

# *The Roles of the Tribunal, the Courts and the Legislature*

Sir Kenneth Keith\*

## I INTRODUCTION

This paper is in three parts. The Introduction discusses the scope of the paper and aspects of the relationships between the bodies I am to consider. The second part concerns the allocation of roles among those bodies. And the third raises broader issues about the Constitution and the Treaty.

### A *"The Executive as Well"*

My task is to discuss the roles of the Tribunal, the courts and the legislature in handling Treaty of Waitangi claims. The Tribunal is created by Parliament and has only that authority which Parliament confers on it. The courts' role in the Treaty area also depends largely on legislation. And of course in our system of Parliamentary government the Parliamentary action supporting Tribunal and court process and power almost always results from executive initiative and always occurs with its concurrence. As well, much legislation authorises and controls relevant executive action (Parliament cannot execute the laws it makes) and in addition the executive will often be free to act under the general law to resolve Treaty issues. I must accordingly consider the executive along with the other three bodies mentioned in the broad title.

I would not want to give the impression from this preliminary comment on the executive that it takes all the relevant initiatives. That is plainly not so, either at the formal level or the more general one. Consider for instance that most important decision of the Court of Appeal in the first SOE case mentioned by Sir Ivor earlier today, *New Zealand Maori Council v Attorney-General*.<sup>1</sup> At the end of his judgment, the President of the Court of Appeal, Sir Robin Cooke, having called the case a success for Maori, added:<sup>2</sup>

[B]ut let what opened the way enabling the Court to reach this decision not be overlooked. Two crucial steps were taken by Parliament in enacting the Treaty of Waitangi Act and in insisting on the principles of the Treaty in the State-Owned Enterprises Act. If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.

That Parliamentary insistence on the principles of the Treaty is to be traced in turn to a last minute, prompt and positive response by the executive to an interim report

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\* President, New Zealand Law Commission, Professor Emeritus, Faculty of Law, Victoria University of Wellington.

1 [1987] 1 NZLR 641.

2 Above n 1, 668.

from the Waitangi Tribunal sitting in Ahipara on the Muriwhenua claim. We see here the interrelated roles of the four bodies and with the Maori claimants as well. On the claimants' proposal the Tribunal recommends action to the executive which proposes amendments to the legislature which enacts the proposal in terms which the Court of Appeal interprets as placing important obligations on the executive which negotiates with Maori and proposes further agreed legislation, noted by the Court, which Parliament enacts conferring further powers on the Tribunal and safeguarding the disputed assets against transfer in breach of the principles of the Treaty.

Such particular situations and interrelations of the formal institutions are to be seen in the wider context of social and political change, such as the 1975 Land March, and the enactment that year of the Treaty of Waitangi Act setting up the Waitangi Tribunal. I think on this occasion that it is also appropriate and fair to mention, if very selectively, related initiatives of an academic and scholarly kind - teaching in the Law Faculty at Victoria University of Wellington in the late 1960s on the Treaty of Waitangi, University lecture series and seminars in 1971 and 1972 organised by Warwick McKean and Bill Parker leading to interesting and possibly significant publications, and advice by Professor Quentin-Baxter to Hon Matiu Rata, the Minister of Maori Affairs, which was significant for the Tribunal legislation of 1975. That scholarly role, the role of the thinker as a leader as well as a critic and conscience of society, is to be seen over the centuries in relation to the rights of indigenous peoples, from the work of Vitoria and the other Salamanca divines in the 16th century through to Professor Irene Daes and her colleagues in the United Nations Working Group on Indigenous Populations resulting in the 1994 Draft Declaration. In time the Waitangi Treaty is a relatively new development, falling about two thirds of the way through that period. Those international developments add a further element to the processes of developing policy and law additional to those I have mentioned.

### *B A Bottom Up View of Power*

I mention the scholarly and international processes for a further reason. They remind us of areas of power, of autonomy, of influence, even of law, created by groups of individuals, distinct from states, coming together for mutual advantage. Those groups - families, tribes, universities, churches and countless other bodies - see themselves as existing before and independently of the State, and probably beyond it as well, since, if I may hazard a personal guess, the State with which we have become familiar if not always comfortable for only the last 300 years is reaching the end of its life cycle. But that is another paper for another occasion.

