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DIBLEY, T.H. Beyond the embryo.

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LLB(HONS) RESEARCH PAPER
PUBLIC LAW (LAWS 505)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2001

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*ABSTRACT***APPENDIX I THE ENGLISH VERSION OF THE TREATY** 54**APPENDIX II AN ENGLISH TRANSLATION OF THE****MAORI VERSION OF THE TREATY** 55**BIBLIOGRAPHY** 56

The conclusion that the essay will offer is that the Treaty, or at least principles that can be garnered from it, should be constitutionalised in New Zealand law. Constitutionalisation will require the Treaty to be provided for in a way that necessitates legislation, policy and precedent to adhere to its principles. The essay further concludes that such a move is necessary in order to provide a framework for a way forward for New Zealand as a nation, but at the moment the national environment is not conducive to this so constitutional change of this magnitude seems unlikely to occur.

Word Length

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ABSTRACT

This essay looks at the constitutional place that the Treaty of Waitangi holds in New Zealand today and suggests that alternative positioning of the Treaty in New Zealand's constitutional fabric is required. The essay suggests that such a change is necessary to provide the Treaty relationship, and the principles that such a relationship enshrines, greater emphasis so that the promise and spirit of the Treaty that was originally bargained upon back in 1840 can be fulfilled.

The conclusion that the essay will offer is that the Treaty, or at least principles that can be garnered from it, should be constitutionalised in New Zealand law. Constitutionalisation will require the Treaty to be provided for in a way that necessitates legislation, policy and precedent to adhere to its principles. The essay further concludes that such a move is necessary in order to provide a framework for a way forward for New Zealand as a nation, but, at the moment the national environment is not conducive to this so constitutional change of this magnitude seems unlikely to occur.

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“The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.”¹

I INTRODUCTION

This paper is designed to explore the issues surrounding a formal recognition of the Treaty of Waitangi (the Treaty) in New Zealand law. The essay puts forward a framework for a general, informed, constitutional debate on the issue of a formal place for the Treaty in New Zealand's constitutional makeup and looks towards some possible outcomes that would provide the Treaty relationship a greater emphasis. The essay will address the issue of what system would incorporate and give effect to the values and aspirations of both Maori and Pakeha as Treaty partners² and whether this system would need to be entrenched to properly provide for the Treaty.

The conclusion that will be offered is that for the goals as set out in the essay to be achieved, and for the Treaty relationship to move beyond the embryo stage, a formal legal place for the Treaty needs to be found. The essay further concludes that a logical place for the Treaty is a constitutional one in which consistency in further relationships can be based. The essay suggests that the best way for all of the parties to consistently interpret the Treaty relationship in the modern world is to place it in a constitutional framework so that all decisions, legislation and policy will be produced in accordance with a consistent legal meaning of the Treaty.

¹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 663 per Cooke P [NZMC v AG].

² New Zealand Law Society Seminar *Treaty of Waitangi Issues – The Last Decade and the Next Century* April 1997, 12 [“NZLS Seminar”].

II GOALS FOR A FORMAL RECOGNITION OF THE TREATY

If change is to occur in the provision for the Treaty relationship then it needs to be precipitated by national consultation with all groups in order to be considered legitimate. "We should draw on the extensive experience of individuals, families, tribes and many other groups organising themselves within a state or indeed across several states."³

In assessing goals for a future recognition of the Treaty relationship the essay looks at only those goals that all parties to the process are likely to agree upon. Unfortunately, it must be noted that the political realities are likely to be much different, with polarised positions on what the Treaty was entered into to achieve and what any constitutional recognition of it should seek to achieve in the future.⁴

The goals that are set out in this section for formal recognition of the Treaty relationship have necessarily been left broad, without suggesting an end in themselves in order to enhance the possibility of agreement. The identified goals don't suggest concrete outcomes such as a full settlement or development of a Maori Parliament. Nor do they suggest other more abstract outcomes, such as a formal constitutional provision.

While most groups and individuals involved in developing Treaty jurisprudence and policy have differing views on what the goals should be in furthering the Treaty relationship, and hence the direction that should be taken on any constitutional issues, some common themes emerge, and are discussed below.

³ Hon Kenneth Keith "The Tribunal, the Courts and the Legislature" in G. McLay (ed) *Treaty Settlements: The Unfinished Business* (New Zealand Institute of Advanced Legal Studies, Wellington, 1995) 39, 46 ["Tribunal, Courts and Legislature"].

⁴ Paul Perry and Alan Webster *New Zealand Politics at the Turn of the Millennium: Attitudes and Values about Politics and Government* (Alpha Publications, Auckland, 1999) 74.

A *Legitimacy*

The Treaty has to be seen as a key source of the New Zealand government's moral and political claim to legitimacy in governing the country.⁵ For the Crown to be morally and politically legitimate, in any sort of outcome on the Treaty, rights it agreed that Maori were to continue to hold under the Treaty need to be formally recognised.

Many argue that a formal place for the Treaty is necessary to establish constitutional frameworks that recognise the equally legitimate sovereign rights of Maori and the Crown to exercise government.⁶ This, in turn, would be seen to increase the Crown's legitimacy, as Maori sovereignty was ceded on terms and conditions that have not been fulfilled and recognition of Maori rights would be seen as an attempt to redress these issues.

Concentrating on the enhancement of the legitimacy of the Crown does provide a possible stumbling block in that the Crown itself is the symbol of illegitimacy and colonial rule and that symbolism may be unacceptable for many to formally recognise. At a hui held at Hirangi Marae participants discounted the possibility of a durable Treaty process without a final break with colonial laws and processes.⁷ What is better looked at is how to further enhance the legitimacy of the "governance" of New Zealand. Formalising the Treaty would necessitate a redefinition of the place of the "Crown" in New Zealand's constitutional framework.

This is a reality that permeates through all of the goals of the formal recognition of the Treaty - the Crown, as it was at the time of the signing of the Treaty and is now

⁵ G Palmer & M Palmer *Bridled Power: New Zealand Government Under MMP* (Oxford University Press, New Zealand, 1997) 287 ["*Bridled Power*"].

⁶ Moana Jackson "Where Does Sovereignty Lie?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 197.

⁷ M.H. Durie "Proceedings of a Hui held at Hirangi Marae, Turangi, 29 January 1995" in G. McLay (ed) *Treaty Settlements: The Unfinished Business* (New Zealand Institute of Advanced Legal Studies, Wellington, 1995) 19, 26 ["Proceedings of a hui"].

is radically different and would need a modern redefinition in order to enhance legitimacy and reflect the values of New Zealanders.⁸

B Recognition

Formal recognition of the Treaty as our founding document would hardly suffice if the underlying message about the constitutional status of Maori were not provided for.⁹ This recognition would need to be in context. Maori were, and are, New Zealand's first nation but recognition given to that status in 1840 was not designed to be, and is not amenable to the present day. One of the goals would need to be a contextual redefinition and re-recognition of the constitutional role of Maori. This contextual redefinition could only be achieved through consultation with a wide range of representatives of the Maori people. This discussion would need to center around the definition and protection of the rights of the Maori people today and the recognition of their constitutional position under the Treaty.¹⁰

C Frameworks

A clear framework for the future relationship between the Treaty partners, including the recognition of intangible grievances such as lack of Maori self-determination, is seen by many as a necessary goal.¹¹ Denise Henare has written that "it is not enough to advocate generosity of spirit; structures and systems are also needed."¹² The lack of frameworks has also been seen as hampering the process of Crown settlement with Maori as the proposals for the settlement of Treaty grievance claims have suffered from the absence of an overriding clear framework based on the Treaty.¹³

⁸ Richard Mulgan *Maori, Pakeha and Democracy* (Oxford University Press, Auckland, 1989) 8 ["*Maori, Pakeha and Democracy*"].

⁹ Hon Edward Durie, "The Treaty in the Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 201 ["The Treaty in the Constitution"].

¹⁰ Report of the Royal Commission on the Electoral System *Towards a Better Democracy* (Government Printer, Wellington, 1986) p112 – recommendation 7 ["*Royal Commission*"].

¹¹ Catherine Callaghan "Constitutionalisation of Treaties by the Courts" (1999) 18 NZULR 334, 335.

¹² Denise Henare "Can or Should the Treaty be Repealed?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 207, 209.

¹³ Proceedings of a hui, above n7, 26.

D International compliance

Assimilation with international law principles, especially the draft United Nations Declaration on the Rights of Indigenous Peoples 1993, would need to be a goal of formal recognition of the Treaty. International political reality necessitates this, as the sovereignty of individual nations is increasingly being eroded as a concept by the globalisation of political standards.¹⁴ This does not mean that any possible agreement on the Treaty relationship should be unduly constrained by international agreements, merely that it is a useful guide that should not be deviated from if possible.

E National Identity

Some, such as Richard Boast, have argued that the Treaty has proved too slender a foundation on which to construct a new mythic sense of national identity.¹⁵ While, through the current methods of interpretation, the Treaty has failed to provide a basis for "one-nationhood", if formal recognition of the Treaty is to be promoted one of the goals that any manifestation that formal Treaty recognition takes would need to be its ability to promote a sense of national identity.

Perhaps this notion of a symbolic position for the Treaty that acknowledges our national identity is what Matthew Palmer was talking about when discussing legislative recognition of the Treaty, arguing that "If your purpose in referring to the Treaty in legislation is to enhance its symbolic value, then strictly speaking you have no need to give it a particular legal effect."¹⁶ Palmer does not discount symbolism as important, citing it as a cornerstone of constitutional arrangements,¹⁷ but proposes that legal effect should be given instead to specific legislative provisions.

¹⁴ Tribunal, Courts and Legislature, above n3, 47.

¹⁵ Richard Boast "The Treaty of Waitangi and the Law" (1999) NZLJ 123.

¹⁶ Matthew Palmer "The Treaty of Waitangi in Legislation" (2001) NZLJ, 207.

¹⁷ Palmer, above n16, 209.

Palmer's argument is confined to individual pieces of legislation rather than something that gives the Treaty an overall formal place.¹⁸ If this approach is to be adopted toward the vehicle which carries formal recognition of the Treaty, then care will need to be taken in separating what is the symbolic and hence of no legal effect and what is the instrumental to be given legal effect. This separation would not necessarily be easy as the Treaty is itself a document symbolic of the relationship between the Crown and Maori, and this symbolism will need to be represented and may need to be given legal effect in any formal recognition of the Treaty relationship.

