New Zealand Experience: The Treaty Of Waitangi

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The main point

The main point I wish to advance in this paper is that no matter how finely worded a treaty might be, it will not be effective unless there is a broad political consensus to make it effective. Professor Brij Lal has shown in his paper that despite the meticulous care and widespread consultation that underlay the making of the 1997 Fijian constitution, it was abrogated by force by sections of Fijian society who were not fundamentally in sympathy with it. Much the same can be argued in respect of the Treaty of Waitangi in New Zealand.

When proposals for a treaty with the Aboriginal people began to be mooted in the 1970s it was commonly argued in Australia (as indeed it still is) that the situation of Maori in New Zealand was markedly better than that of Aborigines in Australia, because Maori had the benefit of a treaty their chiefs signed with the British in 1840, the Treaty of Waitangi. In contrast, many New Zealanders, including many Maori, were quite cynical, in the light of their experience, about what a treaty might achieve for Aborigines. As recently as 1983, the New Zealand Maori Council, the senior Maori representative body, established (like ATSIC) under an act of parliament, stated as follows:

> "In the treatment and handling of Maori claims the Treaty of Waitangi has been sadly denigrated. Unlike many other countries where treaties and the facts of prior occupation have been regarded by the Courts as proper sources of domestic law resulting in a body of court laws on treaty and indigenous rights, the New Zealand courts have consistently denied that the Treaty fo Waitangi forms part of our domestic law or that such sources of law could exist...We have persistently pleaded on the basis of the Treaty and consistently

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we have been denied redress on that basis. We have now the somewhat unique situation in New Zealand that the settlement of Maori claims must invariably be sought at a political level.[1]"

The Maori Council is here reminding us that statements of indigenous rights may be of little practical effect, unless they are enforceable as part of the law of the land, in the regular courts. It must be understood that a treaty is normally an agreement between two executives - in this case Lieutenant-Governor William Hobson, coming to take up office as the Crown's representative in New Zealand, and over 500 Maori chiefs; unless a treaty is 'ratified' by the legislature or somehow made part of the domestic law, the document as such is not enforceable in the courts. It may, however influence the interpretation of law, which is another matter which we will shortly consider.

As we shall see, parts of the Treaty of Waitangi were transposed into New Zealand statutes by the settler-dominated parliament, but often in ways which Maori saw as working against them rather than for them. It was not until 1975, when a Labour government with a Maori, Mr Matiu Rata, holding the office of Minister of Maori Affairs, that the Treaty of Waitangi as such was incorporated in a statute, the Treaty of Waitangi Act. Many of the gains made by Maori since that time stem from the Treaty of Waitangi Act 1975, and the Waitangi Tribunal created under that act, rather than from the Treaty of Waitangi as such, or from some of the earlier attempts to give statutory force to some of its provisions. It is very important that Australians who look at the relatively better situation of Maori compared with Aborigines, and advocate a treaty as the basis of Aboriginal advancement, should understand these distinctions.

The Treaty of Waitangi 1840 and the question of sovereignty.

The treaty negotiated between Governor Hobson and the Maori chiefs in 1840 was a political instrument intended to secure the chiefs' consent to the assertion of the Crown's sovereignty in New Zealand. It is often asserted, particularly by Pakeha (non-Maori) New Zealanders, that the chiefs ceded full sovereignty to the Crown in the treaty. It is in fact doubtful that they did so, but arguable that British sovereignty was established by other means. There are several reasons for this.

Most important among these is the undoubtable fact that New Zealand was already being settled, predominantly by British people, before 1840. Settlement and acquisition of land rights had begun ever since the colony of New South Wales had been established in 1788. Merchant companies exploiting seals, whales, flax and timber, established bases in New

[1] New Zealand Maori Council, 'A Discussion Paper on Maori Affairs Legislation', unpublished typescript, February 1983, p.35.

Zealand from the 1790s, either directly from Britain or, more commonly, from Sydney. Increasingly the agents of these companies made transactions with the Maori chiefs which purported to transfer huge tracts of land in freehold title to the traders and settlers. Moreover, in the 1830s the New Zealand Company was formed in England by a coterie of capitalists headed by Edward Gibbon Wakefield and began to send out immigrants. The Company claimed to have purchased from Maori chiefs some 20 million acres on either side of Cook Strait. In addition a largely Scottish company, the Manukau Company, claimed to have purchased in 1838 the peninsula on which Auckland is now located, and prepared to send out immigrants, while in 1840 a French colonising company sent out immigrants to Akaroa on Banks Peninsula, with the intention of acquiring and settling what is now known as the Canterbury Plains.

It was apparent to the Colonial Office that New Zealand was being over-run by ill-organised but aggressive private settlement. The humanitarian groups in that office and in the British parliament, therefore decided that it was necessary in the interests both of settlers and Maori that the land trade, and relations between Maori and settlers, be regulated under the authority of the British Crown.[2] They were not sure that they needed a treaty to achieve this, and Letters Patent of June 1839 in fact authorised the Lieutenant-Governor designate, William Hobson, to annex parts of New Zealand to New South Wales. It is clear from Hobson's own statements that he would have done so, whether or not the chiefs signed the Treaty of Waitangi. Moreover, Governor Gipps of NSW on 14 January 1840, and Hobson in the Bay of Islands on 30 January 1840, before the Treaty was signed, issued proclamations bringing all pre-1840 land transactions under review by a land claims commission to be established by the NSW legislature.

