INDIGENOUS CUSTOMARY RIGHTS AND THE CONSTITUTION OF AOTEAROA NEW ZEALAND

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I. INTRODUCTION

The focus of this article is on the place of indigenous customary rights in the constitution of Aotearoa New Zealand. I use the term 'indigenous customary rights' in an attempt to ensure that the rights and obligations established by the legal practices of indigenous societies in this part of the globe are not equated with the rather static notion of local custom – established since 'time immemorial' – that once was important but now remains as only a very limited source of law in English law.[1] I am also happy to apply the term 'custom law' to tikanga Māori, as used by Durie and the New Zealand Law Commission.[2] I am not happy, however, to diminish and demean the significance of tikanga Māori by describing it as 'lore' rather than 'law' – with the implication that it is an inevitably inferior source of obligations that can always be trumped by 'real' law. I have long advocated the importance of legal pluralism to understand the role of law in society and I prefer the more far reaching and open-ended version of legal pluralism which holds that the concept of law 'does not necessarily depend on state recognition for its validity.'[3] A similar view was advanced in a recent book by the film-maker Barry Barclay in relation to the protection of taonga, and the inability of intellectual property laws to perform that function.[4]

In Aotearoa New Zealand the indigenous tangata whenua are a minority of the population. The status in the New Zealand state's legal system of customary rights based on tikanga Māori/Māori law is very different from the situation in the constitutions of other independent South Pacific island nations in which the indigenous peoples comprise the overwhelming majority of the population. In those nations constitutions with the status of supreme law generally proclaim the importance of indigenous customary rights. Moreover, Māori in Aotearoa were subject for more than a century to successive Crown policies of amalgamation, assimilation, adaptation and integration that were specifically designed to suppress and eliminate their cultural knowledge systems

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1 See C K Allen, *Law in the Making* (7th ed) (Oxford: Clarendon, 1964).

2 Law Commission, *Māori Custom and Values in New Zealand Law* (Study Paper 9) (Wellington: Law Commission, 2001) 1-7.

3 A Griffiths, 'Legal Pluralism' in R Banakar & M Travers (eds), *An Introduction to Law and Social Theory* (Oxford: Hart, 2002) 289. See also H Arthurs, *Without the Law* (Toronto: Toronto University Press, 1985) 1-3.

4 B Barclay, *Mana Tuturu: Māori Treasures and Intellectual Property Rights* (Auckland: Auckland University Press, 2005).

and customary legal practices. I have described those policies in some detail, based on archival material, in a report published by the Waitangi Tribunal in 2001.[5] Colonialism no doubt severely distorted indigenous customary rights in the island nations of the Pacific, but at any rate partially intact custom laws systems continued to operate (and evolve) into the post-colonial era.

By way of background as to my interest in this topic, in the 1980s I was the co-ordinator for a course in Pacific Legal Studies at the University of Auckland and I used the collection of essays from the proceedings of the Canberra Law Workshop VI at the Australian National University on Pacific Constitutions, and also papers from the Canberra Law Workshop VII, which I attended, that were published as *Legal Pluralism* in teaching that course.[6] The conference on Constitutional Renewal in the Pacific Islands at Port Vila in 2005 was therefore of considerable interest to me. Most of the constitutions I had taught about in the 1980s were written constitutions put in place at independence during the decolonisation decades of the 1970s and 1980s. Under these constitutions the indigenous majority populations of the Pacific nations regained their rights of self-determination and political independence, even if neo-colonialist economic structures remained in place. In stark contrast, in Pacific Rim countries where the indigenous populations were decimated and subsumed during the course of European colonisation in the nineteenth and twentieth centuries, they became a minority group within their own lands and the United Nations decolonisation instruments were never applied to permit them to exercise a right of self-determination. Their (individualised) constitutional rights came to be defined by the settler majority populations, with a legal ideology dominated by centralist and legal positivist notions of law, and their collective customary values and practices were either extinguished completely or else redefined by imperial and colonial law within a doctrine known as aboriginal title.[7]

II. Constitutional Dialogue

My interest in this article is with the notion of 'constitutional dialogue and reform' as proposed by the University of South Pacific conference convenors. In most Pacific Ocean nations constitutional dialogue as it affects traditional customary values may need to look at how Western-educated elites, international NGOs and aid and development agencies dialogue with or ignore populous local communities for whom traditional customary practices are of vital importance. In Pacific Rim nations, however, indigenous peoples generally have to strive very hard even to be heard in constitutional dialogues, let alone have their customary rights and practices valued and protected.

Looking at such matters from an Aotearoa New Zealand perspective ought in my view to lead to consideration of the status of the Treaty of Waitangi. To what extent is the Treaty of Waitangi the (or a) cornerstone of the constitution of the country? However, public lawyers in New Zealand hearing the words 'constitutional dialogue' would almost certainly think not of Treaty issues but of an ongoing debate as to the authority of Parliament in relation to the alleged 'judicial activism' of the courts. In academic debate, for example, Joseph has argued for a form of constitutional

5 D V Williams, *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices* (Wellington: Waitangi Tribunal, 2001).

6 P Sack (ed), *Pacific Constitutions* (Canberra: ANU, 1982); P Sack & E Minchin (eds), *Legal Pluralism* (Canberra: ANU, 1986).

7 B Slattery, 'Understanding Aboriginal Rights' (1987) 64 Canadian Bar Review 727. More generally on aboriginal title, see P G McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991); K McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon, 1989).

dialogue in which Parliament and the Courts exercise a co-ordinate, constitutive authority in a symbiotic relationship founded in political realities. Ekins has leapt to the defence of the doctrine of parliamentary sovereignty.[8] Oddly, in my view, this controversy was played out in the journal of an English academic journal – hardly a clear sign that we have yet arrived at the post-colonial era proclaimed by some to already exist. In addition to academic controversy, there have been a number of attacks by politicians of various persuasions on perceived challenges to Parliament's powers in court judgments and in extra-judicial utterances by leading members of the judiciary. In particular, as discussed below, the Deputy Prime Minister (who is also the Attorney-General) has taken deep umbrage over certain views expressed by the Chief Justice.

New Zealand retains perhaps the most 'pure' form of the unitary Westminster version of parliamentary sovereignty anywhere in the world. In addition, with a unicameral Parliament since 1950, the slim possibility of an upper house acting as a check on legislation being rammed through to meet the political needs and moods of the moment does not exist here. On the other hand, the parliaments in Australia and Canada have to operate within the restraints of federal constitutions, bicameral parliaments and judicial review of the constitutionality of duly enacted legislation. In Canada's case there is also the Canadian Charter of Rights and Freedoms 1982 as a form of supreme law. The United Kingdom Parliament is subject to supranational law and human rights conventions from the European Community, on the one hand, and has devolved certain powers to the Scottish Parliament and the Welsh Assembly on the other hand.

