Waitangi: Morality and Reality

(by Kenneth Minogue,

New Zealand Business Roundtable, 1998 - $24.95)

As an expatriate Canadian who has lived in New Zealand now for five years, I am continually amazed by the nature of the debate surrounding the Treaty of Waitangi. For a start, there is simply very little open debate about the worth of the Treaty. Instead there is a stifling blanket of newly emerged liberal consensus that frowns on any questioning of the Treaty's value and benefit. This consensus is most obvious in public broadcasting, government departments, the judiciary, and the universities, but is evident too in various strata of 'polite society'. Ask any questions of the following sort:

1. Why a three clause, cobbled together, 158 year old treaty should be a major basis for structuring modern, industrial New Zealand society; or
2. Why it matters what is or is not 'taonga' *(i.e.* treasures); or
3. What, if any, meaning one is to give to amorphous, indeterminate blandishments like 'Treaty principles', 'partnership', and 'spirit of the Treaty'; or
4. Why, precisely, it matters who arrived here first (be it Maori or others); or
5. When the Treaty reparation process is supposed to end; or even
6. Whether most Maori actually benefit from a lawyer driven, Waitangi process that focuses on tribalism and land;

and odds are you will be met by an embarrassed silence or outright hostility. Sceptics, doubters, and the uninitiated soon learn that there is an almost religious aura surrounding the Treaty. Apostates of any form are considered beyond the pale. So those who think the emperor has no clothes, or has not much more than some skimpy underwear, generally keep their doubts to themselves. Open criticism of the Treaty is today more or less taboo in New Zealand.

That means that most discussion, assuming as it does the Treaty's worth, goodness and social benefit, takes for granted that New Zealand today consists of two peoples, two identifiable peoples who have more or less remained constant throughout time. (That is, a very illiberal pre-supposition is made that groups matter, *not* individuals; a further, rather unhistorical pre-supposition is also made that the two peoples of 150 years ago have not much inter-married, mingled and been joined by waves of further newcomers so that the two groups of New Zealanders then are the two groups now.) Furthermore, it is more or less an act of faith in understanding the Treaty that one of those peoples or groups *today* has been badly wronged by the other. (So wrongs and injustices are committed by racial groups, through the agency— it may be conceded if push comes to shove— of individuals fr om that group.) One's group, or perhaps more accurately in a country where there are probably no non-mixed blood Maori, the group with which one identifies emotionally or culturally, determines

whether one is today to feel grievance, historical outrage and betrayal or guilt and shame.

Where there is debate surrounding the Treaty it occurs over such ethereal issues as what the original signatories did or did not intend, what the implications of the two different linguistic versions of the Treaty might be, whether 'taonga' includes the Maori language carried on radio waves, and whether fish, fauna and flora introduced to NewZealand after the T reaty's signing are or are not to be covered by it. The comparatively down to earth question of whether to entrench the Treaty as part of a new written constitution also raises its head from time to time.

Against that backdrop of tacit outward acceptance or excommunication and of esoteric debate one has little expectation of coming across a doubter's guide to the Treaty and the Treaty process written by a well-respected political philosopher. In 1998, however, that expectation was discomfited by the appearance of Kenneth Minogue's book *Waitangi: Morality and Reality*. This short book makes a refreshing and needed change even if the doubts expressed in it are safely expressed from 12,000 miles away in London and even if mere mention of the name of the publisher of it, the New Zealand Business Roundtable, tends to evoke a visceral, negative reaction in all those who comprise, support and perpetuate the existing consensus.

Professor Kenneth Minogue is a New Zealander by birth who moved to Britain when he was young. He was until recently Professor of Political Science at the London School of Economics and has published widely. In short he is an eminent political philosopher whose views cannot (at least easily or convincingly) be written off as the rantings of an ill-informed ignoramus or bigot or neo-colonialist or whatever one's favourite term of abuse happens to be. (Notice I say that the fallacious *ad hominem* response cannot be made convincingly, not that it in fact will not be made — it will and has been. The absolute moral certainty of many academics and others that all who oppose their views are either ignorant rednecks or, if they happen to have an education approaching their own, racists is pervasive.)

