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ASPECTS OF TREATY OF WAITANGI JURISPRUDENCE

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I. INTRODUCTION

In this paper I consider aspects of the jurisprudential nature of the Treaty of Waitangi, the principles of which were recognised and given effect in the great case commemorated at this Symposium, *New Zealand Māori Council v Attorney-General* ("the *Lands* case").[159] I relate those principles to the actual terms of the Treaty, to other legal and moral principles and to the radical Māori claims made on the basis of the Treaty and the tino rangatiratanga reserved under Article Two.

First though I explain my own understanding of the Treaty and the circumstances under which it was made. I mention only briefly the most well-known difficulties, namely the important and unresolvable differences between the Māori and English versions. Especially there are the differences in Articles One and Two of the two versions. In the case of Article One, Māori ceded "sovereignty" in the English version and "kawanatanga" or governance in the Māori. Under Article Two, the signatory hapu retained lands and fisheries etc in the English version; in the Māori "te tino rangatiratanga" – full chieftainship. And there is a basic disagreement even among Māori as to whether the Crown's

[159] [1987] 1 NZLR 641. Note, the paper given at the Symposium has been revised to include comment on the new Crown forestry lands case, *New Zealand Māori Council v Attorney-General* [2007] NZAR 569, decided three days after the Symposium.

kawanatanga was over the hapu or merely a recognition that the Crown could govern non-Māori in Aotearoa New Zealand. I add to those difficulties that it was in effect a multiple Treaty between the Crown and the United Tribes (arising from the Confederation of 1835) and each of the other signatory hapū. Māori understandings of its effect must have differed widely. Not all hapū were party to the Treaty. The non-signatory minority ceded nothing, there being no rule of law or moral principle to bind them.

Further, the Treaty cannot found rights directly enforceable in the courts. That remains good law under the Privy Council judgment in *Te Heuheu Tukino v Aotea District Māori Land Board*,[160] unless and until the Supreme Court of New Zealand declines to follow it.

My own conclusion in writings over the last twenty two years, especially in my book *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*,[161] has been that the Crown in establishing, by a revolutionary seizure of power, its absolute sovereignty over Aotearoa New Zealand, without any constitutional protection for Māori institutions and for the Treaty itself, took much more than it was entitled to. Adopting the distinction between legality and legitimacy, I see the New Zealand state as lawful and having a large degree of legitimacy that has come about through the passage of time and, I maintain, through a beneficial side of colonisation. But in relation to Māori there is a partial but serious lack of legitimacy for the reason already given. The legislative recognition of the "principles" of the Treaty, especially as given strong effect by the Court of Appeal in the *Lands* case, partly remedies that lack.

II. THE TREATY AND ITS PRINCIPLES

Based on the honour of the Crown, the principles include fiduciary duties of the Crown to Māori, the correction of past Treaty breaches, the active protection of Māori in the use of their lands and waters, and the duties of both parties to act in partnership and in good faith with each other.[162]

Though they have not been transmuted into rules of the legal

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[160] [1941] NZLR 590.

[161] (Auckland: Auckland University Press, 1999; 2nd ed 2006). See especially 34, ch 2, ch 6 and 185-87.

[162] For discussion and references, see PA Joseph, *Constitutional and Administrative Law in New Zealand* (Wellington: Thomson Brookers, 3rd ed 2007), 70-77 and FM Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 2nd ed 2006),151-56.

system, they may "have direct impact in judicial review cases or in cases involving statutory interpretation."[163] They remain controversial. They have been assailed from the left wing because they are seen to blur the clear differences between the two versions of the Treaty and deny Māori tino rangatiratanga.[164] I shall come to those objections later. For right wing critics, on the other hand, Parliament, in using the phrase in s 9 of the State-Owned Enterprises Act 1986 and in other statutes, has simply given "activist" judges the opening to give effect to Māori aspirations far beyond (it is said) what the text of the Treaty justifies.[165]

