The concept of "tangata whenua" and collective interests

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The Treaty of Waitangi – for such a simply and casually drafted political document – has developed an extraordinarily complex jurisprudence. In this article Jeremy McGuire considers the legal implications of meanings to be attached to the term "tangata whenua", and the related question of vicarious responsibility of present and future taxpayers for what are felt to be historical injustices. As an aside, answers to this latter question raise interesting issues about the jurisprudence of limitations. If a tangata whenua can claim for historical wrongs done to earlier generations why in principle, should not a family, say, be entitled to be likewise – at least from the Crown? This article does not address that interesting question. The author emphasises the need for greater social tolerance and social harmony in discussion on the meaning of the principles of the Treaty of Waitangi. He expresses concern about the current programme as being too rapid. He also questions the concept of Maori sovereignty.

Introduction

This short paper is a continuation of the expression of my opinion on aspects of the elaboration of the principles of the Treaty of Waitangi. To briefly recap, I have previously mentioned reservations about the second limb or, more precisely, subordinate or minor premise, of the political and legal syllogism that presumably is *implicitly* accepted in the reasoning and argument in support of the relative liberalisation of the principles. I intentionally say relative because some, whom I shall call either "claimants" or "Maori" in recognition of previous theoretical difficulties posed over the identification of "Maori" ([1995] NZLJ 168) might argue that the current political and legal approach to the meaning of the principles of the Treaty is not liberal but is, or should be regarded as normal. Claimants might argue that the previous approach to the elaboration of these principles, most notably illustrated in *Wi Parata's* case ((1878) 3 NZ Jur (NS) 72, 78 per Prendergast CJ) where the Treaty was dismissed as a "simple nullity", was an unjustified calamity. They might also argue that the Treaty was and is a binding document that preserved the constitutional and property rights of Maori and created corresponding duties and obligations on the Crown. These latter duties have been continually breached since 1840.

This paper will address one of two more minor facets of the debate on the meaning of the principles of the Treaty of Waitangi that appear to this author to be responsible for causing some concern among many "non-Maori" New Zealanders. This is the elusive meaning of the concept of "tangata whenua". How is this term derived and what are its implications? The second, related, issue is the question of how the current and future generations of "non-Maori" can be held vicariously responsible and liable for the historical injustices and breaches of fundamental rights of former generations. To some extent it is suggested that this latter issue overlaps with previous discussion on group dynamics that was previously mentioned in another article ([1995] NZLJ 168). I shall not discuss this issue in this paper. Opponents of the present Treaty discourse might also argue that the concept of the "tangata whenua" is now a myth and metaphor that is practically meaningless. There is not any reality of a separate and identifiable group loosely called "Maori" who now qualify as victims of colonial and imperial hegemony and oppression. The reality of contemporary New Zealand society is that the races are mixed and assimilated. The issue of how this occurred and whether it was, in fact, a policy of cultural and political guerilla warfare, is redundant. Opponents of change might argue that such argument is eminently suitable for the higher realms of moral discourse and philosophising but is not strictly relevant to modern New Zealand society. In response, it is suggested that this stance, if held, would be simplistic. The fact is that there are still at least pockets of communities that have retained their essential Maoriness and are, therefore, essentially different to "non-Maori". I say that this proposition is one of the huge difficulties confronting New Zealand politicians, Judges and

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consequences of conviction are horrific – shame, obloquy, incarceration. The black, semi-clerical robes, the covenant with God to tell the truth, – these are all reminders we are dealing with matters that have consequences in eternity for all involved.

The oath is not "an ancient ruin still standing". It is the tip of an edifice with firm foundations. □

academics. How can material differences within a single category of individuals all of which are defined as "Maori" be accommodated in the modern liberal body politic?