Minogue's book has four chapters and a conclusion. The first chapter introduces the reader to the Treaty of Waitangi process and the underlying basis for that process, the claim that past injustices must be remedied. The second chapter puts that Waitangi process in context by examining the words of the Treaty itself, the notion of historical injustice, and the setting up of the Waitangi Tribunal, and then looks at legal developments surrounding the Treaty and how they have affected the way the Treaty is seen. Chapter three is devoted solely to what Minogue describes as the 'cultural question'. Within this he includes the post-World War II vogue for expressing almost all moral and political demands as rights, the internationalization of that vogue, and the contribution of academics to it, together with a sustained analysis of the concept of culture and how it can sensibly be understood. The fourth chapter then, in some detail, contrasts the so-called moral claims against what Minogue calls 'political and other realities'.

That bare outline fails to convey the flavour of Minogue's book. More success might be had by articulating four or five themes from the book. One such theme is justice. Minogue argues, correctly, that the Waitangi process cannot be

understood without appreciating the moral claim of historical injustice that lies at its core. He also aptly notes the connections between claims of justice or moral rightness and feelings of guilt or grievance. That connection becomes troublesome, however, once one rejects any absolute, non-relative notion of justice (see pp.5-7) or once one puts 'justice as absolute' in the scale against other absolutes or against pragmatic questions of political feasibility (see pp.79-82). The danger of a puritanical focusing on moral abstractions is further magnified when the claimed injustices of the past have been suffered not by living individuals but by a group, all of whose members are now dead and who are linked to the living only by race (and an inter-married, half-caste racial connection at that— see pp.15-18).

Related to this first theme of justice, grievance and guilt are more mundane questions of interpreting the Treaty and giving it meaning. But in a document of three brief clauses this is difficult to do, especially as the meaning many today wish to give to the Treaty is such a broad, expansive and politically fundamental one. And this is Minogue's second theme. On its face, the Treaty "...accord[s] sovereignty over NewZealand to the Cr own [clause one], confirm[s] the rights and properties of the Chiefs and Tribes [clause two] and grant[s] them protection and the 'Rights and Privileges of British Subjects' [clause three]." (pp.10-11) It was never intended to be a founding constitutional document (in any sense even approaching what is meant by a constitution today) nor does its exiguous content make it even remotely suited for such a task.

> The Treaty of Waitangi is thus a fragment and its significance might be contested on many grounds. It was not the result of any deep thoughtfulness on the part of those concerned, but was hastily assembled as a response to circumstances which were changing rapidly. Certainly no one conceived of it as a form of constitution. In the later nineteenth century it was often judged of no legal significance.... Nevertheless, it has come to be accorded the status of a founding document and scanned for 'implications'. These have grown more extensive with the passage of time. (p.11)

And therein lies the rub. For the New Zealand judges in the last dozen years have been doing their best to give credence to the otherwise implausible deconstructionist claim that no text has any established meaning that cannot be interpreted away by human interpreters. So these judges (particularly those of the Court of Appeal) invented the whole notion of 'the spirit' of the Treaty (see p.26) and "...generated the idea that New Zealand is a 'partnership' between distinct races rather than one nation living under law. *Although there is no mention of specific rights in the Treaty, highly specific rights have been discovered in it.*" (p.26, italics mine) Quite simply, the judges have done Jacques Derrida and Stanley Fish proud. When Cooke P, in the 1987 *New Zealand Maori Council* case, said that:

> What matters is the spirit. This approach accords with the oral character of Maori tradition and culture.

he was in effect granting a licence to ignore what the Treaty actually said (unless, of course, the actual words happened to prove useful in coming to the conclusion one was going to anyway). Minogue's response to this judicial deconstructionism is scathing:

> This is not only to turn the Treaty into something it is not — an oral agreement — but to bias that misinterpretation against any alternative legal reading.... [T]here is adaptation and adaptation, and it is clear here that the search for 'the spirit' of the Treaty is creating a jurisprudence of the ineffable, which is another way of saying that decisions are emerging from unpredictable and arbitrary political judgments of the judges thus liberated from the tedious business of interpreting texts. (p.26)

Precisely. What one sees is an inflationary stretching of terms so that, for example, 'taonga' or 'treasures', already an indeterminate concept, is expanded to cover virtually anything. Indeed it is the Treaty's "... vacuity on substantive questions [that] has licensed bold operators to invent its 'spirit'." (p.80)

This leads on to a third, and related, theme of Minogue's book which is a condemnation of the judicial activism that has played such a major part in the Treaty's latter day pervasiveness. The new found judicial hankering after stretching terms, implying others, and straight out making up new notions and obligations *de novo*, has introduced a new uncertainty (read 'flexibility' if you are a judge) into law and public life. This uncertainty is the clear result of what can kindly be summarised as the judicial decision to take a broad interpretation of the Treaty.