The principles may be defended in the light of Ronald Dworkin's work on the role of moral principles that are as much part of the law – though the role of most of them may be interpretive only- as the rules made by the legislature or by the judges in the development of the common law.[166] In the case of the Treaty, the definition of what have been thought of as its principles has been hindered by conflicting views of the interpretation of the terms of the Treaty; for lack of agreement over that is inevitably reflected in the controversy over the principles. We can however make some progress if we consider Māori complaints of Treaty breach as (in Moana Jackson's words) "part of the broader and grievously wrong process of colonisation".[167] That rightly sets the controversy in a wider context. But I suggest that the legal system may include moral principles, as well as rules of law, which may mitigate to some extent the wrongs that have been done to the colonised; and this quite apart from any reliance on the Treaty. Nevertheless, the recognition of such principles in legislation, as principles of the Treaty, clearly strengthens their position.

To identify them, we have to achieve the best possible understanding of the Treaty, or more importantly and generally, of the

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[163] *New Zealand Māori Council v Attorney-General* [2007] NZAR 569 para 72.

[164] J Kelsey, "Treaty Justice in the 1980s" in P Spoonley, D Pearson and C Macpherson (eds), *Nga Take: Ethnic Relations and Racism in Aotearoa/New Zealand* (Palmerston North: Dunmore Press, 1991) 108, 111.

[165] W Mapp, "Time for Constitutional Clarity" [2003] NZLJ 148, 149.

[166] For some recent essays on Dworkin's work, see S Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford: Oxford University Press, 2006) and Dworkin's "Response" to them (ibid, 291). In his contributing Essay (ch 7), "Did Dworkin Ever Answer the Crits?", J Waldron noted Dworkin's "later approach which talked of rival *theories* [rather than principles: Waldron's emphasis] put forward by those who were working with the existing law to justify a current decision."(ibid, 161). Waldron's suggestion that the two approaches are not materially different (ibid) is accepted by Dworkin in his "Response" (298).

[167] Quoted by K Johnston, " The Treaty of Waitangi" [2005] NZLRev 603, 610.

relationship of colonisers and colonised. If one follows Dworkin[168] in this, that best understanding is arrived at by looking back on the history of the country and its institutions: though much settled practice in that history, both in legislation and in the courts, has been against the Treaty and the rights of Māori as the indigenous people, there is a sufficient element in that history (again, both in legislation and in the decisions of the courts) that has been protective of Māori legal and moral rights, for the courts of recent decades to recognize that element, and in effect to build upon it as happened in the *Lands* case.

One of the principles of many legal systems is that no person should profit by his or her wrongdoing, so that (in one of Dworkin's original examples) a murderer should not benefit under the will or the intestacy of the person murdered.[169] The principle may control the operation of any statutory or common law rule under which the wrongdoer could otherwise claim. On the other hand, there is a principle tending the other way: that title to land that has been based on a wrongful taking of possession should be validated by the passage of time. The Limitation Act 1950 and the Land Transfer Amendment Act 1963 make rules that recognize and regulate that principle.[170] But in relation to Māori customary land we discern another principle, which arises secondarily from the Treaty of Waitangi but primarily as part of the general principle of the honour of the Crown and the fiduciary relationship resulting from it. This principle protects Māori against the wrongdoer. We find the rule recognising and giving effect to it (though much modified in favour of the Crown) in ss 6(1), 6(1)A and 7 of the Limitation Act 1950 , which ensure that the title of the private person who wrongfully takes possession of Māori customary land –the squatter- remains invalid despite the passing of time.

This competition between principles inconsistent with one another is evident in the *Lands* case. See for example the remarks of Richardson J:

> "Much still remains in order to develop a full understanding of the constitutional, political and social significance of the Treaty in *contemporary* terms and our responsibilities as New Zealanders under it."[171]

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[168] R Dworkin, *Law's Empire* (Cambridge, Mass., Belknap Press, 1986) 225-28.

[169] R Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) 23. The principle is codified in the Succession (Homicide) Act 2007.

