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**CLOSING THE GAP: ENHANCING PARLIAMENT'S
LAW-MAKING ROLE IN TREATY OF WAITANGI
AND CUSTOMARY RIGHTS ISSUES**

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CHAPTER I: INTRODUCTION

The New Zealand system of government subscribes to the doctrine of the supremacy of Parliament. This means that where Parliament have, in legislation, explicitly and clearly stipulated an intention to be arbitrary, unfair or oppressive, the judicial branch of government cannot strike that legislative provision down.¹ Instead, the Courts law-making role is confined to interpreting and developing case law where there is no applicable statutory rule.

New Zealand does not have a written entrenched constitution setting out limitations on the ability of Parliament to enact laws that infringe fundamental rights of individuals and minorities.² It has been referred to as the “acme of legislative supremacy” having no fundamental laws, no entrenched Bill of Rights, and no federal division of powers.³ There is, however, a form of protection under the New Zealand Bill of Rights Act 1990 (“BORA”). This Act is an ordinary statute which during its enactment was criticised as “weak” by commentators who would prefer that fundamental rights be enshrined in a “higher” law.

Despite such criticism, one cannot say that the BORA has not played an important role in defining the way in which the rights it contains are taken account of in the legislative process. The BORA requires the Attorney-General to report to the House on an introduced Bill’s consistency with the rights and freedoms contained in it. This “vetting” procedure has resulted in a reluctance on the part of the Executive to introduce legislation which infringes the rights and freedoms set out in the BORA.

¹ New Zealand courts have however acknowledged that in extreme cases a court may be forced to revisit the doctrine of Parliamentary supremacy: see *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (CA); *Cooper v A-G* [1996] 3 NZLR 480, and; *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154.

² New Zealand does, however, have a collection of legislation and customs which together form an “unwritten constitution”. Examples of such legislation are the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 and the Treaty of Waitangi Act 1975.

³ Joseph, P. A. *Constitutional and Administrative Law in New Zealand* (2nd ed 2001) 472.

When the idea of having a Bill of Rights was first proposed in the government's 1985 *A Bill of Rights for New Zealand: A White Paper*⁴, it was intended that the resulting legislation would, not only be entrenched, but would incorporate the Treaty of Waitangi ("the Treaty") as part of the fundamental law of New Zealand. The proposals to entrench the Bill of Rights Act and to include reference to the Treaty were dropped as they were considered to be too controversial.⁵ Consequently, the procedure of "vetting" Bills to determine their consistency with fundamental rights and freedoms is not applicable to rights guaranteed under the Treaty. This leaves a significant "gap" between the way that the New Zealand parliamentary system deals with Treaty rights in the legislative process and the way that it deals with the other fundamental rights contained in the BORA.

This essay provides an analysis of the relationship between the process by which Parliament takes account of Treaty rights when it makes law and the way in which judicial law-making influences that process. I consider that the way in which the courts in New Zealand have applied the common law doctrine of Aboriginal title is broadly analogous to the way in which the courts have applied common law doctrines surrounding fundamental human rights, namely, there is a general presumption that Parliament cannot have intended to extinguish such rights and hence the statutory provisions purporting to extinguish them must explicitly and clearly say so. Consequently, because "extinguishment" must be deliberate and clear on its face, the "vetting" process currently set out in the BORA ought to be extended to Treaty rights. I also consider that the rights guaranteed to Maori under the Treaty are as fundamental in New Zealand as the rights and freedoms contained in the

⁴ *A Bill of Rights for New Zealand: A White Paper, A.6 Appendices to the Journal of the House of Representatives* Wellington, 1985.

⁵ Palmer, G. and Palmer, M. state that the arguments advanced by opponents were: (a) the measure gave power to the judiciary, who were not elected, not accountable, and unrepresentative of the community; (b) the bill was required to be enforced through the judicial process to which people, especially the poor, did not have equal access; (c) because some acts of Parliament could be repugnant to the Bill of Rights, and it was not readily predictable which laws these would be, there would be considerable uncertainty about what the law is; (d) there would be increased litigation as a result of the bill; (e) if more checks and balances were needed, better ones were available (thirty-nine submissions thought an upper House would be better); (f) it would be premature to adopt a Bill of Rights, more time was needed to study the implications, and it was not necessary, as there were no threats to human rights in New Zealand; (g) a Bill of Rights would freeze New Zealand's constitutional development and not allow for social change in the future; (h) the bill emphasised individual and not collective rights. See Palmer, G. and Palmer, M *Bridled Power: New Zealand Government Under MMP* (1997) 269.

CHAPTER II: PARLIAMENT'S ROLE IN THE CREATION OF THE LAW RELATING TO TREATY RIGHTS

This chapter "sets the scene" for the rest of this essay by setting out the framework for the way in which Treaty rights are considered and given effect to under the current legislative process.

II.1 Legislative Process

It is salient that government recognises the need for legislation to comply with Treaty principles. When a Bill is submitted to Cabinet's Legislation Committee for approval, the covering submission must indicate whether the Bill complies with the principles of the Treaty,⁶ and must provide reasons if the Bill does not do so.⁷ This requirement imposes a constitutional obligation on officials, Ministers and Parliamentary Counsel during both the policy formulation stage and the drafting stage of all proposed legislation.⁸

The Legislative Advisory Committee Guidelines⁹ ("the LAC Guidelines") state that:

The Treaty of Waitangi does not directly create rights or obligations in law except where it is given effect by legislation. It however has been judicially described as "part of the fabric of New Zealand society" (*Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210) and has become a constitutional standard. Legislation is expected to comply with the principles of the Treaty. Generally the Courts will presume that Parliament intends to legislate in accordance with those principles and that in relevant contexts they should have appropriate application (so that, eg, decision makers may have to take some account of the principles), even perhaps in the absence of any mention of the Treaty in the particular legislation. (See

⁶ See *Cabinet Office Manual* para 5.35 which states in part "Ministers must confirm compliance with legal principles or obligations in a number of areas when bids are made for Bills to be included in the programme and priorities are awarded. In particular, Ministers must draw attention to any aspects that have implications for, or may be affected by... the principles of the Treaty of Waitangi..."

⁷ See *Cabinet Office Manual* para 5.36.

⁸ Te Puni Kokiri *He Tirohanga o Kawa ki te Tiriti o Waitangi; A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) 16. See also Joseph, P. A. "Constitutional Review Now" (1998) *New Zealand Law Review* 90.

⁹ These Guidelines have been endorsed by Cabinet- see *Cabinet Office Manual* para 5.35.

eg the decisions of the Court of Appeal in *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 and *Attorney-General v New Zealand Maori Council* (No 2) [1991] 2 NZLR 147.)

The Government's recognition of the need for legislation to comply with Treaty principles if possible is itself a recognition that, whatever the difficulties, the Treaty is constitutionally important and must (at the least) strongly influence the making of relevant legislation. Thus the Cabinet, in its directive of 23 March 1986, agreed that-

- all future legislation referred to it "at the policy approval stage should draw attention to any implications for recognition of the principles" of the Treaty and
- "departments should consult with appropriate Maori people on significant matters affecting the application of the Treaty", the Minister of Maori Affairs to provide any necessary assistance in identifying those people.

It also noted that "the financial and resource implications of recognising the Treaty could be considerable and should be assessed wherever possible in future reports".

The principles of the Treaty, so far as they affect the preparation of legislation, are among those that derive from the basic principles of partnership and the need for good faith between the Crown and Maori as parties to the Treaty. The principle of appropriate consultation, in accordance with the Cabinet's directive just quoted, is especially important where without it Maori interests or values may not be identified or adequately considered. (The Court of Appeal has said that the principle of good faith between the parties to the Treaty "must extend to consultation on truly major issues" (*New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, 152.)

The LAC Guidelines then continue in paragraph 5.1.1 to stipulate that Maori should be consulted in some appropriate way if the proposed legislation would affect Maori rights and interests (including the taonga of Maori) protected by Article 2 of the Treaty. If consultation is undertaken, this usually takes place during the policy development stage and thus well before the drafting of a Bill. During the drafting of a Bill, the content of any drafts remain confidential and

thus organisations and individuals outside government, including Maori are not consulted unless the prior approval of Cabinet has been obtained.¹⁰

The next section will look at existing judicial constraints both on the legislative process itself, and in the way in which any substantive rights said to arise out of the Treaty are incorporated, or as the case may be, omitted from, a Bill.

