PART II AND CLAUSE 26 OF THE DRAFT NEW ZEALAND BILL OF RIGHTS

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This paper considers the lessons of our history and why entrenched constitutional provisions seem necessary for the maintenance of rights against the vagaries of political whim and popular opinion, even in a democratic society. It considers that full legal recognition may be needed for the Treaty of Waitangi because of the failure to recognise common law rights in the past. Finally the paper ponders whether, for the future, Maori rights should be determined exclusively in the general Courts, and whether the jurisdiction of the Waitangi Tribunal should be limited to the practical resolution of problems arising from the past.

The lessons of history

New Zealand's draft Bill of Rights would do more than affirm some basic rights and freedoms of a Euro-centric society. It would recognise the status of the native people of our society for whom group rights were more important than individual freedoms and protect their aboriginal rights acknowledged in the Treaty of Waitangi.

Historically the Treaty of Waitangi seems to have been less concerned with securing sovereignty than assuring the position of the native people. At the time settlement was as inevitable as it was unwelcomed by the British Government, and the Government was probably more concerned to protect native interests than provide for its own. In the result the Treaty had the potential to form a basis for a bicultural constitution. If that potential was not realised it

was not through any lack of idealism on the part of the Imperial Government but through the contrary expectations of settlers.

I do not think it is too late to reinstate the original expectations of the Imperial Government. I think it is timely that we should. We have moved from the kindergarten of our colonial past and from the Land Wars fought in our youth. We have since experimented successfully with idealism. It is proper that in now proposing a national Bill of Rights, we should declare not just those rights that are thought fundamental to our ways, but should revive those that were meant to be fundamental to our nation's birth, but which subsequently fell by the wayside.

Our history indicates that Maori people need some form of proper recognition for their rights. I believe they have suffered more than any people should, for the lack of it. We can no longer ignore Maori demands in the hope that they will simply go away or maintain an ignorance of world-wide recognition of the rights of indigenous people. Those who say we do not need a Bill of Rights can say so from the standpoint of a people whose rights have never been seriously threatened. That is not an experience that Maori people have enjoyed.

Yet Maori people have received word of the draft with some scepticism. There is one view that the Treaty is so sacred that it ought to stand alone. That view, if born of sentiment, is difficult to debate, but if for some reason the Bill of Rights proposal did not proceed, there would be support for the view that the Maori section of it should proceed alone. Another view is a more pragmatic one. The main question, it is thought, is not whether Treaty rights ought to be

recognised, for it is presumed that they should be, but whether the preponderance of public opinion will allow them to be. Does Part II of the Bill seek to reverse an inevitable verdict of history?

There is a growing international opinion that indigenous minorities have particular rights. That view has been upheld by North American courts since at least 1823. International bodies have espoused the same view more slowly. New Zealand has ratified, in order, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of all Forms of Racial Discrimination. In these the rights of different cultures are progressively strengthened, but reports of the United Nations Working Group on Indigenous Populations indicate an international view that indigenous minorities are entitled to rights exceeding those of non indigenous cultural minorities. That is certainly the view of the World Council of Indigenous People, an ad hoc body to promote the interests of indigenous minorities throughout the world.

In New Zealand we seem strangely unaffected by world opinion or the opinions of other Courts that have reached different conclusions from our own on the rights of indigenous minorities. Our Courts have tended to reflect contemporary political thinking and our political thinking has followed the preponderance of local opinion. The place of the Treaty of Waitangi in the Bill of Rights may be determined even now by the balance of public prejudice, or we may find it was easier to advocate where the balance should be than to judge where it actually was.

Our history shows too well that the political and judicial consideration of Maori rights is overly susceptible to a community stance and that for Maoris, as a minority, the democratic reliance on popular opinion is at best inconvenient.

New Zealand was settled during an enlightened age in British colonial history. There was enlightenment even when Captain Cook found the Maoris, (although the Maoris were not aware that they were lost). With some idealism the drafters of the United States Constitution declared all men to be equal. It was not the sexist language that first caused offence but the belief that indigenous Indians and imported blacks were not equal because they were either not citizens, or not people.

