

# What is distinctive about New Zealand law and the New Zealand way of doing law? New Zealand law and Maori

Address to the Law Commission's 20<sup>th</sup> Anniversary Seminar  
Wellington, 25 August 2006

The Hon Justice Baragwanath

Treaty business will never be finished. Remember the Treaty always speaks. Our problem is that its voice has been muffled.<sup>1</sup>

...it is still very  
difficult to procure word processors

that have a set of macronised vowels  
and subeditors who do not pluralise  
Maori loan words although most have  
ceased italising them  
to give a sense of inclusion  
in one context

in the other context  
it is for purposes  
of pacification<sup>2</sup>

## Perspective

Distinctiveness suggests comparison. But with what is the New Zealand way of doing law, in relation to its indigenous people, to be compared?<sup>3</sup> And how broad is the notion of “doing law”?

The current review of the Auckland Law School has illustrated the awkward tension of which the President and Robert Sullivan speak. Outstanding performance within the School by Maori students and their teachers; yet despite much effort by the University, including the provision of special places, disturbingly few Maori are able or willing to obtain entrance and thus able to join the legal profession. Is this a “distinctiveness” of the New Zealand way of doing law?

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<sup>1</sup> Rt Hon Sir Geoffrey Palmer “Where to from here?” In *Treaty Settlements: the Unfinished Business* ed Geoff McLay (NZ Institute of Advanced Legal Studies and VUW Law Review 1995) p151.

<sup>2</sup> Robert Sullivan “Some definitions and a note on orthography” in *Star Waka* (AUP 1999) p21.

<sup>3</sup> It is not to be overlooked that New Zealand now has many other cultural groups for whom the law must cater. See [http://judicial/hc\\_committees/ijs/ijs.html#Interpreters](http://judicial/hc_committees/ijs/ijs.html#Interpreters).

There is also the persistent question of context. No visitor to Turangawaewae Marae this last week could fail to be impressed by the graciousness, vision, confidence and success of those honouring Te Arikinui, Dame Te Atairangikaahu. Maori achievement receives less publicity than the adverse statistics to which I will refer.

Further, other categories of law do not, for the most part, distinguish between Maori and other New Zealanders. Indeed equality under the law is a basic constitutional precept. But the present topic is different in kind from the others discussed today and must consider how the law does and perhaps should treat Maori differently. They are not only individual New Zealanders but, depending on perspective, either a “people” or indeed “peoples” who may warrant separate legal treatment. The dimensions include not only constitutional law but international law and various facets of domestic law. And, contrary to the opinion of a majority of the Supreme Court of Canada in *R v Van der Peet* (1996) 137 DLR (4<sup>th</sup>) 289, dynamism is a core component of the indigenous dimension.<sup>4</sup>

The topic embraces laws specific to Maori, laws that affect Maori, and the contribution of Maori custom and value to what Professor Frame calls “our common law with bicultural characteristics”.<sup>5</sup>

It has been argued that there is an inconsistency between the rangatiratanga<sup>6</sup> promised to Maori by the Maori language version of the Treaty of Waitangi and the sovereignty<sup>7</sup> conferred on the Crown by the English language version. How can Maori be independent within an interdependent society? The dilemma is summarised by Neil MacCormick in *Rhetoric and the Rule of Law* (Oxford 2005) p 16:

... I... believe in the Rule of Law, and think that our life as humans in community with others is greatly enriched by it. Without it, there is no prospect of realising the dignity of human beings as independent though interdependent

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<sup>4</sup> Compare the pungent essay by Grammond “La protection constitutionnelle des droits ancestraux des peuples autochtone et l’arrêt Sparrow” (1991) 36 *McGill LJ* 1382 and the forceful dissenting judgment of L’Heureux-Dubé J in *R v Van der Peet* at pp 345-9 which cites it, emphasising the need both to look at the actuality of indigenous practices and not to treat them as frozen in history. As will be seen, Professor Frame has drawn attention to Lord Phillimore’s advice in *Hinietī Rirerire Arani v Public Trustee* (1919) NZPCC 6 which vindicates the minority decision.

<sup>5</sup> Grey & Iwikau, *Journey into Custom* (Victoria University Press 2002) p31.

<sup>6</sup> Interpreted by Sir Hugh Kawharu as “chieftainship”: see [1987] 1 NZLR 663.

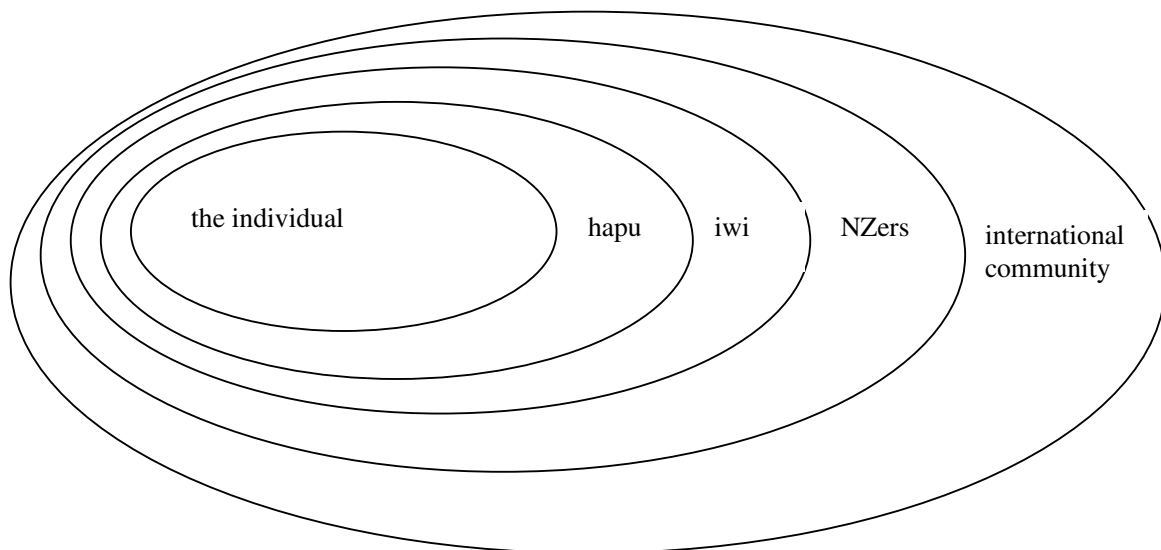
<sup>7</sup> Sir Hugh’s translation of “kawanatanga” which in the English language version is “sovereignty”.

participants in public and private activities in society. Dignity of that sort and independence-in-interdependence are, to my way of thinking, fundamental moral and human values. How is it possible to believe in both?

Any attempt to sketch the many layers and complexity of the Maori dimension, with neither special expertise nor the perspective of time and distance, guarantees imperfection. So the following is a provisional attempt at some thoughts to invite discussion.

### **Overview**

Maori can be seen as members of a series of concentric circles, each with greater or lesser legal significance, comprising:



One might add family and whanau and others. Each requires consideration and the issues of distinctiveness again invite a comparison. But with what?

### **International law<sup>8</sup>**

An obvious measure is against international norms. While there is more than one perspective, many or most Maori are at the least the descendants of the Chiefs

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<sup>8</sup> Sir Kenneth Keith “The Treaty of Waitangi in the Courts” (1990) 14 NZULR 37, 39 traces the jurisprudence back to Vitoria *De Indis* (1532).

who signed the Treaty.<sup>9</sup> That injects a potential element of international treaty law, even though (whatever one's view of sovereignty v rangatiratanga) Maori no longer constitute the independent state or group of states recognised by three Imperial statutes<sup>10</sup> and given a 21 gun salute.<sup>11</sup> But someone must have standing to enforce the obligations assumed by the British Crown in 1840<sup>12</sup> and now the responsibility of the Crown of New Zealand even if, according to *Hoani te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308, the means of doing so do not yet include application to a domestic Court for declaratory judgment.

The Universal Declaration of Human Rights, adopted by the General Assembly without dissent in 1948, has been described as the cornerstone of UN activity.<sup>13</sup> Since James Crawford's *Rights of Peoples*<sup>14</sup> published in 1989 there has been much movement. While the status of indigenous rights at international law is the subject of debate, it is interesting to see what is happening in the UN.

Increasingly the value of indigenous culture and its contribution to the quality of community life is realised internationally.<sup>15</sup> But it is also realised that in relation to indigenous issues recognition of individual rights and democratic processes is not enough; that Tocquville's and Mill's warning about the tyranny of the majority is not obsolete.<sup>16</sup> In the 2006 edition of *Waitangi & Indigenous Rights*<sup>17</sup> published this month, F M Brookfield<sup>18</sup> makes the stern judgment that the Foreshore and Seabed Act 2004 "has very seriously diminished the legitimacy of the Crown's government of

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<sup>9</sup> Some chiefs did not, not least Tuwharetoa. But their iwis' position has evolved into one of support for the Treaty.

