its train equivalent benefits suggests an atmosphere in which to operate. The succession of bold initiatives by the Crown and the settling tribes to put historical grievances behind illustrates the process at work.

It is not however enough to advocate generosity of spirit; structures and systems are also needed.

Fair minded people will often hold polar views on important topics, as Sir Isaiah Berlin has taught. Differences as to the search for solutions will arise and have arisen; it is the task of the Crown to put in place effective means of dispute resolution that will have the confidence of all New Zealanders.

The essential lesson for both the legal profession and the wider community is that there is material difference in the values and perceptions of Maori from those of European New Zealanders; that the basis of our presence here is the provision of a full and fair role for Maori and Maori values throughout the community.

To move towards that requires great care, judgment and wisdom on the part of all concerned.

The *Ika Whenua* decision points the way. In it the Court of Appeal in substance acknowledged that, as the US constitution is triadic, the New Zealand constitution is duadic. As well as the predominant Pakeha legal constructs by the judges of the common law and by Parliament of legislation there is a residual set of Maori norms to which it is the duty of the Courts to give legal effect insofar as they have not been ousted by the Treaty of Waitangi's cession or by statute: except where the original cession and subsequent statutes provide a bar the courts will give effect to Maori aboriginal rights.

Even where Parliament has intervened the Treaty of Waitangi retains its influence. It does not do so directly: the principle of the *Aotea Maori Land Board* case is that the Treaty cannot be sued upon simply as a Treaty.

But its influence is another matter. In its jurisprudence relating to the New Zealand Bill of Rights Act 1990 the Court of Appeal has demonstrated the importance of its unentrenched provisions both in construing other statutes and in developing the common law. In its recent report **Crown Liability and Judicial Immunity: A Response to *Baigent's Case* and *Harvey v Derrick*** (NZLC R37) the Law Commission has recommended that the Court of Appeal's creation of remedies for breach of the Bill of Rights should be endorsed; it argues that development of the common law in accordance with the Bill of Rights conforms with principle.

The only reason why the Treaty of Waitangi does not, as originally proposed, appear as an appendix to the Bill of Rights is the realisation that to do so would demean it. It is New Zealand's founding document; it is to be presumed that both statutory construction and common law development will occur in conformity with its principles: *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 656. The discovery in *Ika Whenua* that in New Zealand Maori claims to the title of river beds require reference to Maori values rather than to the Roman law maxim *ad medium filum* adopted by the common law, was a revelation to many; it was however anticipated in *Baldick v Jackson* (1910) 30 NZLR 343 where the Maori custom, that a whale killed and secured belongs to the captors, was preferred to the statute 17 Ed. II c2; that decision is echoed in the recent whale watching case *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553. In truth a system of conflict of laws applies within New Zealand: where statute permits, Maori issues are referred to Maori norms.

Counsel have not performed their task where they have failed to identify some relevant Maori custom, not excluded by the cession or a statute, which therefore subsists as a matter of New Zealand law.

A recent example in relation to family protection is in the matter of the *Estate of Nikorima Kupa; Haronga v Harmer* M62/91 Napier Registry 29 October 1996 Heron J.

Other cases are likely to exist in a variety of spheres. For example there is no reason of principle why, where the status of Maori hapu or iwi is under consideration, it should not be recognised as having legal personality if it possesses its own identity in the perception of Maori; just as the Privy Council conferred legal personality on an Indian idol: *Pramatha Nath Mullick v Pradyumna Kumar Mullick* (1925) LR 52 Ind. App 245.

The Law Commission is at present looking at issues of Maori succession and alternatives to prosecution as well as Maori women's access to justice. While an independent Maori legal system is unlikely to be seen as desirable by most New Zealanders, there is real need for fair representation of Maori members in the institutions of our legal system, as MMP seems to be achieving in Parliament. If as I believe it is possible to improve our system of justice, and to devise ways for Maori to play a greater role in its due administration so that they feel closer identity with that system, we will all benefit. The issue is what system of justice would incorporate and give effect to the values and aspirations of both Maori and Pakeha as Treaty partners.

It is of particular importance that the dynamism of Maori society - before and after the Treaty, and not least in the past generation - be recognised by all New Zealanders. A pungent essay by Grammond and the forceful dissenting judgment of L'Heureux-Dubé J in *R v Van der Peet* (1996) 137 DLR (4th) 289, 345-9 which cites it, emphasise the need both to look at the actuality of indigenous practices and not to treat them as frozen in history.

The Treaty and the constitution - the set of basic principles that direct how we are governed - are indivisible.

A state's constitution is workable to the extent that it fairly meets the reasonable needs and aspirations of each group of its citizens. The need for better compliance with Treaty principle is something of which the Government in its three elements of legislature, executive and judiciary is increasingly aware; the wider public has some distance to go. The principles which were the focus of Lord Cooke's remarks in *Ika Whenua* and which have been the focus of successive judgments of the Court of Appeal require to be taken seriously. The fact is that Maori rights are part of the laws and usages of New Zealand which the judiciary are sworn to uphold. Since that is what practitioners will increasingly encounter in government, in Parliament and in the courts it is as well for them to be prepared.

Treaty jurisprudence is and must continue to be in a state of evolution. The preamble to the Treaty looked to a future when non Maori would join Maori as citizens of the country. The Treaty clearly contemplated that the arrangements would be appropriate to ensure for Maori a part in that new society which would be fair and in keeping both with their aboriginal rights and with the further rights promised by the Treaty. The same principle acknowledges the right of the settlers to a place in New Zealand. That principle provides the atmosphere within which future policy and law making will occur within New Zealand.

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