II.2 *Justiciability of the Legislative Process*

Once a Bill is introduced into the House the ability of the courts to enquire into its validity is extremely limited.¹¹ The New Zealand courts subscribe to the doctrine of the legislative supremacy of Parliament, which holds that legislation enacted by Parliament is to be accorded recognition by the Courts as the highest expression of law.¹² Consequently, it is inconceivable at present that an attack on legislation, on the grounds that the proposed legislation would be beyond the constitutional powers of Parliament, could succeed.¹³ In addition, any challenge on the content of the legislation would not be consistent with parliamentary supremacy.

However, this is not to say that the courts will not intervene in some circumstances to strike down legislation for a failure to comply with "manner and form" or procedural requirements as opposed to "substantive" requirements.¹⁴ In New Zealand it is now a widely held view that these

¹⁰ See *Cabinet Office Manual* para 5.23 which states that "At every stage of its development, draft legislation is confidential and must not be disclosed to individuals or organisations outside government, except in accordance with the Official Information Act or Cabinet approved consultation procedures. Any such release or disclosure must first have the approval of the Minister concerned. Premature disclosure of the contents of a draft Bill could embarrass the Minister, and imply that the prerogative of Parliament is being usurped. Cabinet, government caucus(es) and Parliament must always retain the freedom to amend, delay or reject a Bill."

¹¹ Note however, that if adequate consultation has not occurred at the policy formulation stage of a Bill, a complaint may be taken to the Waitangi Tribunal alleging that the Crown has breached its Treaty duties.

¹² *New Zealand Maori Council v Attorney-General* [1987] NZLR 641; *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301.

¹³ McGee, D "The Legislative Process and the Courts" in Joseph *Essays on the Constitution* (1995) 84 at 88-89.

¹⁴ See generally McGee, D "The Legislative Process and the Courts" in Joseph, P. A. *Essays on the Constitution* (1995) 84.

restrictions as to manner and form are effective.¹⁵ For instance, in *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40, the Court observed that, in the event of non-compliance with mandatory “manner and form” requirements imposed by statute law for the enactment of legislation by Parliament, the Court could grant appropriate relief. The Court stressed that “manner and form” went to legal requirements as to process, not to the content of the legislation. David McGee goes so far as to assert that compliance with manner and form requirements is an essential component of the doctrine of parliamentary supremacy on the basis that the Parliament of New Zealand is a creature of statute law¹⁶ and thus subject to that law like every other person or body in the realm.¹⁷

II.3 Conclusion

The Treaty is recognised by the Government as a basis for constitutional government and as the foundation for the relationship between Maori and the Crown. The Government has stated that it will “at all times... endeavour to uphold the principles of the Treaty of Waitangi”.¹⁸ As can be seen the Treaty plays an important part in the legislative process. It does not however, limit the law-making capacity of Parliament as affirmed by the Court of Appeal in *New Zealand Maori Council v Attorney-General* as follows:

Neither the provisions of the Treaty of Waitangi nor its principles are, as a matter of law, a restraint on the legislative supremacy of Parliament.¹⁹

Parliament is however, free to impose Treaty obligations on the executive by including in legislation a provision imposing such obligations.

¹⁵ See generally the Chapter in *Laws Of New Zealand* titled “Parliament” written by Chen, M. and Palmer, G. and McGee, D “The Legislative Process and the Courts” in Joseph, P. A. *Essays on the Constitution* (1995) 84.

¹⁶ See section 14 of the Constitution Act 1986.

¹⁷ McGee, D “The Legislative Process and the Courts” in Joseph, P. A. *Essays on the Constitution* (1995) 85.

¹⁸ Department of Prime Minister and Cabinet *Key Government Goals to Guide Public Sector Policy and Performance* (22 February 2000).

¹⁹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 691.

CHAPTER III: THE ROLE OF THE JUDICIARY IN THE CREATION OF THE LAW RELATING TO MAORI CUSTOMARY RIGHTS

There has been some uncertainty in New Zealand about the exact nature and source of Maori customary rights claims²⁰ as to whether such claims derive from common law Aboriginal title²¹ or from the Treaty. This uncertainty was expressed in the preamble to the Fisheries Deed of Settlement dated 23rd September 1992 between the Crown and Maori, paragraph C, of which stated:

There has been uncertainty and dispute between the Crown and Maori as to the nature and extent of Maori fishing rights in the modern context as to whether they derive from the Treaty and/or common law (such as by customary law or aboriginal title or otherwise) and as to the import of section 88(2) of the Fisheries Act 1983 and its predecessors.

This chapter provides an analysis of the way in which the courts have interpreted Maori customary rights. I examine the jurisprudence which stems from the common law doctrine of Aboriginal title and Treaty jurisprudence before moving on to examine the nature of judicial law-making in relation to Maori customary rights and the appropriateness of such judicial law-making.

III.1 COMMON LAW ABORIGINAL TITLE JURISPRUDENCE

Aboriginal title has been described as follows:

Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title that goes with

²⁰ In this essay, I use the term "Maori customary rights" in a generic way to include both common law Aboriginal title and Treaty rights.

²¹ In this essay I use the term "Aboriginal title" to refer to the body of common law which has developed in relation to indigenous peoples rights.

sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective.²²

In the 18th century international law recognised three ways of acquiring sovereignty: by conquest; by cession,²³ and; by the occupation of territory that was defined as "terra nullius", which literally means "land of no-one". However, the application of the doctrine of terra nullius went further than its literal meaning would suggest. Where land was populated by "backward peoples", it was treated as though it was unoccupied and so, any acquisition by a new sovereign was treated as if it had been by occupation or settlement of a territory that was terra nullius.²⁴

The content of Aboriginal title is very fact specific as it is determined by enquiring into the laws and customs of the relevant indigenous society and their connection to the land and waters. Consequently, if the way of life of an indigenous people included hunting, fishing and gathering then the Aboriginal title would include the right to engage in traditional activities such as the right to hunt, fish and gather native plants and animals. The Australian courts,²⁵ the Canadian courts²⁶ and the Privy Council²⁷ all accept that Aboriginal title includes both territorial rights to "property" and non-territorial "usufructory" rights, such as, the right to hunt, fish and gather native plants and animals.

²² *Te Runanga o Te Ikawhenua Inc Soc v Attorney General* [1994] 2 NZLR 20 at 23- 24.

²³ This essay is based on the premise that the Treaty of Waitangi is a Deed of Cession and its signing meant that in New Zealand, sovereignty was acquired by the Crown by way of cession.

²⁴ Butt, P. and Eagleson, R. *Mabo: What the High Court said and What the Government Did* (1996) at 22.

²⁵ *Mason v Tritton* (1994) 34 NSWLR 572 at 575, 582; *Yarmirr v Northern Territory (Croker Island)* (1998) 156 ALR 370; *Ward on behalf of the Miriuwung and Gajerrong People v Western Australia* (1998) 159 ALR 483 at 645, and; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1.

²⁶ *R v Sparrow* [1990] 1 SCR 1075 and *Calder v A-G (British Columbia)* (1973) 34 DLR (3d) 145 (SC(Can)).

The situation is similar in New Zealand. Williamson J stated in *Te Weehi v Regional Fisheries Officer* that in his view, a customary right to take shellfish from the sea along the foreshore need not necessarily relate to ownership of the foreshore and consequently such "non-territorial" customary rights were valid.²⁸ Aboriginal title may also include an element of commercial exploitation if traditional society included such a right.

Aboriginal title may be extinguished by statute or by relinquishment. Extinguishment of Aboriginal title by statute requires the manifestation of a clear and plain intention on the part of the legislature to extinguish and thereby expropriate Aboriginal title. In *Te Weehi* Williamson J stated:

The customary right involved has not been expressly extinguished by statute and I have not discovered or been referred to any adverse legislation or procedure which plainly and clearly extinguishes it. It is a right limited to the Ngai Tahu tribe and its authorised relatives for personal food supply... It follows that I prefer the reasoning in the Weepu decision concerning the preservation of customary rights unless extinguished rather than the view that such rights are excluded unless specifically preserved or created in a statute.²⁹

Implied extinguishment will have occurred where the statute is inconsistent with any "Aboriginal title". In such a situation, the statute prevails. An intention to extinguish may be implied where extinguishment is necessary to the purpose of the legislation and the legislative scheme in question is

²⁷ *St Catherine's Milling and Lumber Co v R* (1888) 14 App Cas 46; *R v Secretary of State for Foreign and Commonwealth Affairs* [1982] QB 892 at 915, and; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 110-119.