<sup>10</sup> 57 Geo III, c 53; 4 Geo IV, c 96 s 3; 9 Geo IV c 83 cited in Sir Edgar Williams "James Stephen and British Intervention in New Zealand 1838-40" (1941) XII (I) *Journal of Modern History* 19 at 22.

<sup>11</sup> By HMS Rattlesnake following the selection of the new Confederation flag on 20 March 1834.

<sup>12</sup> Art. 26 Vienna Convention of the Law of Treaties (in force 1980).

<sup>13</sup> Malcolm Shaw *International Law* (5<sup>th</sup> ed) 259.

<sup>14</sup> Clarendon Press Oxford.

<sup>15</sup> The opening in June of the Musée du Quai Branly in Paris, with its beautifully presented collection of Maori and other indigenous artefacts, focused international attention on this contribution.

<sup>16</sup> Lord Irvine LC in a perceptive comment ([1996] *Public Law* 636) on Sir John Laws' paper "The Constitution: Morals and Rights" [1996] *Public Law* 622, which offers a moral basis for the English constitution, reminded the audience that Hitler had secured power by an overwhelming plebiscite.

<sup>17</sup> (AUP).

<sup>18</sup> Lord Cooke of Thorndon reviewed the work at (2003) 119 *LQR* 326.

New Zealand”,<sup>19</sup> adding that better informed public opinion can contribute to undoing the ill that has been done.

At international law there are evolving norms recognising not only individual human rights but also those of minorities and, increasingly, those of indigenous peoples. The steady trend in all civilised states is to greater recognition of indigenous values<sup>20</sup> and, at least in domestic law, to couple that with what is seen as a core value of dignity of the individual. The importance of land, waters and other natural resources to indigenous people is increasingly recognised as not substitutable by money.<sup>21</sup>

The fact that Maori are in no position to secede at international law<sup>22</sup> accentuates the moral responsibility of the Crown.

On 15 March 2006 New Zealand was one of 170 states voting in the General Assembly in favour of the establishment of the new Human Rights Council. But on 12 June 2006 at a meeting of the Council in Geneva New Zealand’s representative stated:<sup>23</sup>

New Zealand is committed to advancing the rights of... indigenous peoples. However, consensus in setting new standards must be an objective. And, the new human rights council needs to make sure it delivers quality outcomes and supports proper process. Sadly, that is not yet the case with the Chair’s text for the Draft Declaration on the Rights of Indigenous Peoples. New Zealand cannot associate itself with this text which, despite our most strenuous efforts and genuine intentions, remains fundamentally flawed. We want a consensus decision and a text that is capable of practical implementation.

On 29 June Canada, with which New Zealand and Australia are closely associated, was with the Russian Federation one of two votes opposing adoption on 29 June 2006 of a “UN resolution on the rights of indigenous peoples”.<sup>24</sup>

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<sup>19</sup> page 213.

<sup>20</sup> See generally Yukich “Aboriginal Rights in the Constitution and International Law” (1996) 30: 2 *UBC Law Review* 234.

<sup>21</sup> See Waikato Raupatu Claims Settlement Act 1995 Recital O.

<sup>22</sup> See essay by Finkelstein and others “Does Québec Have A Right to Secede at International Law?” (1995) 74 *Can Bar Rev.* 224 and *Reference re Secession of Quebec* [1998] 2 SCR 217.

<sup>23</sup> <http://www.mfat.govt.nz/speech/minispeeches/21jun06.html>.

<sup>24</sup> Those supporting included the United Kingdom whose representative observed that it did not accept the concept of collective rights in international law and said that it understood the right of self-determination as set out in the Declaration as one which was to be exercised in the territory of a state and which was not designed to impact any way on the territorial integrity of states. It emphasised

A glance at the Declaration brings out the very real difficulty encountered by the law in dealing with indigenous issues. Article 26(1) states:

Indigenous peoples have the right to the lands, territories and resources which they have conditionally owned, occupied or otherwise used or required.

That presents practical problems in New Zealand where:

The view generally accepted by historians and lawyers at the present day is that expressed as long ago as 1846 by Sir William Martin, the first Chief Justice. As he put it, before the Treaty of Waitangi the whole of New Zealand “or as much of it as is of any value to man” was divided among the Maori tribes and sub-tribes.

*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 653.

And in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 the Court of Appeal accepted the submission of the appellants that among the matters declared by s 3(1) of the Town and Country Planning Act 1977 to be of national importance and in particular to be recognised and provided for were:

(g) the relationship with the Maori people and their culture and traditions with their ancestral land rejecting the contention the land no longer owned by Maori was automatically not ancestral land.

Article 26 must of course be read with Article 28 as to modes of redress. But the potential problem of endorsing a UN instrument which on one view could challenge the whole of New Zealand’s land registration system is obvious.

The problems of historical disputes are more deeply layered than can be answered by general language. The case of Edom, the area south of the Dead Sea where Jacob defrauded Esau of his birthright and which is now bisected by the Israel/Jordan border, illustrates the point. It may perhaps be thought that New Zealand, Canada and Australia are justified in requiring a more nuanced form of drafting than is offered by Article 26.

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that “the citizens of the United Kingdom and its territories overseas did not fall within the scope of the declaration”.

That said, as the Conventions to which New Zealand is party clearly show, it is appropriate for such instruments to stipulate norms as standards which State's members commit themselves to meet.

But the meticulousness exhibited by New Zealand in dissociating itself from the over-broad language of the Convention places us under an international searchlight. The Ambassador concluded his address with a challenge:

Governments must work in tandem with the High Commissioner and the United Nations system to make a genuine difference in the lives of our own citizens. We must commit ourselves to follow-up our decisions, or be held collectively accountable for our failure to act.

Members and observers alike must ensure that this Council is at the forefront of a new and dynamic era of human rights protection and promotion. Members have a particular responsibility to live up to the pledges they made before the Council elections.

Let us be under no illusions. The Council's credibility will be judged by its actions at this meeting and beyond. We can make this work or we can allow it to fail – either through benign neglect or deliberate action. We must stay the course that our leaders have set for us.

Clearly we are distinctive. But the distinctiveness is justified only to the extent that domestically we conform with the essential principles that the Declaration seeks, albeit imperfectly, to express living domestic law.

Moreover it is insufficient to confine attention to law expressed to deal explicitly with Maori. As will appear, among the laws of greatest significance to Maori are the general laws dealing with economic, cultural and social issues. The President of the International Court of Justice, Dame Rosalyn Higgins, has warned against drawing a sharp line between civil and political rights, seen as true law, and economic, cultural and social rights which have long been regarded as moral pieties. Because it

challenges deep-seated assumptions<sup>25</sup> her important analysis warrants extensive citation.<sup>26</sup>

It is... sometimes said that economic and social rights cannot be rights at all, because 'rights' implies something in respect of which legal claims can be brought, and economic and social rights are not justiciable. What would it mean, it is said, for a citizen of a poor African country to go to a court in his country to say that the government has violated his right to education, or healthcare? The correlation of rights with justiciability is an understandable attitude from the domestic-law point of view. But, of course, international lawyers are very familiar with the phenomenon that, for a variety of reasons... it is not possible to bring claims in vindication of rights held in international law... The absence of the possibility of recourse to third-party judicial procedures is certainly not the test of whether the right exists or not. To the international lawyer, the existence of the right is tested by reference to the sources of international law.

There are necessarily differences of degree of a considerable order which verge on differences of kind. Civil and political rights are more readily considered in courts of

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<sup>25</sup> See Hayek's claim "that he had delivered the *coup de grâce* to troublesome economic, social and cultural rights" discussed by JW Harris in "Human Rights and Mythical Beasts" (2004) 120 *LQR* 428, 429.

<sup>26</sup> *Problems and Process: International Law and How We Use It* Clarendon Press Oxford (1994) pp 99-102. She continues at p102:

It is further suggested that economic, social and cultural rights are not real rights for two more reasons: they are imprecise as to content, and, in any event, because these demands are mostly incapable of immediate delivery, it must be recognised that they are mere aspirations. Here imprecision of content of the right in the hands of the beneficiary is in reality being confused with uncertainty as to the scope of the obligation incumbent on the state. From the perspective of the holder of the right, the entitlement to free primary education is as clear as the entitlement to be free from torture. The *real* difference is that in large part the state's duties in respect of civil and political rights are covered in terms of abstention from prohibited conduct, whereas the provisions of economic and social rights usually requires specific action by the state... It must immediately be said that a right is just as much a right if its implementation requires positive steps rather than negative abstinence. Moreover, the concept of positive duties is increasingly becoming part and parcel of the normative requirements of civil and political rights. The European Court of Human Rights has, in respect of several rights, indicated that their fulfilment places positive duties upon states...

