Giving Better Effect to the Treaty:  
SOME THOUGHTS FOR 1990

THESE DAYS, any discussion of the Treaty of Waitangi must begin with the acknowledgment that there are in fact two treaties, one written in English, the other in Maori.¹ Neither is a copy or translation of the other and at times they say rather different things. The differences are important since they are the source of alternative Pakeha and Maori historical traditions that lie at the heart of our race relations. Until recently the English text was regarded as the official text, but now it is commonly said that the Maori text is the only valid one since it was the one that was agreed to by all but 39 of the Maori signatories. This argument has some force: what was said in Maori clearly had more meaning to Maori signatories than the English text with all its tortuous legalisms. But of course there are always at least two parties to a treaty and, although Hobson, as representative of the British crown, signed both texts, it was the English text that had meaning for him. That was why he regarded it as the official text and the Maori text as merely a translation.

Since 1975, with the passing of the Treaty of Waitangi Act, which established the Waitangi Tribunal, both texts have been regarded as valid. Under section 5 of that Act the Tribunal has an exclusive authority, for the purposes of the Act, to determine the meaning and effect of the Treaty as embodied in the two texts, and to decide issues raised by the differences between them. That task has not been undertaken lightly; Tribunal reports contain lengthy discussions about the meaning of the texts and the principles behind them. Quite often, however, the Tribunal has given greater weight to the Maori text. There are good precedents in international law for doing so. For instance, in its Motunui-Waitara Report the Tribunal referred with approval to the accepted principle, expressed as long ago as 1899 (in the US Supreme Court case, Jones v. Meehan), that a treaty with an Indian tribe must ‘be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by Indians’.² The application of that to Maori and the Treaty of Waitangi was obvious. And to ascertain how such a treaty was understood by Indians, or Maori, it was necessary to consider what was said at the time of the signing — how the words were translated and explained, what additional

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¹ This essay is a revision of the lecture, 'Waitangi: the Treaty and the Tribunal', delivered in the Auckland Institute and Museum's Winter Lecture Series, 19 June 1989. Although I am a member of the Waitangi Tribunal and discuss some of its findings, my comments here are not to be regarded as having the endorsement of the Tribunal.
promises might have been made — not just the words that were written in the texts of the treaty. What was said at Waitangi and elsewhere by Henry Williams and other interpreters was particularly important. As D.F. McKenzie recently reminded us, Maori culture was still essentially oral. Despite the efforts of the missionaries, few Maori were literate. Only 72 of some 530-40 who adhered to the Treaty were able to write their names; the rest used a cross or moko. Moreover, as commentators on the texts of the Treaty from Ruth Ross (1972) to Bruce Biggs (1989) have pointed out, much of the Maori text of the Treaty was missionary Maori and some Maori words were made to bear new burdens. Henry Williams, in devising a Maori text, always had his eye on the need to negotiate it with proud and suspicious chiefs. The Treaty negotiations were as much an exercise in diplomacy as semantics. All of which is to say that it is no easy task today to discover what the Treaty may have meant to Maori ‘signatories’ in 1840. Moreover, it is not sufficient to confine our attention to Waitangi, the best reported of the signing ceremonies. We need to know what was said to, and understood by, Maori at other signings, some of which, like Hokianga and Kaitaia, were comparable in size and ceremony to Waitangi. These are particularly important when the Tribunal is considering claims that come from those districts. For instance, the Tribunal’s consideration of the Muriwhenua claim, not yet completed, could well take the Kaitaia meeting of 28 April 1840, where 61 chiefs adhered to the Treaty, into account. It was here that Nopera Panakareao made his famous declaration: ‘the shadow of the land is to the Queen, but the substance remains to us’. The fact that he very soon reversed that statement is an eloquent comment on Maori disillusion at the way government had begun to operate the Treaty. Similarly, in the Ngai Tahu claim, currently before the Tribunal, it will be necessary to take into account Maori understandings of the Treaty as it was explained to them at various South Island signings.

From time to time a good deal has been made of the fact that important inland tribes and chiefs did not accept the Treaty. So far as the British were concerned, that hardly mattered; indeed Hobson declared British sovereignty over the North Island on the basis of Maori acceptance of the Treaty on 21 May 1840 even before all of the signed copies of the Treaty came back, and over the South Island — this time on the basis of Cook’s ‘discovery’ — before any had come back. But with over 530 ‘signatures’ the Treaty must be one of the most fully signed international treaties in existence. So far as the non-signatory tribes are concerned, some, like the Waikato supporters of Te Wherowhero, the first Maori King,
claimed that they were not bound by the Treaty. This has not stopped later
generations from claiming the benefits of the Treaty, even to the extent of
lodging claims with the Waitangi Tribunal. Other tribes who did not sign, like
Arawa, have a long tradition of loyalty to the Crown and the Treaty. So, in one
way or another, most Maori tribes have adhered to the Treaty; it binds both
parties. In 1840 and for nearly 40 years afterwards the Treaty was regarded as
a valid treaty of cession. Despite mistaken views to the contrary, stemming from
Chief Justice Prendergast’s notorious judgment of 1877 — which described the
Treaty as a ‘nullity’? — it is now so regarded by lawyers.

