Te Oranga o te Iwi Maori:
A Study of Maori Economic and Social Progress

The Treaty of Waitangi: The uses and abuses of a 'living document'

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Contents

Introduction

Representatives of two separate and distinct peoples signed the Treaty of Waitangi in 1840. Maori immigrants from the Pacific region, who had lived in isolation on the islands now known as New Zealand for somewhere between 500 and 700 years, had been connected with the rest of the world in the decades following James Cook's arrival in 1769.[1] Their separation from the traders, religions, cultural achievements, military forces and diseases of other nations was inevitably going to end. The world was changing rapidly and Maori would be forced to respond and adapt. They were not a powerful, unified nation like Japan, for example, which could turn its back on the world; Maori had no choice but to reach some sort of accommodation with one of the expansionist powers. This was a reality that only slowly became apparent.

By the late 1830s two of the world's great powers, Britain and France, were showing interest in New Zealand. Britain had the head start and, after strong encouragement from settlers and some Maori, its government signed a hastily put-together, three-clause treaty with many Maori chiefs in 1840. The Treaty of Waitangi ceded governance to the Crown (article one) in return for protection from other nations, and the same rights as were enjoyed by the people of England (article three). Maori also received a guarantee that they could retain ownership of their properties (taonga) for as long as they wished to keep them (article two). Differences between the Maori and English texts of article two have spawned much debate since then. The English version referred to Maori retaining 'land and estates, forests, fisheries and other properties'; the Maori version referred to them having 'rangatiratanga' over their lands, settlements and personal property. The word 'rangatiratanga' can be translated as 'having chieftainship over', implying some sort of residuary element of sovereignty.

One hundred and sixty nine years later, their descendants and successors are very different from the original treaty partners. Maori remain an identifiable section of society, most notably through iwi and hapu structures, though the basis of their identity is now more cultural than genetic. Since before the signing of the treaty Maori have intermarried with settlers from Britain and the rest of the world. With accelerating immigration during the second half of the nineteenth century, the Maori share of the population fell rapidly from 98 percent to approximately 6 percent by 1901. Until 1974 'Maori' were defined as those with 50 percent or more Maori blood. Fewer and fewer could meet this criterion. Following the enactment of the Maori Purposes Act 1974 anyone with Maori ancestry, however slight, has been recognised as Maori if he or she wishes to be. Today at least 15 percent of New Zealanders have one or more strands of Maori ancestry and wish to identify themselves as Maori. Conversely

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1 N Prickett, *Maori Origins from Asia to Aotearoa*, David Bateman, Auckland, 2001.

virtually all Maori have ancestors who are English, Scottish, Italian, Croatian, Chinese or from some other ethnicity.

The 'Crown' too has morphed since the signing of the treaty. For all intents and purposes it now represents the citizens of New Zealand of all cultures and backgrounds: Maori, British, Chinese, Pacific, Indian etc. They can all vote. Many of these citizens, notably the descendants of early British settlers, have no other home to return to. They have no more right to migrate to Britain than a Maori or anyone else in the world. They are New Zealanders; New Zealand is their only home. In 2004 Professor Ranganui Walker said that as a Maori, "I have been here a thousand years. You [the Crown] arrived only yesterday."[2] Such possessiveness is a distortion. Of the 800 or so years of human history in New Zealand, European settlers have been around for about 200 or a quarter of that time. The old bicultural duopoly of the two dominant cultures, British and Maori, has become less and less relevant in a society that includes communities from all over the world, including significant Asian and Pacific Island communities. The Pacific Islanders, who came in large numbers from the 1970s, have shared this place for only one-twentieth of its human history; for those who arrived with the great Asian migration of the 1990s, the fraction is even smaller. These groups are not graded as to their citizenship by the time of their own or their ancestors' arrival.

If we fast-forward another 169 years, the situation will be different again. Through intermarriage and higher fertility the section of the population with some Maori ancestry will have grown. The community is likely to be even more multicultural, British culture less dominant, the various Asian cultures more so.

What will be the longevity or relevance of a treaty that was signed over 300 years earlier by representatives of two groups who have long since changed and who live in a context that the original treaty signatories would no longer recognise? Logic would suggest that its relevance as a guiding force for social and constitutional arrangements will have dwindled over time. New Zealand's unique history, and linguistic and cultural diversity, we hope, will still be cherished. Maori will always be a key, founding part of that continuing story. But before the law, it is logical to expect that the intrinsic worth of all New Zealanders, regardless of background, will assert itself as the generations pass. Logic, however, has seldom been the guiding force of human history. And there is nothing inevitable about human civility.

