[Image]

[Image] Valedictory Speech

[Image]

Mike Moore
Parliament House

Tuesday 24 August 1999

Rt Hon. MIKE MOORE (NZ Labour--Waimakariri): Mr [Image] Speaker, I wish first to pay tribute to you, my opponent and colleague, and your office and [Image] staff, and to thank you and your staff for your courtesy and assistance over many years.

[Image]

It is nice to see so many people here at my [Image] farewell and funeral. If only people had said such supportive things when I was alive! I have no illusions. When Frederick George Young, a bit of a villain from the trade union movement, died, a number of his opponents stood by his grave. His real friends asked his tormentors why they were there, as they were his enemies. They replied: ``We're just here to make sure the old bastard's dead and really is going.'' I do not know whether this story is true, but I am told that when Fintan Patrick Walsh died, several members put a cement mixer on the back of a truck and drove in the funeral procession, just to make sure. What an honour! I thank those who are here today, whatever the reason they are here.

I want to thank Yvonne, my wife and best friend. No MP's or party leader's wife ever worked as hard as she did. You did more than your share. I remember campaign meetings where children would rush towards you. We were mocked for that, but you still get poems and letters sent to you. Thank you. I was always bewildered as to why you suffered so much abuse from some who should have known better, and why some of the sisters did not reach out to help you. I am still confused about that. You deserved better.

People say you do not make real friends in Parliament. That is rubbish. I want to thank the drivers, the messengers, the library staff, Bellamy's, the police, the security people, and the researchers. Of all the honours I have received, the greatest was from some members of the Diplomatic Protection Squad who in 1993, out of their own pockets, flew down to Christchurch to help us.

I owe so much to the staunch people of my electorate. When other seats fell they nourished us and comforted us. They are the best. Anything I have managed to do I have been able to do because of them. I wish I could have done more for them. They are the real battlers, who want to own their own homes, who, in the main, look after their kids, run the netball teams, and

wash other people's children's football jerseys. They are the cream. They do not want a Government to tell them what to eat, who to meet, and how to greet. They simply seek the gift of opportunity, and that their children have a better life than themselves. As Norman Kirk, who represented Kaiapoi as mayor, said: ``They don't ask much: someone to love, somewhere to live, somewhere to work, and something to hope for.'' To serve them has been the highlight of my life. To be asked to hold hands at a hospice, to join in a family christening, and to share their hopes and represent them--that is the privilege. Whenever I have flown home, as soon as I see the silver water of the Waimakariri River I feel that much safer and that much happier. We are still getting phone calls from women crying and saying ``Don't go!''--and that is only Yvonne!

The highest honour a democracy can afford a citizen in a free nation is to be an elected member of Parliament. Every day it has been an honour, and every hour it has been a privilege. Parliament has been my university, my training college, and I respect it so. I owe many debts of honour to many people, many mentors, and I sense their ghosts here today--people like Mat Rata, Joe Walding, Hughie Watt, my friend Fraser Coleman, and Norman Kirk. He had fingers like sausages. When he was angry at you, you knew it.

I used to be a prison visitor, and my heart aches to hear a decent speech about prison reform. I helped this bloke get out of prison. He had killed a couple of people. Truth found out about it and printed an article about Mike Moore and the killers. There were enough copies to be delivered door-to-door in Epsom, and enough posters to be put up around the electorate. Kirk, with his huge fingers, came down to see me in my office, saying that I was X, that I was stupid, and what the hell was I doing. I said that I was doing the socialist thing. I thought I was right. It took me about 10 years to work out that he was right. He said that I had no right to endanger a fragile Government by doing such a thing. It would be nice to hear some prison reform speeches. I do not know anybody who has ever become better for going to Parliament or to prison.

It was a bloke called John Stewart who first suggested I stand for Parliament in Eden. We won that seat in 1972. They should have made me Prime Minister then. I knew everything. It is a curious fact of political life that the longer you are here the less you know. I lost that seat in 1975, which incidentally was my best election result ever. If the swing had been consistent, we would have held on to Government in 1975. But when I won in 1972, it was all my own work of course. It did not even cross my mind that Norman Kirk or the swing to Labour had anything to do with it.

John Stewart took me aside and said: ``I've got a few words of advice.'' I thought: ``Oh no, what's it going to be? Nationalise the meat industry, ban nuclear testing, increase the minimum wage? What's he going to put on me?''. He suggested three things, and I make these points to Clayton Cosgrove, who I hope will follow me in this Parliament. He said: ``Always thank the people who make the tea; never swap old friends for new friends; and never mention the names of people when you are giving speeches of thanks, because the only people who remember are the ones you forget to mention.'' John, you are not with us now. I have done my best, but there are some people I must thank.