F Multiculturalism/Bi-culturalism

There is general objection among Maori to being considered one among many minorities in a multicultural society.¹⁹ The argument is that terming New Zealand a multicultural society has the effect of downgrading the unique importance of the Maori people; they become just one more ethnic minority alongside all the others, each with their own culture.²⁰ This argument would see New Zealand as more of a bicultural society.

The need for recognition of New Zealand as a multicultural society comes back to the need to redefine the Crown, and to ask the question who the modern successor to the Crown is.²¹ Other minority groups will come under the auspices of the modern New Zealand definition of "Crown." Maori were an indigenous, sovereign signatory to the Treaty and as such, while a minority group in numbers, have a status equal to that of the Crown. Other minority groups' points of view, on the other hand, will

¹⁸ Palmer, above n16, 209 where Palmer talks about possible symbolic placement of the Treaty in the Constitution Act 1986.

¹⁹ D.V. Williams "The Constitutional Status of the Treaty of Waitangi: An Historical Perspective" (1990/91) 14 NZULR 9, 16.

²⁰ *Maori, Pakeha and Democracy*, above n8, 8.

²¹ Alex Frame "A State Servant Looks at the Treaty" (1990/91) 14 NZULR 82, 91.

need to be considered under the notion of "Crown" when formulating any formal place for future Treaty relationships.

New Zealand is now both a bicultural and a multicultural society. Multicultural aspects will come under the modern definition of the Crown; Bi-culturalism is the notion that a nation should accommodate two peoples each with its own culture and in this context will be the sharing of power between the Crown and Maori.²² Both the bicultural and the multicultural will need to be recognised when finding a formal place for the Treaty.

III THE CURRENT PLACE OF THE TREATY

To say that the Treaty is a matter of national importance and will likely be so for a long time to come is to state the obvious. Literature of all kinds, and from all viewpoints has traced the historical origins of the document and the relationship between the native Maori people and the settler population that it enshrined. Given the status of the Treaty it therefore seems strange that the methods used to deal with the Treaty by the legislature and the judiciary have been inconsistent in approach and effect. The problems with the current methods of interpretation and implementation of the Treaty and its principles need to be assessed to see whether they are providing, or could provide, a consistent framework for the Treaty relationship.

The Treaty is a document that has conflicting literal meanings and an unsure place in New Zealand constitutional fabric. These problems have meant that two main issues have faced anyone considering a place for the Treaty:

²² *Maori, Pakeha and Democracy*, above n8, 8.

First, finding an acceptable interpretation of the Treaty out of the conflicting literal meanings of the English and Maori versions of the document.

Second, finding a place for the Treaty that provides the meaning garnered from the document with a formal place in New Zealand's constitutional fabric that is acceptable to all concerned. This has often meant that the issue of a constitutional place for the Treaty has not been debated much beyond the embryo stage that Lord Cooke suggested, and any proposals for change have been met with skepticism and ultimately rejected.²³

Compounding the problems with interpreting and categorising the Treaty, is the inconsistent way in which the Treaty is included in legislation and in which legislative references to the Treaty are interpreted by the Courts.

A *The Legislature*

The substantive incorporation of the Treaty into New Zealand law came with the passing of the Treaty of Waitangi Act 1975 which provided for the establishment of the Waitangi Tribunal.²⁴ This did not mean that the legislature had newfound enthusiasm for Treaty issues - reference to the Treaty itself or to tikanga Maori was virtually non-existent in pre-1984 legislation.²⁵ Since that date many other Acts have attempted to deal with how the Treaty applies to their legislation²⁶ and it is mainly through legislative means that the Treaty is now recognised in domestic law. However, legislative provision for the Treaty has been ad hoc, inconsistent and, at

²³ The example of the Treaty clause in the proposed Bill of Rights is discussed below in Part VII.

²⁴ Section 5 of the Treaty of Waitangi Act 1975 provides for there to be a Waitangi Tribunal. Section 6 of the Act provides for the Tribunal's jurisdiction.

²⁵ Paul Havemann "What's in the Treaty?": Constitutionalizing Maori Rights in Aotearoa New Zealand 1975 - 1993" in Kayleen Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy* (Ashgate Publishing Ltd, Aldershot) 73, 89. ["What's in the Treaty"].

²⁶ Some legislation was specifically enacted to secure rights protected by the Treaty, examples include the Maori Language Act 1987 which implemented the Waitangi Tribunal *Te Reo Maori Report* (Wai 11), the Maori Fisheries Act 1989 which in part implemented the Waitangi Tribunal *Muriwhenua Fishing Report - Wai 22* (Department of Justice, Wellington, 1988) - see also Havemann, above n25, 94.

least until the 1986 *New Zealand Maori Council* case, the exact meaning that the legislative references conveyed were never really known.

In 1986 Cabinet gave a general direction on Treaty issues. Cabinet:²⁷

1. agreed that all future legislation referred to cabinet at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty
2. agreed that departments should consult with appropriate Maori people on all the significant matters affecting the application of the Treaty, the Minister of Maori Affairs to provide assistance in identifying such people if necessary; and
3. noted that the financial and resource implications of recognising the Treaty could be considerable and should be assessed wherever possible in future reports.

Despite this agreed consistency in the process of including the Treaty in legislation, the legislature has not been altogether consistent in the development of statutory provision for this policy. Sir Kenneth Keith categorised the different types of legislative references to the Treaty, concluding:²⁸

1. Some statutes, we must take it by deliberate Ministerial and Parliamentary decision, make no reference at all to the Treaty when one could have been expected (recent health statutes provide instances).
2. Others require those exercising powers to have regard for the Treaty along with other matters and purposes (the resource management legislation is an instance); while
3. Others, such as the Conservation and State Owned Enterprises Acts, go further and require compliance with the principles of the Treaty.

²⁷ Legislation Advisory Council "Legislative Change: Guidelines on Process and Content (1991) 40.

²⁸ Tribunal, Courts and Legislature, above n3, 42.

Keith goes on to state that there are other Acts which state that their terms are based on the principles of the Treaty²⁹ and others refer to specific Maori interests rather than the Treaty or its principles.³⁰

Specific examples of inconsistent provision made for the Treaty include:³¹

“This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi”³²

“...The shareholding Minister shall have regard to the principles of the Treaty of Waitangi”³³

“It is the duty of the Council of an institution in the performance of its function and the exercise of its powers (b) to acknowledge the principles of the Treaty of Waitangi”³⁴

Statutory interpretation would dictate that these sections would have different meanings and different levels of force and protection given to the Treaty of Waitangi and Maori interests.³⁵

It would seem from this analysis that it would be beneficial for interpretation of legislation and the development of the Treaty relationship for there to be consistent methods of including Treaty references in legislation. The wide-ranging and inconsistent references to the Treaty allows Treaty interests to play a large part in some areas and an inconsistently smaller one in other (equally important) areas. Providing consistency of application of Treaty principles across all legislation would

²⁹ Keith here refers generally to Fisheries and Forestry legislation.

³⁰ Maori Language Act 1987.

³¹ Palmer, above n16, 208.

³² Section 4 Conservation Act 1987.

³³ Section 10 Crown Research Institutes Act 1992.

³⁴ Section 181 Education Act 1989.

³⁵ Palmer, above n16, 208.

go far toward addressing these problems, and also help to make the Treaty clauses less stagnant in time so they become living and adaptable to future occurrences.

Inconsistency in legislative provision may not necessarily be a negative thing. Flexibility in legislative provision is necessary to fully deal with the Treaty relationship and the wording of provisions will necessarily be diverse. The way in which the Treaty relationship needs to be fostered in regard to commercial matters differs vastly from how the Treaty needs to be provided for in environmental matters and this needs to be reflected in the legislation.

Others believe that the current system could provide for a constructive and consistent way forward if changes in referencing the Treaty in legislation are made. Palmer has suggested that a generic, symbolic reference to the Treaty without legislative effect, coupled with specific legislative provisions which are legally enforceable, would be a useful direction for future Treaty relationships.³⁶

These arguments would be much stronger if it were just the Treaty Clauses themselves that were inconsistent and diverse. The reality is that the policy and principle that underlies their development and intended application of Treaty references is also inconsistent.

In July 1989 the Labour government set down five principles in respect to the determination of Treaty issues: these were issued in the form of a policy statement³⁷

Principle 1: The Principle of Government, The Kawanatanga Principle

The Government has the right to govern and make laws

Principle 2: The principle of self management, the Rangatiratanga Principle

³⁶ Palmer, above n16, 212.

³⁷ Department of Justice *Principles for Crown action on the Treaty of Waitangi* (1989) ["Principles for Crown action"].

Iwi have the right to organise as iwi, and, under the law, to control their resources as their own.

Principle 3: The principle of equality

All New Zealanders are equal before the law.

Principle 4: The principle of reasonable co-operation

Both the Government and Iwi are obliged to accord each other reasonable co-operation on major issues of common concern.

Principle 5: The principle of redress

The government is responsible for providing effective process for the resolution of grievances in the expectation that reconciliation can occur.

After the 1990 election, the new National government redrafted the principles to accommodate new policies. The kawatanga principle was amended to include that the government ought to govern for the common good, and the principle of rangatiratanga was extended to reflect self-management within the scope of the law.³⁸

This indicates that governments are not afraid to change what the principles of the Treaty are when it suits their purpose. This is another flaw in the current method of provision for the Treaty - it is not out of the hands of people who can alter it arbitrarily. A genuinely bi-cultural partnership ought surely to entail that important decisions concerning the Treaty are within the jurisdiction of a body that is in itself bi-cultural in process.³⁹

The development of the underlying policies and principles is a political one. Different governments and political parties are entitled to have a different

³⁸ Jane Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books, Wellington, 1993) 257 - 258.

interpretation of the Treaty relationship and have this reflected in the policies that they develop and the legislation that they enact. Under the coalition governments that the environment the Mixed Member Proportional (MMP) voting system tends to deliver,⁴⁰ negotiation between parties is necessary to form governments and enact legislation. In the Treaty context this may mean that hybrid Treaty policies are developed and inconsistency in the principles of the Treaty relationship will be likely even within governments.