New Zealand has not fallen victim to the ethnic hatreds that have made life miserable for many around the world, but neither is it colour blind. For a while treaty-based distinctions did seem to be fading from view, but in the past three decades they have become critical to New Zealand's social and constitutional arrangements. The trend has been clearly in the direction of greater significance for the treaty, and it has been interpreted in such a way as to treat those New

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[2] Ranganui Walker, Kaimahi for Whakatohea (c November 2003). An open letter to Helen, Bill, Richard, Peter, Jeanette and Jim.

Zealanders with some Maori ancestry differently in several respects from those without. The concept of a treaty partnership, which in a perverse way perpetuates the idea of two separate peoples, has been generally accepted. If New Zealand continues its current trend then, fast-forwarding 169 years, divisions within society will surely have widened.

This short essay traces, at a broad level, the trends and impact of the Treaty of Waitangi since it was signed in 1840: its apparent slow death, its rebirth and the many uses and abuses of it in recent times.

Early land sales

In the decades immediately following 1840 Maori were treated specially in several ways, specifically over the greatest issue of the day – land. Under the treaty it was agreed that Maori would only be able to sell land to the Crown. This move, in line with Lord Normanby's instructions to Lt Governor Hobson, was designed to protect Maori from the perils of the free market, as well as to provide the fledgling colonial government with a revenue stream for infrastructural development in its widest sense.

When contemplating a treaty, British ministers had expected to pay Maori only nominal sums for most of their lands, reasoning that, with a small, unevenly spread Maori population (fewer than 100,000 by 1840) ranging over 267,000 square kilometres, there would be many surplus acres. The development of the colony, it was hoped, would be funded by the profits made on the re-sale of land to settlers. It did not work out like that. The prices paid, though cheap on a per acre basis for the early purchases in relatively thinly populated areas, were more than nominal. This was principally because Maori claimed ownership of every acre, even in vast districts like the South Island and Wairarapa where they numbered only in the hundreds. In some areas, like the much-cited example of the area that became downtown Auckland, the Crown was able to turn a quick profit.[3] In other areas, it was years, if ever, before the Crown saw a return on its investment. European settlers, with the choice of free or cheap land in Australia, the United States, Canada, Argentina and South Africa, were not taking the longest boat trip in the world to pay high prices for undeveloped land in the middle of nowhere.

For their own reasons, some Maori tribes, notably Ngati Kahungunu in the Hawke's Bay and Wairarapa and Ngati Whatua in the Auckland region, wanted to sell lands. Others refused, and the demand for land from settlers gradually built up as Europeans came to New Zealand. In the 1860s large and valuable parts of Waikato, Taranaki and the Bay of Plenty were taken by force (raupatu) after the wars of that decade. Meanwhile the Crown, perennially short of money,

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[3] Sir Douglas Graham used that example: *Trick or Treaty?*, Institute of Policy Studies, Wellington, 1997.

had been slow to purchase from Maori. Pressure built up from settlers, and some Maori, to do away with the Crown's monopoly right to buy. By allowing settlers to engage in direct negotiations with Maori over land it was thought that more land would be sold; some Maori hoped that with a competitive market it would fetch better prices.

The emergence of the Native Land Court system

Before this comparatively free market was allowed to emerge, an intended safeguard was built in to attempt to ensure that the correct people sold each piece of land. The Native Lands Act 1862, without mentioning the treaty, confirmed the article two guarantee of Maori customary land rights, and set up a court to convert them into titles granted by the Crown. In 1865 the Native Land Court, under Chief Judge Francis Fenton, began a process of investigating the ownership of parcels of communally held Maori land and incorporating them into a British style of ownership.

Aside from three areas confiscated in 1864–65 and one or two other exceptions, all the land that was sold thereafter went through the Native Land Court. In recent times the safeguards for Maori in the Native Land Court process have often been condemned as cynically and deliberately inadequate. In its *Taranaki Report* the Waitangi Tribunal likened the effect of the Native Land Court to judicial confiscation. It said in respect of Taranaki, "the confiscation of tribal interests by imposed tenure reform was the most destructive and demoralising of the forms of expropriation". At one point the term "holocaust" was used.[4]

In practice, the feature that led to most dissatisfaction was that under the legislation the Native Land Court often placed large blocks in the legal ownership of a handful of chiefs (indeed, for a while there was a limit of 10 owners on each block). In some cases, most notoriously in the rich Heretaunga plains of Hawke's Bay, the individual Maori owners were plied with alcohol and credit by storekeepers. By one means or another, these 'owners' sold their shares in the tribal estate, to the immense dissatisfaction of the rest of the tribe.

