The Negotiation of Treaty of Waitangi Claims: An Issue Ignored

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Introduction

> Disputes and all the cultural baggage - institutional, ideological, behavioural, political, even legal - that surrounds them are... not just contests of power and privilege, but contests of identity...Disputing is not just about my rights and your obligations, it is about who I am and what we are....[1]

There have recently been three important developments in the negotiation between Crown and Iwi of Treaty of Waitangi claims. In 1992, the Sealord deal was the first example of a multi-tribal settlement, and earlier this year the first major Crown-Iwi Raupatu grievance was settled under the Tainui Deed of Settlement. Then the *Crown Proposals for the Settlement of Treaty of Waitangi Claims*, published in 1994, was rejected by Mäori.

Each development has proven in its own way the complexities of reaching a substantive solution. However this article canvasses some of the more problematic procedural difficulties which have yet to be addressed. In it, I will argue that the Crown has so far ignored the crucial issue of power-sharing. Tino rangatiratanga is at the heart of the *process* of negotiation, profoundly affecting the cultural identity of the Iwi, and dictating the ultimate finality of any substantive outcome.

The Treaty of Waitangi

The Treaty of Waitangi signals the legal collision of two cultural notions of sovereignty. The New Zealand Parliament rests on the common law cultural foundation of Diceyan parliamentary sovereignty. In an address at Gisborne on the 13th of May 1995[2], the Prime Minister Jim Bolger declared:

> It must be clear that the Government will not entertain any division of sovereignty of Parliament, nor substantive power-sharing. We do not recognise the right of any group of New Zealanders... to determine their destiny regardless of the state of which they are a part.

The cultural context of the Mäori Treaty partners was not very different. Each Iwi had as firmly an entrenched doctrine of sovereignty as the British partner. Before the Treaty was signed Mr Bolger's comment could have been legitimately paraphrased to read:

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1 Just, Peter "History, Power, Ideology and Culture: Current Directions in the Anthropology of Law" (1992) 26 *Law and Soc. Review* 373, 407-8.

2 Reproduced in *Mäori Law Review, May 1995*, page 10.

> It must be clear that Ngati — will not entertain any division of sovereignty... nor substantive power-sharing over that Tribe's resources.

It was the job of the Treaty to strike a balance, necessitating a power-sharing model. So how can the Treaty of Waitangi accommodate the two notions of sovereignty?

Each right given to one Treaty partner has a corresponding obligation. Article One is about governance. The proper role of the State is to have a function, a duty and a right to regulate in the national interest.[3] This role is given by Iwi "absolutely and without reservation."[4]

Article Two reciprocates the power-sharing process whereby the Crown is obliged to accept a limit on *its* sovereignty by recognising 'tino rangatiratanga'. Practically, tino rangatiratanga entails iwi control over iwi resources under an iwi structure. This fundamental aspect of Iwi sovereignty is subject only to regulation in the interest of others.[5]

This interpretation may well raise the eyebrows of most lawyers. Yet many would be prepared to pay lip-service to Court of Appeal statements that the Treaty is a "founding document".[6] This must literally mean that the Treaty is not merely declarative, but *constitutive* of a divided sovereignty[7]; a new "Grundnorm", so to speak. The continual denial by Governments of any limit of their sovereignty is in breach of the Treaty and has caused frustration, anger and cynicism in Iwi populations.[8]

As Ngäi Tahu Mäori Trust Board chairperson Tipene O'Regan said in a lecture given at Otago University in 1995:[9]

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3 *Ngäi Tahu Mäori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 558. See also O'Regan, Tipene "A Ngai Tahu Perspective" *(1995) 25 VUWLR (No.2)* 178.

4 Treaty of Waitangi (English Text), Article One.

5 In an application for review of the Director-General of Conservation's issuing of permits for commercial whale-watching, the Court of Appeal held that "a reasonable Treaty partner would not restrict consideration of Ngäi Tahu interests to mere matters of procedure. The iwi are in a different position in substance and on the merits from other possible applicants for permits": *Ngäi Tahu Mäori Trust Board v Director-General of Conservation* [1995] 3 NZLR 558, 561. However this decision did depend on Parliament's statutory incorporation of the principles of the Treaty in the conservation legislation.

6 *New Zealand Mäori Council v Attorney-General* [1987] 1 NZLR 641.

7 Davies, S. and Ewin, R.E. "Sovereigns, Sovereignty, and the Treaty of Waitangi" in Oddie, G. and Perrett, R. (eds.) *Justice, Ethics and New Zealand Society*, OUP, Auckland, 1992.