One commentator has said that recognition and consultation with Maori has gone beyond mere Cabinet and governmental direction to find a more solid place in New Zealand's constitutional fabric, stating "The reality may be that Parliament can legislate as it pleases and the practice of not legislating without Maori consent may be described in Diceyan terms as a constitutional convention. However, the political reality is that this convention has become formalised beyond the unwritten gentleman's understanding of Dicey's description."⁴¹ Under this analysis, the constitutional position of Maori and the Treaty relationship are safeguarded through the consultative processes in place.

This constitutional convention is really only protective and fostering of the Treaty relationship when the parties are in agreement. However, "Maori and the State are sometimes poles apart, sometimes more or less in agreement, and at times uncertain about their respective roles, obligations and mutual expectations."⁴² This means that in times of disagreement, the decision on how to proceed falls only on one of the parties, and that action will be determined by the shifting sands of political expediency⁴³

³⁹ Williams, above, n19, 34.

⁴⁰ The two elections to date under the MMP system (1996 and 1999) have both provided coalition governments.

⁴¹ P McHugh "Sovereignty this Century – Maori and the Common Law Constitution" (2000) 31 VUWLR 187, 205 ["Sovereignty this Century"].

⁴² M.H. Durie *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination* (Oxford University Press, Auckland, 1998) 1 ["Te Mana"].

⁴³ Williams, above n19, 32.

It seems that legislative provision for the Treaty as it stands now does not and could not provide for the constitutional way forward envisaged in this essay. Both the policy and the principles that go toward the development of the Treaty clauses in legislation and the Treaty clauses themselves are inconsistent and subject to changes based not on the agreement of the parties to the Treaty but on the political whim of one of the state, with or without consultation with the Maori treaty partner.

While it may be true that the present situation does provide, at some level, for the interests of Maori and the Treaty relationship, the thesis of this essay is that there are alternative methods that would provide the relationship between Maori and the Crown with constitutional safeguards and a position more likely to flourish the Treaty relationship. As seen above, the current method of dealing with Treaty relationships and principles is subject to change on political whim. The Treaty relationship is not appropriately provided for while a constitutional position is allowed to continue where the views of one of the parties can be ignored and shut out of the real decision making process.

B The Judiciary

Inconsistency in legislative provision for the Treaty has led to inconsistent interpretation of its position in the judiciary. Inconsistent legislation has necessitated the Court having to identify for themselves what the principles of the Treaty are and then determine what level of protection is being afforded to them under the wording of each different legislative clause.

Added to the problem of inconsistent signals from the legislature, the Court has also had to grapple with the problem of a common law place for the Treaty. Jurisprudence surrounding the Treaty has shifted ground dramatically over the last

150 years, from the Treaty considered as “a simple nullity”⁴⁴ to having no place in municipal law,⁴⁵ to becoming a fundamental constitutional foundation.⁴⁶

Uncertainty on the applicability of the Treaty by the judiciary does not by itself render the current situation unable to provide for the Treaty relationship. It is the nature of the law to be uncertain. Fundamental changes in other areas of common law have occurred much more rapidly than this.⁴⁷ However, as already discussed, the Treaty comes for interpretation in the Courts only through legislative provision. Therefore, under the current constitutional system, it is not the domain of common law and judicially developed policy, as the Courts have to interpret the legislation that Parliament enacts.

The Courts have been quick to state their constitutional place in the Treaty process stating that the Treaty will only come to them for analysis and interpretation when the legislature has incorporated it into the statute.⁴⁸ The Courts have also routinely dismissed the Treaty and its provisions as non-justiciable in the absence of specific legislative reference.⁴⁹

However, the judiciary is stretching their constitutional boundaries in attempting to provide for the Treaty. Specific examples include;

1. Instances where the Courts have felt that, because of the informal constitutional importance of the Treaty, it can be used as an interpretative tool even in the absence of legislative reference.⁵⁰
2. The Court of Appeal saw the reference to the Treaty in the State Owned Enterprises Act 1986 as a sufficient basis for the Court to stop executive action.

⁴⁴ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 78 per Prendergast CJ.

⁴⁵ *Hoani Te Heuheu Tukina v Aotea District Maori Land Board* [1941] AC 308.

⁴⁶ *NZMC v AG*, above n1.

⁴⁷ An example is the law of torts which had its start with *Donoghue v Stevenson* [1932] AC 562.

⁴⁸ *NZMC v AG*, above n1, 655 per Cooke P.

⁴⁹ Two of the most recent cases are *Manukau v Attorney-General* (19 July 2000) unreported, High Court, Auckland Registry, M259-SD00, Chambers J, and *Te Kaihau v New Zealand Police* (11 May 2000) unreported, High Court Palmerston North Registry, AP5/2000, Durie J.

⁵⁰ Palmer, above n16, 207.

3. The Courts have even gone beyond this, stating that customary usage takes precedence over other laws.⁵¹

Most of the cases regarding the Treaty are taken under the head of judicial review. But in the words of one commentator "The cases established a common law ground of "constitutional" (as opposed to judicial) review."⁵² Under the constitutional system of government in New Zealand as it stands now, Courts should be constrained to their usual function of interpreting parliament's expressed intention rather than effectively legislating themselves with little to rely on regarding controversial policy issues.⁵³

The question then begs why it is necessary for the judiciary to extend their constitutional boundaries when it comes to providing for the Treaty? The Legislature continues to provide inconsistent and vague legislative references to the Treaty and leave the interpretation of the principles of the Treaty to the Courts.⁵⁴ Palmer has argued that the Treaty itself is not sensibly susceptible to ordinary techniques of statutory interpretation as the Treaty is a document of constitutional importance, and inconsistent legislative references as well as the Treaty itself do not yield black and white answers from straight textual analysis.⁵⁵ Thus the Courts have had to strive to provide for this.

Palmer argues that a successful way forward could be achieved under the current arrangements if Treaty principles are left to the elected representatives and legal force is only given to specific provisions rather than the symbolic value given to the Treaty in much legislation.⁵⁶ This would leave the Courts in a position where they

⁵¹ *Te Wehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

⁵² P Joseph "Constitutional Review Now" [1998] NZ Law Review 85.

⁵³ Palmer, above n16, 212.

⁵⁴ Section 5(2) of the Treaty of Waitangi Act 1975 gives the Waitangi Tribunal the authority to "determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them."

⁵⁵ Palmer, above n16, 208 – 209.

⁵⁶ Palmer, above n16.

would not need to stretch beyond their constitutional position in providing for the Treaty.

This is a fair point and would go far towards the goal of tidying up legislative references to the Treaty, and returning the Courts to within a position that they should fill in the constitutional makeup of the Country. However, splitting the legal and symbolic would only be productive in provisions from now on. Such a move would not provide for consistent interpretation of treaty provisions that have previously been enacted. There is, in turn, a real danger that the principles and precedent developed by the judiciary in situations where it could be described as having stepped beyond its constitutional bounds would influence decisions on the specific legislative provisions that Parliament has enacted.

C Conclusion

The combination of an unsure legislature and judiciary as to the place the Treaty occupies has meant those decisions, policy and legislation concerning the Treaty is inconsistent. The context and interpretation of the Treaty is currently the realm of lawyers and judges. The legislature not only consistently refers to the abstract concept of the principles of the Treaty in legislation, but also has specifically enacted legislation making the interpretation and formulation of such principles the domain of the Courts. This does not and cannot provide a consistent way forward in the future of Treaty relationships

IV HOW SHOULD THE TREATY OF WAITANGI BE INTERPRETED?

This Part analyses some of the approaches that could be taken in interpreting the Treaty to best provide for the future of Treaty relationships. The answer to this question and the one posed in the next section on methods of giving the Treaty formal recognition are best left for discussion at a political level between all interested parties in the Treaty relationship. What this essay does is provide an analysis and guidance on where the future Treaty relationship may best be served.

A Literal Approach

The approach of the Treaty literalist compared with a principled approach is that Treaty “principles” and “spirit”, conveniently overlooks the fact that the Treaty is a *written* document (both in English and Maori)⁵⁷

A difficulty with this interpretation has been identified by Lord Cooke: “The meaning of the text as a whole, and the meanings in the context of individual phrases in it, are far from self evident.”⁵⁸

The question as framed in this essay is whether the literal method of Treaty interpretation is the one best adopted when looking to interpret the Treaty bearing in mind the goals in Part II of this essay. Addressing the goals suggested by this essay would seem to necessitate some reassessment of the Treaty. If a literal interpretation is adopted, this would require at least finding a common literal interpretation of documents which are on their face irreconcilable. Leaving the two versions of the Treaty as they are in legislative form as suggested would throw the question of their meaning and interpretation back to the Courts who will be likely to (if not feel bound to) follow current precedent of looking beyond the literal word to the Treaty principles.

⁵⁷ G Chapman “The Treaty of Waitangi – Fertile Ground for Judicial (and Academic) Mythmaking” [1991] NZLJ 228, 232 emphasis in the original.

Another possible framework for eliciting the meaning of the Treaty is to use the literal version(s) of the Treaty and apply the principles of contract law to its provisions.

Difficulties arise when addressing the most basic of contractual principles. For contract law to apply at all there would need to be a contract between the Crown and Maori. This would need to assume that there was an offer by the Crown in the form of the Treaty and an acceptance by Maori of the agreement. Analysis of this delves into the unclear waters of New Zealand history and this essay is not an apt forum to debate what exactly the Crown was offering and Maori were accepting. What is clear, however, is that not all Maori were signatories or even in agreement to the terms of the Treaty. Those Maori who were signatories to the Treaty were signing a document in Maori that was different on its fundamental terms to that signed in English. The Ministry of Maori Development has provided an English interpretation of the Maori version of the Treaty and the differences between the wording and the meaning of the two texts is obvious.⁵⁹

A single Treaty designed to incorporate the goals mentioned above and to be interpreted in a literal way or on contractual principles would also seem to be close to a renegotiation or a new agreement which is discussed and rejected in Part V of this essay.

B Principled Approach

The Treaty is already somewhat recognised as the document that constituted New Zealand, thus it has taken on constitutional status: "It is to be presumed that both statutory construction and common law development will occur in conformity with its principles."⁶⁰ The Treaty is part of the set of basic principles that direct how we

⁵⁸ Hon R Cooke "Introduction" (1990/91) 14 NZULR 1, 3.

⁵⁹ See Appendix I and II.