Cosmetic rhetoric and the principles of the Treaty

Personally I am alarmed at what I perceive to be the current method towards the elucidation of the principles of the Treaty. Undoubtedly this elaboration is an extremely difficult and challenging exercise. The consequences are also potentially enormous. Arguably the political and social future of this country is largely dependent upon the resolution of this single meta-issue. It is for both of these reasons that I would counsel informed debate and caution before important decisions are made. I think that it is vital that all associated and underlying issues and all angles of debate are thoroughly canvassed before any binding and irrevocable political or legal commitment is made. I would suggest that the effects of a rapid form of "utopian social engineering" against which Popper warned may be disastrous for this country if, in retrospect, it turns out that such social engineering is misguided, uninformed or, to put it bluntly, simply wrong. It is most difficult to change changes once these have been initiated, for reasons that I shall not mention in any detail here. In very brief summary, changes raise legitimate expectations in individuals who would have benefited but for the subsequent change in policy direction. The difficulty then faced by policy-makers is placating those individuals whose interests have been detrimentally affected by such reversals of fortune.

In view of this possibility I suggest that decision makers should reverse the method by which they attempt decisions in this area of Treaty discourse. Popper elsewhere argued that rather than seek to prove the correctness of some hypothesis it is better to concentrate on finding reasons and grounds that refute or falsify proposed conjectures. This "Refutation Theory" may be particularly useful in relation to the elaboration of the principles of the Treaty of Waitangi as it may encourage a more rigorous and thorough approach. If so, the validity of conclusions may be improved leading to a more lasting settlement of the outstanding issues.

These preceding comments apply to both sides of the argument. I can appreciate claimant restlessness and frustration at the seeming lack of progress on this issue, which issue has been the focus of discontent since the date that the Treaty was first signed. Historical reasons and grievances responsible for "Maori" discontent and activism have been very thoroughly documented elsewhere and will not be recounted in this article. I would suggest, notwithstanding this litany, that the current revolutionary discourse on the meaning of the principles of the Treaty of Waitangi is moving too rapidly to allow the average, reasonable New Zealander, regardless of age, sex, religion or ethnicity, to keep up. I suspect, judging from the tenor of the letters to the editors of the metropolitan newspapers for instance, that many members of the general public are puzzled, concerned and threatened by what are considered to be rapid and unmerited developments in this area. I would urge that the "silent majority" of inherently conservative New Zealanders need to be convinced by academics and politicians that change is a positive improvement and is not actually going to be destructive. I would suggest also that theoretical and complex philosophical and jurisprudential arguments directed mainly at the small elitist audience of fellow Platonic "philosopher kings" are of limited benefit and will not suffice to gain the vital support of the "ordinary person". Rather, it is suggested that much effort should be expended on educating the average New Zealander in the reasons for the apparently enlightened approach to the elaboration of the principles of the Treaty of Waitangi and also the ultimate aim of this exercise. Presumably this latter aim of the discourse is directed at some indeterminate goal of justice. If this suggested programme of public education is executed then I would feel more confident that the general level of debate on the topic would be elevated. More individuals might be able to participate meaningfully in the discussion. Thus a positive benefit of this suggestion may be the incorporation of a greater range of values in any final resolution on the meaning of the principles of the Treaty. A second benefit of my proposal may be to raise incidentally the level of tolerance towards any effected change. As a greater degree of understanding of the reasons for change are uncovered and discussed in an open way then hopefully greater scope for appropriate redress may also be accepted by the public.

Conversely, it is suggested that this current failure to explain adequately the underlying rationale for the current approach to the meaning of the principles of the Treaty of Waitangi is likely to cause increasing future friction if this issue is not dealt with reasonably promptly and more thoroughly.

Incidentally, this point is not original and has already been recognised by at least one scholar who has been most active and productive in this area. McHugh has stated:[1]

> That there has been real change in New Zealand political and economic life, not to say its cultural and social aspects, as a result of Maori claims is signified by ...the so-called "white-backlash". These "rednecks" hardly see the last decade as any diminishment of Maori power but quite definitely are worried by its perceived growth and threat. This change is symptomatic of the deeper-seated reorientation of New Zealand society....

However, it is suggested that Dr McHugh's (and others) failure to address possible reasons for this defensive response by some members of the community is a major omission to date.

Tangata whenua and sovereignty

It seems to me that the presumption of the validity of the claim of "tangata whenua" forms the major premise for the Maori claim for sovereignty of New Zealand. In brief, some but not necessarily only,[2] claimants have tended to argue that prior discovery and colonisation of New Zealand before the discovery and arrival of Europeans validates their claim for sovereignty. Sharp briefly mentions the concept in his well known book.[3] He says that the term roughly translates to "people of the land". In elaboration Sharp says that the term is associated with the idea that Maori are born of the land, their generations are buried in it, and they are attached to it by

indissoluble spiritual ties in a way that Pakeha are incapable of comprehending. He says further that the loss of land was more than merely material. It went to the roots of Maori culture.

