A theory for a more coherent approach to eliciting the meaning of the principles of the Treaty of Waitangi

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This short article is a further continuation of my assault on the underlying implicit logic, and methodology, presumably accompanying the elucidation of the meaning of the principles of the Treaty of Waitangi ([1995] NZLJ 168, [1996] NZLJ 28). *I declare bluntly my interests from the outset. At the risk of sustaining extreme social opprobrium I largely disagree with the current approach taken by the Court of Appeal,*[1] *especially, and academics and politicians to a lesser extent, to the meaning of the social, political and legal significance of the Treaty. I feel that the current approach, which is rapidly attaining the status of conventional wisdom, is arguably both misplaced and cavalier. I am very concerned about the validity of some of the purportedl enlightened social commentary, political policy and apparently "just" case law on the principles of the Treaty. I question whether the necessary preceding dialectic has been canvassed and the legitimacy of all potential political and legal options thoroughly considered before decisions have been made. In my opinion, for the most part well-meaning*[2] *but arguably misdirected case law, political policy and general commentary is currently being developed. Further, any continuation of this trend should be discouraged until some of the fundamental, hitherto ignored, debate on the merits of the underlying principles in justification of the new rubric has been thoroughly addressed.*[3]

The focus and theme of this article is a general consideration of the current approach to the determination of the meaning of the principles of the Treaty of Waitangi. I am particularly interested in the role of the Courts in the development of these principles. Such questions that include whether the participation of the Court is appropriate, whether Courts make the right decisions and what reception and effect do judgments have on the formation of broader principles and policy on the principles of the Treaty of Waitangi will be briefly considered in this article.

Discourse and the Treaty of Waitangi

The term "discourse" has assumed an increasingly popular usage in the literature and general discussion on the meaning of the principles of the Treaty of Waitangi. A very brief, and probably simplistic, explanation of the concept of discourse is offered here.

Habermas says that discourse serves the justification of problematic claims to validity of opinions and norms. Discourse is a specialised form of communication that focuses on the search for arguments and which attempts to offer justifications for the agent's opinion and beliefs. As a method, discourse guarantees the possibility of attaining a consensus discursively by which the consensus itself might then be subsequently recognised as rational (J Habermas, *Theory and Practice*, 1974, pp 18-19).

The key element to discourse is the search for justification. Theoretically the logical step involved in justifying the formation of some posited rule, making of a decision or completion of some action depends upon deductive reasoning. A rule, decision or action is justified if and only if the specific rule or particular decision or action conforms to a wider underlying principle or general law. Rules, decisions or actions that are inconsistent with some underlying abstract principle are unjustified because they are logically invalid. If any rule, decision or action violates the "principle of validity" then it is wrong.

Legal discourse is a subset of general discourse but is, in ways, a marked exception to it. Legal discourse is a rhetorical genre that consists of a language of power. It employs a specialised text that is intentionally directed at the pursuit of control over meaning and which is utilised as an instrument and expression of domination. Legal language and legal discourse is the idiom by which interests and claims are enforced ultimately as rights. Arguably the vocabulary and application of legal discourse is an inevitable incident of the adversarial method of dispute resolution. Consequently,

the principles governing general discourse must be adjusted to reflect the more technical, specialised and self-interested motivations of legal discourse. Legal jargon and legalese – notably antiquated Latin words and phrases – may be used by lawyers as a means of intimidating non-lawyers and of persuading decision-makers of the validity or merits of claims and actions. Thus, unlike the province of logic, legal discourse is not necessarily concerned with the revelation of the truth. Its main, perhaps only, function is to persuade. (In fact, legal discourse is more precisely called eristic reasoning.)

Historical injustice and the Treaty of Waitangi

Should historical accounts of perceived injustices perpetrated on Maori have any persuasive influence on the formation of modern Treaty policy and the resolution of Treaty-related disputes? History is essentially a descriptive discourse which may incidentally have a normative function. Perhaps the most important function of history is its educative value: an awareness of former mistakes and injustices may provide the enlightenment necessary to avoid repetition. However, it is a moot issue whether historical material is vitally relevant to the resolution of contemporary political and legal issues. The primary importance of history depends upon the factual context within which it is used. If similar social conditions obtain then historical accounts may be of more relevance. If the social context has significantly evolved, that is changed, since the days the reliant history was made then the converse conclusion would hold.

