

**The Incorporation of the Treaty of
Waitangi into Municipal Law.***

by

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The purpose of this paper is to establish that the Treaty of Waitangi was a treaty of cession and being such a treaty was in no need of ratification or of being incorporated into municipal law. It is my submission that in spite of a lack of judicial recognition this Treaty can be relied on in a court of law.

To establish that the Treaty was a treaty of cession the four constituent elements necessary to such a treaty must be identified. These, according to Schwarzenbarger,¹ are: (i) international personality; (ii) intention to act under international law; (iii) *consensus ad idem*; (iv) intention to create legal and not merely moral obligations.

According to Malloy,² the basic requirement of international law for the validity of such a treaty is the full capacity of the parties. The only basis on which the validity of the Treaty can rest, therefore, is that the Maori signatories were possessed of the characteristics essential to international legal personality. These characteristics are set out in Article 1 of the Montevideo Convention on Rights and Duties of States 1933.³ These requirements are: (i) a permanent population; (ii) a defined territory; (iii) a government to which the mass of the population renders habitual obedience; (iv) independence. Malloy is in doubt only as to the third criterion. I shall return to this criterion shortly and deal with it at some length.

¹ Schwarzenbarger, *A Manual of International Law*, (5th ed. 1967), 151.

² Malloy, "The Treaty of Waitangi" [1971] N.Z.L.J. 193.

³ Brownlie, *Principles of International Law* (1966), 66.

There has been obvious doubt about the third of Schwarzenbarger's requirements: *consensus ad idem*. Kawharu,⁴ Sir Apirana Ngata,⁵ McIntyre and Gardner,⁶ and Adams,⁷ all point to the differences in language between the English and Maori texts. Kawharu instances the fact that in the Maori version of the treaty, "sovereignty" and "protection" were represented by a word coined for the purpose, *Kawana-tanga*, which translates as "governship". Kawharu questions the necessity for this because⁸ ". . . the Maori already had some well tried notions about political organisation, rank and responsibility". He explains that the word *rangatira* is equivalent to chief and *ariki* to paramount chief and that the Maori would have understood the significance of *rangatira-tanga* or *arikitanga*: the exercise of kingly powers. Kawharu doubts whether they would have understood the significance of government by the Queen of England as conveyed to them by the word *kawana-tanga*. Further, Kawharu points to the fact that in the second article of the Treaty, the Maoris' "possession" of land, villages and all property was simply translated by the familiar *rangatiratanga*. The Maori understood that this *rangatiratanga* was to continue guaranteed and undisturbed. As Kawharu explains, whilst they had little idea of what they were giving away, *kawanatanga*, they did have very clear ideas about what they were not giving away, *rangatira-tanga*. Kawharu states that it was the Maoris' misfortune that they failed to see that the first would have to supersede the second and assumes that if *rangatiratanga* had been used instead of *kawanatanga* the Treaty would not have been signed.

It is important to note, however, that different words are used in the English text. "Sovereignty" and "protection" are used in the first and third articles, and "possession" in the second. The text would surely have been incomprehensible otherwise. It is my submission that the Treaty cannot be attacked on this ground. Such was the promise to the Maori people: possession was to be retained, governship was to be surrendered. Such was the way the Honourable Sir Apirana Ngata understood it: the soil remained with the Maoris, the Queen merely acquired the shadow. Such was the tragedy of the Treaty: the promise was not kept.

Neither Schwarzenbarger nor Starke⁹ would have considered the longitudinal error sufficient to render the treaty invalid. There have been constitutional doubts as to independence. Foden¹⁰ could be con-

⁴ Kawharu, *Maori Land Tenure* (1977), 5-6.

⁵ Ngata, *Te Tiriti o Waitangi* (1922).

⁶ McIntyre & Gardner, *Speeches and Documents on New Zealand History* (1971).

⁷ Adams *Fatal Necessity* (1971).

⁸ Kawharu, *op. cit.*

⁹ Starke, *An Introduction to International Law* (1972).

¹⁰ Foden, *Constitutional Development in New Zealand, 1839-45* (1939).

strued as suggesting that the Maoris were not an independent sovereign state despite the passing of three statutes, e.g. St. Geo. 3. C. 53, specifically denying that New Zealand was within the Crown's dominions.

There can be no doubt as to the permanent population and the defined territory, despite dicta to that effect in *Wi Parata v. Bishop of Wellington*,¹¹ and Lord Normanby's dispatch to Captain Hobson.^{11a} Stout C. J. in *Tamihana Korokai v. Solicitor General*,¹² states that all the old authorities are agreed that for every part of land there was a native owner. This judge cites Bishop Selwyn and Sir William Martin as authorities for this proposition, the latter saying¹³:

So far as yet appears, the whole surface of the Islands, or as much of it as is of any value to man, has been appropriated by the Natives and, with the exception of the part which they have sold, is held by them as property.

It is my submission that there can be no doubt that all four criteria established by international law have been fulfilled and that the Treaty is therefore valid. I shall now endeavour to establish that the Maoris had a civil government, a settled system of law and were capable of performing the duties and therefore of assuming the rights, of a civilized community. I shall then demonstrate that ratification is unnecessary. I shall finally look at case law.

Levi-Straus, a noted French anthropologist and philosopher, after looking at the structures of all societies and recognising the same structure in each, denies the basis for any notion of primitivity.¹⁴ It was his thesis that there could be no notion of superiority or inferiority: the same structure can be seen in any society. In the following discussion I shall attempt to present Maori culture as it was. It is my submission that the Maori is and was capable of fulfilling the third criterion necessary for acceptance into the family of nations.

