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CLARIFICATION OF THE POSITION OF THE TREATY OF WAITANGI IN NEW ZEALAND'S CONSTITUTION

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ABSTRACT

This paper examines the role of the Treaty of Waitangi in New Zealand's constitution. It is currently unclear the exact role the Treaty plays in New Zealand's constitution. This paper outlines a suggestion for formalising that role.

The paper looks at the New Zealand system, the way the New Zealand system has evolved and also compares the New Zealand system with the system from the United States of America. The paper then goes on to look at contemporary arguments for and against clarifying the position of the Treaty in New Zealand's constitution.

The paper then addresses how the Treaty should be afforded greater protection by its inclusion in a form of higher law or constitutional document as part of a Hybrid constitution. Through the New Zealand Bill of Rights Act 1990 New Zealand has already developed a Hybrid constitution, but I will set out that this should evolve so that there is more dialogue between the legislature and the courts. Two constitutional systems that have the potential for this type of dialogue are the systems in Canada and the United Kingdom.

The paper then identifies some practical difficulties that might be faced if New Zealand were to look at enacting the Treaty.

Finally the paper concludes that clarifying the position of the Treaty in New Zealand's constitution will not only provide greater order but will improve community access to, understanding of, and confidence in, the constitution. It is acknowledged that adopting the Treaty in a Constitution as part of a new hybrid model is going to require New Zealand to address difficult issues. But this paper suggests that this should not be a reason for New Zealand to defer dealing with these issues.

WORD COUNT

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and bibliography) comprises approximately 12,364 words.

I INTRODUCTION

The Treaty of Waitangi ("Treaty") is increasingly seen as a founding document in New Zealand's constitutional arrangements.[1] While not every one would agree with this assessment, it is clear that the Treaty does play an influential role in New Zealand's constitutional arrangements. In particular it has helped shape dialogue between the Crown and the Maori people. Despite its influence the nature and extent of its role has not been clearly defined.[2]

The rights of the Maori people that flow from the Treaty are broadly speaking analogous to other minority rights. In the New Zealand Bill of Rights Act 1990 ("NZBORA") New Zealand has set out some of the rights that it has held to be fundamental to its society. Treaty rights are not protected under the NZBORA but are dealt with on a more ad hoc basis.

Some of the analysis below is also applicable to the rights of minorities generally. However, it is important to remember that the relationship between the Crown and Maori has an extra layer of complexity because the Maori people were in New Zealand prior to Europeans and because of the Treaty. These two factors mean that the Maori people have a different status in New Zealand society to other minorities.

In this paper I propose that Treaty rights should be afforded protection through inclusion in a form of higher law or constitutional document. For the purposes of this paper I will refer to this form of higher law as a Constitution. It is submitted that any such Constitution would also likely include the other minority rights protected under the NZBORA, but it is beyond the scope of this paper to specifically consider other minority

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[1] See generally Royal Commission on the Electoral System *Towards a better democracy* (1986) 109 where it noted that "it accepts that the signing of the Treaty marked the beginning of constitutional government in New Zealand, and that it recognised the special position of the Maori People".

[2] See generally Geoffrey Palmer and Matthew Palmer *Bridled Power New Zealand's Constitution and Government* (4 ed, Oxford University Press, Melbourne, 2004) 346 where it is set out that "it is clear that the Treaty is an integral part of New Zealand's constitutional arrangements. What is not clear is the nature and extent of that integral part".

rights. I will be focusing on issues that would likely arise if the Treaty was included in a Constitution.

I also consider changes to New Zealand's constitutional structure. The new constitutional structure will provide two things; firstly it will provide greater protection for Maori rights which flow from the Treaty and secondly it will provide a formalised framework for dialogue between Parliament and the courts when dealing with Treaty issues. It is submitted that formalising the process would enhance the ability of the parties within the Constitution to deal with Treaty issues constructively.

To discuss these issues I will set out some broader constitutional background before dealing with issues specific to New Zealand. My paper is divided into seven parts. After my introduction the second part of my paper will examine the current status of the Treaty in New Zealand's constitutional arrangements. The third part of my paper will examine the concept of Parliamentary Sovereignty and the important role this plays in Westminster style Parliamentary democracies. In this section I will also look at the way Parliamentary sovereignty affects Treaty rights before contrasting the way the Westminster system operates with the way the system operates in the United States of America ("U.S"). In the fourth part of my paper I will outline some contemporary arguments for and against clarification of the Treaty in New Zealand's constitutional arrangements. In the fifth part of my paper I will look at an option for reconciling the Westminster and U.S models. In the sixth part of my paper I will address two issues that will need to be examined if the Treaty was to be included in a Constitution and then the final part of my paper will outline my conclusions.

II THE CURRENT STATUS OF THE TREATY OF WAITANGI IN NEW ZEALAND'S CONSTITUTIONAL ARRANGEMENTS

A New Zealand's Constitution

The framework for New Zealand's constitutional arrangements is broadly based on the Westminster system developed in England. New Zealand does not have a comprehensive written constitution. One description of the fundamentals of New Zealand's constitution sets out that the constitution is:

> to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a monarchy, that it is a parliamentary system of government, and that it is a democracy.[3]

Some of the core elements of New Zealand's constitution are set out in The Constitution Act 1986. The Constitution Act 1986 details that the Queen is the head of state of New Zealand and that the Governor-General appointed by her is her representative in New Zealand. The Constitution Act also sets out details of the three bodies that make up government; the executive, the legislative and the judiciary. Other major sources of the constitution include: the prerogative powers of the Queen, other relevant New Zealand statutes, relevant English and United Kingdom statutes, decisions of the courts and conventions of the constitution, with the Treaty also taking an increasingly prominent role.[4]

New Zealand's constitution is not easily defined, therefore it can mean different things to different people. Sir Geoffrey Palmer set out that the New Zealand constitution is neither readily accessible nor easily understood. He states that "the New Zealand constitution is flexible, to a large extent uncodified and fluid. The constitution is both malleable and

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[3] Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) 1.
[4] Cabinet Office, above n 3, 2.

mysterious. It is an iterative constitution in a state of constant and often silent evolution."[5]

Central to New Zealand's constitutional arrangements is the idea of Parliamentary sovereignty. Parliament is made up of the Queen, who as I have mentioned is represented in New Zealand by the Governor-General, and the House of Representatives which is responsible for legislative power.[6] The Executive branch of government is made up of the Prime Minister and Cabinet. The Executive branch of government generally directs and controls the House of Representatives and thus legislative power. As one commentator set out:

> "The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative power…a cabinet is a combining committee- a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part of the State."[7]

New Zealand's Parliament, through the advent of MMP has the potential to exert slightly more influence over the Executive, although Cabinet is still a powerful body. I will discuss Parliamentary sovereignty in more detail in part 3 of this paper.

B The Current Status of the Treaty in New Zealand's Constitution

The Treaty has become a keystone to contemporary Maori issues.[8] Despite this, the Treaty's current status means that the courts lack any constitutional warrant to enforce it until it is included in legislation.[9][10] As one author noted, this means: "the legal system

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[5] Rt Hon Sir Geoffrey Palmer "The New Zealand Constitution in 2005" (NZLS Seminar, Wellington, May 2005) 1.
[6] The Constitution Act 1986, s 14.
[7] Walter Bagehot *The English Constitution: With an introduction by RHS Crossman, M.P* (3ed, C.A Watts & Co. Ltd, London, 1964) 65 and 66.
[8] Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 1.
[9] Cabinet Office, above n 3, 4.
[10] See Generally Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 65 which notes that this principle was most recently endorsed by the Privy Council in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 PC see also PG McHugh "What a difference a Treaty makes – the pathway of aboriginal rights jurisprudence in New Zealand public

effectively gave the Executive a monopoly in deciding if and when to honour the Treaty".[11] It is left to the will of Parliament to determine when Treaty rights are justiciable and consequently when the courts can become involved in dialogue on the Treaty.[12]

However, this fact is not as limiting as it might sound. Statutory references, whether to the principles of the Treaty or through other references to the Treaty, have become an increasingly common feature of New Zealand's legislative landscape with a sizeable body of legislation referring to the Treaty in the fields of fishing, conservation, state owned enterprises, the environment and resource management.[13] An important reason why so many Treaty references have been inserted in legislation is the convention set out in The Cabinet Manual 2001 ("Cabinet Manual"). The Cabinet Manual exists to set out "guidance for executive government principles, procedures and values".[14] The convention requires that when proposals for new legislation or "bids" are submitted to the Cabinet Legislation committee for approval the Minister must confirm the draft Bill complies with, among other things, the principles of the Treaty.[15] This convention ensures that consideration is given to the Treaty when legislation is being formulated and should ensure that the Treaty or the "principles" of the Treaty are given statutory recognition where it is appropriate.

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law" (2004) 15 PLR 87, 91 which notes that the *New Zealand Maori Council v Attorney General (broadcasting assets)* [1996] 3 NZLR 140, 168 (CA) per Richardson P, Gault, McKay, Henry, Keith and Blanchard JJ "reaffirmed the orthodoxy that treaty rights, including those associated with the one concluded at Waitangi in 1840, required statutory incorporation and took effect only and subject to that manner and recognition".

[11] Palmer Geoffrey *New Zealand's Constitution in Crisis* (McIndoe, Dunedin, 1992) 74.