[170] See FM Brookfield, "Prescription and Adverse Possession" in GW Hinde (ed), *The New Zealand Torrens System Centennial Essays* (Welllington: Butterworths, 1971) 162.

[171] [1987] 1 NZLR 641, 672 (emphasis added).

His Honour was clearly referring to other principles which modify in effect those of the Treaty, such as one based on the passing of time. The same thought is at least implicit in the judgments of all the Judges. So too the Privy Council in *New Zealand Māori Council v Attorney-General*: "'[w]ith the passage of time , the 'principles' which underlie the Treaty have become much more important than its precise terms."[172]

Yet how is one to deal with statutory provisions where the Treaty, with no mention of it or its principles, is nevertheless perceived to be relevant to the context? Here the judgment of Chilwell J in *Huakina Development Trust v Waikato Valley Authority*,[173] in which he recognized Māori cultural values in a statutory context that did not mention them, is most instructive. He does at one point refer generally to the "principles" of the Treaty[174] but mostly to the Treaty alone. And despite the rule in *Te Heuheu Tukino v Aotea District Māori Land Board*[175] against the recognition of the Treaty as a legal instrument, he was able find sufficient institutional support in past decisions and in other statutes to describe the Treaty as having "a status, perceivable whether or not enforceable, in law"[176] and as "part of the fabric of New Zealand society".[177] These were apt words to describe the constitutional position of the Treaty, based as it is on the principle of the honour of the Crown. Granted that much in New Zealand settled practice has been done contrary to the principle, yet there is sufficient institutional support to require judges and officials to consider it and to give effect where no rule clearly excludes it.

III THE TREATY PRINCIPLES AND RULES OF LAW

The principles of the Treaty as such are not directly enforceable in law. But what if particular principles are supported in substance by rules of common law or equity? One obvious instance is that of Māori customary communal title to land, recognised in principle by Article Two of the Treaty but, subject to statute, recognised *and enforceable* at common law under authorities now beyond doubt. A second instance, supported by Canadian authorities but recently rejected by the Court of Appeal, is that in equity the Crown is in a fiduciary relationship with

[172] [1994] 1 NZLR 513, 517.
[173] [1987] 2 NZLR 188.
[174] [1987] 2 NZLR 188, 210.
[175] [1941] NZLR 590.
[176] [1987] 2 NZLR 188, 206.
[177] [1987] 2 NZLR 188, 210.

Māori and that, as in private law, in appropriate circumstances the duty is enforceable in the courts.

The Court of Appeal, in holding otherwise in *New Zealand Māori Council v Attorney-General*[178] allowed that the Crown was in a fiduciary relationship with Māori under the Treaty but by way of analogy only with the relationship in private law. Māori cannot enforce a Treaty duty in the courts. In this it clearly saw itself as bound by *Te Heuheu Tukino v Aotea District Māori Land Board*,[179] as it had been in its previous decisions where the element of analogy has been emphasised in regard to the Crown's Treaty obligations.[180] On the Canadian position the Court said:

> We do not intend to traverse the arguments made to us on the basis of the recent Canadian authorities as to the nature of the duty owed by the Crown to aboriginal peoples in that country. Those decisions reflect the different statutory and constitutional context in Canada.[181]

I respectfully suggest that the differing constitutional (as distinct from statutory) contexts are not relevant here. It is so that in Canada the legally enforceable fiduciary duty of the Crown is now constitutionally protected by section 35 of the Constitution Act 1982. But it existed in law prior to the section. Its origin is, as explained by Dickson J in *Guerin v R*, as follows:

> The fact that Indian Bands have a certain interest in lands does not ...in itself give rise to a fiduciary relationship between the Indians and the Crown. *The conclusion that the Crown is a fiduciary depend upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.*[182]

It seems clear that historically a similar equitable duty or obligation on the Crown's part in relation to Māori would have applied in New Zealand (if not fully recognised at the time), the words emphasised being as applicable here as in Canada. Hence the Crown, exercising its common law power as sole lawful buyer, would (quite independently of

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[178] [2007] NZAR 569.

[179] [1941] NZLR 590.

