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**The Honour of the Crown: Giving Effect to the True
Purpose of the Treaty of Waitangi**

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I Introduction

When the British Crown moved to annex New Zealand into its empire, it was dependent on the co-operation of the indigenous Māori population who they recognised as the independent sovereign of the land.¹ Māori were extremely militarily capable and by 1840 they outnumbered the number of European settlers by approximately 80,000 to 2050.² In light of this (and a number of other factors discussed below) the British Crown proposed what was to become the Treaty of Waitangi 1840 (the ‘Treaty’).³ The Treaty gives the British Crown the right of *kāwanatanga*, or ‘government’ within New Zealand, in return for the guarantee that Māori will retain their *tino rangatiratanga*, or ‘absolute chieftainship’, over their lands, homes and ‘*taonga katoa*’.⁴ As former chairman of the Waitangi Tribunal, Sir Edward Taihakurei Durie, explained:⁵

It is the Treaty that gives Pakeha the right to be here. Without the Treaty, there would be no lawful authority for the Pakeha presence in this part of the South Pacific... The Pakeha here are not like the Indians in Fiji, or the French in New Caledonia. Our Prime Minister can stand proud in Pacific forums, and in international forums, too, not in spite of the Treaty, but because of it... We must remember that if we are the *tangata whenua*, the original people, then the Pakeha are the *tangata Treaty*, those who belong to the land by right of that Treaty.

Despite the fact that the Treaty is our country’s foundational constitutional document, as Durie identifies here, its constitutional status remains uncertain and consequently its true purpose has become lost. Instead of certifying Maori and the Crown as equal sovereign

¹ Recognition of Māori sovereignty by the British Crown is clear from a number of documents including He Whakaputanga o te Rangatiratanga, the Declaration of Independence 1835, the Letters Patent 1839 and Lord Normandy’s instructions to (soon to be New Zealand’s first Governor) William Hobson.

² Statistics New Zealand “Population” (2008) Statistics New Zealand Tatauranga Aotearoa <<http://web.archive.org/web/20080305185447/http://www.stats.govt.nz/tables/ltds/ltds-population.htm>>.

³ Claudia Orange *The Treaty of Waitangi* (Allen & Unwin New Zealand, Wellington, 1987).

⁴ The Treaty of Waitangi 1840.

⁵ Eddie Durie, Chairman of the Waitangi Tribunal (Waitangi, 6 February 1989) cited in “Treaty is about rights of all NZers” *Stuff.co.nz* (New Zealand, 11 October 2007) <<http://www.stuff.co.nz/archived-stuff-sections/archived-national-sections/korero/24642>>.

partners, engaging in an agreement to share power on a nation-to-nation basis, and informing out constitution accordingly, the Treaty was forgotten in what Elias CJ referred to as a “legal dustbin” for over 130 years.⁶ Over that time, the British Crown claimed sovereignty and Māori were relegated down from their intended constitutional position as an equal Treaty partner sovereign alongside the Crown, to a mere subject of the Crown. New Zealand had failed to create the co-operative society the signatories of the Treaty envisioned and as a result we have fallen into what this paper will refer to as a ‘cycle of grievance’ of Māori rights; a cycle of continuous breaches against the Treaty and its guarantees of Māori rights, claims of injustice and grievance by Māori, then an apology and settlement of those claims by the government.⁷

By the 1970s, Māori had grown intolerant of this cycle of grievance and ongoing breaches of their rights and as a result, Aotearoa New Zealand is currently undergoing an incremental, ‘organic’ revolution of its constitution. The aim of this revolt is to place the Treaty of Waitangi 1840 back in its intended position at the heart of New Zealand’s constitution and give effect to the Treaty’s true intention: the equal sharing of power between Māori and the Crown, each sovereign alongside the other. This ‘organic’ revolution, also referred to here as the ‘Māori Renaissance’, began in the early 1970s as a result of a collaboration of grass-roots movements and protests by Māori. The underlying philosophy is that through economic, cultural, educational and legal means, New Zealand is being moved slowly towards a more bicultural reality which truly represents the Treaty partnership and values the Māori cohort. This movement rejects the assimilationist and colonialist government policies that had dominated New Zealand society since the mid-1800s and calls for the Crown to honour the

⁶ Dame Sian Elias “First Peoples and Human Rights a South Seas Perspective” (2009) 39 NML Rev 299.

⁷ Judge D Arnot “Treaties as a Bridge to the Future” (2001) 50 UNBLJ 57 at 60. There are a number of examples of this ‘cycle of grievance’ where agreements were reached between Māori and the Crown only to be breached later. Examples may be found in all Treaty Settlement Acts under the historical redress sections where the acknowledgements of grievances and apologies by the Crown may be found.

Treaty and restore Māori rights.⁸ Three institutions illustrate the initial success of this organic movement towards constitutional change today: the Waitangi Tribunal, the Treaty Settlements Process and the enshrinement of Treaty Principles in various pieces of legislation. However, while these three institutions have created significant change towards protecting Māori rights to date, they have not managed to achieve the constitutional change that honours the Treaty and restores balance to the Treaty Partnership. This is because all three institutions operate within our current constitutional structure which recognises the Crown as sovereign and Maori as a special minority with unique rights due to their status as tangata whenua. This again is not the true purpose of the Treaty, Maori were intended to be recognised within our constitution as sovereign alongside the Crown.⁹

Recognising the limitations of the three institutions above as trapped within the confinements of New Zealand's current constitutional structure, Dr Carwyn Jones argues that these institutions are inappropriate fora to discuss or implement the constitutional change required to give effect to and thus unable to give effect to the true purpose of the Treaty.¹⁰ Thus Jones advocates for a change in perception, a discussion based on 'political sovereignty' rather than 'legal sovereignty' where we discuss the legitimacy of the Crown's claim to sovereignty over New Zealand through the Treaty.¹¹ In doing this Jones argues that we must recognise the Treaty within the historical context and legal system it was signed; in a land governed by Maori according to a Maori legal system. Only then can we determine the true constitutional intention of the Treaty, and only then can we begin to give real effect to that meaning. The question now is how can we give effect to this Maori voice?

⁸ Joe Williams "Not Ceded but Redistributed" in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) at 11.

⁹ Dr Carwyn Jones "Tawhaka and Te Tiriti: A Principled Approach to the Constitutional Future of The Treaty of Waitangi" (2013) 25(4) NZURL 703at 713.

¹⁰ At 717.

¹¹ At 717.

The answer, Jones suggests, lies with the courts. The courts hold a constitutional function to collaborate with the other branches of government to develop our constitution in line with the values of our society through their constitutive powers. In this way the courts can introduce a Maori voice into the law, a process Jones has termed a “constitutional korero”. This paper argues that the doctrine of the honour of the Crown will be a useful judicial tool to help introduce this Maori voice.

This paper is split into three parts. Firstly, this paper will outline why New Zealand needs to change its constitution to place the Māori version of the Treaty of Waitangi at its heart. It will be necessary here to ‘stock-take’ New Zealand’s current constitutional structure which upholds the Crown as sovereign above Māori. This orthodox view is challenged; it ignores the existence of a Māori legal system, the Māori perspective of the Treaty in light of this legal system, and the historical context within which the Treaty was signed. The Treaty was entered into by two sovereign states – the Crown and Māori – and formed an agreement to share power over Aotearoa New Zealand. This is the true purpose behind the Treaty that must be given effect to in our constitution. Secondly, the paper turns to the courts as the vehicle that may give effect to this constitutional change. Here it is argued that in light of the ongoing cycle of grievance of Māori rights, the organic movement towards including tikanga within our society, culture and law and the courts’ duty to aid in developing our constitution to reflect modern day social values, the courts must engage give effect to the true meaning behind the Treaty. Thirdly, this paper suggests that the courts must engage in a constitutional kōrero with the Crown, invoking the doctrine of the honour of the Crown, to give effect to this constitutional change. In concluding, this paper gives an example of how the constitutional kōrero and the honour of the Crown would work in practice.

II New Zealand Needs Constitutional Change to Reflect the True Constitutional Purpose of the Treaty of Waitangi

It is well known that the Treaty of Waitangi has two versions – one in English, the other in te reo Māori. It is also well known that these version contradict each other greatly, with the English version purporting to cede sovereignty from the Māori to the British Crown, and the Māori version purporting to cede ‘kāwanatanga’, or governance, a much lesser power than sovereignty, while retaining ‘tino rangatiratanga’, or absolute chieftainship, a power much more akin to sovereignty than kāwanatanga.

Over the 19th and 20th centuries in New Zealand, however, the English version of the Treaty has become the orthodox view and accordingly has been given effect by our constitution. Thus in New Zealand the Crown is the supreme sovereign, and Māori have been made mere subjects of the Crown.

It is the contention of this paper that this “orthodox” view is incorrect as it is based solely on a mono-cultural view of the Treaty. The true meaning of the Treaty is argued to be that in the Māori version interpreted from a Māori legal system. The words of the Treaty must therefore be understood within the context of the Māori world-view, not simply translated and interpreted from a western perspective that is stuck in the constitutional mind-set that the Crown is sovereign.

The true purpose of the Treaty, as explained below, is that it is a constitutional agreement between two sovereign nations to share power over one geographical space; Aotearoa New Zealand. This part will now compare the orthodox view to one based on a Māori perspective and argue that it is the Māori perspective that is the most legitimate, and accordingly, it is the Māori perspective that should be given effect to in our constitution.

A The Orthodox View: The Treaty within our Current Constitutional Arrangements

The orthodox view of the Treaty of Waitangi is that it was one of, if not the only, document that transferred sovereignty over Aotearoa New Zealand from the indigenous Māori people to the British Crown. As leading New Zealand constitutional lawyer and academic, Phillip A Joseph wrote:¹²

The establishment of British sovereignty in 1840 was New Zealand's paramount constitutional event. The Crown acquired "sovereign power to make laws and to enforce them, and, therefore, the power to recognise existing rights or extinguish them, or to create new ones."

Another view is that if it did not transfer sovereignty from Māori to the Crown, it was a partial legitimisation of the transfer of sovereignty, whereas acquiescence of the Crown's rule over time amounted to the full transferral of sovereignty.¹³ As will be explored below, however, these views are limited to perspectives from a western legal system and have not taken into account the perspective of the legal system that governed New Zealand at the time: tikanga Māori.

Whichever way this more orthodox view sees the Treaty of Waitangi, however, the reality in New Zealand currently is that the Crown is the sovereign, we have a colonial legal system based on western values and Parliament is supreme.

¹² Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 35.

¹³ FM Brookfield "The New Zealand Constitution: the search for legitimacy" in IH Kawharu (ed) *Waitangi: Maori & Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 1 at 181.

B The Māori Perspective of the Treaty of Waitangi: Dual Sovereignty

It is well rehearsed that in New Zealand we have a “if it ain’t broke, then don’t fix it” mentality towards our constitution.¹⁴ However, our constitution is broken and this is clear when we look at the Treaty of Waitangi. As legal academic, David Williams points out, the Treaty of Waitangi has been labelled many things. Up until the 1970s it was regarded as a “simple nullity”¹⁵ or an unenforceable international treaty.¹⁶ However, since the Māori Renaissance in the 1970s however, the Treaty has been redefined as “the founding document of New Zealand”, “simply the most important document in New Zealand’s history”, and “of the greatest constitutional importance to New Zealand”.¹⁷ Despite this change in judicial attitude, however, the Treaty’s place is still so unclear within our constitution that the rights guaranteed within it are often trumped by other legal principles.¹⁸ In particular the Treaty is trumped by Parliamentary Supremacy, which within our current constitutional structure makes perfect sense; Parliament is supreme and therefore it can make any law it likes – it holds the will of the people and may exercise it as it sees fit.

