

# THE EVOLUTION OF TREATY JURISPRUDENCE

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## Introduction

In his Harkness Henry address in 1994 “The challenge of Treaty of Waitangi jurisprudence”<sup>1</sup> Sir Robin Cooke tackled that part of our jurisprudence which deals with its treatment of the indigenous people of New Zealand, in which he had played a dominant role. To be asked to provide an update of that address, effectively from the time of Lord Cooke’s unprecedented move to the House of Lords, and to do so before this audience in the heart of Tainui, is a privilege and a challenge.<sup>2</sup>

## *Candide*

In *Candide* Voltaire commented on human nature:

All is for the best in the best of all possible worlds.<sup>3</sup>

We tend to assume that the fundamentals of our jurisprudence are so well-settled that they can be taken for granted as sound. Yet the Law Commission’s *Juries* research, undertaken by Dr Warren Young and his colleagues, established that while the institution of trial by jury was essentially sound, as practised it contained deep-seated flaws.<sup>4</sup> To achieve justice it required substantial change, on a continuing basis, of how we use it. Whether some review of Treaty

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<sup>1</sup> [1994] Waikato Law Review 1.

<sup>2</sup> 1995 marked the end of Lord Cooke’s term as President of the Court of Appeal of New Zealand. For the next decade he continued to preside in the Court of Appeal of Samoa and also as a Non-Permanent member of the Final Court of Hong Kong as well as hearing the occasional Privy Council appeal from his own country. Uniquely, as a member of the House of Lords, he was concurrently responsible for testing the law of the United Kingdom against both the Treaty of Rome and the European Convention on Human Rights. It is interesting to consider what would he have made of our jurisprudence over the past 13 years.

<sup>3</sup> (1759) Ch 1 <<Dans ce meilleur des mondes possibles...tout est aux mieux>>.

<sup>4</sup> NZLR 69 *Juries in Criminal Trials* (2001).

jurisprudence is needed is a topic I have touched on in earlier papers.<sup>5</sup> Tonight I seek to place our developments in something of a comparative perspective.

### **The Maori reality**

In “Vikings of the Sunrise” Sir Peter Buck wrote of the first great globalisers: the Polynesian navigators who opened up the Pacific as far as Hawaii and Easter Island and who are believed to have sailed as far west as Madagascar. Ann Salmond followed him using, in “The Trial of the Cannibal Dog”, David Lewis’s account of how Cooke’s interpreter, Tupaia, was himself a member of that elite group, with special privileges, who maintained the skills of ocean navigation without compass, sextant or chronometer let alone GPS. Tainui’s tradition of its arrival by great canoe is maintained today, as anyone knows who has visited the marae at Kawhia. The Maori fisheries renaissance, which has followed the restoration of fishing rights removed from Maori during the colonial process, is a partial restoration of the mastery of the trade graphically recounted by the 18<sup>th</sup> century French navigators cited in the *Muriwhenua Fishing Report* of the Waitangi Tribunal.

In “The New Zealand Wars” Jamie Belich showed that our traditions had got history back to front. The military geniuses who repeatedly defeated greater numbers and came close to throwing superior numbers of British troops into the sea had receded from sight. Only recently has a truer picture been seen, thanks to historians such as Dame Evelyn Stokes in her “Wiremu Tamehana”.

More generally, it has taken the brainchild of Matiu Rata and the careful work of Justice Durie and his colleagues in the Waitangi Tribunal to bring home to non-Maori New Zealanders the gap between the promise of the Treaty of Waitangi and its performance.

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<sup>5</sup> One delivered to the New Zealand police (<http://www.police.govt.nz/events/2005/ngakia-kia-puawai/>) a second to mark the 20<sup>th</sup> anniversary of the Law Commission (*What is distinctive about New Zealand Law and the New Zealand way of doing law? New Zealand law and Māori* in Sir Geoffrey Palmer ed *Reflections on the New Zealand Law Commission* LexisNexis (2007) p 55); and a third to the University of Otago on the 20<sup>th</sup> anniversary of the decision in the *Māori Council* case (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 687) *A perspective of counsel* in Jacinta Ruru ed *The Treaty of Waitangi in law 20 years on: A reflection on Aotearoa/New Zealand’s landmark Treaty of Waitangi Court of Appeal case* New Zealand Law Foundation and University of Otago (forthcoming)).