Today the point I want to make is that in addition to a top down view of law and administration we should also have a bottom up view. The groups I mentioned, or many of them, have their own bodies of doctrine and knowledge, their own rules and institutions including methods of enforcing their rules and penalising breaches, their own law if you like. Within very important limits they may and do run their own affairs. They may be organised in terms of people, activity or territory, or usually some

combination. Consider for instance the rules and institutions governing and at least in part created by:

- (1) the people who are nurses;
- (2) those playing rugby league; or
- (3) those playing rugby league for an Auckland club which also plays in New South Wales and Queensland.

The top down and bottom up approaches to the organisation and understanding of power can be seen as paralleling a favourite verse from the Psalmist which the Chief Judge tells us Sir Monita Delamere was fond of quoting in the Tribunal: "Truth shall spring out from the earth; and righteousness shall look down from heaven (or Fidelity springs up from the earth and justice looks down from heaven (85:11))". I return to the springing up view later.

## II CHOICE BETWEEN THE TRIBUNAL, COURTS, LEGISLATURE AND EXECUTIVE: WHO SHOULD DO WHAT?

### A *The Constitutional Role of the Treaty*

We begin with the Treaty of Waitangi which is, it appears, now accepted by the major political parties as the foundation document of New Zealand. In 1986 the Royal Commission on the Electoral System adopted a different formulation. For the Royal Commission the Treaty marked the beginning of constitutional government in New Zealand and recognised the special position of the Maori people.<sup>3</sup> Those statements avoid the question whether the Treaty places limits on the powers of Parliament which the courts might enforce. I make just one comment relevant to such a judicial role: it should not be assumed that if the Treaty does restrain Parliament's power its provisions will be fully enforceable in the courts. As cases in Scotland relating to the Treaty of Union and in the United States relating to the constitutional guarantee of a republican form of government show, the courts might say that certain issues arising from the text of the constitutional document are not justifiable. Rather, they present political questions which are to be resolved by other branches of government.<sup>4</sup>

### B *Legislation Giving Effect to the Treaty*

Of course the orthodox view is, or at least has been, that the courts can give effect to rights included in the Treaty of Waitangi (as in any treaty) only if Parliament so directs. Whatever the basic constitutional position, the legislation that results from such

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3 Report of the Royal Commission on the Electoral System *Towards a Better Democracy* (Government Printer, Wellington, 1986) para 3.102.

4 For example *Gibson v Lord Advocate* [1975] SC 136, 144; *Luther v Borden* 48 US 1 (1849).

Parliamentary direction is obviously significant. It is in that context that in 1986 Cabinet:

- (1) agreed that all future legislation referred to Cabinet at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty of Waitangi;
- (2) agreed that departments should consult with appropriate Maori people on all significant matters affecting the application of the Treaty, the Minister of Maori Affairs to provide assistance in identifying such people if necessary; and
- (3) noted that the financial and resource implications of recognising the Treaty could be considerable and should be assessed wherever possible in future reports.

After the 1990 election, the new Government endorsed that decision.<sup>5</sup> The legislative manifestations of that decision vary. Briefly, and in ascending order:

- (1) some statutes, we must take it by deliberate Ministerial and Parliamentary decision, make no reference at all to the Treaty when one could have been expected (recent health statutes provide instances);
- (2) others require those exercising powers to have regard to the principles of the Treaty along with other matters and purposes (the resource management legislation is an instance); while
- (3) others, such as the Conservation and SOE Acts, go further and require compliance with the principles of the Treaty.

There are also statutes such as those relating to the State enterprises settlement, fisheries and forestry, which expressly state that their terms are based on the principles of the Treaty, sometimes following reports of the Tribunal or other litigation. As well, some statutes may refer to more specific Maori interests (sometimes using the Maori language) rather than referring generally to Treaty principles. And all of them are directed expressly or impliedly to a range of bodies: the Tribunal, Ministers, officials, Iwi and other institutions with Maori members, statutory bodies or courts. The Treaty legislation calls for closer study than it has so far received.