I want to thank the long-haired radicals in Eden who thought I was too conservative. I have always been an extreme moderate. I thank those ``lefties'' who worked till they dropped--people like Jack Elder and Phil Goff. I remember election night 1972. You were not there, Jack, but I thought, knowing everything, that the appropriate thing to do was not to thank the committee for its work but to convene a meeting of the committee to pass a resolution to send to the Prime Minister elect, Norman Kirk. We did that. We sent a telegram telling the Prime Minister to get out of Vietnam, to get rid of compulsory military training, to save Manapouri, to stop nuclear testing, to recognise China, and to do it forthwith! I took a Trekka down to the phone box--I ran out of petrol--to send a telegram on behalf of the Mount Eden committee. We should have done it in 1984, because everything we said in that telegram that Government actually did.

In Christchurch I have always been blessed with the best people, people who have looked after others as well as Yvonne and me. With the Shaughnessy tribe, if you get one you get 100. There is Brian Gargiulo, Roger Pike, Sally Thompson, Denis Hills, and so many others.

A good reputation is hard to lose. I have done my best over the last 6 years. So I must thank my staff in Wellington, Maree and Yvonna, and Hine and Linda at home in Christchurch, who have covered up for me for the last few years. I have had many loyal staff and I want to pay tribute to them. I refer to the so-called Beagle Boys--and those who follow will be offended by that title. They worked 18 hours a day, and were criticised by people who could not come to work for 8 hours a day. I thank them.

It is not true that power corrupts; it is the absence of power that corrupts, and what one has to do to get power--the promises one is driven to make because of opinion polls and sound bites, such as no student fees, etc. Members know what I am saying.

I leave disappointed. There is lots more I would like to have done for New Zealand. We ought to

celebrate some of the best things about our country, because sometimes we forget. We have an honest Public Service, although the concept of public service is changing. Some public servants now think they are corporate leaders or rock stars. They should realise that the corporate sector has not acted like that since the crash. We ought to acknowledge how well this nation is served by the men and women in uniform who stand guard to protect us, and who are not with their families at Christmas because they are serving in Bougainville or in the Sinai, or on street corners in our confused cities so that we can sleep in peace; and those who nurse us when we are sick then walk home in the dark. They serve us and we should serve them.

I am off to Geneva, where many political exiles end up. I see my job at the World Trade Organization as an extension of public service, and I will give it everything I have got. I have to say that this World Trade Organization venture is the first time I have ever had the total, unanimous commitment of the Labour caucus behind me!

I am obliged to, and want to thank, the Prime Minister for her support. As I told her, no good turn ever goes unpunished in politics. I thank her Ministers for their support, especially Lockwood Smith. Jim Bolger was terrific, I must say; he worked hard.

And Paul East was great. One person who has been very supportive, ringing Yvonne and leaving messages, is Philip Burdon. I want to thank Philip publicly for his friendship. Mention should be made, too, of Winston Peters, who, when Treasurer, assisted. I thank him and our go-between and interlocutor, Mr Johnnie Walker, and Ms Gilbey. The staff at the department have been professional and supportive, and I thank them.

The strategy that won through at the World Trade Organization was difficult. If members do not understand what was happening, it proves they have been relying on the New Zealand media. It was fascinating going for this position, meeting with Presidents, Ministers, ambassadors, and World Bank and IMF leaders. There were rows of economists lined up. It was quite intimidating, but I soon put them at ease, made them feel comfortable, and treated them as equals.

I want to wish Don McKinnon well. I guess if my capitalist credentials can get me into the World Trade Organization, his anti-apartheid and antinuclear credentials will get him into the Commonwealth club. Don will do a superb job for the Commonwealth and for the country.

I have seen a lot of change. I have opposed a helluva lot of it, too. I have seen the National Party, once the party of the landed gentry, become the party of the land agent. When I first

came to Parliament I was in awe of some of the National Party leaders--and I offer no personal disrespect to members opposite. Those of that generation were soldiers, they were decorated, and many had served their country--MacIntyre, Muldoon, Marshall. I mean them no disrespect by not giving them their titles. They were a remarkable generation.

My own party has changed, of course, as it must. It is the success of the welfare State that has changed my party. The sons and daughters of cleaners and carpenters can now become university lecturers, professors, or whatever. That is a good thing. I know I have always been a bit of a dinosaur. The movement has been good to me. Without the movement I would just be another overweight, unemployed, white-trash freezing worker in the far north. It was Nye Bevan--some of my colleagues will not even know who Nye Bevan was--who said that Labour used to be the cream of the working class, and now it is an intellectual spittoon for the middle class.

I say Labour is doomed to win the next election--and I hope it does. Helen, I hope you do form the next Government. I did my best last time to stitch up a deal. When I lost the Labour Party leadership--at the time I preferred to think I had mislaid it--things got pretty grim. But I am tribal, and Labour made me a life member the other day. Nowadays head office sends one the bill--talk about cost recovery! That means, of course, that I cannot be expelled from the Labour Party.