[12] See Generally Joseph, above n 10, 72 The Treaty of Waitangi Act 1975 and the Waitangi Day Act 1976, contain schedules that recite the English and Maori Texts of the Treaty. However, neither statute employs language sufficient to incorporate the Treaty into municipal law.

[13] See generally Joseph, above n 10, 73 and 74 for a list of "major statutes that contain reference to the Treaty or the Maori dimension".

[14] Cabinet Office, above n 3, "forward" xiii.

[15] Cabinet Office, above n 3, 5.35-5.36, see also Joseph, above n 10, 73 which notes that "in 1986, the Lange Government agreed that all legislation referred to Cabinet at the policy approval stage should draw attention to any implications for recognition of Treaty principles" and "in 1991 the *Cabinet Office Manual"* (now the Cabinet Manual) "revised the format by which ministers make 'bids' for the inclusion of Bills in the Government's legislative programme."

C "Principles" of the Treaty

Statutory references have often been to the "principles" of the Treaty. This type of reference first occurred in The State-Owned Enterprises Act 1986 which led to the watershed case of New Zealand Maori Council v Attorney-General (the "Lands" case).[16] The Court of Appeal determined that under these principles "partnership" was the key concept defining the relationship between the Treaty parties. The concept of partnership under the Treaty is said to create "responsibilities analogous to fiduciary duties".[17] Despite the "partnership", the judgment affirmed the orthodoxy that preserves Parliament's powers of legislation. It set out that the Treaty is not a bill of rights or fundamental constitutional document: it did not fetter Parliament's sovereignty and it confirmed Treaty rights were non-justiciable in the absence of statutory incorporation.[18]

On many occasions since the Lands case the phrase "principles" of the Treaty has been used in substitution for the original text of the Treaty. The use of the principles has helped overcome the complications of the textual differences between the English and Maori interpretations of the Treaty. The textual differences arise because some of the expressions used in the Maori text had no precise English equivalent.[19] In particular, the expressions "kawanatanga" from Article I of the Treaty and "rangatiratanga" from Article II of the Treaty could not be easily reconciled with the English versions of the text. The English text of Article I uses the word "sovereignty" while the Maori people have often interpreted the word Kawanatanga, which is used in their text, to mean one of complete government, governance or full sovereignty.[20] The English version of Article II uses the word "chieftainship." The Maori version uses the phrase rangatiratanga. One author states a translation of rangatiratanga is "unqualified chieftainship" which Maori

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[16] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) Cooke P, Richardson, Somers, Casey and Bisson JJ.
[17] *New Zealand Maori Council v Attorney-General,* above n 16 , 663 Cooke P.
[18] Joseph, above n 10, 68.
[19] Joseph, above n 10, 47.
[20] Joseph, above n 10, 48.

retained over their lands, villages and 'taonga'. Taonga meaning "treasures" or "anything highly prized."[21] I will discuss these concepts in more detail below.

With no agreement between Maori and Pakeha on what the text actually means the Court of Appeal in the Lands case, and in particular three judges, called for the application of principles of interpretation relevant to constitutional documents – eschewing the "austerity of tabulated legalism."[22] The Court of Appeal also renounced a "strict or literal interpretation of the Treaty."[23]

The Court of Appeal set out that:

> In brief the basic terms of the bargain were that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated. These aims partly conflicted. The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.[24]

The Court of Appeal viewed the Treaty as a living instrument, capable of adapting to new and changing circumstances.[25] One author summarised the judgement by saying that it addressed the spirit and principles of the Waitangi pact, the textual differences between the English and Maori language versions, past breaches of the Treaty, and the interpretive approach to statutory recognition of Treaty principles.[26] The principles the Court of Appeal developed are representative of the broader relationship between the Crown and the Maori people and they are often used as a paradigm within which to assess individual cases.

However, the fact that there are more than thirty statutes in New Zealand that incorporate the Treaty in some form or other has lead to interpretative difficulties. This is often due to

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[21] Joseph, above n 10, 48.
[22] *New Zealand Maori Council v Attorney-General,* above n 16, 655 Cooke P.
[23] *New Zealand Maori Council v Attorney-General,* above n 16, 714 Bisson J. See also 673 Richardson J.
[24] *New Zealand Maori Council v Attorney-General,* above n 16, 663 Cooke P.
[25] *New Zealand Maori Council v Attorney-General,* above n 16, 655-656 Cooke P and at 673 per Richardson J.
[26] Joseph, above n 10, 67.

the vague and ambiguous nature of the provisions themselves.[27] In each case new principles are teased out from earlier decisions. This is partly because the true understanding of what these principles mean and the nature of the underlying relationship between the Crown and Maori is yet to be completely resolved and partly because of the nature of our common law system. Even if a form of resolution was achieved, these principles would still be fluid and evolving. These interpretative difficulties have led to calls from some for Parliament to work out in precise terms how it wants to protect Maori interests and to be more explicit in legislative schemes rather than using a general formula.[28]

D Maori Self-Determination or Sovereignty

Self-determination is important to Maori and some interpretations of the Treaty suggest that is leaves open the potential for independent Maori Sovereignty. As set out above, it can be argued that through ceding Kawanatanga, the Maori only ceded government and not sovereignty. It has also been argued that the Maori version of the treaty potentially assured Maori 'te tino rangitiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa' which is interpreted as 'the unqualified exercise of their chieftainship over their land their villages and over all their treasures'. This chieftainship over property could be interpreted to approach sovereignty in its intensity of control.[29]

Even if it is resolved that self-determination does not arise from the Treaty, self-determination is a dominant call from indigenous peoples across the world.[30] One way of analysing the idea of Maori self determination is by looking at sovereignty according to what have been described as internal and external perspectives. An internal perspective would allow a system of Maori self-determination to operate in parallel with, and within the confines of, a regular unitary state system of government. If this type of system were to operate since both governing mechanisms would be operating contemporaneously over

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[27] Rt Hon Sir Geoffrey Palmer, above n 5, 15
[28] Mathew Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207.
[29] Michael Belgrave, Merata Kawharu, and David Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 2005) 314.
[30] B.V Harris "The Constitutional Future of New Zealand" (2004) NZ Law Rev 295.

the same geographical area, a formal pluralism would have to be put in place.[31] In the New Zealand example, this form of internal self-government would work within the current Westminster framework. Conversely, external self-determination implies secession from the post-colonial state and the development of an independent indigenous nation-state.[32]

I have raised this point to highlight the difference between the Parliamentary sovereignty which I will refer to throughout this paper and the self-determination issues which are also often referred to as 'sovereignty' issues. I will not be discussing self-determination type sovereignty issues in detail in this paper. The option for protection of Treaty rights proposed in this paper is based on the idea that Maori will continue to operate within New Zealand's present constitutional framework.

III PARLIAMENTARY SOVEREIGNTY, MINORITY RIGHTS, TREATY RIGHTS AND THE U.S MODEL

Parliamentary sovereignty is a rule of the common law and plays a key role within Westminster systems of government.[33] It also has a huge impact on the way minority rights are dealt with and for the purposes of this paper the way Treaty rights are dealt with.

A Parliamentary Sovereignty

The classic empirical analysis of the Westminster system was made by A.V Dicey who has been described by one author as the 'high priest' of orthodox constitutional theory.[34] Although there are arguably some deficiencies in his analysis, his work provides a useful reference point for analysing New Zealand's constitution.

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[31] B.V Harris, above n 30, 295.
[32] Mason Durie *Te Mana, Te Kawanatanga – The Politics of Maori Self-Determination* (Oxford University Press New Zealand, Auckland, 1998) 12.
[33] Paul McHugh, above, n 8, 58.
[34] Martin Loughlin *Public Law and Political Theory* (Clarendon Press, Oxford, 1992) 140.

Dicey identified the three guiding principles which underpinned the English constitution as; the legislative sovereignty of Parliament, the universal rule throughout the constitution of ordinary law and the role which constitutional conventions play in the ordering of the constitution.[35] However, of these three principles he referred to Parliamentary sovereignty and the rule of law as the "twin pillars" of the English constitution.[36] But Dicey was also equally clear that he considered the sovereignty of Parliament, from a legal point of view, to be "the dominant characteristic of our political institutions."[37]

To Dicey the principle of Parliamentary sovereignty meant that Parliament, made up of the Queen, the House of Lords and the House of Commons, has the right to make or unmake any law whatever.[38] He went on to state that "there is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament."[39] In the New Zealand situation his analysis translates into Parliament being in control. Dicey's analysis of the control of Parliament by the executive was limited.

Dicey's justifications for his view of Parliamentary sovereignty are based on the manner in which Parliament had previously acted as well as the fact that he was able to dismiss any other potential sources of legislative power.[40]

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[35] A.V Dicey *The Law of The Constitution* (10ed, MacMillan & Co Ltd, 1959) 35.
[36] A.V Dicey, above n 35, 183.
[37] A.V Dicey, above n 35, 39.
[38] A.V Dicey, above n 35, 39.
[39] A.V Dicey, above n 35, 40.
[40] See Generally P.P Craig "Dicey: Unitary, Self-Correcting Democracy and Public Law" 1990 106 (Jan) LQR 105, 106 where he notes that Dicey's chain of reasoning is eclectic. His views are based on in part: the writings of previous jurists such as Blackstone and Coke, examples of the exertion of Parliamentary authority in the past (in particular he looked at the Acts of Union, and the Septennial Act) and upon the fact that Parliament is able to interfere with private rights of citizens. Dicey also dismissed other possible sources of legislative power. He dismissed: the Monarch, resolutions of either house of Parliament, the vote of parliamentary electors, the power of the judiciary to legislate and alleged legal limitations derived from morality, international law, the prerogative and previous legislation.