The United States Supreme Court challenged that belief, so far as the Indians were concerned, by declaring Indians more than equal. It was held the native Indians had aboriginal rights by virtue of their prior occupation of the land, rights recognised since at least 1066 when William the Conqueror had guaranteed to the native British rights to keep their own lands, forests, fisheries, laws and customs for as long as they wished but subject to his sovereign authority. It was considered these rights did not depend on treaties. The treaties did not create those rights but could modify them (see Johnson v McIntosh (1823) 8 Wheat 543 and Worcester v Georgia (1832) 6 Pet 515. The classic definition is given by Chief Justice Marshall in United States v Percheman (1831) 7 Pet 51.)

This thinking was not confined to the United States. The same view was adopted in Canada and Africa and was upheld by the Privy Council in Britain (see for example St Catherine's Milling Co v R (1888) 14 AC 46 and Amodu Tijami v Secretary of State for Southern Nigeria [1928]

2 AC 399). Nor was the doctrine a phenomena of countries settled by the British. The doctrine of aboriginal title had been propounded by the Spanish Canon Lawyer Francisco de Vitoria for example, as early as 1557 and had been recognised within legal systems quite different from our own.

In Britian, political thinking became influenced by Wilberforce and members of the Humanitarian Movement who promoted the protection of native people in the establishment of new colonies. We were settled during the Humanitarian age. The Colonial Office insisted that the rights of the native people be respected. Lord Normanby instructed Captain Hobson

> "...(the Maori) title to their soil and to the sovereignity of New Zealand is indisputable and has been solemnly recognised by the British Government..."

and Hobson was required to the treat with the native tribes as independent sovereign groups. Punctilious recognition of Maori aboriginal rights was required.

I do not think Captain Wakefield's description of the Treaty of Waitangi as a device to give some respectability to acquisition is correct. The English version of the Treaty is a statement of clear British policy formulated before 1840 and continued after then. Recognition of aboriginal rights was contained in British treaties in Africa for example, in 1788, 1791, 1807, 1818, 1819, 1820, 1821, 1825, 1826 and 1827. Like the Treaty of Waitangi they did little more than state Native rights as discernable at common law and upheld in British colonial policy.

For a considerable time after 1840 the doctrine of aboriginal rights was maintained in New Zealand in a variety of Imperial and Colonial enactments. Four months after the Treaty the Crown's right of pre-emption was expressed in a Land Claims Ordinance, the right, vested in the Crown, being seen to carry a corresponding duty to protect Maorisfrom excessive alienation of their lands. A further Land Claims Ordinance of 1841 declared the title of the Crown to all unappropriated lands within the Colony subject to the "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" (per the Privy Council in Nireaha Tamaki v Baker (1901) (1840-1932) NZPCC 371). Other instructions from the Colonial Office and Imperial Acts of the British Government, including the New Zealand Constitution Act 1852, acknowledged the Maori's right to hold land and administer their own affairs in accordance with custom.

Many of these early Acts cited the Treaty. Usually a preamble explained that the Act was based on the Treaty (as for example the Native Rights Act 1865 and Native Lands Acts 1865). Occassionally it was referred to in operative sections. Section 8 of the Fish Protection Act 1877 assumed that the Treaty either was or could be an independent source of rights.

> "Nothing in this 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."

The early decisions of the New Zealand Courts reflected the humanitarian thinking of contemporary official policy and the Colonial Office stance requiring the recognition of Native rights. In R v Symonds (1847) NZPCC (1840-1938) 387, the Supreme Court of Martin CJ and Chapman J drew upon the wealth of American experience and applied the doctrine of aboriginal rights to this country. In that case Maoris had sold land to M. Later an area that included that land was ceded to the Crown and the Crown granted the land to S. It was held that the Crown Grant to S prevailed over the earlier sale to M. It was considered that under the common laws affecting aboriginal rights, land could be ceded only to the Crown which in turn was the sole source of title. The Court ranged widely in considering the origin of this law and the case is of interest, not for its limited facts, but for its clear statement of the doctrine of aboriginal rights, a doctrine described by Chapman J as securing to the Maoris

> "all the enjoyment from the land which they had before our intercourse, and as much more as the opportunity of selling portions, useless to themselves, affords."

