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The role of the Treaty of Waitangi in Contemporary Public Law: Does the Treaty have to be Incorporated into Municipal law to be of effect?

Research Paper for Indigenous Peoples and the Law

LLM (Laws 546)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON
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INTRODUCTION

There is a general principle of international law that whenever a Sovereign state "acquires" (by conquest, cession by a Treaty or otherwise) a territory the inhabitants of the territory lose existing rights and only have rights recognised in law by the new Sovereign.[1] The general principle was explained in the following terms by Lord Dunedin in the Privy Council case of Vajesingi Joravarsingji and Others v Secretary of State for India in Council:[2]

> ".... When a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it maybe by cession following a Treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler, in all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers recognised. Such rights as he had under rule of predecessors avail him nothing. Nay more, even if in a Treaty of cession it is stipulated that certain inhabitants should enjoy certain rights that does not give a title to those inhabitants to enforce those stipulations in municipal courts. The right to enforce remains only with the high contracting parties ...."

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[1] For the general principle see e.g., Lord McNair, The Law of Treaties, Oxford, 1961 pp 78-110; Hoani Te Heuheu Tukino v Aotea District Maori Land Board (1941) NZLR 590, 597.

[2] [1924] LR 51 Ind App 357, 360. In that case three Naiks sought, on appeal from the High Court a declaration that they were the proprietors of the whole lands in a specific area and that they were not bound to accept a lease in the terms offered to them by the Government given that there was a Treaty of Cession between the Maharaja and the British Government stating that rights under such leases should continue. The appeal was dismissed largely on the grounds that a Treaty of Cession could not provide the basis for enforcing rights in a municipal court unless the principles of the Treaty had been incorporated in the municipal law.

So far as treaties of cession are concerned the effect of the general principle is that even if it is provided in such a Treaty that inhabitants should enjoy specific rights that does not mean that the Treaty is legally effective/judiciable unless through statute, or some other way, the legislative, administrative and judicial branches of government are given the necessary legal power to implement the Treaty.[3]

While it has been argued in the past, and is still argued by some, that the Treaty of Waitangi was not a Treaty of Cession, it is now generally accepted by the Courts that the Treaty is one of cession.[4] Moana Jackson is amongst those who maintain that the Treaty was not one of cession and consequently that Maori retained the right to self-government.[5] In his recent report on the "Maori and the Criminal Justice System" Moana argued that the fact that the Treaty was an affirmation of aboriginal rights rather than a cession of sovereignty was reflected in Article Two of the Treaty which guaranteed "te tino rangatiratanga", the right to self government. The maintenance of the right to self government provided a basis for further arguing that Maori should retain the right to self development generally and in the Criminal Justice System specifically.[6]

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[3] Lord McNair, The Law of Treaties pp 78-79; Te Heuheu (supra).

[4] Acceptance that the Treaty was one of cession seen in New Zealand Maori Council v Attorney General (1987) ; NZLR 641; Waitangi Tribunal Reports; 2 Muriwhenua Fishing Report; The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989, pp 12-15 (Chief Judge ETJ Durie)

[5] The Maori and the Criminal Justice System - A New Perspective - He Whaipaanga Hou, Moana Jackson, Department of Justice Policy and Research Division, November 1988

[6] The right to self development has been regarded as a requirement of "te tino rangatiratanga" i.e., article II has been regarded as guaranteeing "the continuation of Maori Sovereignty, the exercise of Maori control and power over their lands, homes, estates, valued possessions and institutions". See also The Bill of Rights and Te Tiriti O Waitangi, Shane Jones, Legal Research Foundation Seminar, University of Auckland August 1985 page 209, 211 Royal Commission on Social Policy Volume III Part I page 150 and pages 163 - 171.

Irrespective of whether the Treaty is one of cession or, for example, one of acquisition the legal consequences were the same in sofar as the English law was said to prevail.[7] According to the general principle relating to treaties of cession the Treaty of Waitangi has to be incorporated into municipal law for it to be effective.

The aim of this paper is to assess the degree to which the New Zealand situation is required to comply with this principle in order that the Treaty of Waitangi can have a position in Public Law. The consideration of this matter necessarily involves a general overview of the Treaty's historical position, its present position, and making some assessment of how it has come to its present position. Specific matters discussed are the

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[7] Law Commission Report on Fisheries, March 1989 pp 54-56. One of the arguments for New Zealand being a settled rather than a ceded colony, as expressed in Wi Parata v Bishop of Wellington [1877] 3NZLR 72, was that the Treaty was not such at International law because Maori were not "competent" to enter international relationships. Consequently New Zealand was acquired by annexation and a consequence of that was that British Common law automatically extended to New Zealand on acquisition of sovereignty and this was confirmed by the English Laws Act 1858.

As indicated in the Law Commission report (pages 56 - 57) this view has been superceded in recent years and there are strong arguments for the view that:

- ....the Treaty....was a valid treaty of cession in terms of a common understanding of international law both then and now.

- that regardless of its status at international law the Treaty was a valid act of cession in British Constitutional law and therefore capable of making New Zealand a ceded rather than a settled colony (though in terms of the reception of English law the practical consequences were the same).

- that the common law itself, in its application to British territories, however acquired, recognised the land and related rights of native peoples as a legal qualification .... The Treaty was no more than declarations in this respect, and Maori property rights did not and need not derive from the Treaty. This is the concept of aboriginal title.... Maori property rights continued to exist unless and until legislation took them away".

degrees to which the general principle is still applicable; whether the Treaty is in fact part of municipal law and whether it is necessary for the Treaty to be part of municipal law in order for it to be effective.

I GENERAL HISTORICAL OVERVIEW

Historians, lawyers and others interested in Treaty issues are generally agreed that the "fortunes"[8] of the Treaty since 1840 can be divided into significant periods, although the dividing lines between these periods, and the relevance ascribed to them, is somewhat fluid according to the nature of the Treaty issues being considered, whether the perspective is a Maori or Pakeha one and the views of the person making the categorisation. Claudia Orange , for example, has referred to the following three periods as being significant:

> "1. the 1840 to 1870 period when the Treaty served a European need for peaceful settlement and a Maori need for reassurance that certain rights would be honoured.
>
> 2. the 1870 to 1930 period when European New Zealand suffered a loss of memory over the Treaty, whereas for Maori New Zealand the Treaty assumed an increasing relevance.

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[8] C. Orange, The Treaty of Waitangi - A Historical Overview, Public Sector Volume II No 4 page 2.

3. the 1930's to the 1980's when there has been a rediscovery of the Treaty by Pakeha New Zealanders and a continuing and more articulate assertion of their Treaty rights by Maori New Zealand"[9]

While such a categorisation necessarily has its limitations, paricularly in so far as it fails to give adequate weight to most recent developments, it provides a useful framework within which more specific analysis can take place.[10] To some degree the role of the Treaty in Public Law necessarily reflects the same "Treaty Fortunes" categories although in other respects the diverging lines of authority that developed within these

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[9] Ibid; see also Advisory Committee on Maori perspective for social welfare categories in submissions to Royal Commission on Social Policy page 148 - 149:

> "....following 1840 during which Maori iwi controlled their own transformation, managed their own economy and set about the development of their own institutions; change was dramatic. The 1850's saw the beginning of the development of dominant Pakeha institutions....
>
> Between 1895 and the late 1930's, the government's Maori policy was a curious blend of assimilation, paternalism, integration and exploitation."

See also general overview at pp 144-160; Muriwhenua Waitangi Tribunal report categories; Historical overviews in Te Weehi v Regional Fisheries Officer [1986] 1NZLR 680 and Huakina v Waikato Valley Authority [1987] 2NZLR 188. Waitangi : Maori and Pakeha Perspectives of the Treaty of Waitangi (1989) Edited by IH Kawharu, page x comments that the statement that the Treaty was a legal "nullity" ".... blew the Treaty into a judicial limbo for the better part of a century" CF Orange, Claudia, The Treaty of Waitangi (1987) 187.

[10] The limitations of C Orange's categorisation are discussed further in Part V of this paper "How did the Treaty come to have its present position?" In particular the categorisation does not appear to acknowledge the growing endorsement of the doctrine of aboriginal title, the acceptance of the Maori right to self determination and the acceptance of the importance of the principles of the Treaty as opposed to the Treaty itself (by the legislature, courts and others). Other factors increasing the Treaty's profile include the fact that Maori have always pleaded the Treaty, the Labour Government, until recently, has had a "positive" approach, the Waitangi Tribunal has provided a strong forum, increased awareness of international developments favouring indigenous peoples rights.

periods means that such classifications must be qualified. On the one hand it is possible to look at statutes and case law and say, for example, that during the 1870 to 1830 period they reflect the fact that there was a loss of memory over the Treaty. The decision of Wi Parata v Bishop of Wellington [1877] 3NZLR 72 reflects this view. On the other hand the kauwaeranga judgment (1870; reported in (1984) 14VUWLR 227) supports the view that the Treaty of Waitangi was effective to create rights; that it was part of the "bedrock" of the New Zealand legal system.[11]

The Wi Parata case arose from the fact that the Ngatitoa tribe (who dwell principally in the Porirua District) gave land at Witireia to a church as an endowment for a school and while the Bishop gave an undertaking that the school would be opened forthwith the trust was not executed for thirty years and the Crown subsequently made a grant of the land to the bishop of Wellington (for a college at Porirua) without the knowledge or consent of the tribe. While the tribe no longer desired the execution of the trust because it had dispersed and diminished in number it sought declarations to the effect that the land should be returned to the Ngatitoa tribe.

In the course of reaching his conclusion that the Ngatitoa tribe had no rights to the land at issue Prendergast CJ concluded, interalia, that the Treaty of Waitangi so far as it purported to cede sovereignty had to be regarded as a simple nullity because no body politic existed capable of making cession of sovereignty and nor could such a body exist:

> "....In the case of primitive barbarians, the supreme executive government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular can not be examined or called in

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11 A Frame "Kauwaeranga Judgement" [1984] NZLJ 227.

> question by any tribunal, because there exist no known principles whereon a regular adjudication can be based".[12]

> "So far as the proprietary rights of the natives are concerned, the so called Treaty merely affirms the rights and objectives which, jure gentium, vested in and devolved upon the Crown under the circumstances of the case".[13]

In the kauwaeranga case Chief Judge Fenton was required to decide whether Hoterene Taipari and others should be granted the certificate of title to a piece of land which was covered by the high water of ordinary tides but left by the water as the tide receded. While the Crown argued that English law should determine the matter, and that by English law the foreshore belonged to the Crown and could only be held subject to grant from the Crown, Fenton J considered that the matter had to be determined on the basis of the uniqueness of the New Zealand situation arising from the existence of the Treaty of Waitangi.

Specific issues Fenton J considered needed addressing were firstly whether Maori had any right of ownership, and if so what right, to the mudflat at issue in 1840; and secondly whether the cession of sovereignty of the land destroyed the right or title that had previously existed.[14] In the course of reaching his conclusion that while the applicants were not entitled to the absolute property in the soil of the foreshore they were entitled to the exclusive right of fishing and using

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12 [1877] 3NZLR 38, 72

13 Ibid, 78

14 A Frame "kauwaeranga Judgement" [1984] NZLJ 227

for the purposes of fishing the surface of the soil of all the portion of the foreshore between the high water mark and the low water mark Fenton CJ summarised the issues to be considered in the following terms:

> "Was the land now claimed, at the date of the Treaty of Waitangi, land or a fishery collectively or individually possessed by aboriginal natives? For if it was, the full, exclusive and undisturbed possession thereof is confirmed and guaranteed to the possessors by the Crown of England. And this fact is clearly proved. We must seek then in the Treaty itself for the true solution of our problem and it only remains now to inquire whether cession of sovereignty of the island to her Majesty has the effect of destroying the Crowns guarantee and the first idea that naturally suggests itself, is that this guarantee was the main consideration for the cession. And I do not see how one part of an instrument, of which the intention is clear, can be held thus to destroy another part, unless there is irreconcilable conflict and here there is no conflict. In England, where the whole soil of their country fell to the King by conquest .... large portions of the foreshore are owned in fee simple absolutely by private persons".[15]

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15 Ibid, 239

It is quite clear from the above passage and the judgement as a whole that Fenton J considered that the Treaty was effective to create rights and he went on to explain the uniqueness of the New Zealand situation in the following terms:

> "There is probably no case of a colony founded in precisely the same manner as New Zealand i.e., by contract with a race of savages, the Crown of England obtaining the sovereignty or high domain and confirming and guaranteeing to the Aborigines the useful domain or the use and possession of all the lands"[16]

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16 Ibid, 243

II. HISTORICALLY CASE LAW SUPPORTS THE VIEW THAT THE TREATY HAS TO BE INCORPORATED INTO MUNICIPAL LAW TO BE EFFECTIVE.

Subject to the qualification already referred to, that there are diverging lines of authority, it has generally been accepted that the Courts considered the Treaty was a legally binding document in the decades following the signing of the Treaty but that following Wi Parata (supra) and the passing of Acts such as the Land Title Protection Act 1902 and the Native Land Act 1909 it was considered that the Treaty was not a source of law.[17]

Apart from the kauwaeranga (supra) judgment authority up to and including Hoani Te Heuheu Tukino v Aotea District Maori Land Board (1941) NZLR 590 provides that the Treaty will not be of effect unless it is incorporated into municipal law. Cases in addition to Wi Parata (supra) which support the view that the Treaty must be incorporated include Nireaha Tamaki v Baker (1900) AC 561 (Privy Council), Waipapakura v Hempton (1914) 33 NZLR 1065 (Full Supreme Court Wellington, Stout CJ, Edwards J and Cooper J) and Te Heuheu (supra).

The matter that arose for consideration in Nireaha (supra) was whether the appellant had a native title of occupancy to the land at issue.

The Privy Council considered that the appellant's claim could be considered because the Lands Claim Ordinance 1841 declared the title of the Crown subject to the "rightful and necessary occupation and use "of the Maori inhabitants and sections 3,4 and 5 of the Native Rights Act 1865 gave the Civil Courts jurisdiction to ascertain native title to and interest in according to custom or usage of the Maori people.

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[17] Royal Commission Volume III part 1 page 96; The Treaty of Waitangi and Maori Fisheries, Law Commission, March 1989 pp 106-129.

The Privy council made it clear however that the Treaty itself did not create the rights of the Maori occupiers but rather those rights only arose because there was a specific statutory provision in municipal law creating that right. The Privy Council considered that the Lands Claim Ordinance 1841 which declared the title of the Crown subject to the "rightful and necessary occupation and use" of the Maori inhabitants:

> ".....was to that extent a legislative recognition of the rights confirmed and guaranteed by the second article of the Treaty of Waitangi. It would not of itself, however, be sufficient to create a right in the Native occupiers cognizable in a court of law"[18]

In Waipapakura (supra) the full Supreme Court was required to decide whether the appellants had in fact been using nets unlawfully in terms of specific fishing regulations or whether the appellants had been exercising a Maori fishing right which was saved from the operation of the Fisheries Act 1908 by Sections 76 and 77(2) of that Act which provided that:

> "76(1) No Maori or half-caste habitually living with Maoris according to their customs shall be sued for any fine or forfeiture under this part of this Act unless and until the authority of the Native Minister to take proceedings has been filed in the Court in which such proceedings are intended to be taken.
>
> (2) The aforesaid authority of the Native Minister may from time to time be signified by him to any person, either generally or specifically, and shall be valid if signified by telegraph or telephone message....

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[18] Page 567; referred to in Huakina page 206.

77(1)....

(2) Nothing in this part of this Act shall affect any existing Maori fishing rights."

The Court adopted the arguments raised by the Crown in the course of reaching its conclusion that the nets had in fact been used unlawfully. The Court considered that section 77(2) was a saving clause and was not the grant of a right and that even if the Treaty of Waitangi had granted such a right it could not be of any effect because the legislature had not confirmed that grant. Following Wi Parata (supra) and Nireaha (supra) Stout CJ commented:

> ".....It is clear from the decision of the Privy Council in Nireaha ..... that until there is some legislative proviso to the carrying-out of the Treaty, the Court is helpless to give effect to its provisions...."[19]
>
> "....It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right and in absence of such both Wi Parata and Nireaha are authorities for saying that until given by statute no such right can be enforced...."[20]

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19 (1914) 33 NZLR 1065, pp 1070-1071.

20 Ibid, pp 1071-1072.

The proceedings in Te Heuheu (supra) were instituted by the appellant to remove the statutory charge imposed upon the native owners by section 14 of the Native Purposes Act 1935 which provided that:

> "14(1) The Aotea District Maori Land Board (....) is hereby authorised, empowered and directed to accept the offer of the Egmont Box Co Ltd, to release and discharge the Board and the Native Owners from all claims and demands of whatever kind arising out of a certain agreement made between the Tongariro Timber Co Ltd, and the said Egmont Box Co Ltd, dated .... in consideration of a sum approved by the Native Minister to be paid to the said Egmont Box Co Ltd, by the Board.
>
> 2(a) The sum approved by the Native Minister, together with all costs and expenses incurred by the Board in connection with its negotiations by the Board out of moneys in its account.... shall be deemed to be a loan to the owners, including the Crown....
>
> (b) upon payment of such sum as aforesaid the Board shall .... be deemed to have a charge upon all the lands and the revenue thereof referred to in paragraph (a)...."

The contention made by the appellant, which is relevant to the matter at issue, was that section 14 of the Native Purposes Act 1935 was ultra vires the legislature of New Zealand in so far as it derogated from the rights conferred on native owners by the Treaty of Waitangi.

The appellants' arguments in support of this contention were as follows:

"(i) .... the Treaty of Waitangi was a solemn compact defying the rights given to the Maori people in respect of their lands;

(ii) .... the right thus acquired by the Maori people is cognisable in the Courts.