## **Thesis**

My thesis this evening is that the process of denial of indigenous values and achievement has not escaped the field of jurisprudence in New Zealand any more than it has internationally; that there is need to link that event with the otherwise inexplicable phenomenon of Maori social disadvantage and the offending which is a symptom of it; and that in New Zealand as elsewhere the law needs to heed Antony Anghie's lesson, that insofar as public international law is built on Vitoria's theory of how Spain could justify its seizure of Indian possessions in South America, it is a colonist's rationalisation that cannot resist analysis. Conferring on indigenous people the fundamental human right of dignity may be expected to contribute seriously to reversal of the unhappy social trends of which we see so much evidence in the criminal courts.

## **The unknown jurisprudence**

It tends to be overlooked that New Zealand is more than simply a British colony, settled by colonists from "Home" who somehow or other acquired the right to rule the country. That there is any more to it was not evident during the legal education of the current elder members of the profession. For us the Judicature Acts and the English Laws Act 1908<sup>6</sup> brought as much of the law of England as seemed necessary to operate the judicial system. I was personally oblivious to anything more.

The reason is, however, that of Dr Johnson, replying to an enquiry why his Dictionary contained an error: "Ignorance Madam, sheer ignorance". A greater effort to find the authorities by which New Zealand courts other than the Supreme Court are bound would have thrown up authority requiring a deeper analysis. I mention in passing *Nireaha Tamaki v Baker* (1901) NZPCC 371 and *Wallis v Solicitor-General* (1903) NZPCC 23, cases familiar to modern law students, where the Privy Council first chided and then castigated the New Zealand authorities for failure to give effect to Māori rights. Professor Frame has drawn to attention another case whose practical utility was seen in a recent judgment of the Court of Appeal of Samoa, about the need in a succession case to examine the common law of that state.<sup>7</sup> In *Arani v Public Trustee of New Zealand* (1919) NZPCC1 (PC) non-statutory adoption under Māori custom was recognised by the Privy Council as effective under the New Zealand Adoption Act 1895. That form of adoption was rejected by the Adoption Act

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<sup>6</sup> See now the Imperial Laws Application Act 1988.

1956, which created much anguish for natural mothers who were separated for life from their child. But, following a report of the Law Commission in 2000,<sup>8</sup> Parliament enacted the Care of Children Act 2004 which has gone far to restore the option, always recognised by Maori, of open adoption which had been excluded from our statute law for half a century.

### **Foreshore and seabed**

The common law's determination to protect interests recognised "according to native custom or usage" is seen in the recent analysis by Fogarty J in *Minister of Conservation v Maori Land Court* [2007] 2 NZLR 542 endorsing a finding by Judge Mair, better known as Major William Gilbert Mair, who had been:

...brought up in the Bay of Islands among Maori. They were fluent in Maori [having] an intimate understanding of Maori custom [and] held in the highest regard by Maori tribes.

He held that certain mudflats near Nelson claimed by the Crown constituted Maori freehold land.

That approach had been adopted in 2003, in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643, where the Court of Appeal reinstated the principle, settled by decisions of the Privy Council and accepted by the Supreme Courts of the United States and Canada, the Constitutional Court of South and the High Court of Australia, that indigenous custom forms part of the common law of the state.

But, following the Orewa speech, that decision was set aside by the Foreshore and Seabed Act 2004. It provides:

### **Section 33 High Court may find that a group held territorial rights**

The High Court may...make a finding that [a] group...would, but for the vesting of the full legal and beneficial ownership of the public foreshore and seabed in the Crown by section 13(1), have held territorial customary rights to a particular area of the public foreshore and seabed at common law.

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<sup>7</sup> *Tai Devoe v Attorney-General* 14 September 2007.

<sup>8</sup> NZLC R65 *Adoption and its Alternatives: a Different Approach and a New Framework*.