The Committee acting under the International Covenant on Economic, Social and Cultural Rights has shown the way forward on these issues. Its starting-point has been that these are present rights and not long-term aspirations. States are under an immediate obligation to do what they can to provide these rights. They are required to identify a programme for the progressive achievement of those rights, in some considerable detail. As the obligation is a present one, they must prepare a realistic programme and show the Committee, in regular period examinations, how they are complying with the timetable they themselves have set. As to the content of the right, the Committee is able to lend assistance in formulation where necessary... States are expected to participate in erecting building blocks, or stepping stones, to put into place the obligation to provide the right. The task of the Committee is to assist in the formulation of these building blocks and to monitor that they are being complied with. Its approach is at once imaginative and realistic, a further example of the creativity that goes into the formulation of international law norms.



law; economic, cultural and social rights are in general better managed by the Executive which has the opportunity, skills and experience and also the accountability to the voter giving it the legitimacy to weigh competing priorities for valuable public resources.

But the international conventions, such as the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child, and indeed the Treaty of Waitangi itself, have a powerful normative influence on the content and administration of domestic law as it affects Maori. Justiciable or not they are an important part of any sensible notion of the law.<sup>27</sup>

### **Domestic Law**

A second measure of the performance of New Zealand law is against the treatment of other indigenous peoples by their own domestic laws. That would be a formidable exercise. On a recent count there were at least 5000 indigenous groups comprising 300m individuals living in more than 70 states in five continents.<sup>28</sup> Yet is worth performing a test sample; in our globalised world and enhanced communications such comparison is inevitable and necessary.

Even in domestic law this topic is different in kind from the others being considered today, all of which apply as much to Maori as to anyone else.

### **The individual**

As New Zealand citizens Maori are entitled to the same legal rights as others.<sup>29</sup> The rights of British subjects confirmed by Article 3 of the Treaty include, importantly, the right of a citizen who is not tangata whenua of the locality to protection from the cost of measures to honour Treaty breach which should fall on the Crown in one of its

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<sup>27</sup> Which is why they appear in standard texts such as *Shaw* at pp 257 ff.

<sup>28</sup> *ABC des Nations Unies*, United Nations, New York 1998, p268. For a substantial discussion see Cédric Viale *L'Instance Permanente sur les Questions Autochtones de l'Organisation des Nations Unies* Thesis for Doctor of Laws Université d'Aix-Marseille 13 December 2003.

<sup>29</sup> *Ding v Minister of Immigration* HC AK CIV 2005-404-4900 15 August 2006; *X v Refugee Status Appeals Authority* HC AK 2006-404-2650 para [63] 14 July 2006.

many guises, including that of local government.<sup>30</sup> Most human rights are not confined to citizens but extend to all persons legally, and in many cases to those illegally, in New Zealand.<sup>31</sup> But what are those rights? The practical difficulty at the individual level is that on all social statistics “Maori” are disadvantaged. One profoundly important question is why that should be so. A second is what if anything the law can and should do about it.

It is not necessary to spell out to this audience the unhappy reality of the life of many Maori.<sup>32</sup> Ministry of Health media statements on problem gambling and cancer death rates released on 1 and 2 August 2006 are typical:

...two reports...show poorer communities including Maori... are still hit by problem gambling

...Maori were more likely to die from cancer, often because Maori were more likely to be diagnosed at a more advanced stage when the cancer had spread.

The prison statistics of 14.5% of the community producing 50% of the prison population<sup>33</sup> are a confirmatory symptom of malaise.<sup>34</sup>

I have noted that the Courts are now adopting and applying to decision-making in various spheres the standard of human dignity which is basic to Neil MacCormick’s rule of law.<sup>35</sup> In principle Maori are entitled to the application of that standard.

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<sup>30</sup> *Ngati Maru Ki Hauraki Inc v Kruithof* [2005] NZRMA 1. The principles are those applied in *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA).

<sup>31</sup> *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 (HL).

<sup>32</sup> See [www.socialreport.msd.govt.nz](http://www.socialreport.msd.govt.nz) reported *New Zealand Herald* 9 August 2006 pA7.

<sup>33</sup> Ministry of Justice annual report 28 October 2005 (source *New Zealand Herald* website visited 6 August 2006).

<sup>34</sup> To similar effect are the figures produced by former Commissioner Peter Doone – Combating and Preventing Maori Crime: Hahei Whakarurutanga Mō Te Ou. Referring to 1998 data he recorded that Maori aged 17 and over were:

- 3.3 times more likely to be apprehended for a criminal offence than non-Maori;
- 3.6 times more likely to be prosecuted than non-Maori;
- 4.1 times more likely to be convicted than non-Maori;
- 1.5 times more likely to be sentenced to imprisonment on conviction;
- 51% of the prison population but only 14% of the general population.

See *Overview: the Treaty and the Police* <http://www.police.govt.nz/events/2005/ngakia-kia-puawai/baragwanath-on-the-treaty-and-the-police.pdf> W D Baragwanath (November 2005).

<sup>35</sup> The first of the 17 references in the New Zealand Law Reports is *R v McKay* [1967] 1 NZLR 139 (CA). The topic is lucidly discussed by Connor Gearty in *Principles of Human Rights Adjudication*

Because they are statistically the most disadvantaged of our community, any rights in this area are of special importance to them and require mention in the present context.

There should not be overlooked the cultural and socio-economic provision made by New Zealand's health, social welfare and cultural regimes by legislation and administrative arrangements that benefit Maori. Many of those are distinctive in making special and specific regimes for Maori, including Te Puni Kokiri and a wide range of initiatives across the public sector.

Of particular moment is of course the retention of Maori seats in Parliament, which it may be thought have come to serve Maori better than the problematic "nations" regimes that present such difficulties for North American Indians in the USA.<sup>36</sup>

But in the important area of public law New Zealand has taken a conservative position. An example is education, the presence or absence of which for Maori may lead either to tertiary education or to gang membership. The international human right to education<sup>37</sup> endorsed by our statute law<sup>38</sup> is a social right. A greatly respected friend and colleague has argued that:

A statute or a provision of a statute that confers or protects social and economic rights, eg education and health, has to be approached just as broadly as one that protects civil and political rights. We accept that expansive interpretation of a Bill or Rights is appropriate. So why not the others?

That opinion has the support of President Higgins. But it is not adopted by New Zealand law, stated by the Court of Appeal in *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA), correcting a less conservative judgment at first instance.<sup>39</sup>

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(Oxford 2005) Chapter 5: see s 92M(1)(c) Human Rights Act and *Director of Human Rights Proceedings v Cropp* HC AK AP7-SWO3 12 May 2004 para 46.

<sup>36</sup> See Philip Frickey "(Native) American Exceptionalism in Federal Public Law" 119 *Harvard Law Review* 431 (2005).

<sup>37</sup> *Innovation and Internationalism: pushing the boundaries of education law The Right to Education: guarding the guardians* Address to ANZELA conference September 2004 W D Baragwanath

<sup>38</sup> Education Act 1989 s 3 **Right to free primary and secondary education...** every person...is entitled to...free education at any state school...

<sup>39</sup> English law takes a similar position: *A v Head Teacher and Governors of Lord Grey School* [2006] 2 WLR 690 (HL). See George Tanner QC "Confronting the Process of Statute-Making" in *The Statute: Making and Meaning* (ed. Bigwood LexisNexis 2004) pp 90-1.

Some states have made the international law right to education justiciable in domestic law. In Ireland the Supreme Court has held that under its constitution a plaintiff is both “entitled to free primary education appropriate to his needs” and able to sue to enforce it.<sup>40</sup>

A recent and striking decision is that of the majority of the Court of Appeals of New York on 20 June 2003 from which there was a vigorous dissent. *Campaign for Fiscal Equality v The State of New York*<sup>41</sup> concerned Art. XI para 1 of the New York State Constitution:

The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated.

Kaye CJ for the majority of the State’s Court of Appeals presented a powerful and closely reasoned argument in support of judicial intervention in fundamental matters of educational governance, stating:<sup>42</sup>

Courts are, of course, well suited to adjudicate civil and criminal cases and extrapolate legislative intent... They are, however, also well suited to interpret and safeguard constitutional rights and review challenges to acts of our co-equal branches of government – not in order to make policy but in order to assure protection of constitutional rights. That is what we have been called upon to do by litigants seeking to enforce the State constitutions’ education article.

The Court concluded:<sup>43</sup>

...children are... entitled to minimally adequate teaching of reasonably up to date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach these subject areas...