I take a look first of all at the systems of land ownership as evolved by the Maori. It is immediately apparent that, in this particular sphere, he is centuries ahead of the European. It is interesting to note, and this is a classic example of Levi-Straussian structuralism, that the ability in the Maori to revive a claim to land, *ahika*, has its equivalent in Roman law: *scintillula juris*. What is the *ahikamateoteo* other than the French/English doctrine of *laches*? The English have but recently developed the legally convenient half-way house;¹⁵ the Maori have always had one: *ahitere*: the ability in the grandchildren at the beginning of the third generation to make a claim to land and so prevent the

¹¹ (1877) 3 N.Z. Jur. 72, 77.

^{11a} 14th August 1839.

¹² (1913) 32 N.Z.L.R. 321.

¹³ *Supra*, at 340.

¹⁴ Levi-Straus, *Tristes Tropiques* (1955).

¹⁵ *R v. Strawbridge* [1970] N.Z.L.R. 909.

operation of *ahikamateoteo*.

The English test for ownership of land is possession—there is no obligation to use the land. This latter, the *nohohotutura* test, is the touchstone of Maori ownership of land. Prendergast C. J. in *Wi Parata v. Bishop of Wellington*¹⁶ took exception to such a test: it was as if they belonged to the land and not the land to them. The French philosopher, scientist and theologian, Teilhard de Chardin¹⁷ believed that spirit existed in matter. What are the Maoris expressing if not the epitome of French philosophical thought in the 1950s? The Maori believes that in dying he returns to the womb: *Tane*. Becket, an English philosopher and novelist domiciled in France, had in his character, Molloy, in the novel of that name, a person who in old age, resought the womb: a wandering to find home: an English/French version of the legend of *Tanematua*.

The Maori recognised four methods of acquiring land: *take kite* (discovery), *take raupata* (conquest), *take tupuna* (heredity), (it is important to note, this was by way of cognatic descent, through the female line) and *take tuku* (gift). It is axiomatic that none of these modes of acquisition of land was sufficient in itself to establish a right to the land: this mode of acquisition had to be accompanied by occupation and use, the *nohohotutura* test. It is interesting to note that as late as the 19th century the Europeans were still in doubt as to whether occupation was necessary. In 1826, the British Commissioners, Huskisson and Addington, during the Conference on the Oregon Question between the Commissioners of Great Britain and those of the United States of America made the following pronouncement¹⁸:

Upon the question of how far prior discovery constitutes a legal claim to sovereignty, the Law of Nations is somewhat vague and undefined. It is, however, admitted, by the most approved writers, that mere accidental discovery, unattended by exploration—by formally taking possession in the name of the discoverer's sovereign—by occupation and settlement, more or less permanent, by purchase of territory, or receiving the sovereignty from the natives—constitutes the lowest degree of title; and that it is only in proportion as first discovery is followed by any or all of these acts that such title is strengthened and confirmed.

It is also important to note that the Maori has embodied in his customary law a far stricter code of conservation than any of the Litter or Soil and Conservation Acts the European has enacted. This was the concept of *rahui*: the protection of daughter of life, of mother earth.

Tapu, it has been said, is to the Maori what civil law is to the European.¹⁹ Ignorance was no excuse for the breach of it. The word *tapu*

¹⁶ *Supra*.

¹⁷ De Chardin, *Le Phénomène Humain* (1955).

¹⁸ Foden, *New Zealand Legal History* (1965), 5.

¹⁹ Johannes Anderson, "Maori Religion" vol. 49, *Journal of Polynesian Society*, 517.

has been compared to the negative imperatives of the commandments: a fishing ground rendered *tapu* could be used by no-one until the *tapu* was removed and a sign (*rahu*) would usually be erected at or near the ground to serve as a warning, a warning far more rigorous than the European, "Trespassers will be prosecuted".

It is respectfully submitted that Prendergast C. J. had little excuse in *Wi Parata v. Bishop of Wellington*²⁰ for not bothering to inform himself of the Maori civil code; and similarly neither had Molloy²¹ in 1971, to follow this uninformed judgment. Such blindness bears the taint of "British is best" and "White is right". Later in this paper I shall demonstrate the very limited effect in law of this unfortunate judgment.

Gudgeon²² describes perhaps the purest form of democracy this earth has ever seen and is ever likely to see: the *ariki*, the high-born Maori, the aristocrat, was not an autocrat. Any influence that he might exercise was allowed by the people and was not assumed by right of birth.

Law has given to the English words "interest", "land" and "negligence", an extended meaning. The word *mana*, has the following meanings: "to fulfil"; "potent"; "effective"; "granted"; "support". With the addition of the suffix *ki*, (*manaki*) it takes on two more meanings: "acceptable" and "like". *Manu* is the Maori word for bird. Raymond Firth²³ has said that *manu* is used as synonymous with *mana*, no difference in meaning appearing in their use, no difference in meaning being recognised by the users. How is this divorced from the Christian depiction of the spirit as a dove? At St Mary's Church, Onewa Road, Northcote, a white dove is suspended above the altar. Below is the latin inscription: *veni sancte spiritu*.