The Native Land Court system was remarkable in that it took every acre of land in the country, much of which had never before been used or lived on by anyone, and divided it amongst whichever group of Maori could stake a credible claim to it. The result was that a generation of chiefs went about establishing ownership over blocks of land that had always been vacant, or infrequently visited, and then derived a steady income by selling them. They became so used to the lifestyle

4 *Ta Taranaki*, Waitangi Tribunal, Wellington, 1996, p.312.

that they eventually sold blocks that their people needed.[5] The mana of the chiefs themselves suffered serious damage as a result of this process.

In recent treaty settlements the Crown has in effect said that in such cases it should have done more to protect the land holdings of the 'tribe'. Presumably here the Crown means that it should have protected the lesser members of the tribe from their chiefs, and the chiefs from themselves. The Native Land Acts could have ensured that every member of the tribe, regardless of his or her status, received an equal share. But to do so would have meant that the state deliberately undermined the authority of the chiefs, presumably in the interests of the others (and in the process insulting the concept of 'rangatiratanga' in article two of the Treaty of Waitangi). Such an approach would have created uproar at the time, and there is every likelihood it would be assailed today for deliberately undermining the existing Maori social structure. The fundamental issue of who appropriately represents a tribe, hapu or whanau, or who has ownership, has been vexed, to say the least, for the past century and a half. The lengthy battles of the 1990s between traditional tribes and urban Maori for shares of the fisheries settlement show that little has changed.

Just what was the right and proper thing to do was as hotly debated and contested then as it is today. Governments were torn in different directions, giving pragmatic responses to difficult issues while juggling competing demands. Their efforts were often ham-fisted, and the result was sometimes the opposite of what was intended. In the interests of everybody, for example, the government of the 1890s broke up the big estates held by wealthy settlers. In some areas, Maori were the greatest estate holders.[6] Today those actions would be criticised; back then they were seen as progressive because they opened land to more intensive cultivation, thus fostering New Zealand's economic growth which was important for Maori and non-Maori alike.

The treaty in decline

Over the years the treaty retained its status as the document signed at the birth of the country. It would never be forgotten although, not surprisingly, its significance in decision-making declined after the New Zealand Wars of the 1860s. There are few historical examples in which a treaty has survived after a war between the two parties; the Treaty of Waitangi survives today because there has been a political will on the part of the descendants of both sets of signatories to recognise its continuing validity.

There was no early Maori consensus on how to respond to the British sovereignty that was granted by the treaty. Hone Heke challenged it militarily in 1844–45 and

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5 For an example, see P Goldsmith, *The Rise and Fall of Te Hemara Tauhia*, Reed, Auckland, 2003.

6 T Brooking, *Lands for the People?*, University of Otago Press, Dunedin, 1996.

was subdued, by both the British and other Maori. Similarly, 20 years later, when Waikato, Taranaki and other tribes fought against the Crown, they were defeated, by both the British army and Kupapa Maori (tribes supporting the Crown). The treaty was used by officials and settler politicians in the 1860s to call for continued Maori allegiance to the Crown and for the renunciation of 'rebellion'. It was given great emphasis at the conference of chiefs convened at Kohimarama in 1860 by Governor Gore Browne. But in legal terms the majority of politicians had not seen the treaty as restricting the Crown's ability to confiscate land after the wars. Rather, in their view the right to punish rebellion was one that any sovereign enjoyed.

The Native Rights Act 1867 was intended to confirm for Maori the article three guarantee of the rights and responsibilities of British subjects. Maori used public services such as libraries and hospitals like anyone else. As settler concepts of justice reached further inland, Maori came before colonial courts too. But for pragmatic reasons they were treated separately on some matters, usually to their advantage. Four separate Maori parliamentary seats were established in 1867 under the Maori Representation Act. The initial intention was that the four seats would last only until Maori qualified for the vote through the possession of individual property – a British requirement at the time. All Maori men received the vote, whereas non-Maori men needed to pass a property qualification before they could enrol. Special schools for Maori were set up, Maori were not liable for some taxes, and even in the two world wars of the twentieth century some Maori were exempted from conscription.

Although many Maori married settlers and adapted to the colonial world, the treaty was never forgotten. From the 1870s onwards, tribes and individuals regularly brought cases to the superior courts, citing the treaty as the basis for their claims to land or waters. They had little success, however, as the courts concluded that the treaty did not form part of New Zealand's domestic law, and had been rendered obsolete by the engagement of the two races in sustained warfare. In 1877 Chief Justice Prendergast described the treaty as a 'simple nullity'.

It was little different in 1941 when the Privy Council confirmed what by then had become the conventional wisdom: the treaty was of no legal effect, except when it was expressly incorporated into domestic New Zealand law by deliberate Act of Parliament. The treaty was clearly no constitution; it was an historical agreement between two peoples made at the point when sustained settlement began.