The Colonial Office decided to seek a treaty with the chiefs largely because they had previously tried to create a kind of Maori government in the north of New Zealand. In 1833 they had sent to the Bay of Islands a British 'Resident', James Busby of NSW, invested with consular jurisdiction and instructions to try to 'work up' the chiefs into some kind of legislature and judiciary. In 1835, concerned by the claims of a French landbuyer called Charles de Thierry, Busby had some of the northern chiefs agree to a constitution for a 'Confederation of the United Tribes of New Zealand' and assert Maori independence. London gave the Confederation a highly qualified recognition, subject to the legitimate rights of others. For this reason, and partly to avert anticipated criticism from the United States (which also had consular representation at the Bay of Islands) and from France, it was decided in London that the consent of the Confederation chiefs should be sought to the assertion of British sovereignty.

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[2] There are a number of texts dealing with these events. Particularly useful are Peter Adams, *Fatal Necessity; British Intervention in New Zealand 1830-1847*, Auckland, 1977, and Claudia Orange, *The Treaty of Waitangi*, Wellington, 1987.

Some Maori today argue that this meant that from 1835 there was a recognised Maori nation, and that the Treaty of Waitangi was therefore an agreement between two nations, enforceable in international law. There is some support among jurists, especially in the United Nations, that such treaties with indigenous peoples are indeed valid in international law, though whether this makes them enforcable against inconsistent domestic law is doubtful in principal and even more so in practice. But one thing is clear, historically: there was no single functioning Maori nation in 1840. Even as the 30 or so northern chiefs signed Busby's 1835 constitution they told him not to expect the individual chiefs to subordinate their personal and tribal mana to that of the confederation. Busby took the point and never again assembled the Confederation chiefs except to sign away their authority to Hobson in 1840. As the Treaty of Waitangi itself states, effective sovereignty still lay with the many individual chiefs and tribes throughout New Zealand.

That is why, after the initial negotiation on 4 to 6 February 1840 at the Bay of Islands, when 46 chiefs signed (including most of the Confederation chiefs), Hobson had his lieutenants and the missionaries hawk the treaty around the country, collecting signatures. By June 1840 they had collected over 500 but Hobson did not wait till then to proclaim British sovereignty. On 21 May, concerned that the New Zealand Company in Wellington were going to set up their own government in agreement with local chiefs, he declared British sovereignty over the whole country - the South Island by right of discovery, the North Island by cession. His proclamations were published in London in October 1840 in the government gazette. Since that time, jurists have divided on just how, in international law terms, New Zealand became a British possession. But the weight of opinion is that it was by settlement and act of state, rather than by cession, notwithstanding Hobson's proclamation.[3]

Maori have also divided on how they perceived the Treaty. Many today argue that the chiefs did not in fact consent to the transfer of full sovereignty to the British Crown and a number of scholars have supported that view. First, the proceedings were in the Maori language (with the missionaries acting as interpreters) and most chiefs who signed put their marks on a Maori version of the Treaty – which is close to, but not an exact translation of, the English text in which it was originally drawn up. In the Maori version of Article 1, the chiefs ceded, not sovereignty, but 'kawanatanga' – an abstract noun meaning 'governorship', from the transliteration of 'governor' as 'kawana'. And whereas the English text of Article 2 assured Maori the 'possession' of their lands, forests and fisheries until such time as they wished to sell them to the Crown, the Maori version assured them of their 'tino rangatiratanga', or 'full chieftainship' of these and other valued things. ('Rangatiratanga' being term derived from

[3] See J Rutherford, *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand, 1840*, Auckland, 1949.

'rangatira' the Polynesian word for 'chief'). In other words, in their eyes, they ceded some kind of wider administrative authority called 'governorship' while retaining 'full chieftainship' among their own tribes. There is thus some ambiguity between the English and Maori versions. In either language there is tension between the powers assumed by the governor or Crown under Article 1 and those retained by the chiefs and tribes under Article 2. Article 3 is less controversial: it accorded Maori the rights and privileges of British subjects. However, it is obvious that drafting of the text of a treaty is no easy matter, especially when two or more languages are involved and every word is likely to be the subject of intense controversy - and of litigation should the document become law.

Recently, an important book by Emeritus Professor Jock Brookfield of the University of Auckland argues that, in addition to the many chiefs who never did sign the Treaty of Waitangi, those who did

had no clear understanding of what it meant for the British Crown to have full 'sovereignty' of New Zealand. Rather, Brookfield argues, the British in 1840 made a revolutionary assertion of the Crown's authority, supplanting the Maori jural order with their own. They then asserted the Crown's authority partly by force of arms – the succession of Anglo-Maori wars beginning in 1844 – and partly by winning Maori consent to and participation in the new institutions of state. The latter process began early in 1840 when Maori began to be arrested for crimes such as theft or assault, or brought before courts over unpaid debts. Some Maori were defiant, and said that the new courts had no jurisdiction, especially as regards matters of Maori custom. Others saw the usefulness of the system, and supported the courts, bringing their own claims against settlers. Most importantly, they gave evidence to the Land Claims Commissions which investigated the pre-1840 purchases, and generally accepted their decisions – a good deal more willingly, it might be said, than did the New Zealand Company and other speculators whose claims were struck out or greatly reduced.