The Court then proceeded to its evaluation, agreeing with the trial Court’s findings and conclusions that the teaching within the State was inadequate; that large class

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<sup>40</sup> *Sinnott v Minister of Education* [2001] 2 IR 545 (SC); see *Daniels v Attorney-General* n 31 below at p 770 para [94].

<sup>41</sup> 26 June 2003 (to be reported in the New York Reports). On 14 November 2005 the US Supreme Court gave judgment in *Schaffer v Weast* 546 US \_ (2005) holding that the burden of persuasion in an administrative hearing challenging an “individualized education program” (IEP) is upon the party seeking relief. The need for such ruling is evidence of the importance of such programmes.

<sup>42</sup> *Campaign for Fiscal Equality v The State of New York* *ibid* p 51-52.

<sup>43</sup> *Ibid*, p 11.

sizes negatively affected student performance in New York City public schools; and that such schools were deficient in “instrumentalities of learning” (including libraries and computers). It further held that, whether measured by the outputs or the inputs, New York City school children were not receiving the constitutionally-mandated opportunity for a sound basic education.

There are good reasons to look for alternatives to litigation to deliver on the right to education. One method, already proposed, providing an expert and economical forum for complaints of inadequacy in education, would be an educational ombudsman.<sup>44</sup> But to lack powerful means of redress of a vital right tends to reduce confidence in the law, not limited to the measure which expresses it.

In various jurisdictions other important socio-economic rights have also been accepted as justiciable within certain limits.

As so often, in this sphere of socio-economic rights the Constitution and modern courts of South Africa provide examples.<sup>45</sup> In relation to a child’s right to basic nutrition, shelter, basic health care and social services the Constitutional Court has observed:<sup>46</sup>

It is true that the inclusion [in the Constitution] of socio-economic rights may result in Courts making orders which have direct implications for budgetary matters. However, even when a Court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A Court may require the provision of legal aid, or the extension of State benefits to a class of people who formerly were not beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that results in a breach of the separation of powers... The fact that socio-economic rights will almost inevitably give rise to such implications (budgetary) does not seem to us to be a bar to their justiciability.

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<sup>44</sup> Essay at fn 34 above. Scotland has just announced the extension of its ombudsman service for that purpose.

<sup>45</sup> See DM Davis “Socio Economic Rights in South Africa: the Record 10 Years After” (2004) 2 *New Zealand Journal of Public and International Law* 47, a valuable account of the first decade of the South African Constitution. See also Hugh Corder “Judging Rights in a Democratic South Africa” in Endicott *Properties of Law: essays in honour of Jim Harris* (Oxford 2006) pp 317 ff.

<sup>46</sup> *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), paras [77]-[78].

The Court stopped short of treating social and economic rights as directly actionable.<sup>47</sup> But in *Modderfontein Squatters v Modderklip Boerdery (Pty) Ltd* (2004) (6) SA 40 the Supreme Court of South Africa created and awarded “constitutional damages” to deal with the dilemma that 40,000 squatters each possessing a right to housing had occupied the respondent’s farm and could not be accommodated elsewhere, and that the law of South Africa prohibited expropriation without compensation. Leave for

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<sup>47</sup> In *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) some 900 squatters had been evicted from private land designated for low cost housing. The issue was whether measures taken by the State conformed with s 26 of the Constitution providing that:

- (1) everyone has the right to have access to adequate housing;
- (2) the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

The Court declined to enquire:

Whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent.

It accepted that a measure of deference must be given to the legislature and the Executive to implement a proper housing programme but required evidence that there had been sufficient attention given to the needy and most vulnerable within the community. While acknowledging that “it may be possible and appropriate” to consider the content of a minimum core of right it did not find it necessary to decide whether the Court should make such determination.

In *Minister of Health v Treatment Action Campaign & Ors* 2002 (10) BCLR 1033 (CC) the Constitutional Court was faced with s 27 of the Constitution providing:

- (1) everyone has the right to have access to health services, including reproductive care;
- (2) the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

In considering governmental refusal to make available a drug to prevent mother to child transmission to HIV the Court found that:

The policy of confining Nevirapine to research and training sites fails to address the needs of mothers and their new-born children who did not have access to these sites.

But it rejected the argument that s 27(1) contained an independent right to health, holding:

The socio-economic rights for a Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them... all that is possible, and all that can be excepted from the State, is that it act reasonably to provide access to the socio-economic rights identified in ss 26 and 27 on a progressive basis. (Paras 34-35.)

As to relief the Court stated:

The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the Court to enable it to satisfy itself that the policy was consistent with the Constitution... In appropriate cases [the Courts] should exercise such a power if it is necessary to secure compliance with the Court order. That may be because of the failure to heed declaratory orders or other relief granted by a Court in a particular case. We do not consider, however that orders should be made in those terms unless it is necessary. The Government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.

further appeal was declined in a judgment delivered by Langa ACJ (now CJ) for the Constitutional Court.<sup>48</sup>

French administrative law employs the concept of *faute de service* or failure of the system. It brings out the very important feature that liability is for the failure of government to fulfil its mission.<sup>49</sup>

Under EU law rights conferred by the Convention are seen as so important that breach, even by a judiciary or legislature, renders the state liable in damages.<sup>50</sup> That principle has been applied by the House of Lords in England in a case where legislation excluding Spanish fisherman from operating in British waters was held to be discriminatory as to nationality and domicile.<sup>51</sup>

Other examples arise from the jurisprudence of the European Court of Human Rights.<sup>52</sup> A similar approach is taken in the written constitution states of the new Commonwealth.<sup>53</sup>

Close to home, across the Tasman where legal conservatism is not unknown, the ACT Human Rights Act 2004 and the Victorian Charter of Human Rights and Responsibilities Act 2006 point to way to legal acceptance of social and cultural rights.

The reluctance of New Zealand law to afford relief in these spheres, where Maori would potentially have cultural and socio-economic claims, may be said to render it distinctive.

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<sup>48</sup> *President of the Republic of South Africa v Modderklip Boerderey* Case No CCT 20/04 13 May 2005. The Chief Justice's experience is informed by the deadly effects of apartheid on his family and colleagues.

<sup>49</sup> Bell & ors *Principles of French Law* (Oxford 1998) p190.

<sup>50</sup> "It is a principle of Community law that the Member States are obliged to make good loss and damage caused by breach of community law for which they can be held responsible": *Francovich v Italy* 1991 1 ECR 5357.

<sup>51</sup> *R v Secretary of State ex p Factortame Ltd* [2000] 1 AC 524.

<sup>52</sup> An important example is the right to a family, which in Europe is enforceable under article 9 of the European Convention of Human Rights and in both the ACT and Victoria is protected by human rights legislation: Human Rights Act 2004 (ACT), Charter of Human Rights and Responsibilities Act 2006 (Vic) but is not enforceable in New Zealand despite our accession to the International Covenant on Civil and Political Rights. For discussion see *Ding v Minister of Immigration*.

<sup>53</sup> *Maharaj v A-G of Trinidad and Tobago (No 2)* [1979] AC 385 (PC).

It may be expected that President Higgins, Sir Kenneth and their colleagues will follow the course she has outlined, in company with the other jurisdictions mentioned and move back the barriers to justice by introducing incentives to public sector performance. It is to be hoped that we can do as well at home.

### **Rights as hapu and iwi**

There are three parts: what was; what is; and what ought to be.

#### **What was<sup>54</sup>**

We began quite well. The Evangelicals, of whom James Stephen, the widely experienced head of the Colonial Office, was perhaps the most influential on New Zealand's fortunes, were experienced, erudite and principled. They knew of the richness of indigenous culture in India, the Americas, Africa and elsewhere, including New Zealand. They well understood the effect of imperial greed and unbridled colonialism: in South America with the Spanish and Portuguese excesses, on the indigenous people of North America, in India and, above all, in Africa with the slave trade which was their constant focus. Its *realpolitik* had been seen in Mansfield's vacillation: as both a Scot and England's foremost commercial lawyer he was troubled by damage to property rights comparable with the recent Telecom disclosure; yet his moral sense resulted in the profound human rights judgment in *Somerset*.<sup>55</sup> As will be seen, tension between majority interests and the affected minority over what are or may be valuable assets of the latter, even if no longer their actual bodies, has not disappeared.

The Evangelicals were acutely aware both of the enormities of the musket wars and other forms of lawlessness that were afflicting Maori and of what would happen to Maori if, or rather when, colonisation occurred.

Their response is seen in what is undoubtedly the most distinctive element of New Zealand law, the Treaty of Waitangi. Despite the argument about its legal status,

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<sup>54</sup> While the following are my own views I acknowledge the help of Dr Mark Hickford's masterly overview with its provocative title "'Decidedly the Most Interesting Savages on the Globe': An Approach to the Intellectual History of Maori Property Rights" (2006) XXVII *History of Political Thought* 123 ff. I owe the reference to Ned Fletcher.



its emergence from obscurity to dominance, currently the subjection of reaction, has been the dominant feature of New Zealand jurisprudence in the last two of my four decades in the law.

