



Number 6

***The Legal Reality of Customary Rights
for Maori***

Rt. Hon. Sir Douglas Graham, KNZM

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The Legal Reality of Customary Rights for Maori

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Treaty of Waitangi Research Unit

Stout Research Centre

Victoria University of Wellington

Wellington, New Zealand

Phone: 64 4 463 5933

Fax: 64 4 463 5439

Email: maureen.west@vuw.ac.nz

Occasional Papers Series Editor

Richard Hill, Litt D

Production

Maureen West

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PREFACE

This series of papers is designed to provide a forum for differing views on Treaty of Waitangi and related matters. The author of this contribution to the debate, the Rt. Hon. Sir Douglas Graham, KNZM, holds the degree of LLB as well as an honorary doctorate from Waikato University. Sir Douglas, as Attorney General and Minister of Justice, and especially as Minister in Charge of Treaty of Waitangi Negotiations, dominated Treaty issues for the whole decade of the 1990s through his extraordinary energy and commitment, the fruits of which include the pioneering settlements with various tribal groupings.

Upon his retirement from politics at the 1999 elections, he took up a Visiting Fellowship at Wolfson College, University of Cambridge, assisted by the Link Foundation for UK–NZ relations. In March of last year I asked Sir Douglas – for whom I had worked as Chief Historian and as a senior manager in the Treaty of Waitangi Policy Unit and the Office of Treaty Settlements - for a contribution to the Treaty of Waitangi Research Unit’s planned occasional paper series. He offered this paper, which he had completed at Cambridge during his fellowship. In the event other TOWRU commitments delayed the launch of the series, but the paper remains topical, and we are pleased to publish the conclusions on significant issues of such a keynote player in New Zealand’s recent Treaty and related developments.

Richard Hill

6 January 2001

INTRODUCTION

A willingness at last to address claims by Maori arising from our colonial heritage has engendered some expansive claims to perceived customary as well as to Treaty 'rights'. Some of these have been favourably received by the Maori Land Court and the Waitangi Tribunal. But it is hard to see a proper basis in law for such acceptance (notwithstanding, in the Tribunal's case, its wide statutory jurisdiction). And while New Zealanders seem prepared to accept that serious injustices occurred that need to be addressed, there is a strong aversion to Maori people having rights over and above those held by their fellow citizens. There is considerable disquiet, therefore, when iwi and other groupings claim interests in resources in which the public thought Maori had abandoned claims to years ago, or in new resources that, by their own acknowledgement, they never knew existed at the time of the signing of the Treaty of Waitangi in 1840.

The purpose of this essay is to consider whether such assertion of rights has merit and, if so, the source, nature and extent of these rights. It will be argued that while there are certain rights not shared with non-Maori, they are far less extensive than argued by many Maori and non-Maori alike. 'Treaty of Waitangi' claims as well as customary rights are canvassed, and some comparisons with similar jurisdictions noted. The paper argues that *real* customary rights in law need to be distinguished from claimed rights which have little or no merit. In exploring the relationship between Maori and the Crown, it is suggested that once myth and reality in the arena of customary rights have been clarified, Maori can best choose the appropriate route to pursue in their quest for justice - Treaty, customary or other.

Over the past 30 years there has been significant jurisprudence in New Zealand, Canada and Australia on customary and (in New Zealand and Canada) treaty rights of indigenous people. Case law has helpfully clarified the evidential burden that exists to establish such rights and who carries that burden. It has also described in some detail the qualitative nature of such rights once proven, and how and by whom those rights can be lost, modified or extinguished. What is abundantly clear is that those indigenous communities that have remained physically separate from the settler community, such as Aborigines in the Australian outback or Inuit in northern Canada, are much more able to assert customary rights than are Maori, who - in a relatively small island land mass - quite quickly adapted to Europeanisation and eventually became largely integrated with Pakeha. Over time and as a consequence of such processes,

then, Maori ceased to practise a customary way of life; and, as a result, the customary right to do so was generally lost.¹

Yet inasmuch as the indigenous people make up a far larger percentage of the population in New Zealand compared with Canada and Australia, the actual exercise by Maori of remaining rights is actually and potentially rather more visible. As a result, the decisions of the courts or the findings of the Waitangi Tribunal on fishing and other rights are of as much interest to non-Maori as to Maori. Not surprisingly, judgments and Tribunal recommendations relating to customary rights have not always been met with public enthusiasm. Indeed, particularly in the case of the Tribunal, the public response on occasions has been quite critical - even hostile.

No-one doubts the difficulty the Waitangi Tribunal faces, and generally its work has been of a high standard, but there is a real risk that it may lose credibility as a result of some of its pronouncements. Indeed, matters have now reached the point where some commentators are suggesting that the Tribunal has both been ‘captured’ and has gained far too much influence. Relatedly, and notwithstanding that ‘judge-made law’ is a regular feature of all aspects of common law, it is frequently now argued that the courts have usurped the role of Parliament and are ‘making law’. Many people feel that their own views have become irrelevant, and that there is minimal opportunity for them to have their perspectives addressed through, say, their parliamentary representatives presenting such views in parliamentary debate. In such a situation there are dangers of, for example, backlash against Maori striving to effect their legitimate customary (and Treaty) rights.

A recent rapid upsurge in the number of legal cases concerning customary rights, beginning with *Calder*² in Canada and *Mabo*³ in Australia, has certainly resulted in the dominant societies in both countries being forced to take greater interest in this controversial and complex area. In both countries many of the indigenous people continue to reside on land in remote areas occupied by their ancestors, and follow inherited traditions that have changed little over the centuries. In those circumstances, an assertion that customary practices are still followed and that therefore the customary right to pursue them has been retained, is hardly surprising and quite frequently made. The improbability of such interests surviving in a much

¹ This approach, it is noted, does not alter *how* such rights have been lost, insofar as it is legally based. It is the province of the Waitangi Tribunal to examine the ethics of Crown actions or their omissions which may have contributed to such losses.

² *Calder* [1973] SCR 368.

³ *Mabo v Queensland* (No 2) (1991-2) 175 CLR 185.

smaller and much more integrated country like New Zealand has seen an emphasis on the interpreting and applying the Treaty of Waitangi, and examining its role in New Zealand society, as is appropriate. Nevertheless, judicial pronouncements on both customary or treaty rights in any of the three countries mentioned have some relevance in the others because of their common heritage from a colonial past - in particular the shared legal inheritance of common law jurisdiction.

It need hardly be said that the Crown's failure to uphold customary or Treaty of Waitangi rights for much of our history has been an undoubted contributor to the disparity gap that exists between Maori and other New Zealanders; Canada and Australia have a similar legacy. It is encouraging that all three countries are now endeavouring to address the problem that has been created, even if the approaches being taken differ considerably. In a legal sense New Zealand faces some critical issues in such redress. Do, for example, Maori enjoy certain rights that are not held by other New Zealanders? If so, where is the source of those rights and what is their extent?