In New Zealand, however, we have the Constitution Act 1986 – which unlike most Pacific national constitutions and unlike almost every other national constitution in the world is merely an ordinary statute – and a very brief one at that. It has no protection from amendment (express or implied) or from repeal by ordinary parliamentary processes in a subsequent session of Parliament. Ours is an 'uncontrolled constitution' so that, as Lord Birkenhead LC observed in the Privy Council in 1920, 'it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject-matter'.[9]

For the present, though, the Constitution Act 1986 stipulates baldly that 'the Parliament of New Zealand continues to have full power to make laws'.[10] That is a proposition that ministers of the Crown have been most anxious to reaffirm during controversies that have arisen since 2003. The Courts, the Waitangi Tribunal, indigenous rights claimants and human rights activists are perceived to have been challenging the right of Parliament to overturn inconvenient Court decisions and the right of the executive to reject Tribunal recommendations. The Deputy Prime Minister, Michael Cullen assiduously proclaimed the importance of parliamentary sovereignty in a series of speeches in 2004.[11] Indeed his contribution to a special sitting of Parliament, on the 150th anniver-

8 P Joseph, 'Parliament, the Courts, and the Collaborative Enterprise' (2004) 15 Kings College Law Journal 321; R Ekins, 'The Authority of Parliament: A Reply to Professor Joseph' (2005) 16 Kings College Law Journal 51.

9 *McCawley v The King* [1920] AC 691, 703 (PC). In that case it was declared that the legislature of Queensland could disregard a provision of the Queensland Constitution Act 1867 on the security of tenure for judges when enacting the Industrial Arbitration Act 1916 without reference to the Constitution Act.

10 Constitution Act 1986, section 15(1).

11 M Cullen, 'Waitangi Tribunal Report Disappointing', 8 March 2004; 'Address to Labour Party Conference, Wanganui', 15 March 2004;'Waipukurau Rotary Club', 15 March 2004; 'Address to Otago District Law Society', 8 April 2004; 'Human Rights and the Foreshore and Seabed', 1 June 2004; 'Parliament: Supremacy over Fundamental Norms?' 29 October 2004, available at <www.beehive.govt.nz/>

sary of its first session in 1854, was devoted to insisting upon the 'settled doctrine that New Zealand is a sovereign State in which sovereignty is exercised by Parliament as the supreme maker of law, the highest expression of the will of the governed, and the body to which the Government of the day is accountable'.[12] This speech contained a very strong attack not only on 'some radical Māori, who argue that sovereignty has never been legally acquired in New Zealand', but also on judicial activism 'from within the heart of New Zealand's judiciary'. His strongest barb was directed at the incumbent Chief Justice. He attributed to her three key statements:[13]

> Firstly, we have assumed the application of the doctrine of parliamentary sovereignty in New Zealand—why, is not clear. Secondly, whether there are limits to the lawmaking power of the New Zealand Parliament has not been authoritatively determined, which raises the interesting question of who has the authority to determine that. Thirdly, an untrammelled freedom of Parliament does not exist.

To those suggestions Cullen replied:

> In my view, we are approaching the point where Parliament may need to be more assertive in defence of its own sovereignty, not just for its own sake but also for the sake of good order and government. In our tradition the courts are not free to make new law. It is fundamental to our constitution that lawmakers are chosen by the electorate and accountable to the electorate for their decisions.
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> …
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> Governments, of whatever stripe, do not favour judicial activism. They almost inevitably favour a strict constructivist approach, because it involves far fewer political or fiscal risks. Activism does not always challenge parliamentary sovereignty, but it often does. And in New Zealand fundamental questions have been raised about that sovereignty. It is almost as if there is an emerging view that sovereignty is to be shared between Parliament and the judiciary, with Parliament being the junior and less-informed partner. That is so because where Parliament's sovereignty is questioned it is usually accompanied by the assertion or implication that it is the courts that have the final say as to the rules.
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> The point I make in response is not merely that this is a trend for which there is no democratic mandate, and which has never been part of the political discourse in New Zealand, but that it cannot exist as a one-sided development. It will inevitably lead to the politicisation of the process of judicial appointments and of the judiciary itself—something to be avoided.

III. New Zealand Constitution Act 1852

The General Assembly of Parliament that first met 150 years earlier at Auckland (then the capital of the colony) in May 1854 was constituted by the New Zealand Constitution Act 1852, an Act of the United Kingdom Parliament acting as the supreme legislature for the British Empire. This brought New Zealand's status as a directly ruled Crown Colony to an end and substituted a form of representative (then responsible) government comprising ministers drawn from parliamentarians elected by enfranchised members of the colony's population. Māori still comprised a majority of the total population in 1854 – they first became a minority about 1858 when the pace of European settlement began to accelerate rapidly. Yet only a tiny number of Māori were enfranchised in 1854. The failure of New Zealand constitutional norms (apart from the never-utilised section 71 noted below) to take adequate account of the place of Māori as tangata whenua, or their customary

12 M Cullen, 'Address to Her Excellency the Governor-General' 24 May 2004, 150th Anniversary Sitting of Parliament, available at <www.parliament.nz/>.

13 For her own words, see S Elias, 'Sovereignty in the 21st century: Another Spin on the Merry-go-round' (2003) 14 Public Law Review 148.

values and practices, was a feature of the constitution from the outset of parliamentary governance. The franchise depended, until the Qualification of Voters Act 1879, on a property ownership qualification. Māori tribes collectively 'owned' the majority of land in the North Island under customary tenures in 1854 but the franchise depended on ownership of land in fee simple. Only those very few Māori who owned land under a Crown grant were eligible to vote. Most Māori were totally excluded from political society as then constituted. In a complicated deal that had more to do with the balance of power as between South Island settlers and North Island settlers, Māori were first admitted to Parliament in 1867. As a consequence of the Māori Representation Act 1867 four members were elected to represent Māori electorates representing about 50,000 Māori (at a time when 72 seats were allocated to represent the settler population that at the time comprised about 250,000 persons).[14]

Some Māori, especially the missionary school educated members of the Young Māori Party, actively participated in national politics from about the turn of the 20th century. The leadership of the more traditionalist Māori communities sought another route for what we might now call constitutional renewal. They focussed on section 71 of the 1852 Constitution Act. This provision allowed for Letters Patent to be issued for the creation of Native Districts in which 'the Laws, Customs, or Usages of the aboriginal or native Inhabitants of New Zealand, so far as they are not repugnant to the general Principles of Humanity, should for the present be maintained for the Government of themselves, in all their Relations to and Dealings with each other'. There were numerous instances of Māori petitions for the creation of Native Districts including the petitions directly to Queen Victoria and King George V in London by northern chiefs in 1882, and by the Kingitanga movement led by the Māori Kings Tāwhiao in 1883 and Te Rata in 1913. The Palace and the imperial government insisted that these were matters for the responsible ministers in New Zealand and those ministers consistently were profoundly deaf to submissions in favour of native districts. Section 71 was quietly dropped from New Zealand law when the Constitution Act 1986 was passed (despite my personal objections submitted to a select committee hearing on the Bill at the time).