²⁸ *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 at 690. See also *Ngati Apa and Ors v Attorney-General* (CA 173/01, 19 June, 2003) para 31.

²⁹ *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680. See also *Ngati Apa and Ors v Attorney-General* (CA 173/01, 19 June, 2003) para 63.

incapable or impossible of co-existence with the Aboriginal title right claimed.³⁰

Extinguishment of Aboriginal title by relinquishment may occur by cession or sale, or by abandonment. If the traditional connection of the indigenous community with the customary practice has been lost, that is, if continuity of that practice cannot be demonstrated, then extinguishment of Aboriginal title by abandonment will be seen to have occurred.³¹

The next section will examine Treaty jurisprudence in New Zealand.

III.2 TREATY JURISPRUDENCE

Treaty duties do not give rise to legal obligations on the Crown unless they have been "incorporated" or given the force of law by an Act of Parliament.³² This is based on the general rule that the Executive cannot alter the law except through the authority of Parliament.³³ In *Te Heu Heu Tukino v Aotea District Maori Land Board*, the Privy Council stated that:

It is well settled that any rights purported to be conferred by such a Treaty of Cession cannot be enforced by the Courts, except in so far as they have been incorporated in municipal law.³⁴

³⁰ *Te Runanga o Te Ikawhenua Inc Soc v Attorney General* [1994] 2 NZLR 20. See also Bartlett, R. H. *Native Title in Australia* (2000) at 247. See also *Ngati Apa and Ors v Attorney-General* (CA 173/01, 19 June, 2003) para 58.

³¹ *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45, 8 February 2001.

³² *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576, 603. See also Burrows *Statute Law in New Zealand* (1999) 300-301.

³³ It is well settled that the making of a Treaty is an executive act while the performance of its obligations, if this entails alteration of existing domestic law, requires legislative action: *Van Gorkom v Attorney-General* [1977] 1 NZLR 535, 542.

³⁴ *Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] AC 308, 324.

This orthodox position has, however, evolved somewhat in some areas of administrative law. For instance, in the exercise of executive discretion, in some circumstances, the principles of the Treaty may be a relevant consideration for the decision-maker even where there is no explicit statutory direction to take them into account. For instance in *Barton Prescott v Director-General of Social Welfare*, the High Court held that:

We are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private, and for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the Treaty in the statute.³⁵

This development reflects similar developments in the law relating to the effect that binding international treaties which have been ratified by the Executive, have on domestic law.³⁶ The applicability of the doctrine of

³⁵ *Barton Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179, 184 (HC). See also *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210 where Justice Chilwell stated that:

... the Treaty has a status perceivable, whether or not enforceable, in law... There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

³⁶ Prior to 1984, although an unincorporated international instrument might be used as an aid to interpretation, it seemed that where a statutory discretion was being exercised in the light of a relevant international instrument which had not been subject to action by Parliament, the decision-maker did not necessarily have to take account of the international instrument. However, in 1984 the decision of the Court of Appeal in *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) had the effect of lifting the role of international instruments. Counsel for the respondent argued that the Minister and the Department were entitled to ignore any pertinent international instruments that had been ratified but not incorporated into domestic legislation. The Court of Appeal rejected the Minister's argument stating:

That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing... The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution.

In *Tavita* the decision can be seen as indicating that some matters are so important that they might well be regarded as mandatory relevant considerations, in the sense that they would be something that no reasonable Minister would ignore, the protection of the rights of children being one such matter. The courts have yet to hold definitively that the provisions of any relevant international treaties ought to be a mandatory relevant consideration in the exercise of a statutory discretion. But it would seem prudent in the light of *Tavita* for other decision-makers exercising a statutory discretion likewise to respond with good administrative practice. Furthermore, it is to be noted that attaching a mandatory relevant consideration to a discretion still does not bind the decision-maker, it merely requires that he or she genuinely consider that factor in the

incorporation and some of the other rules surrounding the justiciability of the Treaty are congruent with the rules which apply to the enforceability of international legal instruments at municipal level. The applicability of these rules to the Treaty is based on the premise that the Treaty is a Deed of Cession and therefore an international legal instrument.³⁷

Joseph has concluded that the dicta in *Barton Prescott* has amounted to an erosion of the rule in *Te Heu Heu* as it enables the Courts to discuss the meaning of the Treaty, and to require decision-makers to consider it.³⁸ However, in accepting that "erosion" has occurred, it is to be noted that the *Te Heu Heu* rule has only eroded in relation to certain specific circumstances. The courts have made it quite clear that the Treaty, if not specifically incorporated into legislation, does not apply in some circumstances.³⁹

Consequently, Treaty rights are always justiciable when those rights have been incorporated into statute, and sometimes justiciable when they have not been so incorporated.

Where Treaty obligations have been incorporated into legislation and the provisions of the statute are not clearly inconsistent with the principles of the Treaty, the Courts will prefer an interpretation consistent with the Treaty. In

exercise of the discretion. Australian law on this point has developed in a similar way- see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 128 ALR 353 (HCA).

³⁷ The status of the Treaty is controversial. In practice, however, it has been construed as an international Treaty of Cession. International arbitral tribunals have twice indicated that the Treaty of Waitangi was a valid and effectual international Treaty of Cession: Kingsbury, B "The Treaty of Waitangi- Some International Law Aspects" in Kawharu, I. *Waitangi: Maori and Pakeha perspectives of the Treaty of Waitangi* (1989) 125. See also *Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] AC 308 where the Privy Council state at page 324 that "It is well settled that any rights purported to be conferred *by such a Treaty of Cession* [emphasis added]...". It is beyond the scope of this essay to examine in detail the debate surrounding the status of the Treaty at international law.

³⁸ Joseph, P. A. "Constitutional Review Now" (1998) *New Zealand Law Review* 85.

³⁹ See *Warren v Police* [2000] 9 February, unreported, AP 133/99 (HC); *Kohu v Police* [1989] 5 CRNZ 194 (HC); *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC); *R v Pairama* [1995] 13 CRNZ 496; *R v Fuimaono* [1996] 24 October, unreported, 159/96 (CA); *R v Clarke and Anor* [1998] 26 February, 348/97 (CA); *Knowles v Police* [1998] 27 February, unreported, A 123/97 (HC); *Haira v Police* [1999] 3 February, unreported, A 18/98 (HC); and; *R v Waetford* [1999] 2 December, unreported, 406/99 (CA).

Ngai Tahu Maori Trust Board v Director-General of Conservation, the Court of Appeal stated:

Statutory provisions for giving effect to the principles of the Treaty of Waitangi in matters of interpretation and administration should not be narrowly construed... at least to the extent that the provisions of the [relevant Act are] not clearly inconsistent with those principles.⁴⁰

Likewise, the courts have also held that where a statute is ambiguous, and there is a reference to the Treaty, the general presumption is that the interpretation which best gives effect to the Treaty will be preferred. In *New Zealand Maori Council v Attorney-General* the Court of Appeal stated that:

The Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty.⁴¹

The next section provides an analysis of the way in which the courts have given legal effect to Maori customary rights in light of the doctrine of the separation of powers and the supremacy of Parliament.

III.3 SOVEREIGNTY OF PARLIAMENT

New Zealand's constitution is based on the doctrine of the separation of powers, those powers being the Executive, Parliament and the Judiciary.⁴² The Executive is the organ of government which "embraces the administrative powers and functions of central government and includes all the government

⁴⁰ *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 558.

⁴¹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 655-656.

⁴² The separation of powers can be seen in the provisions of the Constitution Act 1986 ss 6-24.

departments under ministerial control".⁴³ Parliament is the organ of government, exercising its dual "functions of law-making and holding to account the political Executive".⁴⁴ The third organ of government, the Judiciary "exercises powers for adjudicating disputes according to the law including disputes between individuals and the state".⁴⁵

The doctrine of the separation of powers operates alongside the doctrine of the sovereignty of Parliament which holds that Parliament enjoys unlimited powers to enact legislation and its collective will, duly expressed, is law which can neither be judicially invalidated nor controlled by earlier enactment.⁴⁶ The supremacy of Parliament has been referred to in dicta of the High Court as follows:

The constitutional position in New Zealand (as in the United Kingdom) is clear and unambiguous. Parliament is supreme and the function of the courts is to interpret the law as laid down by Parliament. The courts do not have a power to consider the validity of properly enacted laws.⁴⁷

The role of the courts is consequently confined to interpreting laws enacted by Parliament and developing case-law where there is no applicable statutory rule. New Zealand adheres to the view that the creation of public policy is properly the function of Parliament rather than the courts.⁴⁸ However, while the courts must give effect to the statute law enacted by Parliament there are many areas in which Parliament has not spoken, and in which the courts must make a decision as to what principles should guide their decision.