For the purposes of this paper the case has greater interest for its clear statement that native rights arise by virtue of the common law and do not depend upon treaties. Chapman J noted

> "..the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled."

This should be kept in recall because later the judicial recognition of aboriginal rights foundered upon a view that the Treaty of Waitangi had no status in law and an erroneous deduction from that, that therefore there were no native rights save those expressly given by statute.

A marked change in judicial thinking followed the Land Wars. By the 1850s the Maoris were dramatically outnumbered. More settlers needed more land and fewer Maoris were disposed to sell. With war came the New Zealand Land Settlements Act 1863 by which the lands of 'rebel' tribes were confiscated. With peace came other laws and policies for the acquisition of other native lands for rural and township settlements.

At various times Governments sought to restrain settler demands for more land but the policies of acquisition predominated. In any event it was thought, or perhaps hoped, the Maoris were a dying race. At this time too our judicial thinking changed. The Courts of the United States, Canada, India, Ceylon, Nigeria and the Privy Council in Britain continued to wrestle with the doctrine of aboriginal rights. The Canadian case Calder v Attorney General for British Columbia [1973] 4WWR 1 shows that the doctrine has survived to modern times - at least abroad. In New Zealand and Australia we set aside aboriginal rights and opted to orbit on a southern axis of our own.

In New Zealand the change came with Wi Parata v The Bishop of Wellington (1877) 3 NZJR 72. In that case the Governor had granted Maori land to a church for a school, it being said that the Maoris had agreed. After thirty years a school had not been built and the tribe claimed the land back. The Supreme Court (Prendergast CJ, Richmond J) held that they could not

get it back. The Crown Grant was an act of state and a Court could not look behind the implied declaration in a Crown Grant that the native customary claim had been extinguished. It was added that the Treaty of Waitangi was also an act of state, "a simple nullity" in so far as it purported to cede sovereignty and, it was thought, any recognition of any prior claims by natives had also to be an act of state not within the purview of the Courts.

The Court of Appeal took the opportunity to uphold and extend that approach in Nireaha Tamaki v Baker (1894) 12 NZLR 483. The difference in that case was that the land had not been Crown granted. The Maoris claimed the customary ownership of certain land (their customary entitlement having been recognised in a preliminary determination of the Maori Land Court). The Crown claimed that the land had been ceded and the Commissioner of Crown Lands arranged for its disposal. The decision of the Court of Appeal, of which Prendergast CJ was a member, was delivered in 1894 by Richmond J. It was held that the Maori claim could not even be considered, the Crown's mere assertion of ownership being sufficient to oust it. Maori rights were dependent not upon recognition of those rights by the Court, but recognition by the State.

The Maoris took the matter to the Privy Council (Nireaha Tamaki v Baker (1901) (1840-1932) NZPCC 371). Their Lordships were of a decidedly different opinion. The Privy Council did not find it necessary to review at any length the doctrine of aboriginal rights as it might be applied in New Zealand. In its view it was simply "rather late in the day" to argue that the Courts could not take cognisance of any aboriginal and customary rights for such rights had been recognised in

a number of statutes. It was considered that the Wi Parata view that there was no customary law of the Maoris of which the Court could take cognisance, "went too far".