(iii) .... such right was declared by the Imperial Act, the New Zealand Constitution Act, 1852 (15-16 Vict; C.72) which granted a representative constitution to New Zealand.

(iv) .... the Colonial Laws validity Act, 1865 (28-29 Vict; C.63), preserves such right;

(v) .... the New Zealand Constitution Amendment Act, 1857 (20-21 Vict; C.53) which amended the above Act of 1852, did not authorise the Parliament of New Zealand to legislate in derogation of a treaty right; and

(vi) that the legislature of New Zealand has recognised and adopted the Treaty as part of the municipal law, and that S.14 of the Native Purposes Act, 1935, derogates from the right conferred by the Second Article of the Treaty in so much as it imposes a charge on the Native lands."[21]

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21 (1941) NZLR 590, 596.

In concluding that section 14 of the Native Purposes Act 1935 was not ultra vires the Privy Council, interalia, adopted the general principles of Vajesingji Jora Varasingji v Secretary of State for India (supra) and concluded as a matter of fact that the Treaty was not incorporated into municipal law. While the Court acknowledged that the right conferred by the Treaty of Waitangi was made a substantive part of the municipal law by section 73 of the New Zealand Constitution Act 1852 this situation had been altered by the legitimate enactment a few months later of a provision in the same terms as section 14 of the New Zealand Act 1935 (The Native Purposes Act 1935) which effectively overrode the earlier provision.

III. THE DEGREE TO WHICH THE GENERAL PRINCIPLE THAT THE TREATY MUST BE INCORPORATED INTO MUNICIPAL LAW STILL APPLIES: THE PROSPECTS OF CHANGE FROM THAT VIEW.

There is no doubt, following recent decisions including New Zealand Maori Council v Attorney General (1987) 1NZLR 641 that the courts still maintain that the law requires the Treaty to be incorporated into municipal law for it to be judiciable. There has been some "liberalisation" of the principle/acknowledgment of exceptions to it which, coupled with a re-analysis of past decisions, consideration of the relevance of the principle to the New Zealand situation, changed social and political circumstances and perceptions of the Treaty, could result in an argument that the Treaty does not need to be incorporated being successful however.

A. Principle that the Treaty must be incorporated into municipal law still applies.

The decisions of Inspector of Fisheries v Ihaia Weepu and another [1958] NZLR 920, Re The Bed of the Wanganui River [1962] NZLR 600, Keepa v Inspector of Fisheries [1965] NZLR 322, New Zealand Maori Council (supra) and Love and Ors v Attorney General and Ors (Unreported decision of the High Court, Wellington Registry 17 March 1988) reflect the view that the law requires the Treaty to be incorporated into municipal law for it to be justiciable.

The matter at issue in Weepu (supra), like the earlier case of Waipapakura (supra) concerned section 77(2) of the Fisheries Act 1908 and whether or not the defendants possessed an existing Maori fishing right within the meaning of section 77(2). In reaching his conclusion that the Defendants did not possess an existing Maori fishing right within the meaning of the provision Adams J commented that:

> "It is trite law that the Treaty of Waitangi confers no rights cognizable in a court of law: Waipapakura.... Hoani.... For some purposes the Courts may take cognizance of rights preserved by the Treaty (Nireaha....) but, in the absence of statutory provision, a legal claim against the Crown cannot be founded on the Treaty."[22]

Similarly in Keepa (supra), which also concerned the application of section 77(2) of the Fisheries Act 1908, Hardie Boys J implicitly accepted that the Treaty had to be incorporated into a statute to be of effect.[23]

In Re the Bed Of the Wanganui River (supra) Turner J observed that:

> "the obligation of the Crown under the Treaty ... was akin to a Treaty obligation and was not a right enforceable at the suit of any private persons as a matter of municipal law by virtue of the Treaty ... itself".[24]

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22 [1958] NZLR 920, 925.

23 [1965] NZLR 322, see for example page 327. The finding of the Court in that case, from the headnote, was that "Customary Maori fishing rights on the foreshore between high and low water marks or a particular place are extinguished (if they ever existed) when title is granted or a freehold order is made in respect of the land bordering the sea at that place.

Thereafter the Maori has no greater fishing rights than his pakeha neighbour and section 77(2) of the Fisheries Act 1908 does not protect a Maori charged with a breach of that Act or of Regulations made thereunder which has been committed by him between high and low water marks at that place."

24 [1962] NZLR 600, 623.

As indicated in RP Boast's article "New Zealand Maori Council v Attorney General : Case of the Century? the "case is, if anything, an illustration of the rule" ".....that rights conferred by the Treaty are unenforceable unless incorporated into a statute."[25]

[The background to the New Zealand Maori Council case was that the State Owned Enterprises Bill was amended to include sections 9 and 27 of the Act to alleviate fears that the transfer of land to the Corporations would mean the Crown could not return it to Maori if recommended to do so by the Waitangi Tribunal. (Section 9 of the Act provided that nothing in the Act should permit the Crown to act in a manner inconsistent with the Principles of the Treaty of Waitangi and section 27 dealt with land which was subject to a claim to the Waitangi Tribunal under the Waitangi Act 1975 on or before 18 December 1986) The New Zealand Maori Council applied under Part I of the Judicature Amendment Act 1972 for a review of the proposed exercise of the statutory power to transfer all or any Crownland to a State Owned Enterprise. Interalia the Court of Appeal held that section 9 of the State Owned Enterprises Act was a firm declaration that nothing in the Act would permit the Crown to act inconsistently with the principles of the Treaty of Waitangi and overrode the rest of the Act].

Excerpts from the judgments which specifically endorse the principle that the Treaty must be incorporated to be of effect are as follows:[26]

- Cooke P at page 655:

> "Counsel for the applicants did not go so far as to contend that, apart altogether from the SOE Act, the Treaty ... is a Bill of Rights or fundamental

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[25] [1987] NZLJ 392.

[26] Aspects of Cooke P's and Somers J's judgements which indicate that the principle is not a strict one are discussed below.

NZ constitutional document in the sense that it could override Acts of our legislature. Counsel could hardly have done so in the face of the decision of the Privy Council in Hoani ..... That rights conferred by the Treaty cannot be enforced in the courts except in so far as statutory recognition of the rights can be found ...."

and further at page 668:

"In short the present decision together with the two Acts means that there will now be an effective legal remedy by which grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted. I have called this a success for the Maoris, but let what opened the way enabling the Court to reach this decision not be overlooked. Two crucial steps were taken by parliament in enacting the Treaty of Waitangi Act and in insisting on the principles of the Treaty in the State Owned Enterprises Act. If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity."

Somers J at page 691:

"The received view of the law is that the Treaty .... does not form a part of municipal law of New Zealand as administered by its courts except to the

> extent it is made so by statute. This proposition is referred to by the Privy Council in Hoani ...., where Viscount Simon LC delivering the judgment of the Board said:
>
> ...To the same effect is the statement by Turner J in Re the Bed of the Wanganui River .... when he observed that the obligation of the Crown under the Treaty of Waitangi "was akin to a treaty obligation and was not a right enforceable at the suit of any private persons as a matter of municipal law by virtue of the Treaty .... itself:.
>
> Notwithstanding some criticisms of these opinions, I am of the opinion that they correctly set out the law. Neither the provisions of the Treaty .... nor its principles are, as a matter of law, a restraint on the legislative supremacy of parliament."

The case of Love and Ors (supra) concerned an interlocutory application to strike out judicial review proceedings on the grounds that the pleadings did not disclose a reasonable cause of action.

The cause of action relied on by the plaintiff was that the proposed sale of shares in Petrocorp (announced in the Government's June 1987 Budget) involved the exercise of a "Statutory power of decision "as defined in section 3 of the Judicature Amendment Act 1972". (There were two statutory powers involved, section 15 of the Ministry of Energy Act 1977 and section 2 of the Finance Act 1982, both of which did not contain any directions as to the factors to be considered by Ministers when deciding when and how to dispose of the shares).

The essence of the applicant's claim was that Taranaki Maori had a claim before the Waitangi Tribunal relating to Tribal lands encompassing all lands commonly known as the Taranaki Region and including part of Wellington, and the North of the South Island including the Chathams, and they were likely to get a recommendation from the Waitangi Tribunal that substantial relief be granted by way of transfer of land, money by way of compensation. They maintained that they were likely to get recognition from the Tribunal that the rights include rights to petroleum gas and other minerals beneath the surface and that the decision to sell the shares would result in the shares themselves and access to Petrocorp's assets being removed as a possible form of compensation.

In the course of reaching his conclusion that the action should be struck out Ellis J referred to Cooke P's and Somers J's comments about Te Heuheu (supra) in the New Zealand Maori Council (supra) case, and implicitly accepted them as being correct but concluded that the Love case was in sharp contrast to the New Zealand Maori Council case which had section 9 and that the court was not empowered to give effect to the Treaty provisions when considering the lawfulness or otherwise of the sale of Petrocorp shares.

B. There has been a "liberalisation" of the principle and an acknowledgement of exceptions to it.

The Royal Commission on Social Policy referred to four ways in which the Treaty can, and has been relied on, even though it is not in legislation:

"1. interpret legislation so that it does not breach the Treaty (Huakina)

2. give content to general language in legislation by reference to the Treaty (Te Weehi)

3. use the Treaty as evidence or declaratory of the existing customary position (even Wi Parata acknowledges that possibility)

4. in an extreme case use the Treaty as a basic limit on legislative power (Keith, 1988 = 2)"[27]

(i) Interpret legislation so that it does not breach the Treaty; The Treaty as an aid to statutory interpretation.

In New Zealand Maori Council (supra) Cooke P accepted a submission from Counsel for the applicants to the effect that the Treaty should be used as an aid to statutory interpretation:

> ".. The Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of subsequent developments of international human rights norms and that the court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the importance of an express reference to the principles of the Treaty ....."[28]

In adopting such an approach Cooke P was reinforcing the approach taken by Chilwell J in Huakina v Waikato Valley Authority [1987] 2 NZLR 188. In view of the importance of this decision in anticipating how the Treaty may be used as an aid to statutory interpretation in the future, and Chilwell J's detailed reasoning on this matter, it is necessary to consider it in some detail.

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[27] Volume III part 1 page 98.

[28] page 656; see also RP Boast "New Zealand Maori Council" [1987] NZLJ 240.

The facts of Huakina (supra), in brief, were that the owners of a dairy property applied to the Waikato Valley Authority for a water right pursuant to section 21 of the Water and Soil Conservation Act 1967 for a grant to discharge treated dairy shed water and waste, and the right was granted. The Huakina Development Trust, the sole objector to the application, appealed to the Planning Tribunal and their appeal was dismissed. The Trust's appeal to the High Court, the case before Chilwell J, was successful.

Chilwell J's rationale for concluding that an application of the principles of statutory interpretation meant that Maori spiritual values could be taken into account in determining applications for water rights, although there was no reference in the Act to Maori values generally (as may be found in S.3 (17)(g) of the Town and Country Planning Act 1977) let alone to the principles of the Treaty of Waitangi was as follows:[29]

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[29] Chilwell J posed a rhetorical question at page 219 of the decision to the effect that given the relationship of the Water Act and Town and Country Planning Act, and the other circumstances of the case were Maori cultural and spiritual values a relevant consideration to be taken into account under the Act?

The answer to the rhetorical question was given at page 223 in the following terms:

> ".... Maori spiritual and cultural values .... cannot be excluded from consideration .... for the reason that the Water Act is so deficient in guidelines that the Court has to resort to extrinsic aids. In this case those aids include the Treaty of Waitangi, the Treaty of Waitangi Act, Waitangi Tribunal interpretations of the Treaty and the Planning Act. Through all those agencies a common theme is found.

See also RP Boast "New Zealand Maori Council "[1987] NZLJ 248"

The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989 Page 20 (Durie) and pp 42-43 (Kenderdine).

- As the criteria to be applied in an application for a water right under section 21 of the Act are unspecified, and the grounds upon which a person may lodge an objection under section 24(4) are indefinite, the Court has to resort to extrinsic aids.

- it is arguable that the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967 and the Soil Conservation and Rivers Control Act 1941 constitute a comprehensive statutory scheme and consequently the express terms of one of those statutes can provide a useful analogy for the interpretation of another statute to ensure that the statutes are consistent.[30]

- the Planning Act gives recognition to Maori concerns specifically and generally and consequently these provisions may provide a useful analogy for the interpretation of another statute in order to ensure that the two statutes are consistent:

    - case law establishes that customs and practices which include spiritual elements are cognisable in a Court of law provided they are properly established by evidence.

    - case law establishes that international instruments, whether they be convention covenants, declarations or treaties, may be used as aids in the interpretation of statutes.

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[30] There is specific case law supporting the view that the Planning Act and the Water Act must operate in conjunction as they are complementary. Even if they are not related there is authority for the view that a statute may be invoked by an act in interpreting the scope of another statute or common law rule even though the statute in question is not directly related.

While recent cases indicate that the principle of using the Treaty as an aid to interpreting legislation so that it does not breach the Treaty is acknowledged it has not been used to its fullest effect. In Love v Attorney General (supra) Ellis J referred to Cooke P's comments about the Treaty providing an aid to statutory interpretation but did not refer to Huakina (supra) and did not consider the circumstances were such to warrant relief on that basis.[31] It is arguable, however, that analogies could have been drawn between Huakina (supra) and the Love (supra) situation, and reliance placed on Cooke P's comments in the New Zealand Maori Council case, to have required the Treaty to be used as an aid to statutory interpretation.

In Love (supra), as in Huakina (supra), the criteria to be applied in respect of the relevant legislation were not specified. Section 15 of the Ministry of Energy Act 1977 and section 2 of the Finance Act 1982 did not refer to any criteria which the Minister had to have regard to in exercising his statutory power of decision to sell the shares.

Similarly, while Chilwell J placed some emphasis in Huakina (supra) on the fact that the Town and Country Planning Act 1976 (which was part of a statutory scheme with the Water Act and the River Control Act) recognised Maori concerns, and there was authority for the view that the express terms of one of those statutes could provide an analogy for the interpretation of another related statute, he also acknowledged that a statute could be used by a Court in interpreting the scope of another statute even when they are not related:

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[31] See also reference to Cooke P's statements in New Zealand Maori Council in MAF v Hakaria and Scott (unreported decision Levin District Court 19 May 1989; Royal Commission Volume III Part 1 page 92 where reference is made to FM Brookfield's memorial lecture and his statement that in the past there was no basis for recognising the Treaty but a modern view might allow it a role in assisting with the interpretation of legislation.

"A statute may be involved by a Court in interpreting the scope of another statute or a common law rule even though the statute in question is not directly related ....

In the Fletcher Timber case, concerning the extent of public interest immunity, the Court of Appeal refused to follow a decision of the House of Lords. One of the grounds was the contemporary movement towards open Government in New Zealand.

> "This has found statutory expression in the Official Information Act 1982 which states as the first of the purposes expressed in its long title that it is an Act to make information more freely available" [1984] 1 NZLR 290, 296 per Woodhouse P).

Similarly in R v Uljee, in a case concerning client/solicitor privilege, the Court of Appeal noted that Parliament had expressly provided for absolute privilege in some regards under the Inland Revenue Department Act 1974 and the Misuse of Drugs Amendment Act 1978. The rule reflected "important public purposes" .... recognised by statute and indicated a general public policy"

The Treaty of Waitangi Act 1975 provides for the observance and confirmation of the Treaty's principles by establishing the Waitangi Tribunal to inquire into and make recommendations upon any claim by a Maori that he, or a group of Maoris of which he is a member, is likely to be "prejudially

> affected" .... This statutory recognition of the Treaty, as part of the fabric of New Zealand society, is further enhanced by the preamble and the definition of the word "Treaty" which means the Treaty of Waitangi as set out in the English and in Maori in the first schedule ...."(pp 212-213)

It is anticipated that more "ardent" attempts will be made in the future to rely on Chilwell J's comments in Huakina, (supra) which were reinforced by the Court of Appeal in the New Zealand Maori Council case, that the Treaty can and should be used as an aid to statutory interpretation. If this occurs more significant developments (so far as the strengthening of the role of the Treaty is concerned) than occurred in the Love case seem a likely result.

(ii) Give Content to general language in legislation by reference to the Treaty.

In Te Weehi v Regional Fisheries Officer [1986] INZLR 680 earlier cases concerning the equivalent to section 88(2) were distinguished (Waipapakura v Hempton (1914) 33NZLR 1065; Inspector of Fisheries v Ihaia Weepu and Others [1956] NZLR 920; Keepa and Wiki v Inspector of Fisheries [1965] NZLR 322) on the grounds that Te Weehi's claim was not based on a question of land ownership, and that he was not seeking an exclusive right. The Court concluded that as a result of the general provision in section 88(2) of the Fisheries Act 1983, which provided that "Nothing in this Act shall affect any Maori Fishing rights", Maori fishing rights exercised in a customary way are exempt from regulations under the Fisheries Act, and that customary fishing rights continued.

This was a significant departure from the Waipapakura (supra) case but consistent with the approach taken by the Courts in Weepu (supra) and Keepa (supra) on this point given that in

both cases it was considered that Maori fishing rights included customary fishing rights which were preserved by the Treaty of Waitangi and were still unextinguished.[32] In Waipapakura (supra) section 77(2) of the Fisheries Act 1908, which provided that "nothing in this part of this Act shall affect any existing Maori fishing rights" was described as a savings clause "which did not grant any right and in effect restricted the words "Maori fishing rights" to a consideration of Maori fishing rights conferred by statute only. In that case it was held that customary fishing rights were not preserved in law by the Treaty of Waitangi and could only exist if they had been conferred by legislation.