This is why to really understand the meaning behind the Treaty we must step outside of our current constitutional arrangements, or discussions of ‘legal sovereignty’ and examine the Treaty within its historical context by engaging in a discussion of ‘political sovereignty’.

1 ‘Political Sovereignty’, not ‘Legal Sovereignty’

As Dr. Jones argues in his 2013 article *Tāwhaki and te Tiriti: A principled approach to the constitutional future of the Treaty of Waitangi*, the majority of the discussion regarding the

¹⁴ David Williams “Embedding Maori and Treaty Rights in our nation’s constitution – what can each of us do?” (speech to the Network’s AGM, Otautahi, 4 November 2010).

¹⁵ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 78.

¹⁶ *Te Heuheukino v Aotea District Māori Land Board* [1941] AC 308, [1941] NZLR 590 (UKPC).

¹⁷ Williams, above n 14, at 2.

¹⁸ At 2.

constitutional legitimacy of the Treaty considers it within the context of ‘legal sovereignty’ or ‘legality’, rather than in the context of ‘political sovereignty’ or ‘legitimacy’. The difference between these contexts is significant and result in commentators discussing very different issues. Jones looks to Paul McHugh’s description of this important distinction as a useful explanation:¹⁹

‘Legal sovereignty’ is vested exclusively in the Crown. It is the only lawful source of governmental authority in our legal system. All acts of government derive from some legal rule recognising the Crown’s ultimate authority. The paramount expression of this, it has been seen, is the Crown-in Parliament. ‘Political sovereignty’, however, describes the relation between the Crown and its subjects. It especially embraces the idea that the relation is consensual in a dynamic, ongoing sense. ‘Political sovereignty’ thus legitimates the Crown’s exercise of ‘legal sovereignty’.

By discussing the Treaty only in relation to the ‘legal sovereignty’, the discussion cannot step out of the current constitutional framework. Thus from the very start of the discussion commentators have lost because the Treaty must automatically be regarded as subject to the Crown’s sovereignty. These discussions therefore take place within the same limitations as the Waitangi Tribunal, the Treaty Settlement process and the Treaty Principles discussed above; they are trapped in the mid-set of the colonial legal system. As Jones points out, these discussions have been “counterproductive and somewhat circular”,²⁰ what New Zealand now needs is to assess the constitutional role of the Treaty in regards to the ‘political sovereignty’ of the Crown: does the Treaty transfer ‘political sovereignty’ to the Crown and therefore legitimise the Crown’s exercise of ‘legal sovereignty’? Jones contends, alongside many other commentators, that it does not.

¹⁹ Jones, above n 9, at 705; See also Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Oxford, 1991) at 16.

²⁰ Jones, above n 9, at 706.

In justifying this contention we need to consider the Treaty in light of the historical background in which it was signed; where both the Crown and Māori governed themselves with their own legal systems and neither the Crown nor Māori controlled the other, but engaged into a ‘treaty relationship’ on a nation-to-nation basis.²¹

2 *The Historical Context: Aotearoa New Zealand in 1840*

The different factors that contributed to both parties entering into the Treaty of Waitangi help to clarify the constitutional intentions of the Treaty as an agreement between two sovereign nations.

For Māori, the motivating factor was the lawlessness of the new settlers.²² European explorers and missionaries began arriving to New Zealand in 1814 and were followed closely by increasing numbers of settlers. These new settlers were adventurers and upon arriving to New Zealand where the Crown was not yet present, were not subject to tikanga Māori and behaved lawlessly.²³ The Māori therefore chose to enter into an agreement with the Queen of England so that she may exercise governance in their land and thereby take control of her people.²⁴ Māori were by this stage already recognised as the sovereign of Aotearoa by the King of England due to He Whakaputanga o te Rangatiratanga, the Declaration of Independence of 1835. The Declaration stated that New Zealand was an independent state and formed the basis for the Treaty of Waitangi to be entered into by two sovereign nations.²⁵

²¹ Jones, above n 9, at 706-708. Jones draws on the work of Canadian political philosopher James Tully in his work, *Public Philosophy in a New Key: Volume 1 – Democracy and Civic Freedom* (Cambridge University Press, Cambridge, 2008).

²² Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13 at 20.

²³ Orange, above n 3, at 46.

²⁴ Mutu, above n 22, at 20.

²⁵ At 18. For further details, see Orange, above n 3.

For the British Crown, there were many factors that led them to enter into the Treaty of Waitangi with Māori. The lawlessness of their British subjects in New Zealand was indeed a factor for gaining official control, holding those subjects accountable for crimes committed in New Zealand.²⁶ Other factors, however, were equally compelling such as the competing imperial forces of the United States of America and France became more interested in New Zealand resources during the 1830s and their activity had increased.²⁷ Perhaps more relevant to this paper, however, is the fact that by the 1800s the British Crown was well versed in creating treaties with indigenous peoples having done so for well over a century in North America, India and parts of Africa.²⁸ With pressure building to gain internationally recognised control over New Zealand, the Crown turned to its well-used policy of treaty negotiations with indigenous inhabitants.

And so, in 1839, Royal Navy officer Captain William Hobson received the Letters Patent which held instructions from the Lord Normandy to include New Zealand as part of the colonies of the English Crown. Hobson was under instructions to seek voluntary cession of sovereignty from Māori, gain control over all land matters and to set up a civil government.²⁹ As alluded to in the introduction, the British Crown was reliant on the co-operation of Māori to enter into a Treaty due to the fact that Māori were militarily competent and outnumbered non-Māori by approximately 80,000 to 2050. There was no way the Crown could take New Zealand by force.

²⁶ Orange, above n 3, at 8.

²⁷ At 9.

²⁸ Mutu, above n 22, at 14-15.

²⁹ Morag McDowell and Duncan Webb *The New Zealand Legal System: structures, processes and legal theory* (3rd ed, LexisNexis, Wellington, 2002) at 174.

These circumstances led both parties to the creation of the Treaty of Waitangi (the ‘Treaty’). Justice Williams refers to the Treaty of Waitangi as the “point of contact between the first and second laws.” The Treaty is the founding constitutional document of New Zealand and has been described as the “first major negotiation” of the sharing of public power between the Crown and Māori.³⁰ This negotiation took form in two different versions of the Treaty, one in English, the other in te reo Māori, which greatly contradicted each other.³¹ As is well documented, Articles 1 and 2 of the Treaty contain the most controversial tensions between the two translations. The English version of the Treaty transferred sovereignty from Māori to the Crown, and promised Māori retention of their “exclusive and undisturbed possession over their lands and estates, forests, fisheries and other possessions.” The Māori version however, holds that Māori transferred kāwanatanga, the right to govern and make laws to the Crown, which is a right far lesser than ‘sovereignty’. Māori then retained tino rangatiratanga which has been translated as ‘absolute chieftainship’, a concept much closer to sovereignty than ‘kāwanatanga’.³² Regardless of which version of the Treaty is read, it is apparent that the parties intended to share power over the country, its lands and resources and guarantee the safeguarding of Māori rights to that land and resources.³³ It is easy to conclude then that as a negotiation for shared power between Māori, the original sovereign in 1840, and the Crown, the current de facto sovereign, the Treaty presents an agreement of tremendous constitutional importance.

As demonstrated by this historical analysis of the signing of the Treaty of Waitangi, the interactions between the Crown and Māori, as with the Crown and Canadian First Nations

³⁰ Michael Belgrave “Negotiations and Settlements” in Nicola Wheen & Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 29 at 29; Joseph, above n 12, at 45.

³¹ Orange, above n 3, at 90.

³² Mason Durie *Te Mana, Te Kāwanatanga: The Politics of Self-Determination* (Oxford University Press, Oxford, 1998) at 3.

³³ At 177; Wayne Rumbles “Treaty of Waitangi Settlement Process: New Relationship or New Mask?” (paper presented to the Compr(om)ising Postcolonialism Conference, Wollongong, 10 February 2002) at 2.

peoples, show the intention that the basis upon which the parties chose to share public power was in a nation-to-nation or treaty relationship. Jones reiterates this point.³⁴

The first interactions between indigenous peoples in Canada and in Aotearoa were framed by this type of treaty relationship, with its inherent mutual recognition and understanding that the legitimacy of the state was (and remains) dependant on the consent of the indigenous peoples, such consent being conditional on the acknowledgement of indigenous peoples' "equal yet prior status as nations".

Viewing the Treaty of Waitangi in this way, as an agreement between two sovereign nations to share power in light of the important underlying component of mutual recognition, allows us to step out from the parameters of our current constitutional arrangements and consider the Treaty from a 'political sovereignty' framework. This has brought us to see that the Treaty was indeed intended to create a relationship whereby Māori and the Crown were sovereign equals, that they recognised each-others legal systems and respected each-others' right to retain their autonomy and culture, and agreed that they were going to share power over one geographical space: Aotearoa New Zealand.

If we accept this historical analysis to be accurate, that the Crown and Maori entered into relationship from a nation-to-nation basis to be the case, then the next step is to recognise that the Treaty should be understood in our law from the perspective of the Māori legal system, the law that governed New Zealand at the time, rather than from the colonial perspective of the imported legal system of the English Crown.

³⁴ Durie, above n 32, at 707-708.

3 *The Māori Legal System*

As Justice Joseph Williams argues in the 2013 Harkness Henry lecture entitled *Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law*, tikanga Māori was the first law of New Zealand.³⁵ Polynesian voyagers arrived to the shores of Aotearoa approximately 700 years earlier than Europeans. In that timeframe they settled the land and developed what was to become known as ‘tikanga Māori’, a system of custom based on the values these voyagers brought with them and the new land they had arrived to.³⁶ Tikanga Māori has been summarised aptly by the Waitangi Tribunal in their report *Ko Aotearoa Tēnei, A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (‘Wai 262’):³⁷

Its defining principle, and its life blood, was kinship – the value through which the Hawaiians expressed relationships with the elements of the physical world, the spiritual world, and each other. The sea was not an impersonal thing, but an ancestor deity. The dots of land on which the people lived were a manifestation of the constant tension between the deities, or, to some, deities in their own right. Kinship was the revolving door between the human, physical, and spiritual realms. This culture had its own creation theories, its own science and technology, its own bodies of sacred and profane knowledge. These people had their own ways of producing and distributing wealth, and of maintaining social order. They emphasised individual responsibility to the collective at the expense of individual rights, yet they greatly valued individual reputation and standing. They enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) they also emphasised human responsibility to nurture and care for it (known in te ao Māori as kaitiakitanga).

Tikanga differed slightly between distinct iwi across New Zealand, but the core values such as whanaunatanga and kaitiakitanga mentioned above, alongside mana (the source of rights

³⁵ Justice Joseph Williams “Harkness Henry Lecture. *Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law*” (2013) 21 Wai L Rev 1 at 2.

³⁶ At 2.

³⁷ Waitangi Tribunal *Ko Aotearoa Tēnei, A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 5.

and obligations of leadership),³⁸ tapu (both a social control on behaviour and evidence of the indivisibility of divine and profane)³⁹ and utu (the obligation to give and the right – and sometimes obligation – to receive constant reciprocity)⁴⁰ among others remained the same.⁴¹ This was the law that Māori used to govern themselves in their society of “small, kin-based communities” before the arrival of the Europeans and the imposition of colonial law.⁴²

The way in which Māori viewed the Treaty from the perspective of the customs, constitutional principles and legal rules of tikanga is naturally very different to how the Treaty is viewed through a colonial lens. Drawing on the analyses of prominent Māori academics Moana Jackson and Ani Mikaeare, Jones identifies three “key strands” that support the idea that the legitimacy of New Zealand’s constitutional arrangements lies in the Māori legal system.⁴³

- (1) Māori legal concepts in the Māori text of the Treaty lead us to the clear intent behind the Treaty;
- (2) The Māori legal system has a legitimacy in Aotearoa New Zealand that the common law does not have;
- (3) The Treaty itself was signed in the context of the Māori legal system.