In 1844 the Ngapuhi chief Hone Heke, the first to sign the Treaty of Waitangi, rose against the Crown, cut down the flagstaff flying the Union Jack and sacked the township of Russell (the former whaling port called Kororareka in the Bay of Islands). But other Ngapuhi chiefs joined the governor in helping to suppress Heke's rising. Similarly, the Te Atiawa tribe about Wellington, joined with Crown to suppress the rising of Te Rauparaha in the adjacent Hutt Valley in 1846-7. In 1847 the Resident Magistrates Ordinance authorised the appointment of chiefs as 'Assessors' to the Resident Magistrates' courts, enforcing a mix of law and custom in cases involving Maori. In the 1852 constitution setting up a national parliament all but a handful of Maori were excluded from the franchise by the individual property qualification; to resolve the problem Maori in 1867 were given four reserved seats in the national parliament, elected by adult male franchise, and soon began to contest them. From 1867 too, state schools teaching in English were established in most large Maori

villages, on land donated by chiefs and managed by local school committees. Some went on to state and private secondary schools. Many Maori joined the police and armed forces. By the 1890s the first Maori graduates were emerging from the universities and Maori MPs were being appointed as ministers in New Zealand governments.[4]

In short, Brookfield argues, the initial revolutionary assertion of British sovereignty acquired legality over time through the Maori and settlers participating together in the machinery of state. Moreover, it has also acquired legitimacy amongst many Maori (not all) by virtue of Maori and Pakeha living together, intermarrying and sharing the same political, judicial and social institutions.[5]

I have myself argued elsewhere that, notwithstanding the Confederation of United Tribes and its Declaration of Independence, there was no functioning New Zealand nation-state before 1840. Amidst rapidly mounting pressure from white settlement, the Treaty of Waitangi was a political compact between the Crown and most of the important chiefs to create a nation-state where none previously existed - a joint enterprise, under the Crown, which most of the chiefs recognised to be necessary to meet the exigencies created by the modern world sweeping in upon them.[6] That is the sense in which most Maori also probably regard the treaty. For many it was indeed a treaty of cession, though the legitimacy of the Crown's sovereign authority still depends on its fulfilling the terms of Articles 2 and 3 of treaty – that is, Maori rights to customary property assured under Article 2, and the rights of British subjects assured under Article 3.

Comparing this to the Australian situation three points stand out. First, there never was in Australia any proceeding akin to the Treaty of Waitangi whereby even the nominal consent of Aboriginal people was sought for the establishment of the Crown's sovereignty. Second, while it might still remain of great symbolic importance that some kind of consent should be sought, in practice (following Brookfield's reasoning), British sovereignty has already been established in Australia by the long operation of British law and institutions, many of which – such as participation in parliamentary elections, or taking appointments as magistrates - Aboriginal people have accepted. On that basis, the legality of British sovereignty is no longer in question. Indeed much more substantial gains have been made by Aborigines using British common law to pursue land rights, as in the Mabo and Wik cases, than by going off to the United Nations to plead that Aboriginal sovereignty remains extant. But legality is one thing; legitimacy another. There may still be a place for a treaty in Australia, not so much to establish the Crown's sovereignty, which is a fact, but to give

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4 I have covered these developments in *A Show of Justice; Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, 1974.

5 F.M. ('Jock') Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, Auckland University Press, Auckland, 1999.

6 Alan Ward, *An Unsettled History; Treaty claims in New Zealand today*, Bridget Williams Books, Wellington, 1999, pp.15-16.

it political legitimacy with the Aboriginal people. Third, just as the Treaty of Waitangi launched the process of nation-making in New Zealand, in which much remained to be worked out by Maori and Pakeha together, so too in Australia much is still ill-formed, and a truly joint venture of nation-making would involve the Aboriginal people much more than it has hitherto. Again this suggests a possible role for a treaty as a political instrument, with a great deal of prior bargaining and much more explicit agreement by settler and Aboriginal leaders as to the shape of our national institutions, especially insofar as they affect the daily lives of Aborigines. Or, if too much specificity is impracticable, at least that a statement of principles might be agreed to guide the interpretation of law in Australia.

The Treaty of Waitangi and Maori land rights.