### **Section 38 No redress other than that given by Crown**

- (1) No claim may be made in respect of a finding made under section 33 other than redress-
  - (a) that the Crown may give; or
  - (b) provided in accordance with ss 40-43 {relating to the creation of foreshore and seabed reserves}
- ...
- (3) No Court has any jurisdiction to consider the nature or the extent of any matter that the Crown proposes, offers, or gives for the purpose of any redress of the kind described in subsection (1)

It may be compared with a decision the previous year of the Constitutional Court of South Africa *Alexor Ltd. and the Government of the Republic of South Africa v. Richtersveld community* CCT 19/03, 2003 about diamond bearing land. It upheld a decision of Supreme Court of South Africa that concluded:

The effect of the state policy was that the [indigenous] Richtersfeld people were treated as if they had no rights in the subject land. Their disposition resulted from a racially discriminatory practice, in that it was based upon and proceeded from the premise that due to their lack of civilisation...the Richtersfeld people had no rights in the subject land

The claim to all rights in the land by the inhabitants of Richterfeld was sustained.

In *Arani* at p 6 the Privy Council suggested the possibility, which has occurred in Canada, that:

...the old custom as it existed before the arrival of Europeans... [which] has developed, and become adapted to the changed circumstances of the Māori race of to-day

might be recognised by law.

This is not the occasion to discuss such questions. Rather my focus is on the narrower point of how, without considering whether or to what extent Maori customary law is itself part of New Zealand law, the evolving common law of New Zealand should respond to the distinctiveness and dignity of Maori. While the role and status of Māori in New Zealand are by any standard special, the lessons learned may have relevance to how we should treat New Zealanders of non-indigenous racial and cultural background.

## Others' perspectives

Like the English language, the common law at its best is an inveterate borrower of other people's ideas which allow it to retain and increase its capacity to deal with new challenges. It may be called the evolution of the constitution through difference. In *Sixty-year views*<sup>9</sup> David Arnold has written:

If democracy began its career 2,500 years ago in Athens, it has since assumed such different contexts and disparate forms that... 'history can no longer be written coherently from within the terms of the west's own historical experience'

And to justice to indigenous values a wider view must be taken than that of the European Enlightenment. To view our recent Treaty jurisprudence in perspective it is convenient to begin with what has happened elsewhere.

### *Some history*

I have mentioned Vitoria. His contribution to international law was to recognise that the Indians did have some right to legal recognition. His deficiency, as a man of his times, was to patronise them as lesser people who were therefore entitled only to lesser rights. "Imperialism, Sovereignty and the Making of International Law" by the Australian Antony Anghie's book<sup>10</sup> is a sustained critique of Vitoria and his legacy. It allows one to examine the colonial process dispassionately, recognising both the benefits (in New Zealand they included the end of the disastrous Musket Wars) and the detriments. Its message is of a self serving Western arrogance, fuelled by indigenous abuses both perceived and actual such as in New Zealand cannibalism and widow suicide,<sup>11</sup> having the economic effect of passing indigenous resources to the colonist.

Anghie does not stand alone. The Indian scholar Ranabir Samaddar has recently written:<sup>12</sup>

...while Montesquieu, Kant, and Burke each in their own way were promoting the spirit of the laws, on the other side of the world a more significant history of law making was being enacted in order to defend a particular type of rule and a particular

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<sup>9</sup> TLS August 24 page 10.

<sup>10</sup> Cambridge University Press 2005. He is now of the University of Utah. I am indebted for the reference to Judges Clerk Claire Nielsen and to the Chief Justice from whom I received it on successive days.

<sup>11</sup> JR Elder *Marsden's Lieutenants* University of Otago (1934) page 76.

<sup>12</sup> in *Diogenes* Number 212 Volume 53 Issue 4 (2006) published under the auspices of the International Council for Philosophy and Humanistic Studies page 6. I owe the reference to Professor Colin Anderson, Massey University.

type of government... [T]he colonial history of law making was essential to the entire legal culture and tradition of the Euro-American world. The colonial history left a permanent legacy on constitutionalism everywhere; it had taught the rulers that governing by law making was not to be a pure process, rule of law had to be mixed appropriately with rule of men and rule by orders. The other legacy was again something that again neither Kant nor Burke wrote of – it was that constitutionalism was to be built on the principle of difference. Race, gender, caste, communal identity, and locality – all, and most fundamentally race, built this principle of difference. Constitutionalism and law making did not invent difference; they only gave them formal shape in the light of the principle of governing on the basis of principle of difference. At times, constitutionalism also took away the right to be different also, in the sense that everyone had to subscribe to the homogeneity that the legal order was creating. Thus exclusions and inclusions evolved as the two strategies of rule, playing on the fundamental reality of difference.