> [However] broad interpretations of legal documents increasingly approach a licence to legislate.... a continuous stream of *obiter dicta* in the Waitangi cases gives the irresistible impression that a new power is stretching and flexing its muscles. And that that power is explicitly disdainful of 'popular discussion', *alias* democracy. (p.27, italics in original).

Democracy, of course, entails the possibility that one's own views — including one's views about what does or does not constitute historical injustice or the morally right thing to do or the proper trade-off between pragmatism and idealism — may lose out to others', in particular those whose views happen to constitute the majority. (For a sample of such views see p.71.) Minogue notes that many of the people pushing the Waitangi process have little time for such possibilities. Sir Geoffrey Palmer is a favourite example of Minogue:

> [He] can talk about critics of the process in terms of 'Maori-bashing' and 'rednecks'. (p.50)

> The result is that Sir Geoffrey misunderstands the point of sovereignty. He believes it to be naked power, and therefore dangerous stuff... Sir Geoffrey's ideal, as he explains in a recent book, is 'bridled power'. The more bridle, the better the country, would summarise his position. In these matters, however, power is seldom dispersed; more often it is merely transferred, and here it ends up with the judges. (p.83)

> Earlier, we saw the evident relish with which Sir Geoffrey Palmer seeks to find a way round democratic prejudice. His thought illustrates the declension: I am a democrat, you are a populist, he is an extremist. (pp.86-87)

For such anti-democrats (though few of them would openly admit to being this), the lawyer-driven Waitangi process and the claimed over-arching, fundamental, quasi-constitutional status for the Treaty is an attractive alternative to the democratic political process (and to the possibility that their views of what should be done may lose out). Here Minogue has a variety of criticisms. He condemns "...the quite morbidly swollen role of the Treaty of Waitangi in contemporary politics." (p.80) Those who run the Waitangi system are a small, virtually self-appointed elite who try to 'educate' and 'raise the awareness' of those who disagree rather than to give them a chance to be heard. "But it is this very fact, of course, which makes the Treaty so attractive to those who seek to make the Waitangi process an alternative to the political process. It bypasses democracy and can, to some extent, by an operation not far removed from bluff, be made to generate the results some parties desire." (p.81)

From this follows perhaps the major theme of Minogue's book which is a consideration of *whether the obvious fact of social deprivation,* particularly amongst such a large chunk of those who identify as Maori, *is best served and remedied by vague assertions about Treaty rights and by the many vested interests the Waitangi process has created.* For me, Minogue's consideration of this question alone is worth the price of the book. No one can deny the awful social statistics ('awful' often in an absolute sense and nearly always in a relative sense) concerning Maori when it comes to health, to housing, to prison populations, to alcoholism, to education, to teenage pregnancy, and so on. It seems to me that everyone in society will benefit if something can be done to improve the lot of Maori and that this should be a high priority. But that well-founded desire to improve the outcomes of many Maori begs the question of whether improvement is most likely via a backwards-looking, court-like system that emphasises the past, and grievances, and re-taking ownership of land or by a forward-looking, legislature driven system that accepts urbanization and tribal breakdown and emphasises much better education, modern technology and how wealth is actually created today in a modern industrial society like New Zealand.

The unstated assumption behind the whole Waitangi process and the renaissance of reliance on the Treaty is that that process and revival will end up improving the position of the bulk of Maori (in both an absolute and a relative sense). It is a prime virtue of Minogue's book that he *both* clearly brings to the surface and articulates this unstated assumption and that he argues lucidly that it is false. The last four sections of chapter four (pp.66-77) make the strong case that most Maori will never benefit from the existing Waitangi process. For one thing the bureaucratic collectivism that underlies so much of the process is unlikely to create much wealth. How many centrally planned projects to achieve social equity do you recall succeeding? (The NHS is one, but it gets hard after that.) What are the odds that a rural life based on the iwi can ever generate the statistics that would demonstrate even a rough social equity, no matter how much land is handed back? "Tribal ruralism is no route to economic prosperity.