Its irrelevance as a 'living document' was perhaps best shown by the treatment of the treaty itself in the early stages of World War II. Fearing attack, officials put the document – which had been affected by mildew and rats – in a case and sent it inland to Masterton for storage at a Public Trust building there. Owing to an oversight, it was left for some time blocking the entrance to the Public

Trust Office, and was only retrieved when people complained about the inconvenience to staff.[7]

A lingering sense of grievance

At New Zealand's centenary celebrations at Waitangi in 1940 Sir Apirana Ngata forcefully outlined many Maori grievances over lost land, but concluded his speech with the observation that in the whole world it was unlikely any native race had been as well treated by European settlers as Maori. But as the treaty, and indeed Maori issues, dropped from the forefront of the nation's mind in the middle of the twentieth century a sense of grievance remained alive within some Maori communities. The treaty continued to loom large on marae around the country and in the discourse of Maori politics. Wiremu Ratana's movement, launched in the 1920s, which eventually entered into a form of political alliance with the Labour Party, called for the 'ratification' of the treaty through its incorporation in legislation.

The confiscations in Waikato, Taranaki and the Bay of Plenty were the greatest sores that refused to heal. A royal commission established under Gordon Coates's government, and headed by Mr Justice Sim, reported in 1927. It found that in several areas wrongs had been done that needed to be set right. That commission led eventually to several 'full and final settlements' in the 1940s under the Labour government of Peter Fraser. These involved compensation by way of annual payments to trust boards established for the claimant tribes.

Other grievances remained. In some regions, such as Taranaki and Wellington, significant areas of Maori land had been leased for long periods at rentals that became 'peppercorn' over the decades with the onset of inflation, which was gradually becoming a worrying trend everywhere in the world. Meanwhile, councils and central government used the Public Works Act 1864 to take Maori land for roads and railways. Compensation was generally paid, but it was often inadequate. It was frustrating for Maori that it was more often their land that was compulsorily acquired rather than that of their Pakeha neighbours. As the remaining areas of Maori land were whittled away, irritation mingled with feelings of resignation amongst some Maori. By the 1930s less than 6 percent of New Zealand's total land mass (a higher percentage in the North Island) was in Maori collective ownership. This was not an insignificant holding. Maori also held land as private individuals and shared ownership of the vast tracts held by the Crown for all New Zealanders. But the usefulness of that land remaining in Maori customary ownership was seriously undermined by the nature of its tenure, which further fragmented ownership with each succeeding generation.

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7 M Bassett, *The Mother of All Departments: The History of the Department of Internal Affairs*, Auckland University Press, Auckland, 1997, p 127.

While the years of full employment from 1940–70 were generally better for Maori than any preceding period, the rapid process of urbanisation and de-tribalisation that accompanied the opportunities afforded by those years added a new dimension to grievances. As Maori society separated from its rural base, social problems became more visible. Maori interleaved with the modern urban economy but gravitated, due to their lower levels of educational achievement, to jobs requiring fewer skills. Through New Zealand's golden years 1940–70, the worst effects of this reality were masked. Since the 1970s, as the unskilled labour force has become increasingly marginalised and the premium on knowledge has grown, many Maori have watched their relative living standards subside. The elevation of knowledge as the driver of wealth has been a worldwide phenomenon that no nation or group hoping to generate first-world living standards has been able to ignore. This development, combined with the effects of a social welfare system that from the 1970s locked a disproportionately large number of Maori into welfare dependency, has arguably been the key driving force of continued social and economic disparities between Maori and Pakeha. Pacific Island immigrants have suffered in a similar manner.

The 1970s brought changing attitudes to the treaty. In retrospect, the high tide of assimilation came at the start of the decade. The Race Relations Act 1971 reflected a common commitment to work towards a state and a society in which race was officially irrelevant; racial distinctions were illegitimate. In October of that year, our greatest historian, Keith Sinclair, published an article entitled, 'Why are race relations in New Zealand better than in South Africa, South Australia or South Dakota?'.[8]

A reappearance in the nation's discourse

However, this air of self-congratulation dissipated steadily. The doyen of official treaty scholarship, Alan Ward, has argued that the explosion of Maori protest in the 1970s and 1980s reflected the instability of a situation that had been building up for more than a century. Yet surely there was more to it than that? The rapid growth of welfare and the social and economic squeeze of the 1970s and the restructuring of the 1980s inevitably impacted on Maori because they were over-represented amongst the less skilled. The international context of black civil rights campaigning in the United States and a fashionable post-colonialism within academia also contributed. And then there were triggers like Ralph Hanan's Maori Affairs Amendment Act 1967 which proposed compulsory measures for the 'improvement' of Maori land that did not apply to other land. The powers of compulsory acquisition of uneconomic interests in Maori land were expanded. Once more, the bureaucracy was struggling with the difficult issue of how to handle land that was held by dozens, sometimes hundreds of owners. Some, however, viewed such moves as another assault on what little land remained in collective Maori ownership.