8 The seizing and occupation of the Moutoa Gardens by Wanganui Mäori in early 1995 was over claims to local Mäori ownership, but quickly escalated into assertions of self-determination and Mäori sovereignty: Joseph,P. (ed.) *Essays on the Constitution*, Brooker's Wellington, 1995, p5-6.

9 O'Regan, T. *The Treaty, Ngai Tahu and the New Millennium*, unpublished lecture, Otago University, 24 May 1995.

> Unless the fundamental question of the acceptance of the very limited concept of authority and domain secured and guaranteed by the Treaty is achieved by Ngäi Tahu, we will continue to build our future without a settlement.

The Settlement Process

In an article on negotiated justice[10], Ian MacDuff suggests that the "fiscal envelope" debate has unfortunately focused on the *solution* of issues of settlement. He argues for a shift of focus to the issues of procedure, so that, between the Crown and Mäori, there is "not just an exercise in bargaining about the details of a settlement but also the creation of a culture of bargaining" — bargaining about how *they* will bargain.[11] Moreover, an insistence on seeing conflict as primarily in terms of its resolution:

> may lead us to exclude from our purview conflicts that may never become eligible for resolution because... the institutions of conflict resolution systematically exclude them.[12]

I would submit that the present climate of negotiation will never achieve "full and final " settlement, as long as the Crown's processes and structures which are established for negotiation, continue to deny dialogue about and implementation of tino rangatiratanga.

These structures will now be discussed in more detail to elucidate the procedural difficulties which stem from this unilateral and essentially dishonest negotiations foundation.

1. Who is the Claimant Group?

In order to reach an equitable and lasting settlement, the negotiating parties need to be confident that the correct claimant group has been identified. Excluding the right people, or including the wrong people can result in new grievances.[13] This involves determining at what level of the Iwi structure negotiation should take place: the individual, the whänau, the hapü, the Iwi, or a pan-Iwi body. The Treaty itself does not mention 'Iwi', and renders the equivalent of tribes as 'hapü', while Article Two recognises both collective and individual property rights.

The actual level chosen will depend on the wishes of the claimants[14] and the nature of the resources involved. For example, although the Waitangi Tribunal found that the hapü was the basic political and resource owning unit in the context of fishing rights, in a particular claim where "matters of common policy

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10 MacDuff, Ian "The Role of Negotiation - Negotiated Justice"*(1995) 25 VUWLR (No.2)* 144.

11 Ibid., 145

12 Just, Peter supra, 384

13 Office of Treaty Settlements, *Crown Proposals For the Settlement of Treaty of Waitangi Claims - Detailed Proposals*, 1994, page 42.

14 In the case of disagreement, or dissentient members of an Iwi, see text at notes 51 and 52.

affecting the people generally" were involved, they should be resolved with the Crown at an iwi or wider plane.[15] In contrast, a specific claim to a particular piece of land is a local issue and might be handled at the hapü level.

The Minister in Charge of Treaty of Waitangi Negotiations, Doug Graham, has recently implored Mäori to address the issue of a national "Kaumatua Council" for all matters, in order to make much greater progress in the Treaty claims process.[16] However pan-tribal organisations established for the purposes of dealing with the Crown have been criticised by Tipene O'Regan as being repugnant and essentially racist. Apirana Mahuika from Ngäti Porou agrees[18]:

> I don't need Pan Maori organisations or a Crown appointed committee to select who and what we are, and therefore to stand on our marae and to run our business.

The issue has divided the Treaty of Waitangi Fisheries Commission (Te Ohu Kai Moana) which is a body of exactly that nature. According to O'Regan:

> the Commission has thus far failed to deliver its fruits to the people whose rights it attempted to return... It does not offer a precedent.[19]

The Crown's push for a homogenous body representing all Iwi is a suspect tactic which would ideologically legitimate the dominance, both legally and factually, of the British Treaty partner. By reducing the numerous Iwi partners to a 'Maori conglomerate' the Crown can hand over a bundle of 'negotiated resources' to the Maori representatives and then watch with paternal concern the inter-tribal bickering.[20]

For some time, lawyer Annie Mikaere has predicted the potential for inter-tribal disputes as Iwi hotly contest the limited resources available. The Waitangi Tribunal is also concerned by the:

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15 Waitangi Tribunal *Fisheries Settlement Report*, (Wai-307), 12-13.