While Hobson had been discussing issues of Maori land rights as early as 1837,<sup>56</sup> I find it inconceivable that he rather than Stephen, who drafted Lord Normanby's instructions, was responsible for such a visionary and balanced document as the Treaty of Waitangi and the legal formalities attending it.<sup>57</sup> It is simply too important to have been delegated and too elegant to have been drafted on any informal basis. Its succinct Preamble (contemplating the problematical immigration) and careful balance among the vital elements of articles 1 (Crown authority), 2 (protection of Maori rights) and 3 (conferral of protection as British subjects) covers the essential bases in a manner that, construed and applied decently, can still do justice among the competing interests of Maori, Crown and other citizens.

The problem however was, as it remains, of securing such decent construction and application by the three limbs of Government: legislature, executive and judiciary.

It is not difficult to understand the polarisation that occurred. In 1868 there had been three major Maori victories under the generalship of the chief Titokowaru. That year Bishop Williams wrote:

the number of reverses we have received during the last six months is truly astonishing. There have been a great number of them and not a single success to put on the other side. What does this seem to indicate, but that God's hand has been turned against us ... Unless it should please God to check the progress of the natives ... there will be no settlers living in the country except in the towns.<sup>58</sup>

The Manukau (Wai 8 1985), Ngai Tahu (Wai 27 1991) and Taranaki (Wai 143 1966) reports of the Waitangi Tribunal are among those that have brought the enormity of colonial conduct to public attention. Most extreme, although only in degree, was the raupatu - the confiscation of tribal land following the land wars, themselves sparked by the colonists' greed. The land was greatly prized by the settling colonists. But any

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<sup>55</sup> (1772) 20 St Tr 1.

<sup>56</sup> Letter of 8 August 1837 to Colonial Office cited at fn 62 of *Hickford*.

<sup>57</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 687 (CA).

<sup>58</sup> Belich *The New Zealand Wars* 1986 pp 256-7.

student of aboriginal issues, or reader of the Tribunal reports, or of the evidence in the *Maori Council* case, now realises that land loss was even more devastating to Maori than the considerable loss of Maori life.<sup>59</sup>

There is no greater incentive to extreme conduct than fear for self, family and security; and the colonial backlash against Maori is intelligible. But the colonists' conduct in terms of securing Maori land was substantially unlawful throughout.

The British Crown, for its part, progressively abdicated the responsibility it had assumed, by action and inaction passing its authority to the very colonists against whose selfish interest the Treaty was supposed to provide protection. Far from delivering on its promise of protection, it weighed in on the colonists' side with military and naval forces.

In comparative terms however Maori may consider themselves relatively fortunate that English colonial policies provided a stronger foundation for the rule of law than those of other colonial powers.<sup>60</sup> In certain respects, notably in most of the jurisprudence of the Privy Council<sup>61</sup> and in the contributions of some New Zealand

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<sup>59</sup> In a letter received last week a young scholar, the granddaughter of a celebrated Maori leader, wrote:  
As a child I heard my grandfather speak in closed circles of the injustices dealt to our people at the time of the land wars. Unfortunately his parents and grandparents bore the scars of a lot of hurtful things, and this hurt was passed on to him and the children of his generation. His thoughts about seeking retribution in a very dignified way were very definite. Although he could probably never reconcile how money could ever repay the lives lost, I have no doubt that the gestures embedded in acknowledgement of wrong doing by the Crown, and the return of what could possibly be returned, would have been something that he would support as a means towards healing a lot of hurt and providing a new beginning and better lives for our people.

<sup>60</sup> Fernando Cervantes *Too Near Madrid!* review of JH Elliott *Empires of the Atlantic World; Britain and Spain in America 1492-1830* TLS August 4 2006 3 at p 4:

...whereas the Spanish imperial state had created an indispensable framework for colonial life which was much more thorough and successful than its British American counterpart, the disappearance of the imperial structure from British America left the colonies free to manage their lives much as they had done before. By contrast, the disappearance of the Spanish imperial structure left a despairing vacuum behind it, a vacuum that the successor states would prove themselves ill prepared to fill.

A further essay in the same volume recounts the need for Simon Bolivar's liberation from Spanish rule of Venezuela, Columbia, Panama, Ecuador, Bolivia and Peru, driven by "his respect for the rule of law [which] did not desert him": David Gallagher *A Vile offspring* reviewing John Lynch *Simon Bolivar: a Life* (Yale) TLS 4 at p5.

<sup>61</sup> It has been noted that Professor Frame's dusting off Lord Phillimore's advice in *Hinietī Rirerire Arani v Public Trustee* (1919) NZPCC 6 vindicates the minority decision of the Supreme Court of Canada in *Van der Peet*. In *Nireaha Tamaki v Baker* [1901] AC 561; (1901) NZPCC 371 the application in New Zealand of the principles of aboriginal title was confirmed, overruling a judgment

judges,<sup>62</sup> the performance of the judiciary was exemplary. But in others it was deplorable and grossly out of phase with principle that had been settled and applied

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of the Court of Appeal in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, reversing the decision in the instant case (1894) 12 NZLR 483, and approving the earlier first instance decision of Martin CJ and Chapman J in *The Queen v Symonds* (1847) NZPCC 387. The effect of *Nireaha Tamaki v Baker* was however retrospectively legislated away in 1909. In *Wallis v Solicitor-General* [1903] AC 137; (1903) NZPCC 23 the Privy Council was sharply critical of the Court of Appeal, attracting the celebrated protest of bench and bar of April 25, 1903, reported in NZPCC Appendix p 730.

With the exception of *Hoani te Heuheu Tukino v Aotea District Maori Land Board*, the Privy Council decisions right up to *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 were protective of Maori, applying the simple principle of colonial law stated by Lord Denning in *Oyekan v Adele* [1957] 2 All ER 785, 788:

The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and it will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law...Furthermore, if a dispute arises between the inhabitants as to the right to occupy a piece of land, it will be determined according to native law and custom, without importing English conceptions of property law...

<sup>62</sup> *The Queen v Symonds* applied conventional principle. See also Sir William Martin *The Taranaki Question* (1860) (Hocken Library Reprint 1967) eg p76: "It is not meant to be suggested here that William King and the other claimants knew or thought much of Constitutional rights or English Law. They had sufficient natural sense of fairness to know that they had not been treated fairly...As was to be expected, William King and his people did not appeal to the Queen for protection against those who wielded her power. They met force by force."

elsewhere.<sup>63</sup> Overall the pattern was to use law to defeat rather than to protect Maori interests.<sup>64</sup> Its effect is seen in the successive reports of the Waitangi Tribunal.

Over time there have been examples of distinctive virtue and distinctive vice as well as the mediocre between them. But the problem is more complex than to identify the character of the various decision-makers over the years.

It results in part from Sir Neil MacCormick's point, expressed by Professor Alex Frame in the New Zealand context as:

The "dilemma for modern statecraft – "how to reconcile Governor Hobson's declaration to each chief on signing the Treaty of Waitangi in February 1840 – 'He iwi tahi tatou' (we are one nation) – with the implication of the Treaty itself that Maori identity would be preserved in such matters, and for so long, as Maori desired?"<sup>65</sup>

The point is emphasised by the advice of Dame Joan Metge that Colenso's translation fails to render the full nuances of the Maori – "tahi" without a preceding "ko" stresses

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<sup>63</sup> *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jurist Reports (New Series) (SC) 72 is notorious. Its effect is seen in decisions up to and including *Keepa v Inspector of Fisheries* [1965] NZLR 322 which I argued for the Crown. The principled decisions of the US Supreme Court such as *Johnson v McIntosh* 21 US (8 Wheat.) 543 (1823), *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831) and *Worcester v State of Georgia* 31 US (6 Pet) 515 (1832) were well familiar to the New Zealand judges who had applied them in *The Queen v Symonds*. In *R v Côté* (1996) 138 DLR 385 at 405 Lamer CJ C adopted the following statement by Professor Brian Slattery in "Understanding Aboriginal Rights" (1987) 66 *Can Bar Rev.* 727 at 737-8:

The doctrine of aboriginal rights, like other doctrines of colonial law, applied automatically to a new colony when the colony was acquired. In the same way that colonial law determined whether a colony was deemed to be 'settled' or 'conquered', and whether English law was automatically introduced or local laws retained, it also supplied the presumptive legal structure governing the position of native peoples. The doctrine of aboriginal rights applied, then, to every British colony that now forms part of Canada, from Newfoundland to British Columbia. Although the doctrine was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application in the colony.