But of course the Treaty was far more than a treaty of cession. It was also a
charter for the future: meant to protect Maori rights and resources while also
setting the guidelines for British colonization of New Zealand. I shall now
consider that rather more difficult aspect of the topic, including the different
histories stemming from the two texts of the Treaty.

Until recently, the Maori history of the Treaty, like the Maori text, has been
submerged, though it has been carefully preserved and often reiterated in tribal
traditions. But to a considerable extent Claudia Orange’s recent book has
restored the balance.\textsuperscript{8}

The Pakeha version, based on the English text, is more familiar, simply
because it has been part of the public and historical record for so long. In
considering the relationship of history to text, we should remember what Bruce
Biggs has called the ‘Humpty-Dumpty principle’ — ‘when I use a word it means
exactly what I choose it to mean’\textsuperscript{9} — not just in interpreting the meaning of words
in the Treaty, but also in tracing how the words and promises of the Treaty were
carried forward into government policy and legislation. The Treaty as a whole
has never been embodied in New Zealand municipal law, but certain aspects of
it have been from the beginning. Moreover, some parts of the Treaty have
received greater emphasis than others. Article 1, which provides for the transfer
of sovereignty from the Maori to the British has, in the Pakeha view, the
vital part from which all else follows, including the protection of land and other
resources in article 2 and the grant to Maori of the rights and privileges of British
subjects in article 3. British sovereignty was seen as one and indivisible. In
theory, if not for many years in practice, it covered the whole country and
subjected Maori, as British subjects, to the civil and criminal law of England as
well as to locally made statutes. (I have said England, because the Scots
remained apart, a precedent that does not seem to have been seriously considered
for the Maori.) There were one or two exceptions in the early years which
allowed Maori runanga to operate, making by-laws of local concern. But these
were regarded as temporary expedients until all Maori were brought within the
realm of the ordinary institutions of government. Section 71 of the 1852
Constitution Act allowed districts to be proclaimed where Maori law and custom
could prevail. Though no such districts were ever proclaimed, relations between
Maori \textit{inter se} were in fact governed by traditional law and custom, except in the

\textsuperscript{7} Wi Parata \textit{v. Bishop of Wellington} (1877), 3 NZ Jur (NS) SC 72.
\textsuperscript{8} The Treaty of Waitangi.
\textsuperscript{9} From Lewis Carroll, quoted by Biggs in Kawharu, p.304.
case of warfare or major crimes, for a good many years. On the other hand there was always a steady and fixed determination by governments in New Zealand to bring relations between Pakeha and Maori, especially over property, under the ordinary domestic law. And that was part of a larger objective: to amalgamate the Maori, thereby creating one people, 'he iwi tahi tatou', which Hobson had promised at Waitangi. The objective was steadily pursued through war and peace. Indeed, it was the legislation passed during the war years of the 1860s, when the colonists had got responsible government and thus freedom to deal with the Maori unfettered by imperial control, that set the seal for an assimilation policy that lasted for a hundred years.

The sovereign authority exercised by the New Zealand legislature under article 1 was brought to bear on article 2 of the Treaty. This was longer and more specific in the English text than in the Maori. It guaranteed Maori the 'undisturbed possession of their Lands and Estates Forests Fisheries and other properties' (whereas the Maori text did not specify forests or fisheries) and it yielded to the Crown a right of pre-emption to purchase such land as the Maori were willing to sell. From the beginning, there was strong pressure from the colonists to reduce or remove these guarantees. They tried repeatedly to get rid of the pre-emptive clause so that they could purchase land directly from the Maori. It was abolished by FitzRoy in 1844, restored by Grey in 1846, abolished by the Native Territorial Rights Bill in 1859, though this was disallowed by the imperial government, and abolished again by the 1862 Native Lands Act. This did receive royal assent since the imperial government had surrendered control over Native Affairs. Pre-emption was never comprehensively resumed, though from time to time the Crown did resume it by proclamation or special legislation for specific blocks of land. The preamble of the 1862 act recited the second article from the English text of the Treaty and claimed that 'it would greatly promote the peaceful settlement of the Colony and the advancement and civilization of the Natives if their rights to land were... assimilated as nearly as possible to the ownership of land according to British law'. It was the beginning of a long continued attempt to use statutes to transform Maori customary land tenure into individual Crown-granted certificates of title.