Birds figure in many mythologies and religions: Egyptian, Greek, and Hindu besides. When a new pa of importance was opened with religious ceremonies, two *tohunga* took their stance at two corners of the defences, each holding a captive bird in his hand. A certain formula was intoned, and on the completion of the words the birds were liberated and allowed to fly away. The act was said to be a symbolic communication to the gods that the supplicants craved for the new pa such prosperity and welfare as was represented in the release and freedom of the birds. Elsdon Best²⁴ instances similar customs among other peoples:

In Morgan's work on the Iroquois he tells us that in the funeral rite of that people a bird was set free on the eve of the burial in order to carry away the soul of the dead.

²⁰ *Supra*.

²¹ *Loc. cit.*

²² Gudgeon, *The History and Doings of the Maoris*, (1885), 217-225.

²³ Firth, *The Work of the Gods in Tikapia* vol. ii (1940), 212-3.

²⁴ Best, "Maori Religion and Mythology" (1924) *Dominion Museum Bulletin*, 10, 38.

Max Muller, in his *Anthropological Religion*, explains yet another illustration of this quaint custom. When a certain ceremony is being performed in India in connection with an image of Kali or Durga, that image is allowed to sink in the waters of the sacred river just as the sun is setting. At the same time, the beautiful Indian jay, is released from a cage to fly away to Siva to tell him that his beloved Kali (Durga) is coming back to him.

In all these instances the bird is considered as a direct envoy from mortal to deity.

In Greek mythology the *atu* (manifestation) of Psyche was a butterfly; she is the symbol of the soul, and when a man had just expired a butterfly appeared hovering above his face as if it had just fluttered from his lips. A Maori explained to Elsdon Best²⁵ that certain moths were regarded as being *te wairua no te kehua*—the souls of ghosts.

Johannes Anderson²⁶ explains that there were two religions in Maoridom: there was more than the pantheon of deified nature powers and ancestors; there was more than a placating of *atua* by *karakia* (incantations). These deities appear to have been the pantheon of a secondary religion: a religion known to and understood by the ordinary class of people, “whose intellect or imagination were unable to soar loftily or apprehend profoundly; and that was the one gathered by the Pakehas endowed with like intellect and imagination”.²⁷ But there was besides this, an esoteric, a higher teaching, imparted to only the few, the select, the *ariki* who were able to pass the tests qualifying them to be taught the higher teaching of the old Maori school of learning, the *whare wananga*. This higher teaching was so *tapu*, the word here meaning sacred in its highest sense, that very few Pakehas ever heard of it. As I have already stated the high-born Maori, the *ariki*, was an aristocrat; the aristocrat was not likely to hold intellectual commerce with a plebian such as was the early trader and adventurer, or with an antagonist such as were the early reformers, and his knowledge died with him. Some of the fragments rescued, however, give glimpses of his thought, his philosophy.

We frequently use the words “body”, “soul”, and “spirit”, but how many of us are able to define the difference between soul and spirit? The Maori distinguished them clearly. The soul, *wairua*, leaves the body at death and the soul is visible to those endowed with second sight, the *matakite* of the Maori. (The Maori, too, was well acquainted with E.S.P. No less a scholar than Arthur Koestler²⁸ has but recently rendered such practice acceptable to the European mind.) The *wairua* may also leave the body during sleep and wander about, the remembrance of that wandering constituting a dream. After the

²⁵ *Idem.*

²⁶ *Op. cit.*

²⁷ *Ibid.*

²⁸ Arthur Koestler was greatly influenced by Tedhard de Chardin.

death of the body, the *wairua* may wander for a time and may be seen as a ghost; but it dies a second death, shedding from it what of the earthly remains. After that shedding, it can no longer be seen, even by the *matakite*: it is now the *awe*, which, whilst it cannot be seen, may be felt. The *awe* is the spirit.

The religion or philosophy taught in the *whare wananga* (it can be compared to that select body of theologians whose utterances are too esoteric for us lesser mortals) taught that there was a deity above all those of the ordinary pantheon; a supreme deity, a spirit permeating all things but confined to none, a *spirit creating all things but himself uncreated*—(About whose God are we speaking now?)—Io the parent, Io the parentless, Io of the hidden face. The name might not be uttered except in the open air, under the purity of the skies; (Thou shalt not takest my name in vain); and there are fragments known of invocations addressed to him, fragments of cosmogonic myths that reveal a philosophy and a concept of life and deity in no respect any different from that evolved by the so-called most advanced peoples. The name and idea is not only Maori but Polynesian, seeming to link up with other forms of the name occurring even more widely from the Pacific—Io, Iah, Jehovah, Zeus, Jupiter, Dyaus—pitar.

Best has written²⁹:

It may be thought that this concept of a Supreme Being is but a result of Christian thinking, but on close examination this idea must be abandoned . . . a considerable amount of the ritual pertaining to this cult has been preserved, ritual formulae and invocations to Io. . . . All this matter is couched in exceedingly archaic language, and it is impossible to believe that it has all been composed during later years. Also, all the matter pertaining to Io published, in the volume mentioned, can scarcely have been recently "invented". Had this concept been based on Christian teachings it would undoubtedly show the influence of such teachings, which it assuredly does not. There would have been some analogies or some rendering of the old Scriptural myths. . . . The welfare of all things in all realms emanates from and depends upon Io. The life principle and welfare of everything emanates from him. The whole system of practices, as well as the archaic ritual, seem to bear the impress of antiquity, and it seems highly improbable that such a cult was ever evolved in any of the isles of Polynesia. If such is the case, then it must have been brought from the homeland of the race, wherever that may be. In Vol. 27 of the Journal of the Polynesian Society, p.95, appears an extract from Renan's *History of the People of Israel*, as follows: 'It is very possible that the long history of religion which, starting from the nomad's tent, has resulted in Christianity or Islamism, derives from primitive Assyria, or Arcadian Assyria, as it is called, another element of capital importance,—that is, the name of Iahove or Iahuch.' After discussing the origin and its variations, he goes on to say: 'The holy name became contracted to Iahou or Io. . . .'