If I was asked what was the most important social change in my time, I would say it was the treatment of women as partners. When I was first an MP a married woman who did not work in the workforce, who stayed at home, found that if her husband kicked her out she had no claim on the family home or assets. Those women would stand outside one's office with only the clothes they stood in and a suitcase. That was barbaric.

The worst social change? I hate it when constituents, always male, ring up and argue about family support, and are not prepared to pay $20 per week for their own kids, and therefore expect their neighbours to pay. They threaten one on the phone as the local member: ``Well, I'd be better off if I went on the benefit, and then you would have to pay the lot.'' There is some sort of truth in that. Are these connected? I do not think so.

My biggest disappointment is the fact that we still do not have a compulsory savings scheme, as envisaged by Norman Kirk, Roger Douglas, and, later, Winston Peters. When Bismarck put up the first pension, less than 3 percent of the population was covered. Within 20 years it will be 25 percent. No nation or family can long prosper and survive, or even be independent, if it is not living on its own savings, and is

sucking money in from other countries and living off other people's savings. That is something we will have to address, and something I was unable to do much about.

I never thought that New Zealand was just another country, just an average, normal place. I thought we could build here--and we can build here--and enjoy a different destiny inspired by all the cultures that make up our nation. But we are a society in danger of going rotten before we are ripe. We are a land of unlimited opportunities. We make it so complicated when in fact it is so simple.

I think the defining issue of our age--against which we will measure our progress as a civilised society--is race relations and treaty issues. Of course, I do not expect all members to agree with me, but race relations have been the stone in New Zealand's shoe. We could get everything right here--I doubt it, but we could--inflation, employment, health policies, and debt. But if we fail on this issue we fail at everything. We keep talking about the Crown and Maori at Waitangi. I do wish we would substitute the words ``New Zealand Government'', ``New Zealand people'', and ``New Zealand taxpayer'' for ``Crown'', and I would like us to stop using the word ``beneficiary'' when we speak of Maori claims, and instead talk of ``owner'' and ``stakeholder''.

Let us think of that fateful morning at Waitangi. There on the lawn were assembled Maori and representatives of the British Government. Was that the deal? Not entirely. There was a third partner--the church, God, the missionaries. It was the missionaries whose mana and prestige gave confidence to the partners. Remember, this was 1840 not 1640. It was not America or Africa, where the church was the villain. Europe had gone through the age of reason and enlightenment. The church had a moral mandate based on the principle that we are all created in God's likeness, therefore we are all the children of God, and therefore we must be equal. That is the moral basis of democracy. That is the force of the democratic impulse. Those are the core values that have driven civilised society.

That is why I get uneasy when people say that partnership could mean Maori having 50 percent of the seats in Parliament, or could mean having a State within a State.

Sometimes I do fear for our country. We are in danger of dividing ourselves. Any nation that bases its law and destiny on the colour of skin will perish, and so it should. When faced with a hostile Congress because of the slavery issue, President Lincoln said these words. He had a civil war on his hands, and he knew that the Union could be over, that it was in peril. He said: ``We are not enemies but friends. We must

not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battle-field, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.'' The better angels of our nature can win through. The better angels of our nature have worked in the new constitutions in Fiji and in South Africa.

I am not being defeatist. We have a lot to be proud of. The young people are better than my generation. The young people are better on just about every issue--the environment, gender issues, and race issues. They are more generous. We should acknowledge that the National Party in Government performs so much better on these issues than the National Party in Opposition. The Government has tried, and I respect it for it. On any objective scale throughout the world, New Zealand must be among the best nations. We are trying hard. We may be wrong but we are trying to get there. The worst have to be Rwanda or the Balkans. This country is trying. It is time, I think, eventually, for us to consider what kind of nation we will become and what constitutional provisions there should be.

In the last couple of years I have bored members and bombarded them with memos and copies of a member's Bill. I have improved it, shaped it, and stretched it, I have taken out MMP, and I have done all sorts of things, because I think it is time that Parliament and this country focused. I do regret going now, because I would have liked to do more in this area. I am halfway through a book on the issue. If it had not been for this Geneva thing, I would have finished it. I am going to take the unusual and almost unique liberty of seeking leave at the end of my speech for the Constitution Convention Bill to be introduced and read a third time--that is, a first time; I would not get away with a third reading, and I will be lucky to get away with a first reading, but I will try--and referred to the Justice and Law Reform Committee for consideration.

Change ought not to be rushed or hurried. Change ought to be entered into only after deliberate, detailed, and sober consideration and reflection. We have to establish a profound and convincing case before we make changes to what we are about. There has to be a more comprehensive approach to this issue. The present direction is leaderless, dangerously ad hoc, and confusing. I say, with respect, that we ought not to be sidelined by debate on the republic issue.

How we choose our head of State is a different issue. But I suspect that, because of the referendum in Australia on the republic issue,

everyone will want to talk about a republic, and will not get down to what the core issues are.