⁴³ Joseph, P. A. *Constitutional and Administrative Law in New Zealand* (1993), 5.

⁴⁴ Joseph, P. A. *Constitutional and Administrative Law in New Zealand* (1993), 5.

⁴⁵ Joseph, P. A. *Constitutional and Administrative Law in New Zealand* (1993), 5.

⁴⁶ See Joseph, P. A. *Constitutional and Administrative Law in New Zealand* (2nd Ed 2001) 461.

⁴⁷ *Rothmans of Pall Mall (NZ) Ltd v A-G* [1991] 2 NZLR 323 at 330. See also *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 at 157; *Cooper v A-G* [1996] 3 NZLR 480 at 484; *R v Knowles* 12/10/98, CA 146/98, at 2; *Westco Lagan Ltd v A-G* [2001] 1 NZLR 40 at 62-63.

⁴⁸ See Law Commission *The Treaty Making Process: Reform and the Role of Parliament* (December 1997) 2.

Accusations of judicial activism are based on the idea that the courts have gone beyond the role they have been accorded under the doctrine of the sovereignty of Parliament. It is, however, accepted that in some instances the courts will have a policy-making role.⁴⁹ In the absence of a clear expression of parliamentary will, the courts have no other option but to rely on common law to resolve the disputes before them. One cannot expect the courts to stop filling legislative gaps- they need to do so in order to decide cases.

Harris has stated:

If we accept the principle that, consistent with the democratic underpinning of our society, law should preferably be made by democratically elected lawmakers, Parliament should only leave laws to be made by the courts where it is not appropriate that those laws be made by the Legislature, and it is appropriate that they be made by the Courts. Indeterminacy in legislation therefore is not inherently a bad thing. It is only bad if, in the particular circumstances, the required rule-making is more appropriate for the Legislature than the Courts.⁵⁰

Consequently what is important is distinguishing between when it is and when it isn't appropriate for the courts to engage in policy-making. I consider that the determination of the nature of Treaty rights is more appropriately a task for the legislature. The next section provides an analysis of the courts law-making role in the development of Maori customary rights jurisprudence.

⁴⁹ It is now widely accepted that judges do make law: see Thomas, J "Centennial Lecture: The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 32. This proposition is not being questioned here- the proposition put forward here is that it is more appropriate for the legislature to be "making law" in relation to Treaty issues.

⁵⁰ Harris, "The Law-Making Power of the Judiciary" in Joseph, P. A. (ed), *Essays on the Constitution* (1995), 270.

III.4 SOVEREIGNTY OF PARLIAMENT, JUDICIAL LAW-MAKING AND THE EVOLVING JURISPRUDENCE OF MAORI CUSTOMARY RIGHTS

Increasingly Treaty rights that have not been legislated for by Parliament are being given legal significance by the courts via either the application of the common law doctrine of Aboriginal title or the "reading in" of Treaty obligations. This goes against the democratic underpinnings of New Zealand's constitutional arrangement. In this section I will look firstly at the development in *Barton Prescott* before going on to look at the courts use of common law Aboriginal title to "fill a gap" where there is no explicit statutory reference to the Treaty.

The decision in *Barton Prescott* was clearly a departure from the Privy Council's decision in *Te Heuhe*, a decision which had been strongly supported in subsequent leading New Zealand cases. For instance, the Court, in the *Lands* case, stated as follows:

Counsel for the applicants did not go as far as to contend that, apart altogether from the State-Owned Enterprises Act, the Treaty of Waitangi is a Bill of Rights or fundamental New Zealand constitutional document in the sense that it could override Acts of our legislature. Counsel could hardly have done so in the face of the decision of the Privy Council in *Hoani Te Heuhe v Aotea District Maori Land Board* [1941] AC 308 that rights conferred by the Treaty cannot be enforced in the Courts except in so far as a statutory recognition of the rights can be found.⁵¹

The decision in *Barton Prescott* was not "filling the gaps" but rather it was a departure from existing law. Filling a "gap" assumes that there is no existing law to deal with the "problem" at hand. This decision has significantly

⁵¹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 655.

extended the policy-making role of the courts, an extension which does not sit comfortably with the doctrine of the sovereignty of Parliament.

The court had the option of interpreting Parliament's silence as an indication that Treaty matters had been considered and a decision made that a reference to the Treaty should not be included.⁵² This is an interpretation that the Court has used for some matters, such as when the Treaty is being argued as a defence in criminal proceedings,⁵³ while in other situations the Courts have "read in" Treaty obligations where these have been absent from the relevant statute. There are no clear "rules" for when the courts will "fill a void" and when they will let the legislative provision "speak for itself".⁵⁴

A further feature of the jurisprudence of Maori customary rights is the willingness of the Courts, to rely on common law Aboriginal title to "fill the void".

The New Zealand courts have been willing to view the relationship between Treaty rights and the doctrine of Aboriginal title as purely academic and have stated that in practical terms the content of the rights remain the same, as reflected in the following passage from Cooke P's judgement in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*:

There are difficulties in formulating legal claims, some of which have been touched on in this judgment. But, in the light of the theme of the judgment under appeal, it is as well to underline that in recent years the Courts in various jurisdictions have increasingly recognised the justiciability of the claims of indigenous peoples - the Canadian Courts by developing the principle of fiduciary duty linked with aboriginal title, in cases including

⁵² See Te Puni Kokiri *He Tirohanga o Kawa ki te Tiriti o Waitangi; A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) 23.

⁵³ For instance see cases mentioned in note 39 above.

⁵⁴ See Elias, S "The Treaty of Waitangi and Separation of Powers in New Zealand" in Gray B. D. and McClintock, R. B. (eds) *Courts and Policy: Checking the Balance* (1995) at 218 where she states "In cases

Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development (1979) 107 DLR (3d) 513; *Guerin v R* (1984) 13 DLR (4th) 321; and *R v Sparrow* (1990) 70 DLR (4th) 385: the Australian High Court by *Mabo*: the New Zealand Courts in a line of cases in which it has been seen, not only that the Treaty of Waitangi has been acquiring some permeating influence in New Zealand law, but also that treaty rights and Maori customary rights tend to be partly the same in content. The legal system is not powerless to provide remedies for racial injustice in appropriate cases, and decisions of the Courts in this field have assisted the parties to achieve voluntary settlements.⁵⁵

However, the significance of such a distinction from a constitutional standpoint is far from "purely academic". It goes to the heart of the doctrine of the sovereignty of Parliament and the relationship between Parliament and the Judiciary. If one relies on the Treaty as the source of Maori customary rights (for which the general rule is that it has no effect until incorporated into legislation by Parliament) then any substantive policy decisions will of necessity be made by the legislature. If, however, one sees the source of the right as stemming from common law Aboriginal title, then substantive policy decisions about the nature of Maori customary rights will be left to the Courts to make.

This increasing tendency to rely on common law Aboriginal title in situations where a Treaty obligation has been omitted from the relevant statute has in effect reversed the default position under Treaty jurisprudence and in doing so has far-reaching constitutional implications. That is, if the Treaty is relied on as the source of Maori customary rights, under the doctrine of incorporation, any rights stemming from it would have no effect unless the Treaty was explicitly referred to in the relevant statute- the default position would be that it had no effect **until** Parliament gave it the force of law by statutory enactment. However, this default position is reversed if one relies on the

where there is no reference to the Treaty or to matters of Maori interests, it is not yet settled that the Treaty must be taken into account".

⁵⁵ [1994] 2 NZLR 20 at 27.

common law doctrine of Aboriginal title; that default position being that Maori customary rights will prevail in the form decided upon by the Courts **until** extinguished by the legislature. This is reflected in the following passage from *Te Weehi*:

It follows that I prefer the reasoning in the *Weepu* decision concerning the preservation of customary rights unless extinguished rather than the view that such rights are excluded unless specifically preserved or created in a statute.⁵⁶

It does not seem entirely appropriate for the courts to be making policy decisions on issues of such significance. The New Zealand courts are not trained in, or well suited to, what is essentially a policy-making job of balancing the interests under the Treaty of Waitangi.⁵⁷ Moreover, the court process does not lend itself to policy decisions which require input from, and the balancing of, interests of other New Zealanders.⁵⁸

Certain passages from various Court of Appeal judgements, such as *New Zealand Maori Council v Attorney-General* have acknowledged that the role of the Courts in developing Treaty jurisprudence depends largely on a Parliamentary invitation to the Courts through a Treaty clause:

⁵⁶ *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680. See also *Ngati Apa and Ors v Attorney-General* (CA 173/01, 19 June, 2003) para 63.