Following Jones’ lead, this paper consider these three points and contend that the true meaning behind the Treaty can only be understood from the perspective of the Māori legal system.⁴⁴

³⁸ Williams, above n 35, at 3.

³⁹ At 3.

⁴⁰ At 3.

⁴¹ At 2.

⁴² At 3.

⁴³ Jones, above n 9, at 709.

⁴⁴ At 709-711.

It is important to note that the Māori understanding of the Treaty is based on cultural and legal concepts that are deeper than mere translations of the words used in the Māori version of the Treaty can convey.⁴⁵ As Māori academic Ani Mikaere points out, we must accept that by 1840, Māori had their own legal system and system of governance which they had developed over the approximate 700 years they had lived on these islands. Also, the majority of the rangatira that debated and first signed the Treaty of Waitangi in 1840 had also signed the Declaration of Independence in 1835. Furthermore, in the Māori version of the Treaty of Waitangi, Māori leaders retained their “tino rangatiratanga” and gave to the Crown “kāwanatanga”. In light of these three factors, and the political reality of the time with the arrival of an increasing number of unruly settlers, Mikaere argues that the most reasonable purpose that we can give the Treaty was that the Māori signatories in signing it declared their own authority, and recognised and made space for the Crown and its increasing number of settlers within their country.⁴⁶

This view is supported by Moana Jackson who notes:⁴⁷

Rangatiratanga as a concept of authority existed even before 1840, and was never seen by any Iwi as a power subordinate to that of another. For Maori, the treaty could never cede such authority, nor permit such assumptions to be made. The rangatiratanga or sovereign authority of Iwi or tribal nations was entrusted to the living to nurture and hand on to the generations yet to be. As a gift from the ancestors, it was both spiritually incomprehensible and legally impossible to even contemplate giving it away. No matter how powerful or respected a political leader might be, he or she was never powerful enough to give away that which ensured the protection and well-being of the people. However in the treaty, that ancient authority is suddenly transmogrified into an authority subservient to the newest Iwi on the block, the Crown. It is a colonial sleight of hand bedazzling to the mind.

⁴⁵ At 711.

⁴⁶ At 709.

⁴⁷ Moana Jackson “Maori, Pakeha and Politics: the Treaty of Waitangi” (paper presented to the Global Culture Diversity Conference, Sydney, April 1995).

The reason Māori might agree to make space for these new-comers and their Crown can be explained by the valued Māori custom of ‘manaakitanga’ or ‘hospitality’, a value that governs the pōwhiri process or welcoming ceremony.⁴⁸ According to this important Māori custom, it is good practice to acknowledge and welcome guests and provide them with a space, provided they respect the ‘kawa’ (customs) and ‘mana’ (prestige or authority) of the hosts.⁴⁹

It can be seen from these considerations that there is more to the Māori version of the Treaty than mere translations can show; there is a body of principles grounded in the Māori legal system that demonstrate the real intent and understanding of the Treaty by the Māori signatories. Any assertion that this understanding is irrelevant and that the Treaty was still one of cession ignores the Māori legal and cultural tradition completely.

As has been pointed out already above, the Māori legal system was the first law of our country and as such it preserves a legitimacy that the imported common law of the British Crown cannot claim. As such, it must be within this Māori legal system that New Zealand’s constitution should be based.⁵⁰

In light of these two preceding points then, it is fair to conclude that the Treaty itself was signed with the context of the Māori legal system. As Jones notes however, the argument here is not based on constitutional originalism whereby the meaning of the Treaty from a Māori perspective in 1840 must be upheld regardless of social and cultural change.⁵¹ Instead this Māori perspective of the Treaty poses a question: how may we give effect to it?

⁴⁸ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 120.

⁴⁹ Jones, above n 9, at 709.

⁵⁰ At 710.

⁵¹ At 711.

C The True Meaning of the Treaty of Waitangi: Shared Power

In light of the historical context in which the Treaty of Waitangi was signed, it is contended here that the true meaning behind the Treaty is that which is framed in the Māori version of the Treaty itself and understood from the perspective of the Māori legal system. Having regard to these points, this paper proceeds on the basis that the true agreement reached in the Treaty of Waitangi is that public power would be shared between the Treaty partners; Māori and the Crown. This is the *kāwanatanga – tino rangatiratanga*, or dual-sovereignty, relationship expressed in Articles 1 and 2 of the Māori version of the Treaty. The current reality is that the Crown is sovereign, and Māori retain unique rights as *tangata whenua* based on the principles of the Treaty of Waitangi that it can enforce in certain circumstances prescribed by the Crown in legislation. This does not give effect to the true agreement of shared public power. Instead it is necessary to recognise that New Zealand is founded on an agreement between two sovereign nations which each have their own valid legal system and system of governance. These two nations have agreed to share power over one geographical space and in doing so must forge a constitution that reflects the values and legal systems of each. How the sharing of public power between Māori and the Crown would look in our society is outside of the scope of this paper, however some ideas will be offered throughout.

The orthodox view is based on colonialist, assimilationist ideals that are no longer acceptable in New Zealand. We are now a multi-cultural country with bi-cultural origins based on Māori and the British.⁵² This modern society has rejected these 19th and early 20th century colonialist policies that were targeted at assimilating Māori into a ‘superior’ culture,⁵³ and our constitution needs to reflect this. It is unlikely (or rather, absolutely impossible), however that this change will originate from within Parliament, this change will only arise from the courts.

⁵² Justice Joseph Williams “Te Reo video” (2014) YouTube <www.youtube.com/watch?v=VJpSRZtZe08>.

⁵³ David Round *Truth or Treaty?* (Canterbury University Press, Christchurch, 1998).

III Convincing the Courts: The True Purpose of the Treaty Must be Given Effect

This paper contends that there are three reasons why the courts must turn to give effect to the true purpose of the Treaty of Waitangi outlined above. The first reason is that our current constitutional structure perpetuates a destructive cycle of grievance regarding Māori rights that can only be ended by giving true effect to the kāwanatanga - tino rangatiratanga relationship described above. The second reason is that giving effect to the true purpose of the Treaty will reflect the values of our modern society which has rejected the policies of assimilation inherent in the colonial legal system and is moving organically towards a system based on both the Māori and the colonial legal systems. Finally, the third reason is that it is the duty of the courts to help develop our constitution and reflect the values of our society.

A Ending the Cycle of Grievance

Despite the fact that the Treaty is our country's foundational constitutional document, its place within New Zealand's constitution, and therefore the constitutional status of Māori and their rights to tino rangatiratanga, remains uncertain. By omitting to give effect to the true purpose of the Treaty and provide it proper constitutional provision, New Zealand's 19th and 20th century colonial policies and laws created markedly lop-sided Treaty partners; the Crown – our supreme Parliament – on one side and Māori on the other side, at the whim of the most popular political campaign of the day and dominating almost all of the lower socio-economic facets of our society.⁵⁴ New Zealand has failed to create the co-operative society the signatories of the Treaty envisioned and as a result we have fallen into what this paper will refer to as a 'cycle of grievance' of Māori rights; a cycle of continuous breaches against the

⁵⁴ Lisa Marriott and Dalice Sim *Indicators of Inequality for Māori and Pacific People* (Working Paper 09/2014, 2014) at 23.

Treaty, claims of injustice and grievance by Māori, then an apology and settlement of those claims by the government.⁵⁵

This paper concedes that Māori rights are much better protected now that Māori have the Waitangi Tribunal, the Treaty Settlement process and the Treaty Principles enshrined in legislation; however none of these institutions have been capable of ending this cycle of grievance. This cycle is real, not a mere inconvenience – it is destructive. It has been the cause of inter-generational poverty and disenfranchisement of Māori people which is the underlying cause of the over-representation of Māori in all the negative socio-economic aspects of our modern New Zealand society.⁵⁶

Currently Māori are at the behest of the Crown. Crown acts or omissions breach Māori rights laid out in the Treaty. Māori are then aggrieved and claim justice and redress and the Crown either reacts positively or negatively, depending on what is most politically expedient. There are many examples of this imbalanced Treaty relationship, the Foreshore and Seabed Act 2004 being the most infamous and obvious.⁵⁷ Under the Foreshore and Seabed Act, the right for Māori claimants to refer to the Māori Appellate Court to establish whether or not the foreshore and seabed surrounding the New Zealand coast-line was Māori customary land was explicitly removed by Parliament, and the land in question was vested in the Crown.⁵⁸ This is an example of the Crown's ability to "ride rough-shod" over Māori rights in one instance.

An illustration of the actual "cycle" of grievance is clear in each and every Crown apology and Crown acknowledgement of historical grievance throughout the historical Treaty

⁵⁵ Arnot, above n 7, at 60; There are a number of examples of this 'cycle of grievance' where agreements were reached between Māori and the Crown only to be breached later. Examples may be found in all Treaty Settlement Acts under the historical redress sections where the acknowledgements of grievances and apologies by the Crown may be found.

⁵⁶ Marriott and Sim, above n 54, at 23.

⁵⁷ Foreshore and Seabed Act 2004. See also Maria Bargh "Changing the game plan: The Foreshore and Seabed Act and constitutional change" (2006) 1 Kōtuitui: New Zealand Journal of Social Sciences Online 13 at 13-24.

⁵⁸ Foreshore and Seabed Act 2004; See also *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

Settlements process. An extract of some of the acknowledgements in the Tūhoe Claims Settlement Act 2014 prove the existence of this cycle beyond doubt:⁵⁹

The Crown acknowledges that,—

(8) The Crown acknowledges that its confiscation of part of the rohe of Tūhoe and its subsequent conduct in warfare began to erode Tūhoe's mana motuhake, which was guaranteed to them under the Treaty. These Crown actions undermined chiefly authority, and the political impacts resonate today...

(23) The Crown acknowledges that in 1894 through 1895, Tūhoe negotiated in good faith to secure Crown agreement to a solemn compact respecting their mana motuhake, but that the Crown undermined their mana motuhake and caused Tūhoe severe prejudice by the manner in which the Crown implemented the Urewera District Native Reserve Act 1896 (the **1896 Act**).

(24) The Crown acknowledges that—

(a) it caused significant delays in the establishment of the local government provided for under the 1896 Act. This was compounded by unreasonable delays in the establishment of a body to hear appeals from decisions of the Urewera Commission; and

(b) it failed to provide options to ensure majority Te Urewera Māori participation in the Urewera Commission when it sat; and

(c) it failed to provide any role for Te Urewera Māori on the Urewera Commission appellate body; and

(d) it failed to uphold the agreement in the compact that land titles in the Urewera District Native Reserve (the **Reserve**) would be awarded to hapū; and

(e) it undermined the 1896 Act's core principle of self-government by intervening in 1909 to change the membership of the General Committee, which the Act had provided would be elected; and

(f) it ultimately failed to establish an effective system of local land administration and governance and this was a breach of the Treaty of Waitangi and its principles.

(25) The Crown acknowledges that it breached its compact with Tūhoe by promoting unilateral changes to the 1896 Act and that this breached the Treaty of Waitangi and its principles.