One simple answer is that a person of Maori descent may still enjoy, as part of a group, certain customary rights that are recognised by the common law. Such customary rights, to the extent they still exist, are not shared by the rest of the population, including perhaps other Maori. In addition, any Maori has individual or collective rights under the Treaty of Waitangi which were reciprocal to the acknowledgement by Maori of the legitimacy of British governance. It is sometimes said that customary rights and Treaty rights are much the same⁴ and that the Treaty simply confirmed pre-existing customary rights. However, there are substantial differences between the types of rights and indeed the nature of any given right - matters such as its specificity, the ease or otherwise of proving its existence, its enforceability, its susceptibility to modification or ultimate extinguishments.

We will now examine rights under the two broad headings of customary and Treaty of Waitangi rights.

⁴ Cooke P in *Te Ika Whenua* [1994] 2 NZLR 20.

CUSTOMARY RIGHTS

Introduction

English common law has long accepted the principle that the right to follow customary activities and practices by the prior occupants of a settled colony survived the assumption of sovereignty by Britain. The purpose of this principle was to facilitate the reconciliation of the two cultures, which could otherwise be in a state of conflict. Accordingly, there are customary rights based on originality that will be upheld in the courts unless and until those rights have been abandoned, surrendered, or lawfully extinguished. The result is a legal system in which certain members of society have rights not shared by others - not because of ethnic considerations (although as a matter of fact such right holders in New Zealand can only be of Maori descent), but because they were members of a society that enjoyed prior possession.

Those customary rights are alienable only to the Crown, and more significantly are susceptible to extinguishment by the Crown. A resulting vulnerability of Maori to prejudicial actions by the state meant that a special relationship between the two entities was deemed to exist. Unfortunately the Crown's obligation to act honourably to Maori that was at the base of this special relationship, implicit in the Treaty of Waitangi and later reaffirmed by modern Treaty developments, sat uneasily with the colonial government's concern to ensure that there was sufficient land available to the incoming immigrants. As history so often proves, then, good intentions of the Crown (the theory) inevitably came into conflict with the practicalities of government (the reality). And, not surprisingly, reality almost always prevailed.

Customary rights are unique. A Canadian judge recently noted that such rights:

... cannot be defined in a manner which would accord with common law concepts of title to land or the right to use another's land. Rather they are the right of aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories.⁵

Customary rights are not therefore the equivalent of common law property rights. As the Supreme Court in Canada put it:

⁵ *R v Sundown* (1999) 1 SCR 393 per Cory J.

They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful then to avoid the application of traditional common law concepts of property as they develop their understanding of ... the *sui generis* nature of aboriginal rights.⁶

Another judicial definition is found in a recent Australian case dealing with native title:

Native title originates in the traditions and customs of the indigenous peoples of Australia. It is from them and not from the common law, that it takes its content.⁷

It follows therefore that customary rights will differ from country to country as the customary practices and activities on which they were based differ. What may be held to be a customary right in one jurisdiction may be unknown in another. The potlatch in Canada has no real comparable activity in New Zealand, and Maori do not go walkabout. Indeed customary practices and activities may not be uniform even within a given indigenous population, given inter- and intra-tribal differences.

The legal protection afforded customary rights may also differ between countries despite possession of a common heritage. Neither New Zealand nor Australia has the statutory acknowledgement of rights found in section 35(1) of the Canadian Constitution Act of 1982, which provides that:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.

Nor is there a provision in New Zealand similar to that contained in the Indian Act of Canada that requires the courts to resolve conflicts between laws of general application and treaties. This, coupled with the fact that the treaties of Canada were somewhat akin to domestic contracts, made treaties justiciable in the courts. The Treaty of Waitangi was however an international treaty of cession, and, as such, was unenforceable in the courts.

Notwithstanding such differences, and taking into account the timely warning of Kirby J that it is almost impossible to derive common themes of legal principle,⁸ it is nevertheless

⁶ *Sparrow v The Queen* [1990] 1 SCR 1075.

⁷ *Fejo v Northern Territory of Australia* (1998) 156 ALR 721 per Kirby J.

⁸ *Fejo*.

suggested that there is sufficient commonality between the three jurisdictions covered in this paper to determine when customary rights will be upheld (and how such rights can be lost).

A Continuum of Rights

The words ‘customary rights’ constitute a compendium term for the freedom to undertake various customary activities. Each of those activities can be seen as located on a continuum. At one end there are customary activities relating to personal relationships such as adoption practices, the recognition of marriage and divorce, and rules on inheritance. Further along the continuum there are customary activities such as hunting, fishing or other types of food gathering, which of necessity are linked to land, rivers, lakes, foreshores and other natural features. These activities do not however necessitate an actual interest in the land or its natural features. The rights are similar in nature to rights to take (*profit a prendre*) or rights of access or passage. They are sometimes called ‘non-territorial rights’.

Towards its furthest point of the continuum, customary activity is critically dependent on the land or natural feature. The use of a specific site or sites for habitation, or of thermal power for cooking or river water for consumption, or of physical land features such as hillsides to protect the community, are examples. Here the interest is in a tangible permanent feature of the landscape, rather than in conducting an activity on or over it. It is distinctly territorial, the customary right being to possession and occupancy in order to continue the customary usage of resources, until that usage is no longer followed or the right to use has been extinguished by government fiat. If it can be established that possession was exclusive at the time sovereignty passed to the Crown, and that possession has continued unabated to the present time, so that evidence that customary usage of the land and resources is continuing is available, the customary right here is known as customary title. It is a right to possession in order to follow and enjoy the traditional and customary practices and activities associated with possession. It does not, however, equate with a fee simple title. Nor does it entitle the holder to act in any way that is inconsistent with the customary usage. Most importantly, when the customary usage ceases, usually by the holders of the right departing from the land and resources, the customary title is lost permanently. This is because all customary rights only have recognition if they are needed to follow a customary practice. If the practice is no longer being followed, the right is lost.

Every customary right, wherever it is on the continuum, can be lost in one of three ways, by:

- abandonment of the customs on which it is based or, in the case of customary title, severing the physical link with the land concerned;
- surrender by the holder to the Crown; or
- extinguishment pursuant to a lawful act of the Crown.

Once lost, the customary rights cannot be revived, as the common law only protects rights that exist at the time they are asserted.

This fact seems to have been overlooked in recent litigation in New Zealand, where some seem to believe that if exclusive possession at the time of annexation by Britain can be proved, then a customary title will still exist unless and until extinguished by the Crown. If this were so, since exclusive possession at Crown acquisition of sovereignty would be relatively easy to establish, Maori could perhaps advance a claim to a customary title over lands held by the Crown - even though they had not been resident thereon for possibly a century or more. This, however, they cannot do. A customary title is quite unlike a fee simple title where the owner may be absent for years. It is not possible, as is sometimes suggested in New Zealand, for a customary title to exist in favour of generally now urbanised descendants of original occupiers.