[180] As in the *Lands* case and *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (CA).

[181] [2007] NZAR 569 para 81.

[182] [1984] 2 SCR 335, 376 (emphasis added).

the Treaty)[183] do so as a fiduciary.

But the Native Lands Act 1862 brought to an end that common law power. The Colonial legislature created, to adopt the Court of Appeal's words quoted above, a "statutory context" – a statutory scheme - for the disposal of aboriginal land different from that in Canada, namely that of the Māori Land legislation. The Native, now Māori, Land Court, to the extent of its protective role,[184] in effect absolved the Crown of its legally enforceable fiduciary duty in respect of aboriginal lands, identified in the Canadian courts.[185]

But could that fiduciary duty or equitable obligation, recognised in Canada, survive in New Zealand in a context outside that of the Māori Land legislation and independently of the Treaty? Apparently that question was not before the Court, which dealt with the matter solely in relation to the Treaty:

> The decisions of this Court contain clear statements to the effect that the Crown's duty to Māori is analogous with a fiduciary duty and we see no proper basis for us to revisit them. The law of fiduciaries informs the analysis of the key characteristics of the duty arising from the relationship between Māori and the Crown *under the Treaty*: good faith, reasonableness, trust, openness and consultation. But it does so by analogy, not by direct application.[186]

Certainly, so far as the Treaty is relied on, the Crown's obligations under it or its principles can indeed be by way of analogy only with

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[183] It has been pointed out that the Crown's power of pre-emption, explicit in Article Two of the English version of the Treaty, cannot be inferred from the Māori version of that Article: see DV Williams, *"Te Kooti Tango Whenua": The Native Land Court 1864-1909* (Wellington: Huia Publishers, 1999), 104-05. But the common law rule and ordinances incorporating it (such as the Land Claims Ordinance 1841) gave legal force to the practice .

[184] The protective provisions of the legislation and the Land Court's implementing of them are strongly criticized as inadequate by DV Williams, *"Te Kooti Tango Whenua": The Native Land Court 1864-1909* (Wellington: Huia Publishers, 1999), ch 8. For a more favourable view of the Land Court's role, see G Young, "Norman Smith: a Tale of Four 'Take'"(2004) 21 NZULR 309.

[185] In areas where operation of the legislative scheme was suspended (as, eg, in the King Country, under the Native Land Alienation Act 1884) and the Crown's pre-emptive power restored, its fiduciary duty would have been also; though it does not appear to have been fulfilled so far as the "somewhat stingy prices" offered by the Crown were concerned: see R Boast, A Erueti, D McPhail and NF Smith, *Māori Land Law* (Wellington: Butterworths, 1999), para 2.3.7.

[186] [2007] NZAR 569 para 81 (emphasis added).

private law concepts. But I suggest there can be no good reason for channelling the fiduciary duty exclusively through the Treaty, for it to be rendered relatively ineffective under *Te Heuheu Tukino v Aotea District Māori Land Board*.[187] Indeed the Treaty cannot have the effect of replacing any part of the fiduciary duty, dependent on the honour of the Crown and in law "deriv[ing] from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation."[188]

How might the above affect our consideration of the case before the Court of Appeal? The appellants and others had made competing "customary land claims"[189] for the return of certain land held by the Crown under the Crown Forestry Act 1989. Some of the claims had been settled through direct negotiation with the Crown. The appellants, who were not included in the settlement but were recognised by the Court as having "an interest in Crown forest land",[190] sought (inter alia) a declaration that the transfer of Crown forest land to certain claimants under the settlement would be "inconsistent with the fiduciary duty of the Crown."[191]

Once this duty is seen as surviving in common law and equity, independently of the Treaty, the appellants' case appears very much stronger.[192]

This is by no means to suggest that the principles of the Treaty are all supported by rules of common law or equity. (Of course, if they were, the legal position of the Treaty would in effect be assured). To the

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[187] [1941] NZLR 590.

[188] See *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550, 564, per McLachlin CJC.