There are over 40 statutorily recognised acknowledgements of Crown breaches against the Tūhoe people alone. The cycle of grievance is especially evident in ss 23, 24 and 25 which show that despite the fact that the Crown's guarantee to recognise and respect Tūhoe's mana motuhake was statutorily provided for in the Urewera Native Reserves Act 1896, it was breached and consequences of that breach were long-lasting.

⁵⁹ Tūhoe Claims Settlement Act 2014, s 9.

One question that springs to mind is how can we now guarantee that these Treaty Settlement Claims Acts will be upheld by the Crown? Within our current constitutional arrangements, with the Crown as sovereign and supreme, we simply cannot.

The crucial problem that perpetuates this cycle of grievance is that lack of a constitutional limit on the Crown's ability to breach Māori rights. This missing constitutional limit would be a practical manifestation of the Māori right to tino rangatiratanga. If it were introduced into our constitution, it would allow Māori to declare a Crown act or omission to be unconstitutional as it would breach Māori tino rangatiratanga and would therefore provide an end to the cycle of grievance. The only way we can guarantee the end of Crown breaches against Māori rights is to change our constitution to give meaningful recognition and power to the kāwanatanga-tino rangatiratanga relationship intended by the Treaty of Waitangi.

B The 'Organic' Revolution: Reflecting Modern Social Values

Much has changed in New Zealand since the Māori Renaissance in the 1970s. In fact, for people who grew up in the 1990's and 2000's, it is difficult to imagine a society where the Treaty of Waitangi was not taught in schools, commented on in the news or set as a 'hot topic' for political debates. Yet less than 50 years before, the Treaty was viewed in the eternal light shone on it by Chief Justice Prendergast in 1877; as a "simple nullity".⁶⁰ The change has its roots in the Māori Renaissance and the refusal by Māori to assimilate and tolerate the ongoing cycle of grievance.⁶¹ Examples of this change can be seen in the cultural, educational, economic and legal spheres of our society; and many of these changes happened

⁶⁰ MPK Sorrenson *Ko Te Whenua te Utu: Land is the Price: Essays on Māori History, Land and Politics* (Auckland University Press, Auckland, 2014) at 219; *Wi Parata v Bishop of Wellington*, above n 15, at 78.

⁶¹ Williams, above n 52.

so naturally that they were barely noticed.⁶² In the educational sphere, we now have kōhanga reo, kura kaupapa and whare wānanga; you can now complete your entire education in te reo Māori and as a result we now have three generations of children being brought up with te reo Māori as their first language. In the economic sphere we see the growing Māori economy to such an influential level, especially in the fisheries domain, that it can drive corporate behaviour into introducing aspects of tikanga Māori into their practice.⁶³ The first time the national anthem was sung in both English and in te reo Māori was at a rugby league test in Auckland in the mid-1990s. This trend then caught on to netball, then rugby union and by 1999 every sport representing New Zealand anywhere in the world would commence their games with a bilingual anthem.⁶⁴ Yet today we would be surprised if the anthem was not bilingual.⁶⁵ The swearing-in ceremony of Governor General Jerry Mataparae in 2011 which was celebrated with pōwhiri, whai kōrero and kapa haka alongside the traditional English formalities is another example of tikanga Māori becoming more relevant in our modern society.⁶⁶ These examples reflect a change in New Zealand culture; of how we portray ourselves and of how we see ourselves, “as a country founded on two cultures.”⁶⁷ These changes amount to what Williams J refers to as an ‘organic’ constitutional revolution towards constitutional change for Māori.⁶⁸

This organic cultural shift is also being reflected in our law today. In his Harkness Henry lecture in 2013, Justice Williams focussed primarily on this legal advance and spoke of the history of the development what he called the ‘three laws’ of Aotearoa New Zealand.⁶⁹ The ‘first law’ was what became known as ‘tikanga Māori’ referred to above; it was the law that

⁶² Williams, above n 52.

⁶³ For example see the Sanford Limited and Iwi Collective Partnership Agreement < www.sanford.co.nz/sanford-fisheries/icp/en/iwi-collective-partnership.cfm>.

⁶⁴ Williams, above n 52.

⁶⁵ Williams, above n 52.

⁶⁶ Williams, above n 52.

⁶⁷ Williams, above n 52.

⁶⁸ Williams, above n 35, at 32.

⁶⁹ At 12.

arrived with Kupe and Toi, the first Polynesian voyagers to land in Aotearoa.⁷⁰ The second law was the colonial legal system imported by the English Crown and implemented in New Zealand through the Treaty of Waitangi in 1840.⁷¹ This was a totally different conception of law based on very distinctive values such as the autonomy of the individual rather than the communal, kinship based focus of tikanga Māori. This ‘second law’ dominated the first law until it was “a bare shadow of its former self”.⁷² The ‘third law’ is the law that New Zealand finds itself implementing today as a result of this ‘organic’ revolution also known as the Māori Renaissance which began in the 1970s. Since then, our law has been developing an aspect of Māori jurisprudence throughout various areas of our law by reaching back to our country’s first law of tikanga and using it to inform and balance the colonial legal system that has governed our country since the mid-1800s.⁷³ Tikanga Māori has been introduced slowly into our law, first through arenas where it is more easily welcomed and fitted, such as the tikanga of ‘kaitiakitanga’ (stewardship) environmental law,⁷⁴ criminal law through examples like the Rangatahi Courts,⁷⁵ introducing a culture well-being ‘bottom line’ in local government resource management,⁷⁶ and of course the Māori Land Court, the Waitangi Tribunal and the Treaty Settlements process.⁷⁷ As our society and our judiciary become more familiar with tikanga, however, it will begin to inform more areas of our law and – if this organic movement succeeds – our constitution.

This paper will now look at the advancements tikanga has made towards the protection of Māori constitutional rights guaranteed by the Treaty through the Waitangi Tribunal and the

⁷⁰ At 2-3.

⁷¹ At 7.

⁷² At 11.

⁷³ At 12.

⁷⁴ Resource Management Act 1991, ss 1, 7 and 35(A).

⁷⁵ Ministry of Justice “Rangatahi Court: Evaluation of the early outcomes of Te Kooti Rangatahi” <<http://www.justice.govt.nz/publications/global-publications/r/rangatahi-court-evaluation-of-the-early-outcomes-of-te-kooti-rangatahi>>.

⁷⁶ See Paul Dalziel, Hirini Matunga and Caroline Saunders “Cultural Well-Being and Local Government: Lessons from New Zealand” (2006) 12 *Australasian Journal of Regional Studies* 267.

⁷⁷ Te Ture Whenua Māori Act 1993; Treaty of Waitangi Act 1975.

Treaty Settlements process. It is argued that these institutions prove that New Zealand society is ready for a constitutional shift towards giving effect to the true purpose behind the Treaty, despite the fact that these institutions are unable to provide that shift.

1 The Waitangi Tribunal

One of the most effective steps in the Māori Renaissance was the inception of the Waitangi Tribunal through the Treaty of Waitangi Act 1975, and its amendment in 1985 giving the Tribunal jurisdiction to address the cycle of grievance of Crown breaches to the Treaty during the 19th century.⁷⁸ The Tribunal was the “first instance in which the state had organised a specific, institutionalised response to Māori activism after a long period of disengagement from Māori and their Treaty issues.”⁷⁹ Before the Tribunal, any Māori complaints based on the Treaty were dealt with, and consistently repudiated, in the courts or fell on deaf ears in Parliament.

The Waitangi Tribunal is a permanent Commission of Inquiry that hears Māori claims about historic and contemporary grievances leading back to the signing of the Treaty in 1840. As of 1992, the Tribunal may only hear contemporary claims of breaches of Māori rights against the Treaty.⁸⁰ The Waitangi Tribunal has jurisdiction to “investigate claims made by Māori who may have been prejudiced by acts or omissions by the Crown that as inconsistent with the principles of the Treaty of Waitangi.”⁸¹ The Tribunal may make findings and recommendations to the Crown as to how the Crown may address and reconcile Māori

⁷⁸ Williams, above n 35, at 11.

⁷⁹ Juan Tauri and Robert Webb “The Waitangi Tribunal and the Regulation of Māori Protest” (2010) 25 New Zealand Sociology 3 at 2.

⁸⁰ Treaty of Waitangi Act 1975, s 6AA.

⁸¹ Section 6.

grievances for Crown breaches of the Treaty. The Tribunal's recommendations are not binding on the Crown except in very limited situations.⁸²

The Waitangi Tribunal is rightly praised as a unique achievement by New Zealand to address Māori grievances, both historical and contemporary. It provides Māori with an appropriate forum that operates according to tikanga Māori as well as the common law and allows Māori to finally have their say, express the grievances of their people and have those recorded and accounted for. In this way, the Waitangi Tribunal is an excellent example of Justice William's 'third law'; the rejection of a legal system based solely on the colonial legal system and the acceptance of the first law to inform decisions and procedure.

The Waitangi Tribunal, however, remains limited within New Zealand's current constitutional structure which gives effect only to Crown sovereignty and cannot, therefore, provide the constitutional change sought by this organic movement. Firstly, the Tribunal is limited to investigating acts or omissions done by the Crown.⁸³ The Crown in this context is limited to the Executive and any government bodies exercising executive powers. This means that the Tribunal may not investigate Acts passed by Parliament (although they may analyse Bills) even where they are claimed to breach Māori rights. In this way, the Tribunal must allow the subjugation of Māori rights to Crown sovereignty. Secondly, the fact that the Crown is entitled to ignore the Tribunal's recommendations as to how the Crown should address Māori grievances is another example of Crown dominance over Māori rights.⁸⁴ Thirdly, although the Tribunal may have regard to the two texts of the Treaty, it is limited to consider claims against breaches of the principles of the Treaty of Waitangi, rather than

⁸² Section 8D.

⁸³ Treaty of Waitangi Act 1975, s 6.

⁸⁴ The Waitangi Tribunal has the power to make binding recommendations for the return of certain Crown owned lands, tertiary institute or former New Zealand railway land to a claimants group in limited circumstances: State Owned Enterprises Act 1986, s 27B.

against the Treaty itself.⁸⁵ The Treaty principles, however also limit discussion and protection of Māori rights to the current Crown dominated constitutional structure we currently have.

Dr. Jones poses this problem well:⁸⁶

Treaty principles provide a sound basis for dealing with Māori claims within the framework of our current constitutional arrangements... However, it is problematic to enter into a discussion about our constitutional arrangements on the basis of a partnership in which the Crown sovereignty sets the framework for determining how a reasonable Treaty partner ought to behave... under such constitutional arrangements, Treaty rights, if they exist at all, can only exist alongside the sovereignty of the Crown.

These points on the Treaty principles themselves will be revisited below. It is clear, however, that despite the tremendous advancements the Waitangi Tribunal has made for Māori rights, it remains locked within a constitutional structure that contradicts the Treaty and therefore is unable to achieve the constitutional change needed to place the Treaty itself at the heart of our constitution. This has been noted by the Waitangi Tribunal itself in its Wai262 report where its recommendations of mechanisms to protect Māori property rights point beyond “consultation” of iwi models and towards a better sharing of public power.⁸⁷

2 The Treaty Settlements of Historical Claims Process

The Treaty Settlements process is another important example of the advancement of tikanga within our law. The Office of Treaty Settlements describes Treaty Settlements as “an agreement between the Crown and a Māori claimant group to settle all of that claimant

⁸⁵ Treaty of Waitangi Act 1975, s 6.

⁸⁶ Jones, above n 9, at 712 – 713.