It is good that political parties have not polarised on this issue yet. But it is ad hoc. We have a sort of New Zealand style of honours, which is good. Some Ministers say they want to abolish New Zealanders' final right of appeal to the Privy Council. Why should Maori fall for that? They will not and they should not. We need to think of what we are doing. This Parliament has passed legislationÑand I have been guilty of this--without really knowing what it means. I am not quite sure what ``taking into regard the spirit of the Treaty of Waitangi'' means, but let us do it, anyway. We are painting by numbers. We have no clear picture and vision of where we are going. Therefore we are surrendering the rights and prerogatives of Parliament. Because we do not know what it means, we expect a court or some commission to determine what it means.

Good friends on several sides have said: ``Look, taihoa, wait on. Let's finish more claims before we move this way. It will take 10 years.'' I say: ``You're right. It will take 10 years. That's why we should start today. We haven't much time to lose.'' There are people with different views. There are those who believe that the treaty should be the constitution. There are those who do not believe that the treaty should exist at all. My Bill is about a process to take us through this problem.

We ought not to make quick decisions because of some temporary fashion or fad, or because the Aussies are doing something, or because we have a grievance and do not like the Government of the day. We ought to think desperately about what we are doing. New Zealand is no longer an Anglo-Celtic and Maori society. We do not even have a Westminster system of Government any more. When we think of how we do restrict the powers of temporary politicians, we ought to think of how we can move this issue over a decade.

Perhaps we should be inspired by the preamble of the new South African constitution. I will read it to members, because every sentence and every word resonates and has meaning. Who would have thought we would learn from the South African constitution? ``We, the people of South Africa, recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity.'' As Nelson Mandela said, there are no white South Africans and there are no black South Africans; there can only be South Africans. When we read the South African constitution we can see how cultures and different groups could be respected and enshrined, and therefore would not feel

threatened if the Privy Council powers were taken from them.

People talk of New Zealand as being a young nation. I have never seen it that way. Our people reflect the many waves of migration. We were all boat people at one time. Whether people came 1,000 years ago or more, in a waka, or 1,000 hours ago in a Boeing, nobody arrives here without a memory. It is our collective memories that build up a society. This collective memory reflects the English with their history of respect for institutions and law; the agony of the Irish and their experience as the first colony of Britain; and the Welsh, the Scots, the Croatians, the Indians, the Dutch, the Chinese, and the new arrivals from the Pacific. All those memories actually bind us together. We did not just start 1,000 years ago. We can reach back to pre-Bible times. Those are our memories. Those are the thoughts that create a society. The Magna Carta, the Ten Commandments, the Bill of Rights, the science and the poems of the old world, and the inspiration of Mandela or Lincoln; those words of freedom are part of our culture.

While we have been a lonely country geographically, spiritually and intellectually we have always been part of a wider world. New Zealanders have always been proud, but not vain or nasty, ultra-nationalists. We are also internationalists. We have had to be. We like international engagement. We must, because New Zealanders realise that our peace and our progress are actually based on the peace and progress of people everywhere. Therefore we have always supported international engagement in treaties, and the rule of international law and institutions to achieve that end.

Our progress, our wealth, and our future are not just based on domestic, indigenous abilities. The cow, the sheep, the radiata pine, and even rugby are not indigenous. We simply improved on them. We are not just a Polynesian country, although we have the largest Polynesian population in the world. We are not just of European extraction. Nor do we slavishly follow European traditions, even if those traditions have been central to our success as a liberal democracy based on the rule of law, with living standards now placing us amongst the front rank of nations. In 150 years we have brought most of us to the front row of nations. We are disappointed when we cannot provide our people with the same health care as Norway or Oregon provides. We compare ourselves with the best, and so we should, because we are better than the best.

My Bill would establish a process. It ought not be an experiment or an act of defiance. Even less ought it be a quarrel with the past or a Bill of grievance. It is a binding, evolutionary process. Well, a framework is there, and I will

remind members what would happen. There would be a leadership council after the election, made up of all the political leaders. That leadership council would produce an eminent persons group with the powers of a royal commission. That eminent persons group then, over a maximum of 7 years, must talk about these issues, work through them, listen, ask, and evolve. Then a constitutional convention would be held in Parliament, of delegates appointed at large and some from Parliament. That eminent persons group would report to them and say: ``These are the options.'' or ``We shouldn't touch it at all.'' Then, if the constitutional convention--the majority of which would be elected at large, with the rest coming from Parliament--thinks a constitution is right, there would be a plebescite and a referendum.