It ill befits the member of any race to praise or condemn any other race. I have attempted to present the Maori Culture as it was. In doing so, I hope I have portrayed a structure to society in harmony with Levi Straus' thesis and in so doing capable of fulfilling the third criterion for statehood.

I have now to discuss ratification and incorporation. As I have

²⁹ Best, *loc. cit.*, 38.

already stated and as I shall show, case law considers incorporation essential before any treaty can be relied on in municipal law. It is my submission that incorporation is unnecessary.

The *locus classicus* of the status of treaties in the domestic law of Commonwealth countries is Lord Atkin's judgment in *Attorney General for Canada v. Attorney General for Ontario*³⁰:

It will be essential to keep in mind the distinction between (i) the formation, and (ii) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, *if they entail alteration of the existing domestic law*, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the empire, by virtue of the treaty alone, have the force of law. . . .

So Myers C. J. in *Te Heuheu Tukino v. Aotea District Maori Land Board*³¹ said:

A treaty only becomes enforceable as part of the municipal law if and when it is made so by legislative authority and that has not been done in the case of the Treaty of Waitangi, although the Treaty has in certain ways received legislative recognition.

One exception to this requirement is implied in the *Ontario* case: if they entail alteration of the existing domestic law.³² A further exception is that noted by Keith³³ in his essay in the A. G. Davis Memorial Essays. It was held in a number of cases that New Zealand, by virtue of accepting a mandate—held by the International Court to be a treaty—had full power to legislate over the territory of Samoa. This territory, however, did not come under New Zealand sovereignty and was not, at domestic law, part of New Zealand. The difficulty here was that before 1947 New Zealand had no jurisdiction to enact territorial legislation. The British Government was therefore asked to have an Order made under the Foreign Jurisdiction Act 1890 (UK) empowering New Zealand to enact such legislation. Such Order was duly made.

In *re Tamasese*³⁴ Blair J. held the view that the legislative authority came from the mandate³⁵:

The fullest plenary powers left the league and were not restricted on their way to New Zealand.

In *Nelson v. Braisby*³⁶ Myers C. J., Blair and Reed J. J. followed the decision in *Tagaloa v. Inspector of Police*³⁷ that the powers came either from the mandate or the Order-in-Council. Herdman J.³⁸

³⁰ [1937] A.C. 326, at 347-348.

³¹ [1939] N.Z.L.R. 107, at 120.

³² *Supra*, at 347-378.

³³ Keith, "International Law and New Zealand Municipal Law", *The A. G. Davis Essays in Law* (1968) 130, at 145-146.

³⁴ [1929] N.Z.L.R. 209.

³⁵ *Supra*, at 215.

³⁶ [1934] N.Z.L.R. 559.

³⁷ [1927] N.Z.L.R. 883.

³⁸ *Nelson v. Braisby*, *supra*.

agreed likewise without, it would seem, specific reliance on *Tagaloa*. As Keith³⁹ notes, this possible exception is now of no moment. It was merely Keith's intention to show that the principle that treaties do not alter the law of the land unless incorporated by legislation, may not be impregnable.

Mann⁴⁰ gives three other examples of where a treaty which has not been given statutory effect may be relevant to a decision given in a municipal Court:

- (i) It may be expressive of a rule of customary international law;
- (ii) It may constitute a head of public policy;
- (iii) The treaty itself may afford a cause of action in contract.

In *re Kauwarenga*⁴¹ it was held that the Treaty gave rise to contractual rights enforceable by the Maoris against the Crown. And in *Wallis v. Solicitor General*⁴² the Privy Council held that as the law stood in 1848,⁴³ "under the Treaty of Waitangi the Chiefs and tribes of New Zealand, and the respective families thereof, were guaranteed certain rights." Thus it is clear that the principle that treaties are ineffective unless incorporated into the law of the land is not without exceptions.

Starke⁴⁴ doubts, in any event, the need for ratification. If the treaty is not subject to ratification, acceptance, or approval, *or is silent on the point*, the better opinion is that, in the absence of contrary provision, the instrument is binding as from signature. (Note that the Treaty of Waitangi *was* silent on the point and there was *no* contrary provision). The ground for this opinion is that it has become an almost invariable practice where a treaty is to be ratified, accepted or approved, to insert a clause making provision to this effect, and where such provision is absent the treaty may be presumed to operate on signature.

Starke goes on to say that at one time ratification was regarded as so necessary that without it a treaty should be deemed ineffective. This point was referred to by Lord Stowell⁴⁵:

According to the practice now prevailing, a subsequent ratification is essentially necessary and a strong confirmation of the truth of the position is that *there is hardly a modern treaty in which it is not* (my emphasis) *expressly so stipulated*; and therefore it is now to be presumed that the powers of pleni-potentiaries are limited by the condition of a subsequent ratification.

If the practice was so common, why was there not an express stipulation to that effect in the Treaty of Waitangi? It is my submission that those responsible for the Treaty both the British and the Maoris, both

³⁹ Keith, *loc. cit.*, 145-146.

⁴⁰ Mann, *Studies in International Law* (1973).