⁸⁷ See Wai 262, above n 37.

group's historical claims against the Crown.”⁸⁸ ‘Historical claims’ can be made about any legislation that breaches the principles of the Treaty or any other Crown acts or omissions that has caused Māori to suffer prejudice up until 1992.⁸⁹ Examples of these acts or omissions range from large-scale loss of Māori land through confiscation, through war or other means, to the failure of the Crown to recognise and protect Māori cultural interests in and access to natural resources, wāhi tapu and other taonga.⁹⁰ The Crown recognises that its failure to honour the Treaty of Waitangi and protect Māori interests of their land, resources and taonga resulted in the poor representation of Māori in lower socio-economic areas of society.

In practical terms Treaty Settlements are made up of three parts (although each Settlement differs): historical redress which consists of a Crown apology and acknowledgements for past acts and omissions which caused grievance; a provision for cultural redress; and, a provision for financial and commercial redress.⁹¹ As a quid pro quo for this redress of historical grievances, Māori must accept that these Treaty Settlements, which are enshrined in legislation, are ‘full and final’ and give up their right to claim further compensation from the Crown for historical grievances.⁹²

Treaty Settlements are another important advancement as part of the organic movement towards giving effect to the Treaty partnership. In particular, the historical redress consisting of the apology and acknowledgments of past breaches causing grievance are important for Māori in order to move forward as a unified nation. Cultural redress is usually provided for by a promise to recognise and protect Māori interests and access to certain resources or sites and by providing Māori the ability to contribute to government or local body decisions about any areas of ‘traditional and cultural’ importance. Again, however, the Treaty Settlement

⁸⁸NR Wheen and J Hayward, above n 33, at 14; Office of Treaty Settlements “What is a Treaty Settlement?” (2002) <www.ots.govt.nz>.

⁸⁹ Wheen and J Hayward, above n 30, at 14.

⁹⁰ At 14.

⁹¹ At 14-15.

⁹² For example see preamble of the Ngati Ruanui Claims Settlement Act 2003.

process is confined by our current constitutional structure and cannot give effect to the intended Treaty partnership of shared power between Māori and the Crown.

3 *Treaty Principles*

As outlined above, where Māori feel the Crown have acted prejudicially against them, they may appeal to the Waitangi Tribunal or the courts claiming redress on the basis that the Crown has breached the principles of Treaty of Waitangi. Treaty principles were defined in the famous *Lands Case* in 1987 and provided a solid basis for upholding Māori rights to date, albeit within our current constitutional framework set by Crown sovereignty.⁹³ Dr. Carwyn Jones identifies the three most prominent Treaty Principles that have developed since the *Lands Case* as:⁹⁴

- (1) Partnership: Māori and the state, as Treaty partners, have an obligation to act reasonably towards each other with utmost good faith;
- (2) Active protection: the Treaty sets out guarantees that impose positive duties on the state;
- (3) Redress: where Treaty obligations have been breached, redress ought to be provided.

While these principles are a significant advancement for protecting Māori rights, it is apparent that they are confined in our current constitutional structure dominated by Crown sovereignty. These principles are a “compromise between Crown sovereignty and tino rangatiratanga”.⁹⁵ Similar to the Waitangi Tribunal and the Treaty Settlements process, the Treaty Principles are contingent on Crown sovereignty they are therefore unable to challenge

⁹³ Jones, above n 9, at 712.

⁹⁴ At 712.

⁹⁵ At 712.

Crown sovereignty and consequently will never be able to give effect to Māori tino rangatiratanga.⁹⁶

C Judicial Duty to Develop the Constitution in Step with Social Values

The New Zealand courts play an important constitutional role that is said to be the least understood of the primary functions of government.⁹⁷ For example, when New Zealand proposed the idea of creating our own Supreme Court, dissenting commentators claimed that this would create unchecked “judicial activism” or that it would “politicise the judiciary and transform judges into agents of political and social reform.”⁹⁸ These claims, however, are misguided and ignore the essential and fundamental constitutional relationship between the judiciary and the Crown-in-Parliament.⁹⁹

Eminent constitutional lawyer and academic, Phillip A Joseph, described the constitutional relationship between the judiciary and the Crown-in-Parliament as a “collaborative enterprise”.¹⁰⁰ This concept is useful to explain the inter-dependent and reciprocal nature of the relationship between the two branches. Phillip explains;¹⁰¹

Each branch is interdependent on the other, exercising reciprocal responsibilities. Judicial recognition of Parliament’s legislative power and exclusive cognisance augments the political branch, and political recognition of the courts’ judicial powers and institutional independence augments the judicial branch. Parliament and the courts exercise co-ordinate, constitutive authority – Parliament through legislation, the courts through common law principles and statutory construction.

⁹⁶ At 713.

⁹⁷ Joseph, above n 12, at 763.

⁹⁸ At 763.

⁹⁹ At 764.

¹⁰⁰ At 764.

¹⁰¹ At 764.

Of course, as Joseph notes, this type of relationship contradicts the nature of Parliamentary sovereignty as it recognises that courts have the ability interpret legislation according to their own common law principles.¹⁰² This political-judicial relationship, however, amounts to what Lord Steyn called the “twin strands of the democratic ideal – the principle of majority rule and the guarantee of justice and liberty” and identified that while tensions will arise especially when the courts “check” the political branch, these are “healthy” in a government system committed to the rule of law.¹⁰³

In building the common law and interpreting legislation it is the constitutional duty of the courts to consider public policy and “assimilate the linguistic meaning of statutes with common law principles of liberty, fairness and due process.”¹⁰⁴ Often the courts will refer to this exercise as presumptions of the intent of the legislature however as one commentator noted, “these presumptions have nothing to do with the intent of the legislature; they are a means of controlling that intent.”¹⁰⁵ This role of the courts is absolutely necessary in order to uphold the rule of law and update the constitution alongside developing social values. Of course for those that worry about judicial activism or unelected “philosopher king judges”, they can be rest assured that Parliament may override any judge-made decision through specific and purposeful legislation.¹⁰⁶

In light of the cycle of grievance, the organic social movement towards constitutional change, and the constitutional role the courts have to update the constitution according to public policy, social equity and justice it is argued that the courts *must* exercise their duty to give effect to the true purpose of the Treaty of Waitangi. The question now is how can the courts give effect to the purpose of Treaty?

¹⁰² At 765.

¹⁰³ At 765; See also Lord Steyn “The Case for a Supreme Court” (2002) 118 LQR 382 at 388.

¹⁰⁴ At 768.

¹⁰⁵ At 768.

¹⁰⁶ At 768.

IV Giving Effect to the Treaty of Waitangi: A “Constitutional Kōrero” and the Honour of the Crown

The challenge for the courts now is to give effect to the true purpose of the Treaty of Waitangi, the idea of a *kāwanatanga* – *tino rangatiratanga* relationship between the Crown and Māori, from the perspective of the Māori legal system, in our constitution. The current approach of the courts to protect Māori rights by ensuring that the Crown’s acts or omissions are consistent with the Treaty Principles is dismissed as ineffective to achieve constitutional change. Giving effect to the true purpose of the Treaty ultimately requires the courts to think outside of our current constitutional arrangements governed by Crown sovereignty and discuss our constitution from a ‘political sovereignty’ view-point, as explained above. This, as acknowledged by Jones, may require some “fundamental shifts” in the courts’ constitutional thinking.¹⁰⁷ In keeping with the organic movement explained above, however, this paper suggests the courts take an *incremental* approach to this constitutional change rather than an unrealistic radical judicial revolution.

Adopting Jones’ theory of a constitutional *kōrero*, this paper argues that the courts must engage with the Crown through a political-judicial dialogue and invoke the common law doctrine of the Honour of the Crown to give effect to the *kāwanatanga* – *tino rangatiratanga* relationship intended by the Treaty. This paper will now turn to explain the theory behind both Jones’ ‘constitutional *kōrero*’, the Honour of the Crown doctrine and why the current approach of applying Treaty Principles is no longer suitable. This paper will then move on to give a practical example of how this approach could work to achieve constitutional change.

¹⁰⁷ Jones, above n 9, at 717.

A Jones' 'Constitutional Kōrero'

In his article *Tāwhaki and te Tiriti: A principled approach to the constitutional future of the Treaty of Waitangi* (2013), Dr Carwyn Jones discusses the need to find a way to give effect to the actual agreement made in the Treaty. In this article, Jones calls for what he terms a 'constitutional kōrero':¹⁰⁸

Put simply, the basic theory of constitutional dialogue is that, by performing their appropriate constitutional functions, each branch of government has a voice in the collaborative articulation of constitutional law and the protection of constitutional rights... So, the constitutional dialogue is reflected by the legislature passing laws, the courts determining the consistency of those laws with constitutional principles, and then the legislature addressing any such inconsistencies found by the courts. In this way, the legislature and the judiciary in particular are engaged in a dialogue.

Jones argues that through this constitutional kōrero, the New Zealand judiciary may be able to introduce a 'Māori voice' into our constitution.¹⁰⁹ This Māori voice would provide the dialogue with reference to Māori law, rather than simply a consultant Māori perspective, and in this way would give effect to the true agreement of shared power made in the Treaty of Waitangi. This constitutional kōrero would allow that "Māori law can speak to the design and operation of our constitution, not just allowing Māori to be involved in the institutions of our existing constitutional arrangements."¹¹⁰

In order to arrive at this 'constitutional kōrero', an analysis of Jones' article identifies three initial steps New Zealand must take:¹¹¹

¹⁰⁸ Jones, above n 9, at 716.

¹⁰⁹ At 717.

¹¹⁰ At 715.

¹¹¹ At 715.

- (1) Move on from the discussion of the Treaty of Waitangi in the context of ‘legal sovereignty’ and into a context of ‘political sovereignty’ in order to free our mind-sets from the parameters of our current constitutional arrangements;
- (2) Understand the Treaty of Waitangi and the promises contained within it from the context of tikanga Māori, the Māori legal system which was the first law of Aotearoa New Zealand;
- (3) Recognise the validity of the Māori legal system and introduce its ‘voice’ through the courts into a ‘constitutional kōrero’ with the Crown.

The first two steps; that of opening our discussion of the Treaty into a context of ‘political sovereignty’ and understanding the Treaty and its guarantees from the perspective of the Māori legal system have been dealt with above. Recognising the Treaty as an agreement of a constitutional nature between the Crown and Māori, entered on a nation-to-nation basis and that this relationship can only legitimately be understood from the Māori legal system is, it has been argued, the only way to determine the true purpose behind the Treaty: that public power would be shared between the Treaty partners.

Having identified the true purpose of the Treaty and the guarantees it holds for Māori, the third step describes how the courts may give effect to this purpose. Jones argues that the dialogue consists of the legislature passing laws, the courts interpreting those laws in line with their duties to give effect to constitutional principles – such as in line with the purpose of the Treaty of Waitangi – and the legislature either accepting those interpretations or introducing overruling legislation to reject them.¹¹²

Again, however, it is unrealistic to argue for the courts to suddenly disregard the Treaty Principles and begin giving effect to the purpose behind the Treaty. Thus this paper argues

¹¹² At 716; Jones provides the examples of *Simpson v Attorney General (Baigent’s Case)* [1994] 3 NZLR 667 (CA).

that a more realistic way to give effect to the Treaty is through the interpretive aid of the doctrine of the honour of the Crown.