### *C Courts and Treaty Legislation*

Almost all the major litigation in the courts has concerned the statutes which make explicit references to Treaty principles or more specific Maori interests.<sup>6</sup> Others, most

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<sup>5</sup> Legislation Advisory Council *Legislative Change: Guidelines on Process and Content* (rev ed, 1991) para 40 and Appendix D.

<sup>6</sup> A notable exception is *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

notably the President of the Court of Appeal,<sup>7</sup> have reviewed the court decisions. I wish briefly to call attention to just two aspects of them. The first is the most valuable judicial elaboration of the principles of the Treaty to be found in the cases. Sir Robin and others have already commented extensively on that aspect.

The second aspect of the cases is the procedural. At an interlocutory stage in the first SOE case, at the request of counsel for the Maori Council, the Court of Appeal directed the Ministers who were respondents in the proceedings to answer this question: "Did the Crown establish any ... system to consider in relation to each asset passing to a State-Owned enterprise whether any claim by Maori claimants of breach of the principles of the Treaty of Waitangi existed?"<sup>8</sup> This question of course closely tracked the wording of the famous section 9 of the SOE Act. That section states that nothing in the Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty. The Ministers' answer to the question was *No*. That answer was critical. As a result the Maori Council amended its pleadings and sought:<sup>9</sup>

a declaration that the transfer of assets en bloc to State-owned enterprises without establishing any system to consider in relation to each asset passing to a State-owned enterprise whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.

The first order made by the Court was in essentially those negative terms. That conclusion followed in a straightforward way from the Court's interpretation of section 9 and the facts - the *No* in the answer. The Court also directed the Crown, in a positive way, to prepare a scheme to protect the assets in question. As I mentioned earlier, that order led in turn to discussions and agreement between the Crown and the Maori Council and to legislation on the agreed terms.

That process role of the courts is to be found in much if not all of the subsequent civil litigation relating to the Treaty. For instance, in 1989, the Court of Appeal held<sup>10</sup> that the sale of forestry rights (as well as the lands on which the trees were growing) could properly fall within the safeguard procedure set out by the Court in the original SOE case. That holding led to legislation along the lines of that enacted following that original case. Later that year in the *Tainui Coal* case the Court held that coal mining interests fell within the scope of the protective statute enacted following the original case.<sup>11</sup>

The fisheries litigation turns on different statutory language, especially the cryptic provision dating back to 1877 that nothing in the Fisheries Act affects any Maori fishing rights.<sup>12</sup> But again the courts' role - if they had one - has been to delay Crown

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7 Rt Hon Sir Robin Cooke "The Challenge of Treaty of Waitangi Jurisprudence" (1994) 2 Waikato LR 1.

8 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 654.

9 Above n 8, 655.

10 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142.

11 *Tainui Maori Trust Board v Attorney General* [1989] 2 NZLR 513.

12 Fisheries Act 1983, s 88(2).

action and to require it to establish processes which protect Maori fishing rights. That is to say, in these civil cases, the courts have not themselves directly allocated the resources - fisheries, forests, farms, coal mines or television channels. Rather their role has been to review the proposed or actual executive action, often to stop it in the meantime (which might be a lengthy meantime), and to require executive and related processes designed to respect the relevant Maori right or interest and which might have legislative outcomes. That court, executive or legislative process may often be informed by the Tribunal process of careful and sensitive investigation of the facts and extensive reporting, and as well from time to time by other inquiries and reports. It is then for the Crown, preferably in agreement with the Maori party, and as appropriate in accordance with relevant legislation, to make the decision. Such at least is the ideal.