But the inevitable failure of centrally planned projects is not altogether an unhappy outcome, for it is precisely what keeps planners in business." (p.67)

Minogue's sarcasm is deliberate for it is his thesis that the Waitangi process has created a vested bureaucratic-like interest that — like all bureaucracies — cares most for its own survival. Biculturalism, fear of assimilation, the heavy use of jargon, spending other people's money, the assumption that Maori are an homogenous group with a single interest on questions, and much more are all indicators of "bureaucratic defence of patch". (p.67) Worse, Minogue is adamant that an absolutely central question if Maori are ever to improve their social position "...is systematically obscured by the entire Waitangi rhetoric: What are the duties of Maori?". (p.69) In other words, if Maori are to do better in future, part of any solution will include Maori helping themselves. This ties in with Minogue's comment, two paragraphs later, that: "Assets without action (not to mention technology) are valueless." (p.69) His point is that benefits (including grants and returns of land) can be self-defeating, that (most) Maori do not and will not benefit from reparation and subsidy.

Now this claim, that the Waitangi process is not achieving and will not achieve the crucial goal (held by most) of improving the lot of Maori, is a devastating one if true. It cries out for a response. I would argue that Minogue's assertion about the Treaty and the Waitangi process is analogous to the one Thomas Sowell makes about affirmative action programmes in the US, *that they do not help the very people they are ostensibly designed to help*. Surely this is the most direct sort of criticism imaginable. For why, exactly, is the Waitangi process (or an affirmative action programme) in place if it in fact does *not* help the people it specifically was set up to help? Presumably few people would support the process if the winners were preponderantly the lawyers, tribal elites, politicians, judges and bureaucrats with a direct interest in the system.

In making his case that most Maori will not benefit from the current Waitangi process Minogue draws the comparison to Third World aid and its failure (see p.68); he notes the relative lack of attention paid to city dwellers and the ever expanding role of lawyers and legal procedures (see pp.68-70); he questions the utility of too great sums being spent on trying to keep the Maori language alive (see pp.75-77); he excoriates the belief that wealth somehow just emerges from having natural resources and land (see p.74, *inter alia*) with the sentence "The world is full of prosperous economies (Japan, Singapore, Hong Kong, even Switzerland) which have negligible natural resources (including land), and resource-rich countries which are poor, especially in Africa." (p.74); and he points out the causal link between social mobility and wealth creation and wonders if tribal Maori society places a cultural impediment in the way of enrichment (see p.75). The cumulative effect, Minogue ventures, "...is to suggest to many Maori that the road to wealth is not through hard work and enterprise but legal and political. In other words, the Waitangi process bids fair to present Maori with a misleading idea of the process of economic advancement." (p.71)

In short, and at the risk of caricature, Minogue believes that the social deprivation of Maori will never be overcome as long as there is a process in place which instills "...the attitude of the rentier who believes that wealth flows from the control of resources rather than from work and ingenuity." (p.69)

As I said, this is a devastating critique if true and cries out for a response. We all need to hear just why the Waitangi process and Treaty fetishism are likely to bring good consequences for the bulk of Maori. (It obviously brings rewards to *some* Maori.) Instead we hear (from Geoffrey Palmer, Doug Graham, Robin Cooke and all the multitudinous well-intentioned, and often self-righteous, others) about injustice, fairness and reconciliation. Yet this is nothing to the point. How are we ever to achieve reconciliation if the adopted process will not improve the substantive outcomes of Maori when it comes to education, health, housing, etc.? If the architects of the existing consensus are likely to achieve little more than an expiation of their own guilt (and this too is doubtful), surely they could do so with their own money rather than the taxpayers'. I am sure tax returns could be altered so that those who felt deeply any past injustices (à la Graham) could tick a box donating whatever percentage of their incomes they wished. This, of course, would be in stark contrast to the present reality when the well paid and well off donate the money of others.

This result of unintended consequences flowing from the plans of well-intentioned people also pertains to the last theme of Minogue's book I will mention — that the Waitangi process may end up worsening race relations in New Zealand in the long-term (see pp.72 and 73). That depressing possibility surely needs to be addressed in a better way than the present method of lumping together all who dare disagree as either ignoramuses (mild retort) or as racists (strong retort). No one who actually reads this book could claim that Professor Minogue is a racist or an ignoramus. He makes powerful arguments that the present road down which New Zealand's government, legal and judicial practices are heading (paved as it is with good intentions) may well lead to Hades' home, not St. Peter's.

There is a risk to politicizing cultural differences and gazing backwards rather than forwards. Minogue's short book is a plea to start looking forward and to begin to see the alternatives in political terms rather than in absolutist moral categories. For that reason it is a timely one that I would recommend to all readers.

James Allan,
Faculty of Law,
University of Otago.