B Minority Rights under the Westminster system

In the Westminster system, because of its reliance on Parliamentary sovereignty, Parliament has primary responsibility for protecting minority rights.[41] This is perceived as a disadvantage by some because of what has been referred to as the 'tyranny of the majority'.[42] In essence this means that Parliament, as sovereign, is more likely to express the will of the majority and not take full account of the rights of the minority.

Dicey tried to counter this type of argument by referring to perceived limits on sovereignty.[43] In addition to these perceived limits he discussed his second "pillar" of the English constitution, the rule of law.[44]

Dicey highlighted various ways that rights were better protected under a Westminster constitution because of the rule of law. Two of the perceived advantages are of interest to this paper. Firstly, Dicey thought that the way the English constitution protected minority rights through the common law, was more effective because of the absence "of those declarations of rights so dear to foreign constitutionalists".[45] Dicey argued a written constitution could be easily swept aside. He thought an English style constitution would

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[41] See generally Jeffrey Goldsworthy "Homogenizing Constitutions" (2003) 23 OXJLST 483, 483.

[42] See generally J.S Mill *Utilitarianism, Liberty, Representative Government* (J.M Dent & Sons Ltd, London, 1910) 249-250.

[43] See generally P.P Craig, above n 40, 106 where he describes Dicey's distinction between political and legal sovereignty and he discusses Dicey's external and internal limitations on the sovereign power of parliament.

[44] See generally A.V Dicey, above n 35, 188, 193 and 195 where Dicey sets out the three conceptions that make up his rule of law. These are:

(1) that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint";

(2) "not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals";

(3) "that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts".

[45] A.V Dicey, above n 35, 197.

be more difficult to sweep aside because rights flow from the constitution.[46] He preferred that rights were inductive rather than to be deduced from a written document. [47] Dicey thought that because rights in England were inherent in the ordinary law of the land they could only be destroyed through a revolution in the institution and manners of the nation.[48] In light of the way the Treaty has become embedded in the New Zealand constitution, this argument might be quite appealing. However, I think that this justification is limited and I will elaborate why in the next section.

Dicey perceived a second advantage of a Westminster constitution and its rule of law to be that remedies were the key to ensuring minority rights were maintained. He thought that the English constitution was superior to most written constitutions with a declaration of rights because it focused on remedies, rather than making a simple declaration. He makes the point that you can have a declaration of right, but if there is no will to enforce it, it is in effect worthless.[49] He notes that "there runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation."[50]

It is interesting to note that paradoxically, Dicey thought:

> Nor let it be supposed that this connection between rights and remedies which depends on the spirit of the law pervading English institutions is inconsistent with the existence of a written constitution, or even with the existence of constitutional declaration of rights.[51]

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[46] See generally, A.V Dicey, above n 35, 197 where he sets out that "In Belgium individual rights are deductions drawn from the principles of the constitution, whilst in England the so-called principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the Courts as to the rights of given individuals."

[47] A.V Dicey, above n 35, 197.

[48] A.V Dicey, above n 35, 201.

[49] See generally A.V Dicey, above n 35, 198 where he sets out "whether the right to personal freedom or the right to freedom of worship is likely to be secure does depend a good deal upon the answer to the inquiry whether the persons who consciously or unconsciously build up the constitution of their country begin with definitions or declarations of rights, or with the contrivance of remedies by which rights may be enforced or secured".

[50] A.V Dicey, above n 35, 199.

[51] A.V Dicey, above n 35, 200.

In support of this statement he relies on the constitution and remedies available in the U.S. This seems a remarkable statement in light of the fact that it is accepted that the reason that the U.S constitution can enforce these principles is because it squarely rejected the fundamental English constitutional doctrine of the sovereignty of Parliament.[52] Striking down unconstitutional legislation is entirely inconsistent with Dicey's conception of the English constitution.

The existence of these two "superior" methods of protecting rights does not answer how a minority interest might be protected against the will of the majority. Dicey does not suggest the courts should be able to protect minority rights, other than where protections have been made available by Parliament through legislation or have been developed by the courts through the common law. For this reason a declaration of fundamental rights which is enforceable by the courts is seen as a more effective protection for minorities.

Dicey wholeheartedly concluded that the English version of the rule of law protects minority rights better than where the rights are secured in a written constitution. However, in light of my previous analysis, this conclusion seems anomalous. Although I have disagreed with Dicey, as I have said, it is important to put Dicey's writing in perspective. It must be remembered that in essence Dicey was conducting an empirical analysis in 1885, with this in mind it is understandable that his work is not completely accurate in a contemporary environment. At the time of writing his observation that written declarations of rights had often not protected minorities in Europe was quite correct. Dicey was also correct in asserting that this was because they were not enforced. However, he stopped short of concluding that they were not enforced because they were subject to a sovereign power.

It is submitted that the Diceyan style of Westminster constitution is unable to act as a meaningful brake on Parliamentary sovereignty, particularly when minority rights are at stake. Dicey himself notes that the sovereignty of Parliament and the supremacy of the

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[52] Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49 Am.J.Comp.Law 707, 708 and see generally Marbury v Madison (1803) 5 US 137, 177.

law of the land "appear to stand in opposition to each other, or to be at least counterbalancing forces."[53] However he concludes that "this appearance is delusive."[54] Despite Dicey's valiant attempts to convince us otherwise, it does not seem to be the correct conclusion.[55]

C Treaty Rights

In light of my analysis of Parliamentary sovereignty and the way the Westminster system 'protects' minority rights through the rule of law, it is worthwhile analysing how this is reflective of the way Treaty rights are protected in New Zealand.

Parliamentary sovereignty is still generally seen to be a key aspect of New Zealand's constitutional arrangements.[56] Maori Treaty rights, unlike the rights protected under the NZBORA, are protected in a traditional Westminster manner. Because of the deference paid to the Treaty by the executive in legislation, the common law has developed protection for the "principles" of the Treaty and the Treaty. These protections have been woven through the fabric of New Zealand's constitution. This type of protection should continue to evolve because of the convention in the Cabinet Manual that the Treaty is to be considered in relation to legislative bids.

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[53] A.V Dicey, above n 35, 406.

[54] A.V Dicey, above n 35, 406 and see also A.V Dicey, above n 36, 204 the way Dicey attempts to reinforce the way in which the 'liberty of the subject' is protected. He sets out that the object of his treatise: "is not to provide minute and full information, e.g as to the habeas corpus Acts, or other enactments protecting the liberty of the subject; but simply to show that these leading heads of constitutional law, which have been enumerated, these "articles", so to speak, of the constitution, are both governed by, and afforded illustrations of, the supremacy throughout English institutions of, the supremacy throughout English institutions of the law of the land", see also A.V Dicey, above n 36, 411 where he again sets out that England operates in a system where supremacy of the law is crucial.

[55] See generally A.V Dicey, above n 35, 414 as an illustration of a valiant attempt to convince reader that Parliamentary sovereignty is reconcilable with his version of the rule of law I note that Dicey sets out: "By every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality". This 'spirit of legality' vague as it is does sound like something that might offer some protection to minorities under the Westminster system. Although Dicey mentions the 'spirit of legality' on a number of occasions, he does not elaborate on it, or indicate it could in anyway interfere with Parliamentary sovereignty.

[56] But see Sian Elias "Sovereignty in the 21st century: Another spin on the merry-go-round" (2003) 14 PLR 148 where the Chief Justice looks at the contemporary understandings of sovereignty and the role of constitutions in the 21st century.

As set out above, Dicey would have imagined that Treaty rights were better secured because they were not in a written constitution. Dicey would have felt that attempting to sweep aside these rights would cause a "revolution in the institution and manners of the nation." I would question whether this is correct because of the way Parliamentary sovereignty operates in New Zealand. Winston Peters, the New Zealand First leader, through his Principles of the Treaty of Waitangi Deletion Bill illustrated the way Treaty right are subject to the will of the majority.[57] This type of Bill would wipe away much of the protection the Treaty currently enjoys. It would alter the Treaty's place in New Zealand's constitution. Although the Bill was defeated it illustrates the ease with which Treaty rights could be swept aside. Whether a Bill of this type would actually have resulted in a "revolution in the institution and manners of the nation" is unclear.

It seems Dicey would argue that a Bill of the type suggested by Winston Peters would not bring an end to protection of the Treaty because of the previous court decisions and their existence at common law. However, the effect of the type of Bill suggested by Mr Peters should not be underestimated and it certainly has the potential to bring Parliament and the courts into conflict. Dicey would also have thought that political, as opposed to legal, sovereignty would prevent a Bill that was not satisfactory to the electorate being passed. That point also illustrates how rights are subject to the will of the majority. The 2005 Election campaign of the leader of the National Party, Don Brash, suggests that it could be argued that a near majority might not be opposed to sweeping aside many of the Treaty protections that have been established.

Based on Dicey's work, it could also be argued Treaty rights are better protected because they are remedy based. In the New Zealand context there is no doubt many of the Treaty protections have been developed through the courts. However, there are systems with written constitutions setting out basic rights which also provide remedies. The U.S system is an example of this. An important question this raises, and one which I will explore later in this paper, is whether setting out fundamental rights in a written

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[57] Principles of the Treaty of Waitangi Deletion Bill, no 247-1.