16 Graham, D. "Address by the Minister in Charge of Treaty of Waitangi Negotiations" *(1995) 25VUWLR (No.2)* 231, 237

17 O'Regan, T. "A Ngai Tahu Perspective" *(1995) 25 VUWLR (No.2)* , 189.

18 Ibid, 191.

19 Ibid, 188. However in the Fisheries settlement, it is without doubt advantageous to Ngai Tahu to speak out strongly against pan-tribal solutions. They do not want inland Iwi to influence the distribution of fishing quota toward an "equal allocation" model. The nature of the resource however, and the Quota Management System, necessitated a multi-tribal negotiation.

20 In *Re Ngäti Toa Rangatira* (21 Nelson Minute Book 1 Dec. 9, 1994), the Mäori Land Court made scathing comments about the post-fisheries settlement climate of adversarialism: "...[N]ow we have Maori to Maori divisiveness because of Tauiwi inspired commercialism."
See also *Area One Consortium Ltd. and Te Runanga o Muriwhenua Inc. v Treaty of Waitangi Fisheries Commission* (CA 224/93, Sept. 23, 1993); *Hauraki Maori Trust Board v Waitangi Tribunal* (CA 171/95, HC Wgtn 31 July, 1995.)

> creation of an environment which pitches Maori against Maori.[22]

A recent statement by the Treaty of Waitangi Fisheries Commission has perpetuated the problem[23]:

> So, if all neighbouring Iwi deny the Iwi status of a claimant group, then TOKM will consider removing that purported Iwi from the final list of Iwi.

Iwi are given blatant encouragement to deny recognition to potential competitors and stand to gain much from doing so.

Another example is the case of *In Re Tararua District Council*[24] where the Mäori Land Court observed that many hapü which were formerly integrated with other hapü have re-emerged and claimed their former status.

> ....[W]e believe this process is only valid when there is acceptance by all, particularly by the hapü that has harboured them.[25]

The current Crown policy of limiting available resources for settlement provides a powerful incentive for presently dominant hapü and Iwi to refuse to recognise the re-emergence of others.[26] This divisiveness amongst Mäori diverts their energy, money and debate away from the Crown-Iwi power-sharing dispute.

2. *Claimant Group Membership*

The Crown's *Detailed Proposals* suggest two methods of determining claimant group membership.[27] First, those who can whakapapa back to the originally aggrieved group. Second, those who bear the grievance today. A recent article by Jeremy McGuire[28] has regurgitated the objection that today's generation of taxpayers are having to fork out for the historical wrongs of another generation. An answer to that objection might run as follows: if, as I have submitted, the Treaty of Waitangi is constitutive of a divided power-structure in this country,

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21 Mikaere, Annie. "Mäori Issues" *[1993] NZ Rec Law R 311; [1994] NZ Rec Law R 277 ; [1995] NZ Rec Law R 142-55.*

22 Waitangi Tribunal, *Maori Development Corporation Report,* (Wai-350), 2.

23 *Te Reo o te Tini a Tangaroa - Newsletter of the Treaty of Waitangi Fisheries Commission* No.23 Feb. 1995, page 6.

24 Maori Land Court 138 Napier MB 85 , Oct.1 1994.

25 Ibid, 6. The practice of requiring recognition by others was codified in s5(e) Runanga Iwi Act 1990 (now repealed) which defined one of the essential characteristics of an Iwi as "an existence traditionally acknowledged by other Iwi".

26 Mikaere, A. "Maori Issues" *[1995] NZ Rec Law R 143.*

27 Office of Treaty Settlements, *Crown Proposals For the Settlement of Treaty of Waitangi Claims - Detailed Proposals,* 1994, page 42-43.

28 McGuire, J. "A Theory for a More Coherent Approach to Eliciting the Meaning of the Principles of the Treaty of Waitangi" [1996] *NZLJ* 116.

then today's generation of Pakeha can be referred to as "Te Tängata Tiriti" (People of the Treaty). The Treaty constitutes the right of Pakeha, and all New Zealand subjects, to participate in the governing system. Therefore wrongs against the Treaty, historical or not, must be resolved by the present generation in order for Pakeha to justify their own places as legitimate members of this community.

So far, the Waitangi Tribunal has not felt constrained to investigate solely issues of historical entitlement, and in fact has expressed a preference for the needs-based approach.