Te Weehi (supra) was followed in the interim decision of Ngai Tahu Maori Trust Board v Attorney General and Another (unreported CP 559/87, High Court of Wellington 2 November 1987), where Grieg J concluded that section 88(2) of the Fisheries Act meant that nothing could be done under that Act which would affect, restrict, limit or extinguish Maori fishing rights that existed in 1840. Similarly, Inglis J followed Te Weehi (supra) in the recent District Court decision of MAF v Hakaria and Scott (unreported decision Levin District Court 19 May 1989), although some gloss was placed on that decision in so far as Inglis J considered that the New Zealand Maori Council case enabled the Court "to take a step beyond Te Weehi's case in understanding the effect of section 88(2)"[33] and Inglis sought to define customary Maori fishing rights in the following way:

> "A customary or traditional Maori fishing right cannot be seen in isolation from the protocol and other customary requirements in exercising it. The right and its exercise must be seen from a Maori perspective so much is I think implicit in the

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32 [1986] 1NZLR 680, 689.

33 page 2.

> Court of Appeal's decision in the New Zealand Maori Council case. The question is whether the defendants exercised their undoubted rights in a manner that was appropriate and acceptable in custom and tradition".
>
> "....I pointed out that this was not a case of harvesting toheroa for sale in the pub, as sometimes happens, which would plainly be an offence against strong traditional Maori values .... taking toheroa for sale in hotels cannot possibly be regarded as exercising a traditional or customary Maori fishing right and cannot be protected by section 88(2). Neither the Treaty nor section 88(2) gives any Maori person the right to abuse custom, tradition or protocol."[34]

(iii) The Treaty as evidence or declaratory of the existing customary position

While it is generally accepted that the application of the doctrine of aboriginal title means that Maori have customary rights irrespective of the Treaty Somers J in New Zealand Maori Council(supra) referred to a number of cases dealing with customary rights and commented that the courts were obliged to have regard to the Treaty in these circumstances.[35] In the New Zealand Maori Council case Somers J confirmed that the principle of Te Heuheu (supra) still applied and was relevant to the case but suggested that there were circumstances where the Treaty would not need to be incorporated in order for it to be given effect and referred to cases which supported this view:

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[34] page 7; the decision is being appealed by the Ministry of Agriculture and Fisheries.

[35] see for example Waitangi Tribunal Muriwhenua Fishing Report page 209 discussion which indicates Maori have customary rights irrespective of the Treaty.

"This is not to suggest that the courts have ever supposed that the Crown was not under an obligation to have regard to the Treaty although that duty was not justiciable in this country, at least when the dispute was not with the Crown in respect of its prerogative or Royal rights. In Re Lundon and Whitaker Claims (1872) 2NZCA 41 Arney CJ, delivering the judgment of the Court of Appeal said, at page 49, "The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native Proprietary right". In Nireaha Tamaki v Baker (1984) 12 NZLR 483 (not affected on this point by the appeal reported at [1901] AC 561) Richmond J for the Court of Appeal said at page 488 "The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice."[36] in Baldick v Jackson (1910) 30NZLR 345 .... Stout CJ observed of a claim that a whale was a Royal fish under a statute of Edward II that it "would have been impossible to claim without claiming it against the Maoris, for they are accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with ... In the instant case

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[36] Prior to making this statement Richmond J said at page 488: "There can be no known rule of law by which the validity of dealings .... of the sovereign with the Native tribes .... for the extinction of their territorial rights can be tested".

> however, no difficulty of the kind mentioned in Te Heuheu Tukino's case arises. Municipal law, that is to say S9 of the State Owned Enterprises Act 1986 recognises the Treaty of Waitangi by expressly limiting the Crown's power to act under the 1986 Act by reference to the Treaty principles. The difference that does arise because that section 9 does not refer to acts of the Crown inconsistent with the Treaty, but to acts inconsistent with its principles".[37]

Although the Court of Appeal was not required to decisively determine the effects of the doctrine of aboriginal title in the New Zealand Maori Council case Somers J has undoubtedly paved the way for an application of the doctrine in the future and as indicated in the following comments by the Law Commission the doctrine has already gained significant acceptance:

> ".... This is the concept of aboriginal title. In respect of the land where Maori customary title has been ascertained and extinguished the common law has admittedly been superseded by statute. But in other cases it remains applicable except that, because of sections 153-157 of the Maori Affairs

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37 pages 691-692; See also Cooke P at pp 667-668. He was also concerned that no injustice be done by the rigid application of the Te Heuheu principle; Royal Commission Volume III Part 1 page 91 reference was made to the fact that the Courts could not recognise the force of the Treaty in earlier cases because there was no legislation but they "recognised its moral force and the Crown's responsibility" - comments in New Zealand Maori Council were quoted.

> Act 1953, it cannot be invoked against the Crown in respect of land. In other words Maori property rights continued to exist unless and until legislation took them away.
>
> If the last of these propositions is valid the law already recognises to an uncertain degree Maori rights in respect of traditional fisheries. It cannot be affirmed that the New Zealand Courts have adopted it. However, some very recent decisions have gone some way towards accepting the concept that indigenous people had property rights at Common law."[38]

In addition to the recent endorsements of the doctrine of aboriginal title in Court decisions and Waitangi Tribunal cases, the prolific writings of PG McHugh (which appear to have gained widespread acceptance) and international developments suggest that the doctrine will be openly adopted by the New Zealand Courts in the near future.[39] The doctrine will

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[38] Law Commission Report on Maori fisheries, pages 56-57.

[39] Explicit Authority of Te Weehi (supra) Ngai Tahu, Maori Trust Board (supra) and MAF v Hakaria (supra). Implicit Authority Higgins v Bird (7 Waiariki ACMB 24 see for example for acceptance and international developments Law Commission Report on Maori Fisheries, pages "A Bill of Rights for New Zealand", Legal Research Foundation Seminar, University of Auckland, August 1985, "Part II and clause 26 of the Draft New Zealand Bill of Rights" Chief Judge ETJ Durie at page 175; PG McHugh "Aboriginal Title in New Zealand Courts" [1984] Canterbury Law Review page 235; PG McHugh "The Legal Status of Maori Fishing Rights in Tidal Waters" [1984] VUWLR, 247; PG McHugh "Aboriginal Title Returns to the New Zealand Courts" [1987] NZLJ, 39; Treasury Paper, Government Management Volume 1 Chapter 5 "Implications of the Treaty of Waitangi" page 322. See also the decision of RV Symonds (1847) (1840- 1932) NZPCC 387, 390 for early acceptance of the doctrine and reference to the decision in the Law Commission Reports on Fisheries at pages 114 to 115; Comments on RV Symonds in Te Weehi (supra) page 687.

undoubtedly gain an even greater position if sections 153 to 157 of the Maori Affairs Act 1953 are repealed as proposed in the Bill currently before parliament.[40]

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[40] Law Commission Report on Fisheries pages 56 to 57:
"In respect of land where Maori customary title has been ascertained and extinguished the Common law has admittedly been superseded by statute. But in other cases it remains applicable except that, <u>because of sections 153-157 of the Maori Affairs Act 1953, it cannot be invoked against the Crown in respect of land.</u> In other words Maori property rights continued to exist unless and until legislation took them away".
(emphasis added)

C. There are prospects for change from the principle that the Treaty must be incorporated

In view of the factors discussed above which indicate a departure from a strict interpretation of the principle I consider that in an appropriate case a court may find that Te Heuheu (supra) is no longer relevant/sustainable. Factors arguably in support of such a view would include the following:

(i) the Court of Appeal in the New Zealand Maori Council (supra) case was considering a situation where the Treaty was specifically incorporated and therefore Te Heuheu (supra) did not have to come into strong questioning. Somers J acknowledged that there were circumstances where the Crown was under an obligation to have regard to the Treaty although it was not incorporated and Cooke P indicated that he considered an injustice could be done by the rigid application of the Te Heuheu principle. It seems that the judges would not uphold the principle in a future case if an injustice was likely.[41]

The notion of the Courts being obliged as a matter of fairness to have regard to the Treaty was taken a step further in the recent District Court decision of MAF v Hakaria and Scott (supra). In that case Inglis J went as far as suggesting that it was now inappropriate to follow Te Heuheu (supra):

"It is possible that cases such as Waipapakura .... Keepa ... reflected the mood of earlier times, as did the decision of the Privy Council in Te Heuheu ..... In instances where Parliament has either shut the door against Treaty rights or has at least not opened it ..... there may be some chafing against the fetters of

41 pages 691-692

the past precedent, evolved when the partnership was seen differently by many ...."[42]

(ii) it has already been argued by one commentator (A Frame (1984) 14 VUWLR 228) that a review coupling the Kauwaeranga judgment (supra) and Nireaha Tamaki (supra), which was critical of Prendergast CJ's approach in Wi Parata (supra), decisions may be able to "put an end to the Wi Parata dead end" which in turn influenced the decision in Te Heuheu (supra). This view is consistent with that of Inglis J in MAF v Hakaria and Scott[43] (supra)

(iii) as discussed previously the courts have been prepared to use the Treaty as an aid to statutory interpretation where language in legislation is general and in the case of Huakina (supra) to infer a reference to the Treaty when there was no reference to the Treaty or Maori values generally.

(iv) the principle referred to in Te Heuheu (supra) is no longer sustainable given the developments which have occurred in the area of human rights generally and indigenous peoples customary rights specifically. It would seem to be inconsistent with those developments to continue to accept a principle which in effect states that the fact that an agreement between the Crown and the indigenous people/subsumed people is not subsequently honoured by the agreement being incorporated into municipal law is of no legal relevance. Indications that the principle is no longer

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[42] page 3

[43] This view would also seem to be consistent with that of Sir Kenneth Keith's referred to in Royal Commission Volume III Part 1 page 98 i.e., "in an extreme case use the Treaty as a basic limit on legislative power. (Keith) 1988:21 FM Brookfield" The New Zealand Constitution "in "Waitangi, Maori and Pakeha Perspectives on the Treaty of Waitangi" (edited by IH Kawharu) page 10 does not agree with this view.

acceptable are seen from the following:

- Cooke P in New Zealand Maori Council was prepared to accept that the Treaty "should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms."[44]

- there is an international view that "indigenous minorities are entitled to rights exceeding those of non indigenous cultural minorities."[45]

- the doctrine of aboriginal title has gained renewed preeminence.

- Changed social and political circumstances have made the Treaty a part of New Zealand's social fabric. As discussed by Chilwell J in Huakina (supra) one of the grounds for the Court of Appeal refusing to follow a House of Lords decision in Fletcher Timber Ltd v Attorney General [1984] 1NZLR 290 (concerning the extent of public interest immunity) was that there was a contemporary movement towards open Government in New Zealand.[46]

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[44] page 656

[45] "A Bill of Rights for New Zealand", Legal Research Foundation Seminar, University of Auckland, August 1985, "Part II and Clause 26 of the Draft New Zealand Bill of Rights" Chief Judge ETJ Durie at page 175.
As discussed in Huakina (supra), at page 215, international instruments, whether they are conventions, covenants, declarations or treaties may be used as aids to statutory interpretation.

[46] page 215

(v) the principle of partnership was adopted by the Court of Appeal in the New Zealand Maori Council case, as being the preeminent Treaty principle. A consequence of adopting such a principle means that the Treaty must be seen as a contract and consequently the principles applying to partnerships, as opposed to Treaties generally, are relevant.[47] RP Boast explained the development in the following way in a recent article:

> "The Court of Appeal may have been quite deliberately characterising the Treaty relationship in the way it did at least not to foreclose subsequent development in the direction of developing remedies for those situations where the Treaty is not referred to in a statute. A partnership which contains no remedy for breaches of the obligations it entails might be thought to be a rather pointless relationship...."[48]

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[47] RP Boast "New Zealand Maori Council" [1987] NZLJ at 392.

[48] Ibid. At page 243 Boast says "A consequence [of defining the relationship as one of partnership] is that the relationships between the parties are in a sense fiduciary, as was submitted by counsel for the Applicants relying on the Canadian decisions of Guerin v The Queen (1984) 13DLR (4th) 321, and Kruger v The Queen (1985) 17 DLR 591."

IV IRRESPECTIVE OF WHETHER THE TREATY HAS TO BE INCORPORATED IT IS AN IMPORTANT PART OF PRESENT, AND UNDOUBTEDLY FUTURE, PUBLIC LAW

Even if the principle of Te Heuheu (supra) was applied strictly and there was no prospect of it being further reduced in importance it appears that the Treaty would still retain a relatively strong position in New Zealand's Public Law given that it is already referred to in a number of statutes, (via reference to its principles or Maori values) has been the subject of ongoing Waitangi Tribunal and Court cases, and is well on the way to being entrenched as being of fundamental constitutional importance in the administrative psyche[49] (It is of course acknowledged that administrative commitment without political will is not sufficient protection but it should still be regarded as being a significant development).

A. References to the Treaty in statutes

Statutes can be categorised according to whether they make direct reference to the principles as a whole, to the principles in part or refer to Maori values generally.

(i) Statutes referring to the principles of the Treaty generally

Statutes referring to the principles of the Treaty include the following:

- The Treaty of Waitangi Act 1975 (long title and recitals):

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[49] While it is arguable that it is not the Treaty but rather its principles that are invoked it has generally been accepted that the two are synonymous e.g., The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989 page 21 (Durie) "..it is not necessary for any Act to recite the Treaty in order to promote its objects. It may be sufficient for an Act to simply provide for Maori views."

- "An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty"
- "Whereas on the 6th day of February 1840 a Treaty was entered into at Waitangi between her late Majesty Queen Victoria and the Maori people of New Zealand. And whereas the text of the Treaty in the English language differs from the text of the Treaty in the Maori language: And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with these principles."[50]

- The Conservation Act 1986 (section 4) :

  "S.4 Act to give effect to the principles of the Treaty of Waitangi."

- The Environment Act 1986 (Long Title refers to the principles while section 17(c) refers to general matters):

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50 See also The Treaty of Waitangi (State Enterprises Act) 1988 and the Crown Forest Assets Act 1989 which are aimed at enabling assets to be sold while at the same time protecting claims under the Treaty of Waitangi Act 1975; Waitangi Day Act 1976.

. "An Act to -

(a) Provide for the establishment of the office of Parliamentary Commissioner for the Environment.

(b) Provide for the establishment of the Ministry for the Environment.

(c) Ensure that, in the management of natural and physical resources, full and balanced account is taken of -

(i) The intrinsic values of ecosystems; and

(ii) All values which are placed by individuals and groups on the quality of the environment.

(iii) The principles of the Treaty of Waitangi; and

(iv) The sustaniability of natural and physical resources; and

(v) The needs of future generations."

(emphasis added)

. "S.17 Matters to which regard to be given - In the performance of the Commissioner's functions the Commissioner, where the Commissioner considers it appropriate, shall

have regard, in particular but not exclusively, to -

(a) .....

(b) .....

(c) Any land, water, sites, fishing grounds, or physical or cultural resources, or interests associated with such the heritage of the and which contribute to their well being."

(emphasis added)

- The State Owned Enterprises Act 1988 (S.9, at issue in New Zealand Maori Council (supra)):

"S.9 Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."

While there have not been any cases on the meaning of the references to the principles in the Conservation Act or the Environment Act to date it seems inevitable that they will provide fertile ground for legal argument e.g., While RP Boast has expressed the view that the obligations imposed on the Crown by the Conservation and Environment Acts are even stronger than in the State Owned Enterprises Act - "whereas S9 requires the Crown not to act in a manner contrary to the principles of the Treaty, the obligation required by these two statutes is to promote Treaty principles."[51]

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51 RP Boast "New Zealand Maori Council" [1987] NZLJ at 243.

- S Kenderdine considers that the references are of less force than the references to the principles in section 9 of the State Owned Enterprises Act.[52]

(ii) Statutes and Bills referring to the "principles of the Treaty" or "the Treaty" in part

The Maori Language Act 1987 refers to the Treaty in its recitals as follows:

> "An Act to declare the Maori language to be an official language of New Zealand, to confer the right to speak Maori in certain legal proceedings, and to establish Te Komihana Mo Te Reo Maori and define its functions and powers. Whereas in the Treaty of Waitangi the Crown confirmed and guaranteed to the Maori people, among other things, all their taonga : And whereas the Maori language is one such taonga ..."

The recital to the Maori Affairs Bill, which was referred to in New Zealand Maori Council by Bisson J at page 716 as giving some indication of the Government's view of the principles of the Treaty, appears to be an attempt to restrict the scope of the principles by defining what is meant by the Treaty:

> "Whereas the Treaty of Waitangi symbolises the special relationship between Maori people and the Crown : And whereas it is desirable that the spirit of the exchange of sovereignty for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed : And whereas rangatiratanga in the context of the Act means the custody and care of matters significant to the cultural identity of Maori people of New Zealand in trust

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52 The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989 page 49 (Kenderdine).

for future generations : And whereas, in particular, it is desirable to recognise the special relationship of Maori people to their land and for that reason to promote the retention of that land in the hands of the owners' descent groups, and to facilitate the occupation and utilisation of that land for the benefit of the owners' descent groups."

The recital to the Maori Fisheries Bill 1988 states,. interalia, that the Act is:

"(a) To recognise, in relation to New Zealand fisheries, the principles of the Treaty of Waitangi; and

(b) To make better provision for the conservation and management of New Zealand fisheries[53]

(iii) Statutes and Bills referring to Maori values generally

There are a number of acts, in addition to section 3(1)(g) of the Town and Country Planning Act 1977 (referred to in Huakina (supra)), section 88(2) of the Fisheries Act 1983 (referred to in Te Weehi (supra) and section 17(c) of the Environment Act 1986 referred to above, which make general reference to Maori values e.g.,

- Section 5(2)(a) of the Law Commission Act 1985 requires the Law Commission to take into account Te ao Maori, or the Maori dimension i.e.,

"5. Functions - (1) The principal functions of the Commission are -

(a) .....

