The Treaty of Waitangi today

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This paper by John Sutton reviews the status of the Treaty of Waitangi at international law and, with reference to the way the government has implemented the international law rights accruing from the United Nations International Covenants on Human Rights, considers means of implementing Treaty rights. The Treaty of Waitangi Act 1975 is studied and assessment of the practice and potential of the Waitangi Tribunal ventured.

At the Waitangi Day celebrations in 1934 Baron Bledisloe, who gave New Zealand the historic site where the Treaty was signed, said[1] that that gathering

> afforded an opportunity of renewing our obligations to the Maori people — obligations which have become all the greater since, during the intervening years, our [British] race has become the dominant partner in the possession and enjoyment of this country, the sovereignty of which we still hold as a sacred and inviolable trust.

This is typical of the speeches made each February 6th by politicians and statesmen but does the Treaty of Waitangi[2] have any more importance than being the rhetorical focus of formal Maori-pakeha relations? It is submitted that the Treaty has real significance in the New Zealand constitutional and legal system.

I. TRADITIONAL CONCEPTS REVIEWED

As an instrument of cession the Treaty of Waitangi is commonly regarded as a nullity,[3] usually because of the Maoris' inability to enter into a contract or treaty

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1 Baron Bledisloe *The Governor-General's Addresses at the Waitangi Celebrations.* (*s.2*: *s.n*, 1934) 2.

2 The English version is printed in the schedule to the Treaty of Waitangi Act 1975, which is included as an appendix to this paper.

3 *Wi Parata* v. *Bishop of Wellington* (1877) 3 Jur. (N.S.) 72, 78 (obiter dicta); A.P. Molloy "The Non-Treaty of Waitangi" [1971] N.Z.L.J. 193; McNair *The Law of Treaties* (Oxford University Press, 1961) 52 et seq; J. Rutherford *The Treaty of Waitangi and the Acquisition of Sovereignty in New Zealand* (University of Auckland, New Zealand, 1949) 47; N.A. Foden *The Constitutional Development of New Zealand in the First Decade* (Watkins Wellington, 1938) 179-183; Robson (ed) *New Zealand: The Development of Its Laws and Constitution* (2 ed. Stevens and Sons London, 1967)3;

as a collective state. If the Maori people were[4] "composed of numerous dispersed and petty tribes who possess[ed] few political relations to each other and [were] incompetent to act or even to deliberate in concert," then they were not a sovereign body in the sense required by international law. Any vesting of sovereignty in the Crown must have arisen from occupation and settlement rather than transfer by cession.

It is submitted that the question of Maori sovereignty is not vital to an understanding of the Treaty's place in New Zealand's constitutional and legal system. The Treaty of Waitangi should rather be seen in law as a formal recognition by the Crown that the Maori people possessed rights, including rights over their land. Even if the Treaty did not transfer sovereignty, it may be regarded as an instrument declaring obligations incumbent upon the nation settling an inhabited country not recognized as a state at international law. The declaration is a quid pro quo for a root of title thought in some way to derive from the Treaty and the actions related to it. A fuller quotation from the 1839 statement of the official view of Maori status reads:[5]

> . . . we [Britain] acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen . . . disclaims . . . every pretension to seize on the islands of New Zealand, or to govern them as part of the dominion of Great Britain, unless the free and intelligent consent of the natives . . . shall be first obtained.

The International Court of Justice described a similar situation in its *Western Sahara* opinion[6] and found that although the Bilad Shinguitti (a regional collection of tribes, the forerunner of the Islamic Republic of Mauritania) did not exist as a legal entity separate from its members, it did constitute a distinct human unit, characterized by a common language, way of life and religion, and with a uniform social structure.[7] The entity could not be assimilated[8] "even to a confederation, unless one saw fit to give that name to the tenuous political ties linking the various tribes." The emirs or shieks formed alliances and waged war upon one another as equals and the existence of the community only became apparent when colonial forces threatened their regional independence.[9] The court held that these

H. Kawharu "Salvaging the Remnant" (ed. R. Crocombe) *Land Tenure in the Pacific* (1971) 129, 130. Contra: International Arbitral Tribunal in the William Webster Arbitration, reported F.K. Nielsen *American and British Claims Arbitration* (Government Printing Office Washington, 1926) 537, 543, *Mangakahia* v. *New Zealand Timber Co.* (1882) N.Z.L.R. 2 S.C. 345, 350 (obiter dicta).

4 Instructions from Lord Normanby, Secretary of State for the Colonies, to Captain Hobson (14 August 1839) G.B.P.P. 1840/238, XXXIII, 37.

5 Ibid. 37-38.

6 *Western Sahara, Advisory Opinion* [1975] I.C.J.12.

7 Ibid. 58, para. 132.

8 Ibid. 59, para. 135 (a Mauritanian submission).

9 Ibid. 59, para. 136 cf. the Maori social structure where a united Maori entity was only visible against the body of white settlers.

nomadic peoples should[10] "be considered as having in the relevant period, [c.1884] possessed rights, including some rights relating to the lands through which they migrated."

The court also looked to the status of their nomadic Western Sahara neighbours. These were socially and politically organised tribes under chiefs competent to represent them[11] and included nomads traversing the desert on more or less regular routes as the seasons and wells or waterholes allowed them. Recognised burial grounds provided a "rallying point" for many tribes and their allies in a country where inter-tribal conflict was not infrequent.[12]

After considering the people's status at international law, the court found that[13]

> Whatever differences of opinion there may have been among jurists, the State practice of the relevant period [c.1884] indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a *terra nullius* in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.

The Western Sahara situation is clearly analogous to the New Zealand one: in the Royal Order of 26 December, 1884, Spain took Rio de Oro under its protection on the basis of agreements entered into with chiefs of the local tribes;[14] in the Proclamation of 21 May 1840, Captain Hobson claimed Britannic sovereignty over the North Island of New Zealand by virtue of the Treaty of Waitangi.[15] It is submitted that since the force of the promises in the Treaty can be seen as resting on customary international law's recognition of the rights of natives and not the capacity of the parties, then the Maoris in the South Island, as well as those chiefs who did not sign, are entitled to that instrument's protection, though their land was claimed by discovery.[16] If nomadic tribes are possessed of rights over their migratory routes then a fortiori the settled, territorially based Maori tribes must have possessed rights over the land they cultivated, hunted over and cherished.

This view seems indeed to reflect the international custom of the period. In 1837 the House of Commons was told that[17] "protection of the Aborigines [in

10 Ibid. 64, para. 152.
11 Ibid. 39, para. 81.
12 Ibid. 41, para. 87.
13 Ibid. 39, para. 80.
14 Ibid. 39, para. 81.
15 Proclamation, *New Zealand Gazette,* Vol. 1841-42.
16 Ibid. 4/31.
17 Report of the House of Commons Committee on Aborigines in British Settlements, 26 June 1837. Quoted in M. Boyd "Cardinal Principles of British Policy in New Zealand" *The Treaty of Waitangi: Its Origins and Significance* (Department of University Extension of V.U.W. (1972)11.

British settlements] should be considered as a duty peculiarly belonging and appropriate to the Executive Government." Lieutenant-Governor Hobson was charged with the immediate quashing of all titles to land acquired inequitably from the Maoris. A similar command regarding land sales[18] "upon a scale which must be prejudicial to the later interests of the community", may seem to ground the order in administrative desirability rather than Maori rights to land, but it is fair to say that there is an element of concern for Maori rights running throughout the instructions.