⁶⁰ *NZMC v AG*, above n1, 656 per Cooke P.

are governed. Both the Courts⁶¹ and Government⁶² have accepted that a principled approach to the Treaty should be adopted.

The emphasis behind the present approach toward the Treaty has been summed up by Lord Cooke when he said: "The Courts and the Tribunal alike, and Parliament itself in deciding to refer to the principles, have places in the forefront the need to get at the spirit and underlying ideas of the Treaty, to apply them as realistically and reasonably as possible in current circumstances."⁶³

Although some have argued that the idea of a Treaty "spirit" or a collection of Treaty principles is a myth,⁶⁴ or based upon flawed reasoning,⁶⁵ the Courts⁶⁶ have found that the Treaty must be viewed as a living document, capable of adapting to new and changing circumstances,⁶⁷ with importance lying with the spirit and principles of the Treaty above the literal interpretation of the document.⁶⁸

Many commentators disagree with the idea of principles, and their formation by the Court. Some, such as Jane Kelsey, have argued that the principles of the Treaty have been written so as to deny tino rangatiratanga (guaranteed to Maori under Article II of the Treaty of Waitangi) and have consequently "legitimised and entrenched Pakeha political power."⁶⁹ Other writers have argued for the literal interpretation of

⁶¹ *NZMC v AG*, above n1.

⁶² See *Principles for Crown Action*, above n37.

⁶³ Cooke, above n58, 3.

⁶⁴ See for example Chapman above, n57, 228 "that modest, hasty, time bound, document of February 1840." A rebuttal to Chapman's position was given in P McHugh "Constitutional Myths and the Treaty of Waitangi" [1991] NZLJ 316.

⁶⁵ James McGuire "A Theory for a More Coherent Approach to Eliciting the Meaning of the Principles of the Treaty of Waitangi" (1996) NZLJ 116.

⁶⁶ Most importantly *NZMC v AG*, above n1, which was a Court of Appeal decision concerning statutory interpretation and land rights, and *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 a Privy Council decision concerning broadcasting rights.

⁶⁷ *NZMC v AG*, above n1, 655-656 per Cooke P and 373 per Richardson J (NZMC)

⁶⁸ *NZMC v AG*, above n1, 373 per Richardson J, see also *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 where Woolf LJ in the Privy Council stated: "With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms."

⁶⁹ Jane Kelsey, "Rogernomics and the Treaty: an irresolvable Contradiction" (1989) 7 *Law in Context* 66, 85.

the Treaty to take precedence over any sort of principled approach "conveniently overlooks the fact that the Treaty is a written document ... not a mere matter of 'spirit'."⁷⁰

Indeed the mere idea of formalising the principles of the Treaty may seem to cement the interpretation of the Treaty on Crown terms. As the current principles have been developed by the government and the Crown Courts, the Crown would be in effect the arbitrator of an agreement it is a party to.⁷¹ This would indicate that the approach as it stands right now is too lopsided to provide a useful basis of a framework for the future.

If such is true, the place of the Treaty and the principled interpretative process at present is not suitable to provide a framework for a way forward that provides an acceptable solution to the contextual problems.

A positive aspect of using a principled approach is the ease at which new and modern concepts can be developed while consistency is maintained. Unlike other methods, which rely heavily on an interpretation of the Treaty within linguistic or legal confines, a principled approach has few constraints and has the ability to look to providing for the future relationships of the parties.

There would be a real danger that if a principled approach were adopted to elicit the meaning of the Treaty, that current judicial precedent that has been developed would play an over influencing part in formulating any new principles. The principles that have been developed by the Courts have been developed through specific limited jurisdictions handed to them by Parliament. The Waitangi Tribunal is a creature of statute and lives and dies, like any other statutory body, at the whim of its political masters. The Treaty jurisprudence of the High Court and Court of Appeal is also confined in that the Treaty will only apply to their consideration when specifically

⁷⁰ Chapmann, above n57, 234.

referred to in legislation that is in issue. The Court is also usually only asked to look at Treaty issues within the legal and constitutional confines of a judicial review application. A principled discussion at a political level would not be so confined, but may be apt to influence by principles elicited in the confined atmosphere of the Courts.

When talking about an approach to frame a discussion on what meanings to take from the Treaty, a principled approach would provide a full range of ideas to be discussed without undue restriction. However, this process may be influenced by the principles that have currently been elicited by the government and the Courts and there is a danger that discussions will start and end at that point.

In some ways this essay is arguing for just that, a step away from the literal words of the Treaty in favor of nationally determined principles. However, the principles that this essay espouses would be negotiated using the Treaty as the base and giving it a modern emphasis. Proponents of a pure "new deal" approach argue that the Treaty should be retired – be given an honorable discharge as having been satisfied and, therefore, no longer a relevant document to the needs of today's New Zealanders. In its place should be negotiated a fresh, modern understanding.⁷¹

A "new deal" approach would have the advantage that any new agreement would be based upon a modern understanding of the Treaty relationship. Strictly speaking this approach would fulfil the goals of the essay in that the principles and goals could be embodied in a new document that would be agreeable to all parties.

It is unlikely that moving away from the original document and the principles that it has been found to hold would be acceptable to Māori, as it is likely to be interpreted

⁷¹ K Upston-Hooper "Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi" (1998) 28 VUWLR 683, 685.

V *METHODS OF GIVING TREATY FORMAL RECOGNITION*

This section looks at three methods of giving the Treaty a formal place in modern New Zealand. This involves finding a place for the principled interpretation which would be developed through discussion and input from all concerned groups on the goals set out in Part II.

A *New Deal*

Some have suggested that the Treaty should be done away with in favor of a new agreement or understanding, couched in terms acceptable to all parties and expressing a modern approach and framework for the future.⁷²

In some ways this essay is arguing for just that, a step away from the literal words of the Treaty in favor of nationally negotiated principles. However, the principles that this essay espouses would be negotiated using the Treaty as the base and giving it a modern emphasis. Proponents of a pure "new deal" approach argue that the Treaty should be retired – be given an honorable discharge as having been satisfied and, therefore, no longer a relevant document to the needs of today's New Zealanders. In its place should be negotiated a fresh, modern understanding."⁷³

A "new deal" approach would have the advantage that any new agreement would be based upon a modern understanding of the Treaty relationship. Strictly speaking this approach would fulfil the goals of the essay in that the principles and goals could be embodied in a new document that would be agreeable to all parties.

It is unlikely that moving away from the original document and the principles that it has been found to hold would be acceptable to Maori, as it is likely to be interpreted

⁷² Richard Mulgan "Can the Treaty of Waitangi Provide a Constitutional Basis for New Zealand's Political Future" *Political Science* Vol. 41, No. 2, December 1989 51, 65 ["Can the Treaty of Waitangi Provide"].

⁷³ Can the Treaty of Waitangi Provide, above, n72, 65 (Quoting Ralph Maxwell).

as the Crown placing the Treaty obligations in the "too hard" basket, and negotiating an agreement that would more suit their governance structure and thus further marginalise Maori. Any replacement agreement to the Treaty would need to contain almost exactly the same terms in order for it to be acceptable to Maori.

Further, any new agreement would need to find a place in New Zealand's constitutional framework, so the issue that faces the community now about the constitutional place of the Treaty would also apply to any new agreement. The time and resources that would be used in creating the new agreement would be better spent in finding a place for the Treaty that would provide for its principles. Thus, finding an answer to the issue through a new agreement only gets you so far and major issues would still need to be addressed.

The Treaty, both as a symbol and as a set of concrete promises on which a national identity is founded, is too important and entrenched in New Zealand society to be set aside in this way. It is the central symbol of Maori identity within Aotearoa-New Zealand⁷⁴ and is a document that was born in a spirit of goodwill, justice and fair play. It is a living document and that spirit lives with it.⁷⁵ Rather than being set aside and completely renegotiated, the Treaty, its principles and spirit, should be used as the basis of a continuing future relationship for New Zealand.

Thus, as a method of giving the Treaty formal, constitutional recognition, constructing a new agreement between the parties would go as far as looking at the goals set out in the essay and using the principles of the Treaty as a guide. However, the question of giving the Treaty formal recognition would still remain to be addressed.

⁷⁴ Can the Treaty of Waitangi Provide, above, n72, 65-66.

⁷⁵ Geoffrey Palmer "The Treaty of Waitangi - Principles for Crown Action" (1989) 19 VUWLR 335, 344.

B Tangible

A tangible recognition of the Treaty would provide the Treaty with formal recognition through a direct means. Suggestions that have been made on how a tangible recognition of the Treaty could be made include developing a Maori parliament. Concrete recognition could also include what are termed "Treaty settlements" or the return of wrongfully taken land and resources.

1 A Maori Parliament

A concrete recognition of the Treaty through the implementation of a Maori parliament would be much more direct than any abstract recognition and the nation would feel the effects of the change almost instantaneously. Concrete recognition through the development of a Maori legislature would give Maori an immediate constitutional position while maintaining the constitutional institutions needed to maintain the concepts of Crown government.

One suggested option was that "a body fifty percent elected by the Maori people and fifty percent elected by the remainder be established to sit between the parliament and the Governor-General to ensure proposed legislation is consistent with the Treaty of Waitangi."⁷⁶ The idea of a bicameral parliament was, however, rejected by the Royal Commission on the Electoral System stating that "we believe that the re-introduction of a satisfactory second Chamber would be very difficult to achieve"⁷⁷

The real problem with the development of a Maori legislature is the lack of actual options for its achievement. Many questions would still be left unanswered, such as: Would there be a bicameral or unicameral legislature? How would members be elected? What powers would members have to ensure the Treaty principles and relationship is adhered to? What place would the Crown play given its symbolism?

⁷⁶ Williams, above n19, 15.

⁷⁷ Royal Commission, above n10, 282.

These are questions that are really only amenable to answer at a constitutional level. The processes and systems for determining how a newly constituted legislature would work would need to be determined before any new parliament could be formed.

If there were to be found an acceptable proposal for a new parliament the question is would a tangible recognition mean that legislation, policy and precedent will be developed in line with the principles of the Treaty that such a body is designed to enshrine? The answer is of course unknown, but it is difficult to envision that a concrete provision without more would provide a positive answer to this question.

It is much more likely that concrete provisions, such as a Maori legislature or Parliament would flow from an abstract provision for the Treaty than the other way around. Constitutional change to either the legislature or the electoral system in order to answer the questions posed by the Treaty issues would leave a lot of issues surrounding the Treaty still to be dealt with.