There were many other vehicles chosen by Māori leadership to try to give Māori a voice in the nation's affairs. The 19th century Kotahitanga Movement held its own Parliaments at Waitangi and elsewhere and Kingitanga established its Great Council (Te Kauhanganui) in 1894. In the 20th century the Rātana Church Movement campaigned for the ratification of the Treaty of Waitangi first in a petition to King George V in 1924 and then by entering into a political covenant with the Labour Party. Closer to the present time, there has been a Māori cultural renaissance and this has included calls for the Treaty of Waitangi to be recognised as the foundation of the nation. Important pan-tribal hui held at Ngāruawahia in 1984 and at Hīrangi Marae in 1995 have declared that 'the Treaty of Waitangi is a document that articulates the status of Māori as tangata whenua of Aotearoa' and that there should be 'a Constitutional review jointly undertaken by Māori and the

14 Waitangi Tribunal, *Māori Electoral Option Report* (Wellington: Legislation Direct, 1994) s 2.2. The electoral option available to persons of Māori descent since the introduction of the Mixed Member Proportional electoral system resulted in Māori electorate seats rising to five in 1996 and then to seven in 2002.

Crown for the purpose of developing a New Zealand constitution based on the Treaty of Waitangi and, among other things, fully recognising the position of Māori as tangata Whenua'.[15]

IV. The Foreshore and Seabed Lands Decision, 2003 and the Orewa Speech, 2004.

Without directly addressing Māori calls for significant constitutional reforms, over the period since 1987 it had gradually become conventional and eventually almost uncontroversial to state that the Treaty of Waitangi is 'the founding document of New Zealand',[16] 'a constitutional document';[17] 'simply the most important document in New Zealand's history',[18] 'essential to the foundation of New Zealand' and 'part of the fabric of New Zealand society',[19] 'of the greatest constitutional importance to New Zealand'.[20] Passionate responses by many citizens and news media commentators to two particular events in 2003 and 2004, however, have severely challenged the continuing general political acceptability of such remarks.

The first event was the release of a long-awaited decision of the Court of Appeal on common law aboriginal title and customary law entitlements of Māori tribes to the lands beneath the foreshore and seabed. In June 2003 the Court of Appeal decided that the Māori Land Court had jurisdiction to inquire into customary entitlements to foreshore and seabed lands. The Court of Appeal media release stressed that the Court's decision

> is a preliminary one about the ability of the iwi to bring their claims. The validity and extent of the customary claims in issue have yet to be decided by the Māori Land Court. The impact of other legislation controlling the management and use of the resources of maritime areas also remains to be considered'.[21]

The Court's decision in *Ngati Apa v Attorney-General* was a modest procedural victory for seven tribes from the north of the South Island.[22] They had resorted to litigation after years of unresolved difficulties over procedures to obtain permission to engage in commercial aquaculture activities on the foreshore and seabed lands of the Marlborough Sounds. The Court decision did not define their customary rights, if any, but merely enabled the plaintiffs to adduce evidence to the Land

15 A Blank & others (eds*), He Korero Mo Waitangi,* (Ngāruawahia: Te Runanga o Waitangi), 1985; M H Durie, 'Proceedings of a Hui held at Hirangi Marae, Turangi' in G McLay (ed), *Treaty Settlements: The Unfinished Business* (Wellington: Institute of Advanced Legal Studies, 1995); M H Durie, *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Auckland: Oxford University Press, 1998).

16 Government publications include: Te Puni Kokiri*, He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitang*i, Wellington, 2001, 14; 'Paths To Nationhood - Ngā Ara Ki Te Whenuatanga'', available at <www.archives.govt.nz/>.

Scholarly contributions include B V Harris, 'The Constitutional Future of New Zealand' [2004] NZ Law Review 269; P A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed) (Wellington: Brooker's, 2001) 42-86; F M Brookfield, *Waitangi and Indigenous Rights* (Auckland: Auckland University Press, 1999); M McDowell & D Webb, *The New Zealand Legal System* (2nd ed) (Wellington: Butterworths, 1998) 189-233; McHugh, above n 7.

17 G W R Palmer, *Constitutional Conversations* (Wellington: Victoria University Press, 2002) 22.

18 R Cooke, 'Introduction', (1990) 14 NZULR 1, 1-8; S Elias, 'The Treaty of Waitangi and Separation of Powers in New Zealand' in B D Gray & R B McClintock (eds), *Courts and Policy: Checking the Balance* (Wellington, Brooker's, 1995) 206-230. See also articles by D V Williams, K J Keith, A Frame, and A Mikaere in the special sesquicentennial issue on the Treaty of Waitangi and constitutional issues: (1990) 14 NZULR 9-101.

19 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210 (Chilwell J) (HC).

20 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 516 (Lord Woolf) (PC).

21 Court of Appeal of New Zealand, 'Media Release: Seabed Case', 19 June 2003.

22 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) hereinafter *Ngati Apa*.

Court because, despite statutory assertions of Crown ownership, there has been no unambiguous and explicit statutory extinguishment of indigenous customary rights. Despite its narrow jurisdictional focus, the Court ruling created a storm of controversy. The fierce condemnations of the Court by hosts and callers on talkback radio, in letters to editors, political party rallies and the like focused on 'public access to beaches' being threatened by Māori claims to exclusive rights. This rhetoric had little or no connection to the narrow findings of the Court of Appeal and none at all to the actual practical claims of the tribal plaintiffs.[23]

A second noteworthy event in reshaping national debate on Treaty issues was a speech by the then Leader of the Opposition, Don Brash, to the Orewa Rotary Club on 'Nationhood' in January 2004.[24] His notion of nationhood involved staunch criticisms of what he named as Māori 'racial privileges', 'two standards of citizenship' for Māori and non-Māori, and biculturalism policies based on the supposed Treaty principle of a partnership between the Crown and Māori. His message evidently struck a deep chord of resonance judging from the delighted responses of many New Zealanders. The Government did not stand up for its Treaty-based initiatives in partnership with Māori. Rather, ministers of the Crown rapidly reframed some of the health, education and capacity-enhancement policies focussed on Māori as if they had always been 'needs-based' and not 'race-based' or 'Treaty-based'.[25]