The provisions for payment of nominal fees for Maori land and later sales at exceedingly high prices may be explicable in the light of the colonizers' laissez-faire theories. In any event, payment was required to some degree, and Hobson was forbidden to purchase any Maori territory[19] "the retention of which . . . would be essential or highly conducive to [the Maori's] own comfort, safety or subsistence." Maori rights over the land were recognized[20] and all eligible land was to be bought, not occupied without regard for Maori interests. Native rights were recognized in the American and British claims arbitration when the Fijian treaty of cession,[21] similar in many respects to the Treaty of Waitangi, was considered to have ceded the sovereignty of the Islands to Great Britain.[22]

It is submitted that this international state practice which treated natives "as if" they comprised a state and "as if" they were in some way capable of ceding what the International Court calls a[23] "derived root of title" to be consolidated by a continuous and peaceful display of territorial sovereignty,[24] is the basis of international law's recognition of the promises contained in the "Treaty" of Waitangi. Far from being a nullity, the "Treaty" is evidence of obligations the Crown undertook as a quid pro quo for some sort of legal accession to New Zealand. Prendergast C.J. observed in *Wi Parata* v. *Bishop of Wellington*:[25]

> So far as the proprietary rights of the natives are concerned, the so-called Treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case . . . . [T]he Sovereign of the settling nation acquiring on the one hand the exclusive right of extinguishing the native title, assumes on the other hand the correlative duty, as supreme protector of the aborigines, of securing them against any infringement of their right of occupancy . . . . The obligation thus coupled with the right of pre-emption, although not to be regarded as properly a treaty obligation, is yet in the nature of a treaty obligation.

18 Instructions from Lord Normanby, Secretary of State for the Colonies, to Captain Hobson. *Correspondence with the Secretary of State relative to New Zealand.* Great Britain. Parliamentary Papers on New Zealand. Vol. 1, 1837-1840, Paper 238.

19 Idem.

20 Opinions of the Chief Justice, Sir William Martin, an interpreter in the Native Office of Mr White and the Reverend James W. Stack *Opinions of Various Authorities in Native Tenure* New Zealand. Parliament. House of Representatives. Appendix to the Journals, Vol. 2, 1890, G.1:3, 12, 22.

21 F.K. Nielson *American and British Claims Arbitration* (Government Printing Office Washington, 1926) 589-591.

22 Ibid. 588.

23 [1975] I.C.J. 39, para. 81.

24 *Island of Palmas Arbitration* (*United States* v. *The Netherlands*) 2 R.1.A.A. 829, 839.

25 (1877) 3 Jur. (N.S.) 72, 78.

The Treaty of Waitangi is an agreement in two languages and, while thirty-nine chiefs signed one of the five English versions, more than five hundred signed the Maori version[26] which means the Maori version must be of overwhelming importance in assessing the Treaty's effect. While the Treaty has the force of law despite problems of "cession", the *kawanatanga* or "governorship" given up by the Maoris presents an even greater problem. Ruth Ross[27] argues forcibly that *kawanatanga* was a missionary-Maori word that the Maoris did not use or properly understand. While the British understood the treaty to be permission for an assertion of government by them, it appears likely that the Maori chiefs understood their "full chiefship" or "kingdom" *(te tino rangitiratanga)*[28] to be preserved intact by Article the Second of the Treaty, and it is difficult to understand what the chiefs understood they were giving to the British under Article the First, assuming there was any one meaning prevailing. Sir William Martin, the first Chief Justice of New Zealand, claimed that the ceded "governorship"[29]

> . . . was in some degree defined by a reference to its object. The object was expressed to be "to avert the evil consequences which must result from the absence of law." To the new and unknown office they conceded such powers — to them unknown — as might be necessary for its due exercise.

If the Maoris did not agree to succumb to British government but were transferring a power they could not have properly understood, or perhaps even thought themselves to possess, then the Treaty lacks a meeting of the minds, quite apart from any question of capacity. The *Report from the Select Committee on New Zealand* to the House of Commons advised in 1844 that[30]

> It would have been much better if no formal treaty whatever had been made, since it is clear that the natives were incapable of comprehending the real force and meaning of such a transaction; and it therefore amounted to little more than a legal fiction, though it has already in practice proved to be a very inconvenient one, and is likely to be still more so hereafter.

Certainly contradictions such as the limit on Maori powers of disposing of land under Article II while the Maoris were guaranteed all the rights of British subjects under Article III show that anyone, Maori or otherwise, may have been hard pressed to fully understand the Treaty.

If Ruth Ross and others are correct in asserting that the Maoris did not comprehend the full import of the Treaty, it is submitted the Treaty's force at law cannot rest on what happened in 1840. It may be mooted that the Treaty was in reality a unilateral declaration, binding on the Crown and restricting within the terms of the Treaty the Crown's right of action with regard to the Maoris.[31] This overstretches the doctrine of unilateral declaration, which is not without its critics[32]

26 R.M. Ross, "Te Tiriti o Waitangi — Texts and Translations" (1972)6 N.Z. J.H. 129, 163.
27 Ibid. 138 et seq.
28 Literally "evidence of breeding and greatness".
29 New Zealand. Parliament. House of Representatives. Appendix to the Journals, Vol. 2, 1890, G.1:6.
30 British Parliamentary Papers (Irish University Press) Vol. 2, 1848,5.
31 As in *Nuclear Tests Case* (*Australia* v. *France*) [1974] I.C.J. 253, 267, para. 43; *Nuclear Tests* (*New Zealand* v. *France* [1974] I.C.J. 457, 472 para. 46 et seq;
32 E.g. A.P. Rubin "The Legal Effects of Unilateral Declaration" (1977) 71 Am.J.I.L. 1.

and which because of its unilateral essence cannot be intended to cover a treaty situation where the parties have not come to agreement. The binding nature of a unilateral declaration seems to stem from the declaring state's intention to be bound[33] while a state undertaking treaty obligations intends to be bound only in return for the other party's concessions. Instructions from Lord Normanby, Secretary of State for the Colonies, bidding Hobson to avoid engagements (which would be mere illusion and pretence) if he thought South Island Maoris incapable of[34] "entering intelligently into any treaties with the Crown" negate an assertion that the Treaty of Waitangi was a unilateral exercise by which the Crown intended to receive nothing from the Maoris.

If one accepts the force of the Treaty is not wholly dependent on the events of 1840 it must be dependent on subsequent events or lack effect. It is submitted that the faith the Crown has and continues to assert in the Treaty is in the nature of a unilateral undertaking to be bound by its terms. Evidence of this may be seen in the despatch from Lord John Russell, Colonial Secretary, to Captain Hobson dated 9 December 1840.[35]

> [The Maoris] have been formally recognized by Great Britain as an Independent State; and even in assuming the dominion of the country, this principle was acknowledged, for it is on the deliberate act and cession of the chiefs, on behalf of the people at large, that our title rests.

When pressed by the New Zealand Company, the Under-Secretary for the Colonies, Mr Hope, replied that[36]

> Lord Stanley [Minister for the Colonies] entertains a different view of the respect due to the obligations contracted by the Crown of England, and his final answer to the demands of the New Zealand Company must be, that so long as he has the honour of serving the Crown, he will not admit that any person, or any Government acting in the name of Her Majesty, can contract a legal, moral and honorary obligation to despoil others of their lawful and equitable rights.

There is also section 8 of the Fish Protection Act 1877 whereby

> Nothing in [that] Act contained shall be deemed to repeal, alter or affect any of the provisions of the Treaty of Waitangi, or to take away, annul or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder.

now diluted to section 77(2) of the Fisheries Act 1908. There are further the Waitangi Day Act 1960, the New Zealand Day Act 1973, the Treaty of Waitangi Act 1975 and the Waitangi Day Act 1976 as well as numerous Waitangi Day speeches echoing Lord Bledisloe's prayer[37] "that the sacred compact . . . may be faithfully and honourably kept for all time to come." Even if the Treaty may not come within the class of lesser "treaties" in the *Western Sahara* case sense,[38] this continued expression of belief that it is to be observed means that the Crown cannot in good faith now renounce its obligation. A unilateral declaration is binding

33 Supra n.31.
34 British Parliamentary Papers (Irish University Press) Vol. 3, 1840, 238.
35 Gt. Brit. Parliamentary debates s.3 v. 81 (1845): 811-812.
36 Quoted in unsigned paper "The Effect of the Treaty of Waitangi on Subsequent Legislation" [1934] 10 N.Z.L.J. 13, 15.
37 Supra n.1, 18; Quoted in R.M. Ross, supra n.26, 154.
38 [1975] I.C.J. 39, para. 81.

because of the declaring state's intention to be bound,[39] and a unilateral undertaking of this historical depth must render the Crown bound by the Treaty of Waitangi.