2 *A settlement process*

Another possible tangible method of providing for the Treaty principles and Treaty relationships is through settlement of Maori claims for past breaches or non-adherence to the Maori interests that the Treaty sought to protect.

Numerous breaches of the Treaty by the Crown have been recorded⁷⁸ and the government focus has often been on full and final settlement of these grievances. The Waitangi Tribunal was established in 1975 to hear grievances under the Treaty, which (after a 1986 amendment) can stretch back to the time of the signing of the Treaty in 1840. The Tribunal has the power to recommend to government that

⁷⁸ See Claudia Orange "The Treaty of Waitangi" (Bridget Williams Books, Wellington, 1992).

certain lands be returned to Maori.⁷⁹ Further to this the Crown has actively negotiated and settled with Maori groups on a one-to-one basis. Outcomes of these have included the "Sealords' deal" and settlements with the Ngai Tahu⁸⁰

A claims process is necessary in order to determine and make amends for tangible asset losses. Dealing with tangible Treaty claims also helps in achieving a sense of finality in one aspect of the Treaty relationship so that other aspects can be fostered without becoming tied up in asset disputes.

The claims process seeks to return to Maori a resource base and rangatiratanga or Maori control over Maori resources. This re-resourcing would place Maori in a stronger position for the discussion on issues of re-empowerment and governance. It would also serve to create an air of goodwill between the Crown and Maori that could be followed through into any discussions regarding a further place for the Treaty relationship, such as constitutional provision and power sharing.

The claims process would also go some way towards the goal of heightening Crown legitimacy. The Treaty provides for Maori to exercise governance over their own assets. By settling disputes surrounding the assets and relinquishing control over these resources to Maori, the Crown can be seen as actively redressing the issues in the Treaty and moving beyond the "lagging Treaty partner"⁸¹ image.

One policy developed by the Crown was the "fiscal envelope" proposed by the National government in 1994.⁸² This proposal would have seen full and final settlement of Maori Treaty grievances from a fund, capped at one billion dollars.

⁷⁹ Under section 4A(3)(a) of the Treaty of Waitangi Act 1975, the Tribunal cannot inquire into the return of private land, a provision that touched off the *NZMC v AG* case (above, n1) as the State Owned Enterprises Act 1986 was proposing to corporatise large tracks of Crown land which may put them out of reach of any Maori claims.

⁸⁰ Contained in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Ngai Tahu Claims Settlement Act 1998.

⁸¹ *NZMC v AG*, above n1, 672 per Richardson J.

⁸² Office of Treaty Settlements *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals* (Department of Justice, Wellington, 1994).

Objections were raised to this proposal, which highlight the problems associated with using settlements as a method of dealing with Treaty issues. As one writer has put it "There is a scant sense of the need to establish mechanisms for the on going relationship between Crown (the state) and Maori beyond the claims process."⁸³ This seeming ignorance of the underlying issues of the Treaty has been taken a step further by another writer "This mechanism seeks to remove the threat to parliamentary supremacy by neutralizing Article Two of the Treaty,⁸⁴ effectively denying Maori any special constitutional status or recognition."⁸⁵

Certainly it seems that formal processes of redress are taking precedence over formal recognition of the rest of the principles of the Treaty. Tangible Treaty settlements by themselves could never hope to fulfill all of the principles of the Treaty, as true settlement requires recognition of the mana of the Maori people. A constitutional transformation is required to ensure the finality of settlement.⁸⁶

Even in the proposing of the settlement the Crown has fallen down on other possible principles such as consultation with Maori. One commentator, describing Maori reaction to the proposed settlements has summarise: "Objection stemmed from the process adopted in developing the proposal, the principles upon which the proposal is based, the assumption made in justification, and the framework within which the proposal has been drafted."⁸⁷

This highlights an underlying nature of claims based settlement. As Paul McHugh has noted, Aboriginal peoples have no option but to express their claims in the language of the coloniser, and this in itself accentuates the vertical form relationship

⁸³ Sovereignty this Century, above n41, 205.

⁸⁴ See Appendix I and II.

⁸⁵ Nick Harris "Full and Final Settlement of Treaty Grievances: the Crowns Hidden Constitutional Adgenda" (1996) 8 Auckland UL Review 205.

⁸⁶ Harris, above n85, 206.

⁸⁷ Proceedings of a hui, above n7, 20.

between the state and the aboriginal peoples.⁸⁸ This can be seen in our own claims process through the limiting of the jurisdiction of the Waitangi Tribunal and its status as only a recommendatory body and through the imposition of European style management structures for dealing with the assets when they have been recovered, sometimes causing grave problems.⁸⁹ McHugh further goes on to state that this process invests the state with a redemptive capacity and gives the aboriginal people someone to blame.⁹⁰ In perpetuating blame the settlements process can be seen to destroy the Treaty relationship rather than enhance it.

The one-sided nature of the drafting and the formulating of the proposals has also lead to conflict within Maori on questions of how best to redistribute assets to a people who are in a vastly different position now then were when they were deprived of the assets. One commentator has written about the effects of the Sealords settlement, stating "This 'settlement' has since been the source of almost constant litigation, for the most part-Maori against Maori, as various iwi groups have been forced to compete with one another to secure a share of a commercial interest in the New Zealand fishery".⁹¹

A claims process is necessary. There are genuine tangible grievances that can only be worked through and dealt with through such processes. However, this in itself does not provide an appropriate place for the Treaty principles to be realised and relationship flourished. Indeed, if the claims process is all that is concentrated on at the expense of a background agreement on how the relationship between the claimant and the state is to operate, the process is unlikely to do more than cover the visible cracks in the relationship without addressing underlying fundamental issues.

⁸⁸ Ken Coates & P.G. McHugh *Living Relationships* (Victoria University Press, Wellington, 1998) 114 ["*Living Relationships*"].

⁸⁹ See *Mahuta v Porima* (9 November 2000) unreported, High Court, Hamilton Registry, M290/00, Hammond J, which was one in a series of cases that give an example where management structures regarding Tainui??? Have been in great turmoil.

⁹⁰ *Living Relationships*, above n88, 114.

⁹¹ Annie Mikare "Settlement of Treaty Claims: Full and Final, or Fatally Flawed?" NZULR v17 December 1997 425.

Tangible methods of dealing with the Treaty relationship and Treaty principles are necessary. They provide concrete recognition of the Treaty and engage all parties in open dialogue. However, tangible methods are quantitative rather than qualitative they are assessed more in the amounts of claims settled and assets returned than the satisfaction of the parties in the process. To have a successful claims process, it needs to be preceded by agreements as to how the relationship between the parties is to be addressed so qualitative solutions can be reached.

C Abstract

The word "abstract" is used to describe methods of formalising the Treaty that do not have a specific concrete outcome. The major one advocated in this essay is a constitutionalisation of the Treaty. This process would mean taking the Treaty principles that were developed and agreed upon, and providing for them in a document or place that makes them a basis for New Zealand's governance structure so that the principles of the Treaty would influence legislation, policy and precedent, rather than the flawed and inconsistent system that is currently in place.

As discussed above in Part III there is an argument that the Treaty is already recognised as a constitutional document. Paul Havemann has stated that "since the 1980's there has been a fundamental paradigm shift or revolution in official discourse amounting to a constitutionalisation of the Treaty's principles."⁹²

Constitutional law is concerned with the history, structure and functioning of central government.⁹³ A constitution is something that includes all rules that directly or indirectly affect the distribution or the exercise of the sovereign power in the state.⁹⁴ New Zealand lacks an identifiable document or series of documents known as "the constitution", containing a selection of the most important laws about the state and

⁹² *What's in the Treaty*, above n25, 73.

⁹³ Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Ltd, Sydney, 1993) 1 ["*Constitutional and Administrative Law in New Zealand*"].

⁹⁴ A.V. Dicey "The Law of the Constitution" (1885) Part II.

its system of government.⁹⁵ The Constitution Act 1986 does contain fundamental laws and institutions but can be altered in the ordinary way through simple parliamentary majority and many rules of the constitution are found outside this Act.

Some may argue that Treaty jurisprudence has developed down a stream separate from one which may be apt for constitutionalisation and it is becoming too late to try to move the Treaty from its current position.⁹⁶ Legislative references, political principles and a settlement process are all dealing with the job and it is these that seem to be being developed, as opposed to constitutional provision. The Canadian position provides somewhat of an answer to this. Despite numerous treaties Canada first constitutionalised aboriginal rights in their Constitution Act 1982.⁹⁷

The way that the Treaty is written allows for important elements of what the constitution might address sovereignty, governance, government, community authority, ownership rights between the state and its citizens, citizenship rights and duties, and so on.⁹⁸ However, it is a big task to fulfil the goals set out; the constitution that would be developed would need to recognise the Treaty relationship principles based upon a bi-cultural partnership and a multicultural society. The constitution would need re-ordering to recognise the right of Maori once again to exercise their political self-determination.⁹⁹

Analysing this issue is not just a question of looking to the present system and asking whether the current monocultural constitutional norms are compatible with a constitutionalisation of the Treaty. Positions of both Treaty partners need to be looked at as both will necessarily be contributing to the overall makeup of the

⁹⁵ *Constitutional and Administrative Law in New Zealand*, above n93, 9.

⁹⁶ Boast, above n15, 123.

⁹⁷ Section 35(1) of the Canadian Constitution Act 1982 states, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

⁹⁸ *NZLS Seminar*, above n2, 27.

⁹⁹ Moana Jackson "Justice and Political Power: Reasserting Maori Legal Process" in Kayleen Hazlehurst (ed) *Legal Pluralism and the colonial legacy* (Ashgate Publishing Ltd, Aldershot, 1995) 243, 257.

constitution. The current English based constitutional system cannot provide for the Treaty relationship alone and of itself. It would be a culturally smug and circular proposition to imply that the law itself will remain fair and equal simply because fairness and equality are enshrined as basic tenants.¹⁰⁰ This analysis will necessitate looking at two things:

1. The compatibility of the Crown tenements of constitutional government with a constitutionalisation of the principles of the Treaty; and
2. The compatibility of the guarantees made to Maori under the Treaty with a constitutionalisation of the principles of the Treaty.