#### *D Criteria for Allocation of Public Powers of Decision*

Chief Judge Durie, the Chair of the Tribunal, has already given a much better indication than I can of the way the Tribunal goes about its important responsibilities. I draw on his and related writing and the experience it reflects in the comments I am about to make on the allocation of powers among Tribunals, Court, Parliament and Executive. We have useful guidelines from the Legislation Advisory Committee, endorsed in the *Cabinet Office Manual* and the Cabinet Office circular issued each year to Ministers relating to legislative bids.<sup>13</sup> Those guidelines for the allocation of power concern three matters, who, how, and what:

- (1) the characteristics, including the qualities and responsibility, of the person or body in issue;
- (2) the processes followed by the person or body, including the remedies which that person or body might issue; and
- (3) the nature of the matters in issue; for instance fact, law, policy, the allocation or reallocation of public resources.

Again I will be very selective in my comments on each.

#### *1 The Decider's Characteristics*

On the *who* question, the characteristics of the body or person in issue, three aspects at least of the membership of the Tribunal are notable:

- (a) both the Minister of Maori Affairs and the Minister of Justice are involved in appointing its members;
- (b) the Minister of Maori Affairs is to have regard to the partnership between the two parties to the Treaty; in that respect it is worrying that of the present 15 members (16 are allowed) only five are Maori; and

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<sup>13</sup> Above n 5, paras 65-83.

- (c) the Minister is also to have regard to personal attributes and knowledge of and experience in the different aspects of matters likely to come before the Tribunal; as the Chief Judge has noted the members have many talents in tikanga Maori, law, geography, anthropology, history, agriculture, business and industry.

Those personal characteristics can be compared with those of members of the courts and of Cabinet. As well, Ministers are distinct from the others in terms of their responsibility to the House of Representatives and through it to the people who elected them as their representatives. That political responsibility and democratic origin of the Ministry, supported on the Treasury benches by the confidence of the House of elected Representatives, carries with it the power for the time being to develop and promote the policy of the Government. It is a responsibility which of course the other bodies do not have and cannot claim.

## 2 *The Procedure*

What of the second matter - the *how* or process question? The reports of the Tribunal are notable for their careful historical accounts, based, as the Chief Judge indicates, on the very extensive research and inquiries undertaken by the Tribunal, its staff and the parties. That inquisitorial method, subject to the check of public process including cross examination, undertaken by a body independent of the parties following fair procedures plainly has advantages over the processes and resources available to the executive. The process is also significantly different from that ordinarily available to or followed by the courts. The Tribunal might be seen as a continuing commission of inquiry with the advantages over its predecessors set up earlier this century of continuity of personnel and method, a build-up of experience and principle, and an ability to relate and timetable the various claims. The remedies available to Tribunal, court and executive (supported by Parliament) are also significantly different. The courts in general give procedural remedies (if they give any at all). The Tribunal investigates and reports, it may recommend and it has yet to exercise its limited powers of decision. And only the executive (with Parliamentary approval) has the power of the purse.

## 3 *The Nature of the Issues*

The material already covered helps emphasise aspects of the third issue - the *what* question: the nature of the matters in dispute. The Court of Appeal for instance has ruled that the High Court could refer for the purposes of evidence to the Tribunal's *Muriwhenua Fishing Report*:<sup>14</sup>

In the light of the extensive range of the report and the advantages enjoyed by the Tribunal of obtaining evidence on marae and at other places in a manner which would

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<sup>14</sup> *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 653. See also the like reference at 654 to the background paper of the New Zealand Law Commission *The Treaty of Waitangi and Maori Fisheries - Mataitai; Nga Tikanga Maori me te Tiriti o Waitangi - Preliminary Paper No 9* (Wellington, 1990).

not normally be practicable for the High Court, use of the power given by s 42 [of the Evidence Act 1908 which allows reference to books of authority in matters of history and science among others] could greatly diminish the length of a High Court hearing.