Constitution and providing remedies for enforcing those rights requires the rejection of the doctrine of Parliamentary sovereignty as has occurred in the U.S system.

The Treaty is currently protected as much as the Westminster system will allow. It is submitted that this level of protection is not enough. The ease with which Parliament could choose to ignore Treaty rights seems to be a weakness in our constitutional framework.

D The U.S Model

In the past it has been suggested that New Zealand should adopt a U.S style model of rights protection. This would give ultimate responsibility for upholding the rights set out in a Constitution to the courts.[58]

This model would be very different to the way New Zealand currently deals with rights protection because in the U.S model their equivalent to the New Zealand Parliament is not sovereign. In the U.S system legislative power is legally limited and the courts are empowered to enforce these limits.[59]

The U.S constitution rejected the Westminster ideals that currently operate in the New Zealand system in three key areas. These illustrate the polar differences between the legislative and constitutional supremacy models of constitutionalism.

Firstly, the U.S Constitution, including the bill of rights and all subsequent amendments, is the supreme law of the land. This is in contrast to the position in New Zealand where ultimately Acts of Parliament are the supreme law of the land.[60]

Secondly, the U.S constitution is entrenched in the sense that it can only be amended by the supermajority procedure set out in Article V of the constitution. This is different to

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[58] Jeffrey Goldsworthy, above n 41, 483.
[59] Stephen Gardbaum, above 52, 708.
[60] See generally New Zealand Bill Of Rights Act 1990, section 4 and Stephen Gardbaum, above n 53, 708.

the position in New Zealand where the sovereignty of Parliament means that it can amend or repeal almost all previous legislation, including the NZBORA, by ordinary majority.[61]

Thirdly, the supremacy of the U.S constitution is enforced by the judiciary and they have the power and duty to set aside any legal rule that conflicts with it. This is in contrast to the position in New Zealand where, it is generally accepted, the sovereignty of Parliament means no court has the power to question the validity of an Act of Parliament.[6263] The court has certain interpretative duties under the NZBORA, but as I have said, these do not affect the ultimate sovereignty of Parliament.

The differences between the U.S and Westminster systems lead Justice Marshall, a United States Supreme Court judge, to conclude that there is no middle ground between the two systems. He stated:

"the constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it"[64]

This polemic view lead many countries that wanted to protect fundamental rights to adopt U.S style systems. New Zealand could adopt this type of system to ensure better protection for Treaty rights. However, this type of switch would not facilitate clearer dialogue between Parliament and Maori because the courts would have the ultimate decision-making power. The courts could also limit Parliaments' policy on the basis of rights even if that policy might have long term advantages. If the courts were to take these long term advantages into account when making their decision they would seem to be straying into the domain of what should be left to elected officials. The fact that undemocratically elected judges make the final decision on constitutional matters has been perceived as a weakness of the U.S model.

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[61] Stephen Gardbaum, above n 52, 708 & 709.
[62] But see Sian Elias, above n 56 where the Chief Justice looks at the contemporary understandings of sovereignty and the role of constitutions in the 21st century.
[63] Stephen Gardbaum, above n 52, 709.
[64] Marbury v Madison, above n 52.

New Zealand has a strong history of good government and it should be reticent to jeopardise that by adopting wholesale changes that in the long term might undermine the system. It would be important to try and strike a balance between good government and the protection of Treaty rights.

IV ARGUMENTS FOR AND AGAINST CLARIFICATION OF THE TREATY IN NEW ZEALAND'S CONSTITUTIONAL ARRANGEMENTS

I will now analyse why it might be necessary to better protect Treaty rights and some contemporary arguments as to when this might be appropriate.

A Demystifying the Treaty

I would submit that it is necessary to demystify the Treaty because it has such a fundamental role to play in New Zealand's constitutional arrangements. As one author noted:

> a major force for constitutional development in New Zealand is the call from both Maori and non-Maori to better settle the Treaty of Waitangi in the constitutional order, and to ensure that the constitution provides for a structure and functioning of government in which both Maori and non-Maori have confidence.[65]

The fact that the Treaty has only been recognised through sporadic statutory references seems incongruous and as I will illustrate damaging. It is acknowledged that the Maori people's hesitation at having the Treaty within the NZBORA is a major reason that it was not included in that legislation. However, I would suggest that this situation should now be remedied. The way New Zealand's constitution protects Treaty rights generates animosity. The public are often not able to distinguish what rights are being dealt with. Maori rights could actually be divided into a number of categories including:

(a) common law customary rights;

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[65] B.V Harris, above n 30, 289.

(b) contemporary rights that flow from the parties obligations under the Treaty;
(c) rights that flow from historical breaches of the Treaty; and
(d) the rights of Maori as a minority which do not necessarily flow from the Treaty. These are the rights and issues Maori would share with other minorities in New Zealand society.

It seems that presently these are often bundled together as "Treaty" issues. This means that the majority, on whose will the Maori minority are dependant, become tired with what seem to be endless "Treaty" issues. This dissatisfaction from the majority inhibits Government's ability to deal with Treaty issues free from baggage generated by non-Treaty matters.
Including the Treaty in a Constitution would enable constitutional rights to be clearly identified and dealt with free from baggage. They could be distinguished from the separate rights issues I have outlined above and perhaps most importantly they could be distinguished from historic grievances. The historic grievances seem to influence the majority's will to deal with the Treaty and it may be that it is only once these matters have been dealt with that the majority might become amenable to incorporating the Treaty in a Constitution.

Some of the controversy surrounding The Foreshore and Seabed Act 2004 illustrates the confusion over "Treaty" issues. Despite the fact that it did not have anything to do with the Treaty, there was a misconception that it was a "Treaty" issue. This could have a residual impact on genuine Treaty issues in the future.

It is also interesting to note that the Foreshore and Seabed legislation is a clear example of minority rights being susceptible to the will of the majority; Parliament was able to legislate away Maori customary rights with ease.

B Status Recognition

Another reason for incorporating the Treaty in a Constitution is that it would fulfil what Justice Edward Durie describes as "the principle of status recognition." Justice Durie notes:

> Inherent in the Treaty was the recognition of Maori status as prior inhabitants. Coincidentally, status recognition is integral to the Maori (and probably Pacific) way. The failure to acknowledge Maori as having a particular status, once the Treaty was signed, is probably at the root of the subsequent troubles and misunderstandings. Arguably the recognition given by the Treaty should be affirmed in any new constitution.[66]

This status recognition seems to be a strong reason in favour of incorporating the Treaty in a Constitution. If it is at the root of subsequent troubles and misunderstandings, this lack of status recognition would seem to create animosity every time the Crown and Maori enter dialogue. Giving status recognition to the Treaty would give a stronger base to the relationship between the Crown and Maori. The trick would seem to be to give status recognition before there has been a fundamental breakdown in that relationship.

C A symbolic legislative reference?

Professor Matthew Palmer has argued against incorporating the Treaty in New Zealand's legislative framework in a general manner. He would only advocate a general reference to the Treaty if it were symbolic.[67]

Professor Palmer's article sets out that a useful formulation for future Treaty references would be:

- a generic symbolic legislative mihi to the Treaty of Waitangi, without general legal effect;

as long as it is combined with:

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[66] Colin James (ed) *Building the Constitution* (Brebner Print, Wellington, 2000) 202 and 203.
[67] See generally Matthew Palmer, above n 28, 207-212.

- specific legislative provisions that achieve Parliament's specific policy purposes in attending to the health of the relationships between the Crown, Maori and other New Zealanders as expressed in the Treaty of Waitangi.[68]

Below I will discuss two issues raised in Professor Palmer's article.

1 Constitutional safeguard

The first matter I will look at is whether the Treaty should be used as a constitutional safeguard. Professor Palmer's article identifies that:

> there may be extreme cases where judicial scrutiny of a specific legislative regime reveals manifest injustices when considered against general principles of healthy relationships as expressed in the Treaty of Waitangi. It is a worthwhile safeguard for the minority to enable the Courts to express this as a view. In these cases, anyway, the Courts are likely simply to point out the deficiency and to leave the formulation of a new specific regime to the policy-making and political machinery – as occurred in the *Lands* case.

Despite this statement, Professor Palmer does not think that these extreme cases warrant inclusion of the Treaty in legislation in a general non symbolic manner. I would argue that these cases do warrant the inclusion of a general reference to the Treaty in a Constitution. Including a general reference to the Treaty in a Constitution would enable the courts, when required to, to interpret whether legislation has breached the Crown's obligations.

As Professor Palmer points out, this is effectively what happened in the Lands case when the courts interpreted section 9 of the State-Owned Enterprises Act 1986. Although the courts were using the legislative reference to the 'principles' of the Treaty and not the Treaty itself, the courts used section 9 to identify a potential breach of the Crown's obligations under the Treaty. The court of appeal took the initiative despite the fact that they lacked a specific vehicle, like a constitution or bill of rights, to deal with the

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[68] Matthew Palmer, above n 28, 212.

Treaty.[69] As set out by Professor Palmer the Court of Appeal was able to identify the deficiencies and then leave it to Government to deal with the details. Sir Geoffrey Palmer, the Minister responsible for dealing with the deficiency identified by the courts, has noted "in truth the courts have done the nation a great service on Maori issues" and he goes on to note:[70]

> I think we have devised a unique New Zealand framework in which the Waitangi Tribunal, the courts, the executive and the Parliament all played an important role in fleshing out the nature of Treaty obligations.