This began a breach between the New Zealand Courts and the Privy Council that culminated in a formal protest. In Hohepa Wi Neera v Bishop of Wellington (1902) 21 NZLR 655 Stout CJ followed Prendergast's views, despite the Privy Council decision, noting simply that the Privy Council "did not seem to have been informed of the circumstances of the Colony". Wineera's case concerned the same land, trust and facts that were considered in Wi Parata. It happened that the same land and trust were to be considered by the Privy Council in yet another case, Wallis v Attorney-General [1903] AC 173. In that case there were many issues but one of them was whether upon the failure of the trust, the land should return to the Crown. The Privy Council mooted whether the land should return to the native donors "whose claim would at any rate be superior to that of the Crown and whose interest was alternatively magnified and ignored by the Solicitor-General" but the natives were not represented and that claim had not been advanced in the case under review. The Privy Council could not therefore determine the point but delivered instead a stinging attack on the New Zealand Court of Appeal, Lord McNaghten considering that the refusal of that Court to interfere so as to "breach the trust confided in the Crown" was "not flattering to the dignity or the independence of the highest Court in New Zealand or even to the intelligence of Parliament". He added "what has the Court to do with the executive? Where there is a suit properly constituted and ripe for decision, why should justice be denied or delayed at the bidding of the executive?" In rejoinder the Court

of Appeal recorded an equally strongly worded Protest of Bench and Bar (1903) NZPCC (1840-1938) 730 implying that the right of appeal to the Privy Council ought to be reviewed.

Our executive reviewed instead the law that gave rise to the difference of opinion and enacted as section 84 of the Native Lands Act 1909

> "save so far as otherwise expressly provided for in any other Act, the native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in any matter in any debate"

That provision is still law, being now contained in section 155 of the Maori Affairs Act 1953 in slightly amended form.

The Privy Council did not retreat from its view, and in Manu Kapua v Para Haimona [1913] AC 761 Lord Haldane reiterated the common law principle that a Crown Grant did not in itself extinguish a customary claim, and that native rights did not depend on legislation (although legislation could take them away).

The New Zealand Courts did not retreat from their view either but changed the basis of their reasoning from broad principles of common law to a construction of statutory law. In Tamihana Korokai v Solicitor-General (1913) NZLR 321 the Court of Appeal held that the Maori Land Court had jurisdiction to determine a customary claim to the ownership of the bed of Lake Rotorua despite the averment of the Crown that it was Crown land. It reached that conclusion on a construction of certain statutes pointing out the many occasions on which the legislature had recited the Treaty and

enacted legislation with the declared object of giving effect to it. (Stout CJ presided although in 1908 the claim to the lake had been largely accepted by the Stout-Ngata Commission of which he was chairman). But the statute based approach to the Treaty was to lead the Courts to the conclusion that the Maoris had no particular rights save those expressly given by Parliament.

Stout CJ stated that view in the following year in Waipapakura v Hempton (1914) 33 NZLR 1065 SC. Without reference to the contrary determination of the Privy Council in Manu Kapua of the previous year, he declared

> "It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give (an exclusive fishing right) to the Maoris, but if it meant to do so, no legislation has been passed conferring the right, and in the absence of such both Wi Parata v The Bishop of Wellington and Nireaha Tamaki v Baker are authorities for saying that until given by statute no such right can be enforced."

Maori opinion was also to focus on the Treaty itself rather than the maintenance of rights through the common law. Maori calls for the recognition of the Treaty were unequivocal from at least the 1860s. The early claims are recorded in the proceedings of a Conference of Native Chiefs at Kohimarama in 1860 (see 1860 AJHR E-9) and of the MaoriParliament at Orakei in 1879 (see 1879 AJHR sess II G8). The Maoris placed their faith in the Treaty itself. Much later when neither the legislature nor the New Zealand Courts would recognise it, it was thought the Privy Council might. But the Privy Council had never said that the

Treaty had status. Native rights were seen to stem from common law principles. The Treaty merely encapsulated those principles.

The point was clearly made in Te Heuheu Tukino v Aotea District Maori Land Board [1941] NZLR 590. Tukino claimed that a charge on his land was contrary to the principles of the Treaty. That claim was outside the scope of the doctrine of aboriginal rights but possibly without the ambit of the Treaty. The Privy Council found it unnecessary to consider the point. In its view the Treaty was unenforceable in the Courts except to the extent that it had been incorporated into the municipal law.