A nation is the sum total of its history, its memories, and its experiences. A nation without a history is like a man without a memory. It is good that we are confronting our historic ghosts and demons at last. Too late, many friends would say, but it is happening. But I do sense a deep yearning and hunger in this country not only to settle differences, because they ought to be settled, but to move ahead. Are we not lucky and unique to have a Treaty of Waitangi? Without it, we would have to invent it--a treaty where order, laws, and rights were established by agreement. Alas, the principles of the treaty were violated by bayonet, batten, and bank manager, and I think the bank manager was the most violent.

This Bill, if it is not accepted today, I hope will be taken up by some other colleagues, and I have had a talk to some dear friends about that. Would it not be a splendid thing if we could pass on to the next generation a nation more at peace with itself, then emerge into the light of the new century with more respect for our past and more hope for our future, in a confident and resolute way? Because we can build God's own country on these pleasant, lonely, lovely shores.

Mr Speaker, you have my letter of resignation, which is effective from 31 August. On that day 25 years ago Norman Kirk died. On Waitangi Day in 1974 he asked this question, and it needs to be asked again: ``Are we a completed nation? Have we yet achieved a true New Zealand civilisation? Not yet.'' He made Waitangi Day New Zealand Day, and he called it not a memorial but a milestone. Think about it.

I spoke earlier of New Zealand being a land of unlimited opportunities, and how we can build a nation. I wish to conclude with words from a poem written last century. The politically correct will have to forgive me if I use the word ``man''. Actually, there are not enough men in politics; there are plenty of males, but so few men. A poem written last century states:

Give me men to match my mountains

Give me men to match my plains

Men with freedom in their vision

And creation in their brain.

I seek leave for the Constitution Convention Bill to be introduced and read a first time, and to be referred to the Justice and Law Reform Committee for consideration.

Waiata, ``Pokare Kare Ana''

Mr SPEAKER : The member has sought leave for the Constitution Convention Bill to be introduced and read a first time, and to be referred to the Justice and Law Reform Committee for consideration. Is there any objection to that course being followed? There is objection.

Sitting suspended from 5.45 p.m. to 7.30 p.m.

The Treaty of Waitangi as the constitution

[Image]

A discussion of the Moore private member's bill

By Simon Reeves*

THE private member's bill introduced by Mike Moore, MP is a valuable attempt to bring together all the important aspects of constitutional concern in New Zealand, indeed in Aotearoa. The real starting point, however, must be the Declaration of Independence of the United Tribes of the Confederation of Chiefs of Aotearoa, then the subsequent Treaty of Waitangi and then the adoption or imposition of English law in 1840.

Rights at international law

Prior to the Treaty the rights of those already here and those visiting were governed by burgeoning codes of international law which had expanded as imperial activity required recognition of the position of the indigenous inhabitants of countries invaded, conquered or treated with according to what were known as their "customary rights".

The first issue therefore for any reformer is to accept whether, or the extent to which, the signing (by some tribes only) of the Treaty in 1840 confirmed or alternatively detracted from the exercise and recognition of such customary rights to fish, land, forests, self-government, etc such as are referred to in the Treaty but which were not unknown in other lands which had been visited by European explorers and later invaders and administrators.

Here, the important difference is that the existence of the Treaty of Waitangi distinguished the British presence in Aotearoa from invasions elsewhere. Here, by its Article II, the Treaty made express reference to the protection of certain taonga, a point confirmed by the Court of Appeal in Te Runanganui o Te Ika Whenua Inc Soc v Attorney-Generall (Te Runanganui):

"The Treaty of Waitangi 1840 guaranteed to Maori, subject to British kawanatanga or government, their tino rangatiratanga and their taonga, or in the official English version "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties..."

That reference implies that the rights which pertained to such taonga such as enabled them to attract that treaty protection must have predated the Treaty.

By Te Runanganui, the Treaty not only must work to protect Maori taonga or resources by and under its Article II but must not allow and cannot be seen to have allowed any governmental act which might work to diminish such right or rights or to ignore or obliterate them.

Those rights being customary rights, the courts here and abroad (Canada, United States) have agreed to recognise and support claims and have argued against the effects of legislation which might have curtailed or denied them. Here in Te Runanganui the Court of Appeal accepted that responsibility to observe customary rights:

"In doing so, the treaty must have been intended to preserve for them effectively the Maori customary title.2"

In those cases the Court of Appeal agreed that the Treaty requires a reasonable Treaty partner to recognise the validity of Treaty principles and to apply Treaty principles at least if not inconsistent with the particular legislation: that the principles may not be limited to mere consultation or be an "empty obligation" or be "hollow"; and that they require the active

protection of Maori interests.

Such is the first aspect of the Treaty's constitutional importance, the aspect which takes it from being merely a founding document to being the constitution of this country at least as far as Maori are concerned.

Parliament's impotence

The signing of the Treaty resulted in its promulgation in the London Gazette in October 1840 (an act of ratification which was also for the information of and acceptance by the international community of other imperial governments), the subsequent creation of a Governor's Legislative Council in 1841 and the appointment of George Clark as Protector of the Aborigines.