The Supreme Court of Canada has revisited the topic in *Delgamuukw v British Columbia* [1997] 3 SCR 1010. Of course the New Zealand and Australian courts have caught up since the trail blazing judgments in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, *Maori Council v Attorney-General* [1987] 1 NZLR 641, 687 (CA), *Mabo v Queensland* (1988) 166 CLR 186 and their successors.

<sup>64</sup> For land see Evelyn Stokes *The Individualisation of Maori Interests in Land* (Te Matahauriki Institute Monograph 2002); for fisheries Waitangi Tribunal WAI 22 *Muriwhenua Fishing Report* (1988).

<sup>65</sup> Frame, *Salmond: Southern Jurist* (Victoria University Press 1995) p 109

togetherness rather than oneness – “tatou” recognises the continuing presence of at least two major groupings.

In each colonised state indigenous people are both a minority<sup>66</sup> and visibly different from the colonist majority. Their mistreatment is a truism in most legal systems.

#### *A minority*

The law has never treated minorities well. It took a holocaust to bring about discrimination legislation. In all states the law at best still wrestles with such problems and at worst ignores or even accentuates them. While slavery for the most part is no longer present in its more obvious forms, youth prostitution appears to be growing; while the position of women has improved it remains uncertain; the dignity of homosexuals is protected more in theory than in practice; while the rights of children distinct from their parents’ is coming to be recognised, that is less in practice than in theory. That is despite the fact that the sex worker could be a daughter, the woman a wife or mother, the homosexual a brother or son, the child a grandson or daughter; indeed oneself.

#### *And distinctive*

Moreover the person of different race has, like Cain after receiving his mark,<sup>67</sup> been seen as “other”; which is why in immigration and refugee law and policy intolerance is so fashionable – in every society. That has historically been the case in the majority’s treatment of Maori.

That we have problems with these things in New Zealand does not make us distinctive. Nor does the expression of them with which this paper is concerned: the dilemma of recognising in “our own” culture and law values of the indigenous minority which are alien to “our” way of life. But these considerations offer a perspective on why indigenous issues present such difficulty.

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<sup>66</sup> Minority, as historically in the case of women, refers to power rather than simple numbers.

<sup>67</sup> Genesis 4; 15.

The answer, it is suggested, is to recognise this problem as the Daphne Bucket phenomenon: the mixture of arrogance and insecurity that has seen “our” way of doing things as right and other options as wrong.<sup>68</sup>

## (2) What is

It is given to few to see their generation in true perspective. But some themes may be beyond controversy. John Molony has recently written of the Australian experience:

An educated elite is needed for the true conscience of a people to take effect.<sup>69</sup>

We have had the advantage of that in our own time. The effect of the Waitangi Tribunal, which derives from Matiu Rata’s astute recognition of the basic decency of the majority of New Zealanders, skilfully minimising the polarisation and trauma of litigation; Sir Geoffrey’s expansion of the Tribunal’s jurisdiction to historical grievances; the painstaking, sensitive and bold work of Justice Durie and his colleagues;<sup>70</sup> the *vive la différence* response of the Cooke Court of Appeal to Sir Geoffrey’s s 9 of the State-Owned Enterprises Act 1986 and other initiatives: all these and others influenced not only the Maori renaissance since the 1980s<sup>71</sup> but a truly

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<sup>68</sup> With her comparative experience Dame Joan points out the common human tendency to take “our” own way as the *natural* and *normal* way and others as unnatural and deviant – as the unmarked category compared with other marked categories. Cf the way we deny having an accent when speaking English – it is others who have accents.

<sup>69</sup> “Squatters and yabbies”, Review of Tony Roberts’ book, *Frontier Justice: a history of the Gulf country to 1900* (University of Queensland Press) TLS March 31 p31.

<sup>70</sup> for example the Manukau Report WAI 8 written by the Irish silk Temm, the successful farmer and politician Latimer and the perceptive Durie which brought home to Aucklanders the enormity of what was committed on their doorstep and what the Treaty may mean:

Of course the Maori people are unimpressed by the loss of their harbour as a matter of law. They see “the anger of the law” as something that merely deprives them of what is theirs. It is on the Treaty that they pin their hopes, and the hope that the Treaty will be upheld as the supreme law... A decision was made to retain only the Needles Reserve... That is the only Maori oyster reserve existing in the Manukau today... On our visit to the area we could find only dead oyster shells... For the Manukau people the law is as empty as the oyster shells on the Needles Reserves and we think they are justified in feeling that way.

Other notable contributions to the Treaty process included Sir Robert Mahuta’s courage; Sir Tipene O’Regan’s drive; and Sir Douglas Graham’s initiatives. His vision, of encouraging all cultures in New Zealand to flourish, places a premium on getting matters right with Maori.

<sup>71</sup> At a judicial conference on 30 August last year Chief Judge Williams of the Maori Land Court and Chair of the Waitangi Tribunal advised:

- In 2001 585,900 people identified themselves with the Maori ethnic group. That is 15% of the New Zealand population.

distinctive legal evolution to which legislature, executive and judiciary all contributed. It resulted from visionary initiatives that captured the public support required for change in a democracy. At a time when, to some extent, sight has been lost of the reasons for them they need to be rekindled.<sup>72</sup>

Fortunately there remain keepers of the flame. While any list would be invidious, Te Matahauariki Institute of Judge Michael Brown and Professor Alex Frame warrants particular mention.

Dame Evelyn Stokes' translation of Wiremu Tamihana's letter of reproach to the General Assembly has topical lessons:<sup>73</sup>

O friends, I did have respect for the laws of England... the word of General Cameron came to me for peace to be made. I agreed... Three of the laws of England were at

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- In 2004 about 30% of Maori children enrolled in pre-school education attended a kohanga reo. 17% of Maori school aged children were educated in Maori medium with 84% in primary and 16% in secondary education so the proportion of Maori being educated in Maori at primary school is at or above the 30% transferring through from kohanga reo. While in 1975 barely 5% of Maori schoolchildren could speak Maori now nearly 40,000 pre-school and school age children are being educated as native speakers of Maori year on year.
  - 136,600 Maori adults – 40% of the Maori adult population speak and understand Maori beyond the use of single words or greetings. Half of them are speaking Maori “fairly well”.
  - At the time of the last Maori electoral option in 2003 18 year old Maori chose the Maori rolls by a ratio of 12 to 1. Maori youth are using the choice of rolls as a branding exercise and they are overwhelmingly choosing to identify with the Maori brand. Adult Maori of all ages are choosing to register on the Maori rolls by a factor of three to one. By 2021 the Maori population will have increased from 585,000 to 750,000, that is from 15 to 17% of the population. By 2016 37% of New Zealand's population will be ethnic minorities described by Chief Judge Williams as “people of colour”. In Auckland the European-Pakeha proportion of the population will fall from 67% to 54%. By 2040 around 40% of the workforce in New Zealand will be Polynesian-Maori or Pacific Island steadily moving towards an overall majority and is approaching the shift in the 1850s from a Maori majority to a settler majority in terms of its impact on Maori and the country. In the Judge's words:

There is now... such momentum behind the subterranean shifts in our very makeup that we are probably at or even past our tipping point.

<sup>72</sup>Certain arguments for the abolition of the Waitangi Tribunal tend to overlook its constitutional function; the recorded terms on which the State-Owned Enterprises case was settled; and the fact that the Court of Appeal remains seized of the litigation, as was seen in the forests case that gave rise to the Crown Forestry Rental Trust: *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR. 142 (CA).

<sup>73</sup> *Wiremu Tamihana Rangitira* (Huia 2002) p487.

that time broken by the laws of New Zealand... a thought came to my mind lest what England had taught should be set aside by the teaching in New Zealand.

In the invasions of the Waikato, Taranaki and the Bay of Plenty the law and convention of aboriginal rights stated by the Privy Council were breached, with dire consequences. We must ensure that modern breaches of the law and conventions are corrected.

The Maori sense of duty is apparent from the standard account of their war service:

Between 1939 and 1945, 15,744 Maori had volunteered for war service both at home and abroad, a figure made all the more remarkable by the fact that the Maori population of New Zealand was just under 100,000... Freyberg [wrote] that no infantry battalion in his force 'had a more distinguished record, or saw more fighting, or, alas, had such heavy casualties as the Maori Battalion.'<sup>74</sup>

Of the 3600 who saw action with the Maori Battalion 649 were killed, 1712 wounded and a further 29 died after being discharged. They displayed the preparedness of Maori, when treated as fellow members of the community, to undertake in full measure and more the obligations of citizenship. But those statistics have not been balanced by those as to post-war equality of benefit.

Certainly since the emergence of the invigorated Waitangi Tribunal in the Durie era Parliament, the Executive and the Courts have all responded to the hard facts it has placed fairly before them.<sup>75</sup> But the social statistics continue to show that

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<sup>74</sup> Oxford Companion to New Zealand Military History (2000) p311.