That process of convenient rationalisation did not of course stand alone. It was mitigated to a degree in New Zealand by the work of the Evangelicals, not least James Stephen of the Colonial Office who I have suggested was the true force behind the Treaty of Waitangi. An overlapping influence was that from the time of the Enlightenment there were strenuous attempts to improve on the so-called “natural law” and its relation the Canon law which ascribed divine provenance to the sovereign as God’s earthly representative. The process reached its zenith in the 20<sup>th</sup> century with the positivism – authority comes from the ruler – that resulted in the Führerprinzip and the denial of moral content in the law. The perversity of the result led post-war to the human rights movement and its International Conventions – on Civil and Political Rights and many other topics. Their prime achievement is to underpin the human right to individual dignity. But sight has tended to be lost of a different right: to be part of a community.

### **Why?**

The human rights movement has achieved much and it has further fields to conquer. Discrimination law is, rightly, developing apace. The Women’s Convention, the Child Convention have much further work to do. I have discussed elsewhere what on 13 September 2007 the UN General Assembly adopted as the Declaration on the Rights of Indigenous Peoples, to which New Zealand, Australia, Canada and the USA have declined to accede. Another newcomer is the International Criminal Court, whose establishment I greeted with enthusiasm (and still support, in its essence).

But Antony Anghie has persuaded me that my approach to the ICC has been over-simple. To explain why requires mention of what are at first sight disparate topics.

Richard Goldstone is a jurist of such eminence that the South African Constitution was changed to allow him to move for a time from the Constitutional Court to serve as initial Prosecutor in the Hague. Why did he endorse in his own country the inconsistent model of the Truth and Reconciliation Commission?

Why did Lord Cooke give judgment in Samoa endorsing a judgment of banishment, something now inconceivable in English law?

Why did the Guatemalan Nobel laureate Rigoberta Menchúr attach such importance to the fact that in the state adjoining hers:

From the time of its establishment in 1917 the Constitution of Mexico was written only in Spanish. But in November 2006 the Supreme Court – the highest court in the land – rectified that injustice. With the consent of the civil authorities the Constitution is to be translated into 26 other languages?<sup>13</sup>

Among them are her own Mayan language. The President of the Supreme Court, Marino Azuela Gúitron stated that in future Mexicans will be able to defend their rights in the language of their ancestors. One might add a reference to Maori TV and the struggle to secure it, beginning with the Te Reo Claim to the Waitangi Tribunal.

Why in “The Trial on the Cannibal Dog” did Anne Salmond view James Cook’s arrival in Polynesia from the standpoint of the indigenous people?

Examples can be multiplied, as they are by Antony Anghie, to dissect the unthinking assumption of many of the West, myself included, that underlies the constitution of the International Criminal Court - that in human rights one size fits all.

My own exposure to this occurred in November 1986, on the Te Reo Mihi Marae at Te Hapua in the Far North, I appeared before the Waitangi Tribunal for the tribes of Muriwhenua in support of their fisheries claim. The case burgeoned into what became a challenge to the State Owned Enterprises Bill which was the key element of the policies of the Fourth Labour Government. I found myself, like Alice in the first chapter, in my own country but in a

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<sup>13</sup> *Courrier International* Hors-Série Juin-Juillet août 2007 *Fiers d’être indiens* 37.

wholly unfamiliar environment where settled assumptions proved unjustified and there was a way of doing things, unlike in Wonderland, with complete logic, pattern and order, of a kind I had never encountered.

In preparing my response to your challenge I came to realise that a rather different approach is needed from simply listing the statutes and cases since 1994. What at first sight seems a ragbag of unrelated things has assumed what I suggest are part of a clear pattern - the events at Te Hapua in the Far North in 1986; discussion in Geneva with Justice Richard Goldstone; reading Rigoberta Menchúr, Antony Anghie and Anne Salmond; sitting in Samoa. The uniform theme is that *what matters is the opinion of the people affected*.<sup>14</sup> And it requires more than a narrowly domestic focus. The thesis is that Treaty jurisprudence, and indeed all jurisprudence, should be viewed as the child viewed the Emperor, without preconception and in recognition that there may be other assessments than the conventional. In this case also the suggested additional perspective, while very simple and indeed obvious, is uncomfortably unfamiliar: that of the other parties involved.