[53] see also paragraphs (e) and (l) of the recitals.

(d) .....

(2) In making its recommendations, the Commission -

(a) shall take into account Te ao Maori (The Maori dimension) and should also give consideration to the multicultural character of New Zealand society; and

(b) ....."[54]

- Area Health Boards Amendment Act 1988 requires Area Health Boards to consider the aims and aspirations of the Maori

- Social Welfare Act 1971, now amended, requires the Social Welfare Commission to consult with iwi, at least annually, at a national hui.

- Section 56 of the State Sector Act 1988 requires Chief Executives of Departments to operate a personnel policy which, interalia, requires:

"(a) .....

(d) Recognition of -

(i) The aims and aspirations of the Maori people; and

(ii) The employment requirements of the Maori people; and

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54 The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989, page 21(Durie).

(iii) The need for greater involvement of the Maori people in the Public Service; and ......"

- Clauses 55A and 55B of the Education Bill 1989 require that Maori values be taken into account in school charters i.e.,

"55A. Views and concerns of Maori communities to be considered-(1) Before preparing a proposed charter for a school, or a proposed amendment to a school's charter, the Board shall take all reasonable steps to discover and consider the views and concerns of Maori communities living in the geographical area the school serves.

(2) The Board of a correspondence school shall comply with subsection (1) of this section by consulting the Minister of Maori Affairs.

55B. Charters deemed to contain certain aims-Every charter and proposed charter is deemed to contain-
(a) The aim of developing for the school concerned policies and practices that reflect New Zealand's cultural diversity, and the unique position of Maori culture; and

(b) The aim of taking all reasonable steps to ensure that instruction in tikanga Maori (Maori culture) and te reo Maori (the Maori language) are provided for full time students whose parents ask for it."

It also seems likely that the current review of Resource Use laws will make provision for Maori interests.[55]

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55 RP Boast "New Zealand Maori Council" [1987] NZLJ at 243; The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989 page 21 (Durie). Given that Mr G Palmer is Minister for the Environment and that he has "backtracked" on Treaty issues provision for Maori interests maybe more limited however; Dominion Newspaper article July 8 1989 "Palmer Backs off on Treaty Importance".

B. Case law arising out of references to the principles of the Treaty in statutes and interpretations of statutes where there is no specific reference.

There has been a proliferation of case law on the Treaty which makes it difficult to argue that it does not already have a significant place in Public Law

The significance of the Treaty principles can be seen in so far as:

(i) the scope for recognising Treaty principles has resulted in some uncertainty which will inevitably result in further litigation.

(ii) the principle of partnership is of paramount importance.

(iii) reference to the "principles", rather than the Treaty itself has broadened the bases for redress.

(i) The scope for recognising Treaty principles has resulted in some uncertainty.

The Courts and Tribunal agree that the Treaty is a living document and should be interpreted as such, although that needs to be balanced against the rule that the law should be clear, accessible and accurate.[56] However developments to date show a lack of clarity/uncertainty as to what constitute principles and consequently what will be held to constitute principles in the future.

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[56] Environmental Management and the Principles of the Treaty of Waitangi, Parliamentary Commissioner for the Environment, November 1988 page 17 referred to in C Mander's seminar paper July 1989; The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989 page 28 (Wilson) refers to Professor Orr's discussion of principles and conclusion that it is not possible to list a comprehensive set of principles. See also Royal Commission Volume III Part I pp 104, 227 and 233.

This uncertainty is seen in the difficulty encountered in summarising the principles into appropriate title categorises and in representing the content of these principles under each title. The divergences in terminology and content are seen in the variations between statements as to what constitute "the principles" for example:

- the differences between what the Maori Council and the Crown argued were the principles in New Zealand Maori Council (supra), and the divergence between both of them and what the court finally determined were the relevant principles. (Copy of relevant summary from Environmental Management and the Principles of the Treaty of Waitangi, Parliamentary Commissioner for the Environment November 1988 at Appendix A)

- the Parliamentary Commissioner for the Environment's summary of the principles as discerned from the Waitangi Tribunal Reports. The Royal Commission on Social Policy and the Court of Appeal. (Copy at Appendix B)

- the principles of the Treaty as expressed in the Muriwhenua Report. (Copy at Appendix C)

- the principles by which the Government has recently said it will act. (Copy at Appendix D)

- the principles identified by Professor Orr (Copy at Appendix E)[57]

- the principles identified by S Kenderdine at Treaty of Waitangi, New Zealand Law Society Seminar, April 1989[58] (Copy at Appendix F)

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57 Ibid, 28-29.

58 pp 50-53.

(ii) The scope and importance of the principle of partnership

As indicated by the Court of Appeal judgments in New Zealand Maori Council (supra), and the degree to which the word "partnership" has been adopted into "Treaty language" subsequently, the concept of partnership is probably the most important of all Treaty principles.

While the "partnership" cannot be regarded as a "partnership" in the strict sense of the word it provides a basis for extending obligations of both parties in the future, although most notably the Crown's obligations as Trustee/Partner and may provide the basis for developing remedies for situations where the Treaty is not referred to in statutes.[59] While the Court of Appeal specifically stated that the principle of partnership did not create a duty to consult a duty to consult has subsequently been held to exist - the Responsiveness Unit of the State Services Commission in a booklet titled "Partnership Dialogue, A Maori consultation process" implies that consultation was adopted as a partnership principle in the Court of Appeal decision. (Copy of relevant extract at Appendix G)[60] How long will it be before consultation is seen by the Waitangi Tribunal and the Courts as being part of the concept

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59 RP Boast "New Zealand Maori Council" [1987] NZLJ at 243 and 245 - emphasises partnership analogy cannot be insisted on too literally, it seems to resemble a "trust in the higher sense".

60 Responsiveness Unit also publishes a booklet called "Contacts for Consultation"; consistent theme of Maori Hui is that partnership means sharing power and control over New Zealand's progress. (Royal Commission Volume III Part 1 page 111).

of partnership? How long will it be before a literal interpretation is given to the term partnership and as suggested by RP Boast remedies for breach of trust and/or partnership are available?[61]

In view of the scope for the development of obligations on the Crown, and the limited analysis which has been applied by the Waitangi Tribunal and the Court of Appeal in concluding that there is a "partnership" relationship there seem to be grounds for future court action being taken to test the basis for the concept and/or the justification for it extending obligations.[62]

The nature of the concept of partnership and the limited analysis and basis for adopting the term are seen from the following extracts from the Court of Appeal judgments in New Zealand Maori Council (supra) and Te Reo Maori and Manukau Waitangi Reports which the Court of Appeal judges relied on in reaching their conclusions:

. Cooke P at page 664

"The Treaty signified a partnership between races, and it is in this concept that the answer

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61 Note though that Treasury expressed a more restrictive view of the concept of partnership in Treasury Paper - Government Management Volume 1 Chapter 5 "Implications of the Treaty of Waitangi" at page 326: "The point we wish to make here is that, in our view the principle of partnership can indeed be deduced from the Treaty, but its application cannot be divorced from the particular provisions of the Treaty and declared to be binding on a universal basis. The Crown is perfectly free to extend the concept of a special and unique partnership with the Maori people into areas not covered by the Treaty if it wishes but we do not consider that it is legally or morally bound to do so in terms of the Treaty". 3 principles of partnership were referred to at pages 323-324.

62 There is an indication from the Royal Commission on Social Policy Report that Maori accepted the Treaty as a partnership long before the Waitangi Tribunal and the Court of Appeal "coined the phrase" e.g., Volume III Part 1 pp 103 and 111; The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989 page 18 (Durie).

to the present case has to be found. For more than a century and a quarter after the Treaty, integration, amalgamation of the races, the assimilation of Maori to the Pakeha, was the goal which in the main successive Governments tended to pursue. ... Now the emphasis is much more on the need to preserve Maoritanga, Maori land and communal life, a distinctive Maori identity... the Government, as in effect one of the Treaty partners, cannot fail to give weight to the "philosophies and urgings" currently and, it seems, increasingly prevailing. In the context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State Owned Enterprises Act are not used inconsistently with the principles of the Treaty...the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties... the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. ... the duty to act reasonably and in utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers and reasonable co-operation."

. Casey J at pages 702-703:

> "From the attitude of the Colonial Office and the transactions between its representatives and the Maori Chiefs, and from the terms of the Treaty itself, it is not difficult to infer the start in 1840 of something in the nature of a partnership between the Crown and the Maori people. The latter ceded rights of government in exchange for guarantees of possession and control of their lands and precious possessions for as long as they wanted to retain them. In this context Captain Hobson's famous announcement "Now we are one people" points to this concept rather than to the notion that with a stroke of the pen both races had become assimilated. The Waitangi Tribunal has discussed those principles of the Treaty it saw as relevant... this concept of an ongoing partnership can be detected in the Manukau claim... and in the Te Atiawa claim.
>
> At page 61 of that decision the Treaty was described as "the foundation for a developing social contract...." the Treaty obliges the Crown not only to recognize the Maori interests specified in it, but actively to protect them.
>
> I concur in thinking that this is a principle to be rightly drawn from a consideration of the Treaty provisions in the light of the surrounding circumstances ....
>
> Implicit in that relationship is the expectation of good faith by each side in their dealings with the other and in the way that the

Crown exercises the rights of government ceded to it. To say this is to do no more than assert the maintenance of the "honour of the Crown" underlying all its Treaty relationships."

. Manukau Report (19/7/85; page 94)

"We conclude that the Treaty did promise the tribes an interest in the harbour. That interest is certainly something more than that of a minority section of the general public, more than just a particular interest in particular fishing grounds, but less than that of exclusive ownership.

It is in the nature of an interest in partnership the precise terms of which have yet to be worked out. In the meantime any legal owner should hold only as trustee for the partnership and acknowledge particular fiduciary responsibilities to the local tribes, and the general public, as distinct entities."

. Te Reo Maori Report (29/4/86; page 27):

"We have considered this aspect of the case having regard to the particular words in the Treaty but in so doing we have not been unmindful of the broader social purpose of the contract without which no discussion of the Treaty can be complete. In that broader perspective, and as we have said in earlier findings, the Treaty was directed to ensuring a place for two peoples in this country. We question whether the principles and broad objectives of the Treaty can ever be achieved

> if there is not a recognised place for the language of one of the partners of the Treaty. In the Maori perspective the place of the language in the life of the nation is indicative of the place of the people."

(iii) Reference to the "principles", rather than the Treaty itself has broadened the bases for redress.

While there have been allegations that the focusing on "the principles" is an attempt to diminish the Crown's Treaty obligations, and that the phrase "in accordance with and to give effect to the Treaty of Waitangi" is an appropriate substitute I consider that the principles have enabled the Courts and Tribunal to grant remedies that would not be available if matters were frozen at 1840. Maori would not, for example have been regarded as being entitled to deep sea fisheries as was found in the Muriwhenua report. The Tribunal would not have been able to consider claims relating to radio and television broadcasting as it was able to in the Te Reo Maori claim.[63]

This broadening of scope has inevitably meant increased bases for redress and a more prominent place for the Treaty in Public Law.

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63 Muriwhenua Report page 212; Royal Commission Volume III Part 1 pp 105-106; Environmental Management and the Principles of the Treaty of Waitangi, Parliamentary Commission for the Environment page 12.

C. Administrative practices have developed which ensure the Treaty continues to be a part of the social and legal fabric.

The following administrative development should assist in ensuring that the Treaty continues to be a part/increasing part of municipal law so long as there is a positive political will:

(i) Cabinet decision of 23 June 1986 directing that all future legislation referred to Cabinet at policy approval stage should draw attention to any implications for recognition of the principles of the Treaty; that Departments should consult with appropriate Maori people on matters affecting the application of the Treaty, and the financial and resource implications of recognising the Treaty should be assessed whenever possible in future reports.[64]

(ii) The government has issued responsiveness guidelines, as part of its partnership response, requiring Departments to focus on five areas:

[1] Policy making

Policy proposals will be reviewed by the Ministry of Maori Policy.

[2] Corporate Planning

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[64] CO (86)10; Royal Commission Volume III part 1 pages 112 and 113 refers to Cabinet Directive having enhanced position of Treaty.

Treaty principles to be incorporated into Corporate Plans. Maori input required.[65]

[3] Service Delivery

Agencies to seek opportunities for working with iwi for contracts and agreements.

[4] Personnel Policy

The recruitment, training and promotion of Maori people within the State sector to be improved.[66]

[5] Accountability

Ministers will require chief executives to implement the responsiveness measures.

(iii) The Treaty is automatically being included as a consideration when bodies are established by government for example, the Royal Commission on Social Policy's warrant referred to the Treaty.[67]

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[65] see for example pages 7 and 17 of the Inland Revenue Department's Corporate Plan (1 April 1989 - 30 June 1990) where reference is made to one of the Department's objectives being to recognise and help meet the needs of the Tangata Whenua; pages 1 and 7 of the State Services Commission Corporate Plan for the 1988/1989 financial year. One of the stated missions of the State Services Commission is to make State Services responsive to the needs of a culturally diverse community and there are both English and Maori texts. Both Departments have adopted Maori names.

[66] One of the steps taken to improve the recruitment of Maori people is to ensure that whanau can be present and interview panels have Maori representation in appropriate circumstances

[67] The Commission was instructed to consider the social and economic foundations of New Zealand, which was said to include the principles of the Treaty.

(iv) a number of units have been set up in Government organisations to contribute to Treaty issues[68] for example,

- Responsiveness Unit Sate Services Commission
- Treaty of Waitangi Unit Justice Department[69]
- Treaty of Waitangi Unit Crown Law Office
- Maori Secretariat Ministry for the Environment
- Maori Unit in Human Rights Commission
- Ministry of Women's Affairs has equal sharing of power and resources.

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[68] Royal Commission Volume III part 1 page 113 refers to other examples.

[69] The "Department of Justice Resource Management Review (Strategos Consulting Limited), July 1989 has acknowledged the need for the unit to have a high profile in any Justice Organisation - see pages 5 to 8 of the Report. One of the conclusions in that report, however, is that "It is essential to build upon existing efforts with a conscious recognition of what is and is not realistic."

V. HOW DID THE TREATY COME TO HAVE ITS PRESENT POSITION?

The answer to the question - How did the Treaty come to have its present position of relative preeminence in Public Law? - must, to some degree at least, depend on one's view of how change occurs generally and what causes events in history, and one's experiences in and perceptions of Society.[70] In addition the question must raise general questions about the degree to which the law influences society or vice versa and the role and effect of individuals within the legal system.

Undoubtedly there are many other factors which could be regarded as being relevant to any consideration of this matter or to the issue of the reasons for the generally high profile of the Treaty. Consequently, in a paper of this nature, it is only possible to proffer suggestions rather than carry out in depth analysis.

What does seem clear is that the Treaty's relative preeminence in Public Law must be due to a multitude of factors rather than to one or a few prime considerations and the Treaty's position reflects the fact that the "right combination of factors" has occurred. To a degree there has been a "snowballing" effect, the more the Treaty is relied on the more people consider it can/should be relied on and the ,more people seek to refer to it. Claudia Oranges's statement that "there has been a rediscovery of the Treaty by Pakeha New Zealanders and a more articulate assertion of their Treaty rights by Maori New Zealand"[71] provides some but not all of the answer.

The factors which, in combination, I would see as having contributed to the Treaty's present position include the following:

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70 see EH Carr, What is History?, London, 1961 for general discussion.

71 Claudia Orange, The Treaty of Waitangi - A Historical Overview, Sector Volume II No 4 page 2.

(i) generally, Maori have always regarded the Treaty as a constitutional document as well as regarding it as a covenant or scared document (Kawenata).[72] At times when the Courts declined to recognise the Treaty and it was given limited or no recognition in Statutes Maori persistently pleaded the Treaty in the Courts and in petitions to parliament and the Queen. As stated in the Report of the Royal Commission on Social Policy:

> "Despite the Maori consensus that the Treaty has legal status and is a constitutional document, its standing in the existing legal system is controversial for many Pakeha.
>
> Maori people have persistently pleaded the Treaty in the Courts but with limited success .... The most notable Court cases are dated from 1847, then 1877, 1881, 1902, 1912, 1914, 1956, 1965, 1977, and 1987. The Courts adopted the conventional approach to treaties, particularly the general rule that a treaty must be incorporated by legislation

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[72] Obviously there have been , and continue to be, divergences within Maoridom as to the status of the Treaty. The view that "The Treaty is a Fraud", which was proclaimed by protesters in the 1970's, seems to have disappeared however see for example "A Bill of Rights for New Zealand", Legal Research Foundation Seminar, University of Auckland, August 1985, "Part II and clause 26 of the Draft New Zealand Bill of Rights" Chief Judge ETJ Durie at page 190; The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989 page 1 (PB Temm QC).

in municipal law. It is only in recent times that legislation has provided greater access to the courts and has enabled Maori people to plead the Treaty...."[73]

(ii) the relatively positive approach to the issue taken by Labour Governments, albeit at times in response to increasing pressure from Maori for greater recognition of the Treaty of Waitangi, and their grievances from its non implementation, and the recent indications of some "backtracking".[74] Examples of Labour Governments support are seen in legislative, as well as administrative matters.

The Labour Government was responsible for enacting the Treaty of Waitangi Act 1975, and subsequent amendments, which has provided a mechanism for Treaty grievances to be addressed.[75] Similarly all the other

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73 Royal Commission Volume III part I page 91. See also page 97 of the Royal Commission Report where reference is made to the kotahitanga movement presenting tribal and inter tribal grievances to the government in the latter part of the nineteenth century with the aim of protecting Maori rights under the Treaty of Waitangi; Muriwhenua Report 1988 Appendix 8 "Maori Fishing Petitions", as referred to the Native Affairs Committee.