Arguably the current New Zealand social, political and economic environment is entirely different to those conditions that prevailed before, say, 1939. Consequently, it is suggested that care should be exercised when historical reasons are cited as grounds in support of claims made pursuant to the principles of the Treaty of Waitangi.

Further, it is argued that the onus of proving the relevance of this historical evidence as the grounds for the assertion of current interests and claims should be reposed on those who rely upon it to justify such interests and claims. Thus, perhaps claimants should be required to convince their opponents that the cited historical injustices are unattenuated by time and that they are still valid. This would effectively mean, of course, proving that the historical social and political conditions are indistinguishable from contemporary social and political conditions. It is suggested, without further elaboration, that this might be very difficult to prove. If so, the substance of any interest or claim arising from the principles of the Treaty of Waitangi that significantly relies upon historical fact must be subject to intense scrutiny. In final comment I affirm my belief in the broad proposition that history is contextually defined. The reality of life is that human society is dynamic and always changing. Therefore history should not be permitted to dictate the outcome of current disputes and to determine the substance of Treaty of Waitangi policy.

Precedents and the emerging discourse on the principles of the treaty

Much of the discourse on the Treaty of Waitangi, whether expressed in the general literature, law review articles, public policy or within the growing body of case law tends to dwell on the analysis of case law precedents. Case law propositions are cited in support of general principles about the principles of the Treaty of Waitangi. Normally this practice would pass without comment. Judges cite precedents in their judgments and all law review articles and legal textbooks consist of an analysis of case law. However, arguably this is an unsatisfactory method of constructing an emerging discourse on the meaning of the principles of the Treaty of Waitangi. There are at least two objections to this quasi-discursive approach, one of which is largely methodological and the other logical.

First, the discourse on the principles of the Treaty of Waitangi presumes that the underlying case law propositions are correct. Thus, according to my reading, much of the discourse seems to consist of the recitation and limited evaluation of the cases in a continuous narrative. If there is disagreement over the decisions reached in the cases then, by implication, any literature that relies upon this material must also be challenged. Second, incorrect case law assumptions and presumptions are infiltrating the general and impliedly accepted literature on the Treaty of Waitangi. Arguably, therefore, contestable or incorrect rationale employed in the resolution of case law is escaping evaluation and potential analytical censure and is, instead, establishing itself as the conventional wisdom on the subject.

In legal theory there are two competing approaches to the nature of law and adjudication. First, there is the **Social Thesis**. This thesis holds that law is a social fact or construct which depends upon underlying social relations for its existence and validity. Thus legal relations directly reflect social relations because they institutionalise those social relations that are accepted by officials as essential for the survival and integrity of society.

In contrast, the **Normativity Thesis** holds that law is a form of practical reasoning. Under this analysis law has a more prescriptive and directive function. Law consists of rules and principles that have been established by controlling officials. Theoretically these rules and principles should reasonably conform to social expectations and demands. It is trite reflection that the failure of any legal system to satisfy the generally accepted requirements of society in a democratic body-politic invites the prospect of civil disobedience. Positive law tends to dominate conservative societies with a strong interventionist government (a la New Zealand society under Muldoonism?). Under these conditions the law tends to be more restrictive about the scope and substance of personal liberties.

These two doctrines have direct relevance to the preceding discussion on the New Zealand Court of Appeal's approach to the meaning of the Treaty of Waitangi. Which theory is the New Zealand Court of Appeal, in particular, using to resolve Treaty-related disputes? Presumably it cannot be the Social Thesis. If so, it seems that there are many unanswered issues facing this Court for future examination and explanation. Just how great is the demand of the "ordinary person" for changes to the meaning of the status of the Treaty of Waitangi? Does the Court know and, if so, how so? It is suggested that

and public, rather than individual, and it is at least partly deliberate and intentional. Politics has been characterised as the medium through which norms are actively enforced and the potential of deliberate, active and collective innovation or imposition of social patterns may be instituted. In a complex democratic society political discourse, advocating the pursuit of some specified political policy, implies both a plurality of competing legitimate ends of human existence and a kind of authority or organisation. Voters have an (admittedly limited) opportunity to choose the preferred political policy by supporting the individuals and political party who champion it (H Pitkin, *Wittgenstein and Justice*, 1972, pp 210-6). Legislation is the manifestation of political policy. Under the current political regime the type and the substance of enacted legislation reflects the aims and policies of the government in power. Whether this stays the same under MMP remains to be seen.