This unique New Zealand framework was developed because the courts did not have a specific constitutional reference to the Treaty. I would submit that the best way of securing this type of role for the courts in the future would be to include the Treaty in a Constitution as a constitutional safeguard.

I am not certain what a generic symbolic legislative mihi to the Treaty of Waitangi would achieve. It would not let the courts examine the broader relationship between the Crown and Maori. It is submitted that this is an important role for the courts because of the fact that the relationship is formulated according to the "changing social, economic and cultural circumstances."[71]

Using Professor Palmer's formula the courts would be limited to interpreting specific legislative provisions and working on the assumption that Parliament's policy work has correctly interpreted the nature of the relationship. If the courts felt the legislation caused an injustice they would be left without a general legislative reference with which to identify that injustice. This would either require the courts to be 'creative' in its interpretation of the legislation so as to allow it to be used to identify the injustice or to

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[69] See Generally, The Right Honourable Sir Geoffrey Palmer, above n 11, 89 where he sets out that by taking the initiative he meant that the courts had to interpret the legislation in a manner that was beyond conventional statutory interpretation. Sir Geoffrey Palmer noted that "to win the courts would have to read down the very specific provisions in section 27 in order to make section 9 controlling. Conventional statutory interpretation would dictate victory for the Crown, I thought. I was wrong and so was the Solicitor-General. The Court of Appeal held that the principles of the Treaty of Waitangi overrode everything else in the Act".

[70] The Right Honorable Sir Geoffrey Palmer, above n 11, 93.

[71] Matthew Palmer, above n 28, 207.

let the injustice go. Neither of these solutions seems optimal and it would seem that a general constitutional provision allowing the courts to undertake a more open and honest assessment would be best.

In his article Professor Palmer sets out that Parliament should be doing the hard policy work before references to the Treaty are put into legislation. He sets out that if they were doing this general Treaty references should not be necessary.[72] I agree that this is the best scenario. If courts were to become involved in policy development over time it would undermine their role. But it is submitted that short of development of policy the courts should still be able to act as a check where a perceived injustice is taking place. The ability to check is an element of the process that has become crucial to developing the Treaty relationship between the Crown and the Maori people. Retaining it would help maintain a healthy relationship between the Crown and Maori.

2 Symbolism

The second matter I will look at is Professor Palmer's discussion of whether the Treaty could be included in New Zealand's constitution in a symbolic manner. He states that symbolism is important and in support of this proposition he states that "the normative value of symbolism is a core element of the force of constitutional conventions".[73] I would agree with this statement, however, I think the reference to constitutional conventions clouds the analysis of this matter. I do not think symbolic enactment of the Treaty would create a new convention.

(a) Conventions

Conventions have been described as "standards found in previous political practice, or precedents, which are accepted as binding by the persons whom the standards purport to

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[72] Matthew Palmer, above n 28.
[73] Matthew Palmer, above n 28, 209.

govern."[74] Examples of conventions include "collective cabinet responsibility, individual ministerial responsibility, and the restraint on the Governor-General's exercise of power."[75] It is submitted that the insertion of the Treaty in legislation in a "symbolic" manner does not appear to create a "binding" practice.

Sir Ivor Jennings stated that, when establishing a convention three questions must be asked: first, what are the precedents; secondly, did the actors in the precedent believe they were bound by a rule; and thirdly, is there a reason for the rule?[76] I am not sure a symbolic reference to the Treaty would fulfil all three of these categories and thereby create a convention.

However, conventions are by their very nature vague and it could certainly be argued that a symbolic reference might create a "weak convention."[77] But I would suggest it is less like a convention and more like "a statement of general political practice."[78] By contrast, New Zealand does have the strong convention that is identified in the Cabinet Manual that Ministers must draw attention to any aspects of Bills that have implications for, or may be affected by the principles of the Treaty of Waitangi.[79] This does not create the same type of constitutional safeguard as a reference to the Treaty in a Constitution would, but it does creates a positive obligation on which Parliament is required to act.

I would question whether placing a symbolic reference to the Treaty in New Zealand's constitutional environment would create symbolism or ensure it took on normative value. It is submitted that a convention can take on a purely symbolic and normative value when it is generally considered to be no longer useful. However, I do not think a statement of general political practice can take on purely symbolic or normative value because it can never be used.

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[74] David Feldman (ed) *English Public Law* (Oxford University Press, Oxford, 2004) 15.
[75] Palmer and Palmer, above n 2, 5.
[76] Paul McHugh, above n 8, 17.
[77] Feldman, above n 74, 15.
[78] Feldman, above n 74, 15.
[79] Cabinet Office, above n 3, 70.

If at some stage in the future all Treaty issues between the Crown and Maori had been resolved then the convention from the Cabinet Manual, for example, may take on a purely symbolic role and strict adherence to this convention might no longer be necessary. Despite this, the symbolic value of the convention would likely continue. It could become a subtle reminder of the difficulties the constitution had experienced in the past in relation to the Treaty and the work that had been done to resolve those difficulties.

The convention that the Governor-General or Sovereign must assent to legislation is an example of this type of process. Historically the sovereign had the ability to refuse to assent to legislation. However, over time Parliamentary sovereignty became more settled. A strong convention evolved that the sovereign must assent to legislation. Today this process is so settled it is questionable whether this convention is still necessary. It is arguable whether the Governor-General still holds the power to refuse to assent to legislation at all.[80] If the power to refuse to assent to legislation no longer exists a positive convention of this nature seems redundant. It would seem that the convention has taken on a symbolic value. It reminds us that Parliament has not always had the absolute monopoly on power it currently enjoys.[81]

(b) Treaty relationship

It is submitted that it would be difficult for the Treaty to have a symbolic or normative value without resolution of the fundamentals of the Treaty relationship between the Crown and Maori. A purely symbolic reference might confuse what is already a muddled Treaty landscape and is likely to remind the parties of the work that has not been done and the differences that still remain. I am also unsure whether it would deal with the need

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[80] See generally Joseph, above n 10, 665, who sets out that the Governor-General's reserve powers include the right to "refuse the royal assent to a bill where to grant the royal assent would be unlawful or would irreparably impair representative democracy" this can be compared with Palmer and Palmer, above n 2, 57 which does not describe the power to refuse royal assent to legislation as a reserve power and thinks of it as a power that is "so reserved as to be of a qualitatively different nature" to the other reserve powers.

[81] See generally Joseph, above n 10, 645 there was a time in English constitutional history when there was competition between the Crown and Parliament for power. Although he notes the royal veto has not been exercised since 1707 when Queen Anne refused assent to a bill for settling the militia in Scotland.

for 'status recognition' that I discussed above. This symbolic status might be acceptable to Maori, but it could equally be considered demeaning.

Before there can be a purely symbolic reference to the Treaty in New Zealand's constitution there needs to be more dialogue and hard work on the broad parameters of the relationship between the Crown and Maori. It is submitted that the courts can help with this process, as has been the case in the past. A general reference to the Treaty in our Constitution, that has more than symbolic value, would enable this to happen. Once the relationship is more settled, then it could take on a symbolic value. The challenge is to ensure the relationship between the Crown and Maori is not irreparably damaged before this dialogue begins. Damage may occur if New Zealand implements too many policies that fray the already volatile relationship between the Crown and Maori.

I agree with Professor Palmer's proposition that courts should not be left to deal with policy issues. That would ultimately undermine the position of the courts in New Zealand's constitutional framework. However, historically the courts have been adept at augmenting and assisting with the discussion between Parliament and Maori. The courts role should be to continue to identify where there is a deficiency in legislation and to send it back to Parliament to deal with the substantive policy issues. It is submitted the best way to enable this to happen would be to incorporate a general reference to the Treaty in a Constitution.

Finally, I agree with Professor Palmer that specific references to the Treaty would be best. However, it is submitted that these will only come once the broader issues have been resolved.

D The Views of the Maori People

Historically the Maori people have been wary of incorporating the Treaty into a positive law or Constitution because it would mean that the Treaty could potentially be amended. For this reason some Maori favoured the Treaty retaining its existing status as a historical

document. By doing this not only could the Treaty avoid amendment it could also retain its "mana." As it stands at the moment it has a unique status and influence effectively sitting outside the law.[82] However, this unique status is limiting. The fact that it sits outside the law is different to the way a U.S style constitution could be described as sitting above law. The U.S style constitution is "the supreme law of the land" and prevails in the case of conflict with any other legal rule, federal or state.[83] Through sitting outside the law the Treaty continues to rely on the will of Parliament for recognition. History has shown this recognition is not always forthcoming. In light of the influential role the courts have played in assisting with the development of Treaty rights, it would seem logical to incorporate the Treaty in a Constitution to ensure its justiciability.