I am unable to fully respond to Sharp in the short space available in this paper. I would argue however that these comments are a vast generalisation and are not necessarily wholly intellectually honest. It is probably true that historically Maori, much like Celtic, culture was intimately linked to land. However I am unsure about the nature of this relationship within the context of contemporary urbanised Maori. Also, I would suggest that the "spirituality" that Sharp cites may now have been superseded by more mortal, capitalist-related considerations.

Sharp elsewhere briefly mentions the importance and relationship of the concept of tangata whenua to the modern issue of sovereignty and Maori radicalism (ibid, 11):

> ...those whose racial descent and ethnic identification as Maori give them a unique and overriding right of occupation and sovereign political power in Aotearoa, which, arrogating the Maori right of naming, others call New Zealand.

Presumably the argument is that since Polynesian ancestors arrived in New Zealand first and also enjoyed undisturbed possession of the land for centuries prior to European invasion then they have the justified right to claim sovereignty.

I have serious logical and commonsense objections to this reasoning which I shall now briefly discuss. I find it difficult to justify sovereignty simply on the grounds of "queue logic". The principle of "first come first served" is not an appropriate analogy to justify any claim for sovereignty. Queuing for a scarce resource, such as tickets to a concert or sporting event, is materially different to claiming political sovereignty. These are vastly different contexts and, therefore, cannot be truly compared. Queues are a function of supply and demand. Queues form when a commodity is in short supply; where demand exceeds supply. Clearly it is not possible to queue for sovereignty.

I might also add that conflict may often attend shortages in resources. People may often fight to get what they want if it is in short supply. This may partially explain, though not justify, the conflict over land that occurred between Maori and the settlers in the nineteenth century. Claimants may question why under-resourced, over-populated countries do not then attempt to forcefully colonise other countries that still have room to accommodate surplus population based on this reasoning. In response I feel, first, that this is a valid concern. If the world population continues to grow unchecked then I anticipate that international conflict over territory will be an inevitable consequence. The refugees of today may well be the invading armies of tomorrow. Second, I would suggest that the conditions of the early to middle nineteenth century were totally different from the present technological and social environment. We live in an era of potential nuclear warfare and mass devastation and destruction. The consequences of war are far worse now for all compared to last century. Thus I suggest that the chance discovery of New Zealand is mostly irrelevant to the issue of political sovereignty.

I have other reservations about claims to sovereignty which are based somehow on an argument of prior discovery. I would suggest that the discovery of New Zealand by Europeans was inevitable given the historical course of human exploration and discovery and the finite size of the Earth. If the claim of some Maori to sovereignty which is based on the argument of prior discovery is valid then it seems to me to also hold true that the moon was "discovered" by the physical visitation of American astronauts and that Sir Edmund Hillary "discovered" the summit of Mount Everest because he was one of two to first climb to its top. Clearly these latter two propositions would be invalid.

Hannah Arendt has made the same point more persuasively than myself thought not, of course, within the context. She argued that the effect of human exploration, after the immensity of available space on earth was discovered and humanity developed the technology necessary to enable supersonic travel, caused the beginning of the famous shrinkage of the world. Now, Arendt thinks that every person on the planet is as much an inhabitant of the earth as she is an inhabitant of her country. People now live in an earthwide continuous whole where even the notion of distance has yielded before the onslaught of speed. Speed has conquered space and made distance meaningless. No significant part of human life – years, months or weeks – is any longer necessary to reach any point on earth. She concludes, rightly in my vies, that nothing can remain immense once it has been measured (H Arendt, *The Human Condition*, 1969, 250).

In sum, it might be argued that the discovery of New Zealand by both Maori ancestors *and* Europeans was a foregone inevitability which should not count towards anything of definitive political significance, such as sovereignty. However a "thin theory" of sovereignty, to coin a phrase of the great contemporary political philosopher John Rawls[4] may be legitimate on other grounds. I shall now briefly consider some of these.