⁴¹ Unrep., noted in *re Ninety Mile Beach* [1936] N.Z.L.R. 461, at 464.

⁴² [1903] A.C. 173.

⁴³ *Supra*, at 179.

⁴⁴ Starke, *Op. cit.*, 416-418.

⁴⁵ *The Eliza Ann* (1813) 1 Dods. 244, at 248.

high contracting parties, regarded this as a treaty of cession and so unnecessary of ratification and therefore operable from signature. Starke makes this very pertinent comment⁴⁶:

The power of refusing ratification is deemed to be inherent in State sovereignty, and accordingly at international law there is neither a legal nor a moral duty to ratify a treaty.

Lawrence reiterates this point⁴⁷:

Ratification is a formal ceremony whereby, some time after a treaty has been signed, solemn confirmations of it are exchanged by the contrasting parties. . . . To this rule treaties of cession are an exception; for it is undoubted law that they commence to operate from the time of the actual transfer of the ceded territory.

Since treaties of cession can be made only between sovereign states: those capable of ceding sovereignty (and I have already attempted to establish the Maoris capacity in this area), to speak of incorporation begs the question. There can be no question of any alteration in the existing law: there is (and there was as I have clearly established in the case of the Maoris) a pre-existing system of law. That such a pre-existing system of law was recognised at law I shall later demonstrate.

Before leaving this area I have to deal with conflicting authority. Robson⁴⁸ and Foden⁴⁹ are emphatic that the sovereignty of New Zealand was acquired by settlement rather than cession. Elizabeth Evatt⁵⁰ in her article makes the simple assertion that the circumstances surrounding the annexation of Australia and New Zealand were sufficiently dissimilar to imply different modes of annexation. Hookey,⁵¹ in a closely reasoned article, states that there are sufficient dicta in all the decided Commonwealth cases (he was referring in particular to the decision of Bradburn J. in *Millirpum v. Nabalco*⁵²) for a native to found his rights to the land, whether the territory was acquired by settlement or by cession. It is unfortunately beyond the scope of this paper to look further at this writer's interesting arguments.

I find it difficult to accept the argument of Foden.⁵³ It is his assumption that Britain acquired the sovereignty of New Zealand by virtue of settlement followed by occupation under the Letters Patent of 15th June, 1839. The words of that document empowered the Governor of New South Wales to extend the territory to "any territory which *is or may be* acquired by Her Majesty, Her Heirs or successors, within that group of Islands in the Pacific Ocean commonly called New Zealand lying between the latitude of 34 degrees 30

⁴⁶ Starke, *Op. cit.*, 420.

⁴⁷ Lawrence, *The Principles of International Law* (1966), 324.

⁴⁸ Robson, *The British Commonwealth: New Zealand* (2nd Ed. 1967).

⁴⁹ Foden, *op. cit.*

⁵⁰ Evatt, "The Acquisition of Territory in Australia and New Zealand", *The Croation Society Paper 1968*. ed. Alexandrel.

⁵¹ Hookey, "The Gove Lands Rights Case: A Judicial Dispensation for the taking of Aboriginal Lands in Australia", *S. F. L. Review*, 85.

⁵² (1970) 17 F.L.R. 141.

⁵³ Foden, *Op. cit.*, 11-12.

minutes and 47 degrees 10 minutes south of 106 degrees 5 minutes and 149 degrees east longitude". Foden confesses to difficulty in construing this document but arrives at his conclusion by concentrating on the present tense: 'territory which *is* acquired' while apparently ignoring the possibility for future acquisition which is allowed for by the alternative 'or *may* be'.

I find it particularly difficult to accept this argument when this historian uses the fact of the annexation by New South Wales of New Zealand as a basis not only for his argument that sovereignty was acquired by settlement but also as a basis for his argument that the normal rule—that in territories acquired by settlement the law of the settler, i.e. representative government, should apply, and that in territories acquired by cession the law of the ceded territories should apply until changed, i.e. representative government should not apply—is reversed.

Robson⁵⁴ argues along similar lines. Doubt as to their validity is immediately apparent:

Englishmen carried their political rights into a settled colony, and only a constitution could withhold from them the right to representation in the legislature. In a *ceded* colony, on the other hand, prerogative powers could be used to create an *appointive* legislature. New Zealand when it became a separate colony in 1841, was clearly not ripe for a representative legislature, and in fact was given an *appointive* one (my emphasis).

It is my submission that the Letters Patent were intended to act as a backstop in the event of the Maoris failing to cede sovereignty, and that the annexation of New Zealand by New South Wales and the delay in introducing representative government was occasioned by a fear of 'native' representation—a factor which in itself implies respect for and appreciation of the ability of the native to conduct his own affairs.

That it was the intention of the British that the Treaty of Waitangi should be a valid treaty of cession is evidently clear from the correspondence of the period. Although much correspondence is available, it suffices, I think, to cite but one example. On January 24th, 1834 Mr Joseph Somes, a representative of the New Zealand Company, wrote to Lord Stanley, Minister for the Colonies⁵⁵:

We have always had very serious doubts whether the Treaty of Waitangi, made with native savages by a Consul invested with the plenipotentiary powers, without ratification by the Crown, could be treated by lawyers as anything but a praiseworthy device for amusing and pacifying savages for the moment.

The reply from the Under-Secretary, Mr Hope, expressed Lord Stanley's, and the British Government's views⁵⁶:

Lord Stanley entertains a different view of the respect due to the obligations con-

⁵⁴ Robson, *op. cit.*, 3.