74 ETJ Durie "The Waitangi Tribunal : Its relationship with the Judicial System" [1986] NZLJ 235, referred to in CL Mander Indigenous Peoples and the Law Seminar paper "The Waitangi Tribunal".

75 Amendments to the Act in 1985 greatly extended the Tribunal's powers of review back to 1840, and increased the number of members to 6, of whom at least 4 were to be Maori. Amendments to the Act in 1988 increased the membership of the Tribunal to the Chairman and 16 members and deleted the racial qualification.

legislation previously referred to which refers to the principles of the Treaty in some way, or Maori values, has been enacted by a Labour government.[76]

In addition the Labour Government has approved increased research resources and funding to the Waitangi Tribunal and supported and funded the establishment of units throughout the State sector to deal with Treaty related matters.

(iii) The Waitangi Tribunal itself, and its membership under Chief Judge Durie, have enabled the Treaty to attain a relatively high profile and provide the hope, if not the reality, of grievances being redressed.[77]

In addition to making recommendations regarding specific claims the Tribunal has made submissions to Ministers and the government about Treaty related matters in circumstances which are not necessarily directly within its jurisdiction. The most notable occasion on which this has occurred is probably in relation to the State Owned

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[76] e.g., Waitangi Day Act 1976, Conservation Act 1986, Environment Act 1986, State Owned Enterprises Act 1988, Maori Language Act 1987, Law Commission Act 1985 and the State Sector Act 1988.

[77] The parliamentary Commissioner for the Environment, in "Environmental Management and the Principles of the Treaty of Waitangi", Parliamentary Commissioner for the Environment, November 1988 maintains that very few of the Waitangi Tribunal's recommendations have in fact been followed. See also The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989 pp 23-29 (WM Wilson); MPK Sorenson "Towards a Radical Reinterpretation of New Zealand History : The role of the Waitangi Tribunal" Waitangi : Maori and Pakeha Perspectives of the Treaty of Waitangi 91989) Edit by IH Kawharu, 161.

> Enterprises Bill, although there were other occasions on which the Tribunal considered that it was appropriate to act when it was considering the Muriwhenua fisheries claim:
>
> "This began as a land/fisheries claim in 1985. The Tribunal made an interim report on 8.12.1986 on the State Owned Enterprises Bill as being prejudicial to the principles of the Treaty of Waitangi. This resulted in the Bill being amended to include section 9.... Two days later another interim report was issued about the allocation of ITQ under the Fisheries Act 1986 being prejudicial to the Muriwhenua claim. The Tribunal warned of the need for compensation if the allocation of ITQ went ahead. The Minister declined to act. Finally a memorandum in September 1987 prompted the Crown to negotiate when the Tribunal made a finding that the Crown must bargain for any public right to commercial exploitation of the fisheries. ...[78]

The Tribunal has also provided the basis for the ongoing development of a Treaty jurisprudence. The Treaty of Waitangi Act 1975, under which the Waitangi Tribunal is constituted gives the Tribunal the flexibility which is necessary to enable

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78 The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989 page 61 (Kenderdine) see also other references to the Waitangi Tribunal being used as a form of injunctive relief in the Kaituna and Te Atiawa claims.

it to develop practical solutions/recommendations which are acceptable to the government, the claimants and the courts. The Court of Appeal in the New Zealand Maori Council (supra) case, for example, referred approvingly to the findings of the Waitangi Tribunal and implied that the recommendations of the Tribunal should generally be followed.[79]

The fact that the legislation enables the Tribunal to adopt an inquisitorial[80], rather than an adverserial role, and to

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[79] At page 661 (Cooke P) referred to the fact that the opinions of the Waitangi Tribunal should be given weight although they were not binding on the Court; at page 664 (Cooke P) stated that it would only be in very special circumstances that the Crown could fulfil its duty to act as a reasonable Treaty partner and decline to follow a Tribunal recommendation. But see also page 689 (Somers J), Ngai Tahu Maori Trust Board and Others v Attorney General and Others CP 553, 559, 610 and 614/87, 19 May 1989 - The High Court referred to the fact it was not bound by the Waitangi Tribunal's findings, and consequently to the limitations of that body's findings although it also indicated that some regard should be had to its recommendations.

[80] Treaty of Waitangi Act 1975, Second Schedule Clause 6 provides the Tribunal with wide powers to admit evidence, whether it would be legally admissible or not; clause 8 provides that the Tribunal is a Commission of Inquiry; the Tribunal often engages its own researchers to provide the factual basis for considering a claim.

operate as a bicultural body[81] has undoubtedly assisted in the Tribunal attaining a position of legitimacy in the eyes of the government, the claimants and the Courts, if not in the eyes of the Public at large. The Waitangi Tribunal has become the acknowledged "focal point" for Treaty matters and this is recognised by the fact that it has been given some powers of final determination under the Treaty of Waitangi State Owned Enterprises Act 1988 and the Crown Forests Assets Act 1989.[82]

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[81] Treaty of Waitangi Act 1975, Second Schedule clause 5(9) provides that "Except as expressly provided in this Act, the Tribunal may regulate its procedure in such manner as it thinks fit, and in doing so may have regard to and adopt such aspects of te kawa o te marae as the Tribunal thinks appropriate in the particular case, but shall not deny any person the right to speak during the proceedings of the Tribunal on the ground of that person's sex."

The adoption of Marae protocol necessarily requires changes from Court room procedure.

[82] The Treaty of Waitangi State Owned Enterprises Act 1988 establishes a procedure to ensure that no future claimants to the Tribunal are prejudiced by the transfer of Crown land to State Owned Enterprises i.e., any land transferred has to have a memorial registered on the certificate of title stating that it would return to the Crown if the Waitangi Tribunal recommended it should and no contrary agreement could be reached; section 10 provides that if no agreement can be reached with the Crown in relation to the Tribunal's recommendation for its return the Tribunal's recommendation will be binding.

The provisions in the Crown Forests Assets Act 1989 relating to Waitangi Tribunal claims are based on the provisions in the Treaty of Waitangi State Owned Enterprises Act 1988.

The Act provides that where a claim is made to the Waitangi Tribunal relating to Crown forest land that is subject to a Crown forest licence and the Tribunal recommends that the land should be returned to Maori ownership the Crown must -

(i) return the land to Maori ownership but subject to the Crown Forestry licence; and

(ii) pay compensation to Maori in accordance with the provisions of the first schedule.

(iv) Maori have made more ardent and frequent claims for the recognition of the Treaty before the Waitangi Tribunal, the Courts and the Government. The determined nature of the Maori claimants can be seen for example in the watershed Atiawa Waitangi Tribunal claim, the New Zealand Maori Council case (supra) The Love Case (supra), the Ngaitahu case (supra), the many interlocutory proceedings of the Fisheries claim and the ongoing Tainui case.

It is arguable, to some degree at least, that declining economic circumstances and growing unemployment has provided an added impetus for claims to be pursued.

(v) New Zealanders' attitudes to Treaty issues have undoubtedly been influenced by international developments involving indigenous peoples and human rights generally and New Zealands' emerging role in the international community. The growth of groups such as HART and CARE, the tensions and awareness arising from Springbok tours and the diversion of anti racism groups resources into "home issues" increased the Treaty profile.

(vi) the proliferation of written material about the Treaty in relatively recent times has in turn created interest and further written work.

The work of people such as A. Ward, "A Show of Justice", C. Orange, PG McHugh, C Orange IH Kawharu (to name only a few) provides a significant base for others to build on.

(vii) the willingness of the Courts, including the Court of Appeal, to have regard to the social developments that have and are taking place in New Zealand and internationally. This awareness of the Courts is reflected particularly in the New Zealand Maori Council case (supra) and Huakina (supra) decision. It goes without saying that individual judges have played an important role in this development process, just as judges such as Prendergast J had some responsibility for removing the Treaty to a state of oblivion.

VI IS IT NECESSARY FOR THE TREATY TO BE PART OF MUNICIPAL LAW, VIA EITHER INDIVIDUAL STATUTE OR A BILL OF RIGHTS, FOR IT TO BE EFFECTIVE?

A. Arguments against needing to incorporate the Treaty.

As discussed above it can be argued that the need to incorporate the Treaty has diminished given the Courts' and Tribunal's willingness to use the Treaty as an aid to interpretation and to recognise customary rights, the prospect of the Te Heuheu (supra) decision being challenged in the future and the possibility of alternative remedies being developed via the principle of partnership.

An additional argument against incorporating the Treaty itself would be that the incorporating of the Treaty, as opposed to the principles, would result in more restrictive interpretations being imposed than at present given that the "principles" allow a more liberal interpretation to be placed on the Treaty.

While both arguments are valid the Treaty's position is obviously more secure by being incorporated.[83] In addition it would undoubtedly be the principles rather than the Treaty that would continue to be incorporated and even if it were not the

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[83] Ibid, 97. Referred to New Zealand Maori Council Somers J at page 398 "Neither the provisions of the Treaty of Waitangi nor its principles are a matter of law, a restraint on the legislative supremacy of Parliament" as indicating a need for protection.

Courts do/would regard the Treaty and the principles as synonymous in any case. In the New Zealand Maori Council Case, for example, Somers J stated that "A breach of a Treaty provision must in my view be a breach of the principles of the Treaty....."[84]

B. Assuming that it is accepted that the Treaty/principles of the Treaty should be incorporated is it sufficient for it to be incorporated via individual statute or should it be entrenched in a Bill of Rights?

The consideration of the issue of whether the Treaty should be entrenched in a Bill of Rights is to some degree academic given that the Report of the Justice and Law Reform Committee on "a white paper on a Bill of Rights for New Zealand" has recommended that a Bill of Rights which is an ordinary statute (i.e., is not a supreme law and not entrenched) be adopted, and that it would not be appropriate to include the Treaty in such a Bill of Rights. (Copy of the relevant extract at Appendix H)

Assuming, however, that an entrenched Bill of Rights (requiring the support of 75 percent of the members of parliament or a majority at a referendum of electors for amendment) is still a possibility, and that the Treaty would be included in the way suggested in the White Paper, possible arguments for and

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84 page 693 see also Cooke P at page 663; Richardson J at page 672; The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989 page 19 (Durie) and at pages 48-53 (Kenderdine); Waitangi Tribunal in Motonui Report paragraph 10-1.

Clause 4(2) the Draft Bill of Rights provided that:

> (2) The Treaty of Waitangi shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent.

against such an entrenchment would include those set out below.[85]

(i) Reasons for entrenchment

. the incorporation of the Treaty via individual statute, rather than through a Bill of Rights, is necessarily a piecemeal approach which means that the Treaty does not have a proper place as the basis of the Constitution and, by implication at least, that its effectiveness is reduced.

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[85] Part II Clause 4 of the proposed Bill of Rights provided:

"4. The Treaty of Waitangi
(1) The rights of the Maori people under the Treaty of Waitangi are hereby recognised and affirmed.

(2) The Treaty of Waitangi shall be regarded as always speaking and shall be applied in circumstances as they arise so that effect may be given to its spirit and true intent.

(3) The Treaty of Waitangi means the Treaty as set out in English and Maori in the schedule to this Bill of Rights.

Part VI Clause 26 stated:

26 Reference to Waitangi Tribunal
where in any proceeding before any court, any question arises whether any enactment or rule of law, or any act or policy, is consistent with the Treaty of Waitangi, the court may on the application of any party to the proceeding or of its own motion refer that question to the Waitangi Tribunal for a report and opinion and the court shall have regard to that report and opinion". FM Brookefield "The New Zealand Constitution" in "Waitangi, Maori and Pakeha perspectives on the Treaty of Waitangi" page 17.

Professor FM Brookfield, for example, has argued that the Treaty should have been in the Constitution Act 1852[86]; similarly a recurrent theme at the Waitangi hui in 1985 was that the Treaty should not be incorporated into ordinary statute law but should be entrenched in constitutional law as the only, or at least the principal, basis of our constitution.[87]

. the entrenchment of the Treaty would mean Courts and Governments would be required to acknowledge it, they could not ignore the Treaty in the way that is presently possible and has occurred in the past. For example applicants to the Waitangi Tribunal would appear to have direct redress in the Courts by virtue of a Bill of Rights if recommendations of the Waitangi Tribunal were not adopted whereas at present no clear cause of action seems to exist.[88]

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86 FM Brookefield "The New Zealand Constitution" in "Waitangi, Maori and Pakeha perspectives on the Treaty of Waitangi" pages 15-16.

87 A Bill of Rights for New Zealand, a white paper, page 36.

88 Waitangi Tribunal recommendations have not been followed. While Cooke P in the New Zealand Maori Council case implied there was a requirement for the recommendations of the Tribunal to be followed, except in very special circumstances, if the Crown was to be a reasonable Treaty Partner that requirement has not been tested and it may only apply where reference is made to the principles of the Treaty in a specific statute anyway. (see page 664 of the decision).

For analysis of the way the Treaty has been forgotten in the past see "A Bill of Rights for" New Zealand, Legal Research Foundation Seminar, University of Auckland, August 1985, "Part II and clause 26 of the Draft New Zealand Bill of Rights "Chief Judge ETJ Durie at page 173.

Similarly it would not be open to the Executive to decline to have regard to the Treaty when enacting or amending legislation, as is the case at present. This is particularly important, if the Treaty is to retain a profile, given that the Government has shown signs recently of "backtracking" on the whole Treaty issue and the opposition does not appear to have any commitment to the Treaty.

. entrenchment of the Treaty would make it clear that the Crown wanted to give it full effect and make the Crown an honorable partner, whereas the Crown's intentions have been open to doubt in the past because of the absence of a clear and binding commitment by the Crown. The Royal Commission on Social Policy, for example, considered that entrenchment was necessary to bind the partners legally and to provide a direct source of rights and said that the cementing of the Treaty in this way would make it clear that the Crown wanted to give it full effect and make the Crown an honorable partner.[89]

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89 Royal Commission Volume III Part 1 page 98.

. while the doctrine of aboriginal title, which means that Maori have customary rights irrespective of the Treaty, has received some recent endorsement it has yet to be openly adopted by the Courts and cannot provide the same protection of rights that the Treaty can. Consequently it is essential that the Treaty be given the strongest protection possible.

(ii) Reasons against entrenchment

. the Treaty is "such a sacred document that toying with it by including it in such a thing as a Bill of Rights, might somehow make it profane" The Treaty has been described as an agreement, contract or compact or as an arrangement. But for many Maori it is a Covenant."[90] As stated by Chief Judge Durie in 1985:

> "The Treaty has been re-established as a sacred document so that nothing short of full recognition in unadulterated form can give satisfaction or restore honour".[91]

. a fear that the Crown's intentions are not honourable, that the intention of the Bill of Rights is not to honour the Treaty but rather just a further attempt to reduce Maori authority and power. There is a fear that the Bill is merely an attempt to confuse the issue of honouring the Treaty further.[92]

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90 The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989 page 18 (Durie); "A Bill of Rights for New Zealand", Legal Research Foundation Seminar, University of Auckland, August 1985 "Te Tiriti O Waitangi" Shane Jones 209 - 217.

91 "A Bill of Rights for New Zealand", Legal Research Foundation Seminar, University of Auckland, August 1985, "Part II and clause 26 of the Draft New Zealand Bill of Rights" page 190.

92 Ibid

. a fear that Part II of the Bill of Rights was a direct attempt to counteract the recent endorsements of the doctrine of aboriginal title, that it was aimed at reversing an inevitable verdict of history that indigenous minorities have particular rights, that native rights arise by virtue of the Common Law and do not depend on Treaties.[93]

. the view that the Treaty was already being given effect and consequently entrenchment in a Bill of Rights was not necessary; the view in effect, that the piecemeal approach to date had in fact been effective. For example, the Cabinet minute requiring Departments to have regard to the Treaty had meant that it was being included in an increasing number of individual statutes and the Waitangi Tribunal and the Courts were ensuring that Treaty issues were being effectively addressed.[94]

While it is acknowledged that there has been a growth of the references to the Treaty in individual statutes over recent years, and hence an increased profile for the Treaty, there is no guarantee that those references will continue to exist or increase in number in the future and consequently there is no assured protection for the Treaty in such a piecemeal approach.

Although entrenchment would not, in the absence of a provision excluding amendment, guarantee the Treaty's legal position it would at least prevent Courts and Governments being able to

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93 Ibid, 173 (Durie)

94 While the Royal Commission on Social Policy favoured entrenchment it commented on the effectiveness of the Cabinet minute - Volume III Part 1 page 113; One of the reasons given by the Justice and Law Reform Committee reporting on the white paper on a Bill of Rights for not entrenching the Treaty in a statute was the fact that it was already being effectively addressed.

easily ignore it and provide it with a degree of protection which is unprecedented in its history (others have suggested that even stronger protection is necessary, that it should not be subject to amendment by 75% of a national referendum; that there should be a special constitutional Court of Appeal to make ultimate decisions on the Treaty).[95]

I consider that entrenchment is the only means available to the Maori people for ensuring that the Treaty is given ongoing acknowledgment, if it is accepted that there is a need for incorporation and the present monocultural legal system continues to operate.[96] Consequently while Maori fears that any attempt to entrench the Treaty has some "hidden agenda" which is not favourable to the Maori partner is understandable I believe that entrenchment is their most favourable option at present. Similarly, while it is accepted that entrenchment does not allow for the sacredness of the Treaty to be acknowledged the same can be said for the incorporation of the Treaty/Treaty principles in individual statutes and that occurs without the protections from a Bill of Rights.