The council was superseded in 1852 by the General Assembly established by the colonial Government under the New Zealand Constitution Act 1852. Apart from a purported widening of the powers of the assembly by the conferment of Dominion status (1907) and the claimed ability to legislate extraterritorially and contrary to any legislation of the British Parliament under the Statute of Westminster Adoption Act 1947, the present Parliament created or continued by the Constitution Act 1986 is the direct descendant of that assembly.

The legislation which has been passed by those legislative bodies created by the British Crown - ostensibly under the rights to sovereignty it claims for that purpose - must always be within the framework of the Treaty and must therefore always recognise the customary rights which the Treaty recognised and which were recognised at international law. It may not derogate or threaten those rights. There are some (if not many) statutes which could be challenged as ultra vires the Treaty.

If, therefore, Parliament purports to enact a statute, the effect of which will be to create a discretion in a court to allow or to disallow an activity which could adversely affect a taonga to the point of its not being likely or able to be protected as promised by Article II, then the statute must be considered to have been unlawfully passed or the discretion to have been so limited as not to amount to authorising anything in the court but denial of the activity - as would occur if an enactment of a state of the Union contravened the United States federal legislation derived from that country's constitution.

Moreover, if activity which is purported to have been authorised by the statute might have the effect of derogating from the rights of the iwi signatory to determine the fate or to govern that taonga for itself then the statute must be similarly questioned.

Supremacy of Parliament

The 19th century Diceyan theory - that statutes of a central legislature or Parliament are supreme as against all other interests (including constitutions) - would normally prevail, given the need for cohesive and stable government in a sovereign state with responsibilities at international law which can also be domestic in their observance.

Supremacy as a "practice" of government is said to have arisen from the Convention Parliament of 1687 and its 1688 Bill of Rights which included a proclamation that only Parliament - as opposed to the Sovereign - could legislate. In New Zealand, that presumed sovereignty (and there have been decisions subsequent to 1688 which repeated the Jacobean view that there were limits to legislation) was hobbled from the start by the decision of the British Crown and its advisers to opt for a treaty with Maori rather than simple invasion (although that is what some might consider has eventuated).

Despite the claim to sovereignty by Cook's 1769 flag-raising, the eventual form of relationship with iwi was by agreement in 1840 - an agreement made

after and presumably in consideration of the 1835 Declaration of Independence of the Confederation of United Tribes whose successors no doubt were signatories to the Treaty.

Increasingly, the ability of statutes of a central legislature to be struck down as against a constitutional provision is being recognised. In R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)3 Britain accepted that its membership of the EU had limited the sovereignty of its Parliament. Other decisions support that impact of Europe on the primacy of statute law.

In Factortame, the Parliament which remained after the British entry in the EU was a less sovereign body. Since the 1972 European Communities Act it has had to take account of a higher law. That places the British Parliament in the same position as our own. Before the New Zealand legislature could be established here it had to pass through the same kind of initiating process of passage of the Treaty of Waitangi. We now have what we did not have previously in Diceyan discussions: a Parliament in England which has a restriction against which we can compare the system here.

The ability of the courts to intervene in the process of legislating is not unknown. In Rediffusion (Hong Kong) Pty Ltd v Attorney-General (HK)4, the pre-handover court intervened during the bill stage where otherwise the applicant might have been denied a remedy.

In the Cook Islands the question of Parliament's supremacy arose in Robati v Cook Islands when the legislature there sought to exclude Robati from taking his seat because of illness. Its Privileges Committee ruled against him. The High Court of the Cook Islands declared that committee's decision to be invalid.

Since Marbury v Madison5 the federal courts in the United States have claimed the right to strike down legislation which they consider has violated the United States Constitution. Each branch of government in that country claims the right equally to interpret the constitution.

Constitutional conventions

Post-Treaty New Zealand is without a written constitution according to the usual definition of that term: a drafted, purpose-built code of conduct. There is no doubt that the courts as much as the Parliament would benefit from having distinct powers and duties set out as a matter of law.

Instead, we purport to observe 'constitutional conventions' which have no strict force of law. In Cooper v Attorney-General6 Baragwanath J referred to a section of the Fisheries Act 1983 as being by any normal test the law of the land and hence within Magna Carta. The "normal test" was reached by the "settled rule of law" that the courts will give effect to an act of Parliament:

"...both Parliament and the Courts observe, and must clearly be seen to observe, the conventions whose acceptance in New Zealand has substantially avoided the constitutional friction that has a feature of the arrangements of other societies."