The Native Lands Act was also justified by reference to the third article of the Treaty, granting Maori the rights and privileges of British subjects. In 1859 the Law Officers of the Crown had held that the communal nature of Maori land tenure disqualified individuals from exercising the franchise which was then dependent on a property qualification. It was assumed that Maori who were issued with certificates of title would therefore be eligible to vote. In fact, the legislature did not wait for the Native Land Court to produce a significant body of Maori voters, and in 1867 created four Maori seats for the lower house, with an adult male franchise, some time before this was available to Pakeha men. There were several other acts in the 1860s which were deemed to be giving effect to the third article. Perhaps the most notable was the Native Rights Act 1865 which affirmed that Maori were indeed British subjects and clarified their right to appeal to the higher courts, a dubious blessing considering that they were soon involved in costly land litigation and that their attempts to plead the Treaty were
invariably dismissed. Moreover any Maori British subjects who were in rebellion against the Crown could be punished with the loss of their land and liberties under the New Zealand Settlements and Suppression of Rebellion Acts of 1863 and the Outlying Districts Police Act, 1865.

Under cover of the English text of the Treaty a settler-dominated New Zealand parliament was relentlessly pursuing a dual aim: the promotion of colonization through the acquisition, by one means or another, of Maori land; and the extension of substantive sovereignty by bringing all Maori within the compass of civil and criminal law. But what of the fiduciary duty that was spelled out in the preamble of the Treaty: that Her Majesty was ‘anxious to protect’ the ‘just rights’ of the chiefs and tribes and ‘to secure them the enjoyment of Peace and Good Order’? And the guarantee of ‘full exclusive and undisturbed possession’ of lands and other properties? Those promises look a little hollow when we come to look in detail at land purchases and the great pressures that were exerted on chiefs like Wiremu Kingi at Waitara, or organizations such as the King movement in Waikato, who resisted sales. Indeed, if we examine the whole field of Maori land acquisition by the Crown and by individuals under licence from the Crown for the remainder of the nineteenth century, as I did many years ago and as the Tribunal is now beginning to do, then I think we must conclude that the fiduciary duty imposed on the Crown by the Treaty was largely, if not wholly, neglected. There were a few exceptions: some piecemeal attempts were made to stop the worst abuses through Frauds Prevention acts, and occasionally committees or commissions of inquiry looked into specific Maori grievances. There have been some improvements in this century with a slowing down in the acquisition of Maori land, assistance to develop remaining land, attempts to settle land grievances, the introduction of social welfare benefits, and a gradual abandonment of the old assimilation policy. However, as the Tribunal has pointed out on several occasions, the Crown’s fiduciary duty was not confined merely to the protection of Maori resources guaranteed by the second article of the Treaty: it included an obligation to ensure that Maori received a fair share in the development of new resources, including those not contemplated in the Treaty. This was a benefit Maori hoped to receive from accepting a significant measure of British colonization.

So much for the English text and the Pakeha use of it. What of the Maori text and the rather different Maori history deriving from it? I think we can also say that Maori, in their ways, have applied Biggs’ Humpty-Dumpty principle to their text. They have tended to down-play the first article, as Henry Williams encouraged them to do, by suggesting that the kawanatanga, the governance that they surrendered, was essentially a right to govern the Pakeha. The word kawanatanga was a fairly recent invention, having been used by the missionaries in translations of the scriptures into Maori, and in relation to secular governors like Pontius Pilate and the British governors of Australian colonies.

But it was not clear how far the new Governor's powers were to extend over Maori, an issue that was perhaps deliberately fudged by Williams. It does seem that some Maori were willing to surrender some of their authority, 'part of their mana and rangatiratanga', as Hugh Kawharu has put it, including the right to make war on other tribes. But there were instances of inter-tribal fighting at Tauranga and in the far north in the 1840s when the chiefs involved were unwilling to allow the governor to intervene. Although Maori at this time were becoming concerned about the influx of British colonists, it seems that most of them wanted colonization to continue, provided the colonists were properly controlled as the Treaty seemed to promise. Yet it is unlikely that the Maori signatories had any idea of the extent of the colonization that would follow, or of the all-embracing ways that kawanatanga would be applied to their land and their lives.

But, whatever their misunderstanding of the real purport of article 1, they were reassured by article 2, even though the Maori version was somewhat more vague than the English text. Though the Maori text did not specify forests and fisheries, such valuable possessions were covered by the term taonga and probably also intangibles, like language. Even more important, Maori were assured of their rangatiratanga or chieftainship over these treasures: not merely ownership of, but control over them — and the people they sustained. Indeed, if we look back to the Busby-inspired Declaration of Independence of 1835, the term rangatiratanga is used for independence and the phrase ‘ko kingitanga ko te mana’ for sovereign power and authority. Williams replaced this with the single word kawanatanga in the Treaty, knowing full well that the chiefs would not sign away their mana. Twenty-six of the chiefs who had signed that Declaration at Waitangi in 1835 also signed the Treaty there in 1840. At that second signing those chiefs at least must have felt assured that they had retained their rangatiratanga and their mana — their independence, and their authority to control their land and their people. And they were also assured, by Hobson's verbal promise (the so-called fourth article), that their tikanga, their religion and customs, would be preserved as well.