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8 *New Zealand Journal of History*, 5, 2, 121–7.

Over the decades since the 1970s, the Treaty of Waitangi has reappeared in the nation's discourse. At first its presence grew in a limited fashion. However, by 2000 it had become a dimension discussed in virtually every government document. In recent years every government bill before its introduction has had to be assessed for its potential ramifications in regard to the treaty.

The third Labour government (1972–75) assisted this process. Its manifesto for the 1972 election, heavily influenced by Matiu Rata, the member of parliament for Northern Maori, committed the government to examining "a practical means of legally acknowledging the principles [which it didn't define] set out in the Treaty of Waitangi". This promise became a rallying point. The Land March of 1975, led by the dignified figure of Whina Cooper, in which tens of thousands joined as it moved from the far north to parliament, caught the attention of many. The message was simple: no more land should be lost.

In the same year the Treaty of Waitangi Act was passed. Although it did not define the 'principles' of the Treaty of Waitangi, it established a Waitangi Tribunal to consider claims of treaty breaches from that date. Its focus was not on past grievances but on the 'here and now' and the road forward.

Robert Muldoon and his National government that took power in a landslide victory at the end of 1975 were not inclined to take the issue further. But public momentum gathered. The occupation of Bastion Point in 1977 threw into stark relief the different views of history that had existed in parallel since 1840. In the context of the 1970s, with social and economic pressures bearing down on Maori, the need to review Maori history assumed greater urgency.

For several years assertions that 'The treaty is a fraud' mingled incongruously with demands that governments 'Honour the treaty'. The notion underlying the demands was that contemporary Maori problems were due primarily to past injustices where treaty assurances had not been honoured. The argument had the appeal of simplicity. But then, as now, it was an inadequate response to the Maori predicament, because it removed the responsibility for both historical and contemporary choices made by individual Maori, their whanau and their chiefs, and placed it elsewhere, usually on Pakeha. Although there can be no doubt that settler governments were sometimes cavalier in the way they treated Maori interests, the notion that Maori bear no responsibility for what happened has compounded contemporary problems.

The next step in the evolutionary process came with the election of the fourth Labour government in 1984. Following an election promise that had not gone through the party's correct policy-making process, the government in 1985 extended the jurisdiction of the Waitangi Tribunal back to 1840. Again, the 'principles' of the treaty were not defined, but this did not stop the government including a reference to them in key legislation in subsequent years. Section 9 of the State-Owned Enterprises Act 1986 declared that the act could not authorise anything that would be in conflict with the "principles of the Treaty of Waitangi".

Inevitably, in the absence of any definition in the act, these 'principles' were defined by the courts which, not surprisingly, took a legalistic view. The state-owned enterprises legislation led to the *New Zealand Maori Council v Attorney General* case of 1987, where the Court of Appeal stated that the treaty "signified a partnership between races" This judgment led on to the idea that in signing the treaty, the Crown had signed up for long-term responsibilities "analogous to fiduciary duties" as a partner.[9]

This was a decisive shift in view. An alternative route, which might have seen the treaty as a contract whereby sovereignty was conferred on new institutions representing joint peoples, was passed over in favour of the idea of partnership. It sounded benign, but the concept of partnership has fed the notion that two strands of sovereignty will live on forever. The concept of partnership, in a way, attempts to freeze history by adopting the fiction that the original treaty partners still exist as they did in 1840, and will continue to exist as separate peoples in perpetuity. The effect has been to emphasise ongoing differences when, ethnically and in most other ways, the separateness is self-evidently diminishing.

The emergence of the treaty 'industry'

The current prominence of the treaty in every facet of government and the development of an 'industry' to promote it flowed from this invitation from the courts to expand the treaty's significance. Sir Ivor Richardson stated in the *New Zealand Maori Council v Attorney General* case of 1987:

> Whatever legal route is followed the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise.

If those court decisions of the 1980s were the legal green light, the practical encouragement for a more expansive view was facilitated by the creation of a source of funding to enable grievances to be heard. The Crown Forests Assets Act 1989 provided that rentals from Crown forest lands licensed to timber companies would be held by a Crown Forestry Rental Trust. Income from the invested funds was made available for researching treaty claims relating to the forest land. The trust soon had many millions of dollars to spend, and lawyers and historians possessed the resources to find ever-more-creative ways to approach the issue of land alienation from Maori. From there, the treaty 'industry' built a momentum of its own. All of the people involved possessed incentives to extend the process further.

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9 For a discussion of the emergence of this view, see K Minogue, *Waitangi: Morality and Reality*, New Zealand Business Roundtable, Wellington, 1998, pp 11–12, 16–17.