[189] [2007] NZAR 569 para 23 .

[190] Ibid, para 3. Their "interest" would presumably be as claimants or potential claimants under the Treaty of Waitangi Act 1975, common law Māori customary titles to the land having no doubt been extinguished long ago.

[191] [2007] NZAR 569 para 9.

[192] The Court saw "difficulties in applying the duty of a fiduciary not to place itself in a position of conflict of interest to the Crown, which, in addition to its duty to Māori under the Treaty, has a duty to the population as a whole" (ibid, para 81). Further, as in the present case, "the Crown may find itself in a position where its duty to one Māori claimant group conflicts with its duty to another" (ibid). The first of those difficulties arises in Canada with the legal duty also but is resolved by the Crown's balancing of the respective duties (surely not an impossible task in New Zealand). See the Canadian authorities cited by PA Joseph, *Constitutional and Administrative Law in New Zealand* (Wellington: Thomson Brookers, 3rd ed 2007) para 3.11.7. The second difficulty, as a matter of tikanga Māori, could presumably be referred to the Māori Appellate Court under Te Ture Whenua Māori Act 1993, ss 61 and 62.

instances mentioned above we may add the status of Māori as British subjects, which rested at common law upon the gradual spread of the Crown's authority over the colony,[193] rather than upon Article Three; until the Native Rights Act 1865 confirmed and imposed that status on all Māori.

But other principles, such as some of those resting upon te tino rangatiratanga, in the sense of governing authority (as distinct from land rights),[194] reserved by Article Two, have no such legal support. Claims to a greater or less degree of Māori sharing or representation in governance (or of local autonomy where it is demographically possible) can depend only on that Article and the reasonable expectations of Māori. Which is not to deny the moral strength of such claims or the validity of the Treaty principles based on that Article. But the ways in which courts give effect to those principles necessarily fall short of the direct enforcement available if (as in property matters) the relevant principle is supported by rules of common law or equity.

IV. RADICAL REJECTION

I am conscious however how inadequate all that analysis is to the radical Māori constitutional arguments[195] advanced by Jane Kelsey,[196] Moana Jackson,[197] Ani Mikaere,[198] and others. The principle of the honour of the Crown, recognised at law and expressed in the Treaty, is restricted by the overriding principle of the supremacy of Parliament and (as to the Treaty) by the *Te Heuheu Tukino* rule.[199] It is restricted too by the principle that judges cannot give radical effect to it by going outside the

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[193] Or possibly on Hobson's proclamations of May 1840. For discussion see FM Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 2nd ed 2006) 110-14.

[194] I would include here the Māori claim to radio frequencies made in *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 and any claims to substantal bicultural control of the Universities.

[195] See FM Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 2nd ed 2006) 100-06, 199, 205-06.

[196] See, as an example from the large body of her work, "Treaty Justice in the 1980s" in P Spoonley, D Pearson and C Macpherson (eds), *Nga Take: Ethnic Relations and Racism in Aotearoa/New Zealand* (Palmerston North: Dunmore Press,1991) 108.

[197] See, eg, "The Treaty and the Word: the Colonization of Māori Philosophy" in G Oddie and RW Perrett (eds), *Justice, Ethics and New Zealand Society* (Auckland: Oxford University Press, 1992) 1.

[198] AL Mikaere, "The Treaty of Waitangi and Recognition of Tikanga Māori" in M Belgrave, M Kawharu and D Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Auckland: Oxford University Press, 2004) 330.

[199] *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC).

constitutional order of which they are part.[200] But for the radical critics those restrictions and the rules and principles discussed above are simply part of the oppressive system of the colonialist state. The radical appeal is for the revolutionary replacement of the whole system, in line with a view that under the Treaty Māori in no way parted with te tino rangatiratanga.

Ani Mikaere has written on the incompatibility of the present legal system with the Māori dominated one that she advocates.[201] And she has the support of Moana Jackson, especially in his opinion that the chiefs simply had no power to transfer the mana of their tribes. Whatever individual chiefs may have intended, no part of their rangatiratanga was ceded and it has remained intact.[202] The power of the New Zealand state remains an usurpation and non-Māori remain Tauiwi – outsiders.