As a lawyer I have no difficulty with that decision. Our Treaty was not meant to be more than a statement of legal principles that were thought to exist and which the British Government was keen to espouse. But Tukino presaged the modern problem that even were we now to accept those principles, Maori sensibilities require formal recognition of the Treaty. It is

considered not good enough that the rights should be seen to stem from the principles of a common law or should be restricted to them, when there is a more important pact between 'our' Chiefs and 'their' Queen. Tukino, it must be remembered, was a paramount Chief, the 'Sovereign' of Tuwharetoa, and he took his case to the Privy Council, which was seen by the Maoris as the Queen's personal Court. Since then, and also, I suspect, because common law rights were denied, Maori claims have centred on legislative recognition of the Treaty itself. It was no longer a question of law alone, but a question of honour. The Treaty had been sanctified.

Since Tukino the Treaty has been pleaded in the Courts if only to draw attention to its continued existence. Both common law rights and the status of the Treaty were argued in the Court of Appeal in In re the Bed of the Wanganui River [1962] NZLR 600 and In re the Ninety Mile Beach [1963] NZLR 461 but in this context those cases merely illustrate the continuance of the statute based approach in the Courts. In Maoridom however they illustrate that issues of crucial cultural importance cannotbe allowed to die. As in many things Maori, fortitude was found from proverbs, like 'Rangitihi - whakahirahira te upoko i takaia ki te akatea' which records the story of Rangitihi who continued to fight though his head was split by a club and was bound only by a vine. The Wanganui River case illustrates the point. The procedings began in the Maori Land Court in 1938, on the application of Titi Tihu. From there the claim proceeded before the Maori Appellate Court (1944), the Supreme Court (1949), a Royal Commission (1950), the Court of Appeal (1954), the Maori Appellate Court (1958) and the Court of Appeal (1962). Titi Tihu did not get the result he wanted, but although he is now over 100 years old he has not given in. He now has a petition on the river before Parliament. Meanwhile the Treaty continues to underly the claims of subsequent generations, in Hita v Chisholm (Supreme Court Auckland, 1977), on fishing for example, and in Mihaka v Police (No 1) [1980] 1 NZLR 453, on language.

I do not think we can consider Part II of the Bill of Rights, or even the Bill as a whole, without some awareness of this history and of the feelings that underly Maori claims. The Maoris have lost most of their lands and the survival of customary preference in the administration of their remaining lands or their own affairs owes more to Maori obstinacy, (or fortitude depending on the point of view) than benign laws or

sympathetic Courts. While some people may view the Bill as an exercise in legal academics, for many Maoris it raises issues that have been central to the debates within Maoridom for over a century.

For Maoris, some of the lessons of this history are the converse of what one might expect from a people who have not fared well in the Courts. In the Manukau Claim (July 1985) the Waitangi Tribunal reported that amongst the tribes that suffered most from land confiscations there is still a reliance on the due process of law. In a society where politicians must be conscious of the climate of public opinion, the need is seen for a strong judiciary that can withstand the vagaries of climatic change.

The need for an independent judiciary is another lesson from the past. It is not always convenient to remember that the Judges who changed the judicial stance after the Land Wars, Prendergast CJ, Stout CJ and Richmond J, and who came into an unseemly conflict with the Privy Council, were former politicians whose Governments had promoted land confiscation and other policies for the acquisition of Maori land. It seems unfortunate that the good work that Stout CJ did as a politician and chairman of the Stout-Ngata Commission, is now obscured by the blurring of executive and judicial roles. Today we do not think it a good idea to make judges out of politicians whose political life is spent but the lesson of history is not just the need for a politically independent judiciary. At a time when some people are critical of the draft Bill, because rights must change to reflect changing opinions and because Judges are not elected or are not seen as sufficiently in touch with contemporary opinion, the Maori

experience serves to stress the other side of the coin - that the maintenance of rights depends upon a strong independent judiciary capable of withstanding both political and public pressure.