The courts' contribution, in addition to giving the procedural directions I have mentioned, has been mainly to the elaboration of the law, particularly the cryptic phrases in legislation which, the Court of Appeal stresses, are to be read in their broader historical, legal and international context and not in a quibbling way. But the Tribunal too in its reports has made immense contributions to the understanding of the Treaty and its principles: that is partly an historical and factual inquiry but it also has important jurisprudential elements.<sup>15</sup>

The three part distinction between fact, law and policy assigns the last - policy - to those with political responsibilities - Ministers answerable to Parliament and through it to the people. That approach is oversimple, for courts and tribunals sometimes properly decide policy and Ministers fact and law; the approach does not always produce an easy answer, but it does contain a core of truth nevertheless. Within the law and the broader political, social and constitutional constraints it is for those who for the time being have the responsibility of political power to exercise it. It is for them to develop major public policy and to take responsibility for statements of that policy. It is in that context that the exchanges and statements in the *Tainui* case and later, in the courts and elsewhere of late 1989 and extending to the Queen's speech on Waitangi Day 1990 are to be seen.

### III BRIEF REFLECTIONS ON THE TREATY AND THE CONSTITUTION

Earlier, I suggested that we should not always think of power in a top down way, conferred by or devolved from the centre. We should draw on the extensive experience of individuals, families, tribes and many other groups organising themselves within a State or indeed across several states. That thought is relevant as I raise basic constitutional issues which have caused some heat in recent days. They are issues that have been discussed in the Treaty context for much of the last 150 years and again I shall have to be selective. For convenience I begin with recommendation 7 of the Royal Commission on the Electoral System, set out in its Report *Towards a Better Democracy*:<sup>16</sup>

Parliament and Government should enter into consultations and discussions with a wide range of representatives of the Maori people about the definition and protection of the rights of the Maori people and the recognition of their constitutional position under the Treaty of Waitangi.

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15 Eg WH Oliver *Claims to the Waitangi Tribunal* (Dept of Justice, Wellington, 1991) esp ch 7.

16 Above n 3, 112.



That process has yet to be undertaken. One critical reason for that recommendation was that an electoral system, based as it must be in a democracy on the principle of one person one vote (and each vote of the same value), cannot be relied on as the principal mechanism for the protection of all the rights and interests of a minority. Even with a fairer electoral system, giving equal weight to the votes of Maori, other arrangements are needed to protect those interests.<sup>17</sup>

That report and much other practice and writing indicates possible arrangements. The Royal Commission had it in mind that such possible arrangements should be tested through the recommended process of consultation and discussion by reference to the practical situations where power is exercised.

Before I mention some of the arrangements could I warn against the seductive force of certain words, particularly "sovereign" and "independent". In the present world, made ever smaller by technology and many other human and natural forces, no state is fully sovereign in its external relations and leaving aside a handful of absolute dictatorships no politician or government or parliament has real internal sovereignty. What we are seeing is the dispersal of power from so-called "sovereign states" in at least three directions - to the international community, to the private sector, and to public bodies and communities within the State.

What are then some of the possible arrangements? First is the manifestation of the long held Maori desire for a measure of self-determination. Henry Sewell, the first Premier of the Colony, referred in 1864 to the inherent rights of the New Zealanders to govern themselves according to their usages; they did not understand the surrender of Kawanatanga, governorship, or sovereignty (he appears to use those words as synonyms) as surrendering the right of self-government over their internal affairs.<sup>18</sup> 130 years later the UN Working Group Draft Declaration on the Rights of Indigenous Peoples includes the right of indigenous peoples to maintain and develop their own decision making institutions.

That idea of self-government was reflected for instance in the Maori Councils Act 1900, and in later statutes (if in more limited forms), the latest of which provides for the administration of justice in certain cases by Maori committees.<sup>19</sup> A more recent instance is provided by the legislation concerning taiapure, local fisheries. That is to say our history and law shows that autonomous Maori institutions can and do have a role within the wider constitutional and political system. The changing demographic and other facts must affect that role.

A second arrangement depends on agreement or, to put the point another way, a power of veto in the Maori. Again there are precedents in practice and law for such an

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17 Above n 3, para 3.99.