1 Principles of Crown constitutional government

The tradition of constitutional thought which has been dominant in this country through most of this (20th) century has been a Westminster continuation adopted from the British settlers. Thus many of the principles of the constitution are developed directly from England without New Zealand developing a unique constitutional approach. Some say that we have clung on too long to a British tradition that proved to be increasingly arid and not capable of sustaining the various aspirations exhibited by the many different sorts of people who live here.¹⁰¹

This would indicate from the outset that the constitutional principles that underpin our society at the moment would not be conducive or accepting to having Treaty principles affecting them. On the other hand, in an uncontrolled constitution such as ours, it would be perfectly easy to incorporate new norms into the constitutional structure. Indeed the status and standing of these particular constitutional rules may change over time naturally anyway. This would indicate that the Crown

¹⁰⁰ Jackson, above n99, 257.

¹⁰¹ Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our political system* (McIndoe, Dunedin, 1992) 77.

constitutional norms may be amenable to being affected by a new set of principles based on the Treaty.

Change at a constitutional level such as the one envisaged in this essay has not been explored in New Zealand and the system remains almost identical to the one given to us by the English.¹⁰² As one commentator has said: "There remains, however, a no-man's land, in which constitutional principle yields no certain guidance. What limits should the constitution place upon the legislative discretion's of a sovereign parliament?"¹⁰³

In assessing whether a constitutionalisation of the principles of the Treaty would be amenable to the current constitutional processes in New Zealand, two concepts will be looked at: the concept of "parliamentary sovereignty" and the concept of "the Crown."

(a) Parliamentary Supremacy

Under the New Zealand constitutional system of governance Parliament has unlimited and unlimitable powers of legislation.¹⁰⁴ Parliament could enact, amend or repeal any of the principles of the Treaty. There would be no legal boundary in the current constitutional makeup to prevent this from occurring.

If the principles of the Treaty were to be constitutionalised, or in other words become the basis for the power of governance, this would seem to clash directly with the idea of a sovereign parliament. Parliament's supreme lawmaking power would be restrained by the Treaty principles. This section deals with whether having the principles of the Treaty, as a constraint on parliamentary sovereignty would be repugnant to that doctrine.

¹⁰² Exceptions include the Ombudsmann and a different electoral system, but the main facets of constitutional government remain the same, Crown, Parliament and the Judiciary.

¹⁰³ R.Q. Quentin-Baxter "Themes of Constitutional Development" (1985) 15 VUWLR 12, 14.

¹⁰⁴ *Constitutional and Administrative Law in New Zealand*, above, n94, 418.

Parliamentary supremacy is already somewhat bound by the constitutional laws and conventions necessary to keep the system running smoothly. Some rules are in the strict sense "laws as they are rules which are enforced by the Courts."¹⁰⁵ In New Zealand the Constitution Act 1986 contains the legal makeup of the government structure. Courts will enforce its provisions but it too is only a normal piece of legislation, as vulnerable as any other to repeal or amendment. If such a repeal or amendment was to occur, the Courts should rightly apply and enforce such an action as the will of Parliament. The other set of rules of constitutional government, the "conventions," are not written law and are not enforced by the courts, they consist of understandings, habits, or practices which are not really laws at all.¹⁰⁶ The conventions are of binding authority only through their moral adherence for, as Dicey has said, if any or all of them were broken, no court would take notice of their violation.¹⁰⁷

New Zealand is a sovereign state and is not bound by the powers of any other body or parliament.¹⁰⁸ Adherence to the system of government that we have therefore may be described as a "convention." Once as the state and its constitutional makeup is seen as a mental construct, a product of cerebral analysis which sees human relations in a particular way,¹⁰⁹ then the introduction of a basis for the nation's constitutional makeup such as the Treaty principles would not be seen as so repugnant to the current institutions.

Some may argue that the structures of government are contained in the Constitution Act 1986 and are therefore legal rules rather than conventions. However, it needs to be taken a step further back. The New Zealand Parliament has supreme law making powers, and the place where this concept is derived from is an ordinary statute. This

¹⁰⁵ Dicey, above n94.

¹⁰⁶ Dicey, above n94.

¹⁰⁷ Dicey, above n94.

¹⁰⁸ The Statute of Westminster Adoption Act 1947 gave the New Zealand Parliament unrestricted legislative power.

means that the New Zealand Parliament can repeal or amend the basis of its own power with impunity. The reason that Parliament does not do that sort of thing is that they feel morally bound not to. At this level such a bind on legislative action would be considered a convention.

The constraint on acting contrary to the principles of the Treaty may be treated in the same way as the constraint on not abolishing the Parliament. The Constitution Act 1986 states in s14(1) "There shall be a Parliament of New Zealand." This can be amended or repealed and Parliament Dissolved without means of resurrection.¹¹⁰ But, the moral force that it holds is a constraint on the supremacy of Parliament. Such moral force could also attach to constitutional provision for the Treaty principles.

Binding a supreme Parliament to enact its laws in a particular way does seem to go against the doctrine that the Parliament can pass any law that it likes. But, such a constraint is not repugnant to the idea of Parliamentary supremacy. If Treaty principles are seen as a fundamental constitutional provision and constraint on Parliament then they will be adhered to, like all of the other fundamental tenements of our system that have been enshrined in the Constitution Act 1986.

(b) The Crown

The Crown is the head of state and all government is carried out in its name.¹¹¹ Bills become law only through the assent of the Crown, usually carried out through the Crown's representative, the Governor-General.¹¹² There is a convention, core to this system of governance, that the business of government is effectively carried out by Ministers of the Crown, who hold the confidence of Parliament. These Ministers

¹⁰⁹ J C Garnett "Sovereignty and Power in a Changing World" in G A Woog and L S Leyland Jr (eds) *State and Sovereignty* (University of Otago Press, 1997) 36, 38.

¹¹⁰ *Constitutional and Administrative Law in New Zealand*, above n93, 483.

¹¹¹ Andrew Ladley "The head of State: The Crown, the Queen and the Governor-General" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, 1997) 51.

¹¹² The Governor-General is provided for in section 2 of the Constitution Act 1986.

give "advice" to the Governor-General on all sorts of things, such as the appointment of Judges and other key people, and legislation to be assented to. This advice is, by convention, binding on the Governor-General and he or she must exercise his or her legal powers according to the advice of Ministers.¹¹³ Political power rests with the parliamentarians, not an unelected Queen's representative.¹¹⁴

The sovereign power in effect rests with Parliament and, as discussed above, a constitutional place for the principles of the Treaty may not be repugnant to this concept. It seems, therefore, that the concept of the Crown may also be compatible with a constitutionalisation of the Treaty principles. The Governor-General in New Zealand (and the Queen when she is here) performs three main sets of functions – ceremonial, symbolic and constitutional.¹¹⁵ It is in the exercise of these powers that the incompatibility with the idea of a constitutional place for the Treaty principles may lie.

The first role of the Crown is a ceremonial one, some see the Governor-General's role as primarily a ceremonial and community affirming one.¹¹⁶ Except for the symbolism that that may carry, which is discussed below, this role of the Governor-General's could effectively be carried out within the principles of the Treaty.

The second role of the Crown is symbolic. The Crown symbolises the head of state. The idea of Crown as the head of state and thus the necessity to have the Crown assent to all legislation, whether the actual power is fictional or not, would probably be inconsistent with the idea of the Treaty partnership which provides a basis for constitutionalising the principles of the Treaty.

If the Crown was to continue to hold the vital symbolic status of assenting to legislation, even bound by the constitutionalised principles of the Treaty, this would

¹¹³ B.V. Harris "The Constitutional Base" in Hyam Gold (ed) "New Zealand Politics in Perspective" (Longman Paul, Auckland, 1992) 56, 59.

¹¹⁴ Andrew Stockley "The Governor-General and MMP" (1996) NZLJ 213, 214.

¹¹⁵ *Bridled Power*, above, n5, 41.

still be symbolic of the Colonial power and only one of the Treaty partners. This symbolism also carries through to the international arena where New Zealand's identity on the world stage is symbolised through the Crown.

Under this argument there would need to be a symbolic change in the identity of the decision-making executive and the symbolism that it conveys to reflect the partnership aspects of the Treaty. To maintain the Crown as the symbolic head of state could be seen as a European based concept having the last say on the principles of the Treaty without also reflecting the Maori identity of New Zealand.

The third concept of the Crown is the constitutional one. The Crown retains reserve powers so that in some cases the Governor-General is entitled to act on his or her own, not on the advice of responsible Ministers.¹¹⁷ There are four generally accepted reserve powers under New Zealand's constitutional system;¹¹⁸

1. To appoint a Prime Minister
2. To dismiss a Prime Minister
3. To refuse to dissolve Parliament; and
4. In limited circumstances, to force a dissolution.

Added to this list of reserve powers could possibly be the ability to refuse the royal assent to legislation if it were repugnant to constitutional principles.¹¹⁹

Reserve powers are only used when there is a crisis of confidence in the Parliament such that it no longer has confidence in the Prime Minister of the government of the day. Some academics have gone further in the description of the extent of the reserve powers of the Crown stating that these reserve powers should be used in situations "where his or her ministers seek to abuse their control of Parliament so as

¹¹⁶ Stockley, above n114, 214.

¹¹⁷ *Bridled Power*, above, n5, 43.

¹¹⁸ *Bridled Power*, above, n5, 44.

¹¹⁹ Stockley, above n114, 214.

to act unconstitutionally, or should some other crisis require intervention to protect the Constitution or the nation.”¹²⁰

The impact of a constitutionalisation of the Treaty would mean that the situations where the reserve powers of the Crown could be used would be defined by the principles of the Treaty. This may see a greater role for these reserve powers with the Governor-General perhaps having to refuse royal assent if a piece of legislation is in conflict with Treaty principles.

In reality the reserve powers are seldom used and the use of them has been known to spell the end of that particular Governor-General's tenure.¹²¹ But the fact remains that they are there in the constitutional makeup of the country and an introduction of a constitutionalised set of principles would necessarily change their foundation.

This change may then mean that the reserve powers of the Crown have to be reviewed or removed, as the constitutionalisation of the Treaty principles would widen the scope of the reserve powers to include protection when Parliament acts contrary to the principles of the Treaty. Wider reserve powers would give the Governor-General an inflated role in the constitutional makeup of the country. The present structure seeks to limit the Crown's powers, so this wider constitutional role for the Governor-General may be in conflict with the present system.