<sup>75</sup> Examples include, notably, the fisheries legislation under which Maori now have in that capacity increased from nil to some 60% their share of New Zealand's fishing resource. It is clear that the reasons include Professor David Williams' citation in the Manukau case of US and Canadian judicial decisions, which jurisprudence was crucial to the later Muriwhenua and Ngai Tahu reports, judgments of Greig J and of the Court of Appeal; the reports of James Cameron for the Law Commission and of the Wallace Maori Fisheries Committee to the Government; and the leadership of both Maori and Parliamentarians and Ministers which brought about fundamental change. In the case of Parliament the Conservation Act 1987, the Resource Management Act 1991 (see *Proprietors of Hiruharama Ponui Block Inc v Attorney-General* [2003] 2 NZLR 478 as to consultation processes), the Crown Forest Assets Act 1989, the Maori Language Act 1987, Te Ture Whenua Maori Act 1993, Human Rights Act 1993 and, importantly, the Treaty of Waitangi Act 1995 as well as the Electoral Act 1993 are among both the results and the causes of changed attitude to the need to recognise and value Maori values and distinctiveness. The report of the Wallace Royal Commission that led to MMP has played a major role in giving Maori a voice. Less visible is the work of ministers, other parliamentarians including opposition members, public servants and others, including the media. The courts too have played a part which is well known to this audience.



New Zealand law and institutions have failed to reciprocate and to deliver on the promise of the Treaty.

The episode of the inevitable judgment in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) and the hasty decision to enact the Foreshore and Seabed Act 2004 shows that we are not yet of age as a society. In the face of advice to the Crown that in the previous October the Constitutional Court of South Africa had struck down as unconstitutional legislation from the apartheid era to like effect, it persisted in the measure. In breach of settled convention, by s 38 and other sections Maori are deprived of access to an independent court to fix compensation for removal of property rights.

Such legislation accepts a lower standard of protection than the Australian Commonwealth Native Title Act 1993.<sup>76</sup> It infringes the principles laid down by the Privy Council<sup>77</sup> and is discriminatory<sup>78</sup> and will sooner or later run into a *Quilter v Attorney-General* [1998] 1 NZLR 523 declaration from the Courts to that effect. The decision could not have been reached under English law where article 14 of the European Convention on Human Rights protects even foreign suspected terrorists from discrimination and gives the courts power to strike down inconsistent legislation: *A v Secretary of State for the Home Department* [2005] 2 AC 68 (HL); *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 (HL).

In terms of distinctiveness the sections are of the unattractive kind that could not have withstood application of the standards that now apply in Europe, let alone in the USA where expropriation without compensation fixed independently of the state is prohibited by the Fifth Amendment.

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<sup>76</sup> It gives jurisdiction to independent courts and arbitral tribunals to assess inter alia compensation. Section 51(6) authorises non-monetary compensation; if that is not provided the independent decision-maker may make a determination that equivalent compensation in money is to be paid. The payment is mandatory.

<sup>77</sup> fn 61 above.

<sup>78</sup> See Butler and Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis 2005) pp 523-7, Treasa Dunworth "Public International Law - Foreshore and Seabed Act 2004: the CERD Committee Decision" [2006] NZLRev 378 and *R (European Roma Rights) v Immigration Office at Prague Airport* [2005] 2 AC 1 (HL).

We have traditionally assumed that, like the United Kingdom, our constitutional basics were protected by adherence to settled conventions. It has appreciated that they are not enough.<sup>79</sup> Now that the final Privy Council link with the British Crown has virtually gone, we must not deprive our Supreme Court of tools to do justice as effective as those available in the jurisdictions against which we benchmark ourselves. All New Zealanders, and not least Maori New Zealanders, are entitled to the protection of laws that meet international standards in content, as they already do in the quality of their drafting.

### **3 What may be/Maori as members of the international community**

The topic of what may be the position of Maori as hapu and iwi overlaps that of Maori as individual and group members of the international community.

Until recently the international plane has been regarded as for states alone. For most purposes that remains the law. But the law must evolve to keep in step with the reality of the globalised society.

So the Courts have found it necessary to create an exception to state immunity for commercial cases.<sup>80</sup> Nor has the evolution stopped there.<sup>81</sup>

State immunity remains dominant. In *Jones v Minister of the Interior of the Kingdom of Saudi Arabia* [2006] 2 WLR 1424 (HL) a Court of Appeal decision rejecting a claim to state immunity by police officers and an official alleged to have committed torture was reversed on appeal. The decision of the House of Lords in *Ex p Pinochet*

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<sup>79</sup> There it has been found necessary not only to maintain a second chamber but to accept the authority of the European Declaration of Human Rights and of the Court of Justice of the European Community which can override British legislation.

<sup>80</sup> In a series of decisions, including *The Philippine Admiral* [1977] AC 373, *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 and *I Congreso Del Partido* [1983] 1 AC 244 the English courts simply created an exception to the immunity rule for commercial cases because that was patently needed to do justice in accordance with common sense. It is notable however that the standard international law text Brownlie *Principles of Public International Law* (5<sup>th</sup> ed 1998) p 551 rejects the opinion that breach of a contract by the contracting government of itself creates international responsibility, while recording Jennings' argument that there are no basic objections to the existence of an international law of contract.

<sup>81</sup> For similar reasons the Court of Appeal of England and Wales has recently rejected a challenge to the jurisdiction of the English courts to set aside an award of arbitrators over a bilateral investment treaty between the Republic of Ecuador and Occidental Exploration and Production Co which had been referred to UNCITRAL arbitration and where the arbitrators had appointed London as the seat of the arbitration: *Ecuador v Occidental Exploration and Production Co* [2006] QB 432 (CA).

*Ugarte (No 3)* [2000] 1 AC 147 accepting the universal criminal jurisdiction over torturers was not extended to a damages claim.

But as already seen, human rights are very much the concern of the international community and of New Zealand; which indeed is why the New Zealand military forces, commanded and substantially composed of Maori, are deployed as peace-keepers around the globe. There must be an appropriate institutional response.

It is the view of some writers such as Thomas Sowell that individual rights are enough. His 1996 Sir Ronald Trotter lecture *The Quest for Cosmic Justice*<sup>82</sup> argued against differential treatment of indigenous people.

But such attitude is Eurocentric and leaves out of account the fact that Maori do not see it that way. The fact that some 222,362 Maori have elected to join the Maori electoral roll is of real significance.<sup>83</sup> Departure from convention, the proposed repeal or major dilution of the Treaty of Waitangi Act 1975, and the failure to enact any equivalent to the European Convention on Human Rights risk creating stresses within New Zealand along the social/racial line affecting Maori that it is crucial to avoid.

At least since Vitoria in the 16<sup>th</sup> century there have always been some thinkers who can escape from the prison of their own perceptions and look at the world through others' eyes.<sup>84</sup> In Northern Ireland the British recognised after 300 years that the Irish could not be defeated but must be befriended, which meant earning their affection and respect. Similar lessons need to be learned in the Middle East. Here, where Maori

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<sup>82</sup> Round Table.

<sup>83</sup> *The Dominion Post* 12 August 2006.

<sup>84</sup> Burns and Kipling were among them:

'O wad some Pow'r the giftie gie us  
To see oursels as others see us!  
It wad frae mony a blunder free us,  
And foolish notion.'  
*To a Louse*' (1786)

'There are nine and sixty ways of constructing tribal lays  
And-every-single-one-of-them-is-right!'

*In the Neolithic Age* (1893)

have proved the most adaptable of peoples and for most purposes share the same goals as other New Zealanders, the going should be easy.

But we must first deal with the statistics and the conditions that underlie them.

To have the holder of power restrain abuse of its exercise remains as it has always been *the* problem of moral, political and legal philosophy. The Roman dictator Cincinnatus who, summoned from his farm and given absolute authority, dealt successfully with a crisis then returned fifteen days later unbidden to his plough,<sup>85</sup> is exceptional. Dissenting from Hobbes' *Leviathan*, John Locke insisted that the social contract is also binding on the sovereign.<sup>86</sup> That is an essential element of the rule of law.

Democracy has so far failed to cope with indigenous needs:

The monoculturism that continues to characterise the western world explains the lack of serious study of ways of understanding and exercising policy (in the classic sense of the word) appropriately to other civilisations, which is why we are often confronted with the false dilemma: "democracy or dictatorship."<sup>87</sup>

We must find a distinctive way to deliver the rights of Maori and others under the Treaty of Waitangi and New Zealand's convention obligations.<sup>88</sup> It is the function of law and the courts to deal with disputes, even where the defendant is the Crown. The Crown Proceedings Act 1950, the Judicature Amendment Act 1972 and the Treaty of Waitangi Act 1975 have each proved their merit in providing a judicial or quasi-judicial forum for the airing and resolving of grievances. Without such forum there is risk that the grievances of disaffected parties will accentuate.<sup>89</sup>

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<sup>85</sup> Livy *Ab Urbe Condita* Book 3.