⁵⁷ See Palmer, M. "The Treaty of Waitangi In Legislation" (2001) NZLJ 207, 212 who also states that:

- the advent of MMP has increased the diversity of representation in Parliament, and particularly improved the political power of Maori. This political power, rooted in democratic representation, is a much better way of influencing political decisions than relying on the Courts;
- if the approach outlined here is followed Parliament will have considered and decided on the specifics of how to protect Maori Treaty interests. Courts should be constrained to their usual function of interpreting Parliament's expressed intention rather than effectively legislating themselves with little to rely on, regarding controversial policy issues...

⁵⁸ See generally Selway, B. "The Role of Policy in the Development of Native Title" (2001) 28 no 3 Federal Law Review. Also available at <http://law.anu.edu.au/Publications/flr/vol28no3/selway.htm>

If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.⁵⁹

In a similar vein the Courts whilst commenting on administrative law procedural issues have at times shied away from deciding on policy issues⁶⁰ as indicated in the following statement:

As Justice McGechan commented earlier in his judgement, however, it is not the role of the Court to make the policy decisions as to the particular manner in which the Crown is to carry out its Treaty obligations. It is not the Court's role to make policy decisions or to decide on the concrete steps which would have to be taken as a minimum in order to comply with Treaty principles.⁶¹

However, it is difficult to reconcile these sentiments with those reflected in the decisions where the Courts have relied on notions of common law Aboriginal title or have "read in" Treaty obligations where none have been incorporated into statute.

Under the Treaty the Crown confirms and guarantees existing rights of property thus being declaratory of rights according to native custom and recognised at common law.⁶² In this way common law customary rights are embedded in the Treaty. In relying on common law Aboriginal title, and reading in Treaty obligations, the Courts are giving effect to Treaty obligations via the "back door" thus bypassing the legislature.

⁵⁹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 668. See also *Te Puni Kokiri He Tirohanga o Kawa ki te Tiriti o Waitangi; A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) 17.

⁶⁰ See *Te Puni Kokiri He Tirohanga o Kawa ki te Tiriti o Waitangi; A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) 20 and Keith, Sir K. "The Tribunal, The Courts and the Legislature" in McLay, G. (ed) *Treaty Settlements, the Unfinished Business* (1995) 43- 44.

⁶¹ *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576, 598.

⁶² See Elias, S. "The Treaty of Waitangi and Separation of Powers in New Zealand" in Gray B. D. and McClintock, R. B. (eds) *Courts and Policy: Checking the Balance* (1995). See also *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA), and; *Te Runanga o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, 23-24 (CA).

The doctrine of Parliamentary sovereignty has not always been part of the common law. Joseph writes that English judges did not always uncritically defer to parliamentary power and that in decisions down to the 17th century, there are pronouncements that courts could read statutes subject to “reasons and equity”, declare exceptions to them, and refuse to apply them if they were contrary to natural law.⁶³ In a famous passage in *Bonham’s Case* decided in 1610, Coke CJ declared:

[I]t appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.⁶⁴

Over time this situation was reversed. Joseph writes that the attributes of Parliamentary sovereignty are referable to the struggle for supremacy leading up to the Glorious Revolution, and to the judicial accommodation of Parliament’s victory over the Crown. He writes:

The Glorious Revolution swept aside any limitation on parliamentary power. Parliament could legislate on any topic affecting Sovereign or subject; there were no fundamental laws; and any law could be amended or repealed by simple majority. The judges recognised parliamentary enactment as the highest source of law.⁶⁵

Over the last few decades, a string of New Zealand Court of Appeal decisions have questioned the “absolutism” associated with the doctrine of Parliamentary sovereignty.⁶⁶ The view that Parliament is sovereign and can enact whatever laws it wants has consistently been questioned by the former president of the Court of Appeal, Sir Robin Cooke (now Lord Cooke of Thorndon) who argues that there are some fundamental common law rights

⁶³ Joseph, P. A. *Constitutional and Administrative Law in New Zealand* (2nd ed 2001) 462.

⁶⁴ *Bonham’s Case* (1610) 8 Co rep 113b; 77ER 646.

⁶⁵ Joseph, P. A. *Constitutional and Administrative Law in New Zealand* (2nd ed 2001) 472.

⁶⁶ Joseph comments that before Cooke’s dicta, there were no reported or known instances of a New Zealand judge questioning whether a court might refuse to uphold a statute on the ground that it was repugnant to constitutional principle: Joseph, P. A. *Constitutional and Administrative Law in New Zealand* (2nd ed 2001) 461.

that "even Parliament could not override".⁶⁷ He acknowledges that it is the duty of the Courts and part of their constitutional role to ascertain the democratic will of the people as expressed in Parliament, and that Parliament enacts law and the Courts interpret what Parliament enacts.⁶⁸ However, he argues that the modern common law should be seen to have a free and democratic society as its basic tenet and, for that reason, to be built on two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts.⁶⁹ In an article published in the New Zealand Law Journal, Sir Cooke concludes as follows:

Can any lawyer in all honesty accept as a viable principle that some infringements of human rights are so grave that if enacted in other countries they will not be recognised as law at all by us, but that this would not matter if they were enacted by our own legislature? It would seem that hypocrisy on that scale must be the ultimate result of taking Dicey undiluted. It is easy to say that the hypothetical examples are so unlikely that we need not bother about the problem. That may be so. On the other hand, if honesty compels one to admit that the concept of a free democracy must carry with it *some* limitation on legislative power, however generous, the focus of the debate must shift. Then it becomes a matter of identifying the rights and freedoms that are implicit in the concept... Within very broad limits Parliament has the constitutional role of laying down policy, and undoubtedly there is a corresponding duty on the Courts to uphold and respect Parliament's role. But on the foregoing approach, one can no longer talk about "some vague unspecified law of natural justice" or resort to similar anodynes. One may have to accept that working out truly fundamental rights and duties is ultimately an inescapable judicial responsibility.⁷⁰

His conclusion also rests on the idea that the doctrine of the supremacy of Parliament was a creation of the judiciary and as a consequence the courts

⁶⁷ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) in which Cooke J stated at 398 "I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them". Similar dicta was also expressed by Cooke J in *L v M* [1979] 2 NZLR 519 at 527 (CA); *Brader v Ministry of Transport* [1981] 1 NZLR 73 at 78 (CA); *NZ Drivers' Assn v NZ Road Carriers* [1982] 1 NZLR 374 at 390; *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121 (CA). See generally Joseph, P. A. *Constitutional and Administrative Law in New Zealand* (2nd ed 2001), 492.

⁶⁸ Cooke, "Fundamentals" [1988] NZLJ 158, 163.

⁶⁹ Cooke, "Fundamentals" [1988] NZLJ 158, 164.

⁷⁰ Cooke, "Fundamentals" [1988] NZLJ 158, 164-165.

should be free to rescind or change the rule.⁷¹ Lord Cook has not been alone in his condemnation of judicial deference to parliamentary supremacy.⁷² Justice Thomas in disagreeing with the judiciary's deference to the sovereignty of Parliament concludes that:

There is a potential for a "fruitful partnership and interaction" between Parliament and the courts "in the law-making business together... continually at work on the legal fabric of society". Within the limits set by the constitution, Parliament's legislative supremacy will hold sway. The legislature can, if it so chooses, legislatively correct decisions of the courts that it does not like. For their part, the courts will abide Parliament's legislative supremacy without sacrificing their independent role to develop the law to serve the ends of justice and meet the current needs and reasonable expectations of the community. Respect for the separate roles of Parliament and the courts can be accomplished without compromising this judicial function. Indeed, the fundamental constitutional principle of judicial independence exists to ensure that this function is impartially and fearlessly exercised.⁷³

I consider that recent developments in which the courts have relied on the doctrine of common law Aboriginal title or have "read in" Treaty obligations where none have been incorporated into statute are not so much a case of "judicial activism" but rather one of the courts being put in the uncomfortable position of having to do so. The courts have had to develop the law in this area as a result of the failure of the legislature to adequately accommodate its Treaty obligations in the legislative process by according the Treaty the constitutional recognition it warrants. Having said this however, I consider it is more appropriate that the task of determining how Treaty rights should be given effect to should predominantly lie with the legislature.