In view of the protections which a Bill of Rights can offer the Treaty it is to be hoped that the short term proposal to have a Bill of Rights, which is an ordinary statute does not mean that there is no hope of a Bill of Rights, which entrenches the Treaty, being adopted in the near future.

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95 FM Brookfield "The New Zealand Constitution" in Waitangi, Maori and Pakeha perspectives on the Treaty of Waitangi" page 17.

96 The Royal Commission on Social Policy also favoured entrenchment, as does Chief Judge ETJ Durie, see for example "A Bill of Rights for New Zealand", Legal Research Foundation Seminar, University of Auckland, August 1985, "Part II and Clause 26 of the Draft New Zealand Bill of Rights" page 171, pages 187-188 and page 193.

CONCLUSION

As indicated in the introduction the aim of this paper is to assess the degree to which the New Zealand situation is required to comply with the principle that the Treaty of Waitangi must be incorporated into municipal law in order for the Treaty to have a position in Public Law.

In brief, for the reasons set out in detail in the paper and in summary below, I consider that the Treaty does and can continue to have an important role in Public Law in spite of the apparent continued adherence by the Courts to the principle that the Treaty must be incorporated for it to be of effect. This position has been achieved not only because there has in fact been a liberalisation of the "need for incorporation" principle but also because there has been a great increase in the instances of the Treaty being incorporated into statutes in recent years.

Liberalisation of the principle means that the Treaty has effect even when it is not incorporated

While the Courts regarded the Treaty as legally binding following its signing the prevailing view historically was that the Treaty had to be incorporated for it to be of effect. This view was clearly expounded in the cases of Te Heuheu (supra), Nireaha (supra) and Waipapakura (supra) (The minority view, that the Treaty was effective to create rights was reflected in the kauwaeranga judgment).

Despite the fact that the Courts have continued to maintain in recent decisions, including the New Zealand Maori Council, Weepu, Re The Bed of the Wanganui River and Keepa cases, that the Treaty must be incorporated into municipal law for it to be effective there has been some liberalisation of the principle which means that the Treaty is of effect even when it is not incorporated in some circumstances.

Specific ways in which the Courts have relied on the Treaty, despite the fact it has not been incorporated, have been to interpret legislation so it is not in breach of the Treaty (e.g., Huakina, as reinforced in New Zealand Maori Council), to give content to general language in legislation by reference to the Treaty (e.g., Te Weehi, Ngai Tahu Maori Trust Board and Hakaraia) and to acknowledge the Treaty as evidence of or declaratory of an existing customary position (e.g., Somers J in New Zealand Maori Council, Re Lundon, Nireaha, Baldick). In addition it has been suggested by one commentator that the Treaty could be used as a basic limit on legislative power in an extreme case.

In view of the developments that have occurred it also seems likely that an argument that the Treaty does not need to be incorporated could now be successful in an appropriate case. Factors in support of such an argument could include the fact that there has been a liberalisation of the principle; that developments in human rights generally and indigenous peoples customary rights specifically make such a principle unacceptable; the principles applying to partnerships, as opposed to Treaties, are relevant in the light of the New Zealand Maori Council case.

The Treaty has a position in Public Law irrespective of the principle because it has been incorporated

As indicated in Part IV of the paper the Treaty has an important part of present and undoubtedly future public law, irrespective of whether it has been incorporated, by virtue of the fact that it is referred to in a growing number of Statutes and Bills. In addition the reference to the "Principles of the Treaty" in statutes has inevitably broadened the bases for redress, laid the foundation for prolific case law on the meaning of the principles in the future and provided the scope for the development of the principle of partnership.

Similarly, administrative practices have developed which will ensure that the Treaty continues to be a part of New Zealand's social and legal framework.

Given the important position that the Treaty has attained the further question that needs to be answered is whether the Treaty needs to be incorporated in a Bill of Rights for it to have a position in Public Law and be effective in the future.

While the fact that the Treaty has attained its present position without being entrenched in a Bill of Rights in itself provides some argument for such an entrenchment being unnecessary I consider that, on balance, some additional protection is necessary if the Treaty's position is to be guaranteed.

The waning fortunes of the Treaty in the past and the factors referred to as indicating how the Treaty has come to have its present relatively favourable position (persistence and ardour of Maori in pleading the Treaty, positive approach by Labour Governments, membership and procedures of the Waitangi Tribunal, international developments, willingness of Courts to have regard to social developments) serve as indicators of the Treaty's vulnerability.

The problem is that despite the present "relatively positive environment" there are no guarantees that the necessary Political will, as well as other necessary factors, can be retained. To the contrary, there are signs of waning enthusiasm if not "backtracking" by the present government.

If the problems of the past of the Treaty suffering ebbs and flows, are to be avoided then the Treaty needs stronger protection, as would be obtained from entrenchment in a Bill of Rights.

Selected Bibliography

A. Published

(a) Reports and Books

Carr EH, What is History, London, 1961

Kawharu IH, Waitangi, Maori and Pakeha perspectives on the Treaty of Waitangi, Auckland, 1989.

King M, Te Puea, Auckland, 1977

McNair (Lord), The Law of Treaties, Oxford, 1961

Orange C, The Treaty of Waitangi, Wellington, 1987

Ward A, A Show of Justice, Auckland, 1973

Future Directions, Volume III Part 1 of the Royal Commission on Social Policy.

A Bill of Rights for New Zealand, Legal Research Foundation Seminar, University of Auckland, August 1985.

A Bill of Rights for New Zealand, A white paper, Minister of Justice, 1985.

Implications of the Treaty of Waitangi, Treasury Paper, Government Management, Chapter 5.

The Maori and the Criminal Justice System - A New Perspective - He Whaipaanga Hou, Moana Jackson, Department of Justice Policy and Research Division, November 1988.

Environmental Management and the Principles of the Treaty of Waitangi : Report on Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988, Parliamentary Commissioner for the Environment, November 1988.

The Treaty of Waitangi and Maori Fisheries, Law Commission, March 1989.

The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989.

Office of the State Services Commission (Te Komihana O Nga Tari Kawanatanga) Statement of Corporate Intent (1988/1989 Financial Year).

Office of the Minister of Maori Affairs, Partnership Response (Policy Statement), November 1988.

Inland Revenue Department (Te Tare Taake) Corporate Plan (1 April 1989 - 30 June 1990).

Contacts for Consultation, Responsiveness Unit, State Services Commission, April 1989.

Partnership Dialogue, Responsiveness Unit, State Services Commission, April 1989.

Department of Justice Resource Management Review, Strategos Consultancy Limited, 1989.

(b) Articles

RP Boast "New Zealand Maori Council v Attorney General : The case of the Century": [1987] NZLJ 240

C Orange "The Treaty of Waitangi - A Historical Overview" Public Sector Volume II No 4.

EJ Haughey "The Treaty of Waitangi - its Legal Status" [1984] NZLJ 392.

PG McHugh "The Legal status of Maori Fishing Rights in Tidal Waters" (1984) 14 VUWLR 247.

PG McHugh "Aboriginal Title in New Zealand Courts" [1984] Canterbury Law Review 235.

PG McHugh "The Constitutional Role of the Waitangi Tribunal" [1985] NZLJ 224.

PG McHugh "Aboriginal Title returns to the New Zealand Courts" [1987] NZLJ 39.

A Frame "Kauwaeranga Judgment" [1984] NZLJ 227.

SE Kenderdine "Statutory Separateness (2) : The Treaty of Waitangi Act 1975 and the Planning Process" [1985] NZLJ 300.

J Tamihere "The Treaty of Waitangi and the Bill of Rights : A pleas for recognition [1987] NZLJ 151.

GB Chapman "A Bill of Wrongs : The Arguments against the proposed Bill of Rights" [1985] NZLJ 226.

P Joseph "The Challenge of a Bill of Rights : A Commentary" [1986] NZLJ 416.

ETJ Durie "The Waitangi Tribunal: Its relationship with the Judicial System" [1986] NZLJ 235.

(c) Cases and Waitangi Tribunal Reports

Wi Parata v Bishop of Wellington [1877] 3NZLR 72.

Kauwaeranga Judgment (1870); reported in (1984) 14 VUWLR 227).

Hoani Te Heuheu Tukino v Aotea District Maori Land Board (1941) NZLR 590.

Nireaha Tamaki v Baker (1900) AC 561.

Waipapakura v Hempton (1914) 33 NZLR 1065.

Vajesingji Jora Varasingji v Secretary of State for India (1924) LR51 Ind App 357.

R v Symonds (1847) (1840 -1932) NZPCC 387.

In Re Lundon and Whitaker Claims Act 1871 (1872) 2 2NZCA 41

Baldick v Jackson (1910) 30 NZLR 343.

New Zealand Maori Council v Attorney General (1987) 1 NZLR 641.

Inspector of Fisheries v Ihaia Weepa and Another [1958] NZLR 920.

Re the Bed of the Wanganui River [1962] NZLR 600.

Keepa v Inspector of Fisheries [1965] NZLR 322.

Love and Ors v Attorney General and Ors (unreported decision of the High Court, Wellington Registry 17 March 1988)

Huakina v Waikato Valley Authority [1987] 2NZLR 188.

Te Weehi v Regional Fisheries Officer [1986] 1NZLR 680.

MAF v Hakaria and Scott (unreported decision Levin District Court 19 May 1989).

Van Gorkom v Attorney General and Another [1977] 1NZLR 535.

Waitangi Tribunal Reports:

- Manukau Report

- Te Reo Maori Report

- Orakei Report

- Muriwhenua Report

B Unpublished

"Principles for Crown Action on the Treaty of Waitangi", Parliament Buildings, Wellington.

Final report of the Justice and Law reform Committee on a white paper on a Bill of Rights for New Zealand.

Appendix A

APPENDIX L - PRINCIPLES OF THE TREATY OF WAITANGI AS PROPOSED BY APPLICANTS AND PLAINTIFFS IN THE NEW ZEALAND MAORI COUNCIL COURT OF APPEAL CASE (1987)

Proposed by the New Zealand Maori Council

- The Crown duty to actively protect to the fullest extent practicable.
- The jurisdiction of the Waitangi Tribunal to investigate omissions.
- A relationship analogous to a fiduciary duty.
- The duty to consult.
- The honour of the Crown.
- The duty to make good past breaches.
- The duty to return land for land.
- That the Maori way of life would be protected.
- That the parties would be of equal status.
- Where the Maori interest in their *taonga* is adversely affected, that priority would be given to Maori values.

Proposed by the Crown

- That a settled form of civil government was desirable and that the British Crown should exercise the power of Government.
- That the power of the British Crown to govern included the power to legislate for all matters relating to 'peace and good order'.
- That Maori chieftainship over their lands, forests, fisheries and other treasures was not extinguished and would be protected and guaranteed.
- That the protection of the Crown should be extended to the Maori both by way of making them British subjects and by prohibition of sale of land to persons other than the Crown.
- That the Crown should have the pre-emptive right to acquire land from the Maori at agreed prices, should they wish to dispose of it.

(*Source:* NZ Court of Appeal, Cooke P, pp. 13-14)

Appendix B

Table 2: Summary of Principles of the Treaty of Waitangi defined by the Waitangi Tribunal and the Court of Appeal

Waitangi Tribunal (see Appendix J)	Court of Appeal (see Appendix K)
THE ESSENTIAL BARGAIN The exchange of the right to make laws for the obligation to protect Maori interests. (1)	The acquisition of sovereignty in exchange for the protection of *rangatiratanga*. (1)
PARTNERSHIP The Treaty implies a partnership, exercised with utmost good faith. (2) The Treaty is an agreement that can be adapted to meet new circumstances. (3) The needs of both Maori and the wider community must be met, which will require compromises on both sides. (4) The courtesy of early consultation. (9) The principle of choice: Maori, Pakeha, and bicultural options. (12)	The Treaty requires a partnership and the duty to act reasonably and in good faith (the responsibilities of the parties being analogous to fiduciary duties). (2) The freedom of the Crown to govern for the whole community without unreasonable restriction. (3) Maori duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable cooperation. (7)
ACTIVE PROTECTION The Maori interest should be actively protected by the Crown. (5) The granting of the right of pre-emption to the Crown implies a reciprocal duty for the Crown to ensure that the *tangata whenua* retain sufficient endowment for their foreseen needs. (6) The Crown cannot evade its obligations under the Treaty by conferring its authority on some other body. (7) The *'taonga'* to be protected includes all valued resources and intangible cultural assets. (11)	The duty of the Crown is not merely passive but extends to active protection of the Maori people in the use of their lands, and other guaranteed *taonga* to the fullest extent practicable. (4) The obligation to grant at least some form of redress for grievances where these are established. (5)
TRIBAL *RANGATIRATANGA* The Crown obligation to legally recognise tribal *rangatiratanga*. (8) *Tino rangatiratanga'* includes management of resources and other *taonga* according to Maori cultural preferences. (10)	Maori to retain chieftanship *(rangatiratanga)* over their resources and *taonga* and to have all the rights and privileges of citizenship. (6)

Note: This wording is a summary from original sources. Numbering refers to text in Appendices J and K. For principles defined by NZ Maori Council and the Crown in the case before the Court of Appeal, and the Royal Commission on Social Policy, see Appendices L and M.

APPENDIX J - PRINCIPLES OF THE TREATY OF WAITANGI AS DEFINED BY THE WAITANGI TRIBUNAL (1983-1988)

Principles that can be identified from the decisions of the Waitangi Tribunal are discussed below:

1 THE EXCHANGE OF THE RIGHT TO MAKE LAWS FOR THE OBLIGATION TO PROTECT MAORI INTERESTS

This concept was expressed in the Manukau report as follows:

> *"[kawanatanga] means the authority to make laws for the good order and security of the country but subject to an undertaking to protect particular Maori interests."* [1]

In the Motunui report, the Tribunal said:

> *"[The Treaty of Waitangi represents] an exchange of gifts .... The gift of the right to make laws, and the promise to do so so as to accord the Maori interest an appropriate priority."*

and (as also later confirmed in the Orakei report):

> *"The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. It made us one country, but acknowledged that we were two people. It established the regime not for uni- culturalism but for bi-culturalism."* [2]

The Muriwhenua report stated that:

> *"The principle that emerges is the protection of Maori interests to the extent consistent with the cession of sovereignty."* [3]

2 THE TREATY IMPLIES A PARTNERSHIP, EXERCISED WITH UTMOST GOOD FAITH

The principle of partnership was first stated by the Tribunal in the Manukau report:

> *"The interests recognised by the Treaty give rise to a partnership, the precise terms of which have yet to be worked out."* [4]

Subsequent to the Court of Appeal case, the Orakei and Muriwhenua reports reiterated and supported the judgement of the Court that the leading principles of the Treaty are (a) that it

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1 *MANUKAU*, p. 90

2 *MOTUNUI*, p. 61, *ORAKEI*, p. 130

3 *MURIWHENUA*, p. 191

4 *MANUKAU*, p. 95

signifies a partnership between the races, and (b) that it obliges both partners to act towards each other in utmost good faith. [5]

Further treatment of this theme can be found in Appendix K.

3 THE TREATY IS AN AGREEMENT THAT CAN BE ADAPTED TO MEET NEW CIRCUMSTANCES

Tribunal decisions make it clear the Treaty must move with the times and adapt to remain relevant. The Motunui report states:

> *"The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates it was not intended as a finite social contract but as the foundation for a developing social contract . . . .*
>
> *We consider that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and adherence to its broad principles."* [6]

Chief Judge Durie in the Waiheke report stated:

> *"The preamble to our governing Act directs, in my view, that the Treaty is to be always speaking - it is to be made relevant to our times."* [7]

4 THE NEEDS OF BOTH MAORI AND THE WIDER COMMUNITY MUST BE MET, WHICH WILL REQUIRE COMPROMISES ON BOTH SIDES

On the matter of compromise, the Motunui report states:

> *"It is not inconsistent with the Treaty of Waitangi that the Crown and Maori people should agree upon a measure of compromise and change. In particular, it is not inconsistent with the Treaty that the Te Atiawa hapu should accept a degree of pollution in respect of certain of their fishing grounds, on the basis that other grounds will not be spoilt."* [8]

This principle was reiterated in the Orakei report. [9] In the Te Reo Maori report, the Tribunal stated:

> *"The Treaty was directed to ensuring a place for two peoples in this country. We question whether the principles and broad objectives of the Treaty can ever be achieved if there is not a recognised place for the language of one of the partners to the Treaty. In the Maori perspective the place of the language in the life of the nation is indicative of the place of the people."* [10]

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5 *ORAKEI*, pp. 147-148, *MURIWHENUA*, pp. 190-192

6 *MOTUNUI*, p. 61

7 *WAIHEKE*, p. 82

8 *MOTUNUI*, p. 62

9 *ORAKEI*, p. 137

10 *TE REO MAORI*, p. 29

The Tribunal commented as follows in the Muriwhenua report:

> *". . . neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit. It ought not to be forgotten that there were pledges on both sides."* [11]

In the Mangonui report, the Tribunal discussed this principle further:

> *"It was a condition of the Treaty that the Maori possession of lands and fisheries would be guaranteed. The guarantee requires a high priority for Maori interests when works impact on Maori lands or particular fisheries for their guarantee was a very small price to pay for the rights of sovereignty and settlement that Maori conferred. In other cases however, it is a careful balancing of interests that is required. It was inherent in the Treaty's terms that Maori customary values would be properly respected, but it was also an objective of the Treaty to secure a British settlement and a place where two people could fully belong. To achieve that end the needs of both cultures must be provided for, and where necessary, reconciled."* [12]

The principle relating to the question of balance was stated succinctly in the Waiheke report, and reinforced in the Muriwhenua report as follows:

> *"It is out of keeping with the spirit of the Treaty . . . that the resolution of one injustice should be seen to create another."* [13]

The Motunui decision commented on the concept of an 'exclusive user', stating that:

> *"the mana of the Maori people to be able to control their own fishing grounds ought to be upheld. This includes the power to regulate and restrict both the use and the class of persons who may use. It does not follow however, that there must in all cases be an exclusive user but rather that that is a matter to be determined in consultation and negotiation with the hapu concerned. We noted that . . . [the claimants] do not seek an exclusive user . . . this approach is consistent with Maori customs and values."* [14]

In the Manukau report, the Tribunal discussed the concept as follows:

> *". . . we do not think the Maori interest in the seas is the 'full exclusive and undisturbed possession' of the English text. European New Zealanders need this Treaty too because by it the Maori people agreed to and accepted the existing and projected settlements and emigration referred to in the preamble and thereby agreed that the Europeans too would 'belong'. Both parties stood to gain by this Treaty as partners in a new enterprise. The new partner necessarily needed access. The European's interest in the harbour and foreshore areas cannot be denied either.*

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11 *MURIWHENUA*, p 195

12 *MANGONUI*, p. 60

13 *WAIHEKE*, p. 99, *MURIWHENUA*, p. xxi

14 *MOTUNUI*, p. 63

We suspect that the original Maori signatories would have appreciated this and that the subsequent claims to exclusive ownership reflect the total denial of the Maori mana in the laws of the seas and fisheries. Those who appeared before us claiming that the Manukau belonged to them spoke of the Maori willingness to share the Manukau. They spoke also of the belittlement they felt when their 'first nation' status was relegated to that of 'an ethnic minority'.