II. RIGHTS AND OBLIGATIONS

The obligation created, either by the Treaty or the Crown's affirmation of the Treaty[40] "although not to be regarded as properly a treaty obligation, is yet in the nature of a treaty obligation." Roberts-Wray[41] explains that the Treaty did not effect cession to the Crown but adds: "It does not appear ever to have been alleged that international law will not recognize the rights conferred." The question to answer is how the obligations can be fulfilled in satisfaction of these rights. The rights exist at international law by virtue of the international nature of their subject — the treatment of a native race by a colonizing nation.

Rights at international law are susceptible to many methods of satisfaction and it is proposed here to look at the treatment of human rights recognised in international instruments in New Zealand, being analogous to international rights under the Treaty of Waitangi, owed by the government to its own citizens.

The existence of rights in individuals, or "human rights" at international law, would have been regarded suspiciously only a few decades ago when orthodox opinion generally held that only sovereign states could be subjects of international law.[42] The horror of the Second World War prompted the concept of "international crime" whereby states accused not a state, by its national, of having injured their own nationals but tried the individual himself. More dramatic advances in 1945 came with the founding of the United Nations based on a Charter which emphasized above all as an object of international concern faith in fundamental human rights. The provisions always fall short of conferring direct obligations to act other than for the "promotion" or "encouragement of respect for" such rights. It was argued that the Charter obliged governments only to move towards certain goals but did not create rights in individuals.[43] A similar argument ensued with the provisions of the Universal Declaration of Human Rights in 1948,[44] but it is clear from the

39 *Nuclear Tests Cases*, supra n.31.

40 *Wi Parata* v. *Bishop of Wellington* (1887) 3 Jur. (N.S.) 72, 78-79.

41 Sir K.O. Roberts-Wray *Commonwealth and Colonial Law* (Stevens, London, 1966) 103.

42 Separate Opinion of Judge Petren *Nuclear Tests Case* (*Australia* v. *France*) [1974] I.C.J. 253,303; L. Oppenheim *International Law* (2 ed. Longmans Green, London, 1912) 19.

43 H. Lauterpacht attacks this view in *International Law and Human Rights* (Stevens London 1950) 146.

44 In article 2 of the unanimous Proclamation of Teheran (1968) eighty four states declared that "The Universal Declaration of Human Rights . . . constitutes an obligation for the members of the international community." But according to the World Peace Through Law Centre ". . . the Universal Declaration of Human Rights is in fact no part of the International Law of Nations . . ." *The International Observer; World Law Day Human Rights* 1968, Pamphlet Series No. 12 (Geneva 1969) 34.
A similar view was expressed by the then New Zealand Department of External Affairs. "This Declaration [of Human Rights] would not impose legal obligations upon member states." New Zealand Department of External Affairs *The Universal Declaration of Human Rights* (1951)4.

content of the United Nations covenants like the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights that individuals may be the holders of rights in international law. But what are "rights"?

There is a vital distinction between recognition in an international instrument of rights enuring to the benefit of the individual and the enforceability of those rights at the individual's instance.[45] The lack of organised enforcement procedures is not as emasculating to a right at international law as it may be to one at municipal law[46] because international law remains in essence a law of governments. It is in a sense more sophisticated than municipal law because it exists in a political ethos which recognizes the settlement of claims by negotiation and conciliation. The obligations it imposes may range from restitution and compensation to obligations to consult or act in good faith.

The focus of claims that a right at international law is worthless is often on the fact that the individual cannot generally prosecute his case before a third party[47] and therefore does not have any procedural remedy when compared to, say, a right of action at municipal law. The enforcement of rights under the Treaty of Waitangi and the international covenants on human rights depends rather on the efficiency of the rules or tools of national statecraft.[48] It is too simplistic to compare disparagingly the efficiency of international law with that of a policeman arresting burglars with all the enforcement machinery of the criminal law backing him up. That coercive force of law is not available when governments are the principal subjects and so it is that in constitutional law, which deals inter alia with a government's actions in its own courts, we see a more accurate municipal law analogue with all the vagueness of the Diceyan pact between Parliament and the courts,[49] ministerial responsibility,[50] and constitutional conventions,[51] as well as the courts' inability to question the proceedings of Parliament[52] or the exercise of legitimate executive discretion.[53] Despite their non-justiciable nature, these matters are recognised as legal concepts at the heart of our constitution.

Turning to the international covenants on human rights,[53a] the implementation provisions against state parties in violation of the covenants included at the drafting stage investigation by the United Nations. This was a powerful sanction and had

45 H. Lauterpacht "The Subjects of the Law of Nations" (1948)64 L.Q.R.97.
46 E.g. the substantial effects flowing from the Limitations Act 1950, s.4. which erects a procedural bar only.
47 An exception is the European Court of Human Rights.
48 Adapting the words of J.H.R. Fried "How Efficient is International Law? (ed. Deutsch and Hoffman) *The Relevance of International Law* (Cambridge, Mass., Schenkman, 1968) 93 et seq.
49 A.V. Dicey *Introduction to the Study of the Law of the Constitution* (ed. E.C.S. Wade) (10 ed. London, Macmillan 1959) Ch.1.
50 *Attorney-General* v. *Jonathan Cape Ltd* [1976] Q.B. 752.
51 *Adegbenro* v. *Akintola* [1963] A.C.614.
52 Bill of Rights 1688 art.9.
53 *Associated Provincial Picture Houses Ltd.* v. *Wednesday Corporation* [1948] 1 K.B. 223, 228.
53a Printed in (1967) 61 Am.J.1.L. 861 et seq.; U.N. Doc. A/RES/2200 (xxi).

already been introduced for the first time by the Third Committee of the General Assembly a year before in the Convention for the Elimination of All Forms of Racial Discrimination.[54] The Committee diluted this draft investigative sanction to a system requiring regular reports from state parties on steps they had taken to achieve the realization of the rights specified in the two international covenants. Although this reporting system gives more encouragement to a state to take logical and patterned steps to introduce coherent measures for the realization of the rights specified whereas an investigative sanction put the state under pressure to run into measures to avoid international condemnation, that in itself shows that the international covenants on human rights were not considered as immediately important as the Convention on Racial Discrimination. They were adopted by the General Assembly in 1966 and were ratified by New Zealand in December 1978, coming into force here in March 1979.

The rights conferred by the covenants are of differing levels of specificity, the widest of which (e.g. a right to take part in cultural life and enjoy the benefits of scientific progress inter alia),[55] are followed by direction as to how they may be implemented. In this case the steps included those necessary for the conservation, development and diffusion of science and culture.[56] Other more specific rights, such as the right to just and favourable conditions of work which ensure safe and healthy working conditions,[57] are left to the ingenuity of the state party to realize[58] "by all appropriate means, including particularly the adoption of legislative methods," or by adopting[59] "such legislative or other measures as may be necessary to give effect to the rights recognized."

The emphasis on legislation is probably because that is of a readily ascertainable nature and an indication of how seriously the state is taking its obligations. In international law, however, a state acts through all of its branches of government, legislative, judicial and executive (although sharp distinctions between the three must be misleading). Were the many ways the government could implement international rights catalogued the list might run like this:

(a) Enact legislation requiring restitution of property taken in breach of the rights. The wrongful acts are thus denied any legal effect.

(b) Enact legislation requiring compensation to be paid for loss of property or status.

(c) Enact the documents conferring rights to render them justiciable in the courts.

(d) Repeal all contrary Acts to the extent that they are contrary to rights provided in the document.

54 Adopted by the General Assembly of the United Nations in December 1965 and ratified by New Zealand without reservation, November 1972; U.N. Doc. A/RES/2106 (xx).