It is unclear whether Maori would support incorporating the Treaty in a Constitution. When New Zealand considered making the Treaty "part of the fundamental law of New Zealand" by incorporating it within a NZBORA some Maori opposed its inclusion for similar reasons to those I have already outlined.[84] These views ultimately prevented the Treaty being included in the NZBORA. If a large segment of the Maori population oppose incorporation of the Treaty in a Constitution it will not happen. Without a firm proposal to enact the Treaty in some way it is difficult to assess what the views of the Maori people might be. The most recent expression of Maori feelings in relation to New Zealand's constitutional arrangements was made in submissions to the Parliamentary Constitutional Arrangements Select Committee which assessed New Zealand's constitutional arrangements. I will highlight three submissions which made reference to enacting the Treaty:

Te Runanga O Kirikiriroa Trust (Inc) set out that they believe the Treaty is fundamental to any codified constitution for New Zealand. They state the Articles of the Treaty must

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[82] Harris, above n 30, 292.
[83] Gardbaum, above n 52, 708.
[84] See generally Palmer and Palmer, above n 2, 321.

take precedence over the Principles of the Treaty and they should be doubly entrenched within the resultant document and/or legislation;[85]

Te Runanga A Iwi O Ngapuhi submit that the rights and obligations which flow from the Treaty should be constitutionally recognised and protected. This can be achieved by formally incorporating the Treaty into our constitution; and[86]

The Treaty Tribes Coalition supported the idea of two sovereigns. But also set out that their primary concern "is to see the Treaty given full effect by being enshrined in constitutional legislation, such that both subsequent legislation and actions of the executive can be tested against it in the ordinary courts."[87]

It is difficult to determine how representative the submissions on the Treaty are. There are submissions both for and against incorporation of the Treaty in a Constitution. However, the fact that parts of Maoridom are now of their own volition suggesting that the Treaty should be incorporated into a constitution may indicate that attitudes have changed from those that existed prior to the NZBORA being enacted. The submissions also indicate that the issue of internal and external sovereignty is likely to be important.

Perhaps parts of Maoridom are now more aware of the power of Parliamentary sovereignty and the way it has the potential to limit the influence of the Treaty. As outlined previously, although the Foreshore and Seabed legislation was in relation to customary rights and not Treaty rights, it should certainly have illustrated to Maori the power of Parliamentary sovereignty.

Mason Durie notes that many Maori would support "an opportunity to develop a written constitution within which the Treaty of Waitangi was entrenched and the position of

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[85] Te Runanga O Kirikiriroa Trust (Inc) "Submission to the Inquiry to Review New Zealand's constitutional arrangements" <http://www.constitutional.parliament.govt.nz> (last accessed Monday 25 July 2005).
[86] Te Runanga A Iwi O Ngapuhi "Submission to the Inquiry to Review New Zealand's constitutional arrangements" <http://www.constitutional.parliament.govt.nz> (last accessed Monday 25 July 2005).
[87] The Treaty Tribes Coalition "Submission to the Inquiry to Review New Zealand's constitutional arrangements" <http://www.constitutional.parliament.govt.nz> (last accessed Monday 25 July 2005).

Maori as the indigenous people enhanced".[88] Again, it is difficult to know how representative this view is. It would seem further wide spread discussion of this issue within Maoridom would need to take place before this could be gauged.

THE TREATY AND RECONCILING THE WESTMINSTER MODEL AND THE U.S SYSTEM

It is submitted the Treaty should be incorporated in New Zealand's constitutional arrangements. How it is to be incorporated is important and it is submitted that the New Zealand constitutional environment should attempt to strike a balance between good government and the protection of Treaty rights. I would not advocate a wholesale change to a U.S style system. A U.S style system would not create an environment for the courts to facilitate dialogue between Parliament, as the legislator, and Maori. I would advocate that New Zealand strengthen its current system of rights protection by including the Treaty in a modified version of New Zealand's hybrid constitutional model.

A Rights Protection by the Courts under the NZBORA

Through the NZBORA, New Zealand has developed what is described as a hybrid constitutional model. New Zealand, Canada and Britain have all created hybrid models and attempted to infuse minority rights into their constitutional framework without abandoning Parliamentary sovereignty. They have all adapted their governing principles to place individual rights more squarely at the forefront when assessing the legitimacy of legislative and executive action.[89] These 'hybrid' models incorporate the dominant aspects of the Westminster and the U.S systems and challenge the polemic view of constitutions set out in *Marbury v Madison* by Justice Marshall.[9091] Hybrid models present the possibility of a continuum stretching from the Westminster idea of absolute legislative supremacy to the U.S model of a fully constitutionalised bill of rights with

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[88] Durie, Mason, above n 32, 234.
[89] Jane L Hiebert "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?" (2003-2004) 82 Tex. L Rev. 1963, 1965.
[90] See generally Marbury v Madison, above n 53.
[91] Goldsworthy, above n 41, 483.

various intermediate positions in between. New Zealand's history of good government ensured that it was reluctant to abandon the idea of Parliamentary sovereignty. But since World War two countries have also wanted to ensure effective protection, and express a commitment to, fundamental human rights and liberties.[92] New Zealand's unique circumstances also mean that Treaty rights also require effective protection. Treaty rights are not specifically protected under the NZBORA, one way this could be achieved would be by including a general Treaty clause within the NZBORA.

Hybrid models attempt to do two things. Firstly they attempt "to create institutional balance, joint responsibility, and deliberative dialogue between courts and legislatures in the protection and enforcement of fundamental rights".[93] They do this by granting the courts the power to protect rights without giving them supremacy. The legislature still has the final word.[94] This procedure has been said to decouple judicial review from judicial supremacy. Secondly the hybrid model ensures attention to rights in the legislative process. I will look at both these aspects of the hybrid system below.

B Rights Protection by the Courts in New Zealand

The NZBORA transfers important rights protection powers to the courts. It gives the courts the power to control the meaning of statutes in a way that is alien to traditional canons of statutory construction, but the NZBORA is still consistent with the orthodoxy of Parliamentary sovereignty.[95] The NZBORA gives a framework for determining how all other ordinary statutes are to be given meaning. If and only if a statute cannot be interpreted consistently with the NZBORA will the statute trump the rights.[96] However, in New Zealand the decoupling of judicial review from judicial supremacy is not as clear as it is in Canada and the United Kingdom and there is competition between section 4 and 6 of the NZBORA. The purpose of section 6 is to ensure that the courts take the most

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[92] Gardbaum, above n 52, 709.
[93] Gardbaum, above n 52, 708.
[94] Gardbaum, above n 52, 707.
[95] Gardbaum, above n 52, 714.
[96] Gardbaum, above n 52, 714.

charitable interpretation of a statute to ensure that it complies with the NZBORA.[97] The purpose of section 4 is to "assert and preserve parliamentary sovereignty and to immunise legislation from judicial invalidation."[98] This point is highlighted as a problem by Andrew Butler when he sets out that the NZBORA gives ultimate responsibility to the courts for protecting both fundamental rights as well as Parliamentary sovereignty. Because the courts are relying on statutory interpretation they must resolve these rival claims themselves. He advocates that the courts should be able to rely on the legislature having to squarely exercise its own sovereignty claim through a special mechanism as is the case in Canada and the United Kingdom.[99] It is submitted that the NZBORA would be enhanced if the legislature was responsible for and required to take the political consequences of any assertion of Parliamentary sovereignty.

A better example of this type of decoupling in the New Zealand context occurred in the Lands case. In that case the judiciary stepped in to identify the potential breach of the Crown's obligations under the Treaty, but left it to the legislature to work out how to avoid the potential breach. To strengthen New Zealand's current hybrid system we should be aiming for a process that replicates what occurred in the Lands case. By doing this New Zealand would ensure rights protection involved dialogue between the legislator

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[97] See generally Andrew Butler, "The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a bad model for Britain" (1997) 17 Ox J Leg St 323, 326 see also the New Zealand Bill of rights Act 1990 section 6 which sets out:
"Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

[98] Andrew Butler, above n 97, 325 see also section 4 of the New Zealand Bill of Rights Act 1990 which sets out that:
"No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),
(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) Decline to apply any provision of this enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights."

[99] See generally Butler, above, n 97, 336 where he notes the conflict between section 6 and section 4 of the NZBORA, he sets out: section 6 is informed by the view that statutory language is malleable and that text is open to several interpretations by the reader. Once told how a text is to be read-here, in a manner consistent with the Bill of Rights-courts can (attempt to) divine a meaning in the words which complies with human rights standards. Inherent in s4, however, is the notion that a statute has particular purposes and a bounded set of possible meanings. The conundrum which faces a court then is that if Parliament used words which at first glance look as if they cut across rights and freedoms guaranteed by the Bill of Rights how can it know that that was not indeed Parliament's intention, if those words reflect the legislative policy? The answer, of course, is that it does not… thus, it will be seen that s 4 and 6 pull in different directions making their interaction an uneasy one.

and the courts. In the Lands case the legislator passed the legislation, the courts identified the deficiency and then returned it to the legislator for the hard policy work. The legislator then devised a solution that was acceptable to everyone. When discussing the case Sir Geoffrey Palmer, the Minister responsible for devising the solution, noted, "Hammering out those details was one of the most challenging tasks I ever faced as Minister", despite the fact that it was no simple task the method in which the matter was dealt with "turned out to be satisfactory to everyone."[100] The Lands case illustrates that the hybrid model of rights protection can work as long as all parties play their appropriate role. The Lands case resulted in what Sir Geoffrey Palmer described as a rather elegant solution.[101] As already noted, the solution required hard work, but this is the type of process New Zealand should be aiming for in regard to Treaty issues. New Zealand should be looking to ensure hard work by the democratically elected legislator creates good outcomes. It is submitted a modified hybrid model could ensure this is achieved.

Canada and the United Kingdom have already attempted to create models which replicate the type of dialogue that occurred in the Lands case. I will now briefly assess how the hybrid models developed in those two countries.