Judgments, or case law, have a different pedigree to legislation. Although case law, like legislation, is prescriptive it is formed in the Courts. Judgments are the institutional resolution of disputes between interacting agents. They form the constituent part of the doctrine of precedent. Case law is a source of law because the Courts form one of the three agents of government: judicial decisions are state sanctioned and even the decisions of the Disputes Tribunal ultimately may be enforced through the issuing of the appropriate warrant. Thus case law is prescriptive and it also contributes to social control and regulation.

(ii) Functional comparison

A personal thesis, which I am currently developing, is that the Courts and Parliament have distinct and separate roles for making and developing the law. Parliament, through legislation, serves the political agenda of its MPs. Parliament is the forum where legislation is enacted that affects and shapes the broad social, economic and political parameters that govern group social interaction. It is in Parliament that the general conditions for group coherence and coordination is established qua public and political policy. Ideally such policy should be representative of the generally held expectations and demands of society in a democratic society. Theoretically Members of Parliament depend upon electoral support for their continued political survival. It must be noted, however and in contrast, that it has been well documented that theory does not necessarily equate with political reality. Some, usually wealthy, pressure groups wield far more power and influence over politicians than does the "ordinary (unorganised) person". This has been, of course, one of the chief criticisms of the Marxists: in their view the powerful, enfranchised politically elite, such as the Business Round Table, have an unjustified influence on New Zealand laws.[6] The argument is that such undue influence is undemocratic because it does not necessarily correspond to nor reflect the general consensus of the community.

In contrast, it is suggested that case law has a totally different pedigree and function compared to legislation. Case law is derived solely from dispute resolution. Thus it is both fact-dependent and fortuitous as it largely depends upon the decisions of the interacting parties to litigate. Strict rules of evidence and procedure limit the availability of evidence available to Judges and also defines the issues. Eristic reasoning, as previously noted, also reduces the ability of Judges to expound general principles for regulating and controlling future social interaction.[7] The nature of the adversarial system of dispute-resolution is to win cases and not necessarily to reveal the strict truth. It is well known that oratory and persuasive communication techniques are essential features of successful barristers. The art of good Court room presence and general litigation skills is the ability to place selective emphasis on advantageous precedents, to favourably interpret ambiguous precedents and to dismiss and/or distinguish damaging precedents. For a lucid and useful account of legal reasoning techniques the reader is referred to N MacCormick, *Legal Reasoning and Legal Theory* (1978).

In summary, it is respectfully suggested that there are several objections to the development of the principles of the Treaty of Waitangi by the Court of Appeal. Essentially, it is potentially unconstitutional. Court of Appeal judgments do not necessarily reflect the general consensus of the community. This point is particularly salutary given the function of Courts generally to resolve disputes and also the specialised techniques utilised in the Courts to persuade Judges of the merits of counsel's arguments, as discussed. Thus the Court of Appeal is making law that affects the broad parameters of social and political interaction, or collective interests, in a manner that may not necessarily reflect the general consensus of the community.[8] The Court of Appeal has neither the resources nor the constitutional status to attempt to address and resolve such complex issues. Consequently, given these limitations, it is strongly advocated that all Treaty-related disputes should be deferred to the (theoretically) more democratic forum of Parliament for consideration and deliberation.

The general position supported by this writer has already been classically formulated by Mason J in the Australian High Court (*State Government Insurance Commissioner v Trigwell And Other* (1978) 142 CLR 617, 633-4):

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a

> view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.
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> These considerations must deter a court from departing too readily from a settled rule of the common law and from replacing it with a new rule.

I do not agree entirely with this quote. I feel that it should be qualified by the brief comment that this judicial approach is especially relevant to disputes that potentially affect collective interests only. I do not consider it inappropriate for the Courts to reform case law if such reform is justified and provided that this reform does not change broad social, economic and political parameters that govern social control and regulation. This statement itself raises an important incidental issue which is not pursued in this paper, namely, what is the difference between a broad and narrow social, economic and political parameter? To continue, in my opinion case law of the latter type is an arrogation of Parliamentary power. With respect, I further do not think that such intrusions should be tolerated on strict constitutional grounds. It is largely for these reasons that I do not agree with the New Zealand Court of Appeal's decision in the State-Owned Enterprises case not that Court's subsequent involvement in Treaty-related disputes and, also, why I do not concur with the Australian High Court's decision in *Mabo v State of Queensland* (1992) 107 ALR 1).