18 *The New Zealand Native Rebellion, Letter to Lord Lyttelton by Henry Sewell* (1864, reprinted Hocken Library Facsimile No 14, 1974). See also K Sorrenson "A History of Maori Representation in Parliament": above n 3, Appendix B.

19 Maori Community Development Act 1962, s 36.

approach, which replicates of course the original Treaty process. I have already mentioned some recent examples. They can be traced back to earliest times.<sup>20</sup>

Third, Maori rights might place a limit on the exercise of public power. Under some constitutional arrangements that limit might also constrain the lawmaking powers of Parliament. I earlier mentioned instances of the former; on the latter I recall the caution I expressed about assuming that constitutional status automatically brings with it full court enforcement. Maori have long called for a basic constitutional role for the Treaty, as appears from calls for "ratification" of the Treaty and from the 1963 submission by the newly established Maori Council that the Treaty should be referred to in the then proposed Bill of Rights and its importance as the basis for the relationship between the Government and the Maori people acknowledged.<sup>21</sup>

Fourth, the Maori rights or interests might not constrain but rather be relevant to the exercise of power. A variable, relevant to this and the preceding situation, is that specially constituted bodies might investigate and decide whether public actions conform with those rights and might participate in the development of policy and law. Again I referred to examples earlier.

Fifth, in many other cases, the law and its processes should be determined in exercise of the powers recognised in article 1 and by the general recognition in article 3 of the Treaty that Maori belong, as citizens, to the whole community. There is much which we have in common which is to be governed by common or uniform rules which as well increasingly now come from the wider world.

The variety of those actual and possible arrangements indicates that the oft stated proposition that the law must apply equally to all at all times is too simple. We need to have a more subtle, but still principled, approach to the recognition and allocation of power. The great values of the principle of equality must not be eroded by its being applied unthinkingly when diversity is to be encouraged and respected. The diversity can relate to the deciders and their processes as well as to the substantive rules and principles.

#### IV CONCLUDING COMMENTS

I end with four summary points:

- (1) We should take care not to be captured by words: I have commented on "sovereignty" and "equality". Another which can prevent careful thought is "unfinished" - with its apparent implication that all claims can be brought to an end. In the same category are "settlement" (although the Chief Judge has

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20 Eg Sale of Spirits Ordinance 1847, preamble and ss 5-6. More recent examples include Waikato-Maniapoto Maori Claims Settlement Act 1946, Mount Egmont Vesting Act 1978, Tauranga Moana Maori Trust Board Act 1981 and Te Runanga o Ngati Awa Act 1988.

21 (1965) AJHR I.14, 16.

indicated that Australians use it in a future-oriented way) or "resolution" and indeed the word "dispute" which may carry with it the implication of something to be tidied away. One real challenge presented by the Treaty is to discover and elaborate principles of government and law for an expanding future.

- (2) We do have much experience of the dispersed exercise of power and of autonomous communities making their own law and decisions within larger legal and constitutional frameworks. That experience and the related principles are to be measured against those practical situations which may be thought to call out for different treatment. This process can be applied as appropriate, over a lengthy period. The approach can be evolutionary, not revolutionary.
- (3) Other principles of our constitutional order and increasingly of global order, as well as sheer practicality, place limits on autonomous and other special arrangements. But experience, imagination and instinct along with those principles and practicalities, allow for a considerable variety in the body and operation of law which should consist of wise restraints that make us free.
- (4) Finally, I return to the critical importance of detached, informed scholarly study of the issues and of the possible courses of action.

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#### **BEVAN SKELTON**

... I say that there is a need for the nation state to be strengthened and that there is some sort of legal argument to suggest that the Treaty of Waitangi does contain certain safeguards to the Pakeha, like security of land title, the conservation estate, that kind of thing, and that it does impose limits on the statutory laws of government and that you could enforce those limits either in the Privy Council or in the International Court of Justice at the Hague.

Do you think it is possible to argue that the Treaty is in fact, together with the New Zealand Constitution Act, the Constitution of New Zealand, is New Zealand law?