These moves encouraged Eddie Durie, chairman of the Waitangi Tribunal, to say in 1989:

> … the Treaty is moving in as surely as the tide. In the statutes of our Parliament, in bureaucratic operations, in the level of the administration of the courts and in local authority planning, the Treaty is now well known. You know when we stand at the foreshore we do not always see the movement of the tide. We see no more than the regular breaking of the waves, as if no painful inch is gained. But look back to the creeks and inlets. There, silently, it is plain to see the tide running at full flow …

Indeed, with the legislative dam broken by the State-Owned Enterprises Act 1986, references to the 'principles' were soon scattered liberally throughout New Zealand legislation. In 1989 the Lange Labour government attempted to define the 'principles of the treaty' but failed to legislate them into existence and no one took much interest in its efforts. Not surprisingly, given the malleability of the original treaty document and the looseness of references to 'the principles', the field of play has gradually expanded further.

All the while, pressure from the Waitangi Tribunal process fostered demands for compensation (in some cases further compensation) for past wrongs. Another 'full and final' settlement for the claims of the Waikato tribe, Tainui, was made in 1995. Negotiations began with the Taranaki and Bay of Plenty tribes. Then, as eyes gazed back over history, it was easy to find instances, with hindsight, where the Crown could have taken more care in protecting Maori interests.

And so settlements moved rapidly beyond the relatively clear-cut instances where land had been confiscated, to cases where local Maori sold land willingly over many years. Within treaty discourse the term 'alienation', which described a state of affairs without attributing any responsibility for it, replaced the term 'sale'. The most significant example was the Ngai Tahu settlement of 1998, but there have been others subsequently, such as Te Uri-o-hau of north Kaipara. In the process, previous generations of politicians have been judged for failing to act in ways that no one dreamed necessary at the time. Government officials operating on a shoestring budget in the 1850s have been criticised for not foreseeing every unintended consequence of their actions. In the course of the debate, many claimants have succumbed to the parochialism of our time, applying its values to the mid nineteenth century. The historian W H Oliver has labelled this process "presentism".

Aside from land issues, the real driver of the treaty's significance has been the ever-expanding scope of what came under the heading of 'taonga' mentioned in article two of the Maori version of the treaty – possessions or treasures guaranteed to remain with Maori for so long as they wished to retain them. The English text of the treaty specified "lands and estates, forests, fisheries and other properties". It was with this in mind that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 awarded Maori a large slice of New Zealand's commercial fishing quota.

The word 'taonga' has been defined as covering many areas: Maori culture and language, the intellectual property rights in indigenous flora and fauna, and even the airwaves for radio and television. The Waitangi Tribunal recently found that there is a 'treaty interest' in the oil and gas reserves. The government of the day did not agree on the grounds that such reserves were nationalised in 1937 and are therefore the property of all New Zealanders. But the logic to the claim is compelling if one accepts a treaty interest in airwaves and other resources never dreamed of in 1840. A current field of battle is the foreshore and seabed. British officials were surprised in the 1850s when around 60,000 Maori claimed every acre in New Zealand. Their descendants now say their ownership extends to the fish in the sea, the foreshore, the DNA of plants, and any other assets that human ingenuity might unearth.

The advancement of the special status concept

The key transformation that has occurred along the way is that the treaty that began as recognition of prior occupation and Maori rights to their taonga is now being used not just for righting past injustices but increasingly to develop a notion of special status for those who choose to claim some Maori ancestry. As with most developments covered in this essay, this outcome has been the result of good intentions gone awry. The treaty has been used as the vehicle of choice for special initiatives to preserve Maori language and culture, to foster Maori health and to solve social and economic problems, and other laudable objectives. But along the way it has also come to encompass special rights of consultation on virtually every facet of government, as well as special attention and special slices of funding.

The manner in which Maori, or at least those who are interested in doing so, have come to gain a greater say in government than other New Zealanders has taken several forms. The Resource Management Act 1991, for example, established that local authorities must have regard to Maori concerns when considering building consents and other land use applications. Because Maori groups can withdraw culturally based objections in return for financial compensation, this provision has led to ill will and considerable scepticism amongst the wider community. Similarly, the Hazardous Substances and New Organisms Act 1996 requires the Environmental Risk Management Authority to have regard to Maori concerns. Amongst these concerns are animistic superstitions such as beliefs about taniwha. It is a very small step from special rights of consultation to an implicit veto or an explicit recognition of a right to 'toll' before any agreement is reached. This potential extension leaves the question dangling: do some enjoy a superior level of citizenship? At the leading edge, the Waitangi Tribunal's Napier Hospital Report suggested that local Maori groups, through the treaty, should be able to overturn everyday decisions of government that are in the interests of the wider society such as where to locate a hospital.