B The Honour of the Crown

The honour of the Crown is an age-old common-law doctrine that has recently re-emerged in Canadian indigenous jurisprudence. In essence, the honour of the Crown “requires servants of the Crown to conduct themselves with honour whenever acting on behalf of the Sovereign.”¹¹³ Among other duties the doctrine imposes on the Crown, the honour of the Crown provides “a justification for honourable treaty-making and an imperative to accomplish the purpose of treaty and statutory grants.”¹¹⁴ If the Crown acts dishonourably and breaches a promise that is of a constitutional nature (such as those contained in the Treaty Claims Settlements Acts, the Treaty itself or another agreement that stems from the Treaty of Waitangi) the courts may declare it a breach of the honour of the Crown and may require the Crown to “diligently pursue fulfilment of the purposes of the obligation.”¹¹⁵

As will be explored below, it is argued that the doctrine of the honour of the Crown may be used to give effect initially to the promises enshrined in the Treaty Claims Settlements Acts (and thereby provide a potential end to the cycle of grievance), and potentially later to the true purpose behind the Treaty itself. This two-step approach of giving effect to Treaty Claims Settlement Acts first is seen as more realistic and pragmatic although it is argued that as the organic movement progresses and tikanga becomes more established in our law, using the honour of the Crown to give effect to the purpose of the Treaty itself may become more realistic than it currently appears.

¹¹³ Max Harris “Manitoba Métis Federation (Inc) v Attorney-General (Canada): A step forward for indigenous rights jurisprudence and an opportunity for New Zealand” (2013) May Māori LR 1 at 3.

¹¹⁴ At 4.

¹¹⁵ *Manitoba Métis Federation v Attorney-General (Canada)* [2013] SCC 14 at [128].

This paper will now turn to explore the history of the doctrine of the Honour of the Crown and its development in Canada before exploring how the doctrine may be invoked in New Zealand. It is noted that the development of the doctrine in New Zealand would be quite distinct due to the very different constitutional arrangements between Canada and New Zealand, as will soon be explained.

1 Historical Background & the Principle of the Honour of the Crown

The doctrine of the honour of the Crown originates from pre-Norman England when the Crown was a distinct monarch, rather than an abstract figurehead whose powers are exercised by government ministers.¹¹⁶ The King's power stemmed from his good name which was represented, and exercised in public more frequently, by his officials. If any of those officials spoke or acted in an embarrassing or dishonourable way – such as by breaching their word – they had discredited the King's name, and were consequently punished heavily.¹¹⁷

In our modern society these officials are government ministers and “the King” plays a very minimal role as the state's figurehead. There is now a very tangible separation between the workings of government and the Crown they represent and derive power from. As Judge David Arnot¹¹⁸ notes, this separation has resulted in ministers being more wary of political polls than upholding the Crown's honour. This problem is expressed clearly by Arnot in reference to the Supreme Court's decision in *R v Guerin*:¹¹⁹

...the Supreme Court restored the concept of holding ministers to a standard of fairness that demands forethought as to what conduct lends credibility and honour to the Crown, instead of

¹¹⁶ Arnot, above n 7, at 65.

¹¹⁷ At 66.

¹¹⁸ Judge David M. Arnot was appointed Treaty Commissioner for Saskatchewan in 1997. He was appointed to the Provincial Court of Saskatchewan in 1981 and served previously as the Director General of Aboriginal Justice and as Special Advisor to the Deputy Minister of Justice on Aboriginal Justice Issues from 1994 – 1997.

¹¹⁹ At 66; *R v Guerin* [1984] 2 SCR 335.

what conduct can be technically justified under the current law. The Supreme Court clearly rebukes the notion that a minister's motivation to act can be defended on the grounds of political expediency.

Accordingly, Arnot notes that appealing to the honour of the Crown "...was and continues to be not merely an appeal to the sovereign as a person, but to principles of fundamental justice that exist independent of individuals and beyond politics."¹²⁰

As held in *Haida Nation*, the honour of the Crown arises "from the Crown's assertion of sovereignty over a First Nation people and *de facto* control of land and resources that were formerly in control of that people."¹²¹ The Court recognises that sovereignty was not legitimately gained from the First Nation occupants of the land but rather imposed, together with foreign European laws and customs, upon the pre-existing societies of those First Nation people.¹²² Thus the sovereignty gained by the Crown was 'de facto' rather than 'de jure', meaning that it was illegal and illegitimate but established for all practical purposes.¹²³ Sovereignty was asserted by the Crown through Acts such as the Royal Proclamation of 1783, what Arnot describes as the "legal precedents" that led to the making of treaties between the Crown and the First Nations.¹²⁴

The tension created by the assertion of the Crown's de facto sovereignty and the legitimate but undermined sovereignty of the First Nation people creates this special relationship which requires the Crown to act honourably towards the First Nation people.¹²⁵ As emphasised above, this special relationship is not based on a fiduciary relationship between the Crown and First Nations people, but acknowledges that at the time of imposition of the Crown's law, the Crown had persuaded the indigenous peoples that it could be relied upon to protect their

¹²⁰ At 66.

¹²¹ *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 at [32].

¹²² *Manitoba Métis Federation v Attorney-General (Canada)*, above n 115, at [66].

¹²³ Brian Slattery "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR 433 at 437.

¹²⁴ Harris, above n 113, at 3. Arnot, above n 7, at 65.

¹²⁵ *Manitoba Métis Federation v Attorney-General (Canada)*, above n 115, at [67].

rights better than if they were left alone.¹²⁶ Thus the doctrine of the honour of the Crown recognises the presence of the First Nation people, the injustice of the superimposition of their laws on those people and the disastrous impacts that unfamiliar legal system had on them.¹²⁷

The manner in which the British Crown colonised Canada is reminiscent of its colonisation here in New Zealand. As has been argued in this paper, sovereignty was not transferred from Māori to the Crown through the Treaty of Waitangi legitimately, and the assertion of some commentators that the Crown attained sovereignty either through revolution or otherwise may be rejected as illegitimate for the purposes of this doctrine too.¹²⁸ The tension that is created by the imposition of the Crown's sovereignty, one party to the nation-to-nation agreement, over the sovereignty of the Māori gives rise to the honour of the Crown in principle.

Finally, it is important to note the approach of giving effect to the actual agreement made between the British Crown and the indigenous sovereign nation at the time the agreement was signed, in comparison to the modern approach of the dominant Crown implementing policies to address issues arising from the much weaker subject of the Crown, the First Nation people. The modern approach is only capable of addressing the symptoms of issues raised by First Nation peoples, such as poverty, health issues, incarceration levels etc. It is incapable of addressing the root cause of the problem: that the agreement to share sovereignty co-operatively with the English provided that the First Nation peoples' rights to their lands and way of life be protected was breached. After briefly outlining some of the symptoms of

¹²⁶ At [66].

¹²⁷ At [67].

¹²⁸ Brookfield, above n 13, at 181-182.

modern indigenous issues, such as the dire circumstances in which indigenous peoples are currently living as a direct result of this breach, Arnot sums this point up clearly:¹²⁹

The bleak statistics go on and on. Given our will to foster change as a society, we know that something needs to be done. But, I caution against a reflex action to invent a new solution. This is not a simple issue in terms of either magnitude or expense. I suggest that the conceptual framework for improvement and resolution is ultimately a matter of using the tools we already have... The treaties are the right and proper starting point; but, by ignoring and failing to implement them, we failed to build the co-operative society that the signatories of the treaties envisioned. We are paying and continue to pay for that inattention.

Thus, alongside Arnot, this paper turns to the doctrine of the honour of the Crown to give strength to these original agreements by ensuring that the modern government – the representatives of the Crown – honour and implement the promises made in their treaties.

C Application of the Honour of the Crown in Canada

1 When is the Honour of the Crown engaged?

The honour of the Crown is engaged through the constitution. In Canada, the doctrine of the honour of the Crown is now engaged directly through s 35(1) of the Canadian Constitution Act 1982. As the Supreme Court noted, however:¹³⁰

The Constitution is not a mere statute; it is the very document by which the “Crown asserted its sovereignty in the face of prior Aboriginal occupation. It is at the root of the honour of the Crown, and an explicit obligation to an Aboriginal group therein engages the honour of the Crown at its core. As stated in *Haida Nation*, “in all its dealing with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably”

¹²⁹ Arnot, above n 7, at 60.

¹³⁰ *Manitoba Métis Federation v Attorney-General (Canada)*, above n 115, at [70].

It is the contention of this paper that in New Zealand, the doctrine will be engaged through our foundational constitutional document, the Treaty of Waitangi 1840. However, if the New Zealand courts – operating as they do under our current constitutional arrangements – do not accept the Treaty as a valid constitutional link, the doctrine may be engaged through the Letters Patent 1839 and the Hobson’s instructions as the “documents by which the Crown asserted its sovereignty.”¹³¹ Furthermore, there are two decisions that pre-date the advent of s 35(1) which invoked the honour of the Crown as a common-law doctrine of a constitutional nature which demonstrate that the doctrine may be invoked without an immediately obvious “constitutional” link.

The first of these decisions was a dissenting judgment by Cartwright J in 1966 where the ability of the doctrine of the honour of the Crown as an aid for interpreting any treaty or any Act regarding First Nation peoples’ rights was first acknowledged.¹³² Cartwright J reached back to Lord Coke’s obiter in 1613 in the case of *St Saviours Southward (Churchwardens)*:¹³³

Lord Coke said: “If two constructions may be made of the King’s grant, then the rule is, when it may receive two constructions, and by force of one construction the grant may according to the rule of law be adjudged good, and by another it shall by law be adjudged bad; then for the King’s honour, and for the benefit of the subject, such construction shall be made that the King’s charter shall take effect, for it was not the King’s intent to make a void grant...” We should, I think, endeavour to construe the treaty [in question] and those Acts of Parliament which bear upon the question before us [*i.e.* whether the treaty right to hunt had been destroyed by statute] in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.

These obiter comments were subsequently followed in a second decision by MacKinnon JA in the case of *R v Taylor and Williams* [1981] where he held that when “approaching the

¹³¹ Harris, above n 113, at 7; *Manitoba Métis Federation v Attorney-General (Canada)*, above n 120, at [70].

¹³² J Timothy and S McCabe *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (LexisNexis Canada Inc, Canada, 2008) at 36; *R v George* [1966] SCR 267 at 279.

¹³³ Timothy and McCabe, above n 132, at 36.

terms of a treaty quite apart from other considerations already noted, the honour of the Crown is always involved and no appearance of “sharp dealing” should be sanctioned.”¹³⁴

Since 1982, however, s 35(1) has become a much stronger link upon which the Canadian courts engage the honour of the Crown as a means to protect and promote the rights of First Nations people at a constitutional level. This is because up until the enactment of the Constitution Act 1982, any aboriginal rights were not generally afforded any special constitutional status or force and therefore the adoption of common law doctrines to protect aboriginal rights relied mostly on judicial creativity and willingness.¹³⁵ The adoption of the Constitution Act 1982, and s 35(1) in particular, gave more strength to the existing aboriginal and treaty rights held by the First Nations people of Canada. Section 35 is set out as:¹³⁶

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The underlying purpose of s 35(1) is to achieve “reconciliation of the pre-existing aboriginal societies with the sovereignty of the Crown, and with the “broader social, political and economic community”.”¹³⁷ As a result, the manner in which the honour of the Crown

¹³⁴ At 36; *R v Taylor and Williams* [1981] 34 OR (2d) 360 (CA) at 367.

¹³⁵ Timothy and McCabe, above n 132, at 39; Before the adoption of the Constitution Act 1982, existing aboriginal and treaty rights were governed by s 91(24) of the Constitution Act 1867 and s 88 of the Indian Act 1970; *R v Marshall* [1999] 3 SCR 456 at [48].

¹³⁶ Constitution Act 1982, s 35.