The necessity for reserve powers was also raised when the country last shifted constitutional base in implementing MMP as the electoral system. Some commentators were calling for the removal of reserve powers. One such commentator argued that “the most important reform is denying the Governor-General any discretion in constitutional matters and relocating the appropriate powers in Parliament itself. This would leave the Governor-General constitutionally neutered, but freed from political controversy and better able to concentrate on

¹²⁰ Stockley, above n114, 214.

representing the nation in a solely ceremonial and community affirming role."¹²² Similar arguments may crop up if constitutionalisation of the Treaty principles was to be contemplated.

If the repugnance of the Treaty principles against the symbolism of the Crown and the argument against the reserve powers of the Crown are combined, this would seem to leave little room for the concept of the Crown itself. Such a situation would seem to teeter on the edge of republicanism. But, the issue is not whether New Zealand becomes a republic or remains a constitutional monarchy, but how the Crown-Maori relationship is to be resolved and evolved.¹²³

The Crown did, at the very least, obtain the right to govern.¹²⁴ The concept of Crown then is also one of the principles of the Treaty and is a partner to the Treaty. To remove the symbolism and content of what is "Crown" from the constitutional structure of New Zealand may, in itself, be something that the constitutionalised principles of the Treaty would not allow.

2 *Maori principles of governance*

The analysis in this section is limited to the question of whether rangatiratanga guaranteed to Maori in Article II of the Treaty could flow from the constitutionalisation of the principles of the Treaty and how it would be embraced and constrained by such a constitutional move.

The Treaty was based on an exchange of promises and trust. There was a promise by the Queen to protect the political and legal authority of Maori and their control over

¹²¹ Sir John Kerr's dismissal as Governor-General of the Whitlam Labor government in Australia in 1975 is an example. See *Constitutional and Administrative Law in New Zealand*, above n93, 591-593.

¹²² Stockley, above n114, 217.

¹²³ Andrea Tunks "Mana Tiriti" in Luke Trainor (ed) *Republicanism in New Zealand* (Dunmore Press, 1996) 113, 122.

¹²⁴ *Te Mana*, above n42, 3.

natural resources, land and other taonga.¹²⁵ Any constitutional provision for the Treaty would need to be compatible with these ideas.

A warning needs to be sounded against trying to define these promises using the language of the Crown. As Williams has argued: "When a legal system, which has historically operated in a monocultural manner, takes steps toward legal pluralism, there is a distinct danger that the meaning and values attached to Maori concepts, when used in an iwi or hapu context, will be distorted and amenable to manipulation by others when they are used in the official discourse of the state legal system."¹²⁶

With this warning heeded, the concepts that need to be explored center around the promise of tino rangatiratanga. McHugh describes tino rangatiratanga as something akin to the common law idea of imperium or sovereign title, rather than the dominion that the claims process redresses the wrongs through.¹²⁷ Imperium resides in the Crown but, as discussed above, the constitutionalisation of the principles of the Treaty will necessarily limit the powers of the Crown and increase the scope for Maori partnership in the concept of Crown and this in the imperium and governance over the land and other possessions that the Crown now holds as Maori would be more involved at the governance level both in symbolic ownership and actual control over resources

Tino rangatiratanga is understood by many to essentially mean the right to self-determination. Self determination is in turn described as being about the advancement of the Maori people as Maori.¹²⁸ However, the term has been further defined to mean self-management rather than self-determination, as self-determination has connotations in the Draft Declaration of the Rights of Indigenous Peoples of dissent from colonial rule.¹²⁹

¹²⁵ Tunks, above n123, 114-115.

¹²⁶ Williams, above n19, 36.

¹²⁷ Sovereignty this Century, above n41, 205.

¹²⁸ *Te Mana*, above n42, 4.

Whatever label is placed on this concept, there are three fundamental principles of tino rangatiratanga:¹³⁰

1. Nga Matatini – Maori diversity: ...Maori live in a diversity of everyday realities
2. Whakakotahi – Maori unity: the potential for Maori solidarity based on a shared sense of belonging and a common destiny.
3. Mana motuhake Maori – Maori autonomy and control: Maori should be able to determine their own futures, control their own resources, and develop their own political structures

These principles would seem at first sight to clash with the idea of a constitutionalised set of Treaty principles, especially if the idea of Maori self determination was to be curtailed by the sharing of the control of Maori resources with the Crown, and the possible influence of Crown governance structures over the ability for advancement of the Maori people and their resources in a Maori way.

However, while imperium or ultimate sovereignty over the land would be held at a state level Maori would have a much greater say in the exercise of any sovereign rights over the land and the implementation of any policy of legislation that would affect the land. Indeed the constitutional base for government, the principles of the Treaty, may dictate that Maori have full control over the destiny of this land.

The idea that straight out imperium, or independent license to form self government over the lands be the domain of Maori, may be outside the scope of the principles of the Treaty and may also be impractical. McHugh has stated that the processes of self governance are more likely to require state facilitation than to exclude its involvement, providing the example of the United States where virtually all of the

¹²⁹ *Te Mana*, above n42, 220.

¹³⁰ M.H. Durie "Tino Rangatiratanga: a discussion paper" in "Report for the Congress Executive, 13 May 1995, Maori Congress, Wellington, cited in *Bridled Power*, above n5, 44.

tribes govern themselves under mechanisms established by the state, as back up for this proposition.¹³¹

At the dominion, or actual ownership control of the resources level, Maori governance may, as it is now, be curtailed by the state. There would be self government as a delegation from the state, with its scope defined by the state.¹³² But, as the state would be defined by its constitution and the constitution would include the principles of the Treaty, the trickle down effect would be that the delegation and scope of this self-management structure would itself be defined by the Treaty principles.

Thus it can be seen that the principles of tino rangatiratanga may be compatible with underlying constitutional provision provided to the principles of the Treaty. There would be greater Maori control and Maori principles behind the imperium title in the land and greater Maori control over the real self-management of the resources at the dominion level.

Discussing both Crown and Maori tenements of governance enshrined in the Treaty relationship and how they would hold up under a constitutionalisation of the principles of the Treaty is an attempt to move away from criticism leveled at Pakeha academics of framing the whole discussion of Maori rights within a pluralistic jurisprudence of the wairua or spirit that is consistent with their law.¹³³ To constitutionalise the Treaty relationship and principles is to put it at the top of the legal structure. If this is to effectively provide for the Treaty relationship then this will need to provide for both the Crown governance structure and a structure of tino rangatiratanga.

¹³¹ *Living Relationships*, above n88, 121.

¹³² *Living Relationships*, above n88, 121.

¹³³ Jackson, above n99, 252.

VI ENTRENCHMENT OF THE TREATY

As there is currently a doctrine that Parliament is the supreme lawmaking power, this section assumes that the method of providing for a constitutional place for Treaty principles will be through an Act of Parliament. The analysis then will concentrate on whether this Act needs to be, or even can be, entrenched.

Entrenchment essentially means that future Parliaments will be bound by the provisions of the Act and provides special procedures for the amendment of the Act.¹³⁴ Prima face this is repugnant to the idea of parliamentary sovereignty. As one commentator has noted: "It is a maxim of the modern constitution, often acted upon by the courts, that a sovereign Parliament can in law do anything except bind its successors – for, if it could do that, succeeding Parliaments would have lost their sovereignty."¹³⁵

One way that entrenchment can occur is through "manner and form" entrenchment, where the Act spells out the process for its own amendment. An example of this would be an Act requiring a 75% majority in Parliament to amend its provisions.

An example that is often used is section 189(2) of the Electoral Act 1956 which states that particular sections in the Act may only be changed with a 75 per cent majority in Parliament or a majority of electors in a referendum. A similar provision could be enacted to protect the constitutionalised principles of the Treaty. However, care would need to be taken as while section 189(2) effectively entrenches other sections in the Electoral Act 1956, section 189 itself is vulnerable to repeal in the ordinary way. If the Parliament were to be bound to particular manner and form requirements to amend the Treaty principles then they would need to be "double entrenched." Double entrenchment involves enacting provisions providing for the manner and form of amending the section which provides the manner and form for

¹³⁴ *Constitutional and Administrative Law in New Zealand*, above n93, 11.

¹³⁵ Quentin-Baxter, above n103, 18.

amending it. The two sections would effectively cancel each other out and thus, theoretically, bind Parliament.

However, as Joseph has noted "attempts at reconciling entrenchment and legislative supremacy obscure the critical issue: whether the courts would be prepared to recognise a limited constitutional authority to legislate."¹³⁶ The White Paper on the Bill of Rights seriously doubted that the courts would uphold an entrenched Bill of Rights enacted by a simple majority in Parliament.¹³⁷

Single entrenchment would mean that the principles of the Treaty would still be vulnerable to change by Parliament. But if Parliament was constituted partly on the authority of the principles then Parliament, while not legally bound, may feel morally bound to not repeal or amend them, or follow an enacted, but unentrenched manner and form in amending them.

The argument that Parliament could be morally bound to follow manner and form could gain credence from the fact that the Constitution Act 1986, carrying all of the processes of constitutional government is unentrenched. The vulnerability of the processes of constitutional government to amendment or repeal by simple majority has not stopped the nation functioning effectively. The constitutional conventions and principles that remain unwritten, and those that are given only legislative recognition are upheld and adhered to by the Courts and Parliament.

Having a provision for the principles of the Treaty would mean that while the statute was enacted all action would be bound to follow its provisions. However, it would also mean that following the manner and form prescribed in the Statute that is not itself protected or entrenched would be of binding moral force only, and it comes back to the question above of whether the Courts would accept such moral force as binding.

¹³⁶ *Constitutional and Administrative Law in New Zealand*, above n93, 483-484.

Philip Joseph has argued that it is possible that the Courts would see such a process as binding, talking about section 189 of the Electoral Act 1956, a provision similar to the one envisaged for the protection of the principles of the Treaty in this essay. Joseph has stated "Section 189 was enacted by a unanimous vote of Parliament in 1956 and successive Governments have accepted its binding force. This presages the conventional force of entrenchment and the possibility that a binding constitutional convention may "crystallise" into a justiciable rule of law."¹³⁸ Under this analysis, if Parliament were to provide for the principles of the Treaty that would eventuate from a national debate envisaged in Part II and successive governments accept their binding force, then the Courts may treat Parliament as being bound by any manner and form requirements.