In fact it seems to be becoming common to argue that every person of Maori descent, as an indigenous individual, has always had and still has the right to enjoy all forms of customary rights, unless the particular right in question has been specifically extinguished. In other words, if there has been no extinguishment, then the rights will continue to exist for enjoyment by every Maori until they are formally extinguished. This is clearly not so in law. Most customary rights have been lost over the years by most Maori because the customs on which they were based have long been abandoned. Such rights do not lie dormant, capable of revival. Once clearly abandoned, they are no longer capable of recognition at common law.⁹

Thus, the first issue in a given case is whether a customary right exists at all. McLachlin J, in a Canadian case dealing with treaty rights, which - in this context - equate to customary rights, said:

A claimant seeking to rely on a treaty right to defeat a charge of violating Canadian law must first establish a treaty right that protects expressly or impliedly, the activities

⁹ *Williams v City of Chicago* 242 US 434 (1917) per McReynolds J.

in question. Only then does the onus shift to the government to show it has accommodated the right, or that its limitations of the right are justified.¹⁰

Much effort and cost has been expended in New Zealand before the courts and the Waitangi Tribunal seeking to determine whether or not an alleged customary right has been specifically extinguished. First however, in any given case it should be ascertained as a starting point whether the claimed customary right continues to exist. It may be that the right exists for some indigenous groups, but not for others. Some groups may never have had the right in question - for example inland tribes may not have customary fishing rights in the sea - while other groups may have had the right once but have since abandoned it. Indeed it is possible that a still existing right may vary even between members of the same tribe. Moreover, a number of Maori may have no customary rights left today at all. Customary rights, in short, are specific to the facts of the particular case.

Guidelines on Customary Rights

An analysis of judgments from the courts of the three countries under review in this paper makes it possible to reach some conclusions regarding customary rights and their exercise. These are:

- The common law recognises customary rights to practices and activities based on custom as surviving a transfer of sovereignty.¹¹
- The common law protects customary rights that are still in existence at the time asserted. If the customs on which the rights are based have been abandoned, the rights have consequentially been lost. The rights may also have been voluntarily surrendered to the Crown, or may have been extinguished by the Crown. Once abandoned, surrendered or extinguished, the rights are lost permanently and cannot be revived or restored.

¹⁰ *R v Marshall* 177 DLR 4th Ed 513 at 567.

¹¹ See *R v Symonds* (1847) NZPCC 387, re *The Landon and Whitakers Claim Act 1871* (1872) 2 NZCA 41, *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 680 in New Zealand; *Calder, Guerin v The Queen* (1984) 13 DLR (4th) 321, *Sparrow, R v Van Der Peet* (1996) 137 DLR (4th) 289 and *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 in Canada; and *Mabo, Wik Peoples v Queensland* (1996) 187 CLR 1, and *Yarmirr v Northern Territory* (1998) 156 ALR 370 in Australia.

- A customary right cannot be asserted if it is inconsistent with Crown sovereignty; there can for example be no customary right at common law to any form of self government that is not devolved from the Crown.
- Customary rights are unique or *sui generi*, are normally communally held, and can only be surrendered to and extinguished by the Crown.
- Customary title is parasitical to the radical or ultimate title of the Crown.
- Customary title interests are unique and conceptually unlike common law concepts of title to land or the right to use land of another.¹² They too can only be surrendered to the Crown or extinguished by lawful Crown action.
- If the customary right asserted is to a customary title to land or resources, it must be shown on the balance of probabilities that the claimants were in exclusive possession of the land or resources prior to sovereignty passing,¹³ and have continued to follow customary practices thereto, thus maintaining the physical link with the land or resources at all times since.
- Once established, customary title to land includes minerals and trees¹⁴ and confers on the holder the right to use the land for a variety of purposes. While not all of these need be integral to the distinctive culture of the holder,¹⁵ customary title does not permit the use of the land inconsistently with the customs of the holder.¹⁶
- If the customary right asserted is not to customary title but to a lesser right (e.g. relating to an activity such as food gathering) it can be severed from claims to customary title.¹⁷ Nor need it be confirmed by statute to be valid.¹⁸ But it must be shown, on the balance of probabilities, that the activity was being conducted prior to first contact with the new settlers (i.e. was not tainted by them),¹⁹ has continued since (but not necessarily without interruption and not necessarily to the exclusion of other

¹² See *Sundown* 412, and *Delgamuukw*.

¹³ See *Delgamuukw*.

¹⁴ See *Guerin*, and *Blueberry River Band v Canada* [1995] 4 SCR 344.

¹⁵ See *Makivik Corp v Canada* (1999) CFR 38.

¹⁶ See *Delgamuukw*.

¹⁷ See *Te Weehi*, and *A G v Emerson* (1891) AC 649.

¹⁸ See *Te Weehi* over ruling *Waipapakura v Hempton* (1914) 33 NZLR 1065, *Inspector of Fisheries v Ihaia Weepu & Another* [1956] NZLR 920.

¹⁹ See *Van Der Peet*.

activities), and is ‘integral to the culture’ that is distinct.²⁰ The customary right, once established, is personal to the holder(s) of those rights to that activity at that place, i.e. it does not extend to other tribes or to members of the same tribe seeking to undertake the activities somewhere else.²¹ It may be possible for others to establish a similar right on the facts of a particular case.

- A customary right, once established, is not lost by the use of modern equipment; hence, while for hunting a quiver of arrows might once have been used, today a shotgun and box of shells constitutes legitimate weaponry.²²
- The customary activity must be consistent with the right claimed; hence, for example, land claimed for customary hunting activities cannot be strip mined.²³
- The customary right can be extinguished by lawful Crown action but the intention to do so must be unambiguous.²⁴ The inherent power to extinguish in Canada has been constrained by Section 35(1) of the Constitution Act of 1982, which recognises and affirms ‘existing’ rights, i.e. rights extant in 1982; it has been held in that country that a regulatory regime will not of itself normally extinguish the right, but rights can be completely extinguished for a substantive and compelling reason, provided the fiduciary obligation of the Crown is first discharged.²⁵
- A justified modification of a customary right (e.g. for conservation purposes) is unlikely to require compensation,²⁶ but total extinguishment may do so, particularly if the right is taken over and used commercially by the state.²⁷
- Once extinguished the right cannot be revived.
- Extinguishment is effected by legislative action, or by statutorily authorised executive action, or in the case of customary title, by the Crown issuing a lawful Crown grant of interests where the rights associated with the grant are inconsistent with the customary right (for example, a fee simple grant provides the grantee with exclusive rights to

²⁰ See *Van Der Peet, R v NTC Smokehouse Ltd* [1996] 2 SCR 672, and *R v Gladstone* [1996] 2 SCR 723.

²¹ See *R v Adams* [1996] 4 CNLR 1.

²² See *R v Badger* [1996] 2 CNLR 77.

²³ See *Delgamuukw*.

²⁴ See *Faulkner v Tauranga District Council* [1996] NZLR 358, and *Walker v NSW* [1992] 182 CLR 45.

²⁵ See *Sparrow*.

²⁶ See *France Fenwick v The King* [1927] 1 KB 458.