A thin theory of Maori sovereignty

More moderate commentators, which would hopefully include myself, might argue that the fact that Maori did discover and colonise New Zealand before Europeans should be, and is, of some practical importance. Undisturbed possession and occupation for hundreds of years allowed the development of a language and culture, a lifestyle that is currently identified and encapsulated in the term "te ao Maori". Also, the argument might continue by asserting that there are still sufficient numbers of individuals who identify with and speak Maori *despite* the official forced assimilationist policy that dominated much of the New Zealand political and legal rubric and agenda of the nineteenth and twentieth centuries; the philosophy of the "quaint but inferior noble savage". Thus, if nothing else, there are compelling natural law reasons for preserving Maori language and culture. It might equally be argued that the state now has a positive countervailing duty to preserve this unique and indigenous culture given its former improper efforts to have it extinguished.

This sub-issue itself raise a number of difficult problems. Opponents of the policy of "cultural safety" and forced learning of Maori

at school might argue that such policy is paternalistic, unrealistic and undemocratic. It is a form of unjustified coercion and intrusion into the liberty of the individual that is designed by apologists to appease their sense of guilt for former bureaucratic mistakes. Thus it is not any better than the former policy of the cultural oppression and hegemony of Maori because it is equally as coercive. Opponents might argue that ideally any state educational or health policy should be valid on its merits, such merits as can be reasonably ascertained by reasonably accurate public opinion. If it does transpire that a significant proportion of the population does not agree with these and other state policies then it is up to successive governments to persuade the public of their necessity through public education. Until then it is suggested that a government does not have any right to demand conformity with its policies from every citizen on some vague ground that it might somehow be a desirable act of awakened good faith, such good faith that was entirely lacking in previous state policy involving collective Maori interest.

It is suggested that the current approach to state policy towards the preservation of te ao Maori may also be criticised on other grounds. It is not necessarily true that te ao Maori is deserving of preservation in its own right. A strict social Darwinist might argue, for example, that the gradual disappearance of te ao Maori may be an entirely natural inevitability. Such individuals might cite historical examples of lost civilisations to vindicate their claims. Human culture and civilisation is naturally cyclical and evolutionary. The great Egyptian, Greek and Roman empires were eventually superseded and replaced by other empires and cultures. Why should nature not be allowed to take its course in New Zealand?

In reply, it could be suggested that post-Enlightenment Western culture cannot be compared with the barbaric conditions that prevailed in the pre-Christian world. Thus, there are natural law reasons for preserving the heritage and richness of te ao Maori. New Zealand is a better place with te ao Maori rather than without it. It provides an alternative to the dominant and pervasive Eurocentric ethos.

Secondly, claimants might argue that Maori was not allowed to die a natural death. Its decline and demise was driven and accelerated by subtle and covert state intervention which was designed to destroy it. However, unlike the ancient world where open cultural confrontation and naked aggression was the norm, the New Zealand experience was arguably more insidious. Here, the state's agenda was cloaked beneath a veil of ostensible goodwill and charity. Unlike the Australian or South African counterpart, the state attempted to incorporate Maori culture into the mainstream, United Kingdom focused, society. New Zealand attempted to overwhelm and obliterate the distinctiveness of te ao Maori by a process of inclusion and absorption. This might be contrasted with an express and deliberate attempt to separate the two cultures and to institutionally subordinate the indigenous one as was the case in Australia and South Africa. However, claimants might argue that the net result of both policies was indistinguishable. Indeed, arguably the New Zealand historical approach was worse because it was blatantly hypocritical and comparatively more devious. If there had been a more obvious campaign of abuse of civil rights then, perhaps paradoxically, the position of Maori may have been better. The Maori may have been in a better position to invoke the protection of the British Crown against the openly subversive policies of the Colonial government. Unlike the Australian aborigines and the South African natives, the Maori might have been better able to cite the Treaty of Waitangi much earlier as grounds for asserting collective rights at a time when such rights arguably had more substance. By the time the Treaty of Waitangi was eventually recognised by politicians as being of constitutional importance, say from about the 1970s on, the damage had been done because the process of assimilation had been virtually completed.

I suggest that politicians and Judges are now faced with the enormous problem of unravelling one hundred and fifty-five years of history which has harmed collective Maori interests where it is difficult to identify a discrete and neat class of victims.