In more recent times a host of special roles and places for Maori have appeared, particularly in government institutions: liaison roles in virtually every government department, self-nominated representatives of local Maori on local council payrolls, Maori on consultation committees for organisations such as Television New Zealand, Te Papa, and the district health boards set up under the Health and Disability Services Act 2000. In the conservation area, special guardianship roles for local iwi reflect what have been at times chauvinistic ideas about one ethnic group's special affinity with the environment.

The treaty has also been used to justify special slices of funding, or of assets, to Maori. This practice implies that the usual share in the state's largess that Maori receive as ordinary citizens requires 'topping up'. In effect, the treaty is being used to justify a 'double payment' based on ethnicity. Examples range from Maori research funding, the radio spectrum auction in 2000, fishing quotas and educational scholarships, right down to the assumption that only local iwi should have rights to the teeth of sperm whales stranded on beaches.

The fifth Labour government, led by Helen Clark, found itself in an unusual position when it took power in 1999. After holding all the Maori seats from 1943–93, Labour had lost its grip on them in 1996. Although Labour regained all of the Maori seats in 1999, Clark was clearly worried Maori voters might change their allegiance permanently and, because of continued Maori pressure, she sought to elevate the treaty further. In the Speech from the Throne in August 2002 the governor general said:

> The basis of constitutional government in this country is to be found in its founding document, the Treaty of Waitangi. My government values and remains committed to strengthening its relationship with tangata whenua (indigenous people). That means fulfilling its obligations as a treaty partner.

What this meant has been debated ever since.

In 2004 political commentator Chris Trotter highlighted how such sentiments were transposed into the Tertiary Education Strategy as an example. The strategy talks about "Effective partnership arrangements with Maori communities". It declares:

> The tertiary system must meet the educational needs and aspirations of Maori communities. Partnership and autonomy expressed in the Treaty of Waitangi must be given effect through the government, Maori and the tertiary education system working together to produce success in terms meaningful to Maori. This should provide opportunities to recognise and accommodate Maori development aspirations through tertiary education. In the development of charters and profiles in particular, providers should work in partnership with local Maori communities to determine where opportunities exist for tertiary education to contribute to, and benefit from Maori development of their cultural, intellectual and physical assets.

Trotter noted how resources are to be extracted from the New Zealand community as a whole and directed towards the "development" of a specific

ethnic community's "cultural, intellectual and physical assets", leaving open what, precisely, those assets are.

Each area of special consultation, attention or funding has stemmed from the notion that the Crown has a special duty of care to Maori flowing from its treaty 'partnership'. At face value many will see this duty of care as well meaning, but from the broader perspective it is morally questionable. If the state has any duty of care, it should be to all citizens, regardless of their ethnic background.

Over the past 20 years the momentum has clearly been in the direction of an enhanced constitutional role for the treaty. Every year it has been locked further into legislation and practice. In 2004, after the National Party's new leader Don Brash gave a speech on the topic, the government announced several retreats. These proved largely cosmetic.

The arrival of the Maori Party on the electoral scene at the 2005 election, combined with the steady increase in the number of Maori seats, looks set to ensure even greater prominence for treaty-based differentiation. The Maori seats had been retained against the advice of the Royal Commission on the Electoral System in 1986 which also recommended the introduction of the mixed member proportional (MMP) system of voting. The Maori Party's success in electorate seats and its relative lack of success with the party vote have created an 'overhang' in two parliaments so far, thus lending the Maori seats greater political significance than the voters provided for on election day.

In addition, there was a flood of treaty settlements announced in the lead-up to the 2008 election, and serious consideration given by all parties to the entrenchment of the Maori seats. The Royal Commission on Auckland Governance in 2009 went one step further in proposing, at the request of Maori submitters, that Maori have not only elected Maori seats on the new Auckland council but also a councillor appointed by 'mana whenua'. With this proposal the concept of democratically elected representation that applies to everyone was being waved aside.

Conclusions

The trends of the past three decades carry many risks. Hand in hand with such trends come expectations. A significant number of Maori now expect to be treated differently and to enjoy special consultation above and beyond that to which others are entitled. As these heightened expectations provoke uneasiness amongst other sections of the community, greater tension is bound to result. Certainly a serious mismatch in expectations has been allowed to develop. More than that, with the steady elevation of the importance of ethnicity in New Zealand life, the country risks undermining one of its greatest advantages: that it has evolved a modern democratic society based on equality before the law regardless of race, one vote for every adult citizen, and respect for the rights of minorities. Guarantees of equality also exist in legislation, most notably the New

Zealand Bill of Rights Act 1990. There has been general tolerance for a certain amount of deviation from its ideals to reflect the quirks of our history and the role of Maori in it, but there is only so far it can be pushed before New Zealand loses its shine as a modern democratic society.