V. The Academic Debate Intensifies

Meanwhile, debates on the Treaty and the historiography employed by the Waitangi Tribunal had become much more intense within academic circles. For a long time there were very few voices raised against the government moves away from assimilation and integration policies of the pre-1970s.[26] Biculturalism came to be in vogue from the 1970s. Then in the 1980s came the invention by the courts and the Tribunal of the meaning of 'the principles of the Treaty' and, incidentally, I use the term 'invention' in an entirely non-pejorative manner.[27] Parliament had not defined what it meant by 'the principles of the Treaty of Waitangi' so the courts as a matter of statutory interpretation necessarily had to invent appropriate meanings consistent with the purposes of the enactments. These decisions on the principles of the Treaty dramatically raised the status of the Treaty itself from being discarded as a 'simple nullity' to a quasi-constitutional document in the life of the nation. In a rather optimistic moment of reverie, sitting in the Codrington Library at All Souls College, Oxford, in 1990 Sir Robin Cooke (as he then was) imagined William Blackstone saying to him: 'And if the parliament and the judges are forever mindful of the restraint on the part of either which is fitting to preserve equilibrium in society, these questions may safely remain

23 For less sensational comments and material relating to the actual issues, see T Bennion, M Birdling & R Paton, *Making Sense of the Foreshore and Seabed* (Wellington: Māori Law Review, 2004); T Bennion, 'Lands Under the Sea: Foreshore and Seabed' in M Belgrave, M Kawharu & D Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Melbourne: Oxford University Press, 2005), hereinafter *Waitangi Revisited*, 233-47.

24 D Brash, 'Nationhood', Orewa Rotary Club, 27 January 2004, available at <www.national.org.nz/>.

25 T Mallard, 'First results of review of targeted programmes', 16 December 2004, available at <www.beehive.govt.nz/>.

26 See Williams, above n 5.

27 See E Hobsbawm, 'Introduction: Inventing Traditions' in E Hobsbawm & T Ranger (eds), *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983) 1-14; J G A Pocock, 'Time Institutions and Action; An Essay on Traditions and Their Understanding' in *Politics, Language and Time: Essays on Political Thought and History* (London: Methuen, 1972) 233-46.

unagitated. I do not doubt but that your Treaty of Waitangi has become in some sense a grand constitutional compact akin to our Magna Charta'.[28]

If Cooke's dreams of the Treaty as a grand constitutional compact were not taken very seriously in government circles in the 1990s, neither, on the other hand, was any particular attention paid to harsh attacks on the Treaty by a few fierce critics, such as Stuart Scott.[29] Scott was so extreme in his fulminations against the Treaty of Waitangi and so shallow in his research that his views were given little or no credence. McHugh, for example, called Scott's work 'a popular book almost entirely bereft of any scholarship'.[30] Hardly more serious, even if written by an academic, was David Round's contribution to the debate.[31] There was only one serious and credible academic analysis of possible flaws in Treaty-based thinking. This came from the acute writings of an Auckland political philosopher, Andrew Sharp. He started with a detailed dissection of Māori claims to justice and reparation and then turned to questioning of the thrust of 'juridical history' as practised by the Tribunal.[32]

In the early years of the twenty-first century, however, a significant divide has opened up between 'Treaty industry' historians and lawyers on the one hand and a number of academics, historians in particular, on the other hand. To Sharp's criticisms of the Waitangi Tribunal's 'juridical history' has been added some stringent attacks by eminent historian Bill Oliver on the 'ahistorical' methodology of the Tribunal's report-writing with its reliance on 'counterfactual' assumptions to criticise Crown policy, acts and omissions. The Tribunal's common law style of history is said to provide a 'retrospective reconstruction' of a 'millennialist' history that has 'a utopian character' with 'elements of the religion of the oppressed and the promise of delivery from bondage to a promised land'.[33] In mid-2004 a former Tribunal historian turned academic, Giselle Byrnes, brought out a book suggesting that the Tribunal's attempts to write history have been a 'noble, but ultimately flawed experiment' owing to the Tribunal's political bent towards advocating Māori causes.[34] Recently an eminent expatriate New Zealander, the philosopher Jeremy Waldron, has mounted a powerful critique of Treaty jurisprudence. Relying on an aphorism from J S Mill, Waldron has argued that 'No treaty is fit to be perpetual' and that circumstances have changed so fundamentally since 1840 that the Treaty should have no modern application at all.[35] A historian writing a biography of the Wakefield family, many of whom came to live in New Zealand, introduces his book with the statement that it seeks to be a 'dispassionate biography'. According to this author: 'I decided to do the Wakefields the courtesy of attempting to treat them within the context

28 R Cooke, 'Introduction' (1990) 14 NZ ULR 1, 8.

29 S C Scott, *The Travesty of Waitangi - Towards Anarchy* (Christchurch: Campbell Press, 1995).

30 P G McHugh, 'A History of Crown Sovereignty in New Zealand' in A Sharp & P McHugh (eds), *Histories, Power and Loss* (Wellington: Bridget Williams Books, 2001) 189, 202, 248.

31 D Round, *Truth or Treaty: Common Sense Questions About the Treaty of Waitangi* (Christchurch: Canterbury University Press, 1998).

32 A Sharp, *Justice and the Māori: Māori Claims in New Zealand Political Argument in the 1980s* (Auckland: Oxford University Press, 1990); A Sharp, 'History and Sovereignty: A Case of Juridical History in New Zealand/Aotearoa' in M Peters (ed), *Cultural Politics and the University in Aotearoa/New Zealand*. (Palmerston North: Dunmore Press, 1997) 158-81.

33 W H Oliver, 'The Future Behind Us: The Waitangi Tribunal's Retrospective Utopia' in *Histories, Power and Loss*, above n 30, 13, 26-7; W H Oliver, *Looking for the Phoenix: A Memoir* (Wellington: Bridget Williams Books, 2002) 154-70.

34 G Byrnes, *The Waitangi Tribunal and New Zealand History* (Melbourne: Oxford University Press, 2004).

35 J Waldron, 'The Half-Life of Treaties: Waitangi, Rebus Sic Stantibus' (2006) 11 Otago Law Review 161.

of their own times'.[36] The obvious implication of the views of this and other historians is that it is seriously discourteous to view the actors of the past from a presentist perspective. That perspective, however, is the norm of common law reasoning and it is certainly what informs the Waitangi Tribunal in its reports on historical grievances.