With his great experience of the East Kipling expressed the point with clarity:

There and nine and sixty ways of constructing tribal lays,  
And-every-single-one-of-them-is-right!<sup>15</sup>

JB Phillips' best known book on theology, "Your God is too small: a guide for sceptics and others", requires a jurisprudential equivalent.

Each of us is familiar with the part of the law that affects us. There are the statutes enacted by decision of Parliament, with its plenary authority to make whatever law commends itself to a majority of members. We even know that we are evolving a common law of New Zealand. It includes the basic constitutional rules: that what Parliament enacts by statute is the law; that criminal guilt must be proved by the prosecution and beyond reasonable doubt; that the legality of all conduct (save that of the Sovereign in her personal capacity) may be examined

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<sup>14</sup> See likewise Professor William Schabas: "If an international criminal tribunal is seen as something being imposed from outside it is unlikely societies or governments will fully cooperate in its workings and even go so far as to feel that their people are being unjustly prosecuted in *Regions, Regionalism and International Criminal Law* New Zealand Yearbook of International Law 2007 p42.

<sup>15</sup> "In the Neolithic Age" (1893).

by judicial review; what are the elements of an effective contract; what constitutes an actionable tort; when equity will intervene.

But what this misses is the law of the minority, something shown up on a recent visit to Samoa.<sup>16</sup> The effect of the successive foreign rulers – most recently German and New Zealand – is etched deep in Samoan culture.<sup>17</sup> The contribution of the German settlers is reflected in more than the names of their descendants: there remain the relict of German land law, the architecture of the old courthouse where we sat and, crucially, the genetic evidence within that vital society. Also evident is the benign legacy of New Zealand law and administration from the end of World War I until independence; but also the scars of the Mau episode. These and more go to make up what Samoa is. Of particular present interest is the indigenous element of current Samoan law and practice. Notable are the Village Fonau Act, recognising specifically the role in local government of village communities and institutions; authoritative advice that only 1% of crime occurs within the close-knit village communities whose cohesion is protected by the authority of matai leadership; the melding of statute law, derived essentially from New Zealand; common law and equity which together with basic human rights are protected by an entrenched Constitution; and indigenous law by which, in accordance with the tenets of English colonial law, custom forms part of the common law of Samoa.

The Samoan experience has more in common with that of New Zealand than those of us with merely European ancestry are sometimes ready to acknowledge.

What this has to do with the Treaty of Waitangi is the evolution of the constitution through difference.

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<sup>16</sup> The links at that sitting with the Waikato included Salmon J who won the *Tainui* coal case (*Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513) in the New Zealand Court of Appeal and Paterson J who practised as a silk in Hamilton.

<sup>17</sup> Mention must also be made of the 300 year period of Tongan presence, hence the frisson experienced in the recent World Cup game between Samoa and Tonga.

## **The legal status of the Treaty**

### *Crown rights*

There is now no doubt that at international law the Treaty of Waitangi was a true treaty of cession. Previous doubts were put to rest by the essay of Sir Edgar Williams<sup>18</sup> who cited the three Imperial statutes of George III and George IV<sup>19</sup> recognising Māori as a sovereign people.<sup>20</sup> In point of both international law and New Zealand domestic law there is no doubt that the effect of the treaty was to confer sovereignty on the British Crown. That was the legal effect of Article 1 taken with the other events summarised by Somers J in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at p 690.

### *Crown responsibilities*

But the principle that the rind must accompany the fruit is one of common decency. Since the Crown continues to enjoy the benefit of Article 1 of the Treaty, and those of us who in Durie J's terms are *tangita tiriti* in terms of the Preamble have full entitlement to claim to be New Zealanders, what of Māori claims to the rights promised under Articles 2 and 3?

While there is no doubt that the Treaty cannot be sued upon as part of New Zealand domestic law,<sup>21</sup> it by no means follows that the Treaty is without legal significance.