Conclusion

Over the course of three recent articles in the *New Zealand Law Journal* I have attempted to question the current perceived approach to the elaboration of the meaning of the Treaty of Waitangi. I do so in complete good faith. I admit that I am a non-Maori, assuming that there is any such meaningful description. I also consider myself to be a politically moderate liberal. I have no particular axe to grind except to insist upon the demand that any future "progress" in this area be balanced, enlightened, consensual and justified. I do not think that the substance of some of the current Treaty discourse, as either political policy, case law, or general commentary, has any of these attributes and that other discourse is inadequate in certain respects. I feel that perhaps some of the issues mentioned in these papers should first be addressed before any further consideration to the reform of the status and meaning of the Treaty of Waitangi is contemplated.

If so I, personally, would feel far more confident that a lasting, political, settlement of this most difficult of problems may be reached for the greatest benefit of all. ❑

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1. I am fully aware that the Privy Council is this country's highest Court. However, given the uncertain future of appeal rights to this Court, I have confined discussion to the Court of Appeal. Even if the Privy Council was retained as our final appellate Court I would still argue that there should not be any right of appeal to that Court on Treaty-related issues. With respect, I am not confident that the Law Lords are sufficiently knowledgeable about local social and political conditions to enable them to make informed decisions in this controversial area.
2. However I am not convinced that *all* the agents who have contributed to this debate are acting entirely in good faith. Some of the commentary, especially, is vitriolic and appears to be unbalanced. Also, as an aside, it is interesting to speculate on the possible reasons that motivate radical and opinionated "non-Maori" especially to write on this subject. Perhaps it is because they genuinely believe in what they say. I wonder, however, at the risk of being unkind, if these commentators genuinely believe in their opinions. Do they truly treat Maori as their friends and equals or do they perhaps inadvertently patronise Maori? Do non-Maori commentators regularly socialise with Maori? Do they form stable personal relationships with Maori and have they co-parented children with them? See R Dawkins, *The Selfish Gene* (new ed, 1989), for the significance of this latter remark. In the absence of such evidence of true, rather than purported, commitment then it is suggested that the arguably unbalanced opinions of such non-Maori commentators should be viewed with some suspicion.
3. This article does not set out to be mischievous for its own sake. Rather, it (and the two previous articles written by this author) questions some of the rationale and purpose of the approach to the developing principles of the Treaty of Waitangi: rather than necessarily creating an alternative theory the article is critically focused. It is conceded that this method is inconsistent with the conventional wisdom of encouraging constructive criticism, following the lead of LK Galbraith in *The Affluent Society* (2 ed, 1969), p 18.
4. The decision should be contrasted with the Court of Appeal's decision in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 203 – the "Sealord case".
5. A point made in a previous article ([1995] NZLJ 168). The second paper on the Treaty ([1996] NZLJ 28) erroneously and clumsily refers to the *second* premise in the opening paragraphs.
6. For example, one might speculate upon the effectiveness of the occupation of Moutoa Gardens if the occupiers had consisted less of social welfare beneficiaries trying to prove their point and more of well-intending, reasonable and educated middle class professionals. On this point of principle, only, the occupiers arguably deserve some sympathy.
7. To recap, the Courts are a branch of government because judicial decisions are institutionally sanctioned and enforceable. Also, they are prescriptive by virtue of the doctrine of stare decisis.
8. Of course, it may transpire that the Court of Appeal's rulings and public opinion is essentially convergent. However this point is yet to be proved.

Legal Latin

The Daily Telegraph's City Diarist asked **Stephen Pollard**, the lawyer who tried to prevent the extradition to Singapore of Barings rogue Nick Leeson, what his favourite foreign phrase was. "Res Ipsa Loquitur" he replied, ("Let things speak for themselves"). His curiosity roused, the Diarist asked why this was the case. "It's been my favourite ever since I dictated it to a temporary secretary and she typed it out "Ray's hips were locked together", revealed Pollard.

The Week
17 February 1996

judicial suppositions are inadequate proofs of any such demands. It is further suggested that reliance upon arguably distorted and self-interested advice of "experts" such as general academics and academic historians is insufficient persuasive grounds for change. It is suggested that the voice of the people, however measured, must determine how the Treaty should be treated. If the general, discursive, consensus is that this country is not yet ready for radical change then this view must prevail despite the personally different views of the Court of Appeal Judges. Arguably this is the essence of good judgment.