²⁷ See *Te Ika Whenua*.

possession).²⁸ Such grant of an inconsistent right may not of itself extinguish the customary right, but the exercise of the inconsistent right by the grantee does.²⁹ The inconsistent grant may extinguish the customary title only as to part of the land; for example, a taking of land for a highway will extinguish customary title for the land so taken but not necessarily for the adjacent lands.³⁰

- To be successful, an assertion of the customary right against the Crown cannot be barred by statute.³¹

Application of the Guidelines

An application of the above guidelines would suggest that there is little opportunity for a finding in New Zealand of a common law customary *title* over land, despite some apparent enthusiasm within the Waitangi Tribunal for such an assessment.

First, for example, it is unlikely that exclusive possession at point of acquisition of sovereignty and continued physical association since, with continual adherence to customary practices at all times, could be proved. The legal prerequisites appear to have been overlooked by the Waitangi Tribunal in the Napier Inner Harbour report dealing with land that surfaced in the 1931 earthquake, for example, and by the Maori Land Court in an ongoing case dealing with foreshore, where the question of extinguishments - rather than whether the customary right had first been established - seems to have been the main issue.

Secondly, it is almost certain that inconsistent grants have been made over the whole of the country that is physically occupied, and that the grantees have exercised the rights flowing from that inconsistent grant.

Thirdly, it is probable that any claim would be out of time and accordingly statute barred. The question whether Crown actions or omissions deep in the past deprived Maori customary owners of rights without their consent or even knowledge, then, is not a legal one. Such factors point to difficulties in establishing customary title in New Zealand.

²⁸ See *Fejo*.

²⁹ See *Badger*.

³⁰ See *Mabo*.

³¹ For New Zealand refer Te Ture Whenua Act 1993.

However, as already noted, the situation in parts of Canada is likely to be quite different. Customary title in that country, unlike in New Zealand and Australia, was normally voluntarily surrendered to the Crown pursuant to individual treaties with the First Nation bands. In exchange for such surrender, a band received rights to one or more reservations, where customary title was retained.

Much of British Columbia, however, remains in Crown radical title, without treaties with the First Nation bands. These continue to live on traditional lands and their members follow traditional customary practices. No inconsistent grants have been made by the Crown. Although as recently as 1994 it was being noted that ‘not a single square foot’ of Canada had been held to be in customary title,³² a number of appeals to the Supreme Court from within British Columbia indicate that it might only be a matter of time before such judgments emerge. Certainly the risk of this happening would appear to have been the driving force in the decision of the federal and provincial governments to conclude negotiations for a treaty with the Nishg’aa band, and to begin negotiations with others.

In remote regions of Australia still occupied by aboriginal groups, ‘native title’ can certainly exist, and disputes over extinguishment are frequent.³³ In the *Wik* case, it was adjudged that native title rights survive the grant of (especially fixed-term) pastoral leases of Crown land. Other customary rights to fish or access the sea and seabed have been accepted in the courts.³⁴ It should be noted that in Australia such lesser interests are formally recorded,³⁵ which is not the case in New Zealand. The statutory jurisdiction of the Maori Land Court is restricted to examining titles and not lesser interests such as fishing rights.

It has already been suggested that it would be difficult for Maori to establish customary title. Unlike with Canada and Australia, almost all New Zealand’s habitable landmass has been the subject of inconsistent grants, and in any event few, if any, Maori would still be occupying traditional tribal lands and following customary practices thereon.

³² ‘Survey of Aboriginal Land Claims’ (1994) 26 *Ottawa Law Review* 187.

³³ See *Mabo* and *Wik*.

³⁴ See *Yarmirr*.

³⁵ See *Yarmirr*; but also see *Tamihana Korokai v Solicitor General* (1912) 32 *NZLR* 321 where Maori fishing rights to a lake are discussed.

Land Beneath Water: A Case Study

Inconsistent Crown grants, now reflected in land transfer titles, normally however extend rights only to exposed land. A certificate of title to land abutting a river runs to the riverbank and not into the river itself. Accordingly, interests in land permanently or temporarily covered by water, such as the seabed, tidal foreshores, estuaries, rivers and lakes, are not normally included in titles. So it has been left to the Crown prerogative, to common law presumptions or to specific legislation, to determine ownership. Is it possible Maori could successfully assert a common law customary title claim over such land that is excluded from certificates of title? To do so, it is suggested, the claimant would need to prove that:

- the land in question was in the exclusive possession of the claimant at the time of acquisition of sovereignty, and has remained in the possession of the claimants, so that the physical link with the land has not been lost down to the present time; and
- the land has never been abandoned or sold or otherwise alienated; and
- the land has never been used inconsistently with the customary use; and
- the Crown has failed to show that customary interests have been extinguished by any inconsistent Crown grant or by some other lawful means.

A number of recent Waitangi Tribunal reports,³⁶ particularly those relating to rivers and waterways, have tried to address this difficult topic. So, too, have the general courts,³⁷ and the Maori Land Court (in a Marlborough case), in relation to foreshores and riverbeds.

In the *Whanganui River Report* the Tribunal, applying Treaty principles and Maori lore, declared that native title had to be rendered conceptually as Maori saw it. Accordingly, English common law presumptions and concepts, such as the doctrine *ad medium filum aquae*, had no application; the holistic Maori view of resources such as rivers needed to be respected; and since Maori ownership according to custom had never been lost, therefore it should be recognised by the Crown.³⁸

³⁶ Those relating to the Whanganui and Mohaka Rivers and the Napier Inner Harbour.

³⁷ *In re the bed of the Whanganui River* [1962] NZLR 600, and *In re the Ninety Mile Beach* [1963] NZLR 477.

³⁸ Waitangi Tribunal, *The Whanganui River Report*, Wellington, GP Publications, 1999.

This is in direct conflict with an earlier Court of Appeal decision,³⁹ which applied English law to the question of ownership of the same riverbed considered by the Tribunal. It seems certain that the court's view will prevail as a matter of law, unless and until it is over-ruled by legislation, whatever the sympathy that might justifiably be felt for the Atihaunui people. For while it is appropriate for Maori to define Maori custom, it is the application of New Zealand law that will ultimately determine any rights that flow from those customs so defined. Nevertheless, the fact that a customary title or right has been lost at law does not mean that Maori should be deemed to be disinterested in the future use and control of natural resources. In the final analysis, indeed, Maori share the same concerns as the Crown and pakeha, and all should work together to achieve an environmental communal goal. In the Whanganui River case, certainly, the intimate Maori association as kaitiaki with the river needs to be taken into account wherever possible, and consultation conducted when decisions are being sought.

A brief summary of the present position in New Zealand with regard to the land beneath waters is as follows:

- *The seabed*

It appears that the Crown asserts effective ownership of the seabed between low water and the twelve-mile limit, subject to any grant.⁴⁰ In New Zealand, section 7 of the Territorial Sea and Exclusive Economic Zone Act of 1977 specifically deems the seabed to always have been the property of the Crown. Although there is no specific reference to the extinguishment of any customary interest this section probably precludes success for any Maori claims. In any event, evidence of exclusive possession of the seabed from pre-sovereignty times would be required to establish the customary title, before the question of extinguishment arises. That seems distinctly improbable.