But they had been misled, as they soon discovered. That was why Nopera, having found that the Governor and his men were indeed interfering with the way he conducted his land transactions and conflicts with his rivals, said it was only the shadow that now remained and that the substance had gone to the Queen. That was what soon began to agitate Hone Heke, the first to come forward to sign at Waitangi, when he found the Governor's magistrate interfering with him at Kororareka. He was soon persuaded that the Union Jack flying on Maiki hill was the symbol of his diminished rangatiratanga. And in subsequent years chiefs in many parts of the country refused to accept that the British magistrates and their laws should prevail over them. Their independence was demonstrated most conspicuously in Waikato before the war, when they set up one of their number, the distinguished warrior Te Wherowhero, as a King to protect their land and administer their law through their own runanga. The Kingites wanted 'the King

on his piece; the Queen on her piece; God over both; and love binding them to each other'. But Governor Gore Browne saw it as an *imperium in imperio*, a rival sovereignty that needed to be put down.

Though the Kingites, who had for the most part refused to sign the Treaty, could hardly base their independence on it, other loyalist chiefs were soon to do so. With the outbreak of the Waitara war, Browne summoned some 200 still loyal chiefs to a conference at Kohimarama, hoping to get them to declare themselves against Kingi and the Waikato King movement. He assured them that the Treaty had been and would be upheld. They endorsed the Treaty as a solemn convenant, and Browne accepted a request from the conference that it be made an annual affair, a kind of Maori parliament. Although this promise was not kept, the Maori chiefs did not give up the idea. Paora Tuhaere, the Ngati Whatua chief, summoned a parliament to Orakei in 1879. In later years there were numerous hui in the North and elsewhere to promote a Maori parliament that would give effect to the rangatiratanga originally promised in the Treaty. A Maori Parliament was formally constituted in 1892 and went on meeting annually in different Maori settlements until 1902. But it was never legally recognized by the Pakeha-dominated parliament in Wellington, despite frequent requests. So the rangatiratanga of the Treaty was denied, and Maori had to look to other ways to preserve the fragments.

There was a shift in Maori strategies in the early twentieth century as the old loyalist or kupapa leaders of the Maori Parliament or Kotahitanga movement were eclipsed by the new men of the Young Maori party. They looked to parliamentary representation in Wellington to safeguard the remnants of rangatiratanga. Even Ratana, who formed the largest independent Maori church, looked to parliament to further the Maori cause — and to ratify the Treaty. By turning to the Pakeha-controlled parliament, Maori leaders were of course exercising their rights and privileges as British subjects — not, however, to become British, as the assimilationist doctrine expected, but to remain Maori, which in their view the Treaty allowed.

It follows from much that I have said that there has been a vital conflict between Pakeha and Maori in New Zealand over the interpretation of the Treaty. At the heart of this conflict are the differing interpretations of kawanatanga and rangatiratanga. As I have emphasized, the Pakeha used the legislature to impose their view of kawanatanga, a sovereignty that was one and indivisible, on the Maori, whose rangatiratanga — chiefly independence — was progressively diminished. Any suggestion that sovereignty might be divided, as happened in the United States with the recognition of Indians as domestic dependent nations, was quickly dismissed in New Zealand. For instance, the suggestion of the first Attorney-General, William Swainson, that Maori tribes that had not signed the Treaty retained their own sovereignty, was dismissed by the Colonial Office, which took the view that British sovereignty covered the whole country. A similar claim by the Kingite tribes was also adamantly rejected. And section 71 of the

13 Paora Te Ahura, quoted by ‘Curiosus’ in the *New Zealander*, 3 July 1858.
1852 Constitution Act, which would have allowed a limited exercise of Maori sovereignty in proclaimed districts, was never implemented and was finally repealed by the Constitution Act, 1986.

Has anything changed? In the last 20 or so years there have been considerable changes in government policy. Assimilation, after a brief interregnum of 'integration' in the 1960s, has given way to biculturalism. Our education system, our government departments, are required to develop the taha Maori. The Treaty, even in the Maori version, is acquiring a new significance, quite apart from the annual pilgrimages to Waitangi. Cabinet and government departments — even the Treasury — are required to take it into account in their planning. Several recent acts have required the Crown to abide by the principles of the Treaty. Geoffrey Palmer proposed to make the Treaty part of the fundamental law of the country by putting it into the Bill of Rights. The Waitangi Tribunal has been created and has told us that the Treaty is a 'constitutional instrument', 15 the basis for a 'developing social contract', 16 views that were reiterated by Sir Robin Cooke and other judges in the Court of Appeal judgment in the 1987 New Zealand Maori Council case. And F.M. Brookfield, in his inaugural lecture, tried to find in the Treaty a basis for the legitimacy of our constitution.