The Normativity Thesis also poses problems to the Court of Appeal. It seems to me that the Judges are undertaking a leading and innovative role in changing the law in this area: the establishment of the "partnership principle" is a classic example of this general proposition. (*New Zealand Maori Council v Attorney-General* [1987]1 NZLR 641, 651.) The obvious question, however, is what justification is there for this radical development? I doubt whether it was public demand or social expectation, especially given that this case was decided in 1987. There is not any local or overseas precedent for any such principle as far as this author is aware. Thus, arguably this judgment was a well-intended knee-jerk reaction to a very uncomfortable dispute.

It would be unfair to leave the discussion here. In defence of the Court of Appeal it might be suggested that it was forced to make a decision by the Crown's apparent failure to fully emphasise a fundamentally important principle of public law: that serious disputes potentially importing collective interests should be deferred to the legislature. Thus, faced with the dilemma of having to reach some decision the Court (probably rightly in the circumstances) chose the partnership fiction. Thus any criticism, if appropriate, should arguably be directed at the Crown for litigating this issue in the first place and for subsequently failing to argue jurisdictional issues during the hearing.[4]

There is a second, related, reason for why the growing literature on the meaning of the principles of the Treaty of Waitangi should be viewed with caution. As mentioned, this narrative seems to depend upon the reasoning of the cases, especially the leading cases of the New Zealand Court of Appeal. Textbook principles tend to be derived from case law propositions, such propositions that are increasingly treated as infallible and forming conventional wisdom. In contrast, this present article maintains that the decisions themselves should be questioned. Also, by implication, the analysis of the precedents, such as it is, should also be examined on logical grounds. If it is true that public policy, textbooks, law reviews and general commentaries on the Treaty are largely reliant both upon case law propositions and the findings of the Waitangi Tribunal then arguably the following logical faux pas is being committed.

A purportedly deductive argument where the premises and conclusion are indistinguishable is called a petitio principii. (The term literally means "begging the question".) It is not a valid and true argument by definition because the conclusions are not inferred. Rather, the conclusion is determined by the carefully selected premises. If the premises themselves are changed then a different conclusion may follow. Therefore, perhaps the biggest issue concerning the meaning of the principles of the Treaty of Waitangi is the issue of reaching consensus about the correct major and minor premises that should be used in any subsequent dialectic.[5] In summary, my criticism of the current approach in the general legal literature and by policy advisers is that case law propositions and the Reports of the Waitangi Tribunal are accepted with little or no comment about their significance to resolving current disagreements. Thus they are beginning to enjoy an axiomatic status which they may not necessarily deserve.

The authors of the "new wave" liberal (and possibly wrong) approach to the meaning of the principles of the Treaty of Waitangi appear to accept freely the validity of existing principles and conclusions. After determining these existing principles, and accepting them as axiomatically just, they are employed as reasons for forming new and broader principles and conclusions on the Treaty. Typically, for example, the Waitangi Tribunal may accept the historical findings of expert historians as evidence that the Crown or some private individual or agent, such as the New Zealand Company, committed some specific wrong to some specific Maori. The current government, with a sympathetic record toward historical Maori grievances, might then use this information as a reason to pay compensation and/or return the land or other property right to the current descendants of the Maori to whom the original wrong was committed. I would respectfully submit that this "nodding donkey" mentality should be stopped immediately.

The government (and Courts) are unquestionably attempting to resolve extremely difficult and sensitive issues as justly as possible. It is respectfully suggested, however, that their approach to these issues is problematic. The presumption of the validity of historical evidence, upon which much of the changes in interpretation to the status and meaning of the principles of the Treaty appears to rely, has yet to be fully analysed and evaluated. Who now are the victims of historical injustices? Conversely, who now are the villains who are accountable for perpetrating such historical injustices? Why, for example, should current taxpayers be held financially responsible for subsidising a fiscal envelope offered in full and final compensation for damages that arguably happened in previous generations? If the current generation of taxpayers must bear the financial responsibility of righting historical injustices via the fiscal envelope then future taxpayers will be subsidised by this sacrifice. Effectively, then, this generation of taxpayers may be held vicariously responsible for the unjust actions of former generations of non-Maori for the ultimate benefit of future generations of taxpayers. Is this a correct, just and, indeed rational, policy?

Which forum: the Court of Appeal or the Legislature?

(i) First principles

Although instituted political policy and case law contribute to social control and regulation, both are distinct entities. The role and character of political action is collective