- *The foreshore*

Halsbury states that the Crown claims absolute ownership to the foreshore by virtue of the Royal prerogative. Unlike with the seabed, the question of statutory extinguishment is less certain in New Zealand. The Public Reserves Act of 1854 assumed the Crown owned the foreshore. The requirement for prior parliamentary

³⁹ *In re the bed of the Wanganui River.*

⁴⁰ See Halsbury 4th Vol 49 at p 155.

approval to the grant of ‘part of the shore of the sea’ to any person, contained in the Harbours Act of 1878 (later, section 150 of the Harbours Act of 1950), extinguishes an interest only by implication. Even the Foreshore and Seabed Endowment Revesting Act of 1991 appears to proceed on the *assumption* of Crown ownership, and does not expressly and unambiguously extinguish customary title.

While there may be an argument that customary title interests have not been clearly extinguished by statute, however, the court has held that the investigation of title and subsequent inconsistent grant of land adjacent to the foreshore will itself extinguish any customary title to the foreshore.⁴¹ In any event, it seems a major hurdle for a claimant group to prove, on the balance of probabilities, that it was in exclusive possession of even a part of a foreshore at 1840 and that the physical link has been retained since. Until it does so, the question of extinguishment does not arise, because there is no common law customary title to extinguish. That does not mean that a claimant could not succeed in establishing a customary right to fish or take shellfish from a foreshore area.

- *Beds of estuaries and rivers*

Estuaries and rivers that are tidal are claimed to be in Crown ownership by virtue of the Royal prerogative. At common law, the beds of navigable rivers have also been held to be the property of the Crown, and in New Zealand in 1903 the Coal Mines Amendment Act vested navigable river beds in the Crown. Navigable rivers were defined as those of ‘sufficient width and depth...to be used for the purposes of navigation by boats, barges, punts or rafts.’

Presumably it was thought by politicians at the time that ownership of the beds of estuaries and tidal and navigable rivers entitled the owner to determine who used the water above the beds. It could be argued that at law, at least in the case of fresh water rivers, use of the water without restriction had been possible until then because common law does not recognise ownership of flowing water. In any event, the 1903 statute would seem fairly conclusive in terms of ownership of the land beneath the water. And again it would be difficult in any case, although not impossible, for a claimant to establish exclusive possession for the requisite period.

⁴¹ *In re the Ninety Mile Beach.*

The beds of non-navigable rivers are at common law presumed to be owned to the midpoint by the adjacent owner (the *ad medium filum aquae* rule). An investigation into the land adjacent to a non-navigable river, and the issue of an inconsistent grant to it, has been held to extinguish customary title to the bed,⁴² a decision that was the subject of criticism in the Waitangi Tribunal report on the Whanganui River.⁴³

- *Lakes*

Lakes are generally owned by the adjacent land owner or, if there is more than one owner, in segments, unless there is some statutory provision to the contrary.

- *Conclusions*

The legal position regarding ownership of the seabed, estuaries, foreshores, tidal rivers and navigable and non-navigable rivers is not straightforward. If there is evidence of sufficient continuing possession so that a prima facie case for a customary title can be made out, and if there have been no inconsistent grants, any present statutory provision that purports to extinguish may be too ambiguous.

What is clear however is that there has been a presumption of exclusive Crown ownership for all of these natural features other than for non-navigable riverbeds. Present litigation seeks to establish a customary title to such resources. This is likely to result in ongoing litigation, with great uncertainty prevailing for many years. It seems unsatisfactory that a small portion of the foreshore here and there might ultimately, as a result, be held to be in customary title, while the remainder – the vast majority of such area - remains in Crown ownership. It is probably more likely that a court would decline to recognise a customary title on public policy grounds, as has happened in the past in New Zealand,⁴⁴ and as has been more recently hinted at in Australia.⁴⁵ An important factor in New Zealand too is that customary and Treaty rights to marine fishing have now been recognised and protected by the delivery of quota rights for commercial activities, and a regulatory regime introduced for customary activities.

⁴² See *re the Bed of the Wanganui River No 2* [1960] 461.

⁴³ See *Whanganui River Report*.

⁴⁴ See *Kawaeranga* (1870) decision reprinted in (1984) 14 *VUWLR* 227.

⁴⁵ See *Fejo*.

Assuming that the underlying customary rights will continue to be protected from extinguishment, I would argue that Parliament should now legislate to clarify Crown ownership of the seabed, estuaries, foreshores, tidal rivers, and, if it were still thought necessary, navigable riverbeds. It would be made clear that while any remaining customary title interests would be extinguished, any other customary rights to follow traditional and customary activities in relation to the resources were protected. Of course any possession of a seabed, or other submerged land mass, has conceptual difficulties not associated with exclusive possession of exposed land. While there is minimal difficulty in comprehending a 'relationship' with land that is exposed, it is far more challenging to understand how Maori could prove a 'relationship' with a seabed. The Australian court found no evidence to justify a claim to exclusive possession because of such differences.⁴⁶

Moreover, even if Maori were able to overcome such a problem, it seems most unlikely that, looking to the future, they would be given exclusive possession if interests in the water above which breached our international treaty obligations were found to be involved. Further, any ability to exploit the resource, for example by drilling the seabed for oil, would seem to be constrained. First, there is a rule precluding any action that would threaten the future of the 'relationship'. Second, it is probable a New Zealand court would follow the Australian view that legislation vesting minerals in the Crown amounted to full beneficial ownership and defeated any native title.⁴⁷

Taking all such matters into account, it is hard to see how Maori would be seriously prejudiced if legislation as suggested above were to be passed. Indeed to have customary rights to fish confirmed in this way may be very beneficial for tangata whenua. Further, clarification would encourage appropriate development in marine farming, which is currently being delayed, and would thus encourage generation of economic activity. Finally, clarification and confirmation of rights would minimise the potential for social disharmony.

⁴⁶ See *Yarmirr*.

⁴⁷ See *Yarmirr*.

Summary of Customary Rights:

While claims for recognition of a common law customary title seem most unlikely to succeed, there is little doubt that claims to customary rights less than customary title in relation to activities such as food gathering have correctly been upheld. Despite earlier court rulings that a customary fishing right could only be upheld if the right were conferred by statute,⁴⁸ and later that the right depended on ownership of the adjacent land involved,⁴⁹ a common law, severable, non-statutory, customary fishing right has in recent times been finally upheld.⁵⁰

Customary fishing rights, and others relating to food gathering, have in any case a distinctive history in that they have long been given statutory recognition and protection. Thus Maori fishing rights were specifically excluded from legislation controlling marine fisheries. There are also various regulations which have been in existence for a very long time. One set gives, for example, Rakiura Maori of Ngai Tahu a right (not enjoyed by other Ngai Tahu or by other iwi) to take titi/mutton birds from the Crown Titi Islands. Similar regulations exist to give sole rights to Tuwharetoa to take koura/freshwater crayfish from Lake Taupo, while other Maori have special rights in Lake Horowhenua.

A major difficulty, however, for both Maori and fisheries authorities, had been the lack of clarity as to when a customary fishing right existed, and what it was that was authorised. Who had the right to take? Was permission required, and if so whose? How much could one person take? If the resource became stressed, who could place a temporary ban on taking fish, and who was bound by the ban? Was there a priority right for Maori ahead of others where restrictions were necessary?