> It is difficult to see that a [historical entitlement] approach serves best to provide equity... or that it can ever deal adequately with those consequences of social dislocation that call for an assessment of the particular needs of each [tribe].[29]

It is obvious however that different Iwi will have different processes to determine who is sufficiently linked to the grievance to warrant the benefits of settlement.[30]

The Crown's *Detailed Proposals* contemplate a requirement of "active affiliation" to the Iwi or hapü before one is entitled to be a member of the claimant group.[31] This is presumably to avoid mistrust and jealousy on the part of Iwi members if a partially or non affiliated member is given as much say in the allocation and use of resources as a fully affiliated member. However this would exclude those meritorious individual Mäori who were detribalised through a loss of tribal land, and forced into urban centres to search for employment. It is the poor urban Maori of Porirua and Mangere who, arguably, are the true "bearers" of the grievance.[32] Waikato has 49% of its young people living in South Auckland. Tainui Maori Trust Board member Bob Mahuta explains:

> ...what we're saying is, first they have to identify on the roll so that we can get the benefits to them.[33]

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[29] Waitangi Tribunal *Waiheke Island Report* (Wai-10), 1987, 84-85. Furthermore, in Jane Kelsey's definition of the three principal goals of Mäori in bringing Treaty of Waitangi claims, only one is historically based:
- to secure just settlements of historical wrongs
- to protect and enhance a cultural base
- to provide means to participate in mainstream economic activity.

Kelsey, J. *Rolling Back the State : Privatization of Power in Aotearoa/New Zealand*, 1993, p270. Thanks to Barney Riley and his thesis for LLB(Hons), "Final Settlements for Treaty of Waitangi Claims", Otago University, 1994.

[30] Often a historical and a need-based approach will lead to the same group as in the case of the Ngäi Tahu claim. There, every beneficiary is registered on the Trust Board's roll, be they in Te Wai Pounamu or even overseas. Those beneficiaries are determined by the "Blue Book," a nineteenth century Maori Land Court record of every person alive at that time who had Ngäi Tahu blood. (Interview with Ms Hana O'Regan, Ngäi Tahu, Oct.1 1995.)

[31] *Detailed Proposals*, supra, 43.

[32] Hall, Donna. "Comment" (1995) *25VUWLR (No.2)* 193.

[33] Mahuta, Bob "Tainui: A Case Study of Direct Negotiations"*(1995) 25VUWLR (No.2)* 190, 194

The onus should lie on the Iwi authorities themselves to make efforts to contact potential beneficiaries. The bitter sense of grievance would be passed on to the younger generation if a class of tribal Maori elite arose from the settlements, who had restricted the beneficiaries to only those active tribal members. A well-known Mäori proverb captures what needs to be the spirit of negotiation decisions:

He aha te mea nui o te ao?
He Tangata, he tangata, he tangata.

If the claim is more suitable at the iwi level, is a dissentient hapü or an individual from that Iwi to be bound by a negotiated settlement?[34] Maori society is essentially anti-state and egalitarian where sections who do not agree with a kaupapa will split and stand alone on the issue:

> The ability to fractionate and reform ensured the operational autonomy of small hapu groups.

In other words, by fractionating, a group's mana is not lost by going along with a decision it does not fully agree with. In *Greensill v Tainui Mäori Trust Board*[36] the plaintiffs challenged the ability of the Trust Board to enter into a deed of settlement with the Crown on the basis that the Board had no appropriate mandate. Hammond J. held that the mandate was sufficient. More importantly, the deed was a purely political document and therefore not justiciable.

It is submitted that this particular type of intra-tribal dispute will become more and more prevalent as different groups wrestle with each other to be recognised as legitimate negotiating partners and so take a share of the limited resources available. Section 6 Treaty of Waitangi Act 1975 enables any Maori or any group of Maori to lodge a claim with the Waitangi Tribunal. The Crown proposes to amend this to prevent individuals from making claims not mandated by the hapü or Iwi.[37] This would ensure some certainty in the representation process. However, both individuals and dissentient hapü must, in my view, continue to have an avenue of redress. This will be addressed below.

O'Regan has said Ngäi Tahu will not enter negotiations until the tino rangatiratanga issue has been determined.[38] This stance is admirable for its refusal to succumb to the bulldozing tactics of the Crown, but it is likely to cause dissent in the future as frustrated members of Ngäi Tahu feel this may be the

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34 Until recently, the Ngäi Tahu Maori Trust Board was the single authority for that Iwi's dealings with the Crown. However, a group of Maori at Arahura have broken away from the iwi calling themselves Ngäi Tuhuru, and insisting that Ngäi Tahu cannot negotiate for them: *Fisheries Settlement Report*, supra, 12.