If Mikaere and Jackson, and Professor Jane Kelsey also, are right, the Crown's assumption of power over Aotearoa was not only unlawful under Māori law (which it largely must have been) but has remained so and has been in no way legitimated by the passage of time. Nor by the institutions of government that have been built upon it. In short the moral principle that wrongdoers must not profit from their own wrongdoing – a form of which as we saw is part of the present dominant legal system – is in this context elevated to an absolute, operating from outside to invalidate that system itself.

Of course arguments may be brought against all this. I have frequently brought them myself: arguments for partial legitimation of the present constitutional order based on principles of time and acquiescence and of the arguably beneficial side of colonisation.[203] Such arguments have over the years simply been rejected out of hand by the

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[200] There is an exception to this, established by recent cases, that in the event of a successful revolution in the executive and legislative branches of government the courts may recognize the new regime. (See eg *Republic of Fiji v Prasad* [2001] NZAR 385; [2001] LR Commonwealth 743 (Fiji CA)). But unless and until a radical agenda is carried out to that extent, those pursuing such extreme change cannot expect the support or recognition of the courts of the existing order. For discussion, see FM Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 2nd ed 2006) 22-34, 185-87.

[201] AL Mikaere, "The Treaty of Waitangi and the Recognition of Tikanga Māori" in M Belgrave, M Kawharu and D Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Auckland: Auckland University Press, 2004) 330.

[202] M Jackson, "Māori Law, Pakeha Law and the Treaty of Waitangi" in *Mana Tiriti: The Art of Protest and Partnership* (Wellington: Haeta et al, 1991) 14, 19.

[203] See FM Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 2nd ed 2006) ch 6, 203-05.

radical critics referred to, without any attempt to answer them.

However that may be, any discussion of the jurisprudence of the Treaty would be incomplete if one did not take account of the strongly revolutionary implications of the radical demands for tino rangatiratanga. The jurisprudence of the Treaty involves the jurisprudence of revolution.[204]

V. TREATY PRINCIPLES, UNIVERSITIES AND WĀNANGA

We have noticed that principles of the legal system may be inconsistent with one another and may on occasion be in competition. Thus Treaty principles may in some contexts compete with other principles.[205] Even more sharply, radical demands for rangatiratanga may simply conflict with the legal system and require that the system yield to them. It is useful to consider one context where competition and conflict may occur, that of tertiary education, in the Universities in particular.

Here statute has in some sense recognised the principles of the Treaty. Section 181(b) of the Education Act 1989 requires the Councils of the Universities (as tertiary institutions under Part XIV of the Act), in the exercise of their powers and functions, to "acknowledge" those principles. The Act also recognises the principle of "academic freedom" and gives effect to it.[206] Further, under the Act the Universities "accept a role as critic and conscience of society".[207]

It is a role Professor Jane Kelsey has frequently assumed and has done so recently in urging radical reform, the radical transformation of the Universities into strongly bi-cultural institutions, apparently very different from what they are at present. Interviewed recently by Laurence Simmons, she said:

> Universities pedagogically, as well as intellectually, are Western monocultural institutions. There is a minimalist, generally well meaning...but pretty minimalist, adaptation of those existing structures. There is also a defensiveness about those structures but this has also...been a very narrow, retrospective defence of the role of the university. Certainly,

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[204] This would be true in a technical sense (explained ibid) of peaceful but basic constitutional change that would secure Māori Treaty and common law rights in a written constitution. The change would of course be more dramatically shown in a violent replacement of the existing order.

[205] See text at n 13 above.

[206] Education Act 1989, s 161.

[207] Education Act 1989, s 162 (4)(a)(v).