The flow of the debate is not in one direction only. Successive chairpersons of the Tribunal, Eddie Durie and Joe Williams, have sought to inform the public debate with careful comments on the importance of Treaty jurisprudence in modern New Zealand law.[37] Some lawyers, including Paul McHugh and Richard Boast, have been prepared to defend both the common law mode of reasoning and the 'presentism' of Tribunal reports.[38] My Auckland colleagues, Professors Brookfield and Harris, have made a number of interventions in the debates on the status of the Treaty that are reflected in the papers they presented to the Auckland District Law Society.[39] The distinguished expatriate historian, J G A Pocock, writes more cautiously than other historians of 'the histories in Aotearoa New Zealand' and urges all the peoples of the land to engage in 'recounting histories in one another's hearing'.[40] An excellent effort in that direction is a book written by Michael Belgrave and published in 2005.[41] Also there are a number of balanced essays in a 2004 review of the Tribunal's place in contemporary New Zealand society edited by Janine Hayward and Nicola Wheen.[42]

VI. Biculturalism in One Nation

The legal reasoning and advocacy history approach adopted by the Tribunal in its reports have made a powerful contribution to the notion of bicultural development within one nation. That notion is now under attack in some quarters as out of date 'racial' thinking that is inconsistent with notions of equality within a modern democratic state. Yet do leaders of the nation seriously want to return the country to the 'good old days' of integration? Do any of them remember what those policies looked like in practice in the post World War II period and how abject a failure they were to achieve the avowed intention of the Hunn Report 1960 – 'closing the gaps'?[43]

In looking at such questions, it needs to be acknowledged that the Waitangi Tribunal's support for policies of biculturalism is by no means fully embraced by many Māori now basking in a resurgent sense of Māori nationalism. Calls for recognition of tino rangatiratanga rights affirmed

36 P Temple, *A Sort of Conscience: The Wakefields* (Auckland: Auckland University Press, 2002) 3.

37 E Durie, 'Constitutionalising Māori' in G Huscroft & P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Oxford: Hart, 2002) 241-64; J V Williams, 'The Māori Land Court – A Separate Legal System?', NZ Centre for Public Law, Wellington, Occasional Paper No 4, 2001; J V Williams, 'Truth, Reconciliation and the Clash of Cultures in the Waitangi Tribunal' [2005] ANZLH E-Journal 234-238.

38 P G McHugh, 'Law, History and the Treaty of Waitangi' (1997) 31 NZ Journal of History 38; R P Boast, 'Lawyers, Historians, Ethics and the Judicial Process' (1998) 28 VUWLR 87.

39 B V Harris, 'The Treaty of Waitangi and the Constitutional Future of New Zealand' and F M Brookfield, 'Popular Perceptions, Politician Lawyers and the Sea Land Controversy' in *Customary and Indigenous Rights in an Evolving Constitution* (Auckland: Auckland District Law Society, 2005) 19-49. See also their contributions to [2005] New Zealand Law Review, Part 2.

40 J G A Pocock, 'The Treaty Between Histories' in *Histories, Power and Loss*, above n 30, 75-95.

41 M Belgrave, *Historical Frictions: Māori Claims and Reinvented Histories* (Auckland: Auckland University Press, 2005).

42 J Hayward & N R Wheen (eds), *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Wellington: Bridget Williams Books, 2004).

43 See Williams, above n 5, 72-100.

by te Tiriti o Waitangi – most explicitly the Māori text of the Treaty – at the very least require some major reforms of the monistic constitutional structures based on the Westminster system of government presently in place and, in the view of some Māori sovereignty advocates, involve revolutionary challenges to the current legal order.[44] However, there is some ambivalence for tino rangatiratanga advocates as between an emphasis on the Treaty's affirmation of Māori rights – 'a document which articulates the status of Māori as tangata whenua of Aotearoa'[45] – and an emphasis that it is for the nation as a whole – 'The Treaty of Waitangi is the Constitution of New Zealand'.[46] The Co-leader of the Māori Party, Tariana Turia, speaking in Parliament in 2005, inclines to the latter position:

> A vision for a nation must be founded in its very origins. Our vision for this nation is based in the covenant by which its first people, the people of the land, tangata whenua, negotiated with the Crown, about a model for developing a unified nation. … At its very core, the Treaty is about a relationship that has been entered into.[47]

Ani Mikaere, who teaches Māori laws and philosophy at Te Wananga o Raukawa, inclines to the former position:

> [T]he facts surrounding the signing of the Treaty of Waitangi reveals a clear Māori intention to create a space for the Crown to regulate the conduct of its own subjects, subject to the overriding authority of the rangatira. This reaffirmation of Māori authority meant that the highly developed and successful system of tikanga that had prevailed within iwi and hapu for a thousand years would retain its status as first law in Aotearoa: the development of Pākehā law, as contemplated by the granting of kawanatanga to the Crown, was to remain firmly subject to tikanga Māori.[48]

The Waitangi Tribunal has chosen deliberately to adopt a middle-ground position somewhere between reliance on the Treaty as a basis for claims of separate Māori nationhood and marginalisation of the Treaty as a cession of sovereignty that has left the Crown (later the Crown in Parliament) with sole and absolute sovereign law-making power in the nation. The Tribunal position has long been that the sovereignty of the Crown is not in doubt but that nevertheless its sovereignty is qualified by reciprocal obligations to honour the rangatiratanga guarantees of the Treaty in a manner that recognises that the Treaty is always speaking. This is a theory of our national origins that depicts the Treaty as a contract or compact – Māori often call it a covenant – against which the Crown's treatment of Māori is to be assessed.[49] This middle ground, including the Tribunal's pragmatic reinterpretation of the 'partnership' nature of the Treaty relationship between the Crown and Māori, did appear to have achieved a significant degree of acceptance in political, legal and cultural discourse during the 1990s. Now, as noted above, that consensus is being seriously eroded from several directions.

Yet if, or when, formal steps are taken to move New Zealand from being a constitutional monarchy to becoming a republic, the status and future role of the Treaty of Waitangi will have to be

44 See C James (ed), *Building the Constitution* (Wellington: Institute of Policy Studies, 2000).

45 See Blank and ithers, above n 15, 2. A Blank, M Henare & H Williams (eds), *He Korero Mo Waitangi, 1984* (Ngāruawahia: Te Runanga o Waitangi, 1985) 2.

46 M H Durie, 'Proceedings of a Hui held at Hirangi Marae, Turangi' in G McLay (ed), *Treaty Settlements: The Unfinished Business, (*Wellington: NZ Institute of Advanced Legal Studies, 1995), 19-27.

47 T Turia, 'Opening of Parliament, 1 February 2005, Response to the Prime Minister's Statement to Parliament': available at <www.maoriparty.com>.