55 International Covenant on Economic, Social and Cultural Rights, art. 15(1)(1).

56 Ibid. art. 15(1)(2).

57 Ibid. art. 7.

58 Ibid. art. 2(1).

59 International Covenant on Civil and Political Rights, art. 2(2).

(e) Create a commission with power to strike down laws and government action in contravention of the rights.

(f) Carry out a stated legislative and executive policy to fulfil obligations.

(g) Create a commission to recommend overall action to recognize rights and to speak in support of such rights.

(h) Enunciate detailed legislative and executive policy to fulfil obligations.

(i) Create a commission to recommend action in specific cases only.

(j) Create a commission of inquiry into the status and meaning of the rights.

(k) Enunciate general undefined policy commitments towards respecting these rights.

By studying the remedies offered the goverment's sense of the type of obligation incurred under the Treaty can be weighed up against that of other governments in similar areas and its own action in the field of human rights.

Many of the covenants' provisions were being realized in New Zealand long before the Human Rights Commission was born, probably because of a mixture of internal political pressures and international obligation. In this field New Zealand has the Accident Compensation Act 1972, the Equal Pay Act 1972, the Legal Aid Act 1969, the Offenders Legal Aid/Act 1954 and the Status of Children Act 1969, to name but a few.[60] However, there remained rights which were not yet realized.

It is debatable how directly the Human Rights Commission Act 1977 was at first intended to satisfy the requirements of the international covenants because not only was an Act in the form of a Bill of Rights mooted in the National Party's 1960 Election Policy[61] but the Bill introduced into Parliament was entitled[62] "An Act to establish a Human Rights Commission and to promote equality of opportunity among the people of New Zealand; and for certain other purposes related to human rights." It was only when the Bill returned from its Select Committee that the title referred to "the advancement of Human Rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights." Some members of Parliament even expressed preferences for the Universal Declaration of Human Rights over the covenants.[63] Be that as it may, the Human Rights Commission Act 1977 clearly does undertake to realize human rights in New Zealand in a variety of ways.

First of all, it legislates to make unlawful certain acts which, while possibly tolerated by the law before, are clearly in breach of the rights subsisting in others.

60 Corresponding to International Covenant on Economic, Social and Cultural Rights (I.C.E.S.C.R.) art. 9; I.C.E.S.C.R. art. 3; International Covenant on Civil and Political Rights (I.C.C.P.R.) art. 14(1); I.C.E.S.R. art. 2(2); I.C.P.R. 2(1).

61 The International Covenants had existed in draft form since 1954 R.Q. Quentin-Baxter "International Protection of Human Rights" (ed. K.J. Keith) *Essays on Human Rights* (Sweet & Maxwell, Wellington 1968) 134, so the date is not a truly conclusive factor.

62 Human Rights Commission Bill 1976.

63 E.g. N.Z. Parliamentary debates Vol. 413, 1977: 2388; N.Z. Parliamentary debates Vol. 411, 1977: 1248.

In this category are included discrimination on the grounds of sex, marital status, or religious or ethical belief[64] or race[65] in the work place, or on the grounds of colour, race or ethnic or national origins as well in certain associations.[66] It also prohibits the publishing of advertisements or notices which could reasonably be understood to indicate an intention to commit a breach of the provisions of Part II of the Act.[67] The generally worded covenants were not enacted as they stood but the declared rights were individually legislated for. Because of the uncertain content of rights arising from the Treaty of Waitangi there can be no similar enactment of them without extensive interpretation.

Direct legislative enactment of the Treaty of Waitangi is a course of action mooted from time to time and invariably rejected. When the Waitangi Day Act 1960 appeared with the Treaty in English in a Schedule (which is a legitimate part of the Act)[68] it was argued that that may have constituted enactment of the Treaty. However it seems clear that the courts will not hold treaties (or contracts having the appearance of treaties) to be incorporated into domestic law by mere vague allusion when there would have been no difficulty at all in the legislature's doing so expressly and when an obvious opportunity for doing so presented itself.[69] The better view is that the Treaty was included for information.[70]

Wholesale enactment of the Treaty as it stands (without the pre-emption provision of Article II allowing Maori land owners to sell to no-one but the Crown, which has since waived this right) would give the courts immediate cognizance of the Treaty although wreaking havoc on existing legislation. The maxim of interpretation *generalia specialibus non derogant* provides that[71]

> where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.

The assessment of the legislature's intent would cause a flood of litigation to see if a specific Act had been impliedly repealed by the Treaty Act or not. This could be lessened by a section declaring the repeal of all listed contrary Acts but such a section could not prevent the future erosion of the Treaty by subsequent legislation passed in the prescribed manner and form[72] until the Treaty ceased to be the focal point of Maori-pakeha relations. It may be that having the Treaty "on the books" would act as a partial check on legislative repeal which could

64 Human Rights Commission Act 1977, s.15.
65 Ibid. s.76, altering the Race Relations Act 1971, s.5.
66 Human Rights Commission Act, ss.19-22.
67 Ibid. s.32.
68 Acts Interpretation Act 1924, s.5(h).
69 *Republic of Italy* v. *Hambros Bank* [1950] Ch.D.314, 328.
70 K.J. Keith "International Law and New Zealand Municipal Law" (ed. J. Northey) *The A.G. Davis Essays in Law* (Butterworths London, 1965) 130,137.
71 *Seward* v. *The Vera Cruz* (1884) 10 App.Cas. 59,68.
72 *Ellen Street Estates* v. *Minister of Health* [1934] 1 K.B. 190, 199.

not extinguish and must be in breach of the state's international obligations to the Maoris.

The most pressing reason why the Treaty is not enacted is that to solve the current historically based problems it must be given retroactive power to destroy hundreds of titles or interests in land. The upheaval and confiscation of land from people who have vested rights in it is seen as a greater evil than the non-satisfaction of Maori grievances and some alternative method of satisfying those rights will have to be found. This sort of balancing of interests is also found in the Human Rights Commission Act 1977 where two subsections creating offences are followed by twelve subsections exempting certain classes of people.[73]

Piecemeal provisions such as the section excluding Maori seawater fishing rights from restrictions under the Fisheries Act 1908[74] are obviously desirable as far as they go in recognizing prior rights over the land.

The judiciary may not directly apply treaties. If it did so the executive would be allowed to usurp the function of Parliament as law maker.[75] In *Te Heuheu Tukino* v. *Aotea District Maori Land Board,* the leading case on Treaty of Waitangi rights, the Judicial Committee of the Privy Council observed that[76]

> It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts except in so far as they have been incorporated into the municipal law.

The courts do not deny the existence of such rights but are constitutionally unable to prosecute them without Parliament's sanction. They may take international law rights and obligations into account in different ways, however.

In ascertaining public policy, the Ontario High Court in *Re Drummond Wren*[77] first looked to the human rights provisions under the United Nations Charter which the Dominion Parliament had then just ratified. On the basis of the treaty obligations it held a covenant forbidding the sale of land to Jews or persons of objectionable nationality void because it was offensive to the public policy of the jurisdiction. Few may anticipate a New Zealand court using the Treaty of Waitangi to this effect.

Of greater relevance to the force of the Treaty of Waitangi in New Zealand municipal law is the way the courts will interpret statutes so as to be, as far as possible, within the requirements of international law.[78] This presumption stems from a desire that[79] "the Crown in its judicial function does not sleep while in another capacity it watches." The presumption appears strongest where the

73 Human Rights Commission Act 1977, s.15(1) and (2) et seq.
74 Fisheries Act 1908, s.77(2).
75 *Attorney-General (Canada)* v. *Attorney-General (Ontario)* [1937] A.C. 326, 347; *Bitter* v. *Secretary of State for Canada* [1944] 3 D.L.R. 482, 497-498.
76 [1941] A.C. 308, 324.
77 [1945] 4 D.L.R. 674.
78 *Inland Revenue Commissioners* v. *Collco Dealings Ltd* [1960] A.C. 1, 23 per Lord Radcliffe.
79 *Salomon* v. *Commissioners of Customs and Excise* [1967] 2 Q.B. 116, 132 per Diplock, L.J.

statute is plainly intended to carry out the terms of the treaty[80] or the treaty itself provides for legislative enactment.[81] This would mean that section 77 (2) of the Fisheries Act 1908 referring to "Maori fishing rights" may be interpreted with reference to the Treaty of Waitangi but the benefit of that is obscure. The presumption will not derogate from a statute of clear contrary intent[82] and its effect with regards to the Treaty of Waitangi has been minimal. In the case of *Baldick* v. *Jackson*[83] Stout C.J. held inapplicable to New Zealand a statute of Edward II claiming whales as a part of the Royal prerogative. The right to claim whales had not only never been invoked but was held impossible to invoke without doing so against the Maoris who were accustomed to engage in whaling. This was unthinkable because the Treaty of Waitangi assumed that their fishing rights were not to be interfered with and so the statute could not apply to New Zealand. This is the only case where the Treaty has had such a forceful effect.