The case involved a complaint of parliamentary removal of pre-existing rights and saw discussion of Executive-based bills of attainder and retrospective legislation. It referred to Magna Carta and the United States Constitution's Fifth Amendment. The New Zealand Court of Appeal decisions in Taylor and New Zealand Drivers' Association were cited as "high authority" for the judiciary's reservation of the right in extreme cases to declare some common law rights untouchable by Parliament7. Thus:

"Our small society has to date found it unnecessary to equip itself with techniques of judicial challenge to Parliament and its work. Whereas other larger societies have done so- the United States of America by the Supreme

Court judgment in Marbury v Madison8, Canada by its Charter of Rights and Freedoms, Australia by its constitution (see for example discussion in Polyukhovich v Commonwealth of Australia9 and even the United Kingdom by its accession to the European Community R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)10 - and in the constitutions of the new Commonwealth such provisions are the rule, in New Zealand both Parliament and the judiciary recognise that constitutional peace and good order are better maintained by adherence to conventions rather than judicial decision."

The constitutional basis

Unlike every other Commonwealth country New Zealand never had a flag lowering ceremony and did not receive a new constitution. Even Canada was created as a federation and Australia as a commonwealth of colonies with statutory expressions of divisions of power and responsibilities. Now, the new South Africa has devised a constitution for its future governance. Conversely, over the years law students here have been regaled with the joyous but incorrect news that we were alone with Britain in being unwritten, relying instead on conventions and precedential decisions to garner a code of conduct. True democracy demanded Parliament have a free hand and be able to avoid being bound by previous legislatures.

Because of that effectively uncontrolled ability to legislate (especially since the abolition of the upper house appointed Legislative Council) and the lack of training of lawyers here and in Britain in an understanding of constitutional limits, there has not been a strong Bar capable of insisting that courts and Parliament uphold a rule of law. That lacuna has become even more pronounced over the last 25 years since Britain joined the European Union and allowed itself to be restrained by that new relationship.

There has been a constitutional document here all the time simply waiting to be developed as a code of conduct. Because of European settler expansionism there has obviously not only been a lack of understanding of the true importance of the Treaty - unique as a compact at national or central governmental level - but indeed outright hostility. That has been foolish because the Treaty has always been available to act as a guarantor of the civil rights of non-Maori. That it has not been seen to do so can be related directly to that hostility and to the lack of training, thinking and encouragement which the Bar should not have allowed.

Guarantor of civil rights

That negative attitude has overlooked the fact that citizens here have rights as British subjects which have been inherited through the Treaty and the application also of English law Parliament notwithstanding. Those rights were developed over many years not by Parliament but by the English courts as the common law was refined. They were granted to Maori in exchange for sovereignty.

As much as sovereignty is claimed to reside in Parliament so those rights must continue to exist also. Moreover, because the notion of the rights of the subject includes the development of such rights there is a legitimate expectation that both Maori and non-Maori will enjoy the benefit of that development as it might have occurred elsewhere as part of the general expansion or sophistication of rights at international law. Thus, if the Canadians would recognise a restriction on legislative powers in order to prevent loss to a taonga such as customary fishing rights that increasingly might be relevant here.

Thus Sir Geoffrey Palmer (speaking of our relationships internationally through compacts) said:

"One may well ask what impact the Factortame case will have on New Zealand courts' perception of the nature of law-making ability of the New Zealand Parliament. Parliamentary sovereignty in New Zealand is also increasingly

eroded by the acceptance of more and more international obligations deriving from international instruments ratified or acceded to by New Zealand."11

Article III

As I argue in my book To Honour The Treaty - The Argument For Equal Seats (1996) it could be contrary to the Treaty if any curtailment of the rights promised to Maori by Article III were to occur, quite separately from Palmer and from the Court of Appeal's statements as referred to in Cooper and elsewhere. By its Article III guarantee for Maori and non-Maori, the Treaty must operate as a constitution which the New Zealand Queen's judges would be obliged to consider and support if tyranny or less were not to result. The traditional response of reliance on conventions would therefore only succeed if that was a legitimate accoutrement of British subject status - which is doubtful given the history of the common law and the courts' historic battles against Parliament.

Particularly in the English language version, Article III guarantees Maori all the "rights and privileges" of British subjects. In the English translation of the text in Maori it guarantees the "same rights and duties of citizenship" as have the people of England. That is a constitutional guarantee of the rule of law for both Maori and Pakeha against illegal governance, even tyranny. That guarantee could be said to be our most important constitutional attribute.

Although Cooper found that:

"there is no basis for the proposition that a New Zealand Judge could, let alone should, characterise the plaintiff's claims as of such fundamental moment as to warrant the uprooting of the principles observed by our Courts since 1688"

that was a case which did not have to consider the importance of the Treaty. Maybe if the training in constitutional thinking had existed it might have been argued. The reference to "our Courts" of course is a reference to the English courts which were never required to interpret or apply the Treaty of Waitangi or its principles or the aboriginal customary law which was to be found to be applicable here.