## **The role of the courts**

### *(1) Courts to construe law as confirming with treaty obligations*

It is settled constitutional law that the courts, as one limb of the Crown, will endeavour to construe New Zealand law as conforming rather than as conflicting with the treaties entered into by the Executive as a second limb of the Crown.<sup>22</sup> It is unnecessary in such cases for there to be endorsement by the third – lawmaking – limb, Parliament.<sup>23</sup>

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<sup>18</sup> *James Stephen and British Intervention in New Zealand 1838-40* (1941) XII (I) *Journal of Modern History* 19, p 22. Williams, an Oxford historian, married a New Zealander, was Montgomery's intelligence officer from Alamein until the end of the war and was later Warden of Rhodes House, Oxford.

<sup>19</sup> 57 Geo III, c 53; 4 Geo IV, c 96 sec 3; and 9 Geo IV, c 83, sec 4.

<sup>20</sup> Hence Busby's offer to Maori of a range of flags and their selection of the new Confederation flag which on 20 March 1834 was accorded the 21-gun British naval salute due to a sovereign state.

<sup>21</sup> As Sir Geoffrey Palmer's White Paper proposing a Bill of Rights had proposed.

<sup>22</sup> For list see Mark Gobbi in "New Zealand Yearbook of International Law 2007" at pp350-1.

Moreover it is the constitutional responsibility of the Crown to protect its subjects; that responsibility being reciprocal to the subject's obligation of loyalty to the Crown.<sup>24</sup> That common law obligation is the subject of express confirmation in Article 3. It may be thought fundamental that the Executive, when considering how to act in relation to matters that bear upon the rights of Maori as citizens and as the beneficiaries of the undertaking in Article 2, would take care to comply with the obligations assumed by the Crown as the price of sovereignty.<sup>25</sup>

It may also be thought fundamental that the Courts, which strive to give effect to other treaty obligations when construing legislation and performing their role of interstitial development of our law consistently with legislation, would strive no less hard to ensure that they do not put New Zealand in breach of the obligations that are the foundation of their and its existence.

## *(2) Courts' role to warn*

New Zealand courts do not claim the power exercised by courts in virtually every other jurisdiction<sup>26</sup> of setting aside legislation as unconstitutional. But they do claim the right, akin to that of the Sovereign and her Governor-General, to warn the decision-makers. That is a sound claim, for two reasons. One is that the Courts are the limb of government responsible for declaring what the law is and for applying it to the disputes brought before them by citizens rather than taking matters into their own hands. We are the retailers of what Parliament and the Executive handle as manufacturers and wholesalers. We are in a position to see whether there is asperity and injustice. The other, as Palmer and Palmer observe in "Bridled Power",<sup>27</sup> is that the conventions are part of our constitution. It is the task of all elements of society, not least its judges, to understand and help sustain those conventions which are an important part of what gives cohesion to our society. That is not to say that conventions may not be changed. But as the Law Lords made clear in *Pierson, Simms* and

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<sup>23</sup> In recent times care has been taken by Executive and Legislature to avoid speaking with different voices. See New Zealand Law Commission NZLC R45 *The Treaty Making Process: Reform and the Role of Parliament* (1997).

<sup>24</sup> Recognised by Sir Edward Coke in *Calvin's Case* (1609) 7 Co Rep 1a.

<sup>25</sup> Compare the problems identified by the Waitangi Tribunal with the procedures adopted by the Office of Treaty Settlements in relation to cross-claims: *Tāmaki Makaurau Settlement Process Report* (Wai 1362) at 56,86 and 94.

<sup>26</sup> Former exceptions, the United Kingdom and Israel, have in the former case legally (see *R v Secretary of State for Transport ex parte Factortame Ltd (No 5)* [2000] 1 AC 524 (HL)) and in the second case virtually (since the Basic Law of Dignity and Freedom (1992)), joined the majority.

<sup>27</sup> (4<sup>th</sup> ed 2004) page 5.

*Daly*,<sup>28</sup> those who wish to alter settled principle must make their intention to do so wholly clear so as to accept publicly the consequences. That is why the Court of Appeal in *Quilter* [1998 1 NZLR 523 (CA)], and more recently the Supreme Court in *Belcher* [2007] NZSC 54, have asserted the right possessed by the Courts of England to make declarations of breach of the Bill of Rights.