Such confusion had proved unsatisfactory for everybody. As already noted, the government, after full consultation with Maori, recently promulgated regulations relating to marine customary fishing rights, and will shortly promulgate regulations relating to fresh water customary fishing rights. Regulations do not extinguish customary rights, for they are a modern manifestation of such rights in a codified form. But of necessity they apply to all Maori, whether or not a particular hapu or other grouping could show the customary right still survived in its case. The benefits of this last point have yet to be appreciated by some Maori. Greater recognition of the traditional interest of Maori in fishing activities can also be found

⁴⁸ See *Waipapakura*.

⁴⁹ See *Weepu*.

⁵⁰ See *Te Weehi*.

in fisheries legislation. These include mataitai reserves where priority rights are given to the hapu in the event a fall in the fish stock justifies conservation measures. This is similar to the Canadian model.⁵¹

It seems probable that claims to any further customary rights will also focus on food gathering activities. Whether any such activity will require some similar regulatory regime to that of fishing, remains to be seen. There is also some evidence that traditional practices in accordance with customary relationships may be advanced. A customary adoption has been recognised as surviving in Canada, for example.⁵² For Maori, customary guardianship arrangements, traditions relating to forms of marriage and divorce, matters such as inheritance entitlements, all may be able to be advanced as surviving, provided the customs are still followed and any statutory regime has not extinguished the customary rights. It is hard to envisage other areas where customary rights could be successfully asserted, however.

⁵¹ See *Sparrow*.

⁵² See *Casimel v Insurance Corp.* [1993] 82 BCLR 387.

TREATY OF WAITANGI RIGHTS

Treaty Obligations

It is appropriate now to consider, by way of comparison, whether Maori enjoy real and tangible benefits from the Treaty of Waitangi. As an alternative to claims under customary rights under the common law, with all their inherent difficulties of proof, most claims to rights are today advanced under the Treaty of Waitangi. As we have seen, many customary rights have in reality been lost with the effluxion of time, in one way or another. In contrast, while Treaty claims are based on the express or implied contractual terms of a political document signed in 1840, that document remains living and indeed evolving, with major developments in Treaty jurisprudence emerging over the last few decades. From relative obscurity, the Treaty has become generally acknowledged as the founding document of the nation and in fact, in the eyes of some, almost holy writ.

This turnabout is quite remarkable. The Treaty of Waitangi was, after all, a document of its time. Its express terms are short, and most of its points seem relatively unproblematic and 'historical'. Article One's cession of sovereignty or governance by Maori to the Crown was completed by proclamations of sovereignty issued in London a few months later. Article Three's rights of citizenship for Maori were enlightened (certainly in comparison with to other colonies) and were upheld relatively well from the beginning (again, comparative to elsewhere, and notwithstanding that many Maori claims today are based on inequality of treatment vis a vis pakeha) and certainly so in recent years. The Article Two's pre-emptive right whereby only the Crown could buy land from Maori is long since totally obsolete, and in today's social climate would be rejected as discriminatory.

What remains is the clearly critically important undertaking to respect rangatiratanga or 'chieftainship' over lands, forests, fisheries and other taonga, all of which Maori were promised they could retain in their possession for so long as they wished. Even here, 160 years on, the actual words reflect the situation of another time. For of course today Maori possession of the lands, forests and other taonga - and often the resources themselves - has largely gone, and is unlikely to be recovered. How this came about, and to what extent the resources were lost as a result of Crown acts or omissions in breach of the Treaty, is the subject of detailed investigation by the Waitangi Tribunal and subsequent Crown remedy. But while negotiated settlements have rightly increased the land and other resource holdings

of some Maori, in the attempt to atone for past wrongs it is impossible to restore what was before or to fully compensate for past losses.

The express acknowledgement of rangatiratanga in the Treaty and its modern interpretations remains crucially important, however much the extent of the jurisdiction of 'chieftainship' has been greatly reduced in area and in depth, and however difficult it is today to see Maori exercising rangatiratanga over lands and forests and other taonga in any way resembling that envisaged by the signatories in 1840. Yet in seeking to bring two distinct cultures together and in giving legitimacy to the assumption of sovereignty, the Treaty signatories did enter into a compact to deal fairly with one another, and this needs to be worked through in a way that meets the needs of the new millennium.

The Crown clearly accepted fundamental obligations to the tangata whenua of New Zealand, in exchange for the cession of governance, through protecting acknowledged Maori rights. It need scarcely be said that the Crown failed to provide that protection. Why then were the courts unable to provide a remedy for Maori in the course of such breaches of the Treaty? The answer requires exploring questions such as: did the Treaty simply confirm the existing customary rights, adding a contractual undertaking that the Crown would not modify or extinguish those rights without consent?; or did Article Two guarantee, by expressly referring to resources such as lands and forests, create new contractual rights to be seen as additional to and alongside, but not part of, customary rights? For only customary rights were enforceable at law⁵³ not Treaty rights per se. It is instructive to consider why that was so, not in an attempt to atone in some way for past breaches by the Crown of its obligations, but to understand why there was no effective remedy at law for the breaches.

In fact the reason why the Treaty was not justiciable in the courts can be simply stated. It has long been a principle of the law that the executive branch of government, that is to say the Cabinet and the departments of state, should not be able to make law: law-making is a matter for Parliament alone. Treaties normally involve international relations, and these are the preserve of the executive rather than of the Parliament. Accordingly, any treaty entered into by the executive of New Zealand has never been enforceable in the domestic courts unless and until its terms had statutory recognition.

⁵³ See *Te Weehi*.

The Treaty of Waitangi was not, therefore, part of the domestic law of New Zealand, and its terms were unenforceable.⁵⁴ With Maori facing many difficulties in having customary rights upheld in the courts,⁵⁵ the combined effect was little short of disastrous for them. Maori were, in short, at the whim of the government without means of redress – hardly in keeping with the stated intention of the Crown signatories to the Treaty in February 1840 that the document would be faithfully adhered to, assurances on which Maori clearly relied. Yet the British government had directed Lieutenant-Governor William Hobson to enter into a Treaty which was not justiciable in the courts; it knew, or ought to have known, that as a result there could be no realistic means of redress if the Crown breached its Treaty obligations, and that breaches were more likely than not, especially once the settler population had passed parity in numbers and needed increasing quantities of land. The absence of a forum to hear claims by Maori for Treaty breaches caused generations of suppressed anger and frustration.

While it may be true that British colonisation was more benign than many other examples of imperialism, and much that was done was very beneficial to Maori, nevertheless it is beyond doubt that some incidents of history were grossly unfair and unjust, especially under the settler governments of the 1850s onwards. The honour of the Crown requires that they now be addressed, however belatedly. The scene for such redress was set from the 1970's, when political pressure, and later factors such as persuasive reports of historical Crown breaches from the Waitangi Tribunal, made it impossible for the government to ignore the issue of Treaty guarantees and their violations any longer. In the late 1980s Parliament began enacting legislation that included references to the 'principles of the Treaty' with which the government was obliged to comply.⁵⁶

In such legislation it was deliberately left to the courts to determine what the principles were and, in what has been seen by some as unusual and undesirable judicial activism marked by some quite creative thinking, the judiciary rapidly responded. Legislative references to such principles did not of course mean that the whole Treaty of Waitangi itself had suddenly become part of the law of the land. But it was now possible in given circumstances to use the Treaty as a tool in statutory interpretation. In this way, requirements such as that of the Crown acting with the utmost good faith have become capable of enforcement.