48 A Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Māori' in *Waitangi Revisited*, above n 23, 334.

49 For a useful collection of relevant Waitangi Tribunal statements, see P G McHugh, 'A History of Crown Sovereignty in New Zealand' in *Histories, Power and Loss*, above n 30, 202, 248.

resolved. This is a distinctive aspect of the New Zealand debate on republicanism that is absent from Australian or Pacific considerations of constitutional change issues. Is the Treaty really the foundation for the legitimacy of the modern state? Is it merely an item of historical interest? Thus far there has been no willingness by most Pākehā, including those otherwise disposed to favour significant constitutional reforms, to address (let alone resolve) questions about the inclusion of the Treaty as a cornerstone in any new republican legal order. This reluctance may in fact serve to delay considerably the day when fundamental constitutional reforms come to be addressed in this country. There has been no reluctance, on the other hand, to pose serious questions as to whether biculturalism will survive as an integral feature of national life in the twenty-first century, when compared with its predominant position in late twentieth century political and cultural discourse.

Of course, for most Māori biculturalism is not a matter of choice. Some individuals will accept assimilation into the majority culture as Hunn hoped for in his 1960 report on integration.[50] The post-1975 Māori cultural renaissance has ensured, however, that a very substantial proportion of the Māori population wish to promote and enhance their collective values and customs, their tribal rangatiratanga and their pride in being Māori. People who now positively identify themselves as Māori comprise substantially more than 10 per cent (perhaps 15 per cent) of the total population, and they perforce must be bicultural to survive in daily life. They cannot operate in a Māori-only world as our populations are too closely intertwined in all but the most remote rural settlements. So they must move between Māori and Pākehā cultural norms in their daily life.

For the non-Māori majority and especially for those who are the power-holders, however, there is a choice. It is perfectly easy to conduct one's daily affairs without care for or knowledge of Māori indigenous customary rights, language and cultural knowledge systems. Among the choices we Pākehā New Zealanders have is whether we wish to affirm the re-interpretive work of the Waitangi Tribunal since 1975 on the one hand, or to condemn it as a massive mistake, a blind alley, a cultural ghetto that we should be glad to escape from. We must consider whether the hopes encapsulated in the bicultural design featured on Tribunal reports are to be emblematic of a unique nation with a tolerance of cultural diversity. Will that diversity be built into our national vision and lived out in the daily lives of ordinary people, or will the Pākehā majority retreat back to the monocultural vision that 'we are all one people'?

VII. A Subtle Cultural Repositioning?

Paul McHugh has described the period after 1970, and especially the period following the 1987 Court of Appeal decision, as the demise of the 'Anglo-Whig constitutional dream of Crown sovereignty' at a time when the United Kingdom entered the European Community. He identified Māori opposition to the 1967 legislative reforms as 'a crucial beginning' for pan-Māori protest that 'challenged the paternalism of the Anglo-settler state'.[51] Our leading historian, James Belich, would concur. He described the 1960s as the period when New Zealanders began to move beyond the notion that this country was destined to be and to remain a 'Better Britain in the South Seas'.

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50 J K Hunn, 'Report on the Department of Māori Affairs', 24 August 1960, AJHR, 1961, G-10. See Williams, above n 5, 76-100.

51 P G McHugh, 'A History of Crown Sovereignty in New Zealand' in *Histories, Power and Loss*, above n 30, 199-203; P G McHugh, 'Tales of Constitutional Origin and Crown Sovereignty in New Zealand' (2002) 52 University of Toronto Law Journal 69, 86-91. See also P G McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (New York / Oxford: Oxford University Press, 2004).

He commented that the 1967 Act was a 'naïve piece of land legislation' that laid 'the political fuse for an explosion of Māori radicalism'.[52] In McHugh's analysis, during the mid-1970s 'the history of the New Zealand constitution came to require revision' and a Lockean contractarian theme became dominant. The contest of ideas about Crown sovereignty had now shifted to varieties of contractarian dogma. The Tribunal's notions were of the Treaty as a contract by which 'two peoples amalgamated their powers under the Crown and set limits to the Crown's powers over Māori'. Critics preferred to see the Treaty contract as one that 'mattered only once – in 1840' with a full and final cession by Māori of their sovereignty. After that the Treaty became 'a historical curiosity bereft of any presence beyond its spent moment'. Even this most limited view of the Treaty, suggests McHugh, demonstrates 'the historiographical distance Pākehā thinking had come' because now 'one way or another, the Treaty of Waitangi was the foundation of the state'.[53] This ideological repositioning is now described by Belgrave as 'the making of a modern treaty': 'At different times and for different people the treaty has meant quite different things. So different are these interpretations that there can never be a "true" meaning, and even historically sound interpretations of the various signings can have only limited influence on what the treaty can be made to mean as a constitutional or legal document in the present.'[54]

Jane Kelsey is less than enthusiastic about claims that the repositioning that has taken place is truly significant. She does not see a paradigm shift or any obvious signs of power-sharing between Crown and Māori based on the Treaty. Rather she sees that there has been a 'subtle cultural repositioning' to defuse the potentially revolutionary threat posed by Māori nationalist activism in the 1970s and early 1980s.[55] Kelsey is right to emphasise that the tide towards the courts accepting a special constitutional status for the Treaty ebbed from the early 1990s. McHugh was premature, in my view, in asserting that the Treaty has already achieved recognition as the foundation of the state. Ironically, also, McHugh himself appeared as the Crown's expert witness in the Waitangi Tribunal's foreshore and seabed hearing in 2004. His expertise was drawn on to develop the policy whereby the 'full power' of the Parliament of New Zealand was utilised to enact the Foreshore and Seabed Act 2004. That Act was a classic example of the use of parliamentary sovereignty to extinguish indigenous customary rights and to replace them with statutory rights derived from a conservative definition of aboriginal title rights not sourced in tikanga Māori. The Robin Cooke Lecture 2004 by Michael Kirby, a Justice of the Australian High Court, helped to fuel the constitutional debate. Kirby argued for the notion of 'deep lying rights' that courts have an obligation to defend from encroachment. (And the lecture was delivered on the very day that the new Supreme

52 J Belich, *Paradise Reforged: A History of New Zealanders from the 1880s to the Year 2000* (Auckland: Allen Lane / Penguin, 2001) 477.

53 See above n 51, and also McHugh, 'What a Difference a Treaty Makes – the Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law' (2004) 15 Public Law Review 87 (where the legal transformation achieved by court decisions is described as 'seismic'); McHugh, 'New Dawn to Cold Light: Courts and Common Law Aboriginal Rights' [2005] New Zealand Law Review 485.

54 Belgrave, above n 41, 45.

55 J Kelsey, *Rolling Back the State* (Wellington: Bridget Williams Books, 1993) 279-85. See also J Kelsey, 'From Flagpoles to Pine Trees. Tino Rangatiratanga and Treaty Policy Today' in P Spoonley & others (eds), *Nga Patai: Ethnic Relations and Racism in Aotearoa / New Zealand* (Palmerston North: Dunmore Press, 1996); J Kelsey, 'Māori, Te Tiriti, and Globalisation: The Invisible Hand of the Colonial State' in *Waitangi Revisited*, above n 23, 81-102.