⁷¹ Joseph, P. A. *Constitutional and Administrative Law in New Zealand* (2nd ed 2001) 507.

⁷² See also Elias, S "The Treaty of Waitangi and Separation of Powers in New Zealand" in Gray B. D. and McClintock, R. B. (eds) *Courts and Policy: Checking the Balance* (1995) at 206; Thomas, J "Centennial Lecture: The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 32, and; Joseph P. A. "Constitutional Review Now" (1998) NZLR 85.

⁷³ Thomas, J "Centennial Lecture: The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 29- 30.

III.5 CONCLUSION

It is clear in New Zealand that if Parliament fails to more coherently work through its obligations under the Treaty, the courts will fill the void. This will increase the importance of the Judiciary and the way in which Maori customary rights are characterised in New Zealand.

Harris expects that the Courts will increasingly loom larger in the operation of the government system. He argues that this is because of two related reasons:

First, there is likely to be increasing use of litigation for the advancing of political interest. For example, the Courts are being used successfully to advance Maori interests. Secondly, and perhaps more importantly, statute law is increasingly leaving the Courts considerable room in which to exercise law-making power.⁷⁴

The "orthodox" position in relation to strict adherence to the doctrine of incorporation is consistent with and upholds the doctrine of the supremacy of Parliament. Where, however, the Courts have "read in" Treaty obligations or have relied on common law Aboriginal title to "fill a void" they will be exercising more of a policy-making role which should more appropriately be exercised by the Legislature.

Sian Elias (as she was then) writes that the Treaty contains 5 promises, of which the fifth is:

... an acknowledgement of relativity. It is to be discerned from the Treaty as a whole which looked to the settlement of New Zealand and the prosperity of Maori and settlers in what was to become the new enterprise: New Zealand. In those circumstances, the rights guaranteed could not be regarded as absolute. They were necessarily subject to the

⁷⁴ Harris, "The Law-Making Power of the Judiciary" in Joseph P. A. (ed) *Essays on the Constitution* (1995) 265.

Crown's duty, acting under its powers of kawanatanga, to intrude upon Maori rangatiratanga where necessary to further the purposes of the Treaty, but only to that extent. Obviously, the Treaty justification for incursion will vary according to public need and the significance of the taonga affected. But the significant point is that the Treaty itself contains in this manner a mechanism for adjustment and reconciliation.⁷⁵

Given that the Treaty already contains a mechanism for adjustment and reconciliation, it would be more appropriate to incorporate the use of that "mechanism" into the legislative stage rather than leaving it to the courts to determine the content of Maori customary rights.

⁷⁵ See Elias, S "The Treaty of Waitangi and Separation of Powers in New Zealand" in Gray B. D. and McClintock, R. B. (eds) *Courts and Policy: Checking the Balance* (1995) at 208-212. The other four promises are stated as follows: "First, it should be noted that by the Treaty the Crown confirms and guarantees existing rights of property... The second to be taken from the Treaty is the promise of authority... The third promise of the Treaty is the promise of equal treatment to be found in Article III by which Maori received "all the rights and privileges of British subjects"... The fourth promise of the Treaty is the one to be inferred from the whole of the Treaty and its context. It is a promise to use the kawanatanga obtained to accord Maori and their culture a priority which secures their rangatiratanga and their distinctiveness within the new society looked to with settlement".

CHAPTER IV: ENHANCING CONSIDERATION OF THE TREATY IN THE LEGISLATIVE PROCESS

British assumption of legal sovereignty over New Zealand was based upon the Treaty.⁷⁶ Its constitutional significance is such that the Privy Council commented in 1994 that the Treaty "is of the greatest constitutional importance to New Zealand".⁷⁷ In the *Lands* case it was referred to as a document relating to "fundamental rights".⁷⁸ Despite all of these pronouncements the promises made to Maori under the Treaty have not been accorded the same constitutional significance as other fundamental rights have been in the BORA.⁷⁹

This chapter will examine developments under the BORA in an attempt to explore ways in which consideration of the Treaty may be enhanced in the legislative process.

IV.1 CONSIDERATION OF HUMAN RIGHTS IN THE LEGISLATIVE PROCESS

Section 7 of the BORA provides that where any Government Bill is introduced into the House of Representatives, the Attorney-General must, on the introduction of the Bill, bring to the attention of the House any provision

⁷⁶ Elias, S "Treaty of Waitangi and the Separation of Powers" in Gray B. D. and McClintock R. B. (eds) *Courts and Policy: Checking the Balance* (1995) 106.

⁷⁷ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 516. See also: Palmer, G. and Palmer, M. *Bridled Power: New Zealand Government Under MMP* (1997) 287; Waitangi Tribunal, *Ngai Tahu Report* (1991) 224, and; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210.

⁷⁸ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 656.

⁷⁹ The Bill of Rights proposed in the *White Paper* included a proposal to entrench the Treaty as part of the fundamental law of New Zealand. This proposal was however dropped as it was considered too controversial. Some of the opposition came from segments of the Maori community themselves. Palmer, G. and Palmer, M. state: "Some Maori opposed that step. It should be remembered however, that this was before Maori won a famous victory in the Court of Appeal in the state-owned enterprises case, which gave real weight and substance to the principles of the Treaty of Waitangi. Had the timing been otherwise, Maori attitudes to giving the court power may have been different": Palmer, G. and Palmer, M. *Bridled Power: New Zealand Government Under MMP* (1997) 268.

in the Bill that appears to be inconsistent with any of the rights and freedoms contained in the BORA. The aim of this reporting function is to provide a disincentive to Ministers introducing legislation repugnant to the rights contained in the BORA. However, where legislation inconsistent with the BORA is enacted, this will have been done so deliberately and it will be clear to the courts that the relevant provision was intended to abrogate the relevant rights contained in the BORA.

Section 5 of the BORA allows the rights and freedoms contained in the BORA "to be subject only to such reasonable limits proscribed by law as can be demonstrably justified in a free and democratic society". In terms of the benefits of acknowledging that the rights contained in the BORA are not absolute Sir Kenneth Keith has written:

The idea of reasonable limits that are demonstrably justified is relevant to both the uncertainty and antidemocratic arguments mentioned previously. In general, such limits require Parliament to pass laws with some precision and, in doing so, to make an assessment of competing interests. For instance, what is the public interest that can be invoked in the particular case to justify a limit on the right to be free from unreasonable search and seizure? Thus, reasonable limits that are demonstrably justified can be used to reinforce the responsibility of the elected legislature.⁸⁰

In *Moonen v Film & Literature Board of Review*, the Court of Appeal held that, where a statutory provision is found to be inconsistent with a right or freedom, the court may declare that the limit is neither reasonable nor demonstrably justified in a free and democratic society.⁸¹ Declarations of inconsistency such as that in *Moonen* serve to accommodate issues of fundamental rights within the doctrine of Parliamentary sovereignty by setting up a dynamic between the

⁸⁰ Keith, Sir Kenneth "A Bill of Rights: Does It Matter? A Comment" (1997) 32 No 3 Texas International Law Journal 396-397.

⁸¹ [2000] 2 NZLR 9. See also *R v Poumako* [2000] 2 NZLR 695 and Butler, A "Judicial Indications of Inconsistency: A New Weapon in the Bill of Rights Armoury" (2000) NZ Law Review 43.

courts and Parliament under which the courts may "give notice" to Parliament thus encouraging it to introduce remedial legislation.

The "vetting" procedure contained in section 7 of the BORA, and the ability of the courts to issue a declaration of inconsistency have resulted in a "half-way" Bill of Rights which does not redistribute power between the legislative and judicial arms of government but more clearly defines the roles which each arm is to have in their, in the words of Justice Thomas, "on-going fruitful partnership and interaction... in the law-making business together".⁸²

Section 6 of the BORA provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the BORA, that meaning is to be preferred to any other meaning. In *R v Pora* the Court of Appeal held that where legislation proceeds "in error", it may misfire and thus be ineffective. The Court stated that their decision "... implements Parliament's own requirement in s 6 of the New Zealand Bill of Rights Act that Parliament must speak clearly if it wishes to trench upon fundamental rights".⁸³ The judgement of Elias CJ and Tipping J quoted favourably the dicta in *R v Secretary of State for the Home Department, ex parte Simms*⁸⁴ as follows:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to

⁸² Thomas, J "Centennial Lecture: The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 29- 30.