It is this 'other side of the coin' that is seen first by a Maori minority that seeks protection from what could once again be an oppressive majority. For the same reason there is no general Maori demand to abolish appeals to the Privy Council. Some Maoris would keep the right of appeal for the same reason that some Pakeha's would do away with it - because the Privy Council is removed from the weight of local opinion.

Given our current state of enlightenment it may be thought that we are unlikely to become again an oppressive majority and that Part II of the Bill is either not needed or is too late. We are more sensitive today to the needs of special interest groups. I am not so sure that that is correct. Too often, I fear, Maori rights are not identified, or they are subjugated to our current courtship with multi-culturalism. At least Pacific cultures should understand the prior right of the tangata whenua or those who traditionally belong to a place. That right is occasionally apparent in the names of Pacific peoples (Vanuatu - whenuatu - the people of the land, and Kanaka - tangata - the people, for example). I am not so sure that European settlers in Polynesia see the distinction or realise that the equation of Maori groups with other minority cultures offends both Pacific tradition as well as common law rights. Oppression through majority opinion is sometimes well intentioned.

From an historical perspective I do not see how a Bill of Rights for New Zealand could be complete without reference to the particular rights of the indigenous people and nor do I see an adequate protection for Maori rights without one.

The Status of the Treaty and its place in the Bill

As considered in the last section, common law native rights were displaced last century and in this century Maoris came to rely on the Treaty itself. At the same time, when Parliament settled the prior claim of the Crown with regard to the land (section 84 Native Lands Act 1909) Maoris shifted the contest from off the land, to lakes (eg Tamihana Korokai v Solicitor-General, supra) rivers (eg In re the Bed of the Wanganui River supra), foreshores (eg In re the Ninety Mile Beach supra), fisheries (eg Waipapakura v Hempton supra) and even language (Mihaka v Police No 1 supra). As the Courts considered the status of the Treaty, so also did academics (see for example TL Buick The Treaty of Waitangi, NA Foden The Treaty of Waitangi and its legal status in The Constitutional Development of New Zealand in the First Decade and also New Zealand Legal History, J Rutherford The Treaty of Waitangi and the Acquisition of Sovereignity in New Zealand, TJ Lanigan The Treaty of Waitangi, AP Malloy The Non Treaty of Waitangi [1971] NZLJ 193, FM Auburn Te Tiriti o Waitangi (1971) 4 NZULR 309, WA McKean The Treaty of Waitangi Revisited, in The Treaty of Waitangi its Origins and Significance (1972) Victoria University Extension Publication No 7 (1972), B Carter The Incorporation of the Treaty of Waitangi into Municipal Law (1980) AULR Vol 1 No 4, and JD Sutton The Treaty of Waitangi Today (1981) VUWLR 17). In these the main debate was on the status of the Treaty and its signatories at International Law. To PG McHugh for his article

Aboriginal Title in New Zealand Courts (1984) Cant ULR Vol 2 and to both PG McHugh and F Hackshaw who made submissions to the Waitangi Tribunal (Kaituna River 1984 and Orakei Block 1985 respectively) I am indebted for the alternative approach taken here, as was taken in R v Symonds 140years ago, that the debate on the status of the Treaty at International Law is misleading, for native rights needed neither the Treaty nor legislative initiative for their existence.

For a time, when protestors claimed "The Treaty is a Fraud" I thought Maoris may have come to the same view, that their rights are not dependent on the status of the Treaty. I have since learnt of the predominant view of some 1700 participants at the Waitangi National Hui on 6 February 1985 that the fraudulent approach was a temporary aberration. The Treaty has been re-established as a sacred document so that nothing short of its full recognition in unadulterated form can give satisfaction or restore honour.