This may raise again the problem that Palmer has with the judicial enforcement of Treaty principles,¹³⁹ that it is not the Court's role to be assessing the legal effect of the Treaty principles, as they are not well suited to balancing the interests of the Treaty.¹⁴⁰ Provision for the Treaty in a constitutional document would go some way toward answering those problems. Dealing with the competing interests under the Treaty would become the Court's role. The Courts would not be creating the principles themselves, as that would be done at the national level. The Courts would merely be interpreting and applying them, and would not be deciding broad policy issues. The Courts are also used to dealing with issues at the constitutional level, and it is their legitimate place to be the ultimate arbitrator in constitutional matters.¹⁴¹

The Courts in other common law countries have accepted changing constitutional circumstances as a constraint on parliamentary supremacy. The House of Lords in

¹³⁷ Draft White Paper *A Bill of Rights For New Zealand* (Department of Justice, 1985) 7.19 ["*A Bill of Rights for New Zealand*"].

¹³⁸ P.A. Joseph "Constitutional Entrenchment and the MMP Referendum" (1994) 16 NZULR 67, 76.

¹³⁹ Palmer, above n16, 212.

¹⁴⁰ Palmer, above n16, 212.

¹⁴¹ Cases such as *Fitzgerald v Muldoon* [1976] 2 NZLR 615 indicate that the Court is willing to uphold constitutional doctrines.

the *Factortame* case¹⁴² granted an injunction to forbid a Minister from following an Act of the English Parliament that was in contradiction to the European Communities Act 1972 (UK).¹⁴³ This same analysis could apply in New Zealand if the principles of the Treaty were given legislative effect in some sort of constitutional legislation.

Court jurisprudence provides insight into how an unentrenched, constitutional, provision would be. In its jurisprudence relating to the New Zealand Bill of Rights Act 1990, an unentrenched but constitutionally important statute, the Court of Appeal has demonstrated the importance of unentrenched provisions both in construing statutes and developing the common law.¹⁴⁴ Thus a constitutionally important unentrenched provision relating to the Treaty is likely to be afforded a special status by the Courts.

Some have suggested that a logical legislative place for the Treaty would be within the bounds of the Constitution Act 1986. Denise Henare has stated that "Further strengthening of the constitutional protection of the Treaty could be achieved by a proposal to set out both texts of the Treaty in the preamble (to the Constitution Act 1986). This would have the effect of giving acknowledgement to the origins of New Zealand, which in turn would enable future building of the nation."¹⁴⁵

A Treaty provision would not be the same as the other parts of the Constitution Act. The current provisions of the Constitution Act are merely descriptive of the constitutional world as it is and has always been. Other legislation does not challenge the Constitution Act, but is born of the very process that is described in the Act. A Treaty provision as advanced in this essay would be a different creature and would necessarily come into conflict with other legislation. New Zealand could not operate in the constitutionally same way as it has in the past without the provisions

¹⁴² *R v Secretary of State for Transport, ex p, Factortame Ltd (No. 2)* [1991] AC 603.

¹⁴³ B.V. Harris "Parliamentary Sovereignty and Interim Injunctions: *Factortame* and New Zealand" (1992) 15 NZULR 55.

¹⁴⁴ NZLS Seminar, above n2, 11.

contained in the Constitution Act, but it can, and has operated without the Treaty being an institution of government.

It would seem that the Treaty principles in an acceptable form would, perhaps, find their best position in a statute that provides for the manner and form of the amendment of the Treaty principles but with that section not being entrenched itself.

VII THE NATIONAL ENVIRONMENT

For the constitutional status of the Treaty to be properly looked at and changed, the economic, social, cultural and political environment would need to be favorable.¹⁴⁶

Rhetoric on the need to make the most of ourselves, and of the awakened Maori consciousness with its eloquent plea for recognition, respect and partnership¹⁴⁷ is all very well, but it is of no consequence if the national environment rejects such a proposition.

The move since the mid-1980's to a privatised economy with government intervention at a minimum, has helped to highlight the remaining institutional functions of government, subjecting them to closer scrutiny by society. This closer scrutiny has led to constitutional change, evidenced through the change in the electoral system from a First Past the Post to a Mixed Member Proportional system, more representative of the community.

Margaret Wilson is more pessimistic about the chances of constitutional reform on the status of the Treaty, stating: "although conditions within the Maori community and the community at large would appear to be conducive to constitutional change,

¹⁴⁵ Henare, above n12, 209.

¹⁴⁶ M Wilson "A Path to Constitutional Change" in K S Coates and PG McHugh *Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998), 247, 249

¹⁴⁷ Quentin-Baxter, above, n103, 13.

New Zealanders have traditionally been reluctant to undertake constitutional reform."¹⁴⁸

Unfortunately history and the research that is available on the national attitude towards the Treaty, also doesn't bode well for acceptance and possible constitutionalisation of the Treaty.

The Treaty has previously been the subject of an aborted attempt at constitutionalisation. In 1985 the White Paper on a Bill of Rights for New Zealand¹⁴⁹ proposed the incorporation of the Treaty into an entrenched Bill of Rights based on section 35 of the Canadian constitution Act 1982.¹⁵⁰ Both the Treaty clause and the proposed entrenchment of the Bill of Rights were eventually dropped from the final version of the Act.¹⁵¹ Some say due to Maori who were suspicious of the government's motivation, or who asserted that the Treaty did not need entrenching and to do so would demean it.¹⁵² However other academics were also critical of the inclusion of the Treaty in a Bill of Rights stating that, it should not be subject to the same processes of repeal as other provisions in the Bill¹⁵³ and that the proposal was unacceptable as it was not subordinate to the Treaty.¹⁵⁴

There is also statistical evidence that points away from the acceptance of a constitutionalised Treaty. In a survey conducted by Paul Perry and Alan Webster, results offer evidence of declining support for the Treaty and the Waitangi Tribunal that they saw as a major point of division within the country.¹⁵⁵ In this survey 34% of respondents wanted the Treaty abolished, 29% saw a need for greater limits on

¹⁴⁸ Wilson, above n146, 254.

¹⁴⁹ *A Bill of Rights For New Zealand*, above n137.

¹⁵⁰ See above, n97 for the text of section 35(1) of the Canadian Constitution Act 1982.

¹⁵¹ New Zealand Bill of Rights Act 1990.

¹⁵² *What is the Treaty*, above n25, 89.

¹⁵³ F.M. Brookfeild "Submission on a Bill of Rights For New Zealand a White Paper 1985" 4.

¹⁵⁴ J Kelsey in "Submission on a Bill of Rights For New Zealand a White Paper 1985" 4.

¹⁵⁵ Perry and Webster, above n4, 74.

Maori claims under the Treaty and only 5% thought that the Treaty should be strengthened and given the full force of law.¹⁵⁶

This indicates that the national environment is probably not conducive to constitutionalising the Treaty. The reasons for this may be due to the ignorance of the population (especially the Pakeha population) on issues surrounding the Treaty. "There is material difference in the values and perceptions of Maori from those of European New Zealanders; that the basis of our presence here is the provision of a full and fair role for Maori and Maori values throughout the community."¹⁵⁷ Perhaps if the community is better informed of the issues surrounding the Treaty through national debate and commitment to a solution, attitudes towards its constitutional status may change. But, constitutional change in New Zealand, incorporating the Treaty, will be need to be a strategic, negotiated process between Maori, the Crown and the community in general.¹⁵⁸

¹⁵⁶ Perry and Webster, above n4.

¹⁵⁷ NZLS Seminar, above n2, 11.

¹⁵⁸ Wilson, above n146, 256.

XIII CONCLUSION GLISH VERSION OF THE TREATY OF WAITANGI

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland
 In order for the relationship between Maori and the Crown to progress past the embryo stage, aspects of the relationship that were enshrined within the Treaty will need to be given some formal recognition. Including Treaty principles within a constitution appears to be a viable option for maintaining a framework for future relationships and national decision making, replacing the inconsistent adherence to inconsistent Treaty principles that currently occurs in the Legislature and the Courts.

This change in the constitutional structure would need to be preceded by the development of principles of the Treaty at a national level to give the process the legitimacy that it needs. Unfortunately, history and the current available indicators show that the national environment is not conducive to such debate or change. This may mean that the next great step in Treaty relations, a move beyond the embryo, may be some time off yet.

Article the second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective Families and Individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and grants to them all the Rights and Privileges of British Subjects.

[Signed] W. Hobson Lieutenant Governor

APPENDIX I - THE ENGLISH VERSION OF THE TREATY OF WAITANGI

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the first

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

Article the second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[signed] W. Hobson Lieutenant Governor

*APPENDIX II - AN ENGLISH TRANSLATION OF THE MAORI
VERSION OF THE TREATY*

(Translated by the Ministry of Maori Development: Te Puni Kokiri)

Victoria, the Queen of England, in her gracious remembrance of the Chiefs and Tribes of New Zealand, and through her desire to preserve to them their chieftainship and their land, and to preserve peace and quietness to them, has thought it right to send them a gentleman to be her representative to the natives of New Zealand. Let the native Chiefs in all parts of the land and in the islands consent to the Queen's Government. Now, because there are numbers of the people living in this land, and more will be coming, the Queen wishes to appoint a Government, that there may be no cause for strife between the Natives and the Pakeha, who are now without law: It has therefore pleased the Queen to appoint me, WILLIAM HOBSON, a Captain in the Royal Navy, Governor of all parts of New Zealand which shall be ceded now and at a future period to the Queen. She offers to the Chiefs of the Assembly of the Tribes of New Zealand and to the other Chiefs, the following laws:-

I. The Chiefs of (i.e. constituting) the Assembly, and all the Chiefs who are absent from the Assembly, shall cede to the Queen of England for ever the government of all their lands.

II. The Queen of England acknowledges and guarantees to the Chiefs, the Tribes, and all the people of New Zealand, the entire supremacy of their lands, of their settlements, and of all their personal property. But the Chiefs of the Assembly, and all other Chiefs, make over to the Queen the purchasing of such lands, which the man who possesses the land is willing to sell, according to prices agreed upon by him, and the purchaser appointed by the Queen to purchase for her.

III. In return for their acknowledging the Government of the Queen, the Queen of England will protect all the natives of New Zealand, and will allow them the same rights as the people of England

(Signed) WILLIAM HOBSON

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