These are heady developments. But I do not think that all that has been promised will be achieved. It will be difficult to get far with taha Maori in the face of Pakeha intransigence and electoral backlash. The Treaties in full are unlikely ever to become part of our statute law. How could they when they say different things? In its most recent legislation, parliament has either dropped all reference to the Treaty, or merely stressed 'a duty to consider the Treaty', to quote s. 6 of the Resource Management Bill currently before the House. That is a far cry from requiring the Crown to observe the principles of the Treaty. Palmer has dropped the reference to the Treaty as fundamental law from the latest draft of the proposed Bill of Rights. He has also forthrightly rejected Moana Jackson's proposals for a separate system of criminal justice on the ground, constantly reiterated by his predecessors, that there can be only one system of law in New Zealand. 17 Rangatiratanga, in so far as it exists at all, has been largely reduced to a measure of Maori control over Maori things. Existing national Maori bodies, such as the New Zealand Maori Council and the Maori Women's Welfare League, hardly constitute a Maori parliament, though they have been legitimized by legislation. Sometimes they are consulted by government over proposed legislation and other Maori matters; more often they have to fight government over the neglect of Maori interests. It has been said recently by the Tribunal and the Court of Appeal that the Treaty was a partnership between the Crown and the Maori, and that both parties have an obligation to behave towards one another reasonably and with the utmost good faith. But historically there has not been much partnership between Maori and the Crown, let alone treatment of Maori as equal partners.

How, we might ask, has the Crown performed? It is a question that is

15 Report ... on the Kaituna ... Claim, p.19.
frequently asked of the Tribunal. Clearly, no final judgement can be presented here on what is a very large question, although it will be evident from some of my general comments that in my opinion the Crown has not done very well. Of course it is easy to be wise after the event, and we must be careful not to apply too many of today’s standards to the past. As I have been emphasizing, our view of the Crown’s obligations under the Treaty has been expanding very rapidly of late, especially with the consideration now being given to the Māori text by the Waitangi Tribunal and the courts. Since its act was amended in 1985, the Tribunal has had quite staggering powers of jurisdiction to inquire into breaches by the Crown of the principles of the Treaty. Indeed, any Act, regulation, Order in Council, or any policy or practice of the Crown since 6 February 1840 could be held to be in breach of the principles of the Treaty and thus prejudicially to affect a Māori claimant. But the fact that the Tribunal can only recommend a remedy leaves the solution of grievance with the Crown. The Tribunal has reported on only a small number of the claims so far submitted. The old Tribunal reported on six; the enlarged Tribunal, created by the 1985 amendment, has reported on one full claim and parts of two others, and completed one arbitration. Several other reports are in preparation. There are nearly 200 claims on the register, though a good many of these are likely to be amalgamated or withdrawn.

I have summarized the main reports elsewhere, so there is no need to comment on them in detail here. They contain lengthy discussions on the history of the particular claims and on principles of the Treaty as they relate to each claim. Gordon Orr has recently prepared an analysis of principles, which he sees as emerging from the Tribunal reports and recent court decisions. He has discovered seven, plus another which has not clearly emerged. These can be summarized as follows:

- the gift to the Crown of the right to govern (kawanatanga) was in exchange for the protection by the Crown of Māori rangatiratanga;
- there were limits on the authority of the Crown to govern — Crown sovereignty was not absolute;
- there was a tribal right of self-regulation — tino rangatiratanga;
- the Crown, in exercising its right of pre-emption, had a reciprocal duty to ensure that Māori who sold land retained a sufficient endowment for their own uses;
- the Crown had an obligation actively to protect Māori Treaty rights;
- the Treaty signified a partnership and required the Pakeha and Māori partners to act towards each other reasonably and with the utmost good faith;
- the Crown has a duty to remedy past breaches of the Treaty; and, probably, the Crown is under a duty to consult its Treaty partner.

Orr pointed out that this list was far from exhaustive: it had merely arisen from the claims that had been considered by the Tribunal and the courts; and that more

principles would be discerned from time to time.

There is no need to spell out the breaches by the Crown of these principles in relation to claims considered by the Tribunal; these have been detailed in the various Tribunal reports. In each case the Tribunal has gone on to recommend remedies, and a large number of these have been accepted by government, or are still under consideration. Government has been accommodating because the Tribunal’s recommendations have been extremely moderate, despite the magnitude of Maori losses that was revealed in several of the claims. Perhaps the most notable case of this is the Muriwhenua Fishing Report, which aroused great controversy, provided elaborate documentation of frequent and continuing breaches of the Treaty by the Crown, but simply recommended that the two parties — the Crown and the representatives of the New Zealand Maori Council — continue their negotiations for a settlement of Maori fishing rights. It is evident that this claim, and all the other Maori fishing claims that are tied up with it, are not likely to be easily and fully settled, since they involve the return to Maori of large and valuable resources in fish, which the Tribunal’s report holds were wrongly alienated as private property rights. And this could be true for many of the other claims on the Tribunal’s register. Remedying the Crown’s excessive alienation of Maori resources is bound to be costly and controversial.