⁵⁵ Cited in "The Effect of the Treaty of Waitangi on Subsequent Legislation" (1934) N.Z.F.J. 13, 25.

⁵⁶ *Idem.*

tracted 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 or honorary obligations to despoil others of their lawful and equitable rights.

It should be noted that Mr Molloy in his article⁵⁷ drew attention only to the first letter. That was, I submit, not fairly representative.

Before turning to case law and other statutory law I wish to look very briefly at the Maori Affairs Act, 1953. A mere cursory glance will reveal a statutory recognition of certain aspects of Maori customary law. It must however, be immediately stated that the Act has betrayed the spirit of the Treaty of Waitangi: the promise contained in Article II that guaranteed to the Maori the full, exclusive, and undisturbed possession of his *papatipu* land has been disregarded.⁵⁸ One must not, however despair. This paper is written with hope. I instance a few examples of this statutory embodiment: section 54 allows for relaxed rules as to evidence; section 27 gives a wide interpretation to *locus standi*; section 62 leaves orders from the court free from stamp duty; section 132 gives statutory recognition of group ownership: Maori land is not available for debts (I am not forgetting the difficulties over interpreting what actually is 'Maori Land'). It should also be noted that such land is subject neither to taxes nor rates. The only other land not subject to rates or taxes is that of the embassies. One wonders then whether there is not sufficient recognition in this exemption of *papatipu* land from taxes and rates, to give this land the same foreign nation status as has been given to the land of the embassies. Such recognition was given to the Pueblo and Cherokee Indians in the United States last year.⁵⁹

It should further be noted that right up until 1955, effect could be given to Maori customary marriages and adoptions under this Act. It is also noteworthy that a Maori illegitimate child has always been considered a child of the family. It was not until the Status of Children Act 1969 that the artificial construct of the law enabled a similar European child to be given like 'natural' recognition.

Perhaps one of the most important sections of the Act is section 176 which under the principle in *re Hinewhaki*⁶⁰ allows for a statutory inroad into the Torrens principle of indefeasibility of title. Such a partition order allows for the maturing of an estate in fee simple off the Torrens register.

It has been said that much of the legislation enacted in this Act is

⁵⁷ Malloy, *loc. cit.*

⁵⁸ Part XIV, Maori Affairs Act, 1953.

⁵⁹ *U.S. v. Wheeler* 98 S.C. of U.S.A., 1079 (1953); *Santa Clara Pueblo v. Martinez* 98 S.C. of U.S.A. 6167 (1953).

⁶⁰ [1923] N.Z.L.R. 353.

patristic. Patristic or not it is evidence of the statutory embodiment of Maori customary law; it is supportive of my thesis: the Maori had a pre-existing code of law; the Maori was capable of effecting a treaty of cession: there was no need to alter the existing law.

I turn finally to look at case law. As I have said earlier none of it supports my thesis. It is my submission that the cases where the claimant rested his claim on the Treaty of Waitangi were wrongly decided. The Maori had clear contractual capacity, the Maori was capable of giving effect to a treaty at international law. The reason why recourse has been had to the fact that the Treaty has not been incorporated into Municipal law is not hard to find. It is evident in the judgments themselves: these were political decisions. That the government is still capable of handing down political decisions was demonstrated as recently as last year in the Bastion Point case, not surprisingly unreported in any official law journal, but available in glossy paraphernalia from the Lands and Survey Department.

At the outset it will be stated that parliament repeatedly enacted statutes referring to the promise in the Treaty.⁶¹ It seemed odd, then, that parliament could enact such statutes but refuse to ratify the Treaty. There is only one possible answer: parliament never saw the necessity for ratification: it was a treaty which did not require ratification.

It would seem that *Wi Parata v. The Bishop of Wellington*⁶² can be authority only for its actual decision: that the doctrine of *cy-près* would apply. It is however, in my opinion not unworthy of criticism. Prendergast C. J. cites the despatch of Lord Normanby to Captain Hobson at the 14th August 1839⁶³:

We acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make such knowledge 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 concept.

I have already I hope demonstrated the falseness of this statement. However this judge's analysis of the despatch is also incorrect:

"Such a qualification nullified the proposition to which it is annexed".⁶⁴ That "so far at least" is a qualification there can be no doubt. That however a qualification containing no negative can nullify a proposition must be doubted. Prendergast C. J. continues⁶⁵:

There is a second reason, closely connected with the former one, why the acts of the Crown in its dealings with the aborigines for the *cession* (my emphasis) of their title are not examinable in any court of the country. Upon such a *settlement* (my

⁶¹ E.g. The Lands Claims Ordinance 1841; The Native Lands Act 1862; The Native Rights Act 1865.

⁶² *Supra*.

⁶³ *Supra*, at 78.

⁶⁴ *Idem*.

⁶⁵ *Idem*.

emphasis) as has been made by our nation, the sovereign . . . assumes . . . the duty . . . of securing them against an infringement of their right of occupancy.

The polarity of this juxtaposition of the emphasized words can hardly lend any credence to this statement.

The judge continues⁶⁶:

The obligation thus coupled with the right of pre-emption, although not to be regarded as properly a treaty obligation is seen in the nature of a treaty obligation.

This sleight of hand enables this judge to have his cake and eat it too. Not only can he now deny the plaintiff any rights arising under the treaty, he can also prevent this treaty from being called into question in any court of law by virtue of the Act of State doctrine.