The low level of judicial recognition of the Treaty is in marked distinction to the American case law which has developed rules so that ambiguous expressions in Indian treaties must be resolved in favour of the Indian parties concerned. Indian treaties must be interpreted as the Indians themselves would have understood them and they must be liberally construed in favour of the Indians.[84]

The Supreme Court has held that[85]

> In carrying out its treaty obligations with the Indian tribes, the government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards.

However the unique position of the Indians, whose tribes have all the powers of sovereign nations except those powers expressly taken by Congress[86] and whose treaties are the supreme law of the land,[87] means that no pejorative comparison can fairly be made with the New Zealand courts' inability to recognize the Treaty of Waitangi.

What should be noted is the legislative creation of a special United States court, the Indian Claims Commission.[88] While the Court of Claims was set up during the Civil War to enable suits to be brought against the government, Indians were expressly prohibited from entering claims and until the creation of the Indian Claims Commission in 1946 their only avenue of relief was to petition Congress to give the Court of Claims a special jurisdiction over their specific case. The 1946 Act enabled claims against the government on behalf of any Indian tribe,

80 *Hogg* v. *Toye & Co.* [1935] Ch. 497, 520.
81 Supra n.79.
82 *London & N.W. Rly. Co.* v. *Evans* [1893] 1 Ch. 16, 27.
83 (1911) 13 G.L.R. 398.
84 C.F. Wilkinson and J.M. Volkman "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows or Grass Grows Upon Earth' — How Long a Time is That? (1975) 63 Calif. L. Rev. 601, 617 and cases there cited.
85 *Seminole Nation* v. *United States* 316 U.S. 286, 296-297 (1941).
86 *Worcester* v. *Georgia* 31 U.S. (6 Pet.) 515, 559 (1832).
87 Idem.
88 25 U.S.C.A. S 70.

band or other identifiable group of American Indians which would otherwise be actionable in the Court of Claims, plus an extended jurisdiction including inter alia[89]

> claims which result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, *mutual or unilateral mistake, whether of law or fact,* or any other ground cognizable by a court of equity.[90]

Whereas only 142 claims had been adjudicated in the Court of Claims under special jurisdictional acts, over 600[91] were lodged within the five years permitted to file claims accruing before the passing of the Act.[92] An appeal lies to the Court of Claims and thence to the Supreme Court by Writ of Certiorari. Otherwise the decision itself, when filed with Congress, authorises the appropriation of the necessary funds.[93] The commission's life was extended five times to enable it to cope with all the claims and terminated in 1978. With several large suits still to be adjudicated it was stated that awards in excess of 800 million dollars had been handed down[94] and it has recently been reported that a total settlement of over 100 million dollars was awarded by the Court of Claims to the Sioux Nation for the Black Hills of South Dakota.[95] This largest ever settlement to American Indians will be reviewed by the Supreme Court[96] but regardless of the result it is clear the United States recognizes an obligation to vindicate its past dealings or ameliorate their consequences so as to fulfil Indian rights.

A state cannot adduce its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force. In New Zealand it remained for the executive branch of government to satisfy as far as it could the rights under the Treaty if sufficient realization of those rights were not accorded by the legislature or judiciary.

III. THE TREATY OF WAITANGI ACT 1975

In the late 1960s and early 1970s Maori agitation at being left out of the decision making process in Maori affairs grew, particularly in reference to the Maori Affairs Amendment Act 1967. The political parties were forced to look at their policies and the Labour Party, with all four Maori seats and probably seeing itself as the party with Maori interests most at heart, produced in quick succession the New Zealand Day Act 1973 (making 6 February a national holiday), a White Paper on Maori Affairs[97] in the form of a draft Bill, and the Treaty of Waitangi Act 1975. A need was seen to acknowledge more fully the Maoris'

89 Ibid, 70a-3.
90 Emphasis added.
91 M.H. Pierce "The Work of the Indian Claims Commission" 63 A.B.A. J. 227, 229 (1977).
92 25 U.S.C.A. 70k.
93 Ibid. 70u.
94 Pierce supra n.90, 299.
95 39 Facts on File, 22 June 1979, 464D.
96 39 Facts on File, December 1979, 988F; (1980) 30 Congressional Quarterly 29.
97 New Zealand Parliament House of Representatives. Appendix to the Journals, Vol. 3, 1975, E.20.

rights to the land and, for example, the White Paper contained provision for the Maori Land Court to recommend, on the application of the minister, that land with historical significance or spiritual or emotional association with the Maori people be set aside as a Maori reservation.[98]

The Labour Party had introduced in its 1972 Election Manifesto a promise to examine practical means of legally acknowledging the principles set out in the Treaty of Waitangi and from that promise sprang the Waitangi Tribunal created under the Treaty of Waitangi Act 1975. The tribunal is a purely recommendatory body which cannot act at its own instigation. It may recommend to the Crown in general or specific terms that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

On its introduction into the House, the Minister of Maori Affairs, the Hon. M. Rata claimed significantly that the Treaty of Waitangi Bill was primarily aimed at satisfying honour.[99] The Opposition immediately took a stand questioning the Bill's ability to achieve its objectives and attacked it as pretentious window dressing which purported to do a great deal more than it would do.[100] Although the Hon. Mrs. Tirikatene-Sullivan defended the Bill, emphasizing the significance of the Treaty to the Maori people in that it recognized rights in their *tangata whenua* status (because of their prior proportional rights to New Zealand) the Hon. M. Rata admitted that while the Bill gave formal and statutory recognition to the terms of the Treaty, it was not suggested that his proposal be the be-all and end-all. It would serve as a basis for discussion.[101]

The Bill was referred to the Maori Affairs Committee and was amended in four respects.[102] Submissions before the Select Committee had questioned the Bill in several areas. Those which did not prompt amendments included submissions criticizing the lack of appeal provisions,[103] the tribunal's inability to review current and proposed legislation on its own initiative[104] and strongest of all, the tribunal's express lack of retrospective jurisidiction.[105] The call for appeal provisions was based on an argument that not only was the tribunal's interpretation of the Treaty of constitutional importance, but its published reports could lead to public debate and conceivably divisiveness within the community. It is noted that the Human Rights Commission,[106] an Ombudsman[107] and the Race Relations

98 Ibid. 21.
99 N.Z. Parliamentary debates Vol. 395, 1974:5725.
100 Ibid. 5726-5727.
101 Ibid. 5728.
102 Added to the Bill were (1) Provision that the appointee of the Minister of Maori Affairs be a Maori, s.4(2)(c); (2) An express negation of jurisdiction over any Bill before Parliament unless a resolution of the House command otherwise, s.6(6)(b); (3) a declaration that the right to petition Parliament remains unaffected, s.9; (4) A clarification of the position regarding counsel before the tribunal, Schedule II, cl. 7. Nothing was deleted.
103 N.Z. Parliamentary debates Vol. 401, 1975; 4344-4345.
104 Ibid. 4498.
105 Ibid. 4344.
106 Human Rights Commission Act 1977, ss.5(1)(d) and 78.
107 Ombudsmen Act 1975, s.23(1).