#### **SIR KENNETH KEITH**

But to pick up the question that you touched on at the end, the Treaty as a limit on the power of Parliament, it always seemed to me that that's a possible argument. And the Courts have been careful in the last ten years not really to trench completely on that issue.

To take a case different from the kind of cases I was discussing, if there was legislation that prohibited the use of the Maori language, for example, might there not be an argument of the kind that has been foreshadowed often enough in the Scottish context, that there is in that legislation something that is in breach of the very basis of the argument that brought the Maori people into the Empire. The argument that the Scots have made is that the Treaty of Union from all those hundreds of years ago places

limits on the power of the United Kingdom Parliament. That has never got to a final test. It's an argument that's been there for all that time and not resolved.

I think there may well be an argument in extreme cases which you would hope we would never get to because of the good sense of the political process and because of the enhancement of the power of the electorate and so on through the new proportional systems that we're getting. So there is that possibility of a limit.

On your questions about the role of the State, I wasn't expressing any particular view on whether it's a good thing or a bad thing that the State is withering away in its international context; that is just the fact. It is the result of technology and the movement of goods, and the movement of people and the movement of information.

To mention two figures, which I hope not too many of you have heard before. It may be they're worth hearing a second time anyway. Forty years ago, New Zealanders made 20 overseas phone calls a day, the whole country, 20 overseas phone calls a day. Now you can't get the figures because they're commercially sensitive. But they're way over a hundred thousand and that doesn't include faxes and so on and so on. There is a massive explosion of information. The other figure is the number of people who fly in and out of the country each year in that same period from the 1950s through to the present. That's gone up from 50,000 a year to 3 million a year. 3 million, that's one and a half million each way I should say, it's not all of us deciding to leave. But that gives you a measure of that sort of movement. And, of course, if you think of New Zealand's place in the world and its trading relations in the world you get something of that as well. We trade an enormous amount for a small country but it's only about 0.2% of world trade. We're obviously subject to the rules that are drawn up by the big battalions and what that highlights, I think, is a crying need for the democratisation of international processes.

So, we have difficult constitutional issues but the world faces them in a much more substantial way I think.

Two last comments on the role of the State. One is that I think it is critical that we do get a better understanding in New Zealand about what it is that the State must do. I think there's been too great a willingness to say that the State is not responsible for this and is not responsible for that. And the other point I would make about the role of the State is that the international community now does have some role in that. It's not possible for issues that we're talking about to go to the International Court. That Court is available between States that are members of the UN but the international community can take an interest and increasingly does take an interest in matters that were previously thought of as domestic. And that just reinforces the problem about talking about domestic sovereignty.

## **JUNIOR WERAHIRA**

I want to make a comment first and then ask a specific question. On Monday, I sat in my lounge like many of us did and watched the events that happened in Waitangi. I must say that it brought tears to my eyes to see what happened. As a Maori, to see my

people treat other people that way they were treated. I could also understand the hurt and the pain and the suffering that has been felt by many of us as Maori. And I could foresee that if the fiscal envelope goes any further or continues along the road that it is going at the moment, the events that carried on in Waitangi will escalate to a great proportion. And I'm concerned about that. For one, I don't want to see that happen.

My question is, as the Head of the law Commission, what role or what advice would you give to the Government in regards to settling Treaty claims or in regards specifically to the fiscal envelope, taking into account the amount of opposition that has been generated by Maori people.

### **SIR KENNETH KEITH**

Well, I can't speak for my colleagues. I can give you a couple of personal reactions. One is that it seemed to me from earlier on, and it's not an original thought, that one of the major aggravations, the \$1billion cap, is actually not practically significant. It's obviously very significant in the debate and argument that's going on. But the reality as I understand it is the kind of process that the Government is engaged in, as Professor Durie said this morning, quite independently of the Proposals it made in December. The practicalities of that are that it will make a number of decisions each year on claims that come forward. It will in making those decisions have regard to the resources that are available to it. And, as people have said, ten years is a very long time. Like Mason, I'm not aware that there is a ten year budget plan. In any event there must be some prospect, I guess it's safe to say, that there might be a change of Government in the course of that time as well.