Court relied on human rights principles in deciding to allow bail for an alleged international terrorist held in indefinite detention.)[56]

VIII. Is Constitutional Entrenchment of the Treaty 'Too Hard'?

In my view it is not desirable to continue to push the constitutional status of the Treaty into the 'too hard basket'. I have made personal submissions to that effect to parliamentary select committees considering the Supreme Court Bill in 2003 and Constitutional arrangements in 2005. In 2003 I wrote that the proposed abolition of appeals to the Privy Council 'necessarily impacts on the constitutional status of the Treaty of Waitangi – the founding document for the legitimacy of the Crown and Parliament … there needs to be consideration of the appropriate governance structures to reflect the tino rangatiratanga/kawanatanga power relationships of the Treaty'.[57] In my view that Bill, and all Bills of constitutional importance, should not be able to be passed by a bare majority of votes in the House. My statement was quoted by the Justice and Electoral Select Committee in its 2003 report to the House in favour of its recommendation that 'an inquiry into New Zealand's constitutional arrangements is desirable'.[58]

I was less than impressed, however, with the terms of reference and the timeline allowed for the Constitutional Arrangements Committee that sat in 2005. I put in a brief submission nevertheless. I argued that:

> the processes and procedures for constitutional reform should involve 'bottom up' rather than a 'top down' mechanisms for law reform. The New Zealand Constitution Act 1852 was a 'top down' imposition of the imperial parliament of the British Empire. The legitimacy of all the current Acts of Parliament and constitutional conventions that comprise our present constitutional arrangements derive from that "top down" imposition in 1852. In my view we need to reshape our constitutional arrangements taking the Treaty of Waitangi as the starting point and the foundation stone for the legitimacy of an autochthonous constitution that springs from all the peoples of this nation (that I prefer to call Aotearoa New Zealand). If we cannot agree on that starting point, then in my view we should not start at all. The system is not so seriously in need of reform that it cannot wait a few years to allow a deeper consideration of the appropriate governance structures to reflect the tino rangatiratanga/kawanatanga power relationships of the Treaty. Rather, I would prefer that time should be given to allow us to consider the success (or otherwise) of the instances of existing Treaty-based relationship structures in the provision of health services, educational opportunities, Treaty settlement protocols, local government arrangements, church and social service organisational structures, and the like. I am confident that in time – though certainly not in this particular year – a new consensus will emerge that putting the Treaty at the core of constitutional structures does speak directly to the unique circumstances of the life of this nation. This is a vision of a tolerant, culturally diverse, inclusive society based on the coming together of peoples rather than on an imperial imposition from the nineteenth century. The task of your committee should be to think of long-term processes that will be able to steer the citizens of this country to engage with a vision of that inclusive nature rather than to seek an artificial notion of national unity under slogans such as 'We are all one people'.[59]

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56 M Kirby, 'Deep Lying Rights – A Constitutional Conversation Continues', The Robin Cooke Lecture 2004, Victoria University of Wellington, 25 November 2004; *Zaoui v Attorney-General* [2005] 1 NZLR 577. See also *Zaoui v Attorney-General* (No 2) [2006] 1 NZLR 289.

57 D V Williams, 'Personal Submission to the Constitutional Arrangements Committee, House of Representatives' 14 April 2005, paras 4-5.

58 Justice and Electoral Committee, 'Supreme Court Bill (16-2) (16 September 2003)', 52-53, available <www.parliament.nz>.

59 Williams, above n 57.

In assessing the future of our national constitution and the status of indigenous customary law we do need to be mindful of the real successes of sub-national exercises of Māori self-determination. A number of the chapters in *Waitangi Revisited* that I co-edited contain examples from diverse fields such as social policy, health services provision, museum policy, and fisheries management where Māori have been making decisions for Māori under a kaupapa Māori framework of decision-making, or have been moving in that direction.[60]

IX. Concluding Remarks

In concluding, I should be clear that as a matter of colonial legal history it is not my view that the Treaty of Waitangi actually was crucial to the foundation of the colonial state in 1840. On the contrary, earlier in my career in my University of Dar es Salaam PhD thesis and in journal articles I argued strongly that the Treaty was peripheral to the acquisition of British sovereignty over New Zealand and that 're-evaluations of the Treaty and of the principles of international law serve only to obscure the actual historical context of the imposition of colonial rule on the indigenous peoples of Aotearoa'.[61] I wore political protest badges that declared 'The Treaty is a Fraud'. In recent decades, however, the idea of the Treaty as the national foundation stone has been a very positive development for the emergence of a tolerant pluralistic society in which Māori status as tangata whenua has been acknowledged. This has contributed to empowering Māori tribes and groups to develop Treaty-based partnerships with Crown entities. It has enabled a process of cultural conciliation between Māori and Pākehā to be fostered, including in the Waitangi Tribunal hearings held throughout the country at rural and urban marae and in halls and convention centres.

Māori have no need of the Treaty to assert the legitimacy of their presence in this land. They were living here in organised social formations prior to the colonial state. That is the point that Ani Mikaere has stressed, and I agree with her on that. It is Pākehā and tauiwi, those who have migrated here since 1840, who need to find legitimation for the right to belong here and be citizens of this country. Do we continue to rely for the legitimacy of our presence on the arrogance of imperialist chauvinism and the military might of colonialism in the nineteenth century? Do we just assume, as they did in the nineteenth century, that English law had to apply to all because English law was the epitome of modern civilisation: 'Before, this land was occupied by evil, darkness and wrongdoing; there were no upholders of good, no preventers of evil'?[62] Such beliefs are anathema to most contemporary citizens. Do we rely on time and acquiescence as the basis for legitimation and seek to avoid too deep an inquiry into the merits of how the 'revolutionary' occupation of settlers was enabled? In my view that is as far as we get if we followed the thinking and the Treaty settlement policies of Simon Upton and Sir Douglas Graham who were ministers in the National governments of the 1990s.[63] That would be better than European monoculturalism, but it would still be a second-best account of constitutional legitimacy. The best grounds for legitimation, in

60 See Waitangi Revisited, above n 23, passim.

61 Williams, 'The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi?' (1985) 2 Australian Journal of Law and Society 41, 47; 'The Foundation of Colonial Rule in New Zealand' (1988) 13 NZULR 54; 'The Use of Law in the Process of Colonization', PhD thesis, University of Dar es Salaam, Tanzania, 1985.

62 F Fenton, *The Laws of England: Compiled and Translated into the Māori Language* (Auckland: Leighton, 1858) p. i (preface by the Governor, Browne) cited in Mikaere, *Waitangi Revisited*, above n 23, 334.