The main purpose of the British assertion of sovereignty in New Zealand was to control the land trade. The leaders of the Wakefield settlement in South Australia were, in 1838-9, in the very process of brushing aside Colonial Office directions to respect Aboriginal property rights (they could not find any worthy of recognition, said the South Australian Commissioners), and the humanitarians in England sought to avert a similar outcome in New Zealand. The Crown's basic position as regards Maori property rights was that, while radical title to all land, including tidal land and the beds of navigable rivers, passed to the Crown on the acquisition of sovereignty, identifiable Maori property in land, such as village sites, cultivations and burial grounds, remained. Indeed the judges in the first Supreme Court case in New Zealand to consider the issue, Regina v. Symonds, 1847, concluded that even without the Treaty of Waitangi, common law recognised that such customary rights constituted a 'burden' on the Crown's title. But on the matter of 'waste' lands – the vast uncultivated forests, grasslands and mountain crests – the British vacillated. Some thought that the Treaty of Waitangi (if not common law) guaranteed to Maori their rights to all their hunting and gathering land, as well as the cultivated land. But many – perhaps most – thought that no such rights existed either under the Treaty or common law – that much of New Zealand was terra nullius.

In fact Earl Grey, the Secretary of State who had charge of shaping New Zealand's first representative constitution in 1846, instructed the then governor, Captain George Grey, to register the land Maori actually cultivated as Maori land and the rest as demesne lands of the Crown.[7] At this stage it was not the Treaty of Waitangi that was protecting the Maori people but their own military capacity. In 1843, magistrates and armed

[7] See Adams, pp.175-209.

settlers tried to forcibly assert the New Zealand Company's claims in the Wairau Valley, southeast of Nelson, and more than 20 had died in the attempt. Muskets were of little value against Maori in the jungle-clad New Zealand mountains and foothills. Even Governor Grey's regiments had only with great difficulty pushed roads and a small perimeter of settlement outside Auckland and Wellington. The governor and his officials had more success bribing chiefs and manipulating the tribes with spurious promises, and by this means purchased most of the South Island and Hawkes Bay in the North Island. Grey informed his superiors in London that Maori would assert their rights to the 'waste' lands and that some form of purchase must be gone through, but that the chiefs would give way for a trifling consideration and some personal recognition in the form of small grants of freeholds, or appointment to minor office in local administration.

But Maori resistance to land-selling hardened, and the government made little further progress with purchases in the North Island. Consequently, when Maori resisted surveys of a flawed purchase in Taranaki in 1860, the British governor sided with the settlers and sent the regiments against the tribes there. Governor Grey, sent back for a second term, found he could not deal with the kingitanga – an attempt by the central North Island tribes to find unity under a Maori monarch – and sent the regiments into the Waikato district in 1863. The Anglo-Maori wars of 1860-72 involved some 10,000 British troops and settler militia, plus Maori allies (who were largely pursuing old tribal enmities). Vast amounts of the best land in the North Island were confiscated for alleged rebellion, and these confiscations are among the most serious Maori claims against the Crown today, for breaches of the Treaty of Waitangi.

The government's other means of securing Maori land was more subtle. The war in Taranaki had erupted partly because of confusion about which people in a tribal complex had authority to make decisions over customary land. The settlers and Crown officials were aware that land transactions would be greatly facilitated if customary tenure was converted into titles granted from the Crown, with their nature being defined by statute rather than by Maori custom. In 1862 the role of hearing customary claims and recommending grants of title fell to a new body, the Native Land Court (later the Maori Land Court). Maori were not wholly opposed to the process, because they too were interested in economic development, based upon more clear and certain title than custom allowed. But the kinds of title created under the Native Lands Act 1862 were disastrous for the Maori people. Basically they involved a listing of individual names on a Crown grant, with each named owner's share able to be sold or leased, severally, to the Crown or directly to settlers. The tenure conversion facilitated by the Native Land Court inaugurated a huge scramble to purchase shares in blocks of land, with all kinds of attendant chicanery and manipulation. The former reciprocal control chiefs and people had over each other in relation to their collective rights in the

tribal patrimony was destroyed. Without any other ready capital in the new economy, chiefs and people betrayed each other and sold their signatures in order to get money. Moreover, the new titles totally frustrated the Maori people's own efforts at farming because the land purchase agents could acquire individual interests and have blocks that Maori farmers were trying to develop, partitioned by the Land Court. Commonly there was a sequence of partitions, and the Maori landed estate was whittled away over the next 100 years. Maori society was disrupted and Maori people rendered marginal in their own land. So much for the Treaty of Waitangi.

Yet the Native Lands Acts purported to be giving statutory effect to the Article 2 guarantee of the Treaty that Maori property rights would be respected. They purported to make that aspect of the Treaty justiciable in the New Zealand courts. Certainly they brought an end to the debate about whether Maori had valid title to waste lands. But the statutes also defined the kinds of right and title that Maori were given when the customary tenure was converted. These were almost always slanted in favour of the land purchasers and the courts could not go behind them to give their own interpretation to Article 2 of the Treaty, which was supposed to protect Maori customary property rights and control over their alienation.