We conclude that the Treaty did promise the tribes an interest in the harbour. That interest is certainly something more than that of a minority section of the general public, more than just a particular interest in particular fishing grounds, but less than that of exclusive ownership. It is in the nature of an interest in partnership the precise terms of which have yet to be worked out. In the meantime any legal owner should hold only as trustee for the partnership and acknowledge particular fiduciary responsibilities to the local tribes, and the general public, as distinct entities." [15]

5 THE MAORI INTEREST SHOULD BE ACTIVELY PROTECTED BY THE CROWN

As noted in no. 1 above, *'kawanatanga'* means the authority to make laws for the good order and security of the country, but subject to an undertaking to protect particular Maori interests. The Tribunal has stated the possessory guarantees of the second article must be read in conjunction with the preamble, where the Crown 'is anxious to protect' the natives against the outcomes of emigration and with the 'royal protection' conferred in the third article, and said in the Manukau report:

"The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them .... It follows that the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights." [16]

This point was made again in the report on Te Reo Maori, and reiterated in the Orakei report as follows:

"[In Te Reo Maori]... it was submitted that the word 'guarantee' meant more than merely leaving the Maori people unhindered in their enjoyment of language and culture. It required active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture." [17]

In the Muriwhenua report, the Tribunal noted that the guarantees in the Treaty assured that:

"... despite settlement Maori would survive and because of it they would also progress ... to achieve that ... the Crown had not merely to protect those natural resources Maori might wish to retain, but to assure the retention of a sufficient share from which they could survive and profit, and the facility to fully exploit them." [18]

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15 *MANUKAU*, p. 94

16 *MANUKAU*, p. 95

17 *TE REO MAORI*, p. 29, *ORAKEI* p. 135

18 *MURIWHENUA*, p. 194

6 THE GRANTING OF THE RIGHT OF PRE-EMPTION TO THE CROWN IMPLIES A RECIPROCAL DUTY FOR THE CROWN TO ENSURE THAT THE TANGATA WHENUA RETAIN SUFFICIENT ENDOWMENT FOR THEIR FORESEEN NEEDS

Judge Durie in the Waiheke claim found that this was a principle of the Treaty, but the Tribunal was not unanimous on that point through the dissenting opinion on that claim of member Mr J Q Poole. [19]

In the Orakei report, however, considerable research was undertaken into the historical context of the Treaty, and the opinion of Judge Durie in the Waiheke claim was supported. As summarised in the Orakei report:

> *"It is abundantly evident . . . that Lord Normanby, in instructing Captain Hobson to obtain for the Crown the right of the pre-emption of Maori land, and in stipulating how such right was to be exercised, made it clear that no land was to be so purchased which was needed to provide for the comfort and subsistence of the Maori people. In short, they were to be left with a sufficient endowment for their own needs. An official protector was to ensure this. The right of pre-emption was to be a limited right. It was not to extend to land needed by the Maori . . . .*
>
> *. . . we find that Article 2, read as a whole, imposed on the Crown certain duties and responsibilities, the first to ensure that the Maori people in fact wished to sell; the second to ensure that they were left with sufficient land for their maintenance and support or livelihood or, as Chief Judge Durie puts it in the Waiheke Report . . . that each tribe maintained a sufficient endowment for its foreseen needs."* [20]

7 THE CROWN CANNOT EVADE ITS OBLIGATIONS UNDER THE TREATY BY CONFERRING AUTHORITY ON SOME OTHER BODY

This was first stated in the findings on the Motunui claim, and confirmed in subsequent reports. [21]

As stated in the Manukau report:

> *". . . we do not find it necessary to question [the Auckland Harbour Board's] particular acts except insofar as they relate to the nature of its statutory jurisdiction . . . . The first question is whether the Crown has a responsibility in terms of the Treaty. The question is then whether the statutory parameters prescribed for others in defining that responsibility are adequate having regard to the principles of the Treaty. It follows that the Crown cannot divest itself of its Treaty obligations or confer an inconsistent jurisdiction on others. It is not any act or omission of the [Auckland Harbour] Board that is justiciable but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Board."* [22]

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19 *WAIHEKE*, pp. 74-84

20 *ORAKEI*, pp. 144, 147

21 *MOTUNUI*, pp. 65, *WAIHEKE*, p. 74, *MANUKAU*, p. 99, *ORAKEI*, p. 136

22 *MANUKAU*, p. 99

The Tribunal found in the Orakei report that this principle extended to the vesting of responsibility in the Native Land Court, and in the Mangonui report found that it extended to the laying down of rules for local authorities and the Planning Tribunal. [23]

8 THE CROWN OBLIGATION TO LEGALLY RECOGNISE TRIBAL RANGATIRATANGA

In the Mangonui report, the Tribunal first addressed this point in detail in the context of whether Ngati Kahu had been prejudiced in their ability to present their veiws and have them accepted in the planning process. The Tribunal noted that a major impediment to tribal participation was the Crown's failure to legally recongise tribal authorities, a duty required under Article II of the Treaty.

> *"It ought not to be forgotten that the Treaty was with tribes, being signed at different places and times by persons on their behalf .... It was also clear in the Maori text and in the statements made at the time, that traditional mechanisms for tribal controls would continue to be respected and maintained.*
>
> *The main difficulty is that they were not. On the contrary, as the Orakei Report makes clear, policies were introduced over a century ago to put an end to tribal powers.*
>
> *Criticism that a tribe has failed to object is largely to blame the victim of the historic process for its current condition. The nub of the problem is in the omission of the Crown to recognise the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs and to take all necessary steps for the protection of tribal interests."* [24]

9 THE COURTESY OF EARLY CONSULTATION

In the Manukau report, the Tribunal noted that:

> *"Consultation can cure a number of problems. A failure to consult may be seen as an affront to the standing of the indigenous tribes and lead to a confrontational stance. Admittedly some values and traditions are not negotiable but the areas for compromise remain wide ....*
>
> *To achieve a reasonable compromise it is preferable that there be consultation with the tribe rather than have the tribe resort to objection processes, or even protests and demonstrations. It would help if the conduct of the parties were related to planning procedures so that the Tribunal could adjourn proceedings and require discussion and a search for a settlement."* [25]

In the Mangonui report, the Tribunal stated that:

> *"Even at the outset there is a Maori complaint that the opportunity to be involved is merely by an objection procedure which operates after the local authority's plans have been drawn and publicised. The procedure is available to the public*

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23 *ORAKEI*, p. 136, *MANGONUI*, p. 4

24 *MANGONUI*, p. 47

25 *MANUKAU*, pp. 119, 125

as a whole. The tribes were given a special status by the Treaty however, and the objection procedures are often inconsistent with their ways, compelling a confrontational stance.

The complaint is valid in our view but not because there is a duty to consult in all cases. It is the prior opportunity to discuss that is most especially wanting. Early discussions build better understandings in an area of cultural contact where the potential for conflict is high. Agreements may not be reached but new insights may be obtained and the subsequent debate may at least be better informed.

Nevertheless it is as wrong to blame the Council if Ngati Kahu were consulted too late as it is to discredit Ngati Kahu if their objections were not made sooner. There is a decided lack of structure by which to determine the proper tribal members to deal with, or by which an authoritative tribal position can be obtained. The Crown, in our view, has much work to do to complete its Treaty undertakings. It must provide a legally recognisable form of tribal rangatiratanga or management, a rangatiratanga that the Treaty promised to uphold." [26]

10 TINO RANGATIRATANGA INCLUDES MANAGEMENT OF RESOURCES AND OTHER TAONGA ACCORDING TO MAORI CULTURAL PREFERENCES

The Motunui decision first sums this up as the full import of *te tino rangatiratanga.* [27] The Kaituna decision notes this same premise when it determines that traditional rights of ownership are part of the *'taonga* Maori' guaranteed in the Treaty and carry with them the free and uninterrupted right to fish and gather in their traditional areas without impositions on their cultural and spiritual values from pollution. In the Manukau report the Tribunal stated that *'te tino rangatiratanga'* in the Treaty means 'full authority status and prestige with regard to their possessions and interests', and that:

> *"The protection of fisheries must accord with the Maori perception of those fisheries. It must be recognised that those disruption of fisheries that offend cultural or spiritual values, as for example the discharge of animal wastes to the waters of the fishery is as offensive as a physical disruption that reduces the quantity or quality of the catch . . . there must be regard for the cultural values of the possessor."* [28]

The Orakei report reiterates this point and notes that:

> *"In recognising the 'tino rangatiratanga' over their lands the Queen was acknowledging the right of the Maori people for as long as they wished, to hold their lands in accordance with longstanding custom on a tribal and communal basis."* [29]

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26 *MANGONUI,* pp. 4-5

27 *MOTUNUI,* pp. 60, 63

28 *MANUKAU,* p. 95

29 *ORAKEI,* pp. 134-135

11 'TAONGA' INCLUDES ALL VALUED RESOURCES AND INTANGIBLE CULTURAL ASSETS

The Tribunal has noted in the majority of its reports that *taonga* means 'all things highly prized' by Maori and this includes tangibles such as fishing grounds, harbours and foreshores, and intangibles such as the Maori language and the *mauri* or 'life-force' of a river. [30]

12 THE PRINCIPLE OF CHOICE: MAORI, PAKEHA AND BICULTURAL OPTIONS

In the Muriwhenua report, the Tribunal considered the rights guaranteed to Maori in both a tribal context (Article II) and a personal context (Article III):

> *"The Treaty provided an effective option to Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds. That same option is open to all people, is currently much in vogue and may represent the ultimate in partnership. But these are options, that is to say, it was not intended that the partner's choices could be forced.*
>
> *The historical record suggests Maori have consistently sought to uphold tribal ways against policies directed to amalgamation . . . but there is not certainty that that preference would be maintained if the forces of amalgamation were removed.*
>
> *But the tribal right is also upheld. The individual, as a British subject, has the same rights (and duties) as anyone else in pursuing individual employment or gain. This may reduce the tribal need but does not necessarily displace it. "* [31]

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30 *MOTUNUI*, p. 59, *KAITUNA*, p. 17, *MANUKAU*, pp. 93-95, *TE REO MAORI*, pp. 28-29, *ORAKEI*, p. 134

31 *MURIWHENUA*, p. 195

APPENDIX K - PRINCIPLES OF THE TREATY OF WAITANGI AS DEFINED BY THE COURT OF APPEAL (1987)

The Court of Appeal in seeking to define the 'principles' of the Treaty included in its source documents reports of the Waitangi Tribunal, the lists of Treaty principles submitted by the parties to the case (see Appendix L), the Maori Affairs Bill then before Parliament, and affidavits and other materials submitted to the Court.

Justice Somers observed that:

> *"The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply. At its making all lay in the future. Now much, claimed to be in breach of the principles and of the Treaty itself, lies in the past. Those signing the Treaty must have expected its terms would be honoured. It did not provide for what was to happen if, as has occurred, its terms were broken."* [1]

And that:

> *"A breach of a Treaty provision must in my view be a breach of the principles of the Treaty."* [2]

Justice Casey stated that in creating legislation that referred to 'principles' rather than 'terms or provisions' of the Treaty, Parliament provided for the Treaty's terms to be:

> *". . . understood in the light of the fundamental concepts underlying them. [This] calls for an assessment of the relationship the parties hoped to create by and reflect in that Document, and an enquiry into the benefits and obligations involved in applying its language in today's changed conditions and expectations in light of that relationship."* [3]

1 THE ACQUISITION OF SOVEREIGNTY IN EXCHANGE FOR THE PROTECTION OF RANGATIRATANGA

Justice Cooke observed that the 'spirit' rather than the strict text of the Treaty should be considered, and that the basic terms of the Treaty bargain were:

> *". . . that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated. These aims are partly conflicting."* [4]

All citations from New Zealand Court of Appeal, *The Treaty of Waitangi in the Court of Appeal* (New Zealand Maori Council and Latimer v Attorney General and others, 6 NZAR 353), Government Print, June 1987.

1 Somers J, p. 20

2 Somers J, p. 21

3 Casey J, p. 16

4 Cooke P, pp. 34-35

Justice Richardson considered that:

> *"There is . . . one overarching principle . . . that considered in the context of the SOE Act, the Treaty of Waitangi must be viewed as a solemn compact between two identified parties, the Crown and the Maori, through which the colonisation of New Zealand was to become possible. For its part the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees."* [5]

2 THE TREATY REQUIRES A PARTNERSHIP AND THE DUTY TO ACT REASONABLY AND IN GOOD FAITH

Justice Cooke noted that:

> *"The Treaty signified a partnership between races . . . ."*

and that:

> *"utmost good faith . . . is the characteristic obligation of partnership."* [6]

Justice Richardson noted that the 'compact' entered into by the signing of the Treaty:

> *". . . called for the protection by the Crown of both Maori interests and British interests and rested on the premise that each party would act reasonably and in good faith toward the other within their respective spheres . . . .*
>
> *There would be circumstances where satisfying the concerns and aspirations of one party could injure the other. If the Treaty was to be taken seriously by both parties each would have to act in good faith and reasonably towards the other . . . under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi."* [7]

Justice Casey noted that to assert that partnership and the exercise of good faith was implicit in the relationship established by the Treaty was:

> *"to do no more than assert the maintenance of the 'honour of the Crown' underlying all its treaty relationships."* [8]

In summing up the findings of the Court of Appeal, Justice Cooke noted that, approaching the case independently, they had all agreed that:

> ***". . . the principles [of the Treaty] require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith.***

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5 Richardson J, p. 15

6 Cooke P, pp. 35-36

7 Richardson J, pp. 34, 39

8 Casey J, p. 17

That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured." [9]

3 THE FREEDOM OF THE CROWN TO GOVERN

Justice Cooke noted that:

> *"The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try and shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation."* [10]

In addition, Justice Bisson stated that:

> *". . . it is in accordance with the principles of the Treaty that the Crown should provide laws and make related decisions for the community as a whole having regard to the economic and other needs of the day . . . ."* [11]

4 THE CROWN DUTY OF ACTIVE PROTECTION

Justice Cooke accepted that the relationship between the Treaty partners created responsibilities analagous to fiduciary (trusteeship or protectorate) duties, and that:

> *"the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable."* [12]

5 CROWN DUTY TO REMEDY PAST BREACHES

Justice Cooke commented on a proposed 'duty to remedy past breaches', saying that:

> *". . . if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it - which would be only in very special circumstances if ever."* [13]

However, he did not wish to comment on whether the Crown should grant precisely the form of redress recommended by the Tribunal.

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9 Cooke P, p. 44

10 Cooke P, p. 40

11 Bisson J, p. 25

12 Cooke P, p. 37

13 Cooke P, pp. 37-38

Justice Richardson noted that:

> *". . . the protection accorded to land rights is a positive 'guarantee' on the part of the Crown. This means that, where grievances are established, the State for its part is required to take positive steps in reparation."* [14]

Justice Somers observed that:

> *". . . the right of redress for breach . . . may fairly be described as a principle . . . As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other - a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the courts but the claim to it can be submitted to the Waitangi Tribunal."* [15]

The Court ruled that the Crown must devise a mechanism to ensure that in the transfer of lands from Crown control to State-Owned Enterprises the Maori partner's right of redress was not prejudiced.

6 MAORI TO RETAIN CHIEFTAINSHIP (RANGATIRATANGA) OVER THEIR RESOURCES AND TAONGA AND TO HAVE ALL THE RIGHTS AND PRIVILEGES OF CITIZENSHIP

This is implied from Articles II and III, and generally addressed in principle no. 1 above. As it was specifically noted by Justice Bisson:

> *"The Maori Chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the matter in which their existing rights would be guaranteed and in particular guaranteed down to each individual Maori the full exclusive and undisturbed possession of their lands which is the basic and most important principle of the Treaty in the context of the case before this Court . . . . [also] . . . Her Majesty extended to the natives of New Zealand . . . all the rights and privileges of British subjects."* [16]

7 THE MAORI DUTY OF 'REASONABLE CO-OPERATION'

Justice Cooke noted that:

> *". . . the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation."* [17]

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14 Richardson J, p. 17

15 Somers J, p. 22

16 Bisson J, pp. 22-23

17 Cooke P, p. 37

8 ON WHETHER THE TREATY CREATES A DUTY TO CONSULT

Justice Cooke noted that it was 'unworkable' to lay down a duty to consult in an unqualified sense, but noted that for a change of such magnitude as the transfer of Crown lands to SOEs, the Crown:

> *"although . . . clearly entitled to decide on such a policy, as a reasonable Treaty partner it should take the Maori race into its confidence regarding the manner of implementation of the policy."* [18]

Justice Richardson noted that:

> *". . . honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion."* [19]

But that:

> *". . . the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty . . . [however] . . . the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on . . . the Crown, when acting within its sphere to make an informed decision . . . to be able to say it has had proper regard to the impact of the principles of the Treaty."* [20]

He went on to note that to gather the necessary information on Treaty implications, 'some' or 'extensive' consultations may be needed, but in other circumstances the Crown may already have the necessary information at hand.