<sup>86</sup> Christopher Hitchens *Thomas Paine's "Rights of Man" a biography* (Atlantic Books 2006) p106.

<sup>87</sup> Raimon Panikkar *Les fondements de la démocratie* cited by Luciano Canfora *La démocratie: histoire d'une idéologie* (Seuil 2006). The latter was written for the collection "Making Europe", an initiative by publishers in Munich, Oxford, Barcelona, Rome and Paris aimed at clarifying the creation of Europe without concealing its internal contradictions.

<sup>88</sup> The importance in the case of any human right of standing to claim it and a process by which to do so is emphasised in recent writing. See for instance Endicott *The Infant in the Snow in Properties at Law* p354.

<sup>89</sup> For many reasons the Human Rights Committee of the UN and the Committee on the Elimination of Racial Discrimination are no substitute for strong domestic processes. It may be noted that the Supreme Court of Canada, while endorsing the course of negotiation as the ultimate route to achieving reconciliation between aboriginal societies and the Crown (*Delgamuukw v British Columbia* [1997] 3 SCR 1010, 153 DLR (4<sup>th</sup>) 193 at para 186) has used the technique of awarding pre-trial costs to Indian

The perception of Maori by other New Zealanders is of great importance.<sup>90</sup> Those who feel themselves to be respected behave respectfully.

To achieve that requires change on a broad front, change to which lawyers and judges, within the limits of convention, can contribute by adding their ideas to the debate. It concerns the very legal and moral philosophy of our society.

We have been this way before. Adam Smith's lucid and compelling *Wealth of Nations*<sup>91</sup> has been the intellectual force behind virtually the entire theory and practice of market politics. But too many of his economic disciples have overlooked both its context<sup>92</sup> and thus the theme of his *The Theory of Moral Sentiments*<sup>93</sup> which is needed to balance it. There he wrote:

Th[e] disposition to admire, and almost to worship, the rich and the powerful, and to despise, or at least, to neglect persons of poor and mean condition... is... the great and most universal cause of the corruption of society.<sup>94</sup>

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bands in appropriate cases in order to ensure the access to justice which is essential to confidence in the legal process: *British Columbia (Minister for Forests) v Okanagan Indian Band* [2003] 3 SCR 371.

<sup>90</sup> The reasons for Mandela's changed reputation, from terrorist to virtual saint, are not that he changed but that society and others' perception did. For similar reasons the Maori Wars have become the Land Wars or the New Zealand Wars.

<sup>91</sup> Everyman Library.

<sup>92</sup> See Adam Nicholson *Men of Honour: Trafalgar and the Making of the English Hero* (HarperCollins 2005) pp250-1:

The 18<sup>th</sup> century in England saw man's existence as essentially social...As William Hutton, the free commercial thinker and bookseller in Birmingham, wrote in 1781:

For the intercourse occasioned by traffic gives a man a view of the world and of himself; removed the narrow limits that confine his judgment; removes his prejudices; and polishes his manners. Civility and humanity are ever the companions of trade; the man of trade is a man of liberal sentiment; a barbarous and commercial people is a contradiction.

These are, of course, the ideas on which Adam Smith drew. Sociability, never more than when in the service of commerce, was goodness. Virtue was no lonely thing, as it had been for the puritan. It was a full and generous humanity, an acceptance of the human reality of other people and a duty of benevolence among men.

<sup>93</sup> (Cambridge 2002).

<sup>94</sup> p72. He continued:

That utility is one of the principal sources of beauty has been observed by every body, who has considered with any attention what constitutes the nature of beauty...(p209)

Nothing could have greater utility, and therefore beauty, than Smith's theory of the market. But he went on to add:

In his *A Brief History of Neoliberalism*<sup>95</sup> David Harvey presents the challenge of filling the moral void left by the selfish excesses of the post-Reagan political philosophy. The urgency of the need has been learned by leading US academics, including the Dean of the Yale Law School,<sup>96</sup> but is largely ignored. The Financial Times reported on 27 December 2005 p9:

talking this year about ending extreme poverty has yet to make a discernible difference for the hungry the destitute and dying.

That the law can assist is seen in *R (Limbuella) v Secretary of State for the Home Department ex parte Adam* [2006] 1 AC 396. There the House of Lords, yet again, did so to impose minimum standards of decency in the treatment of persons in the United Kingdom. They held in that case that executive policies of refusing work permits, food and accommodation to asylum seekers whose application was made late infringed article 3 of the European Convention. Requiring them to live rough and to beg constituted treatment that was in law “inhuman and degrading”. Lord Bingham cited Shakespeare’s *Sir Thomas More*: “your mountainous inhumanity”. Relief was granted.

That Court appreciated that society must care for its disadvantaged: even those who are only temporary visitors. The response of the asylum seekers and their compatriots to the sensitivity of the highest court can be imagined.

The need for those within the New Zealand legal system to strive to increase public confidence in it by minority groups is painfully clear from statistics produced by Sir Thomas Thorp in a recent paper,<sup>97</sup> showing that Maori and Pacific Islanders are disproportionately reluctant to seek redress for miscarriage of justice. And so long as

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But that this fitness, this happy contrivance of any production of art, should be more valued, than the very end for which it was intended; and that the very end for which it was intended; (p210)...has not, so far as I know, been taken notice of by any body...wealth and greatness are mere trinkets of frivolous utility, no more adapted for procuring ease of body and of mind than the tweezer-cases of the lover of toys. (p212)

<sup>95</sup> (Oxford 2005). See also Raymond Baker *Capitalism’s Achilles Heel* (Wiley) pages 224 ff.

<sup>96</sup> See Kronman “The Value of Moral Philosophy” 111 *Harvard Law Review* 1751 (1997) and also Nussbaum “Flawed Findings: the Philosophical Critique” 64 *Chicago Law Review* 1197 (1997).

Maori are under-represented in the Auckland Law School there is more work to be done.

We have already seen the admirable Law Commission Report NZLC R 92 *Waka Umanga: a proposed law for Maori Governance Entities* (May 2006) proposing a legal structure that will meet Maori needs in a wholly distinctive way.

Without education of the public, modifying the Foreshore and Seabed Act into a non-discriminatory form could, paradoxically, be seen as discriminatory. But to do both and to remove the paradox would be a good start towards converting New Zealand into a society that **is** a community. Our politicians and media can contribute to that. A useful starting point might be Professor Brookfield's proposal<sup>98</sup> of a declaration that the foreshore and seabed are vested in the Crown; but with an Australian style compensation provision in the event that the Crown cannot or will not make non-monetary reparation (such as a declaration of trusteeship) for any Maori "group" that successfully makes its claim to possession of any particular area of it; and with provision for recreational use by the public.

Another step would be to enact a measure equivalent to the European Convention on Human Rights to ensure that the words of our international obligations can be delivered on. Each of these would tend to remove a form of distinctiveness we can do without.

At Turanagawaewae the past and present came together as an expression of the future, the elders speaking of traditions not as frozen in time but as the source of energy for the future of the young people and of the country. It was personified by the presence of Te Arikinui and the portraits above the casket of Te Puea and the other leaders of the Kingitanga, itself a reaction to unjust ways of doing law.

In South Africa the constitution, the rainbow of the rainbow nation, provides not only a set of rules but a vision of how that society can bring its different peoples together

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<sup>97</sup> *Miscarriages of Justice* (Legal Research Foundation 2006).

<sup>98</sup> At p 192.

to create a thing of beauty and magnificence. It can serve as an example of how the Treaty of Waitangi might be seen by New Zealanders.

That would make our way of doing law truly distinctive.<sup>99</sup>

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<sup>99</sup> I record my thanks to friends whose vision has provided ideas, who have saved me from particular errors, and who have provided encouragement. Most have not seen and all would dissociate themselves from what I have called a provisional attempt at some thoughts. Those whose ideas I have taken directly are Dame Joan Metge, Professor Alan Kirkness, Professor Brookfield, Sir Douglas Graham, Professor Alex Frame, Justice Fogarty, Cecilia Gullery, Moana Ieremia, George Tanner QC, Dr Andrew Butler, my clerk Bernice Ng and my daughter Lucy. Others from whom I have learned include the late Sir Edgar Williams, Justice Durie, the late Matiu Rata, Sir Graham Latimer, Sir Robert Mahuta, Dr Tui Adams, the late Dame Evelyn Stokes, Denese Henare, the late Martin Dawson, the Chief Justice, and Lord Cooke. My especial appreciation to Susan and the family.