Similarly, the Native Rights Act 1865 was intended to give effect to Article 3, which accorded Maori the rights and privileges of British subjects. Under the 1865 Act, Maori were deemed to be natural-born subjects of the Crown, with the right to sue and be sued in the Supreme Court. This too, was a double-edged sword. One of its most immediate effects was that Maori captured in the fighting which still ravaged the North Island were no longer treated as prisoners of war but as treasonable, or as murderers. Some were sentenced to be hanged, drawn and quartered, under a statute of Edward I, though the drawing and quartering were remitted. Maori did begin to bring actions in the Supreme Court in defence of their land rights, usually citing the Treaty as their foundation. But the Supreme Court regarded the Treaty as a nullity in domestic law, except insofar as its terms had been given expression in statutes. This brought the Maori claimant's back to the Native Lands Acts – and to stalemate. This went on for over 100 years, and is the reason why the NZ Maori Council as late as 1983 could make the kind of statement quoted at the outset of this paper. The Treaty as such appeared to have availed Maori nothing in the way of protection of their property in the New Zealand courts, but had been perverted by the settler-controlled parliament to serve the interests of the colonists.

There is an obvious lesson to be learned from this in Australia, from an Aboriginal point of view. Whatever a treaty with the Aboriginal people might say, it could be translated into law in a variety of ways. Aboriginal people would need to be very alert that this was done in ways which are beneficial to them, rather than in the form of snares which legally entrap them.

The Treaty of Waitangi Act 1975

Maori had never ceased to protest about what they increasingly saw as breaches of the Treaty of Waitangi. Apart from physical resistance on the land itself, they sent a stream of petitions to parliament about the unfulfilled promises that accompanied the Crown's pre-1860 land purchases, about the military aggressions and confiscations in the Anglo-Maori wars, and about the loss of their patrimony and the disruption of their society through the Native Lands Acts. The Maori members protested in parliament whenever land bills were introduced. Others took cases to the Supreme Court and Privy Council. Boycotts of the Land Court were attempted and surveys continued to be interrupted, though this now usually ended with the culprits going to gaol. Only in the 1920s did the rate of land purchase really slow, and some commissions of inquiry begin to look into the injustices of the past. But from the Maori perspective there was still no secure foundation for their rights, as the indigenous people of the land. Consequently, sections of the Maori protest movements focused increasingly on the Treaty of Waitangi as a charter of indigenous rights. The 'Kotahitanga' or unity movement of the 1890s began to demand that the Treaty be enacted into law by the national parliament (or alternatively that a separate Maori parliament be established to govern Maori). In the 1920s the Ratana Church – the politico-religious movement founded by the prophet Wiremu Ratana - gained the allegiance of a majority of Maori, the length and breadth of the country.[8] It demanded the 'ratification' of the Treaty by parliament. When the Ratana movement began to stand candidates for the Maori seats, and win them, the NZ Labour Party entered into alliance with the Ratana organisation, and to accept their nominees as Labour candidates for national elections. The Ratana-Labour alliance delivered all four Maori seats to the Labour party by 1943 and brought the question of the 'ratification' of the Treaty into the Labour caucus.[9]

The Maori people in fact benefited greatly from Labour's welfare policies, along with the rest of New Zealand's economically marginal people.

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[8] Politico-religious cults were characteristic responses to colonialism throughout the Pacific. In Melanesia they are sometimes (very misleadingly) called 'cargo' cults. Basically they were messianic movements involving the traditional technique of a visitation from the spirit world to a messenger or mouthpiece – the prophet – in times of crisis. The prophet or visionary (who was sometimes a woman) enunciated the message to the troubled community, cured the sick and devised a ritual and set of teachings which, if followed, would lead to the deliverance of the community from their difficulties. Although the techniques were highly traditional they often involved very modern aims, such as the instantaneous learning of English, the recovery of land, a flow of money to develop it, and an access to political power. The Anglican church sought to accommodate Wiremu Ratana, a communicant member of that church, but eventually found him too heretical. Yet the Ratana Church is recognised in New Zealand as a church authorised to formalise marriages and burials, as is the Ringatu Church, founded by another prophet on the East Coast of the North Island.

[9] Orange, pp.232-48.

But little was done by Labour to rectify the legacy of historical grievances. Moreover, in the 1960s, as the post-war economic boom gave way to recession, the fast-growing Maori population increasingly felt their marginalisation. Whereas Pakeha in 1961 was still seeking to promote the assimilation of a relatively small Maori minority into mainstream New Zealand life, they suddenly found themselves confronting some 12 per cent of the population, largely landless, rapidly becoming urbanised, increasingly educated and increasingly unemployed. These were the preconditions for the widespread unrest which erupted in the late 1960s, manifested in street protests, land occupations and demonstrations at Waitangi commemoration days - some of them violent. In 1975 a huge 'land march' commenced in the far north and ended outside parliament in Wellington demanding that the Treaty of Waitangi be honoured and that past breaches be redressed.