Sovereignty and group dynamics

Human society is linked to group existence. A group may be defined as an association of individuals membership to which is loosely determined by factors such as kinship, common interest, attributes and origins. Distinctive cultures and languages are more obvious signs of group membership and identity. By most accounts, group membership depends upon a loose consensus and sharing of common ideals and values. Conversely, an individual who flagrantly disregards the conventional standards of some particular group may be expelled from it (P Vinogradoff, *Common-Sense in Law*, 1914, 23).

Common social history is an important general factor in the discourse on group theory. To some extent kinship and membership of a group depends upon whether an individual has been accepted by the group. The concept of acceptance imports notions of a *sharing* in the group enterprise and some element of belonging and integration. Group membership imposes what Ronald Dworkin has described as *associative* obligations. These are sustained obligations which are engendered by a sense of group loyalty. According to Dworkin they are shared among people who have a general and diffuse sense of members' special rights and responsibilities from or toward one another. They inculcate a feeling of reciprocity (*Law's Empire*, 1986, 199). For a group to be formed, the persons concerned must co-ordinate their action in the pursuit of a common goal (a group enterprise). Co-ordination, or attempted co-ordination, of the activity of members of the group is good evidence that a common purpose or joint activity is being pursued (T Honero, *Making Law Bind*, 1987, 34, 56-7).

I find it difficult for a claim of Maori sovereignty to be made out on these preceding grounds. Even if the "primacy of arrival" argument could be made out, which I do not accept, then I could suggest that the group theory argument is extremely difficult to negotiate. I would suggest that generally speaking the group known as Maori is indistinguishable from the group known as non-Maori, New Zealand born, New Zealanders. I am not necessarily saying, however, that both groups are identical.

Accepting that everybody is different the critically important constitutional and legal question is how loose similarities between individuals can be made to be institutionally important. The common feature of the group presently defined as Maori is that all individuals have Maori blood. However, for reasons previously considered, I find this reasoning specious and unrealistic. How can this one universal biological feature, shared to varying extent by members of the grouping many of whom also share "non-Maori" blood, be transformed into a constitutional claim for group sovereignty?

Claimants may argue that this argument is simplistic. Many, if not most, individuals with Maori blood see the world differently to non-Maori. They have retained different values and therefore they behave differently to non-Maori. They may have adopted traditionally non-Maori sports and an essentially capitalist lifestyle but they also have a different philosophy to many things that distinguishes them from non-Maori. This difference is reflected in social reality. Many Maori cannot compete with non-Maori. The evidence indicates that there are far fewer Maori tertiary graduates, more unemployed Maori and greater Maori representation in prison. Clearly, then, the inference that Maori must be different is true. New Zealand is not culturally homogeneous but, instead, consists of a spectrum of heterogeneous subgroups all of whom possess different attributes of "competitive fitness".

Flew would dispute this claim of the claimants. He said that the argument premised on the assumption that under- or over-representation of some groups in the population in some occupation or organisation must be due to some defect from the ideal of equality of opportunity is often false. Flew suggests that the premise assumes that the members of the subset or group may not on average be any different to the members of the population as a whole. If that assumption is true then it would be reasonable to expect the distribution of abilities, inclinations, temperaments, values and beliefs to be at least roughly proportionate and represented throughout society as a whole (A Flew, *Thinking About Social Thinking*, 2ed 1991, 78-9). Flew elsewhere says that any insistence upon the equality of all cultures reveals a failure to appreciate the enormous difference between racial and cultural identification. He appears to infer that it may not be true that all cultures are actually of equal value (ibid, 214-5).

Although Flew's remarks appear unpalatable at first sight, I would suggest that they hold some substance and that they may potentially be of huge importance to New Zealand. First, it must be reiterated that Flew is referring to "cultural values", which are collective and indefinite and impersonal, and not the comparative value or worth of the individuals or agents who form that collective entity, which is arguably racist.