Conciliator[108] are empowered to make reports in their respective fields which could be just as provocative and divisive, without any right of appeal other than to the Supreme Court in its supervisory role for want of jurisdiction.[109] The constitutional importance of the interpretation is lessened by the fact that exclusive authority to interpret the Treaty rests in the tribunal only for the purposes of the Act[110] although it is clear any authoritative interpretation would stir debate in the community. Although the inclusion of an appeal provision may have given some reassurance, it is submitted that the exclusive interpretative power of the tribunal, chosen presumably for its expertise in Maori affairs and including the Chief Judge of the Maori Land Court, is quite acceptable.

Inability to review legislation on the tribunal's own initiative is a weakness in the Act. There is certainly legislation in breach of the Treaty[111] and more is bound to follow. A power to investigate this legislation and then report by way of recommendation to the mover or proposed mover of a Bill in the case of proposed statutes, or to the Prime Minister in the case of current statutes would be most valuable and would not compromise any party unless legislation were forced through without regard to the Treaty.

The tribunal's express lack of jurisdiction over Bills in the House[112] contrasts sharply with the Human Rights Commission's power to investigate proposed legislation and report to the Prime Minister.[113] The Commission is also directed to work towards and report to the Prime Minister on progress made towards the repeal or amendment of statutory provisions inconsistent with the unlawful discrimination part of the Human Rights Commission Act 1977 and the elimination of discriminatory laws infringing the spirit and intent of that Act.[114]

The biggest reservation concerned the lack of retrospective powers. Because the whole Maori and especially the land problem is bound up with past actions it is hard to see how the Waitangi Tribunal can purport to satisfy Treaty rights when it is not permitted to investigate those actions. The New Zealand Maori Council proposed that the tribunal's jurisdiction should be broadened in this respect to allow investigation of early Maori land rights and their modern implications[115] but that has not yet been effected. When the Bill was passed the Hon. M. Rata stated that 'considerable thought" had gone into the question of retrospective powers but that the government accepted that "at this stage" the complexity of the issues involved precluded it.[116]

108 Race Relations Act 1971, s.28.
109 Human Rights Commission Act 1977, s.75; Race Relations Act 1971, s.19; Ombudsmen Act 1975, s.25.
110 Treaty of Waitangi Act 1975, s.5(2).
111 See H.K. Ngata "The Treaty of Waitangi and Land: Parts of the Current Law in Contravention of the Treaty" *The Treaty of Waitangi: Its Origins and Significance* (Department of University Extension of V.U.W., 1972) 49.
112 Treaty of Waitangi Act 1975. s.6(6)(b).
113 Ibid. s.6(1)(c).
114 Ibid. s.5(1)(e).
115 *Evening Post,* Wednesday 22 March 1978, 15.
116 N.Z. Parliamentary debates Vol. 402, 1975: 5407.

Both debates comprising the Bill's second reading were held after 10.30 p.m. when Parliament was off the air. This was hardly appropriate to the Labour Party's promotion of "a major document of social and political progress,"[117] "a milestone of social and political achievement."[118]

The Bill was passed and the Treaty of Waitangi Act 1975 appeared only a month or so before its champion was replaced in government by the National Party. There was an immediate dilemma. The party which had strenuously attacked the Waitangi Tribunal as window-dressing because of its limited jurisdiction was faced with the option of changing the Act in a display of integrity or setting up the tribunal it had heavily criticized only weeks before. During the passage of the Act it had proposed that the tribunal become one part of a wider human rights commission which would supervise and co-ordinate the work of various specialist tribunals.[119] This seemed to be the course chosen when, a year after the passage of the Treaty of Waitangi Act 1975, the Hon. Duncan MacIntyre, Minister of Maori Affairs said that consideration was being given to meeting the objects of that Act in proposed legislation setting up a human rights commission. It was not contemplated that members would be appointed to the tribunal.[120] The legality of this action is questionable for, although there was no breach of the Treaty of Waitangi Act 1975 (no date for appointment enacted)[121] the action runs perilously close to being an illegal suspension of laws or the execution of laws by regal authority, in breach of the Bill of Rights 1688.[122] The question is important but not to this discussion.

A month later a claim under the Treaty of Waitangi Act 1975 was received and the Minister of Maori Affairs explained that despite his consideration of the possibilities of incorporating the spirit of the tribunal in the proposed human rights commission, the claim meant he would proceed to set up the tribunal.[123]

This could not have stopped the tribunal's inclusion in the human rights commission when that body was established but when introducing the Human Rights Commission Bill to the House, the Hon. David Thomson, Minister for Justice, said that after consideration, it was decided that that was "not the appropriate home for it."[124] Indeed to include it in an Act aimed at promoting human rights under the international covenants would detract from the Treaty of Waitangi's special place in New Zealand law. The tribunal, promoted as a basis for discussion, has been left as it came into the world and a perusal of its two

117 N.Z. Parliamentary debates Vol. 401, 1975: 4343, Hon. M. Rata.
118 N.Z. Parliamentary debates Vol. 402, 1975: 5407, Hon. M. Rata.
119 N.Z. Parliamentary debates Vol. 401, 1975: 4346.
120 N.Z. Parliamentary debates Vol. 406, 1976: 3110.
121 Section 4 of the Act establishes a tribunal with "One person to be appointed by the Governor-General on the recommendation of the Minister of Justice," (S.4(2)(b)) and "One person, being a Maori, to be appointed by the Governor-General on the recommendation of the Minister of Maori Affairs" (s.4(2(c).
122 Article 1 "That the pretended power of suspending of laws or the execution of laws by regal authority without the consent of Parliament is illegal," applies in New Zealand, *Fitzgerald* v. *Muldoon* [1976] 2 N.Z.L.R. 615, 622.
123 N.Z. Parliamentary debates Vol. 407, 1976: 3684-3685.
124 N.Z. Parliamentary debates Vol. 408, 1976: 4690.

reports may shed light on its ability to provide satisfaction for rights arising from the Treaty.

IV. THE TRIBUNAL IN ACTION

In the four years since the Treaty of Waitangi Act 1975 was passed there have been only as many claims filed, which suggests a real lack of faith in the tribunal on the part of the Maori people. As well as the two reported claims, one, a claim relating to the discharge of treated sewage effluent into the Tauranga Harbour was withdrawn before investigation and there is therefore no report. Another involving the discharge of sewage into a river is pending inquiry.

The first claim arose out of the arrest of several Maoris on board a boat laden with a quantity of shell-fish and underwater breathing apparatus contrary to the Fisheries (General) Regulations 1950. It was claimed that the regulations were inconsistent with the principles of the Treaty of Waitangi which guaranteed full, exclusive and undisturbed possession of Maori fisheries.

The tribunal is a commission of inquiry[125] and not a court although it does possess the powers of a District Court in matters such as keeping order at a hearing.[126] It may regulate its own procedure as it thinks fit except as expressly provided in the Act[127] and apparently opted for formal European-style proceedings.[128] There were no speeches of welcome but all were required to stand for the tribunal's entrance. Following bows to counsel the tribunal sat on a stage high above everyone else in the Hotel Intercontinental Ballroom. The claimant, who intended to represent himself, was urged to get a lawyer and eventually the hearing was postponed for two days to allow for this. The claimant was empowered by statute to appear personally or, with leave of the tribunal, by counsel[129] so it is clear that the tribunal chose to regulate itself more in the manner of a court. However Ms. Pierce, a Commissioner of the Indian Claims Commission notes that that Commission adjudicated true cases and controversies litigated in a completely adversary manner. This was justified[130] "Because the Indians wished it and Congress wanted the facts and the law involved in Indian claims against the sovereign to be fully and finally established." The tribunal may have been genuinely concerned that the claimant was not helping himself as much as he might with proper counsel, but an observer pondered[131]

> If the tribunal continues to be run along the lines laid down for the first hearing, then it seems most unlikely that many Maori people will bring claims forward . . . . There is a clear test case here of the extent to which pakehas are prepared to step aside and permit Maori people to stamp their culture upon such proceedings.