¹³⁷ Timothy and McCabe, above n 132, at 39, citing *R v Van der Peet* [1996] 2 SCR. 507 at [41].

doctrine has developed in Canada since 1982 has been influenced prominently by the underlying purpose of s 35(1). In light of this purpose, the honour of the Crown has so far only been applied by the Canadian courts in four different circumstances:¹³⁸

- (1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest: *Wewaykum* at [79] – [81] and *Haida Nation* at [18];
- (2) The honour of the Crown informs the purposive interpretation of s 35 of the Constitution Act 1982 and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed by as of yet unproven Aboriginal interest: *Haida Nation* at [25];
- (3) The honour of the Crown governs treaty-making and implementation leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing; and,
- (4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples: *R v Marshall* at [43].

This list is by no means exhaustive, but a summary of the circumstances that the doctrine has been engaged to solve so far in Canada. This list, and in particular the first and second circumstances, illustrate that the purpose of s 35(1) has limited the scope of the doctrine significantly; to a point that it would be inappropriate in a New Zealand constitutional context as will be argued below.

As pointed out by the Supreme Court in *Manitoba Metis*, however, the honour of the Crown may be applied in a range of different circumstances, and the duties imposed by the doctrine may vary as well, so long as it is consistent with the purpose of the constitutional link that engages it.¹³⁹ This paper contends that the Treaty of Waitangi will be the constitutional link

¹³⁸ *Manitoba Métis Federation v Attorney-General (Canada)*, above n 115, at [74].

¹³⁹ At [74].

that engages the doctrine in New Zealand, accordingly then it must be in line with the purpose of the Treaty that the doctrine must develop.

Unlike the purpose of reconciliation found in s 35(1) which provides for “reconciliation of the pre-existing aboriginal societies with the sovereignty of the Crown”, the Treaty of Waitangi provides for the reconciliation of Māori tino rangatiratanga with the kāwanatanga or right to govern of the Crown. The difference here is critical. Adopting the Canadian approach to applying the doctrine of the Honour of the Crown following s 35(1) would in itself contradict the Treaty as it promotes the sovereignty of the Crown over the tino rangatiratanga of Māori.

Despite the differences in the purposes of s 35(1) and the Treaty, and consequently how those purposes have affected the development of the doctrine, our New Zealand courts – while being mindful of these differences – may still rely on the Canadian jurisprudence to guide what duties the doctrine may impose on the Crown.

2 *What are the duties imposed by the honour of the Crown?*

In the recent case of *Manitoba Metis*, cited many times above, the Supreme Court of Canada usefully outlined a number of duties that may be enforced by the courts on the Crown when it has undertaken a constitutional obligation. Some of these points have been foreshadowed above, but for the sake of clarity, they will be repeated again here.

As above, the honour of the Crown may be engaged in a various situations and what amounts to ‘honourable conduct’ or not will vary with those circumstances.¹⁴⁰ The doctrine will apply to any obligation or promise made to indigenous peoples undertaken by the Crown within

¹⁴⁰ At [74].

constitutional legislation, a treaty or stemming from the constitution itself.¹⁴¹ “Constitution” here does not mean “written” or “supreme” constitution, as the Court pointed out, so long as it is the document by which the Crown asserted its sovereignty.¹⁴²

Having reviewed the different decisions where the doctrine has been applied, the Court in *Manitoba Metis* found that the doctrine generally requires that the Crown:¹⁴³

- (1) Take a broad and purposive approach to the interpretation of the promise; and,
- (2) Acts diligently to fulfil that promise.

A “broad and purposive” approach has been held to mean that the promise be “interpreted in a manner which gives meaning and substance to the promises made by the Crown”¹⁴⁴ and that the interpretation of the obligation “cannot be a legalistic one that divorces the words from their purpose.”¹⁴⁵

To be seen as acting “diligently” the Crown and its servants “must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left “with an empty shell of a treaty promise.””¹⁴⁶ Fulfilment of the promise must be “timely” and the Crown must “endeavour to ensure its obligations are fulfilled.”¹⁴⁷

Finally, the Court acknowledged that there may be human error or another justified reason for why the Crown has been unable to fulfil its promise, and so not every mistake or unfulfilled obligation will attract dishonour to the Crown.¹⁴⁸ With that mentioned, however, the Court held that, “a persistent pattern of errors and indifference of a solemn promise may amount to

¹⁴¹ At [76].

¹⁴² At [70].

¹⁴³ At [76].

¹⁴⁴ At [76].

¹⁴⁵ At [77].

¹⁴⁶ At [80].

¹⁴⁷ At [79].

¹⁴⁸ At [82].

a betrayal of the Crown's duty to act honourably in fulfilling its promise" so the Crown must be seen to act diligently.¹⁴⁹

D New Zealand: Application of the Honour of the Crown via a Constitutional Kōrero

As seen above, the doctrine of the honour of the Crown may be engaged in New Zealand through the Treaty of Waitangi, the Letters Patent 1839 or Hobson's instructions and may be applied to any constitutional obligation in the form of legislation, treaty or agreement that stems from the constitution.

It is necessary to emphasise here that the doctrine is very different to the Treaty Principles which are currently applied by our courts to uphold Māori rights. Unlike Treaty Principles, the honour of the Crown, acknowledges and strives to give effect to the actual promise or agreement made between the Crown and the indigenous peoples on the presumption that the Crown intends to honour its promise. The promise made in the Treaty of Waitangi is that the Crown and Māori were to enter into a 'treaty relationship' or a 'nation-to-nation' relationship where each party would share power.¹⁵⁰ This is very different to giving effect to the compromise established by Treaty Principles. The ability of the doctrine to step outside of current constitutional arrangements is what distinguishes it from the Treaty Principles and what allows it to achieve the constitutional change required.

The question now is whether in engaging the honour of the Crown through a constitutional kōrero with the Crown, the courts may be able to give effect to the true purpose behind the Treaty - that public power would be shared between the Treaty partners – and in doing so,

¹⁴⁹ At [82].

¹⁵⁰ Jones, above n 9, at 706-707.

could introduce the Māori voice permanently into the shaping of the constitution of our country.

In light of the preceding pages, the answer to this question is: yes, but slowly and organically and with the help of a creative judiciary, just as the majority of advances for the protection of Māori rights have been achieved to date.

For the sake of completeness, this paper will conclude with a discussion of one (very speculative) contemplation as to how, in practice, effect may eventually be given to the true meaning of the Treaty.

The example of Tūhoe and their long-lasting struggle for Crown recognition and respect of their mana motuhake will be used here. In her dissertation for her Masters of Laws entitled *Te Mana Motuhake o Tūhoe*, Tūhoe descendent Te Rangimarie Williams defines ‘mana motuhake’ as:¹⁵¹

Mana motuhake is described as “separate identity, autonomy,” and “independence”. Motuhake, as part of mana motuhake, stresses the importance of the separateness of the power. There is no need for the power to depend on anything else to validate itself; one is in control of one’s own affairs and one’s own destiny... mana is linked to other cultural concepts such as tuakana/ teina, whakapapa, and rangatiratanga.

In 2014, as has been laid out above, the Crown and Tūhoe celebrated the passing of the Tūhoe Claims Settlement Act (the Tūhoe Act). Within this Act, the Crown made acknowledgements noting in detail the numerous numbers of breaches it has made against

¹⁵¹ Te Rangimarie Williams “Te Mana Motuhake o Tūhoe” (LLM Thesis, Victoria University of Wellington, 2010) at 19-20.

Tūhoe's right to mana motuhake since 1840.¹⁵² Notably, in its statutory apology the Crown held:¹⁵³

The Crown unreservedly apologises for not having honoured its obligations to Tūhoe under te Tiriti o Waitangi (the Treaty of Waitangi) and profoundly regrets its failure to appropriately acknowledge and respect te mana motuhake o Tūhoe for many generations... Despite the hardship Tūhoe and Tūhoetanga endure, your culture, your language, and identity that is Te Urewera are inextinguishable. The Crown acknowledges you and te mana motuhake o Tūhoe.

The Tūhoe Act does not provide another definition for 'mana motuhake'.

Tūhoe has always been determined to attain its mana motuhake. As part of their settlement, the Crown and Tūhoe acknowledgement this aspiration and entered into a plan whereby Tūhoe would begin to take more responsibility over social services such as housing, education and health for its communities.¹⁵⁴ This combined with significant economic redress places Tūhoe in a strong position to achieve their goal of mana motuhake.

At the risk of appearing cynical, it is evident from the history of the relationship between the Crown and Tūhoe which is now recorded in legislation, that the Crown could breach Tūhoe's mana motuhake again. This is especially foreseeable if Tūhoe attain their goal of mana motuhake and claim their independence as they have always wanted.

In this case, and following on from the argument presented in this paper, Tūhoe would be able to appeal to the courts to invoke the honour of the Crown in a claim to enforce the Crown's promise to acknowledge their mana motuhake. As Arnot notes, political expediency is not a justification for breaching a constitutional obligation to the indigenous peoples. This promise would be defined as a constitutional obligation as it stems from New Zealand's foundational

¹⁵² Tūhoe Claims Settlement Act 2014, s 8-9.

¹⁵³ Tūhoe Claims Settlement Act 2014, s 10(2) and 10(6).

¹⁵⁴ Christopher Finlayson "Crown Offer Accepted by Ngāi Tahu Settlement Negotiators" (press release, 11 September 2012).

constitutional document, the Treaty of Waitangi, and is an agreement between the Crown and an indigenous group. The next step would then be for the courts to invoke the honour of the Crown and hold that the Crown is under a duty to act diligently in fulfilling their promise. In this case, Tūhoe will have been able to use the doctrine to end the cycle of grievance against their right to mana motuhake.

Of course, as Jones acknowledges, the Crown could then appeal or even overrule the court's decision through legislation.¹⁵⁵ However, for the Crown to overrule a judgment to this effect would mean accepting that it had acted dishonourably towards Tūhoe which in turn could cause great embarrassment both domestically and internationally. Either way, the potential is there to invoke the honour of the Crown and Tūhoe to interact as Treaty partners, rather than the supreme Crown and a mere subject of the Crown; the constitutional kōrero has been had.

Taking this argument one step further (again in the spirit of speculative contemplation), it is not an unimaginable leap that an argument to protect Tūhoe's mana motuhake may be stretched into an argument to protect the tino rangatiratanga of all Māori. While this debate will depend entirely upon the willingness of the judiciary to entertain such a possibility, it is argued that the honour of the Crown has potential to open up a constitutional kōrero between the courts and the Crown to give effect to the true purpose of the Treaty and essentially place the Treaty of Waitangi back at the heart of New Zealand's constitution. This is argued to be part of the existing 'organic' movement towards constitutional change New Zealand has been engaged in since the 'Māori Renaissance' began forty years ago.

¹⁵⁵ Jones, above n 9, at 716.

VI Conclusion

Aotearoa New Zealand is going through an exciting organic cultural and constitutional revolution. In the 1970s the indigenous Māori people of New Zealand, inspired and empowered by international uprisings for human rights, began a cultural Renaissance of their own to breathe new life into te ao Māori, the Māori world. Before the 1970s, the Treaty was relatively unheard of, the Māori language was said to be dying out and the Māori people themselves were oppressed and disenfranchised; having gone from being sovereigns in their own land, to being colonised subjects of the British Crown. Forty-four years on and te ao Māori is back; though not without its challenges. While we now have an annual celebration of the Treaty of Waitangi, three generations of native te reo Māori speakers, a Māori economy on the rise, and significant lands and resources being returned to Māori hands; our rightful constitutional as equal Treaty partners, sovereign alongside the Crown is still not recognised. It is this kāwanatanga – tino rangatiratanga Treaty partnership that Māori agreed to when they signed the Treaty of Waitangi, nothing less.