It is with this problem in mind that I want to make some final, but far from comprehensive, comments on the future of the Treaty and what will be needed to make it more effective. It will of course have a future, of a kind; just as we cannot obliterate the Treaty from our history, so we cannot eliminate it from the future. It stands as a foundation of our nation and at the fulcrum of Maori-Pakeha relations. We can expect the Treaty to remain a source of debate, as each side appeals to the different texts for justification of its causes. Because of their differences, contradictions even, the treaties are unlikely ever to be wholly incorporated in our statute law, or in a Bill of Rights. In any case the legislature, the Tribunal, and the courts have recently been saying that it is not the strict text that has to be considered, but the principles, the spirit. As the Orakei Report put it, the Treaty is to be regarded as more than an affirmation of existing rights. It was not intended as a finite contract but as the foundation for a developing social contract. It is in this broad, general sense that the Treaty should be seen as providing a guide, more especially to the settlement of grievances, to the making, administration, and interpretation of our laws, the allocation of our resources, and to our social welfare and cultural and intellectual life. I cannot touch on all of these topics and shall merely discuss the settlement of grievances, the law, and the allocation of resources.

It seems that the Waitangi Tribunal, if unhindered by politicking or a change of government, is the best, though not the only, means of resolving grievances, often by conciliation or arbitration. I doubt whether it needs any substantial increases in membership, staffing, or finances. Nor does it need any significant increase in jurisdiction: it should remain essentially a recommendatory rather than a judicial body. Nevertheless, there is one respect in which the Tribunal’s

authority could be usefully extended. At present, under s. 8 of its act, the Tribunal has authority to report on whether any proposed legislation referred to it by the legislature is contrary to the principles of the Treaty. The section has been inoperative. I think it should be amended so that the legislature is obliged to refer such legislation to the Tribunal for an opinion. This would require a small increase in staff, particularly in the legal division of the Tribunal.

I have examined the Tribunal’s overall performance elsewhere and believe that it has had more influence than any other body in our history in giving ‘better effect to the Treaty’. Given further goodwill and a generous response from government to its recommendations, it will continue to perform that function. And it is likely that the courts, as they continue to hear cases that in some way arise from the Tribunal’s activities, will also treat its findings and recommendations with the same respect that was seen in the recent Court of Appeal judgment. Nevertheless, not all Maori grievances arising from breaches of the Treaty will be solved easily and rapidly, more especially if the present adverse balance of resources remains.

Secondly, there is the question of law. In my discussion on kawanatanga v. rangatiratanga, I suggested that the former had been exerted to the disadvantage of the latter. We must find some ways of reducing that tendency; in other words, ways of restraining or dividing the sovereignty of the Crown to allow a greater expression of rangatiratanga. It is significant that some authorities have admitted, as Orr has put it, that ‘Crown sovereignty is not absolute’.21 To illustrate the point he went on to quote the then Attorney-General, Geoffrey Palmer’s statement, ‘that our system of Government and indeed our very existence here stems from the signing of the Treaty in 1840’. That point was taken up by Brookfield, who said in his inaugural lecture that, with the 1986 Constitution Act, our constitution has finally been domesticated, it has ‘become autochthonous, its roots, its legitimacy are now here in New Zealand’.22 But, if I understand them rightly, neither the Attorney-General nor the Professor said how the Treaty was linked in law to the constitution. Moreover, as I have said, s. 71 of the old 1852 constitution, which would have allowed a measure of rangatiratanga, was repealed by the Attorney-General’s new 1986 constitution. Brookfield, who noted this, went on to suggest that we find a modern substitute for s. 71 by ‘an imaginative use of a modified concept of Maori Districts’.23 Unfortunately, he did not explain what he had in mind. I think it is probably too late to contemplate separate Maori districts, a territorial division of sovereignty like that which the King movement sought to achieve in New Zealand and American Indian nations did largely achieve. But perhaps there are other ways of restraining or dividing sovereignty.

There is the notion of political, as distinct from legal, sovereignty which Paul McHugh has been advancing.24 It is based on the idea that much of the British, and likewise the New Zealand, constitution is based on convention — long

21 ‘Principles’, p.3.
22 Brookfield in Kawharu, p.7.
standing practice—rather than written law. For some odd reason McHugh uses Maori representation in the New Zealand parliament as an example of this, though that representation is based on statute, albeit one that was meant to have a temporary, five-year life. Perhaps the fact that it is still with us is a kind of convention. It can also be seen as a very limited recognition of rangatiratanga in our constitution; one, incidentally, that has been jealously guarded by Maori as the best that they could get. Should it be retained and, if so, expanded? I think it should be retained—so long as Maori electors demonstrate that they want to retain it. And they can do this quite simply by registering and voting in the Maori electorates, which could be adjusted upwards or downwards to equate the numbers on their electoral rolls with those for the general electorates. On a population basis, Maori are entitled to more than four seats, but on a basis of registered voters to slightly less than four. The same principles should be applied to local government. This would restore a greater degree of rangatiratanga to the existing institutions of government. But it hardly makes Maori equal partners, which has been described as one of the principles of the Treaty. Some say that this requires allowing Maori equal representation, but I do not think that we should infringe the democratic principle of one person one vote to that extent. It is necessary to find other ways of enhancing rangatiratanga.