35 *Fisheries Settlement Report*, supra, 13

36 M117/95 HC Hamilton, 17 May 1995.

37 *Detailed Proposals*, supra, 37.

38 O'Regan T. *The Treaty, Ngai Tahu and the New Millennium*, unpublished lecture, Otago University, 24 May 1995.

only time when negotiation and settlement is possible. They should not be forced into such a 'take it or leave it' situation by the Crown. There must be room for dialogue and implementation of meaningful power-sharing between Iwi and the Crown.

3. *Claimant Group Representation*

The Waitangi Tribunal has stated that the consent of all groups (hapü, whänau and individuals) who have an interest in a claim would be impracticable, and so often property rights need to be settled for all through appropriate representative institutions.[39] Several bodies may represent an Iwi for the purposes of negotiation including Mäori Trust Boards, Mäori councils, Federated Mäori Authorities (FOMA) and Rünanga.[40]

The Rünanga Iwi Act 1990 (now repealed[41]) was a detailed and complex arrangement "for the registration by any iwi of a body corporate as the authorised voice of the Iwi" (long title). It addressed the issue of members of an Iwi who resided in the takiwä of another Iwi by making provision for a 'taura here'. Individual-Iwi disputes (s 30) and Iwi-Iwi disputes (s 31) had access to the Mäori Land Court. The Waitangi Tribunal have said:

> There were arguments over the details [of the Act], and rather than deal with them, the Act as a whole was repealed. That was unfortunate in our view. Now the position remains as it was, fluid, and even flaky.[42]

These various legislative attempts to impose upon the Iwi the establishment of an 'authorised voice', were for the most part rejected by Mäori for reasons summarised by Apirana Mahuika:

> Whether it is nobler in the mind to usurp the autonomy of Iwi and to replace it with the democratic processes as determined by the Crown, to determine who and what is my whakapapa, and having done that, to end me forever.[43]

The inherent unfairness of such unilaterally-imposed solutions was, in my view, inescapable. As various Iwi compete to become registered under these structures so as to acquire a share of the limited resources available for settlement, the vital issue of self-determination is submerged beneath internal divisions. What is more, by defining the ambit and monitoring the actions of a limited

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39 *Fisheries Settlement Report*, supra, 13

40 In Ngäi Tahu and Tainui there are settled arrangements which combine marae and hapü based representation with a trust board. In Te Arawa however, a trust board, a rünanga and a FOMA branch all have standing. Kahungunu appears to have a district Mäori Council, a trust board and a rünanga. The Tüwharetoa however are represented by a single trust board. And so it goes on: Ibid., 14.

41 After a mere six months in operation the Act was repealed by s 2(1) Runanga Iwi Act Repeal Act 1991.

42 *Fisheries Settlement Report*, supra, 15.

43 Mahuika, Apirana, "Comment" *(1995) 25VUWLR (No.2)* 190-191.

number of Iwi authorities, the Crown benefits enormously by reducing the number of Treaty partners.

In a critical comment on the Rünanga Iwi Act, Mikaere[44] points out that when the Government determines what should constitute an Iwi, the procedure to be followed to form a Rünanga, and the nature of the dispute resolution processes, Iwi continue to be subservient, and the Article Two guarantee of tino rangatiratanga continues to be breached.

Why is this so? At its most basic level, tino rangatiratanga can be defined as Iwi control over Iwi resources under an Iwi structure. Therefore, I suggest that implementation of a new power-sharing model which incorporated these ideals would mean that although the Crown had a right to regulate in the national interest, Iwi had a right to regulate their own interests, including their own governing structures.

To emphasise that the tribe's tino rangatiratanga still exists irrespective of these legislative solutions, Ngäi Tahu pushed for Parliamentary recognition of their own structure. The result was Te Runanga o Ngäi Tahu Act 1996, enacted on 24 April 1996. This will sever the accountability links with the Crown and mean the Iwi's trustees are directly and solely accountable to the beneficiaries.[45] Why is it that legislation proposed by the Crown is seen as a unilateral imposition, but legislation proposed by Iwi is not? It is submitted that the latter is the practical implementation of tino rangatiratanga, that is, an Iwi's control over that Iwi's resources pursuant to that Iwi's structure. Of course, the New Zealand Parliament still has the power to reverse legislation, and so the Ngäi Tahu solution depends on the good faith of the Crown. A preferable model, in my view, would be to entrench Iwi-related legislation, so that that Iwi's own consent would be required before changes could be made. A new power-sharing constitution could implement proposals such as these.