Until the true purpose of the Treaty is given effect to, Māori will continue to be in a cycle of grievance as the Crown will always hold the ultimate power of Parliamentary Supremacy and, as we have seen in the Foreshore and Seabed Act 2004, will exercise that will wherever possible for political expediency.

It is contended in this paper that a constitutional shift towards giving effect to this proper Treaty relationship is on the horizon. The courts must now keep up with the ‘organic’ revolution and give effect to the true purpose behind the Treaty. It may do this by invoking the doctrine of the honour of the Crown and engaging in a constitutional kōrero with the Crown to feed the Māori voice into our constitutional development.

VII Bibliography

A Cases

Haida Nation v British Columbia (Minister of Forests) [2004] 3 SCR 511.

Manitoba Métis Federation v Attorney-General (Canada) [2013] SCC 14.

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

Ngati Apa v Attorney-General [2003] 3 NZLR 643 (CA).

R v Guerin [1984] 2 SCR 335.

R v Marshall [1999] 3 SCR 456.

R v Taylor and Williams [1981] 34 OR (2d) 360 (CA).

R v Van der Peet [1996] 2 SCR. 507.

Simpson v Attorney General (Baigent's Case) [1994] 3 NZLR 667 (CA).

Te Heuheu Tukino v Aotea District Māori Land Board [1941] AC 308, [1941] NZLR 590 (UKPC).

Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) 72.

B Legislation

Constitution Act 1982 (CA).

Foreshore and Seabed Act 2004.

Resource Management Act 1991.

Te Ture Whenua Māori Act 1993.

Treaty of Waitangi Act 1975.

Tūhoe Claims Settlement Act 2014.

C Treaties

Treaty of Waitangi, 1840.

D *Books and Essays in edited books*

Bargh, Maria “The Post-settlement World (so far): Impacts for Māori” in Nicola R. Wheen & Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books Limited, Wellington, 2012) 166.

Belgrave, Michael “Negotiations and Settlements” in Nicola R. Wheen & Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books Limited, Wellington, 2012) 29.

Belich, James *Making Peoples: A History of New Zealanders: From Polynesian settlement to the End of the Nineteenth Century* (Penguin Books (NZ) Ltd, Auckland, 1996).

Blackford, Carolyn and Matunga, Hirini *Maori participation in environmental mediation* (Centre for Resource Management, Auckland, 1991).

Boast, Richard “The Treaty and Local Government: Emerging Jurisprudence” in Janine Hayward (ed) *Local Government and the Treaty of Waitangi* (Oxford University Press, Melbourne, 2003) 173.

Brookfield, F. M. “The New Zealand Constitution: the search for legitimacy” in I.H. Kawharu (ed) *Waitangi: Maori & Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 1.

Chen, Mai “Post-settlement Implications for Māori-Crown Relations” in Nicola R. Wheen & Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books Limited, Wellington, 2012) 182.

Collier, Hohaia “A Kaupapa-based Constitution” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 305.

Durie, E.T.J. “The Treaty in Maori History” in *International Contexts* (Victoria University Press, Wellington, 1991) 156.

Evans, Roger *The truth about the Treaty* (Lal Bagh Press, Kerikeri, 2004).

Hayward, Janine “Realising Potential: The Ways and Challenges Ahead” in Janine Hayward (ed) *Local Government and the Treaty of Waitangi* (Oxford University Press, Melbourne, 2003) 173.

Hemi, Murray “Local Government and the Waitangi Tribunal” Janine Hayward (ed) *Local Government and the Treaty of Waitangi* (Oxford University Press, Melbourne, 2003) 55.

Hickey, Maureen “Apologies in Treaty Settlements” in Nicola R. Wheen & Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books Limited, Wellington, 2012) 79.

Jarrett, Stephanie “‘Working Together’: Local Government and Aboriginal Relations in South Australia” in Janine Hayward (ed) *Local Government and the Treaty of Waitangi* (Oxford University Press, Melbourne, 2003) 157.

Joseph, R “Unsettling Treaty Settlements: Contemporary Māori Identity and Representation Challenges” in Nicola R. Wheen & Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books Limited, Wellington, 2012) 151.

Kelsey, Jane *A Question of Honour? Labour and the Treaty 1984-1989* (Allen & Unwin New Zealand Limited, Wellington, 1990).

Kelsey, Jane *Rolling Back the State* (Bridget Williams Books Limited, Wellington, 1993).

Macklem, Patrick *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Canada, 2001).

Mason, Durie *Ngā Kāhui Pou: Launching Māori Futures* (Huia Publishers, Wellington, 2003).

Matunga, Hirini “Decolonising planning: The Treaty of Waitangi, the environment and a dual planning tradition” in P. Ali Memon and Harvey C.

McHugh, P.G. “Constitutional Theory and Māori Claims” in I.H. Kawharu (ed) *Waitangi: Māori & Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 25.

McHugh, Paul *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Oxford, 1991).

Mead, Hirini Moko *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003).

Meleisea, Malama “The Past in the Present” in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 130.

Mikaere, Ani *Colonising Myths – Māori Realities: He Rukuruku Whakaro* (Huia Publishers, Wellington, 2011).

Mohanram, Radhika “The Postcolonial Critic: Third-World (Con) Texts/First-World Contexts” in Margaret Wilson and Anna Yeatman (eds) *Justice & Identity: Antipodean Practices* (Bridget Williams Book Ltd, Wellington, 1995) 172.

Mutu, Margaret “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13.

Orange, Claudia *The Treaty of Waitangi* (Allen & Unwin New Zealand Limited, Wellington, 1987).

Patton, Paul “Post-structuralism and the Mabo Debate: Difference, Society and Justice” in Margaret Wilson and Anna Yeatman (eds) *Justice & Identity: Antipodean Practices* (Bridget Williams Book Ltd, Wellington, 1995) 153.

Perkins (eds) *Environmental Planning & Management in New Zealand* (Dunmore Press Ltd, Palmerston North, 2000) 36.

Round, David *Truth or Treaty?* (Canterbury University Press, Christchurch, 1998).

Ruru, Jacinta “The Waitangi Tribunal” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 127.

Sharp, Andrew *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand since the 1970s* (2nd ed, Oxford University Press, Auckland, 1990-1997).

Sorrenson, M.P.K. “Treaties in British Colonial Policy: Precedents for Waitangi” in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 15.

Te Aho, Linda “Judicial Creativity” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 109.

Timothy, J and McCabe, S *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (LexisNexis Canada Inc, Canada, 2008).

Turner, Kaye “The *April Report* of the Royal Commission on Social Policy: Treaty Partnership as a Framework for a Politics of Difference?” in Margaret Wilson and Anna Yeatman (eds) *Justice & Identity: Antipodean Practices* (Bridget Williams Book Ltd, Wellington, 1995) 78.

Walker, Ranginui *Ka Whawhai Tonu Matou Struggle Without End* (2nd ed, Penguin Group, Auckland, 2004).

Ward, Alan “Land and Law in the Making of National Community” in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 115.

Williams, David V. “Te Tiriti o Waitangi – Unique Relationship Between Crown and Tangata Whenua?” in I.H. Kawharu (ed) *Waitangi: Maori & Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 64.

Williams, Joe “Not Ceded but Redistributed” in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 190.

Wilson, Margaret “Constitutional Recognition of the Treaty of Waitangi: Myth or Reality” in Margaret Wilson and Anna Yeatman (eds) *Justice & Identity: Antipodean Practices* (Bridget Williams Book Ltd, Wellington, 1995) 1.

Woolford, Andrew *Between Justice & Certainty: Treaty Making in British Columbia* (UBC Press, Vancouver, 2005).

Yeatman, Anna “Justice and the Sovereign Self” in Margaret Wilson and Anna Yeatman (eds) *Justice & Identity: Antipodean Practices* (Bridget Williams Book Ltd, Wellington, 1995) 195.

E Journal Articles

Arnot, Judge D. “Treaties as a Bridge to the Future” (2001) 50 U.N.B.L.J. 57.

Bargh, Maria “Changing the game plan: the Foreshore and Seabed Act and constitutional change” (2010) 1 Kōtuitui: NZ Journal of Social Sciences Online 13.

Boast, Richard “Treaties nobody counted on” (2011) 42 Victoria U. Wellington L. Rev. 653.

Charters, Claire “Responding to Waldron’s Defence of Legislatures: Why New Zealand’s Parliament Does not Protect Rights in Hard Cases” (2006) 621 N.Z.L. Rev 621.

Cox, Nat “The Treaty of Waitangi and the Relationship between the Crown and Maori in New Zealand” (2002) 123 N.Z.L. Rev 123.

Dalziel, Paul, Matunga, Mirini and Saunders, Caroline “Cultural Well-Being and Local Government: Lessons from New Zealand” (2006) 12 Australasian Journal of Regional Studies 267.

Johnston, Kerensa “Treaty of Waitangi” (2011) 211 N.Z.L. Rev 212.

Joseph, Dr Robert “Frozen Rights? The right to develop Māori Treaty and Aboriginal Rights” (2011) 19 Waikato L. Rev. 117.

Paul, Sacha R. “Commentary: Case Comment: A Comment on Manitoba Métis Federation Inc v Canada” (2013) 37 Man. L.J. 323.

Elias, Chief Justice Sian “The Harkness Henry Lecture: Fundamentals: A Constitutional Conversation” (2011) 19 Waikato L. Rev. 1.

Elias, Dame Sian “First Peoples and Human Rights a South Seas Perspective” (2009) 39 N.M.L. Rev. 299.

Harris, Max “Manitoba Métis Federation (Inc) v Attorney-General (Canada): A step forward for indigenous rights jurisprudence and an opportunity for New Zealand” (2013) May Māori LR.

Huyer, Timothy “Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation” (2006) 21 Windsor Rev. Legal & Soc 33.

Knight, Dean and Whaipooti, Julia “EmpowerNZ: Drafting a Constitution for the 21st Century” (2012) 10 NZJPIL 287.

Mikaere, Ani “Tikanga as the First Law of Aotearoa” (2007) 10 Y.B. N.Z Juris. 24.

Orsman, Jessica “Treaty of Waitangi as an Exercise of Māori Constituent Power” (2012) 43 Victoria U. Wellington L. Rev. 345.

Sheppard, Colleen “Inclusion, Voice, and Process-Based Constitutionalism” (2013) 50 Osgoode Hall Law Journal 547.

Slattery, Brian “Aboriginal Rights and the Honour of the Crown” (2005) 29 S.C.L.R. 433.

Te Aho, Linda “Contemporary Issues in Māori Law and Society Crown Forests, Climate Change, and Consultation- Towards More Meaningful Relationships” (2007) 138 N.Z.L Rev 138.

Toki, Valmaine “‘Tikanga Maori – a constitutional right’? A case study” (2014) 40 Commonwelath Law Bulletin 32.

Valverde, Mariana “‘The Honour of the Crown is at Stake’: Aboriginal Land Claims Litigation and the Epistemology of Sovereignty” (2011) 1:3 UC Irvine Law Review 955.

F Reports

Matunga, Hirini *Local Government: A Maori Perspective* (prepared for the Maori Consultative Group on Local Government Reform 1989).

G *Other resources*

Ladner, Kiera L. “(RE) creating Good Governance Creating Honourable Governance: renewing Indigenous constitutional orders (paper presented at the Annual Conference of the Canadian Political Science Association, Ottawa, May 2009).

McFadgen, Rebecca A “Beyond the Duty to Consult: Comparing Environmental Justice in Three Aboriginal Communities in Canada” (Master of Arts, Dalhousie University Halifax, 2013).

Williams, Te Rangimārie “Te Mana Motuhake o Tūhoe” (LLM Thesis), Victoria University of Wellington, 2010.