One way would be to increase the authority and responsibilities of the two statutory national Maori bodies that we already have, the New Zealand Maori Council and the Maori Women’s Welfare League. (We must remember that the rangatiratanga of Maori women, if I can use that word in relation to them, has not been very well regarded either in the negotiation of the Treaty—only five signed—or since.) Both should be consulted as of right at an early stage and during the passing of legislation of general concern to Maori. Both bodies have stood the test of time and, despite occasional criticism from more radical groups, have represented Maori concerns with dignity—in true rangatira style. Nevertheless, the New Zealand Maori Council, as a creature of the Pakeha legislature, has never had widespread Maori support and might well be supplanted by an organization with fuller flax roots support like the new iwi-based National Maori Congress, which, as a result of the current devolution policy, might well supersede the New Zealand Maori Council. Some of the iwi authorities, like the Ngai Tahu, Taranaki, Arawa, and Tuwharetoa Trust Boards, are more than 50 years old and well used to administering tribal funds. These and other iwi authorities should gain increased resources and authority under the devolution policy. But other iwi, so far without trust boards, need to get them, and the many Maori who have lost their tribal affiliation need to be able to enter the fold, or to have their interests safeguarded by other organizations like the Maori Council or Women’s Welfare League, as has been recently proposed. Of course, rangatiratanga is a matter of allowing Maori the tribal right of self-regulation, to own but also to manage their resources, and to preserve their taonga. But it is also more than that, since Maori, though a minority in their own land, must have a real

share in the government of the country as a whole and the allocation of resources on a national scale. The Treaty of Waitangi does not just apply to what has been left to Maori from 150 years of Pakeha colonization, to the bits of dirt under their finger nails, if I may reapply a comment of Peter Buck's on the loss of Maori land.\textsuperscript{26}

So we come back to the exercise of kawanatanga, of sovereignty. In a democracy such as ours, with a very considerable Pakeha majority, recognition of the rights of the Maori minority, of what they are entitled to under the Treaty, is very largely a matter of restraint by consenting (Pakeha) adults. In other words, that the legislature imposes some restraints on the Crown — as it has done with the legislation relating to the Tribunal and several other recent acts which require the Crown to abide by the principles of the Treaty. Such legislation needs to become commonplace rather than merely occasional. Is there any way of ensuring this? I believe so. The Treaty, it will be recalled, was signed by Hobson, on behalf of Queen Victoria. Maori have always made much of their personal relationship with the British monarch that derives from the Treaty. This did them precious little good in the later nineteenth and early twentieth centuries when they tried to petition or send deputations to Buckingham Palace pleading for the Treaty to be upheld. Since responsibility for Maori affairs had been transferred to the New Zealand government, they were referred back to the Pakeha government in Wellington. At least this has been the public response. I have not searched the unpublished archives, though I doubt whether the British monarchs have ever stopped advising their Governors-General in private. The present Queen has sometimes ignored the advice of New Zealand Prime Ministers: for instance, she insisted on an unscheduled call on the Maori King at Ngaruawahia in 1953. I sometimes wonder whether Queen Elizabeth, as Queen of New Zealand, regards herself as having a residual responsibility for upholding the Treaty that was signed in the name of her great-great-grandmother. After all, at this year’s Waitangi Day ceremony the Queen’s speech, which can hardly have been written by her New Zealand Prime Minister, differed markedly from his speech — most notably in her statement that the Treaty had been ‘imperfectly observed’.\textsuperscript{27}

Then there is the related point that the Governor-General, on behalf of the Queen in New Zealand, gives the final assent to a parliamentary bill. This has been refused in the past. Perhaps the most relevant case is the Territorial Rights Bill of 1859, on the ground that it infringed the Treaty. Could it not be argued that a modern Governor-General retains some residual responsibility for upholding the Crown’s side of the Treaty and might therefore withhold assent to a bill that s/he regarded as infringing the Treaty? I think so, and I am strengthened in my view by McHugh’s suggestion that the Governor-General’s assent might well have been withheld from the proposed Fisheries Bill (which was revised and passed after McHugh’s essay was written).\textsuperscript{28} But I am in no position to advise a Governor-General; I am merely raising a hypothetical point that needs to be