125 Treaty of Waitangi Act 1975, Schedule II, cl.8.
126 Commissions of Inquiry Act 1908, s.4.
127 Treaty of Waitangi Act 1975, Schedule II, cl.5(6).
128 D. Williams "A False Start by the Waitangi Tribunal" (1977) 86: 1960 *The N.Z. Listener* 9.
129 Treaty of Waitangi Act 1975, Schedule II, cl.7.
130 Supra n.90, 231.
131 D. Williams. op.cit. supra n.28.

It must be stressed that the tribunal is a purely recommendatory body and its mandate to[132] "inquire into and make recommendations upon . . . any claim submitted" seems in no way to require it to act in the manner of a court. What may be argued is that a formal European fact-finding procedure is a reliable method of achieving what the tribunal sets out to do and should not be disregarded simply because it has developed in only one of the two cultures represented. This carries weight but, it is submitted, should not be used to justify the imposition of extraneous and decorative conventions on a tribunal designed to satisfy Maori rights, especially when one hundred percent of the claimants and at least a third of the tribunal are Maori. It must be pointed out, however, that the first hearing was conducted in a rowdy atmosphere[133] in which much irrelevant material was aired[134] and this may have prompted a defensive and formal position from the Chair. It is unclear whether the second hearing was any more in line with a bi-cultural concept of the proceedings[135] although the time was taken to visit the site in question and spend a day with the people concerned.

Claims are submitted under section 6(1) of the Treaty of Waitangi Act 1975:

> 6. *Jurisdiction of Tribunal to consider claims* — (1) Where any Maori claims that he or any group of Maoris of which he is a member is or is likely to be prejudicially affected —
>
> (a) By any Act, regulations, or Order in Council, for the time being in force; or
>
> (b) By any policy or practice adopted by or on behalf of the Crown and for the time being in force or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
>
> (c) By any act which, after the commencement of this Act, is done or omitted, or is proposed to be done or omitted, by or on behalf of the Crown, —
>
> and that the Act, regulations, or Order in Council, or the policy, practice, or act is inconsistent with the principles of the Treaty, he may submit that claim to the Tribunal under this section.

The first claimants had been discharged without conviction of the offence against the Fisheries (General) Regulations 1950 in the Magistrate's Court under section 42 of the Criminal Justice Act 1954 which, by subsection four of that section, is deemed to be an acquittal. Because the claimants had been discharged it was held impossible factually to allege prejudice or likely prejudice as a consequence of a prosecution under a regulation.[136] However examination reveals that there is a difference between a "dismissal" under section 115(1) of the Summary Proceedings Act 1957 and a "discharge" under section 42(1) so that if nominal costs are awarded against the accused, the whole discharge may be

132 Treaty of Waitangi Act 1975, s.5(1)(a).

133 "The Chairman . . . said he had never witnessed or experienced such a spectacle," D. Williams, op.cit. supra n.28.

134 Report of Findings, March 1978, para. 17.

135 "[T]o be effective the Tribunal must develop procedures that permit the Maori people to express themselves in their customary way. This in fact occurred in the second hearing where the blend of the two cultures enriched the proceedings," Letter to the editor by Peter Horsley, counsel for the claimant in the second hearing, (1977) 86: 1965 *The N.Z. Listener* 10; "Nothing had changed," D. Williams, op.cit. supra n.28.

136 Report of Findings, March 1978, para. 8.

appealed against.[137] Wild C.J. held in *S.* v. *Police*[138] that where there was no order for costs, there could be no appeal. A discharge[139]

> is not a dismissal of the charge and it may well leave some stigma attaching to the defendant. It may indeed be thought anomalous that the imposition of a nominal sum of costs should make the difference between a defendant's having the right to appeal and his being obliged to accept without challenge a Magistrate's pronouncement that the charge against him is proved together with whatever remarks may be added in discharging him . . . . [This] may well merit the attention of the legislature.

The courts are aware that whatever it be deemed, a discharge is considerably less than an acquittal. The tribunal, on the other hand, found that the discharge rendered impossible any allegation of prejudice or likely prejudice and so had "no hesitation" in finding the claim unfounded on that point.

The claimant further contended that the regulations imposed restrictions on food gathering from the sea or seashore by both Maori and Pakeha, and that they discriminated against the Maori in that they ignored the fishing rights guaranteed him by the Treaty of Waitangi. The English version of the Treaty guarantees "full, exclusive and undisturbed possession" of Maori "fisheries" and the regulations impose restrictions on that possession. The Maori version guarantees the[140] "full possession of their lands, their villages, and all their possessions". The tribunal was informed there was no conflict in the two versions and did not give any finding on that count, presumably because the claim was held to be outside its jurisdiction. While admitting that the restrictions imposed by the regulation were per se inconsistent with the guarantee of Article the Second, Treaty of Waitangi, the tribunal satisfied itself that[141] "there was no prejudice to be found in the Fisheries (General) Regulations 1950 because there was no evidence to show that the regulation had been interpreted in any prejudicial manner."

But is this approach correct? The statute requires that

(1) The claimant be (or be likely to be) "affected" by the regulation; and
(2) He be affected "prejudicially"; and
(3) The affecting Act, decision, etc., is inconsistent with the principles of the Treaty of Waitangi.

Although the tribunal is not a court, interpretation of its statutory jurisdiction is a question of law determinable in the High Court and so it is appropriate to look at the legal treatment of the first two requirements.

"Affected" was declared in *Re Buckinghamshire County Council and Hertfordshire County Council*[142] "not a word of art but a word of ordinary English" capable of a very large meaning. The word was used in a compensation provision

137 *Smith* v. *Wellington City* [1968] N.Z.L.R. 636, 638; [1968] N.Z.L.R. 730.
138 [1968] N.Z.L.R. 798.
139 Ibid. 800.
140 Translation of Prof. J. Rutherford, reprinted in *The Treaty of Waitangi: Its Origins and Significance,* supra n.17, 2.
141 Report of Findings, March 1978, para. 14.
142 [1899] 1 Q.B. 515, 520.

where a local body's income was "affected" by the removal of two parishes from its territory and Willis J. observed that[143]

> The very object of the section was to enable that to be done which under the circumstances should be just and reasonable, and I cannot see why we should give effect to minute verbal criticism [of "affected"] in order not to further but to defeat that end.

A similarly broad interpretation was placed on "affects" by the High Court of Australia in *Shanks* v. *Shanks*[144] when it was held that a decree dismissing a petition for the dissolution of marriage is a judgment which "affects" the status of a person under the laws relating to divorce. The whole court agreed explicitly or implicitly on this interpretation that "affects"[145] "is a synonym for touching or relating to, or concerning." The English Court of Appeal understands a narrower interpretation of "affected" which is[146] " 'influenced', 'altered', 'shaped' " but even in the sense of "altered" the claimants were clearly "affected" in that their freedom of action was restricted in the public interest. The claimants were "affected" by the regulations which "altered" their right to fish.

"Affected" was used as a standing requirement in section 38A of the Town and Country Planning Act 1953, inter alia, and was there interpreted widely[147] in accordance with *Re Buckinghamshire County Council.* The Court of Appeal approved the rule that "affected" in the Act means "appreciably affected"[148] however the reason for this may be traced to the principle de minimis non curat lex.[149] It is noted in Halsbury's *Laws of England*[150] that the maxim does not apply where a person's right is infringed, so an action to assert a right may be maintained although there is no appreciable damage. If the basis of the "appreciably affected" interpretation does not apply in a common law court where a common law right is infringed then nor should "affected" be judicially narrowed here where an international law right is infringed. It is submitted that the ordinary meaning of "affected" (as in *Shanks* v. *Shanks*)[151] applies, enacted to restrict activists from lodging claims they were not privy to, to get parties before the tribunal who are able to present their case from a background of knowledge and interest and to ensure that those most affected are involved in the process of vindicating their rights.