So I think it is a shame that the issue that Government has been caught on is that hook and that it is causing such enormous heat.

The other area I suppose in which advice might have been given, but it's too late to say that now, is in respect of the process. Again, as Mason said, these are proposals rather than policy. They haven't yet been finalised but nevertheless they're presented, aren't they, and particularly in a couple of respects, or in one respect, it may be in another, in a very definite way. There are obviously problems of using a process of consultation if the people being consulted consider that the matter is essentially already, pretty nearly anyway, a *fait accompli*. Now the Government would say that that isn't so in respect of most of what they've put forward. That's the way it's being perceived. So, there would have been room, this is in hindsight, for advice on those issues.

I think more broadly, again speaking for myself and again picking up the themes that obviously came out at Turangi a couple of Sundays ago, I think that the Royal Commission on the Electoral System did get it right eight years ago when it said that there should be those wider constitutional talks. And we have had some discussion within the Commission with some very senior Maori who work with us on these matters about how those constitutional matters might be pursued. Those discussions are in their early stages. And obviously there are difficulties in finding the right way to present those issues.

But today is obviously one such opportunity. And again to repeat the point, we do have a lot of relevant experience if we look back at it and if we're not just frightened off by slogans. We do have experiences here and elsewhere that we can draw on. So, speaking as I say for myself because I can't speak for my colleagues on this matter, there is a range of things I think that can be done in a positive forward looking way and a range of matters that could be addressed by the Government. But especially also I think by the wider community. These are just not matters on the Government's agenda, as indeed the Institute of Advanced Legal Studies is showing by having this seminar.

### **PROFESSOR HIRINI MEAD**

Kia ora tatou. Kia ora koutou e noho mai nei i runga te tepu.

A simple question. In view of what you've been telling us today about other constitutional arrangements, how can we advance this debate so that we can have serious discussions about alternative proposals so that Maori people do have a greater share in the democratic process in our country?

### **SIR KENNETH KEITH**

That's a good academic question. The question is simple, the answers are anything but.

I think there are at least two or three different approaches. Thinking of the discussions that at times we've had with Professor Winiata, for example, about his various models, it is possible first of all anyway for groups of interested people, for people within the appropriate Maori organisations and others to develop the kind of ideas that he has developed. They're sort of a grander scheme of ideas, aren't they, which, in many ways, follows the model that was worked through in the Anglican Church.

Second, I think it's possible again for individuals and groups who are interested may be in particular areas to say thinking of one of Professor Durie's other hats, what can we do in the health area, given the health statistics for the Maori community? What might be done there with a certain autonomy, with a certain amount of authority, obviously with the appropriate money to create our own institutions to deal with some of the major problems of Maori health care?

To go back to a matter I touched on briefly, what can be done in terms of separate systems or somewhat different systems of Maori criminal justice? That brings people out in a rash. There's one former Minister here today who as a Minister reacted strongly against that when it was once raised. But it is part of our history, it's still part of our law in a very minor way. And, in practical ways at the beginning of the criminal justice process in terms of a diversion and at the end in terms of sentencing, we do recognise the role of communities and particularly of Maori communities. So I think at least those two new approaches can be taken.

Let's look at some of the big picture stuff in terms of wider constitutional reform. Let's look as well in terms of those five or six arrangements that I mentioned, at particular areas where it is possible to have people exercising autonomy, exercising authority in respect of the appropriate matters or dealing with matters by agreement or whatever it might be. Because there is that sliding scale of constitutional arrangements.

In addition to those two kinds of efforts, it would be a matter as well of trying to indicate that kind of thinking into wider government thinking. And here I think we do get back to the lack of that there often is, I think, of really good policy discussion. And going back to another question, we do need stronger voices in the wider community to answer at times the Roundtable and other arguments. We do need people to be saying, well look there are these other ways of organising our society, of organising our economy and there are good models. So I think it's partly a matter for the academics, for the universities, as well as a matter for groups of people who are worried and interested about these matters.