Further, Prendergast C. J. denies a fundamental principle of English law: the doctrine of notice. Yet this same judge would have us believe, by virtue of the act of settlement which he was elsewhere steadfastly trying to establish, that the doctrine should have been imported into the country on the 14th day of January, 1840⁶⁷:

By section 10 of the former Act, a copy of the New Zealand Gazette notifying the extinction of the native title over any land therein comprised was made conclusive proof of that fact in the Native Lands Court. . . . If such a notification respecting the lands here in question had ever been issued it would, we apprehend, be an answer to any claim founded upon a supposed native title. But it does not appear that any such notice has been published. Nevertheless, we cite these provisions as plain indications on the part of the Colonial legislature that questions respecting the extinction of native title are not to be raised either here or in the Native Lands Court in opposition to the Crown, or to the prejudice of its grantees.

Compare the judgment in *Nireaha Tamaki v. Baker*⁶⁸ where Lord Davey expressly stated⁶⁹ that the argument in *Nireaha Tamaki v. Baker*, that there was no customary law of the Maoris of which the Courts can take cognizance, as was decided in *Wi Parata*, "goes too far".

Prendergast C. J. in *Wi Parata*⁷⁰ felt it possible to banish the express words of a statute by the simple device of denial:

. . . a phrase in statute cannot call what is non-existent into being.

Prendergast C. J. was referring to section 3 of the Native Rights Act, 1865. Lord Davey considered it impossible to get rid of these words so expediently⁷¹:

It is the duty of the courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by evidence.

Lord Davey held that sections 3, 4 and 5 of the Native Rights Act 1865 did give jurisdiction to the Native Land Court to investigate native claims thus derogating further from any vestigial authority which might remain to *Wi Parata*. Prendergast C. J. was greatly

⁶⁶ Supra, at 79.

⁶⁷ Supra, at 80.

⁶⁸ [1901] A.C. 561.

⁶⁹ Supra, at 577.

⁷⁰ Supra, at 79.

⁷¹ Supra, at 577.

relieved to find that this Act did not bind the Crown and that he would be under no obligation to entertain such a proposition.

The plaintiff in *Nireaha Tamaki v. Baker*⁷² was not resting his claim directly on the Treaty. Whilst declaring that the Land Ordinance Claim 1841 section 2 stated that the title of the Crown was subject to the⁷³ “rightful and necessary occupation” of the aboriginal inhabitants and was to that extent a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi, Lord Davey did not, however, consider that that ordinance of itself would be sufficient to create a right in the native occupiers cognizable in a Court of Law.

The plaintiff in *Hoani Te Heu Heu Tukino v. Aotea*⁷⁴ rested his claim on section 73 of the New Zealand Constitution Act 1852. It appears that such a statute would have been recognised as a sufficient embodiment of the Treaty had it not been repealed. Lord Simon V.C. representing the Board of the Privy Council stated⁷⁵:

Under Article 1 there had been a complete cession of all the rights and powers of sovereignty of the chiefs. 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 in the municipal law.

Later⁷⁶:

So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him. He, therefore refers to the Imperial Act the New Zealand Constitution Act, 1852, under which representative government was conferred on New Zealand.

And⁷⁷:

. . . The appellant's contention was that right conferred by the Waitangi Treaty was made a substantive part of the municipal law by section 73 of this Act, but he had to concede that the Imperial Parliament, by virtue of its sovereign power of legislation might have altered any right recognised or conferred by section 73. . . . In fact, as pointed out by the learned Chief Justice, section 73 of the Act of 1832 was repealed by the New Zealand legislation by the Native Land Act, 1873.

It would appear then that *any* reference to the Treaty, in a statute would amount to incorporation. The only weakness in such a statute would be that like any other statute it would be subject to alteration or amendment by later enactments.⁷⁸

Such a statute does exist: The Treaty of Waitangi Act 1975. This statute is accompanied by a schedule. There can be no possible doubt that this Act is subject to the same defects of the now repealed 1960 Waitangi Day Act where as instanced by Auburn⁷⁹ and Malloy⁸⁰ it was

⁷² Supra.

⁷³ Supra, at 567.

⁷⁴ [1941] A.C. 308.

⁷⁵ Supra, at 324.

⁷⁶ Supra, at 325.

⁷⁷ Supra, at 326-327.

⁷⁸ Supra, at 327.

⁷⁹ Auburn, “Te Tiriti O Waitangi” (1971) 4 N.Z.U.L.R. 391.

⁸⁰ Malloy, *loc. cit.*

the clear intention of this Act merely to create a holiday.

Statements by North J. in *Re Ninety Mile Beach*⁸¹ give cause for alarm. Such statements as⁸²:

This is not the first time in recent years that this court has been called upon to consider novel and *far-reaching* claims (my emphasis) made by Maoris to freehold orders in respect of territory which was once held by them communally under their custom and usages. . . .

And⁸³:

Finally, it is pertinent to observe that at this late period in the development of New Zealand both claims, (North J. is here referring to *In Re Bank of Wanganui River*⁸⁴ which received similar treatment) if well founded, would have *startling and inconvenient* results.

I respectfully submit that it is clear that considerations of policy underlay the decision in each case. In both cases the plaintiff lost his claim to his ancestral lands. Such was the foreboding of the Honourable Sir Apirana Ngata⁸⁵:

The part that is not clear of this portion of the 2nd article to the Treaty is in regard to fishing grounds. Parliament and the courts have been side-stepping these matters.