### **Such role possessed by other non-New Zealand agencies**

That authority is possessed by the Committee on the Elimination of all Forms of Racial Discrimination (see recent report (CERD/C/NZL/CO/17) which noted two concerns relating to the Tribunal: that its decisions are not binding and that only a small proportion of recommendations are followed).

The UN Human Rights Committee claims similar authority to comment on New Zealand's human rights performance.

### **New Zealand Maori Council case 2007**

In *New Zealand Maori Council v Attorney-General* HCWN CIV 2007-485-000095 4 May 2007 Gendall J the High Court exercised that authority in relation to breach of the Treaty of Waitangi, in respect of an alleged breach of the settlement effected following the original *Maori Council* case ([1987] 1 NZLR 687).

I have recently commented on the latter case and do not propose to interpolate an opinion on the merits at a stage between the decision of the Court of Appeal ([2007] NZCA 269), that the High Court was wrong to do so, and the Supreme Court to which an appeal is pending. But in terms of procedure it may be ventured that if the common law is resourceful enough to permit a *Quilter* declaration in respect of breaches of the Bill of Rights, it might well consider that such declaration is the way forward from the stilted wartime decision in *Hoani Te Heuheu Tukino v Aotea Land Board* on which Lord Cooke commented with a degree of asperity in *Maori Council 1*.

### **Continuing significance of the Treaty**

In my view the greatest continuing significance of the Treaty is its standing status as an icon of where New Zealand comes from. The Treaty should, like any other treaty, be a mandatory

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<sup>28</sup> [1995] AC 539, [2000] 2 AC 115 and [2001] 2 AC 532.

consideration when it is relevant to decision-making including adjudication. It is not simply a protection for Maori; it has been used by the High Court to protect a Dutch New Zealander from having to carry the burden of Treaty breach that should be spread more widely.<sup>29</sup> Rather it is an expression of the rule of law: a statement that Western norms do not exhaust the values of society; that even in the absence of entrenched rights we cannot tolerate any tyranny of the majority.

Professor Pratt has pointed out that

...in a Mood of the Nation report in 2004, New Zealanders were surveyed about which of 17 professions they trusted the most; the judges came 9th<sup>30</sup>

Are we failing to perform? Are we failing to communicate? Confidence in the judges is a component of confidence in the rule of law. Unless Maori (and other minorities) feel that the legal system is *their* legal system the estrangement of many from the law will continue and perhaps accentuate. That at least is the apprehension of distinguished speakers who have recently addressed the Auckland judges under Chatham House rules.

An advance of real importance is the issue in June 2007 by Te Matahauariki Research Institute within this University of Te Matapunenga, the compendium of Māori concepts by Māori and non-Māori scholars which, unlike any dictionary, illustrates by example the values lying beneath the words. At its launch the thought was ventured:

Like the role of great literature for the Western world, Te Matapunenga shows to Maori what they have done, what they can do, and indeed what they are. Its account of Maori achievement will add to the confidence, self-esteem and vision of the young Maori whose sense of full participation in all that is good in New Zealand society is so crucial to its future and to theirs.

But we lawyers must play our part in lifting the hopes, aspiration and confidence of all members of our community.<sup>31</sup> Until Maori feel that our laws and institutions value them, the deep-seated problems in our society cannot heal. Our approach to the Treaty and to the

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<sup>29</sup> *Ngati Maru Ki Hauraki Inc v Kruitof* [2005] NZRMA 1.

<sup>30</sup> "Punishment, Politics and Public Opinion: the Sorcerer's Apprentice Revisited" (2006).

<sup>31</sup> The roles of others include those of Crown agencies and of religion, discussed by the Reverend Professor James Haire in his Ferguson Lecture "Should we do it in public? Public theology in the Asia-Pacific Region" delivered at the University of Auckland 1 August 2007 and by David Martin "Split religion" review of John Gray *Black Mass* Allen Lane TLS August 10 2007 page 3.

human dignity of Maori, within this country we claim to share with them, is a vital measure of what its future of our country and that of our children will be.

We need constantly to strive for improvement, recognising that the best evolution of the constitution will be through appreciation of difference and what it can offer.<sup>32</sup>

\* High Court, Auckland

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<sup>32</sup> I thank Megan Crocket for research and Claire Nielsen for a valuable discussion.