⁵⁴ See *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board* (1941) AC 308 (PC), *NZ Maori Council (Lands)* [1987] 1 NZLR 641, *NZ Maori Council (1st Broadcasting)* [1994] 1 NZLR 513 at 524, *NZ Maori Council (Radio Assets No 2)* [1996] 3 NZLR 140.

⁵⁵ See *Waipapakura* and *Te Weehi*.

⁵⁶ See Treaty of Waitangi (State Owned Enterprises) Act 1989.

It has been suggested that by giving the courts further such jurisdiction, the way is open to better protect those fundamental values that provide the foundation for New Zealand's constitutional base. The courts could be given a power of judicial review on constitutional and substantive grounds, for example, rather than on the present administrative and procedural grounds; they could have regard to international conventions on human rights as well as to the Treaty of Waitangi.⁵⁷ While such a development has not occurred here, there have been indications that the concept is seen as having merit in Canada.⁵⁸

Relevant conventions include the International Covenant on Economic Social and Cultural Rights, the International Covenant on Civil and Political Rights (Article 27 of which refers to the right of ethnic minorities to enjoy their own culture), the International Covenant on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the Covenant on the Political Rights of Women. Yet few of these dwell specifically on indigenous peoples, let alone refer to people who have a treaty with the state, and moreover the likelihood is that the Draft Declaration on Indigenous Peoples' Rights will not be successfully negotiated through to completion in the foreseeable future.

In fact the important point for New Zealand is that the Treaty of Waitangi is today now able to give protection to Maori over matters of deep concern to them. While the Treaty is far from specific in the obligations it imposes which might be relevant in modern times, including the reference to rangatiratanga, the manner in which the courts are applying 'the spirit' of the Treaty seems the most propitious way to ensure that the intention of the original signatories is promoted. This is probably worth more to Maori than the multilateral international conventions and treaties that are designed to promote and protect generic human rights.

On balance, perhaps, the Treaty can now be utilised as was originally intended. It seems clear that the New Zealand courts are now showing a willingness to have regard to the Treaty and its principles whether there is reference to them in legislation or not, as well as to the country's international obligations, when interpreting ambiguities in the law. In this, the

⁵⁷ See Philip Joseph 'Constitutional Review Now' 1998 *NZLR* 85 referring to Lord Diplock's criteria of illegality, irrationality and procedural impropriety set out in *CCSU v Minister* [1985] *AC* 374.

⁵⁸ An opinion of the Supreme Court on Quebec secession is a case in point.

courts are following a clear trend in comparative jurisdictions.⁵⁹ For example, the New Zealand judiciary has used the ‘Treaty principles’ to soften the harshness of the common law in respect to customary rights,⁶⁰ (although the benefits of this are likely to be minimal if such customary rights remain as restricted as noted previously).

Fiduciary Duty

In cases where there is a clear inability to apply ‘Treaty principles’, the courts have resorted to the ‘fiduciary duty’ which it is said the Crown owes Maori. This has the potential to have far-reaching consequences, and requires some comment. The fiduciary duty is said to have arisen from a special relationship that exists between the Crown and indigenous people, arising from inter alia the Crown’s pre-emptive rights to land requiring a reciprocal duty. The general concept of fiduciary duties is, of course, certainly not new. For quite some time for example the law has recognised an obligation in circumstances where the Crown had undertaken to exercise a discretion in favour of a beneficiary relating to an asset of the beneficiary that was held by the Crown; in such a circumstance the beneficiary was said to be particularly vulnerable. The Canadian courts especially have held the Crown to account over such matters.⁶¹

It might well be argued that such a duty has always existed, whether the beneficiary was of the indigenous people or not. Indeed, it has been said that the hallmark of a fiduciary relationship is that the relative legal positions of the parties are such that one party is at the mercy of the other’s discretion.⁶² Be that as it may, the courts in various jurisdictions dealing with indigenous people have applied the concept to the Crown relationship to indigenous people when the Crown has held assets on trust for those groups. Recently, moreover, the Canadian Supreme Court widened the equitable fiduciary duty from a private law concept to one of public law.⁶³

Now it is said in Canada that the Crown is a fiduciary to the indigenous people at all times. As a result, the courts have been willing to adopt a liberal attitude to the interpretation of

⁵⁹ See *Keegstra* (1990) 3 SCR 697, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, *Ashby v Min of Immigration* [1981] 1 NZLR 222, *Rajan v Minister* [1996] 3 NZLR 543, *The Maori Electoral Option case*, and *Tangiora* [1998] 1 NZLR 129.

⁶⁰ See Cooke P in *Runanga o Muriwhenua* [1990] 2 NZLR 641.

⁶¹ See *Guerin and Blueberry River Band*.

⁶² See ‘The fiduciary obligation’ 1975 25 UTLJ 1 at 7.

⁶³ See *Sparrow*.

treaties, the admission of evidence, and matters of that kind. Any ambiguity is likely to be resolved in favour of the indigenous people,⁶⁴ although the claimant of a treaty right must still establish the right exists before any consideration of unjustified interference with that right arises.⁶⁵

An example of the more liberal approach is the recent Canadian case in which the court rejected the principle that extrinsic evidence was inadmissible in the interpretation of a treaty unless there was an ambiguity. It held that historical and cultural evidence may be relevant and should be admissible. When, for example, a treaty was orally agreed and then written up later, in such circumstances it would be unconscionable for the Crown to ignore the oral terms and rely solely on the written.⁶⁶ However, there are indications that the courts are aware that there is a risk that the imposition of a fiduciary duty on the Crown may lead to unjustified claims under treaties. Binnie J, in Marshall's case, put it this way:

... 'generous' rules of interpretation should not be confused with a vague sense of 'after the fact' largesse.⁶⁷

The fiduciary duty also governs such matters as consultation with the indigenous people on matters of importance to them, although it may not go so far as to require actual consent.⁶⁸ Such duty has been used in Canada to require justification from the authorities to modify a customary right to fish, and to ensure a priority right for the customary right holders.⁶⁹

There are indications that the fiduciary doctrine may develop further in New Zealand; in cases, for example, where Maori are seeking the return of ancestral lands.⁷⁰ Unfortunately, however, the fiduciary duty owed by the Crown as one party to another has become confused in some quarters with a 'fiduciary relationship' under the Treaty, where each party has reciprocal duties to the other to act with the utmost good faith.⁷¹ It is not helpful to confuse joint contractual obligations with an equitable obligation one party may have to another in a given circumstance. A confusion between fiduciary duty and fiduciary relationship is one of a

⁶⁴ See *Sundown*, and *Badger*.