Flew seems to imply that ultimately, despite the concerns of John Stuart Mill voiced in the nineteenth century, that the majority view on what is acceptable and unacceptable in the social, political and legal order is decisive. Thus the range of values, be they "cultural", "collective", "eccentric" or, generally plain "different", that may be accommodated or indulged by any society at any particular time may be merely dictated by the prevailing majority norms. Of course, there are numerous historical examples of individuals who have dared to be different and who have been forced to pay for their nonconformity by society qua the establishment. Socrates, Jesus Christ, Galileo, Joan of Arc, Van Gogh and Harold Larwood most readily come to mind. I would suggest that this social reality must be acknowledged by claimants, as the individuals and sub-groups who are attempting to introduce change, before any true progress on Treaty discourse can be made. Thus Treaty-dependent claims should be couched in realistic language and should not attempt to transform the status quo in one fell swoop. It is suggested that such behaviour which does attempt to upset the "social equilibrium" without sufficient warning is only likely to be self-destructive. It is suggested that the hostile public reaction to the occupation of Moutoa Gardens provides a classic illustration of this point. The unfortunate reality of communal, group existence which, it seems to me, is a universal feature is that some interest will always be denied by society until the rest of society is positively convinced that it is in their best interests to agree to any change. This takes time.

I do not totally agree with Flew's unevaluated latter remarks. However, I would suggest that the reasons for the incontrovertible facts that indicate substantial differences between the acceptance and incorporation of Maori and non-Maori values, accepting the loose definitions of each group for the moment, have yet to be fully explored and explained. Why do Maori appear to find it difficult to compete in modern New Zealand? (Claimants might suggest why should they?) I am not a social scientist but I would suggest that the current statistical figures used to measure Maori behavioural and economic indices may require considerable refining. It may not be accurate or correct to treat all "Maori" similarly. I would suggest that it is more meaningful to determine the social context from which any statistical figures are derived. How "Maori" is the individual in question? What is the social setting from which the individual came? For example, it may be very relevant whether the individual came from Ruatoria or Christchurch because the former has presumably retained far more Maori culture than the latter. This may have a significant impact on the social conditioning of the individual. If it transpires that the collective Maori statistics may be separated into divisible subcategories and qualifications, then it is suggested that this information may be useful for reference in future policy making. However I am unsure how any subtle differences in the profile of Maori statistics may be effectively translated into constitutional and legal practice. How can laws be made which deal with collective interests but which apply to specific classes of individuals?

Collective interests and the rule of law

One interpretation of the meaning of the doctrine of the rule of law is that the law must be sufficiently certain to enable the reasonable, average person to be able to understand it. This is one of the preceding criteria for the expectation of obedience. The rule of law requires that the law be sufficiently clear to allow individuals to know what their rights and duties may be. Also laws apply equally to all. No one individual and,

importantly, nor is the state above the law.

Characteristically, the law consists of a body of rules or principles. Theoretically rules instil more certainty in the law because they are expressed in more absolute prescriptive or proscriptive language. Rules state the legal requirements or elements that comprise the law and therefore govern social regulation more definitively. Thus it should be easier to anticipate the potential legal consequences of behaviour. Conversely, principles are more open-ended. They encompass more flexible legal standards because they usually have a wider range of application. It is easier to mould principles to facts compared to more rigid rules. In general, principles are less coercive than rules for these reasons.

I would suggest as a main proposition that it is not usually appropriate to attempt to settle disputes involving Maori rights under the Treaty of Waitangi through case law. Such disputes involve fundamental issues relating to social coherence, co-ordination and unity. Courts are not the appropriate forums to deal with these types of disputes for reasons that I shall not attempt to explain here.[5] Legal disputes are litigated by individuals. I shall attempt to argue that the resolution of cases involving Treaty rights should apply directly to those individuals whose interests are represented in any such cases and no further. I do not think that "representative" cases are appropriate when potentially collective issues are at issue. Case law on the principles of the Treaty of Waitangi, if litigated, should generate only legal propositions confined to their facts and not principles. This proposition necessarily requires some background explanation and elaboration.

The doctrine of precedent has an albeit indirect though pervasive effect on social control. The Courts form one of the three agents of Government. Therefore the rules and principles generated by case law have a coercive quality; they are state sanctioned. Also, the Courts may refer to precedents as the main premise of a future decision if the precedential authority is binding. However, in a difficult area such as the elucidation of Maori rights discourse, I would suggest that the rules of the doctrine of stare decisis should be strictly enforced to avoid the possible artificiality of fictions. When indeterminate collective interests are at stake legal certainty, as manifested as legal rules, is fundamentally important. It is suggested that this approach would better serve the interests of preserving some element of legal coherence, co-ordination and control within the legal system.