"Prejudicially" means "detrimentally" but its strength may be gauged by the legal interpretation of "prejudice" which goes nowhere near requiring actual damage or loss.[152]

143 Idem.
144 (1942) 65 C.L.R. 334.
145 Ibid. 337 per McTiernan, J.
146 *Re Bluston deceased* [1967] Ch. 615, 633 per Winn, L.J.
147 *Blencraft* v. *Fletcher Development Co.* [1974] 1 N.Z.L.R. 295, 310.
148 *Rogers* v. *Special Town and Country Planning Appeal Board* [1973] 1 N.Z.L.R., 529, 532 and 538.
149 *Evans* v. *Town and Country Planning Appeal Board* [1963] N.Z.L.R. 244, 248.
150 (3rd ed.) Vol. 1, para, 17: also *Constantine* v. *Imperial Hotels Ltd.* [1944] 1 K.B 693, 708.
151 (1942) 65 C.L.R. 334, 337.
152 *Re Medical Battery Co.* [1894] 1 Ch. 444, 449.

The tribunal applied its narrower interpretation and found itself without jurisdiction because as well as no conviction[153] "there was no evidence to show that the regulations had been interpreted in any prejudicial manner", and so it did not come to any conclusion on the merits of the case.

The second inquiry centered around the New Zealand Electricity Department's proposal to construct a 1400 MW power station on a site close to the Waiau Pa on the Manukau Harbour. The Waitangi Tribunal found the claim in this case was well-founded but noted that between the hearing and the issuing of its report, the government stated it was not proceeding with the proposal. The tribunal reports anyway but does not pursue its intended and extremely important function to determine the meaning and effect of the Treaty[154] and continues with its narrow interpretation of "prejudicially affected". The procedure is legally sound (except that "prejudicially affected" on the authorities may not be as narrow as the Waitangi Tribunal considers), but must be disappointing for those champions of the tribunal who had hoped that in practice it would dispel the criticism of impotence made at its inception.[155]

After many pages of environmental discussion the tribunal finds that the construction of cooling ponds to service the power station would create a serious "prejudice" to those using the area for fishing purposes, that the alternative programme involving cooling towers could cause prejudice and because of the importance of the area with respect to fishing and fish life the likelihood of "prejudice" must be seen in the light of there being no detailed evidence to the contrary. The tribunal may seek to assert a "prejudice" when the statute requires the claimant to be or be likely to be "prejudicially affected" for ease of syntax but it apparently sees the requirements of the statute to be more stringent than an ordinary interpretation would demand. The report could well have issued from an environmental body and although the Treaty is mentioned in passing many times and is partially cited there is very little light shed on its meaning and effect.

The tribunal declined to make any recommendation, given the government's withdrawal of the proposal. This is good legal procedure in a court but the weakness of the Waitangi Tribunal when compared with the Human Rights Commission is revealed. The commission's power to publicly report its proceedings has been mentioned[156] and in a similar case where governmental reconsideration effectively disposed of the claim, the commission went on to state its proposed action, had the government proceeded with its restriction on the political activities of a South African scholar in New Zealand.[157] The commission was precluded by statute from making any comment adverse to a person who had not had an opportunity to be heard[158] and because the government had acted before both parties were heard it could present no conclusions in the matter. It stated, however,

153 Report of Findings, March 1978, para. 14.
154 Preamble, Treaty of Waitangi Act 1975 (assists in explaining the object of the Act, Acts Interpretation Act 1924, s.5(e)).
155 E.g. the Hon. Mr. Reweti, N Z. Parliamentary debates Vol. 401, 1975: 4500.
156 Ante, p. 31.
157 [1979] N.Z.L.J. 365, 368.
158 Human Rights Commission Act 1977, s.78(2).

that on the basis of available information it considered the government's removal of the restrictions the right course of action and described the role of the commission in the affair with special emphasis on the availability of redress for all concerned citizens where convenants binding in international law are breached. The commission regards as an important task formulation of the principles on which the Human Rights Commission Act will be developed.[159]

In contrast, the Waitangi Tribunal observed that[160]

> Were the tribunal to proceed with a recommendation it would be necessary for it to resolve the law in a number of areas. These include particularly the question revolving around whether or not customary fishing rights have been extinguished since 1840.

Now[161] . . .

> The Tribunal is satisfied that a conclusion can be reached on the law but in view of the Government's decision not to proceed with its project at Waiau Pa, the Tribunal believes that this is not the case for it to express its view on the law, particularly when the facts are such that for the purposes of making a report, apart altogether from any recommendation, recourse to the current state of the law is unnecessary.

This reluctance to make a positive contribution to the implementation of Maori rights is no doubt largely prompted by the restrictive terms of the Treaty of Waitangi Act and it is clear that the tribunal does not regard itself as an instrument of change in the way that the Human Rights Commission does, for instance. Ms. Pierce of the Indian Claims Commission enthusiastically records the Indian satisfaction from knowing that their story is being told accurately, completely and without bias.[162] The commission's records were to be delivered to the Archivist of the United States on dissolution[163] so that the identity of the American Indian and his important place in American and his own history will have been established, documented and will never be forgotten. This "judicial" body is fully aware of the social benefits accruing from the fullest extension of its role.

V. CONCLUSION

The Waitangi Tribunal is a legitimate means by which the executive may satisfy Maori rights under the Treaty of Waitangi, but if it is to be regarded as more than window-dressing then it must exercise a broader range of powers. Much reform, as indicated, is possible within the existing structure as the tribunal could become more Maori oriented, and should, it is submitted, interpret its jurisdictional limitations more liberally to allow it to consider claims on their merits. However it must also be given the power to review current and proposed legislation on its own initiative and especially the power to consider retrospective claims. With nearly half the Maori population under fifteen years of age[164] Maori rights can only become more important and past injustices will become the foci of dissatisfaction rather than forgotten history. The Treaty which evidences

159 Annual Report of the Human Rights Commission, 1979, 4.
160 Report of Findings, February 1978, p.18.
161 Ibid. 19.
162 Pierce supra, n.90, 232.
163 25 U.S.C.A. 70v.
164 New Zealand Official Yearbook 1979, 65. Actual proportion 45.3%.

the Maoris' prior title to New Zealand on a formal legal plane must be assessed as involving a more onerous obligation than that currently recognised by the government. The Waitangi Tribunal has potential and if it were given a voice to speak in the community on matters pertaining to the Treaty of Waitangi in the manner of the Human Rights Commission and the Race Relations Concilliator, then it could become a dynamic means of implementing rights and fulfilling obligations arising from the Treaty of Waitangi. Whether that will ever be remains to be seen.

APPENDIX

THE TREATY OF WAITANGI

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands — Her Majesty therefore being desirous to established a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

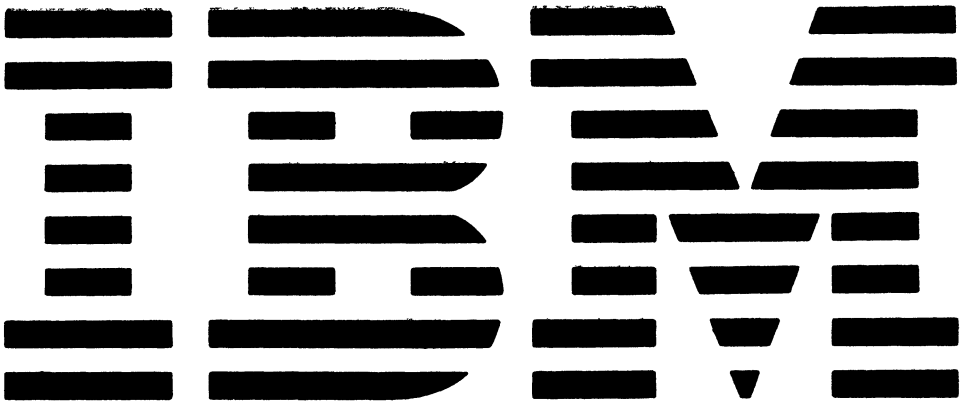
Article the Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[Here follow signatures, dates, etc.]



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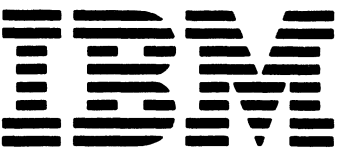

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