⁶⁵ See *Marshall*.

⁶⁶ See *Marshall*.

⁶⁷ See *Marshall*.

⁶⁸ See *Delgamuukw*.

⁶⁹ See *Sparrow*.

⁷⁰ See *Smiler v Port Gisborne Ltd* [1998] NZLR.

⁷¹ See Cooke P in *Wharekauri Rekohu* [1993] 2 NZLR 301 at 304.

number of inherent risks arising from the Treaty jurisprudence that (along with recognition of customary rights) has been developing rapidly in recent years.

Another is that the judiciary, having defined what ‘the principles’ of the Treaty are, has also declared the Treaty to be a living document that must adjust to the times. Does this mean that the principles may change over time? There would seem, on top of this, to be a problem insofar as the courts will interpret a statute using the implied terms of a Treaty that in turn have also been interpreted by themselves. Moreover, when and in what circumstances the fiduciary relationship will be applied is once again for the courts to decide.

It can be argued that all of this is no more than the proper exercise of judicial authority. But it has, perhaps inevitably, produced some uncertainty when the somewhat mercurial ‘principles’ of the Treaty, like the chameleon, can change to meet the exigencies of the moment. It is often difficult for the Crown and its agencies to know what their Treaty obligations to Maori actually are - although, after a century and a half of official neglect of the Treaty, Maori might well say that the Crown should do more rather than less and give Maori the benefit of any doubt. Unquestionably, however, the courts are now protectors of Treaty principles and those who would prefer that Parliament, rather than the courts, should make such decisions should consider the less than distinguished history of Parliament in the protection of the rights of Maori. Indeed it appears to have expended much more time trying to extinguish them.

Conclusion

In conclusion, the Treaty of Waitangi has a new-found importance in New Zealand. It has confirmed customary rights that, in the important area of fishing, have been codified and protected. It included an express Treaty undertaking to Maori that allowed them to hold their lands and other treasures/taonga for so long as they wished to retain them; because that undertaking was broken, compensation is now being negotiated. And the Treaty created a critical new right with a corresponding Crown duty – the right for Maori to exercise, and the corresponding duty of the Crown to respect, rangatiratanga/chieftainship. This intangible, but nevertheless real right, could not exist at common law in any extreme or non-devolved form because this would have constituted a challenge to the absolute power of the sovereign.

The modern application of rangatiratanga has been the subject of considerable deliberation by both the courts and the Waitangi Tribunal. While it is not possible to turn the clock back, it should be viable to devolve greater authority to Maori in the management of their own affairs

in order to meet this obligation. Indeed, that is happening now in a number of areas. Such matters should continue to be debated with goodwill on both sides, together with a degree of pragmatism, to see if more can be done to implement rangatiratanga in suitable modern forms - something that is in the interests of all New Zealanders. The return of substantial assets as part of the settlement of historical claims can complement this process' by, for example, restoring a tribal asset base to manage - an opportunity now being explored by a number of claimant groups.

Considerable debate has taken place over the years on the question of the proper constitutional location of the Treaty. Some argue it should be included in the Constitution Act of 1986. Others prefer the status quo to remain. The result will depend on the perceived benefits from each alternative to New Zealand society as a whole. The greater protection that legislative inclusion may be seen to provide, may in practice be illusory. Section 35(1) of the Canadian Constitution has not prevented the authorities modifying customary rights, and nor is there a prohibition of the rights being extinguished if that is thought appropriate and can be justified (a matter felicitously described as being a 'release to Canada' of those rights). And it is undeniably true that Parliament must ultimately be free to decide what is best for all New Zealanders. As we carefully work our way through this period of discovering our respective responsibilities, there are dangers in tying the hands of Parliamentarians. It is important to be able to legislate to adjust rights at a time when new duties and entitlements are being determined, particularly when these have been revealed to be, of their very nature, rather ephemeral and vague. On balance, it would seem preferable to leave the Treaty where it is. No one should doubt its influence today, and very little – if anything - would be gained by adopting it as a complete document into domestic law.

To some people, recent emphases on the rights of Maori is worrying, even though no new rights have been created at all. Claims by Maori groups to a right to sovereignty, or to self-determination, or to tribal development, or to self-management, and so on, do generate fear and anger in sectors of the pakeha community - although quite why that is so is somewhat obscure. Certainly many New Zealanders appear increasingly uncomfortable that perceivedly pro-Maori courts have largely taken over the policy-making role they regard as the responsibility of Parliament. But it is not possible for Parliament to pass legislative clauses that cover all exigencies, and over and above this it is unlikely that parliamentary consensus could be reached on what 'the principles' of the Treaty should be – and legislating for such an important issue would require substantial consensus.

Lack of parliamentary consensus reflects the fact that there is no general agreement amongst the public as to the meaning of the Treaty today. Some Maori claim that it expressly or impliedly created a partnership agreement pursuant to which Maori and the Crown are to jointly govern the country. Other Maori do not go as far, but maintain that the Article Two guarantee of rangatiratanga means that Maori are entitled to govern themselves and/or share government revenues in proportion to population percentages and expend the latter as they think fit. Alternatively, it is claimed that the Treaty is a partnership pursuant to which the Crown and Maori are to share resources, both natural and artificial, between themselves in some equitable way. This would seem to be the logic behind the recent Waitangi Tribunal finding on the radio spectrum. To many Maori, and particularly younger urban Maori, the Treaty is of little importance, while to many non-Maori it is seen as utterly irrelevant. While some pakeha regard it as a worthwhile protector of Maori traditions and culture, others are convinced it should be revoked or repealed. Views are, in short, many and varied.

This lack of agreement is seen by some as a major concern, notwithstanding that a democracy constitutes many voices. For in such a climate there is a temptation to take unnecessarily extreme positions. There is for example a risk that, in an attempt to atone for past misdeeds, the Treaty will be elevated to a position that is simply not justified – subjected, to take just one such instance, to an argument that by implication it created wide-ranging rights far beyond the contemplation of the 1840 signatories but which today seem to be ‘a good idea’. It is not impossible that, resulting from such developments, instead of bringing two peoples together the Treaty could help drive them apart; we must guard against this happening. On the other hand it can be tempting to put the issues to one side, unresolved, simply because they are inherently difficult.

CONCLUSION

What perhaps needs to be done is to focus on removing the remaining historically-based grievances of Maori by reaching fair and therefore durable Treaty settlements, together with possibly some restoration of customary rights in specific but limited circumstances. Such resolution of problems inherited from the past is a prerequisite for desisting from an unending search for wrongdoing by one party or the other. While this is happening, and in the long run more importantly, the nation needs to seek a critical path to meet the anticipated needs of Maori over the new century. To some extent this is the path that the courts have recommended be followed, through open and honest dialogue. As settlements of historical grievances are reached, then, so too will Maori regain the capacity to decide their own destiny. During this period, a better understanding of customary and Treaty rights will benefit not just Maori but all New Zealanders. It is hoped this paper will assist in bringing about such understanding.

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Fax: 64 4 463 5439

Email: maureen.west@vuw.ac.nz