These were the circumstances in which Mr Matiu Rata, the Minister for Maori Affairs in the Labour government of 1972-5, introduced the Treaty of Waitangi Bill. This measure cited both Maori and English versions of the Treaty in a schedule, and provided that henceforth 'any Maori' who considered that he or she had been injured by any action of the Crown, of commission or omission, in breach of the principles of the Treaty, might bring a claim to a tribunal constituted under the act, the Waitangi Tribunal, comprising both Maori and Pakeha membership, which could investigate the claim and recommend measures necessary to end the injury and provide redress. Hinging the process on the principles of the Treaty rather than its terms was considered appropriate because of the inherent ambiguities in the terms, the fact that they were in two languages and, most importantly, because the Treaty was recognised to be a set of very broad statements setting up a relationship, rather than a document designed to have constitutional status or to be established as fundamental law, against which the validity of all other law was to be tested. There was pressure a decade later to include the terms of the Treaty in a Bill of Rights, which parliament was considering and eventually adopted. But Maori themselves did not press very hard for that, although some have subsequently felt that an opportunity was missed. Generally there was a shared view, across both races, that the Treaty must be respected as the document upon which the nation was founded, that it had established a partnership between Maori and Pakeha and a set of principles which governed the relationship. It was a living charter, always speaking, but its application to changing society and circumstances was a complex matter requiring, not adversarial litigation so much as a detailed analysis of problems by the Waitangi Tribunal acting as a commission of inquiry, followed by political adjustments, mediated by the Tribunal. That is the essence of the system introduced in 1975.

At first Maori showed little interest in the Waitangi Tribunal because it seemed toothless and was not retrospective. The Labour causus would not allow Rata to include that. Direct action therefore continued, with the

massive, year-long occupations of Bastion Point in Auckland itself and at Raglan (where Maori land had been compulsorily taken for a wartime airstrip but not returned, and had become the local golf course). Widespread civil unrest was feared. The situation changed when a Maori judge of the Maori Land Court, Edward ('Eddie') Taihakurei Durie, became Chief Judge of that court and ex officio chair of the Waitangi Tribunal in 1981. His 1983 report on a claim at Motunui in Taranaki, where a local body's waste disposal and government oil exploration were polluting a Maori fishing reef offshore, reached deeply into the Maori worldview, customary values and the history of contact in the area. The Prime Minister of the day, Robert Muldoon, was impressed, and accepted the Tribunal's recommendations to evert the damage. Suddenly the Tribunal gained prestige nationally, and more Maori brought claims

The 1985 amendment and the Treaty claims process.

Then, in 1985, the Labour government, once more in office, decided that the Tribunal's jurisdiction had to be made retrospective to 1840, to provide a due process for the Maori anger and frustration then being expressed by direct action. It is thus the Treaty of Waitangi Amendment Act 1985 which really began the process of remedying past injuries in respect of the land confiscations, the Native Land Acts, public works takings and so on. Claims began to pour in, and today they number nearly a thousand. Often more than one claimant group has emerged in respect of the same land and the process has awakened ancient disputes between Maori as well as providing outlet for Maori grievances against the Crown. The Tribunal has been greatly expanded and provided with some 30 research staff, while other research is done by outside historians on contract. Claims are commonly clustered, region by region, and major inquiries, lasting two or more years, lead to major regional reports, or 'generic' reports (covering a particular type of grievance wherever it is manifested). Progress is slow but, by and large, the Waitangi Tribunal has developed into a most important arm of government. Direct action on the ground still flares occasionally (notably at Moutua Gardens in Whanganui, said to be a former fishing encampment), but by and large the Tribunal has been accepted by Maori as a place where they feel their grievances, great and small, will eventually be considered.

But not the Tribunal alone. For parliament, and the courts, continue to be actively involved, with the Tribunal, in dealing with Maori claims. The classic example concerns large areas of valuable Crown lands which were being privatised or corporatised under the State-Owned Enterprises Bill 1986. Maori claimants had expected that Crown lands and Crown forests would be the main source of practical remedy by government if their claims were found by the Tribunal to be valid. Privatisation would

deny that possibility. The Tribunal at that time was hearing claims in Muriwhenua, north of the Bay of Islands. At the claimants' request the Tribunal in turn exercised its right to comment on bills going through parliament and pressed for an amendment to protect Maori interests in respect of any land found to have been acquired in breach of Treaty principles, but meanwhile on-sold to private parties. The government obliged, with a short clause (s.9) stating 'Nothing in this act shall permit the Crown to act in any manner that is inconsistent with the principles of the Treaty of Waitangi'. Immediately the act became law the Maori Council brought an action in the Supreme Court (soon moved to the Court of Appeal), for judicial review of the Crown's corporatisation programme.

This obliged the Court to consider what the principles of the Treaty actually were. Its judgement, in what is variously known as the SOE case or the Lands case, is the most important judicial enunciation of what the principles were. Drawing in part on Tribunal enunciations of the principles the President of the Court of Appeal, Sir Robin Cooke (now Lord Cooke of Thorndon, and a member of the Privy Council) maintained that the Treaty signified a 'partnership between the races', by which 'the Queen was to govern and the Maoris were to be her subjects; in return their chieftainship and their possessions were to be protected, ...but sales of land to the Crown could be negotiated'. Because there was potential conflict between Article 1 and Article 2 rights under the Treaty, each party had a duty 'to act reasonably and with the utmost good faith' towards the other. The principles of the Treaty 'do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy. Indeed, to shackle the government unreasonably would itself be inconsistent with those principles'. Yet the Crown had assumed a duty of 'active protection of Maori people in the use of their lands and waters to the fullest extent practicable'. The Crown had a duty to remedy past breaches, and an obligation to consult with Maori in the exercise of kawanatanga.[10]