John Hookey, in his article to which I have already referred, says,⁸⁶ with particular reference to *Millirpum v. Nabalco*⁸⁷ (but which perhaps could refer also to the situation in the *re Ninety Mile Beach* case⁸⁸).

However, in 1968, bauxite mining operations conducted by Nabalco Pty Limited (the first defendants) and authorised by the Commonwealth Government (the second defendants) began on the Gove Peninsular. Probably for the first time, the plaintiffs' possession of their lands was sufficiently minded to make it impossible for them to stand idly by and at the same time remain secure in their traditional belief that the lands they claimed as their own were truly theirs. The time had come for them to assert rights in their own country, and it had come at a time when their cause had wide support, and when their struggle would be of significance to all black Australians. But, unfortunately, it was also a time when the judicial climate in countries with indigenous minorities, was unfavourable to this type of claim.

That the law should be subject to the whim of the judiciary is, if that be the case, nothing short of scandalous.

The fate of *Tamihana Korokai v. Solicitor General*⁸⁹ was decided out of court. The bed of Lake Rotorua, as well as a number of other lake beds in the Rotorua district, together with the right to use the waters of these lakes, was by statute declared to be the property of the Crown, freed and discharged from the Maori customary title. Certain fishing rights were reserved to the Maoris; and provision was made for the payment by way of compensation of an annual grant of £6,000 to a statutory trust board set up for the benefit of the Maoris concerned.

⁸¹ [1963] N.Z.L.R. 461.

⁸² *Supra*, at 466.

⁸³ *Supra*, at 469.

⁸⁴ [1962] N.Z.L.R. 600.

⁸⁵ Ngata, *Op. cit.*, 9.

⁸⁶ Hookey, *loc. cit.*

⁸⁷ *Supra*.

⁸⁸ *Supra*.

⁸⁹ *Supra*.

E. J. Haughey, in an article,⁹⁰ states that a similar arrangement was subsequently entered into by the Crown in respect of Lake Taupo.

I find it disturbing to learn from the same writer that the ownership of two other lakes was the subject of litigation. In 1929, Lake Omapere, a small lake in the North Auckland district, was vested by the Maoris Land Court in the ownership of the Maori claimants as Maori customary land. Haughey informs that in so doing, the Crown was influenced by the practical consideration that the ownership of the soil had little or no value for it, and that this particular lake, on account of its smallness, was not suitable for testing the general legal position with regard to the ownership of lakes.

It now seems possible that the law is not only subject to the whim of the judiciary but subject also to the size of the claim. Such arbitrariness was never part of the laws of England. To sum up the case law:

(a) The proposition that the Treaty of Waitangi was a nullity as decided in *Wi Parata*⁹¹ can no longer be considered authoritative;

(b) *Nireaha Tamaki v. Baker*⁹² and *Tamihana Korokai v. Solicitor General*⁹³ are authority for the proposition that the civil courts have jurisdiction to ascertain native title to and interest in land according to the custom, or usage of the Maori people, but *Wi Parata's* case is in conflict.

(c) *Hoani Te Heu Heu Tukino v. Aotea*⁹⁴ is authority for the proposition that the Treaty of Waitangi is a treaty of cession but could not be enforced in the courts. It seems that the Board is allowing for the possibility that a statute referring to the Treaty could be enforced in a court of law.

(d) The *Wanganui*⁹⁵ and *Ninety Mile Beach*⁹⁶ cases cannot be regarded as good authority. These were policy decisions. The Omapere decision was purely arbitrary.

Two other forms of action are possibly open to the Maori. Keith⁹⁷ has posed the question whether the courts could make a declaration under the Declaratory Judgments Act 1908 at the request of a person claiming to have rights under a treaty which has not been incorporated by statute into New Zealand law. Though it was held that an Anglo-Italian financial agreement was not cognizable or justiciable in a court

⁹⁰ Haughey, "Maori Claims to Lakes, Riverbeds, and the Foreshore", 2 N.Z.U.L.R. 329.

⁹¹ *Supra*.

⁹² *Supra*.

⁹³ *Supra*.

⁹⁴ *Supra*.

⁹⁵ *Supra*.

⁹⁶ *Supra*.

⁹⁷ Keith, *loc. cit.*

of Chancery, *Republic of Italy v. Hambros Bank Limited*,⁹⁸ Keith points out that the New Zealand Act is worded more widely than the English rule; but he also points out that section 10 gives the Court a wide discretion to refuse to make a declaration.

Secondly, it would seem that having overcome the *consensus ad idem* objection, an action in estoppel will lie⁹⁹:

The rule of estoppel, whether treated as a rule of evidence or as a rule of substantive law, operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit.

CONCLUSION:

- (i) There can be no doubt that the Maori at the time of the signing of the Treaty of Waitangi possessed the characteristics essential to international legal capacity;
- (ii) Since the Maori possessed the necessary capacity the Treaty was a treaty of cession;
- (iii) Treaties of cession do not need to be ratified; or by their very nature, incorporated into municipal law;
- (iv) A Maori can plead the Treaty in a court of law.

Given the fact that *Wi Parata's* authority has been all but whittled away by the Privy Council in *Nireaha Tamaki v. Baker* it is most surprising that anyone, let alone Keith and Malloy, place any reliance on it at all. It is my submission that once one renders to this case the oblivion it deserves, the way is clear for reliance on the Treaty itself. Once one establishes that the Maori did have a recognized form of government, the need for incorporation or ratification simply does not arise.

⁹⁸ [1950] Ch. 314.

⁹⁹ Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence", 33 B.Y., B.I.L. (1975) 176.