To iwi, the Treaty would surely not have been signed if it were to have been interpreted in a way by Parliament or by the courts created by Parliament to sign away the distinguishing authority, prestige or power which the iwi enjoyed over other iwi. Moreover, there was no agreement that the British Crown would be able to destroy or compromise mana or other taonga between tribes as part of the deal. Instead, by the Declaration of the Confederation of United Tribes and by the Treaty itself they sought protection of such taonga.

In Cooper the issue was not a Treaty issue, there was no discussion about the inequitable imbalance of representation of Maori in Parliament at the time of passage of the act, and the extent of Parliament's authority in that light remained unexamined.

Any right to strike down or restrict the acts of a Parliament should not necessarily be restricted to occasions when a purpose-built constitution is involved. It is not as if such a constitution ever always includes a right claimed by the courts. The United States Constitution does not formally or informally expressly empower the courts to treat statutes as being unconstitutional or vulnerable. Fresh from the vanquishing of tyranny the courts there in Marbury v Madison protected the federal government's ability to work in its confederation of 13 new states. The same argument could apply to ensure that the Treaty's promises are effectuated in these days of increased understanding of cultural differences and iwi imperatives.

Equal seating

In New Zealand Maori Council v Attorney-General12 the Court of Appeal found the Treaty to have been a "solemn compact". Despite that, and of importance when interpreting the acts of the subsequent assembly, it has not led to a partnership in that assembly. Instead, the seating is grossly imbalanced in favour of the other Treaty partner to the extent that, if the Treaty is to be honoured, the likely impacts of any legislation must be open to question. In other words, if the result of an act of Parliament would be to deny an iwi or a non-Maori the protections of the Treaty and hence of customary law or a civil right then the act must be struck down as against the Treaty or interpreted so narrowly as to deny it any efficacy.

Alternatively, it should be given so fair, large and liberal interpretation as to ensure that those rights are protected to the exclusion of any legislative programme or project which might have the effect of defeating Treaty guaranteed customary rights or common law rights, such as the removal of the right to sue for personal injury.

Summary

Any power to strike down acts of Parliament should be exercised restrictively as a responsible branch of government. There would be little point in simply replacing one form of tyranny with another. It is also to be recognised that the courts are the Sovereign's courts rather than Parliament's and that they have been invested with inherent jurisdiction to achieve justice between the Queen's subjects and between the Executive and those subjects including Maori per Article III.

If an act or its provisions might have been enacted per incuriam the Treaty as argued above then the power should exist and be exercised (if necessary by interpretation) to restore the balance. The supremacy claimed by Parliament to defeat the tyranny of the royal prerogative cannot become a tyranny in itself unable to be disciplined by the courts.

In this time of constitutional discussion it is timely for us to assess whether the Treaty means that no statute of the New Zealand Parliament can be supreme as against a Treaty guarantee and whether the courts are able to control such constitutional guarantee or to discipline an act of the legislature which might offend.

If taonga such as fishing rights or forests are taonga of the type protected by Article II and are threatened by an activity of a person having statutory functions and/or powers then neither the Treaty, its signatories nor Parliament and its predecessors could be said to have anticipated or intended such an outcome and the threat would be illegal.

If a taonga enjoys mana to the extent that the framers could never have intended it to have been affected by the Treaty, the courts must question any act which might limit those qualities.

The Treaty already exists and fulfils the role of a national constitution. It sets out the relationship between iwi and non-iwi, it guarantees rights and it allows for their interpretation by the courts. There obviously is need for finer detail which the Moore bill will allow discussion of. Any outcome must not delimit the Treaty but must fulfil it by creating a equally seated legislature to ensure that the full burden of Treaty and hence constitutional interpretation and application does not fall only on the courts. Until recently, all statutes passed by our legislature have been by an embarrassingly unbalanced 96 to 4 majority against those who were here first and whose rights were recognised in 1835 and 1840. That unconstitutional situation requires redress when constitutional systems are being discussed.

Unlike other Commonwealth countries, New Zealand is alone with Canada and Australia in not having been required to cede power to the pre-imperial inhabitants. It is only the Treaty which has prevented non-Maori settlers from having to face international demands from the United Nations Committee

on De-colonisation and the UN Trusteeship Council. Hence its importance for non-Maori.

Any constitutional discussion should therefore ensure that that post-imperial freedom granted to other Commonwealth countries is reflected here.

---

*Simon Reeves is an Auckland practitioner, and author of "To Honour The Treaty - The Argument For Equal Seats".

Footnotes

1 [1994] 2 NZLR 20

2 [1994] 2 NZLR 20, 24, l. 38 (emphasis added)

3 [1991] 1 AC 603

4 [1970] AC 1136

5 1 Cranch 137 (1803)

6 [1996] 3 NZLR 480, 483 - 485

7 At p. 484

8 1 Cranch 137 (1803)

9 (1991) 172 CLR 501

10 [1991] 1 AC 603

12 [1987] 1 NZLR 641

LawTalk 493 page 8

Last modified 2 March 1998

www.kennett.co.nz/law/indigenous/