It is suggested that precedential authorities involving disputes over Maori rights are particularly vulnerable for providing the grounds to justify the contention for other, unrelated, collective Maori rights. In brief review, the usual practice of legal reasoning employs precedents from which other arguments may be devolved. Lawyers quote authorities to enable them to persuade Judges that their clients have valid claims. These case law authorities contain the law. If the facts in dispute are materially similar to the precedential facts then a relevant precedent may determine the outcome of the dispute.

I suggest that this traditional dogma should be qualified when issues over Maori rights arise in disputes. The doctrine of precedent implicitly assumes that the texture of the legal concepts in question are reasonably consistent. Most lawyers have a fairly rough appreciation of general legal concepts such as offer, acceptance, duty of care, defamation and murder. However I dispute whether the concept of what constitutes Maori rights as provided under the Treaty of Waitangi may be expressed with anywhere near the same degree of accuracy. For example, what does the elastic concept of "taonga" mean? It is by definition a very fluid concept.

At best, I would suggest that all cases involving legal argumentation over Maori rights should be treated cautiously. Cases should be confined to their facts and should not necessarily apply to future cases irrespective of the Court within which the precedent judgment was formed. Thus sweeping statements that establish the future equivalent of "the partnership principle" between Maori and the Crown are to be avoided at all costs.

In contrast and perhaps compensation, I think that the narrowness caused by a formalist application of precedents may be rectified by a relaxation of the rules relating to the admissibility of evidence. Thus the historical and sociological background to disputes over Maori rights should be more greatly emphasised. As stated, the concept of "Maori" is an amorphous concept. Also the historical background to Maori land claims and injustices tends to be historically unique. Thus the nature of the submissions permitted within each case should be relaxed. Perhaps resort to natural law principles should be more permissible during the course of the hearing and also the reasoning of the judgment. With respect, I totally agree with the view that "the austerity of tabulated legalism" should be avoided (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 651, 655 (CA) per Cooke P).

Lastly, I would suggest that it is not possible to define which collective rights may pertain to the Treaty of Waitangi simply through case law. Case law is a good method of obtaining a general "feel" of the issues relating to the Treaty discourse. A gradual, case-by-case evolution is possibly a useful way of obtaining useful background information. However, I do not think that this approach encourages consistency of Treaty discourse.

In my opinion all major claims and disputes that involve actual or potential Maori interests should be deferred to the legislature. Parliament is the only forum with the resources available to take a global view of the situation and to introduce any form of coherence in what is an extremely difficult conceptual area.

Conclusion

Undoubtedly the meaning of the principles of the Treaty of Waitangi is experiencing a process of deconstruction. For the purposes of this paper "deconstruction" will be briefly defined as the discourse aimed at challenging the traditional narrow and loaded meaning of underlying logic and rationale usually associated with communicating the ideology of the dominant political or social interest group. Thus feminist deconstructionists attack language on the grounds that it excludes feminist values and perspectives. Maori deconstructionists attack the traditional meaning attributed to the Treaty of Waitangi on the grounds that non-Maori dogma which serves the interests of non-Maori has dominated debate and policy.

I agree that the status quo requires change. New Zealand has been renowned for the conservative and narrow range of values that have traditionally dominated our society. The country was very Euro-centric and was especially English-oriented. All other cultural alternatives, whether imported from Asia, other European countries, or from the South Pacific, or the indigenous Maori culture were relegated to a secondary role.

New Zealand society and its economy have radically changed within the past two decades. There is a far greater scope for choice. The economy has been deregulated and the former social conventions and structures that governed social conformity and tolerance are less narrow and rigid. Changes to the social, political and legal status of the Treaty of Waitangi form part of the momentum of the general social transformation that has enveloped the country.

I do not necessarily agree with the present approach towards the elaboration of the principles of the Treaty of Waitangi. I accept that politicians, Judges and most interested academics dealing with tremendously difficult issues relating to the Treaty of Waitangi are acting in complete good faith and to the best of their abilities. However I also feel that the current programme to redress the problems associated with the Treaty of Waitangi is moving too rapidly. Great care is required to ensure that change is for the better and not merely for the sake of change.