Having enunciated these principles the Court required the government to negotiate with the Maori Council to ensure that they were not breached. The outcome was the Treaty of Waitangi (State Enterprises) Act 1988, by which a memorial was placed on the titles of Crown lands being privatised, whereby the Tribunal could order that if the land was subsequently found to have been acquired by the Crown in breach of Treaty principles, the land must be repurchased at the prevailing market value and returned to the Maori claimants. The power has only ever been used once, to formally ratify a settlement ordered in respect of lands at Turangi, considered by the Tribunal to have been acquired from Maori without sufficient negotiation and consent. But the threat to use it in two other cases of proposed privatisation has stayed the Crown's hand, and the land has been put into the government's 'land bank' - a pool of assets available for the settlement of Treaty claims.

[10] Ward, *An Unsettled History*, pp. 37-8.

The main point about this example, for the Australian situation, is that it is not the Treaty of Waitangi by itself which has achieved these outcomes, nor even the Treaty of Waitangi Act 1975. Of crucial importance in this case, as in several others, is the mention of the principles of the Treaty in specific statutes. Indeed so potent has been the effect of such mentions that the Crown has generally been careful not to make them, in subsequent legislation, with anything like the force of s.9 of the State-Owned Enterprises Act 1986. Instead there are commonly more general mentions, such as, 'In the interpretation of this Act the Crown must have regard to the principles of the Treaty of Waitangi'.

The Treaty thus has a particularly powerful effect under certain combinations of Tribunal findings, statutory reference, and judicial interpretation. Otherwise it has a more pervasive effect, in which the detail of the Tribunal's investigation and reporting of claims is influential upon public opinion and the political process. A striking example of this concerns commercial sea-fisheries. Maori claims that their fisheries were simply appropriated by the Crown and the colonists after 1840 have been found valid by the Tribunal. Maori, like all Polynesians, were essentially a sea-fishing people, and they suffered devastating losses of their inshore fisheries (including shell-fish and fin-fish). Meanwhile, advanced technology had opened up vast new deepsea fisheries. When government began to set tough new quotas on fish for the purpose of conservation, some Maori fishermen found themselves squeezed out of the industry. The Maori Council again brought an action in the courts under a section of the Fisheries Act 1983 which stated simply, 'Nothing in this act shall affect any Maori fishing rights'. The Supreme Court had already found, in Te Weehi's case 1986, that Maori customary fishing rights still endured in the tidal foreshore, as a common law right. The combined effect of that decision, the Maori Council's action and the Tribunal's reports was to persuade the Crown again to the negotiating table. The outcome was that the Crown granted the Maori people some 26% of the commercial sea-fishing quota, much of it in deep water, in recompense for the taking of their inshore fisheries without compensation. The Maori Fisheries Commission has since built the asset up to some 50% of New Zealand's commercial fisheries, and leases quota to individual Maori fishermen or tribal fishing companies and cooperatives.[11]

The settlement of historical Treaty claims in respect of land has proved most straightforward where there is a supra-tribal organisation in place to negotiate with the Crown. Thus the proto-nationalist kingitanga which has endured despite its military reverses in the Anglo-Maori wars, became the vehicle for the negotiation of a $170 million settlement with the Crown for the confiscation of the Waikato Valley in the 1860s. The settlement was reached by direct negotiation under the Treaty of Waitangi Act

[11] See Mason Durie, *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination*, Auckland, 1998, pp.149-71.

without even the necessity for a Waitangi Tribunal report.

The bulk of the South Island had been acquired by the Crown before 1860 but the purchases were seriously flawed as regards boundaries and neglected promises to make reserves and provide other benefits. The largest South Island tribe, Ngai Tahu, had brought actions in the Supreme Court from the 1870s and, though these were unsuccessful, a tribal structure had emerged from that time to pursue Te Kereme – the Claim – by whatever means possible. Following an extremely detailed investigation of the purchases by the Tribunal, Ngai Tahu also settled with the Crown for $170 million.

It should be noted that these figures are not calculated on a 'just terms' basis, as would normally be the case in civil settlements for loss of property. The value of the land lost by Maori, and the interest since the time of the loss, would be beyond the New Zealand economy. Maori leaders know this, and have no desire to weaken an economy in which they themselves aspire to have a major share. This is why negotiations between Maori and the Crown can proceed on a fairly pragmatic basis. In 1994 the Crown earmarked a figure of $100 million per year over ten years, indexed for inflation, for the settlement of historical grievances. (Later government's have lifted that ceiling, but said that previous settlements would remain as guidelines) What is bogging down negotiations in many areas is not the lack of funding, but divisions and rivalries among the several tribes or hapu occupying any given area.[12]