\textsuperscript{26} New Zealand Parliamentary Debates, 167 (1913), p.413.
\textsuperscript{27} New Zealand Herald, 7 February 1990.
\textsuperscript{28} McHugh in Kawharu, p.50.
debated. It is, after all, a rather murky area that appears to have been little discussed in New Zealand, or elsewhere in the Commonwealth. Governors-General do have some rather significant residual powers — as we saw a few years ago when Sir John Kerr dismissed Gough Whitlam in Australia. But who advises them when they are in dispute with their 'responsible advisers'? And who, for that matter, trains them in their constitutional responsibilities, something of considerable concern now that so many of them have no constitutional law in their background? I am not suggesting that a Governor-General would lightly or frequently withhold assent to bills — the essence of a veto is that it is there, to be used as a last resort, and that is usually enough to ensure that legislators do not provoke its use. But there are one or two occasions when assent might be withheld, in addition to that suggested by McHugh: for instance, if the legislature ignored a recommendation of the Waitangi Tribunal on a draft bill (as I have suggested above); or a similar recommendation by the New Zealand Maori Council and Maori Women's Welfare League, indicating very widespread Maori resistance to a particular measure. This at least would allow a rather more significant expression of rangatiratanga than exists at present. Withholding of assent would allow the parties to talk, the public to express views, and parliament to think again, something that is important in a unicameral legislature. But if, after all that, the government was determined to press ahead, the Governor-General would have to give way — or invite dismissal.

I have not investigated the constitutional role of the courts and am scarcely competent to do so, but it is worth noting two points that have been further developed by two legal academics and which could perhaps help to restrain the exercise of sovereignty by the legislature. Firstly, as McHugh has argued on numerous occasions, there is probably scope for a further development of the common law — and more particularly a New Zealand common law that incorporates surviving Maori 'aboriginal' law. We have seen what might be called a first win for the McHugh view in Mr Justice Williamson’s judgement in Te Weehi v. The Inspector of Fisheries (1987), though that decision was possible because the aboriginal fishing right had been protected by legislation, rather than taken away, as has happened with Maori land. The second area of restraint lies in international law, more especially in United Nations conventions which New Zealand has adopted and which, as Benedict Kingsbury has argued, might be used for claims against the Crown for the non-fulfilment of obligations under the Treaty.  

Finally, there is the allocation of resources. Some of the constitutional measures I have suggested are essentially negative; they could help to prevent the Maori from being despoiled by the Pakeha majority. But what can be done about the despoliation that has already occurred? The relentless acquisition of Maori land by the Crown and by settlers has reduced the Maori estate to about one million hectares, some 2% of the country, plus a small but indeterminate area under general titles. Moreover, the land in Maori ownership is unevenly distributed, with some tribes having a considerable amount and others very little.

It has been too long assumed in New Zealand that the reservoir of Crown land acquired from the Maori was to be available solely for Pakeha colonization. Maori could make a living from their own land or in the Pakeha economy. It is, in my view, a matter of some urgency to start returning Crown resources — not just land and most certainly including fish quota — to the Maori, more especially to those iwi that have ended up with very little. I am not suggesting that resources should be simply given back, but that the prices should be to some extent concessionary, as was the case when much Crown land and other resources were allocated to Pakeha over the years. Maori iwi should also be given a preferential right to bargain for Crown resources before these are privatized, so that they are not faced with having to try to claw them back through appeals to the Waitangi Tribunal under the present State Owned Enterprises legislation. In addition, the Crown should facilitate the purchase for Maori of land and other resources in private ownership by setting up and financing a Commission like that which was recently in existence in Australia, to buy land for Aborigines. I am not suggesting compulsory purchase, but merely purchase on the open market on a willing buyer, willing seller basis. If the Australian experience is any guide, no great area of land would become available, but a Commission could be used to acquire strategic assets for under-resourced iwi, or land of spiritual or historic significance. A little of this has already been done: recently the Minister for Maori Affairs helped Ngati Porou to purchase a Pakeha farm around the base of their sacred Mt Hikurangi. It should also be possible to return areas that have a similar significance in National Parks and other Crown reserves so that they are under iwi management but still available as public reserves. The government acceptance of Tribunal recommendations for parts of the Orakei block — to be returned to Ngati Whatua ownership on condition that they remain public reserves or parks — and the proposals of the Tribunal’s mediator for the Waitomo caves, are encouraging illustrations of what can be achieved.

Such measures help to restore the balance between the two parties to the Treaty. They are necessary if the Crown is belatedly to fulfil its fiduciary obligation to its Maori partner — to ensure that, in the acquisition and allocation of resources, Maori rights were properly safeguarded. It is the burden of this essay that these rights were not properly safeguarded in the past, but that they must be in the future. And not just in the areas I have discussed. Indeed there remains a range of social questions relating to welfare, health, education, and the criminal justice system that I have not touched on. How has the Treaty been applied and how should it be applied to them? Those are very large questions. But some of the principles I have discussed above will be relevant, more especially the need always to temper the harsh application of Pakeha kawanatanga by a proper recognition of Maori rangatiratanga.

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