⁸³ *R v Pora* [2001] 2 NZLR 37 at 50.

⁸⁴ [2000] 2 AC 115.

the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.⁸⁵

Such a development has already occurred in Treaty jurisprudence. In *New Zealand Maori Council v Attorney-General* the Court of Appeal stated that:

The Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty.⁸⁶

Given that the general presumption is the same for Treaty rights as it is for other fundamental human rights, I consider that the way in which both Treaty rights and the rights contained in the BORA are given effect to under the legislative process should be similar.

As set out in Chapter II, the current legislative process provides that when a Bill is submitted to Cabinet's Legislation Committee for approval, the covering submission must indicate whether the Bill complies with the principles of the Treaty and must provide reasons if it does not do so.⁸⁷ This obligation is fulfilled by the officials responsible to the Minister promoting the Bill and thus differs from the process under the BORA. The BORA process requires the Ministry of Justice to vet all bills for compliance with the Bill of Rights (except for those Bills promoted by the Minister of Justice, which are vetted by the Crown Law Office). The BORA vetting process thus provides for a more "objective" analysis of compliance with the rights in the BORA because of the independence of the agency undertaking the "vetting". It is considered that the

⁸⁵ *R v Pora* [2001] 2 NZLR 37 at 50-51.

⁸⁶ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 655-656.

⁸⁷ See *Cabinet Office Manual* para 5.35 and 5.367.

independent determination of whether or not the proposed legislation complies with the principles of the Treaty would significantly enhance the way in which Treaty rights are given effect to in the legislative process.

A recent interesting development in the legislative process is the use by Maori of the Waitangi Tribunal ("the Tribunal") to "vet" legislative proposals before they are introduced to the House. This has raised the issue of which agency or institution is best placed to undertake a "vetting" procedure if Treaty rights are to undergo one. The next section looks at the role of the Waitangi Tribunal and its recommendations in respect of the proposed Aquaculture Bill.

IV. 2 A ROLE FOR THE WAITANGI TRIBUNAL

The Waitangi Tribunal

The Waitangi Tribunal⁸⁸ was established by the Treaty of Waitangi Act 1975 ("the TOW Act"). The Tribunal is a permanent commission of inquiry⁸⁹ whose main function is to inquire into claims relating to the Treaty of Waitangi. The Tribunal comprises a chairperson and between two and sixteen members who are appointed by the Governor-General on the recommendation of the Minister of Maori Affairs made after consultation with the Minister of Justice.⁹⁰ From this membership, Tribunal panels made up of a presiding officer and between 2 and 6 other members are constituted by the Chairperson to conduct particular enquiries.⁹¹

If the Tribunal finds a claim that has been properly submitted to it to be well-founded, it may, if it thinks fit, having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or

⁸⁸ See generally: <http://www.waitangi-tribunal.govt.nz>

⁸⁹ Under clause 8 of the Second Schedule of the TOW Act, the Tribunal is deemed to be a commission of inquiry under the Commissions of Inquiry Act 1908.

⁹⁰ Section 4(2) of the TOW Act.

remove the prejudice or to prevent other persons from being similarly affected in future.⁹² In general the Tribunal's recommendations do not bind the Crown.⁹³

The Tribunal has no jurisdiction in respect of any Bill that has been introduced into the House of Representatives unless that Bill has been referred to the Tribunal under section 8 of the TOW Act.⁹⁴ Under section 8 the Tribunal must, if a Bill before the House of Representatives has by resolution of the House been referred to it, examine and report on whether, in its opinion, any or all of the provisions of the Bill are contrary to the principles of the Treaty.⁹⁵ Likewise, the Tribunal must also examine and report on any proposed Regulations or an Order in Council if requested to by any Minister of the Crown.⁹⁶ This is very different from the mandatory statutory vetting procedure contained in the BORA as it relies on Maori having both the knowledge of the relevant legislative policy proposal and the financial means to lodge a claim.

The House of Representatives has not ever used section 8 of the TOW Act to refer Bills to the Tribunal for their consideration. The Tribunal did however consider and provide recommendations on draft legislation not yet introduced into the House in its report titled *Ahu Moana: The Aquaculture and Marine Farming Report* ("the Aquaculture Report"). The following section provides an outline of that report.

The Aquaculture and Marine Farming Report

⁹¹ Clause 5(1) of the Second Schedule of the TOW Act.

⁹² Section 6(3) of the TOW Act.

⁹³ There are however some exceptions to this in relation to licensed Crown forest lands, and certain memorialised lands: see generally sections 8A- HJ of the TOW Act.

⁹⁴ Section 8 of the TOW Act.

⁹⁵ Section 6(6) of the TOW Act.

⁹⁶ Section 8 of the TOW Act.

In 1998 the Crown started initiatives to reform the regime regulating aquaculture on the basis that the legislative framework regulating aquaculture was fragmented.⁹⁷ A public announcement was made on 28 November 2001 that legislation was being proposed which would bring into effect significant reforms to aquaculture, including that regional councils would be given the responsibility of setting aside aquaculture marine areas ("AMAs") within which marine farming would be confined and be delegated to tender the coastal marine space to determine competing applications within the AMAs.⁹⁸ It was the issue of the impact of these proposed reforms on Maori interests in marine farming that formed the substance of the complaint. The complaint to the Tribunal encompassed both a procedural aspect, in that the claimants⁹⁹ alleged they were not adequately consulted and secondly, a substantive aspect, in that the reforms did not provide adequately for their interests in aquaculture.

The Claimants applied for and were granted urgency.¹⁰⁰ Two of the grounds advanced by the Claimants for urgency were that, firstly, they would suffer significant and irreversible prejudice if substantive reform of the current marine farming regime was implemented without specific provision having been made for the interests of Maori in marine farming, and, secondly, they alleged that they had tried to engage with the Crown in order for the Crown to provide for Maori interests in marine farming, to no avail, and further that they did not consider that the select committee process could in any way substitute

⁹⁷ That framework includes the Resource Management Act 1991, the Marine Farming Act 1971, the Fisheries Act 1983 and the Fisheries Act 1996.

⁹⁸ See Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (2002) 1. The announcement also revealed that a two year moratorium on the granting of resource consents for new aquaculture developments was to be effected through the legislation and that moratorium was to have retrospective effect. The issue of the moratorium was to be put before the Tribunal, however, they did not have jurisdiction to enquire into this issue because three days after the relevant Statement of Claim was lodged by the claimants, the Resource Management (Aquaculture Moratorium) Amendment Bill 2001 was introduced to Parliament. By virtue of section 6(6) of the TOW Act the Tribunal has no jurisdiction in respect of any Bill that has been introduced into the House.

⁹⁹ The claimants included Ngati Kahungunu, Ngati Whatua, Ngai Tahu, Ngati Koata, Ngai Tamanuhiri, Te Atiawa, and the Whakatohea Maori Trust Board. Hereafter referred to as "the Claimants".

¹⁰⁰ See Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (2002) 5.

for the careful scrutiny of an independent body such as the Waitangi Tribunal.¹⁰¹

The issues which the Tribunal had to consider were:

- (1) whether it had jurisdiction to hear the claims, and;
- (2) what the nature and extent of the Maori interest is in aquaculture- in particular, marine farming- and whether it has an interest protected by the Treaty of Waitangi.¹⁰²

The Tribunal found that they did have jurisdiction to enquire into the Bill and stated as follows:

This is because of the Tribunal's unique jurisdiction to hear claims alleging prejudicial effects as a result of Crown policies, practices, legislation, or acts and omissions in breach of the principles of the Treaty of Waitangi. This is a jurisdiction quite separate from that exercised by the ordinary courts in New Zealand. In this jurisdiction, we ask what was intended in Treaty terms, not what are the imposed common law or statutory law rules, although these matters may be contextually relevant. We are to have regard to the two texts of the Treaty and we have exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide the issues raised by the differences between them in the context of the claims before us.¹⁰³

In relation to the second issue, the Tribunal found that the Maori interests in marine farming forms part of the bundle of Maori rights in the coastal marine area that represent a taonga protected by the Treaty Of Waitangi and that the proposed aquaculture law reforms amount to acts, policies, practices and omissions of the Crown inconsistent with the principles of the Treaty of Waitangi Act 1975 which if implemented in their current form, would result in prejudice to the claimants.¹⁰⁴ The Tribunal then went on to recommend that the delay before the introduction of the Bill, should be used by the Crown to

¹⁰¹ See Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (2002) 3 - 4.