The future

It is apparent that in the last 25 years the Treaty of Waitangi 1840, has assumed a much larger place in New Zealand life than it had previously. This is a consequence of strong and successful Maori demands that the relationship between Maori and the Crown (that is, the New Zealand community at large) be mediated in terms of Treaty principles, and that historical grievances arising from previous breaches of the Treaty by the Crown should be remedied. Many years of work will be required before the backlog of historical grievances for all tribes will be remedied, but a process is in place for systematically dealing with the claims. Meanwhile urgent 'contemporary' issues will also have to be resolved. These include Maori claims to rights in the sub-surface (that is to oil, natural gas, geothermal power and valuable minerals), to the foreshore and sea-bed (where aqua-culture is developing to meet a huge Asian market) and to rights in native flora and fauna. As before, it can be expected that these matters will be approached through a combination of detailed

[12] For a comprehensive discussion of these processes, see Durie 1998, Ward 1999. Also W.H.Oliver, *Claims to the Waitangi Tribunal*, Wellington, 1991.

investigations and reports by the Waitangi Tribunal, by actions in the courts, and through parliament. It has been accepted by some judges at least that, even without specific statutory mention, 'the Treaty is part of the fabric of New Zealand society' and its principles important to the interpretation of all law.[13] The interpretation of Treaty principles by the Court of Appeal in 1987 remains the main precedent judgement of the matter.

But while the Treaty of Waitangi has become very important in New Zealand life, it has also emerged over the last 25 years that the Treaty alone cannot govern the whole relationship between Maori and non-Maori, in a complex and fast-changing world. Much is left to the flux of day to day politics, in which Maori are very active participants. After 1993 Maori were accorded not just the four parliamentary seats they were given in 1867, but additional seats so that the average number of voters per seat on the Maori electoral roll was roughly equal to the average number of electors in general electorates. The result is that there are now six Maori reserved seats and shortly to be seven. Moreover, in 1995, New Zealand shifted from a first-past-the-post electoral system with single-member electorates to a mixed-member proportional (MMP) system on the German model. The result is that smaller parties such as New Zealand First, headed by the prominent Maori leader Winston Peters, are winning seats in parliament, and that the major parties, National and Labour, are including more Maori on their lists for elections according to the proportion of votes they win nationally. The combination of electorate and list members has resulted in about 14 members in a parliament of 120, not much short of their proportion (14%) in the New Zealand population at large.

There has been relatively little interest in New Zealand in pursuing notions of a divisible sovereignty, along the lines of the Canadian constitution. New Zealand is a small country, with Maori and Pakeha closely inter-married and mixed in social life. 'Sovereignty' is simply not on the agenda of the leaders of the main political parties and tentative efforts by the Tribunal to raise it have been sharply rebuffed.[14] Certainly many Maori have actively campaigned for 'tino rangatiratanga', but this is usually interpreted as meaning devolution of power to tribal authorities, or their greater participation in local government. But from very early on Maori have generally been more prone to pursue a significant share of economic and political action in the mainstream than to pursue separatist politics. Now they have reasonable expectation of so doing. The inauguration of a programme of transfer of wealth back to Maori, via the Treaty claims process, and their access to power in the national parliament and cabinet, has relieved much of the marginalisation and frustration Maori were feeling

[13] Chilwell J, in *Huakina Development Trust v Waikato Valley Authority*, 1987, cited Durie, pp.181-2.

[14] See e.g, Douglas Graham, *Trick or Treaty*, Wellington, 1997, p.17.

in the 1970s and 1980s. Maori are putting much more effort into the management of their existing resources at individual, tribal and regional level, and negotiation for an expanding share of interests in new resources, than into agitation over past wrongs or the pursuit of abstract concepts of sovereignty.

Relevance to Australia

The political circumstances of Aboriginal people in Australia are very different from those of Maori in New Zealand. They are only about 1.75% of the Australian population, but some Aboriginal communities in remote Australia live separately from the mainstream, as do indigenous groups in Canada. As in Canada, Australia's federal structure creates more complexity but also perhaps offers more opportunity in comparison with more unitary New Zealand. Aboriginal people have similar common law rights to those of Maori and, since the Mabo judgement, have made significant gains through the common law. But they are well aware that those gains can be diminished or taken away through legislation. It is in this context that a treaty of some kind becomes attractive to Aboriginal people. Ideally, it would set out a charter of Aboriginal rights, and have constitutional status or the status of fundamental law (as in a bill of rights) against which all other law must be read. But non-Maori New Zealanders did not concede this to Maori, despite their constituting some 14% of the electorate and holding the balance of political power in close-run elections. It is scarcely to be expected that the Australian political process will be any more amenable. But Maori have shown how a treaty, written as a set of fundamental guidelines and requiring judicial interpretation for particular situations, can have a pervasive influence, when used in conjunction with parliamentary legislation, and with the general courts. A special institution along the lines of the Waitangi Tribunal, essentially a standing commission of inquiry, is something else again. The Tribunal in New Zealand arose out of specific historical circumstances and operates in a specific social context. What matters would be referred to such a body in Australia, and who would refer them, would be difficult matters to determine. The New Zealand experience of a treaty for mediating race relations has been quite mixed over the last 150 years. It is no miracle solution. But it gives some insights into what might and might not be achieved by that means.