This approach creates difficulties. If the Treaty merely declared native rights discoverable in the common law then those rights would be capable of succinct codification in either a Bill of Rights or a statute. But the Treaty itself was in Maori, and in Maori it not only goes much further than the common law position, but it can mean different things to different people. It lacks the precision of a legal contract and is more in the nature of an agreement to seek arrangements along broad guidelines. In this respect it is different from Treaties with North American Indians which were concerned to make those arrangements and in so doing to modify common law rights. In the result Treaties are recognised in the United States by the 'commerce clause' of the United States Constitution, while the Canadian Charter finds it

prudent to refer not just to Treaties or to aboriginal rights in the Treaties, but to aboriginal rights and the Treaties. I think our Treaty includes the aboriginal rights and then goes further. How much further has yet to be determined.

Earlier I had thought it would be best to simply codify native rights at common law. I had a penchant for Jeremy Bentham's views that laws should be understandable, made known, and clearly listed. But the Maori stance is understandable and in fairness I do not think we can now do less than give constitutional status to the Treaty itself. The position could only be different if in the past the principles for which it stood had not been so severely put down.

The Courts and the Treaty

There are other factors arising from other historical developments that raise the question of whether the interpretation and application of the Treaty should pass exclusively to the general Courts, and that cast doubts on the interpretative role proposed for the Waitangi Tribunal. After an inauspicious beginning in 1865, the Maori Land Court achieved some popularity with Maori people because of its subsequent brief to prevent alienations contrary to equity, good conscience and native interests and for its later role in forming owner-controlled incorporations and trusts. But a belief grew amongst Maoris that success was to be had only from a Maori Court. That in turn fed the view that separate Maori Courts were needed for Maori things to the extent that in 1980 before the Royal Commission on Maori Courts most Maoris opposed the incorporation of the Maori Land Court into an integrated judicial system administered by the Department of Justice. The Waitangi Tribunal may have now re-inforced that view.

Part II of the draft Bill of Rights would change the ground rules set at the end of the last century and remove existing impediments to the judicial recognition of native rights. There is at least the prospect of some Maori success in the Courts. At a time when the Maori underperformance in law observance causes concern, and there is a need to engender a better respect for the "necessary laws and institutions" of the country (as promised in the Treaty), I do not think it helpful to perpetuate the view that justice for Maoris is only to be found in separate Courts for Maori things. Apart from the thought that there seems to be something inherently wrong in referring down to an inferior tribunal questions of interpretation as distinct from questions of fact or custom, it could be that the role proposed for the Waitangi Tribunal is conceptually wrong, or serves to entrench a view that the crime rate suggests is a view we can no longer afford to take. If Maoris are to find a relief from this Bill should the relief be seen to come from a 'Maori Court'? Some Maoris have asked me whether we can afford to trust the general Courts with the interpretation of the Treaty of Waitangi. The more important question may be whether we can afford not to. I do not think it beyond the wit of any Court to interpret, on evidence, a document in another language or to apply recognised principles of law to the interpretation of bilingual treaties.

The Role of the Waitangi Tribunal

There is currently a bill before Parliament to enable the Waitangi Tribunal to consider claims going back to 1840. At present the Tribunal can consider only those matters arising after 1975. If Parliament were to so extend the jurisdiction of the Waitangi Tribunal and pass as well Part II of the draft Bill of Rights, there

would seem to be room for a severance of functions whereby matters arising after the enactment of a Bill of Rights would fall within the exclusive purview of the general Courts, with a power of final decision. The Tribunal might then be concerned only with past events, and of necessity would recommend, not on the basis of the conclusions to be drawn from finite rights, but on the practical application of broad principles having regard to changed circumstances and the position of others who have acquired defined rights in good faith. It is this broad and practical approach directed to realistic recommendations that is provided for in the Treaty of Waitangi Act 1975 as it currently stands.

But I hope, in concluding, that my references to some vagueness in the Maori text of the Treaty and my suggestions for the rationalisation of the respective functions of the Courts and the Waitangi Tribunal, do not detract from the main theme, the need for some entrenched recognition of the rights of Maori people as the tangata whenua, capable of definition and final determination in the Courts. The recommendations of the Waitangi Tribunal are not an adequate substitute, given the record of our past, and are overly susceptible to a substantial public view that Maori claims are at best inconvenient.