¹⁰² See Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (2002) 45.

¹⁰³ See Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (2002) 52.

¹⁰⁴ See Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (2002) 76.

establish a mechanism, to be resourced by the Crown, for consultation and negotiation with Maori including the claimants as facilitated by Te Ohu Kai Moana.¹⁰⁵

In considering the first issue, the Tribunal noted that:

The views of Crown officials on the development of reforms and implementing legislation is the correct one in Treaty terms when they advised the cabinet that "the Select Committee process is not an appropriate place to formulate a policy response on Treaty issues.... Where a policy would significantly affect Maori, the Treaty requires a more active response from the Crown than one that rests solely on Maori views being considered in a report from the relevant Select Committee. That report comes far too late in the process of law making. In the normal course of events, the Crown should not rely on such a process, as it is not sufficient in Treaty terms to demonstrate active protection."¹⁰⁶

This segment of the Tribunal's findings highlight an important deficiency in the current legislative process. Normally, if Maori are consulted this is done during a "discussion document" phase. The results of the consultation undertaken are analysed and a "policy" for the Bill is developed and proposed to Cabinet for approval before the Bill is drafted. It is unusual that external groups, including Maori, are consulted during the drafting of a Bill. This means that often Maori have no input from the time they submit on the "discussion document" until the time that the Bill is introduced into the House. Ironically, this phase of the legislative process can be the most intensive in that a lot of significant decisions are made in response to issues which have arisen as a result of the more careful scrutiny necessarily undertaken during the drafting process.

¹⁰⁵ The Maori Fisheries Commission.

¹⁰⁶ See Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (2002) 46.

Any person who wishes to effect changes to the policy decisions made prior to the introduction of a Bill to the House, may only do so by submitting to the Select Committee and as stated in the excerpt above, "the Select Committee process is not an appropriate place to formulate a policy response on Treaty issues". Moreover, it is difficult to make major structural changes to a Bill, or have it withdrawn entirely, at the Select Committee stage.

It is considered that an analysis of whether or not the legislative proposal breaches the principles of the Treaty, undertaken by an independent agency, would significantly improve the legislative process. It may well be that the Ministry of Justice or some other government Department would be best placed to undertake this analysis. However, given the specialist nature of Treaty rights, I consider that the Tribunal would be the best agency to undertake at least part of this analysis.

The Tribunal in its recent *Petroleum Report*¹⁰⁷ stated that the approach to determining Treaty compliance was analogous to that taken by the mainstream courts when considering how far fundamental rights and freedoms under the BORA were to be limited by "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In applying the four part test set out in *Moonen v Film and Literature Board of Review*¹⁰⁸ the Tribunal stated:

When faced with an expropriatory statute, the question for this Tribunal reduces to whether the expropriation was reasonably necessary, or whether there was a reasonable

¹⁰⁷ See Waitangi Tribunal *Petroleum Report* (2003).

¹⁰⁸ [2002] 2 NZLR 9. That four part test was set out as follows:

- Identify the objective which the legislation is attempting to achieve and assess the importance and significance of the objective.
- Consider whether the way in which the statute achieves the objective is proportionate to the importance of the objective- "a sledgehammer must not be used to crack a nut".
- The means used in the statute must rationally relate to the objective.
- The interference in the right or freedom must be as limited as possible- i.e. only that required to achieve the objective.

alternative available which could have achieved the statutory objective without overriding the fundamental Treaty right. If some form of expropriation can be reasonably justified, the next question is what is the least interference necessary to achieve the policy objective of the statute.

This approach accords with the conclusions reached by Sian Elias (as she was then) that the Treaty itself contains a mechanism for adjustment and reconciliation.¹⁰⁹ Any "vetting" process could be split in two with the analysis required to establish whether or not there was a breach of the Treaty guarantees being undertaken by the Tribunal whilst the analysis of whether or not the breach is justifiable could be undertaken by another agency of the Crown, for instance the Ministry of Justice.

IV.3 CONCLUSION

Given the constitutional significance of the Treaty, it is considered that a vetting process similar to that provided for under section 7 of the BORA should be extended to rights guaranteed under the Treaty. Such a measure would ensure that policy decisions balancing rights guaranteed under the Treaty with the Crown's governance role would be made by the legislature.

This conclusion is reflected in the Tribunal's recent *Petroleum Report* where it stated that:

We think it is now beyond argument that the Treaty of Waitangi also guarantees fundamental rights. It is the task of this Tribunal to review Government action, including legislative action, which may breach those fundamental rights. The Crown is incorrect when it says that the Tribunal lacks the expertise to deal with these matters. Like the courts in respect of guarantees of rights in the New Zealand Bill of Rights Act, the

¹⁰⁹ Note also that the Tribunal engaged in similar analysis in relation to the cultural harvest of albatross and mutton-birds in its Chatham Islands Report. It concluded that there was a Treaty right to take but that equally the Crown had a Treaty duty to preserve, and, on the evidence the Tribunal found that the current restrictions by the Department of Conservation were still reasonably necessary: See Waitangi Tribunal *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (2001) 10.

Waitangi Tribunal is specifically required to analyse Acts and actions of the Crown in relation to the Treaty guarantees, and for a broadly similar reason. In our country, a proper process of review of the Government's compliance with the fundamental rights and interests contained in the Treaty of Waitangi is seen as crucial to the wellbeing of our particular brand of democracy.¹¹⁰

It is not even accurate to say that other fundamental rights have been accorded under the BORA. The failure of the legislature to honour the Treaty the constitutional recognition it warrants nor to adequately acknowledge it within the legislative process has left the courts with little option but to step in to "fill the gaps".

The courts have had to either read in Treaty obligations or rely on the common law doctrine of Aboriginal title where the legislation in question has not addressed the relationship that the Crown is to have with Maori. The resulting ambiguity has had a tendency to exacerbate the tensions between the courts and the legislature as has been evidenced in the recent decision of the Court of Appeal in *Ngati Apa & Ors v Attorney-General & Ors*.

It is my view that the "fixing" process provided for under the "halfway" Bill-A approach with the practice of the courts to "read" declarations of intent into legislation might be extended to rights guaranteed under the Treaty. This would create a process for "filling the partnership and interaction" between the judiciary and Parliament whilst retaining the essential elements of the doctrine of sovereignty of Parliament and the independence of the judiciary.

It is perhaps trite to conclude with the words of the Royal Commission on Electoral Reform who in 1986 urged Parliament and Government to enter into consultation with Maori about the definition and protection of the rights of the Maori people and the recognition of their special status under the Treaty of Waitangi.¹¹¹ In the Royal Commission's words:

The government must begin to consider the rights of Maori as a separate issue. The government must begin to consider the rights of Maori as a separate issue.

¹¹⁰ See Waitangi Tribunal *Petroleum Report* [2003].

CHAPTER V: CONCLUSION

Although the Treaty has been referred to by the Privy Council as "of the greatest constitutional importance to New Zealand", it does not qualify New Zealand's legislative sovereignty. It is not even accorded the same "status" that other fundamental human rights have been accorded under the BORA. The failure of the legislature to neither give the Treaty the constitutional recognition it warrants nor to adequately accommodate it within the legislative process has left the courts with little option but to step in to "fill the gaps".

The courts have had to either read in Treaty obligations or rely on the common law doctrine of Aboriginal title where the legislation in question has not addressed the relationship that the Crown is to have with Maori. The resulting ambiguity has had a tendency to exacerbate the tensions between the courts and the legislature as has been evidenced in the recent decision of the Court of Appeal in *Ngati Apa & Ors v Attorney-General & Ors*.

It is my view that the "vetting" process provided for under the "halfway" BORA coupled with the practice of the courts to "issue" declarations of inconsistency ought to be extended to rights guaranteed under the Treaty. This would ensure a process for "fruitful partnership and interaction" between the judiciary and Parliament, whilst retaining the essential elements of the doctrine of sovereignty of Parliament and the independence of the judiciary.

It is perhaps salutary to conclude with the words of the Royal Commission on Electoral Reform who in 1986 urged Parliament and Government to enter into consultation with Maori about the definition and protection of the rights of the Maori people and the recognition of their constitutional position under the Treaty of Waitangi.¹¹¹ In the Royal Commission's view:

The issues will not become any easier as time passes, and we think it desirable to face the problems before their resolution becomes even more difficult.

¹¹¹ See Royal Commission *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986) paras 3.106- 3.111.

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