I feel that it is unrealistic and unjustified to expect the social, political and legal structures of the past one hundred and fifty-five years to be reformed to the extent that te ao Maori achieves domination. It is also difficult to see how parity may even be reached simply because the majority of the population are not only non-Maori but also because most all New Zealanders, including Maori, now accept that this is not only not possible but also undesirable. It is trite political and legal theory that rival political and legal systems cannot be truly accommodated within single territorial boundaries. Any system of government cannot tolerate such conditions essentially because there are alternative institutional sources of authority. The system of Government is destabilised because it is not unified.

I do believe, however, that there is ample scope for incorporating a greater range of traditional Maori values within the limitations required for effective government. New Zealand culture should reflect local social input. Alternative methods of education and healthcare should be introduced and implemented so that the public, either as parents on behalf of children or as adults, may choose the form of education they want for their child or the type of healthcare they wish to receive. However I do not agree that the state may simply impose its will in a democracy without any justification. The state's function in a pluralist society is to provide reasonable alternatives provided these meet reasonable social demands. Claimants may argue that this is not correct because present demands for te ao Maori are not truly accurate and representative. History was distorted by the policy of assimilation. This policy deliberately reduced the intensity of social demand for te ao Maori. Therefore a period of positive discrimination in favour of te ao Maori is justified to redress the previous imbalance. Once the scales have been balanced then it may be fair to allow supply and demand to naturally determine the level of public expenditure that should be applied to the provision of services fostering te ao Maori. Until then it might be argued that the state has a political and moral obligation to force children into learning te ao Maori regardless of the sentiments of their parents and also, I think to a much lesser extent, to teach healthcare professionals traditional Maori protocols and alternative treatment methods.

The ultimate aim of the discourse on the meaning of the principles of the Treaty of Waitangi is greater social tolerance and social harmony. I feel that New Zealand is experiencing the growing pains associated with an enlightened maturity that is directed towards the achievement of a higher plane of Rawlsian "reflective equilibrium".[6] This means in practice that New Zealand public opinion is arguably more informed and tolerant to a different interpretation of the meaning of the principles of the Treaty of Waitangi although such developing tolerance, as briefly discussed, may not necessarily be shared by all members of the community.

The Treaty of Waitangi is the subject of great interest and speculation. The aim of this short article was to attempt to contribute positively to the contentious and fractious debate. ❑

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1 PG McHugh, "Legal Reasoning and the Treaty of Waitangi: Orthodox and Radical Approaches" in G Oddie, R Perrett (eds), *Justice, Ethics and New Zealand Society* (1992), p 91, 104.

2 Ian MacDuff, a Senior Law Lecturer at Victoria University of Wellington, has stated that the framework for Maori rights is not articulated as demands based upon the promises and premises of liberal theory but rather on the unique status of the Maori as tangata whenua, as the original people of the land – I MacDuff, "Biculturalism, Partnership and Parallel Systems" in W Twining (ed), *Issues of Self Determination* (1991), p102.

3 A Sharp, *Justice and the Maori* (1990), 8. With respect, I was personally disappointed with the book. I felt that it was too descriptive. In my opinion Dr Sharp tends to cite the views of others with insufficient evaluation. There is, to adopt and adapt an idea of the author, insufficient "philosophical contestability" (12-3) in his book for my taste.

Also, it is suggested that the style of the book is not truly dialectic. It seems to me that the discussion is more of an attempted vindication of Sharp's "progressive" stance on the elaboration of the principles of the Treaty of Waitangi rather than a more balanced discussion on whether such views are philosophically valid. For example Sharp assumes and accepts, without reason, that Maori are a discrete group (although he is not alone here). I have previously mentioned that I hold real doubts about this claim.

4 *A Theory of Justice*, 1972, p 396.

5 I have attempted this in an unpublished paper called "Institutional Sources of Law and Law reform: A Comparative Study".

6 Above n 4, passim.

I think with mild and shy delight
Of all the times that I am right,
But then the Court does set to nought
The brilliance that my client bought!

Anon