Justice Somers observed that:

> *". . . while each side is entitled to the fullest good faith by the other, I would not go so far as to hold that each must consult with the other. Good faith does not require consultation although it is an obvious way of demonstrating its existence."* [21]

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18 Cooke P, p. 38

19 Richardson J, p. 39

20 Richardson J, p. 40

21 Somers J. p. 23

APPENDIX M -
Principles of the Treaty as Defined by the Royal Commission on Social Policy (1988)

"It is the covenant of the Treaty which establishes three fundamentals; partnership, equality of peoples, and guarantee. Many Maori believe that these fundamentals must guide the interpretation of the Treaty of Waitangi. This understanding may be controversial to many Pakeha. It emerges clearly however, from Maori interpretations of the Treaty texts, and their historical and contemporary perspectives.

The **FUNDAMENTAL OF PARTNERSHIP** referred initially to the relationship between Maori people and the British Queen and Crown. Later, the relationship changed to that between Maori and the Crown based in New Zealand (and thence all immigrants and settlers). It was to be a relationship of mutual respect between equal peoples.

The rangatira sought a partnership for several reasons. Although numerically and militarily the stronger, the Maori wanted a system of law and order to govern the relationship between Maori and Pakeha. Many rangatira were also worried about the continuing conflicts between some iwi. Further they wanted continued access to internal and overseas trade and new technology, and independence from other colonial powers.

The **FUNDAMENTAL OF EQUALITY OF PEOPLES** refers to the understanding that Maori and Pakeha would have equality and live in such a way that mutual respect and integrity were maintained.

The **FUNDAMENTAL GUARANTEE** refers to the promise that the Queen would ensure that Maori were treated and protected as British subjects. At the same time the retention of Maori fishing grounds, forests, lands and other properties including culture would be guaranteed."

(*Source:* Royal Commission on Social Policy, 'The April Report', Volume III, part 1, p. 103)

The general principles of the Treaty which the Tribunal considered were relevant to the Muriwhenua claim, having regard to New Zealand Maori Council v Attorney General [1987] INZLR 641, and the objects and intentions already referred to, were stated to be threefold

(i) The principle of protection.
"Maori were protected in their lands and fisheries (English text) and in the retention of their tribal base (Maori text). In the context of the overall scheme for settlement, the fiduciary undertaking of the Crown is much broader and amounts to an assurance that despite settlement Maori will survive and because of it they would also "progress".

...."The essential point was that the Treaty both assured Maori survival and envisaged their advance, but to achieve that in Treaty terms, the Crown had not merely to protect those national resources Maori might wish to retain but to assure the retention of a sufficient share from which they could survive and profit, and the facility to fully exploit them". (page 194).

(ii) The principle of mutual benefit.
"Both parties expected to gain from the Treaty, the Maori from new technologies and markets, non Maori from acquisition of settlement rights and both from cession of sovereignty to a supervisory state power....

....neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit. It ought not to be forgotten that there were pledges

on both sides". (pages 194 - 195).

(iii) The principle of options.
"Neither text prevents individual Maori from pursuing a direction of personal choice". (page 195), i.e., there is an option to Maori to develop along customary lines and from traditional base, or to assimilate into a new way or to walk in two worlds. But the tribal right is also upheld.

Appendix D

Principles For Crown Action on The Treaty of Waitangi

Principle 1

The Principle of Government *The Kawanatanga Principle*

The Government has the right to govern and to make laws.

Principle 2

The Principle of Self-Management *The Rangatiratanga Principle*

The 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 Cooperation

Both the Government and the iwi are obliged to accord each other resonable cooperation on major issues of common concern.

Principle 5

The Principle of Redress

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

The five Principles are detailed in the following pages together with a commentary.

Appendix E

5.6 The Principles of the Treaty of Waitangi

It must be remembered that the function of the Tribunal is to investigate whether the actions complained of are inconsistent with the principles of the Treaty, not with either or both of its two texts. The phrase "the principles of the Treaty" is likewise used in other legislation, such as the State Owned Enterprises Act 1986, the Environment Act 1986 and the Conservation Act 1987. It is therefore necessary to attempt to determine what are the principles of the Treaty.

Professor Orr has recently made a very helpful analysis of the decisions which have discussed these principles. He prefaces his conclusion with the important point that it is not possible to formulate a comprehensive or complete set of Treaty principles. The Tribunal has articulated only those principles which it has thought relevant to the cases before it, adopting a case by case approach. The Court of Appeal did likewise in the Maori Council case. Moreover it is undesirable to attempt to formulate a definitive or exclusive set of principles because the Treaty is a living document which calls to be interpreted and applied not simply as at 1840 but in a contemporary setting.

Having made these observations, Professor Orr identified the following principles of the Treaty.

1. The gift to the Crown of kawanatanga (the right to govern) was in exchange for the protection by the Crown of Maori rangatiratanga (full authority).

2. There are limits on the authority of the Crown to govern.

3. There is a tribal right of self-regulation.

4. The Crown has the right of pre-emption and reciprocal duties.

5. The Crown has an obligation actively to protect Maori Treaty rights.

6. The Treaty signifies a partnership and requires the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith.

7. The Crown has a duty to remedy past breaches of the Treaty.

The last of these principles raises the interesting question of whether the failure of the Crown without reasonable justification to give effect to the substance of a Tribunal recommendation may in itself constitute a further breach of the Treaty. In the words of Sir Robin Cooke at pages 664-5 of the Maori Council case:

> "A duty to remedy past breaches was spoken of. I would accept that suggestion, in the sense that if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it - which would be only in very special circumstances, if ever. As mentioned earlier, I prefer to keep open the question whether the Crown ought ordinarily to grant any precise form of redress that may be indicated by the Tribunal".

What is clear is that the development and redefinition of the principles of the Treaty will be a continuing and difficult task for the Tribunal and the Courts.

5.7 The Future

Despite its inauspicious beginnings, I believe that in recent years the Tribunal has performed a valuable role by providing a vehicle for Maori claims to be researched, a forum for grievances to be expressed and responded to by the Crown and a source of recommendations to Government as to possible solutions. In doing so the Tribunal has at all times been conscious of, and has on many occasions referred to, the necessity to ensure that in attempting to remedy the injustices of the past we do not create new injustices.

We are at a critical point in the history of race relations in this country. On the one hand, Maori expectations that long standing grievances will be addressed have now been raised by the recent recognition of some of those claims by Parliament, the Courts and the Tribunal. On the other hand, it would be naive to pretend that there is not a developing backlash among other sectors of the community against what is seen as preferential treatment for Maori. Meanwhile the rhetoric of extremists on both sides is producing emotive responses both for and against their position.

The Tribunal may be able to assist in reconciling the present widely divergent views within the community. Hopefully it can do so by exposing breaches of the Treaty which have occurred over the years and making practical and realistic recommendations to compensate for these breaches. At the same time the Tribunal must identify those claims which are not well-founded or where relief is not appropriate.

In order to carry out its functions successfully the Tribunal must have the confidence of the country as a whole. It requires in particular the support of the legal profession, support which I am sure will be readily forthcoming.

Appendix F

Summary of Treaty principles identified by S Kenderdine in paper at The Treaty of Waitangi, New Zealand Law Society Seminar, April 1989.

1. The Principle of Partnership.

2. The Principle of Reciprocal Obligations.

3. The Principle of Active Protection.

4. The Principle of Honest Effort to Ascertain the Facts.

5. The Principle of the Right of Redress for Breach.

6. The Principle of Mutual Benefit.

7. The Principle of Options.

8. The Principle of Consent.

9. The Principle of the Maori Right to Exercise Rangatiratanga (Tribal self-regulation).

10. The Principle of the Right to Govern Without Undue Shackles.

11. The Principle of the Crown Guarantee to Individual Maori of full exclusive and undisturbed possession of their lands.

12. The Principle of Negotiation for Interference with Rights.

THE IMPERATIVES OF MAORI CONSULTATION

What is the "Why?" of Maori Consultation? Why should we consult? There are a number of reasons. They vary in substance and importance in different situations. Collectively they comprise an imperative for effective government in contemporary New Zealand.
Some of these reasons are:

Statutory requirements

Numerous statutes now contain reference to the Treaty of Waitangi. These typically enjoin us to pursue the "principles of the Treaty" or to conduct our business in "accordance" with them. Even if they don't there are legal decisions emerging steadily which inevitably lead us back to the Treaty in some way. It is so basic to our developing law that it's hard to avoid.

What are these "Principles of the Treaty"? The Court of Appeal has been at some pains to define them in the Maori Council Case 1987. It defines the central principle of the Treaty as that of "Partnership" and then goes on to describe the Maori-Crown relationship in partnership terms. One of the primary duties between partners is that of **Consultation.**

The Common Law

There are a variety of decisions emerging in the Common Law which are as compulsive as statute. These include fisheries and resource law reliant on the principle of **aboriginal rights**, the appeal decisions in planning law turning on the application of the "National Importance" provisions, and decisions turning on particular provision for the Maori interest in other legislation. Some of these decisions reverse or modify long established interpretation.

Thrust of general Government policy

There is a clearly discernible thrust in general Government policy which is inclusive of Maori interest or representation alongside that of women and other Polynesian people. This is evident particularly, but by no means exclusively, in the social sector.

This thrust suggests it is prudent to behave inclusively towards Maori and Maori interests and concerns. It does not enjoin us to "tokenism" simply to gain acceptance of initiatives or for other reasons. However, it does suggest administrative behaviour which is regularly reviewed and tests for its inclusiveness of a Maori dimension. This review process should be driven by pragmatic considerations of effectiveness rather than moralistic aims.

Pragmatism

Maori are a significant and growing component in New Zealand society. They have a greatly increased presence in our national life which is unlikely to diminish. Past relative deprivation and disadvantage pose a major social and political challenge for the future. Meeting that challenge requires the active involvement and participation of Maori. This cannot be achieved without effective and honest consultation. To seek to ignore or avoid the Maori dimension in government administration is unwise because Maori resistance or hostility has an increasing capacity to frustrate policy fulfilment in the medium and longer term. Effective Maori consultation is practical administrative behaviour.

Appendix 5

Order of Reference

The White Paper on a Bill of Rights for New Zealand was referred to the Justice and Law Reform Committee by resolution of Parliament on 9 October 1985 for investigation and report.

Committee Personnel

Members of the Justice and Law Reform Committee for this inquiry during the 41st and 42nd Parliaments were:

Bill Dillon (Chairman)
Richard Northey
Trevor Mallard (from commencement until 15 July 1987)
Jenny Kirk (from 23 September 1987)
Paul East (from commencement until 11 April 1986 and again from 5 February 1987)
Hon. J. K. McLay (11 April 1986 to 5 February 1987)
Katherine O'Regan (from commencement to 15 July 1987)
Mr R. J. S. Munro (from 23 September 1987)

Parliamentary Staff assisting the Committee were:
Audrey Butcher, Committee Secretary
Gerry Rudd, Committee Clerk (from commencement until August 1987)
Alison Carlin, Assistant Committee Secretary (from 13 April 1988)
Kirsty Burnett, Assistant Committee Secretary (from September 1987 until February 1988)

Introduction

The Committee made an interim report on the White Paper describing the progress on its investigation which was tabled in the House on 9 July 1987. The Committee has now completed its investigation.

Recommendation

In its report to the Justice and Law Reform Committee on the White Paper the Department of Justice discussed a number of options for a bill of rights.

The first option was the White Paper draft, that is, an entrenched statute having the effect of supreme law and providing for enforcement by the courts of the enumerated civil and political rights. The second option is similar but with some amendments to the listed rights. The third option discussed in the Department's report was for the entrenching of the International Covenant on Civil and Political Rights.

A large majority of the submissions did not favour this type of approach at all. The power given to the judiciary by the White Paper thought to entail from elected representatives of the people who were directly accountable to them to the judiciary who were appointed and held office until their retirement.

The Committee considers that there is a limited public understanding of and support for the role of the judiciary under a bill of rights. In countries which do have a bill of rights the judiciary does not usually see it as their function to thwart the wishes of the elected representatives by striking down legislation without a very good reason. In fact they rarely exercise the power. Nonetheless, the Committee has concluded that New Zealand is not yet ready, if it ever will be, for a fully fledged bill of rights along the lines of the White Paper draft.

The Committee has however concluded that the bill of rights proposal should not lapse. The Committee considers that there is substantial merit in a bill of rights. New Zealand is without some of the checks and balances of other similar jurisdictions. A bill of rights can provide valuable checks on the actions of the Executive. The debate on the White Paper has also highlighted that the community as a whole has very little knowledge of fundamental human rights issues, what human rights are worth specific protection in the New Zealand context, and about our constitutional system. A bill of rights could have great educative and moral value and help fill this gap.

Nonetheless, the Committee considers that it is necessary to adopt a fairly cautious approach. **The Committee accordingly recommends the introduction of a bill of rights which is an ordinary statute, that is, not a supreme law and not entrenched.** Provision should be made for the operation of the bill of rights to be monitored by a select committee of Parliament. Further, the bill of rights could give guidance to the courts about the interpretation of legislation in light of the rights set out in the bill of rights. Third, the existing administrative processes for the scrutiny of legislative proposals could be strengthened. The bill of rights could require the Attorney-General to certify on the face of a bill when the Attorney-General considers that the bill derogates from the bill of rights, and the select committee of Parliament to take similar action and report to the House on provisions in any Bill that appeared contrary to the principles and specific articles in the Bill of Rights.

It has to be acknowledged that an ordinary statute will be less powerful than the draft bill set out in the White Paper. It could be amended or overridden by another ordinary statute. However, it could still provide some of the necessary checks and balances and perform an educative function. It would also meet the principal argument made against the White Paper draft, that is, that it involves an unwarranted transfer of power from Parliament to the judiciary.

A more detailed outline of the features of the bill recommended by the Committee is attached as Appendix A.

The bill outlined in Appendix A substantially follows the White Paper draft. However, the Committee would like to draw particular attention to

Appendix H

omission of the Articles relating to the Treaty of Waitangi. Article 4 of the White Paper draft recognised and affirmed the rights of the Maori people under the Treaty. Those rights therefore would have become enforceable by the courts in the same way as the other rights in the draft bill. One reason for including the Treaty is that it must be seen as an essential part of any supreme constitutional law which might be enacted. As the bill recommended by the Committee would not be supreme law this reason no longer applies. Indeed, to include the Treaty might suggest that it is no more than an ordinary statute. Further, the Committee notes that questions about compliance with the Treaty are increasingly being addressed effectively by individual statutes, the Waitangi Tribunal, and the courts. For these reasons the Committee recommends against including an equivalent to Article 4 of the White Paper draft.

The second of the features which the Committee would like to comment on is the inclusion of fundamental social and economic rights. Those rights are obviously as important to New Zealanders as the civil and political rights in the White Paper draft and a number of submissions recommended their inclusion. However, there are great difficulties in dealing with such rights in a judicially enforceable supreme law such as the White Paper draft. With a bill that is not judicially enforceable there are much fewer problems about incorporating such rights in the Bill. In Appendix A the Committee suggests that some of these major specified rights could be included. It is recognised that effective exercise of civil and political rights depends on securing an adequate standard of living, housing, health care and education.

Conclusion

By a majority, we recommend that the Government draft and introduce into the House a Bill of Rights along the lines recommended in this report in time for it to be considered, and if enacted, come into force during the term of this Parliament. The Opposition Committee members oppose this recommendation.

FEATURES OF BILL OF RIGHTS ENACTED AS AN ORDINARY STATUTE

The drafting of the bill outlined below will of course require further scrutiny. Bearing in mind this qualification the Committee considers that the bill could be drafted along the following lines:

1. Introductory Clauses

The Preamble in the White Paper draft would form a useful basis with amendments consequential on the fact that the bill would not be supreme law; the inclusion of a reference to social and economic rights; and on the omission of Article 4 relating to the Treaty of Waitangi; while specifically acknowledging the continuing importance of the Treaty of Waitangi and the multi-cultural nature of New Zealand society.

2. General

The bill could then incorporate Articles 2 and 3 of the White Paper draft with an amendment to Article 2 consequential on the fact that the bill would not be supreme law.

3. Civil and Political Rights

The bill could contain in one Part a list of fundamental civil and political rights. The list could be based on the White Paper draft with amendments made in response to the comments made in the submissions to the Justice and Law Reform Committee. Adopting also many of the suggestions for amendments to that draft made in the Report of the Department of Justice, and reordering the articles in a more appropriate priority order and more logical grouping of categories, this part of the Bill would be redrafted along the following lines:

PART 00
CIVIL AND POLITICAL RIGHTS

Life and Security of the Person

1. Right not to be deprived of life

No one shall be deprived of life except on such grounds, and, where applicable, in accordance with such procedures, as are established by law and are consistent with the principles of fundamental justice.

[Marginal note only altered, formerly Article 14 of the original White Paper draft.]

2. No torture or cruel treatment

(1) Everyone has the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.

(2) Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

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