63 See the discussion of the views of Upton and Graham in F M Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 1999) 136.

the ideology that has been crafted in recent years, is that Pākehā like myself are citizens who can and should count ourselves as 'tangata Tiriti - people of the Treaty'.

We should not forget research and writing on the actual history of colonial imposition and, of course, historians should undertake that task in a conscientious and critical manner. But we need new stories of national origins to acknowledge the generosity of Māori in inviting us to come here and to explore how we can best meet the obligations of the rangatiratanga guarantees that accompanied that invitation. Some historians may want still to insist that the Treaty was a document signed by tribal peoples in a nineteenth century context with a consul of the British Crown, and that it has nothing useful to say about the multicultural identities of twenty-first century New Zealanders. I beg to differ. As Eddie Durie wrote in a 1990 sesquicentennial document: 'But then we must not forget that the Treaty is not just a Bill of Rights for Māori. It is a Bill of Rights for Pākehā too. It is the Treaty that gives Pākehā the right to be here. Without the treaty there would be no lawful authority for Pākehā presence in this part of the South Pacific'.[64]

A view of the Treaty that makes sense to me here and now, especially in the light of the events of 2003 and 2004, is that the Treaty's preamble and articles are an explicit immigration compact in which Māori welcomed those who wished to settle here. That welcome applies to all who came in the past, to their descendants and to all those who continue to come as immigrants and now wish to call Aotearoa New Zealand their home. Along with the welcome comes an obligation to honour the collective rights of the indigenous people. That means we need to find ways and means to continue to honour the Treaty in the circumstances of the present and the future. Again, to quote from Eddie Durie: 'The principles of the Treaty are not diminished by time, rather it takes time to perfect them'.[65]

X. What Does the Future Hold?

The 2005 Constitutional Arrangements Select Committee Inquiry reported to Parliament just before the House was dissolved prior to the September general election. It concluded that New Zealand's constitution is not in crisis and that the 'risks of attempting significant reform could outweigh those of persisting with current arrangements'. This has not altogether stifled further public debate. A *Listener* writer in 2006 acknowledged that 'New Zealand is in a constitutional coma. But', he went on to argue, 'if we're going to weather the social storms ahead, as demographic and global changes impact on us, we urgently need a formal written constitution. Done right, it would not only strengthen human rights but also transform race relations. It would be our turangawaewae – a place for all of us to stand.'[66] The then Governor-General Dame Sylvia Cartwright, though, cautioned against haste in any constitutional reform involving the Treaty: 'If we are to make changes to our constitution to reflect the role of the Treaty of Waitangi in New Zealand society, it is important that all New Zealanders walk together at more or less the same pace.'[67] Meanwhile, the Select Committee's bland recommendation to the House of Representatives was 'that it considers developing its capacity, through the select committee system, to ensure that changes with constitutional implications be specifically identified and dealt with as they arise in the course of

64 New Zealand 1990 Commission, *The Treaty of Waitangi: The Symbol of our Life Together as a Nation* (Wellington: NZ 1990 Commission, 1989) 14.

65 Ibid, 16.

66 T Watkin, 'Get It *in* Writing' New Zealand Listener, 5 August 2006, 26.

67 A Young, 'All March at Same Pace on Treaty', NZ Herald, 10 May 2006.

Parliament's work.' One of four generic principles recommended by a majority of the Committee to the Government was 'there should be specific processes for facilitating discussion within Māori communities on constitutional issues'.[68]

If such discussions ever do take place, I would argue that one of the starting points for the constitutional dialogue must include an acceptance of tikanga Māori, Māori custom law, as a law of the land. Presently there is no constitutional recognition of that proposition and of course no entrenched protection from future repeal of the partial recognitions of tikanga Māori and the Treaty of Waitangi that are to be found in the judgments of courts and in Acts of Parliament. On the contrary, for example, a Principles of the Treaty of Waitangi Deletion Bill promoted by the New Zealand First Party as a private member's Bill received a first reading in 2006. It is unlikely to pass a second reading, but it is before a Select Committee for public submissions. If it fails to proceed, that will not be because a constitutional issue relating to the jurisdiction of the Waitangi Tribunal cannot be tampered with by ordinary parliamentary processes.

Māori calls for a much higher constitutional status to be accorded to the Treaty will continue. The Māori Party in and outside Parliament will certainly continue to highlight the need for that.[69] For Māori academic, Claire Charters, the Government's abrupt repudiation of recommendations from the Waitangi Tribunal, then the United Nations Committee on the Elimination of all forms of Racial Discrimination (UNCERD) and then the Special Rapporteur for the United Nations Commission on Human Rights highlighted the imbalance of constitutional powers in this country. An unchecked Parliament was able and willing to interrupt due process in the courts, retrospectively deprive Maori litigants of the fruits of their success in the Court of Appeal, and abrogate Maori customary rights when enacting the Foreshore and Seabed Act 2004. The report of the Special Rapporteur urged measures to strengthen the 'customary self-governance of Māori' and included a recommendation that 'The Treaty of Waitangi should be entrenched constitutionally in a form that respects the pluralism of New Zealand society, creating positive recognition and meaningful provision for Māori as a distinct people, possessing an alternative system of knowledge, philosophy and law'.[70] Charters concluded her remarks in an international journal promoting the rights, voices and visions of indigenous peoples with these sentences: 'And while Māori's political presence is still small, it is growing. Undoubtedly that trend will continue, perhaps one day even prompting a new constitution'.[71] On the other hand, the Attorney-General's firm determination to defend parliamentary supremacy remains undiminished. In August 2006 Dr Cullen was quoted for the view that 'critics (such as the United Nations) do not understand "the importance New Zealanders as a whole attach to Parliamentary sovereignty … a deeply held belief that the democratically elected representatives of the people should have the final say over legislation, rather than the courts" '.[72]

What does the future hold? Time will tell.

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68 Report of the Constitutional Arrangements Committee, AJHR, 2005, I.24A, 5-10.

69 W Winiata, 'The Reconciliation of Kāwanatanga and Tino Rangatiratanga', Otaki, 30 January 2005; P Sharples, 'He iwi kotahi tatou - a shared frame of reference?' Wellington, 17 August 2006, available <www.maoriparty.com>.

70 R Stavenhagen, 'Mission to New Zealand' in United Nations Economic and Social Council, Commission on Human Rights, Indigenous Issues (62nd session, item 15), 13 March 2006, para 85.

71 C Charters, 'An Imbalance of Powers: Māori Land Claims and an Unchecked Parliament' Cultural Survival Quarterly, Issue 30.1, 27 March 2006: available at <www.cs.org>.

72 D Haywood, 'Bill of Rights Unlikely to Grow Up', NZ Herald, 28 August 2006, A14.