The major legislative attempt to resolve these representational issues is section 30(1)(b) Te Ture Whenua Mäori Act 1993 which provides:

> The Mäori Land Court may:
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> at the request of the Chief Executive or the Chief Judge, determine, in relation to any negotiations...the persons who...are the most appropriate representatives of any class or group of Mäori affected by the negotiations...[46]

The leading case on section 30 is *In Re Tararua District Council,*[47] where the council applied to the Mäori Land Court for a determination as to who had tängata whenua status between Tämaki Nui a Rua Taiwhenua (Ngäti Kahungunu) and Rangitane o Tämaki Nui a Rua Incorporated Society (Ngäti Rängitane). In determining the "most appropriate representatives" the Court found that neither group could claim exclusive tängata whenua status, having

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44 Mikaere, A. "Maori Issues" *[1990] NZ Rec Law R* 122-3

45 Interview with Tahu Potiki, Ngäi Tahu, Oct.1 1995.

46 Section 6A Treaty of Waitangi Act 1975 provides for a similar referral by the Waitangi Tribunal to the Court for a final determination.

47 138 Napier Minute Book 85, 30 June 1995.

both descended from common ancestors and enjoyed historical occupancy and use rights in the area. In any case:

> both tribes were present in Tararua, and the question as to who was first and who enjoyed primacy had little bearing on the present factual situation...[48]

The judgment considered that underpinning tino rangatiratanga are values such as whänaungatanga, mänaakitanga and kaitiakitanga which translate roughly as cohesiveness, reciprocity, and stewardship. Thus the Court found it odd that Rängitane should fail to acknowledge their whakapapa links with Ngäti Kahungunu. Although on appeal the Mäori Appellate Court upheld that approach, they did state that:

> it was hard to envisage any such representation not including, in part, representatives of tängata whenua...The allegiance by owners of the land to a particular Iwi would be an important ingredient in determining the tängata whenua, and there was no reason why there could not be more than one tängata whenua in any given area.[50]

In establishing this wide range of discretionary considerations the Court may have cemented its role in the negotiation processes as the arbiter of an increasing number of intra- and inter-Iwi disputes. This would seem to be contrary to its wishes. It has strongly expressed in two cases the need for debate and settlement of all whänau and hapü disputes on the marae and not in the Court.[51] This is certainly preferable at the early stages of a dispute. However with such contentious and important issues as Iwi identity and resource allocation being brought into sharp focus by Crown pressure, it is submitted that an independent arbiter is essential.[52] Such an independent arbiter must have the power of final determination of matters, rather than merely recommending to the Crown which only perpetuates the existing structural power imbalance.

The Crown has paid too little attention to these complex procedural issues and overlooked the fact that for quite some time yet, Iwi may not be structurally ready to engage in negotiations. In the meantime however, the limited resources available for settlement places pressure on Iwi to come up with structures of which the Crown might approve. If the *process* of the negotiations is flawed, then any so called 'full and final settlement' will be the subject of continuing resentment.

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48 Ibid., 102.

49 11 Takitimu Appellate Court Minute Book 96

50 Ibid., 101-104.

51 *In Re Pangaroa North B No 10 A Block,* (Maori Appellate Court, App 1992/6, Oct.22 1992, page 14. *Re Rahui A 13* (Maori appellate Court App 1992/2 May 14 1992, Page 10.

52 *Detailed Proposals,* supra, 47

> Disputing is not just about my rights and your obligations, it is about who I am and what we are...[53]

Structural issues and issues of representation go to the identity of the iwi involved, and challenge its very makeup. Thus the issues of the negotiating process become inseparable from wider questions of self-determination and active participation in rule-making. A system of 'negotiated justice'[54] would respond to these concerns by allowing dialogue and bargaining about the shape of the law, rather than bargaining in the shadow of the law.[55] The principles of negotiation cannot be principles of efficiency, utility and expedience, nor can they assume the priority of the present constitutional structure. They must be principles of participation, genuine dialogue and a commitment to power-sharing.

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[53] Just, P. supra, p407-8.

[54] MacDuff, Ian. "The Role of Negotiation - Negotiated Justice" *(1995) 25VUWLR (No.2)* 144.

[55] Mnookin, R. and Kornhauser L. "Bargaining in the Shadow of the Law " *(1979) 88 Yale L J 950.*