> within the [Auckland] Law School, for example, we have looked at trying to introduce new aspects to what we do here, but the way we teach, and what we teach, is [sic] still defined by the English common law.[208]

That is a tantalizing statement, on several accounts much in need of further explanation. What, one may wonder, does her example mean for the future of legal education in New Zealand as she visualizes it? She may have in mind controversial legal systems of the future when the counter hegemony of radical Māori and their Pakeha allies has replaced that of the present colonialist state, in the revolution (seen as not necessarily violent) that her writings and those of Jackson and Mikaere portend.[209]

Until that occurs – if it does – is there in the meantime a possible conflict between, on the one hand, the principle of academic freedom recognised and given effect in the Education Act 1989 and, on the other, the principles of the Treaty as "acknowledged" in that Act? Much depends of course on the circumstances in which the conflict is thought to arise. There is however a basic consideration to be borne in mind which, if it applies, tilts a solution in favour of academic freedom. Some years ago Professor John Bishop, in a paper sympathetic to Māori concepts of treasured learning, nevertheless emphasised that

> ...the European ideal of the university is bound up with a theory about the value of seeking the truth and how that search should be conducted. According to this theory, in all areas of inquiry without exception, education which seeks to develop a critical stance is superior to education which excludes or inhibits critical evaluation of received knowledge.[210]

I do not know to what extent if any teaching and research in the Wānanga established under the Education Act 1989 might be inconsistent with the European ideal. Certainly the definition of the "characteristics" of a Wānanga under section 162 (4)(b) (iv) includes the

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[208] L Simmons (ed), *Speaking Truth to Power: Public Intellectuals Rethink New Zealand* (Auckland: Auckland University Press, 2007), 158.

[209] For discussion of the ideological elements here and for references, see FM Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 2nd ed 2006) 165-66, 168, 264-65 and FM Brookfield, *Waitangi and Indigenous Rights in the New Millennium* (forthcoming).

[210] J Bishop, "The Treaty and the Universities" in G Oddie and RW Perrett (eds), *Justice, Ethics and New Zealand Society* (Auckland: Oxford University Press,1992) 109, 123.

"develop[ing]" of "intellectual independence" as well as "assist[ing] the application of knowledge regarding āhuatanga Māori (Māori tradition) according to tikanga Māori (Māori custom)". And the provisions for academic freedom apply. So apparently there need be no such inconsistency. At all events, there appears no reason why, in light of Treaty principles, the Universities should discard or radically modify the European ideal on grounds that it is monocultural.[211]

VI. CONCLUSION: THE TREATY IN THE FUTURE

Chilwell J in the *Huakina* case[212] found institutional support for the Treaty both in the statutory recognitions of the "principles" but also in other sources, such as Stout CJ's decision on Māori entitlement to whales in *Baldick v Jackson*.[213] If as some proposed, Parliament were to remove all statutory references to the "principles", that would weaken any future argument in support of Chilwell J's approach but would not exclude it.

Nevertheless, until Māori rights, both those existing at law and those dependent on the Treaty, are secured in a written constitution their position remains obviously weak. Professor David William writes, quoting the Hon ET Durie, that"[t]he principles of the Treaty are not diminished by time, rather it takes time to perfect them".[214] But the passing of time does come into the balancing of principles that is inevitably involved in our constitutional discussions and negotiations. And the "perfecting" of the principles of the Treaty, so far as it is possible, depends on their agreed place in a written constitution. And that, with the inevitable republic, cannot be far off.

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[211] I can refer but briefly to Elizabeth Rata's serious criticism that the requirement that the New Zealand Universities (in her words) "adhere to the principles of the Treaty of Waitangi," is imposing a cultural relativism on them and inhibiting freedom of research in culturally sensitive areas: E Rata, "Cultural Relativism", in *Ingenio* (The University of Auckland Alumni magazine), Autumn 2007, 38. The statutory formula is of course the weaker one of "acknowledgment" (rather than "adherence"). It could not justify any such imposition or inhibition.

[212] [1987] 2 NZLR 188, 206.

[213] (1910) 34 NZLR 343.

[214] DV Williams, "Indigenous Customary Rights and the Constitution of Aotearoa New Zealand" (2006) 14 Waikato LR 120, 133.