In trying to preserve Maori identity and culture, and to address social disparities – all laudable objectives – the treaty has been advanced as the solution. In fact, as it is being used, it has become part of the problem.

This is not the terrain of easy solutions, and there is insufficient room in this essay for a full discussion of possible future directions. I offer the following observations, based on my reading of recent trends.

For the reasons outlined above, some sort of process to examine Maori grievances was necessary, even inevitable. As the distinguished expatriate Kenneth Minogue wrote, "We need not doubt that in the moral context of the modern world, New Zealand had no alternative but to deal with these problems in one way or another. The challenge for the government is to address these grievances while preventing them getting out of hand."[10]

The pity has been that the debate has focused excessively on past wrongs; on sins and omissions by the Crown in the nineteenth century. In an attempt to redress the historical balance, the negatives of Maori experiences of colonisation have been emphasised repeatedly, and the positives overlooked. No group – whether defined by ethnicity, religion, gender or any other trait – has ever benefited from being told that its problems are largely the fault of another group. But that has been the underlying message to Maori over the past three decades. Implicit has been the notion that if only the past wrongs could be righted, things would be well. That is a chimera. The world keeps moving on. Successful societies cannot be consumed with endless re-litigation of their past. They have to keep their eyes on current challenges and issues. Meantime, much recent government policy has served to reinvigorate and entrench the power and importance of old Maori institutions and structures, which have difficulty adapting to modern, fast-moving and complex times.

New Zealand still faces the reality that Maori, as a group, have substantially lagged behind the social and economic performance of non-Maori. This is the dominant experience of colonised indigenous peoples around the world and is rightly a matter of considerable concern to all New Zealanders. Successfully closing this gap, however, depends on making gains in other areas such as achieving general economic growth, expanding job opportunities, changing attitudes to education, sheeting home greater individual responsibility and ending multi-generational welfare dependence. These matters are the stuff of everyday choices by individuals that can be greatly influenced by government policies. They are, quite simply, matters beyond the scope and limitations of the

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10 K Minogue, *Waitangi: Morality and Reality*.

treaty process. Most of the government policies that are good for Maori are those that are good for non-Maori; the treaty is irrelevant. In economic terms, the treaty process has been more about asset redistribution with little thought given to future wealth creation. But, by itself, redistribution cannot be a route to sustainable prosperity. It encourages ever greater inventiveness in finding new arguments about what should be redistributed. The process breeds a warped kind of entrepreneurship. The treaty debate, at its worst, has become a cul-de-sac into which many of the best Maori and Pakeha minds have ventured, only to be distracted from the challenging current issues facing society as a whole. With the process of reparations for past breaches of the treaty already well advanced, there is now a real need for a speedy resolution of outstanding claims.

It seems to me that if New Zealand continues on its current path towards differing levels of citizenship based on ethnicity, and a never-ending attempt to undo history, it invites future tension and/or emigration by many skilled and mobile citizens. Moreover, there is no indication that in following this path the core issues of relative Maori deprivation will be solved. We must always keep in mind the fundamental alteration to the nature of the treaty 'partners' that has been occurring since the treaty was signed in 1840. Using that document to justify a special status to the descendants of one set of signatories as that group gradually becomes ever less distinct as a racial entity, is bound eventually to bring these modern arguments advanced to justify forms of privilege into ridicule. What kind of New Zealand would exist with entrenched Maori seats 100 years from now if, through continued intermarriage, 30 percent of the population qualified for the Maori roll and there were 40 or more Maori seats in a 120-seat parliament? It is a recipe for a political world dominated by questions of ethnicity. Every question would increasingly be viewed through the lens of 'the treaty partnership', even though there is nothing to suggest that optimal political, democratic, social, legal and economic arrangements to govern people in a modern world are culturally unique.

A more desirable and optimistic scenario is that the country confronts current day deprivation, Maori or otherwise, honestly and on its own merits. That will provide the basis on which to move to a more realistic understanding of the scope and the limitations of the treaty process: recognising the country's history, but not justifying real or perceived variations in the standards of citizenship in the twenty-first century, nor offering the false hope of Maori prosperity through the ongoing redistribution of assets based on increasingly dubious grounds. For this more desirable and optimistic scenario to happen, the legalistic and unhelpful notion of a treaty partnership, which, anachronistically for modern New Zealand, implies two different peoples looking at each other across the negotiating table for ever more, needs to give way to a more realistic view of the Treaty of Waitangi. In this alternative view, we see the treaty for what it is: an historic contract between the British and Maori chiefs that contributed to the formation of the modern, democratic state that is New Zealand, where every citizen now shares citizenship on the same basis.