B Rights Protection by the Courts in Canada

Canada has judicial enforcement of their Charter Rights, but these for the most part are subject to section 33 of their Charter.[102] Section 33 permits legislatures by express provision to override many of the rights protected by the Charter.[103] All that is necessary is the enactment of a law containing an express declaration that the law is to operate notwithstanding the relevant provision of the Charter. Once this declaration has been enacted, the law that it protects will not be touched by the overridden provision of the Charter. Through section 33 the principle of Parliamentary sovereignty has been retained,

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[100] The Right Honorable Sir Geoffrey Palmer, above n 11, 90-93.
[101] The Right Honorable Sir Geoffrey Palmer, above n 11, 90.
[102] The Constitution Act 1982, s33(1).
[103] See generally The Constitution Act 1982, s 33(1) sets out that:
"Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter".

although the weakness of the Canadian model is that in practice the power of override is seldom used.[104] Because the power is seldom used, in effect, the courts always end up having the final say. Once the courts strike down legislation the legislature has generally not had the will to use the override. As set out above, the potential strength of this type of system appears to be the dialogue between the courts and the legislature. Although the Canadian system has the potential to create meaningful dialogue, it is currently failing on that front.

It is submitted that a Canadian style system could be effective in New Zealand if the courts and legislator used it to generate a healthy dialogue.

As an aside, it is also worth noting that in the Canadian model the Constitution Act 1982 includes a section which protects indigenous rights. Section 35(1) of the Constitution Act 1982 sets out that "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed." This illustrates that the Treaty could be included in this type of document.

C Rights Protection by the Courts in the United Kingdom

The British Human Rights Act 1998 ("HRA") also aims to give further effect to rights without giving them the status of supreme law. Again, there is an attempt to create inter-institutional dialogue. The HRA is along similar lines to the NZBORA except that it allows a "declaration of incompatibility" if primary legislation cannot be interpreted in a manner consistent with convention rights.[105] However, Parliamentary sovereignty is maintained because there is no legal duty on Parliament to remedy the incompatible legislation. In spite of this fact "the government has repeatedly stated its belief that the normal course of action would be that such a declaration will almost certainly prompt the Government and Parliament to change the law."[106] If the government follows this course

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[104] Goldsworthy, above n 41, 483.
[105] Hiebert, above n 89, 1976.
[106] Gardbaum, above n 52, 716.

of action it again seems that the courts have the final say. If this is the case the constitutional actors are not utilising what could be an advantage of their system.

D Criticisms of the Canadian and British Hybrid Models

One author has suggested that the fact that the Canadian legislator are reluctant to use section 33, and the emerging British assumption that Parliamentary sovereignty does not mean that government should act in a manner inconsistent with judicial interpretations of rights (as inferred from judicial declarations of incompatibility), means that from a judicial review perspective these models seem exceedingly close to the U.S model.[107] However, it is interesting to note the articles conclusions. The author states that there is no reason to assume that the hybrid model is inferior to the U.S model of protecting rights. In fact in some ways the author suggests that it might be superior. The author notes her only caution:[108]

> does not arise out of any inherent conceptual shortcomings with this model, but from the strong influence of American constitutional ideas. Despite the innovative approach these models take, it remains to be seen to what extent these political communities can resist the emphasis on judicial hegemony when interpreting rights and resolving legislative conflicts where rights claims arise.

The author also notes that:[109]

> Only time will tell whether it is possible to establish a bill of rights that will evolve in a manner that can resist the notion that judicial hegemony is required for responsible judgements about rights.

These comments, far from resigning hybrid models to the scrap heap, seem to offer hope that these models might evolve in a satisfactory manner if they can throw of the dominant U.S ideology.

The fact that one of the New Zealand legal systems most important Treaty cases, the Lands case, was decided in a way that allowed inter-institutional dialogue illustrates that

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[107] Hiebert, above n 89, 1980.
[108] Hiebert, above n 89, 1986.
[109] Hiebert, above n 89, 1987.

the hybrid model can work. The current shortcomings of the Canadian and British models seem to fall at the feet of the actors within the system, rather than the system itself.

E Advantages of the Canadian and British Hybrid Models over the Traditional Westminster System and the U.S System

1 Westminster system

An obvious advantage of the hybrid model is that it allows rights protection and Parliamentary sovereignty to be accommodated within the same system. When compared with the traditional Westminster system, the hybrid model would also have the advantage of allowing the Treaty to be protected in a clearer manner and enable the courts to act as a brake on the "tyranny of the majority".

New Zealand currently has an ad hoc system of protecting Treaty rights. It is submitted that the protection could be improved by protecting them as part of a modified hybrid model that creates dialogue between the courts and the legislator.

2 U.S system

A U.S style system of rights protection has previously been identified as a model New Zealand should consider.[110] Gardbaum who has set out detailed analysis of the hybrid model outlines four potential advantages that the hybrid model has over the U.S model. I will assess these potential advantages in light of my discussion of the Lands case and the way Treaty protection should operate.

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[110] See generally "A Bill of Rights for New Zealand – A White Paper" (Government Printer, Wellington, 1985) 68 which suggested a U.S style supreme law. It included a supreme law provision which set out: "This Bill of Rights is the supreme law of New Zealand, and accordingly any law (including existing law) inconsistent with this Bill shall, to the extent of the inconsistency, be of no effect."

(a) Protecting fundamental Treaty rights without limiting the legislative process

One of the criticisms often directed at the U.S style system is that because legislatures do not have final responsibility they have a tendency to leave matters of constitutionality and rights to the courts. It is thought that over time, this devaluation of legislative discourse has the potential to sap the self-governing capacity of the people and may displace public in favour of private interest.[111] The hybrid model attempts to avoid this problem by giving the democratically elected legislature the potential to have the final say.

Treaty issues can be unpopular with the electorate. This is illustrated by the legislature's general reluctance to deal with them. If the courts were to become the final decision-maker on Treaty issues it is likely to increase litigation in relation to these issues and enable the legislator to avoid dealing with the tough Treaty issues. An associated problem would be that if the courts are left to deal with the tough issues, over time it might make them unpopular with the public and damage their legitimacy. It would cause constitutional problems if the courts faced resistance from the general public. These are important reasons why the democratically elected legislator should be the final decision-maker on Treaty issues.

(b) Avoiding Politicisation of the Courts

As previously discussed, when courts decide Treaty issues they essentially look at two matters. Firstly, whether the right has been infringed and secondly whether there is an overriding policy interest that allows that infringement. There is often a sense that where the courts are dealing with the second type of issues they are in danger of straying too close to the terrain of policy and preference.[112] Again, over time if courts make decisions involving policy and preference this might undermine the public perception of the courts and potentially politicise their role.

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[111] Gardbaum, above n 52, 721.
[112] Gardbaum, above n 52, 722.

In the New Zealand context, the courts could continue to be involved in determining the scope of Treaty rights. In the Lands case and in subsequent cases the courts have shown themselves to be adept at identifying where the legislator has potentially infringed a Treaty right. Beyond this identification, it would be better if courts left it up to the legislator to make the difficult political or policy decisions. By adopting the hybrid model for Treaty issues New Zealand could formalise a process that has already proven to be successful.

(c) Making rights discourse into a more inter-institutional dialogue[113]

It is also hoped that dialogue between Parliament and the courts would improve constitutional analysis of Treaty issues. The courts could identify the issues and the legislator would then decide whether they should change or override the legislation. The legislator is in the best position to make this decision because they are democratically accountable.

In the New Zealand context the courts have already been utilised to assist with Treaty issues. As mentioned, they have proved themselves to be a useful partner in dealing with these issues. It would be important that discourse between the legislature and the courts was understood to be part of the process. If this was the case it would assist in ensuring that healthy, rather than divisive and destructive discourse was maintained. Again the Lands case is a good example of the way the system can work.

(d) Reducing the tension between judicial protection of Treaty rights and democratic decision making.[114]

If the courts role is a checking one, the legislator will still have ultimate responsibility and power. If the courts role is a trumping one the legislator might at times feel that the courts are interfering inappropriately. If this was the case it would be likely to raise

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[113] Gardbaum, above n 52, 721.
[114] Gardbaum, above n 52, 721.

tensions between the courts and the legislator. However, if both institutions are clear what their roles are and checking was understood to be part of the process, a healthy discourse could be maintained. Historically the New Zealand government has been quite amenable to involving the courts in the development of Treaty principles by including general Treaty clauses in legislation. The Lands case was a good example of how the courts should act.

F Incorporating the Treaty into a Hybrid Model

It is submitted that the final decision on Treaty matters should be left to those who are democratically accountable. However, the courts have proven themselves to be useful in assisting with Treaty issues. In light of the way the process used in the Lands case was able to resolve a difficult situation it seems a logical step for New Zealand to develop its own variant of the Canadian or British model which included the Treaty. Formalisation of the process would ensure ongoing protection for Treaty rights and it would also clarify the process and ensure a formalised rather than ad hoc role for the courts. This would enable New Zealand's hybrid model to evolve to enable inter-institutional dialogue. A fine tuning of the process, rather than a complete overhaul, seems like the best solution.

G Attention to Rights During the Legislative Process

The second feature of the hybrid system I referred to is the political review of proposed legislation. In Canada this occurs through executive scrutiny, while in New Zealand and Britain this occurs through vetting.

Section 7 of the NZBORA requires what are described as vets. This check is meant to ensure that proposed legislation does not breach any of the rights protected by the Act. If a proposed Act does breach the NZBORA it puts the onus on the legislature to justify the departure from NZBORA standards.

As set out earlier, the Cabinet Manual includes a convention that requires those proposing Bills to identify the potential impact on the Treaty. Again it seems incongruous that other minority rights are afforded this type of protection through the NZBORA, yet Treaty

rights are protected through a convention. This is another example of the way the system forces Treaty rights to be dealt with in a different manner to other minority rights. The fact that the system forces many Treaty rights to be dealt with in a different manner to other minority rights may be contributing to the perception held by some that Maori are getting "special treatment" under New Zealand law. It is submitted that this is one area where the Treaty could be brought into line with other minority rights.

The fact that rights are protected in different parts of the constitutional process seems to be an advantage of the hybrid model. In effect the courts role is a back up role and it is hoped that intervention by the courts can be avoided by thorough rights analysis during the legislative process.

The two protection methods offered by the hybrid model would ensure that Treaty matters were dealt with appropriately. More detailed analysis of the various models and New Zealand's constitutional goals would need to be conducted before adopting a modified hybrid model, but it would seem that New Zealand should continue along the hybrid model evolutionary path on which it has embarked.

IV THE PRACTICALITIES OF ENACTING THE TREATY?

The final stage of my analysis will look at two practical issues associated with enacting the Treaty in a Constitution which might prevent it from being a viable option. Firstly, I will examine whether "principles" of the Treaty or the text of the Treaty should be incorporated into legislation. Secondly, I will assess whether the Treaty should be incorporated through ordinary legislation or in a form of higher law.

(a) Should the "principles" of the Treaty or the Text of the Treaty be incorporated?

Whether the text of the Treaty or the "principles" of the Treaty should be incorporated into a Constitution would be an important issue. As outlined previously, the textual differences between the Maori and English versions mean that agreement on the meaning

of the Treaty text may be hard to establish.[115] These difficulties have in part been circumvented by general references to the Treaty. An example of this is the reference to the "principles" of the Treaty used in section 9 of the State Owned Enterprises Act 1986.

A large body of jurisprudence has developed around the various legislative references to the Treaty and in exceptional cases jurisprudence has developed where there has been no reference to the Treaty in legislation.[116] Since the Lands case, textual differences between the Maori and English versions of the Treaty have not been as important because of the fact that the courts had outlined "what matters is the spirit of the Treaty."[117] Sentiments about the nature of the relationship are also expressed by Sir Douglas Graham, he set out:[118]

> It is worth remembering that the Treaty is a pact of goodwill between peoples. If approached with a generosity of spirit, there is no reason why that pact should not succeed as a symbol of an ongoing relationship between peoples based on notions of trust, respect, and dignity.

The question to be addressed is how best to represent this Treaty 'relationship' if it were to be incorporated into New Zealand law. Some suggest it would be preferable to continue to use the "principles" rather than the text because of the historical nature of the text. However, this could be offensive to Maori and it is questionable whether it would be a viable proposition.

It is submitted that the 'relationship' and the 'principles of the Treaty' flow from the Treaty text as signed in 1840. Therefore these 'principles' would be relevant even if the text of the Treaty were inserted in legislation. The text of the Treaty would be a starting point with the 'principles' supplying the meaning of the relationship between the Crown

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[115] I will not be referring to the rule of contra proferentum rule in this paper. This is the rule which is applied to bilingual treaties and dictates that in cases of ambiguity a treaty is to be interpreted against the party drafting it, see generally e-government <http://www.e-government.govt.nz>.

[116] See generally Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188, 210 (HC) for an instance where the Treaty was used as an aid to interpretation because it was "part of the fabric of New Zealand society".

[117] The Right Honorable Sir Geoffrey Palmer, above n 11, 89.

[118] Ken S Coates and PG McHugh *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millenium* (Victoria University Press, Wellington, 1998) 7.

and Maori. Ultimately, interpretation of the meaning of the text would need to be negotiated between the Crown and Maori. Where necessary, this could be augmented by input from the courts.

Enacting the Treaty text would also enable the Treaty to evolve as the relationship between the Crown and Maori developed in the same way that the "principles" of the Treaty have continued to evolve. A form of constitution has been proposed which includes the text of the Treaty as well confirmation that the rights of Maori people and that the Treaty "shall be considered as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and intent."[119] It is submitted that this would provide an excellent starting point for the discussion of the way the Treaty might be incorporated into a Constitution within a hybrid model.

(b) Should the Treaty be entrenched?

How the Treaty is to be enacted would also be an important issue. For reasons already outlined, it would of particular sensitivity to Maori who would be concerned about Government's ability to amend the Treaty.

On this issue, I think it is important to remember that if the Treaty was enacted, it would not mean that the original document ceased to exist. If the text of the Treaty was incorporated into a constitution and in the unlikely situation that at some stage Parliament did want to change the text of the Treaty, the original document would still sit outside the law and could be seen as a touchstone of the true meaning of the Treaty. The fact that the Treaty text had been incorporated would be a manifestation of the original Treaty, but it

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[119] See generally Palmer and Palmer, above n 2, Appendix Part II which sets out:

THE TREATY OF WAITANGI/TE TIRITI O WAITANGI

4. The Treaty of Waitangi/Te Tiriti o Waitangi – (1) The rights of the Maori people under the Treaty of Waitangi/Te Tiriti o Waitangi are hereby recognised and affirmed.
(2) The Treaty of Waitangi/Te Tiriti o Waitangi shall be considered as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and intent.
(3) The Treaty of Waitangi/Te Tiriti o Waitangi means the Treaty as set out in Maori and English in the Schedule to the Act.

would not replace the original Treaty. The original Treaty would continue to exist and represent the agreement between the Crown and the Maori who signed it.

By enacting the text of the Treaty it would be internalising the Treaty within New Zealand's constitutional framework. It is submitted this would also enhance the possibility of a sustainable pluralism operating within New Zealand's current constitutional framework.

However, the fact that the Treaty would continue to exist does not mean that the Treaty should not be entrenched. It should be entrenched so that any amendment would require wider support than a bare majority of Parliament. One option is to entrench the Treaty so that it can only be repealed or amended by a majority of seventy-five percent of all the members of the House of Representatives, or through a majority of votes cast at a referendum.[120]

The question of whether Parliament can bind itself is one that has been addressed previously. Historically there have been two opposing views of Parliamentary supremacy and whether Parliament can bind itself. The 'continuing' view sees the power of Parliament as legally limitless: a feature of omnipotence is its unalterable or 'continuing' quality. The 'self-embracing' view sees the notional omnipotence of Parliament as momentary. This means that one of the features of omnipotence is that the all-powerful body is able to shed one or more of the attributes which were part of its original state.[121]

The 'self-embracing' has been used in New Zealand in relation to New Zealand's electoral legislation.[122] Treaty rights could be entrenched in this manner because it does not seek to bind future Parliaments as to the content of future legislation. It would only

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[120] See generally "A Bill of Rights for New Zealand – A White Paper", above n 110, 118, which provides a useful suggestion for a form of entrenchment. The provision would look as follows:
"No provision of this Bill of Rights shall be repealed or amended or in any way affected unless the proposal
(a) is passed by a majority of 75 percent of all the members of the House of Representatives and contains an express declaration that it repeals, amends, or affects this Bill of Rights; or
(b) has been carried by a majority of the valid votes cast at a poll of the electors for the House of Representatives;
and, in either case, the Act making the change recites that the required majority has been obtained."

[121] Paul McHugh, above n 8, 55.

[122] See generally the Electoral Act 1993 and Palmer and Palmer, above n 2, 22.

necessitate following a specified procedure if a Parliament did want to change the form of Constitution.[123]

It is acknowledged that the process for adopting a provision of this nature would also be important. For example, would it require the support of the majority of people at a referendum? However, the process for entrenching the Constitution is beyond the scope of this paper.

VIII CONCLUSION

At some stage New Zealand is going to have to address the issue of the Treaty's place in New Zealand's constitution. As it currently stands it is unclear and for now that may suit all, or some, of the parties involved. However, over time this approach would seem to create animosity between the parties. In addition to this, the fact the role of the Treaty has not been settled inhibits the ability of New Zealand to undertake any major constitutional development.[124] Constitutional stagnation cannot be maintained for ever.

To return to the two points I highlighted in the introduction to my paper I would reiterate that adopting the Treaty within a Constitution as part of a new hybrid model would ensure better protection for Maori Treaty rights and formalise the framework for assessing those rights. I would envisage that many of the systemic advantages that I have outlined would also be of benefit to other minority rights. I have also set out various collateral advantages that might be achieved through the new hybrid model.

It is hoped that clarifying the position of the Treaty can help bring a far greater sense of order to the New Zealand system of government and consequently allow greatly

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[123] See generally "A Bill of Rights for New Zealand – A White Paper", above n 110, 55 for a discussion of the way Parliament can lay down a procedure for a specific purpose.

[124] See generally B.V Harris, above n 30, 290-291 where he notes "A decision to formalise Maori interests in constitutional law, or to leave the matter to ongoing dialogue, is a political prerequisite to addressing the issues in respect of: the future of the monarchy and whether New Zealand becomes a republic; the future structure and functioning of the legislature and executive; and whether New Zealand adopts formal written constitution.

improved community access to, understanding of, and confidence in, the constitution.[125] It is acknowledged that adopting the Treaty in a Constitution as part of a new hybrid model is going to require New Zealand to address difficult issues. Dealing with these difficult issues could be the very reason why a process of this type is necessary. I hope that New Zealand attempts to deal with these issues sooner rather than later.

[125] B.V Harris, above n 30, 308.

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