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COOKE PAPER 14
INTRODUCTION

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INTRODUCTION

BY THE RIGHT HON. SIR ROBIN COOKE*

In February 1989 the editorial committee of the *New Zealand Universities Law Review* decided to publish in 1990 a commemorative issue to mark the 150th anniversary of the signing of the Treaty of Waitangi. When the convener, Dr Peter Spiller, invited me to write an introduction, my acceptance was subject to a proviso and a caveat.

The proviso was that sufficiently scholarly contributions were forthcoming. The reason for stipulating it flows from the very status of the Treaty, a status not necessarily yet finally determined in any strict legal sense but undeniably growing with the years. The observation of the Chief Justice of 1877 that in relation to the cession of sovereignty the Treaty was a simple nullity probably never was good international law, as Sir Kenneth Keith brings out in his essay, and now stands as a sad and doubtless undeserved symbol of Sir James Prendergast's judicial work. No lawyer would dare to dismiss the Treaty in that way in 1990. And, no matter precisely how it should be categorised in law, it has taken on in fact a vitality and potency of its own. For Maori its mana has always been high. Now there can be few Pakeha who in their hearts scoff at it or underrate its practical significance. Some see it as a threat, and political capital is made out of that point of view; but in truth theirs is a tacit tribute to the Treaty, a reluctant recognition that it has become part of the essence of the national life. Even its critics have to accept that it is a foundation document. It is simply the most important document in New Zealand's history.

Occupying as it does that position of central significance, and concerned as it is with race relations, the Treaty can generate emotional, even passionate, reactions and unbalanced arguments which are far less than intellectually honest. In stipulating for scholarship, I wished to make sure that this *Review* marked the sesquicentenary by contributions objective, well-informed and likely to be of more than transient value. The essays meet these tests, as the calibre of the authors would suggest. All four are carefully written and balanced. They cover much common ground, yet they represent attitudes significantly and in some respects subtly different.

The book review is different again. It is also a very lively contribution to debate. The commemorative issue of the *Review* would itself have failed to be balanced if it had omitted a fair sample of this kind of approach; I am glad that it has been included.

The caveat already mentioned was that the editorial committee would realise that some restraint would be required on my part in speaking of

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unresolved issues. How much water would have flowed under the bridge, and what decisions the Court of Appeal would have been called on to make in the next year or so, could not be foretold. In fact it turned out that the court had to make decisions in the *Tainui* case (mainly about coal) and the *Muriwhenua* case (mainly about fish). Neither my fellow judges nor I would suggest that what we or anyone else have said about these subjects and the bearing of the Treaty on them is the last word; but our position differed from that of commentators in that we did have to make decisions, and I adopt with gratitude Mr Alex Frame's verdict on the fisheries case in his essay, while appreciating that it falls rather short of an encomium, "It may be considered that this outcome represents a kind of progress".

The field remains littered with unresolved issues, and experience indicates that the chances of making remarks which will not be quoted out of context are not good. So in an especially acute way the putting together of this introduction presents the dilemma confronting *any* professional judge who tries to answer, within reason, claims that in modern society the judiciary should "speak out" more. On the one hand there are the pointlessness and tedium of the anodyne: on the other there is the risk of compromising judicial impartiality. Let it be clear therefore that what follows is not clothed with the authority of the judicial gown, nor would any opinions expressed or thought to be hinted at necessarily survive the salutary experience, denied to article writers, of hearing the points argued on both sides in court by competent counsel.

The growth in the de facto stature of the Treaty has been accompanied by rapidly increasing interest on the part of practising and academic lawyers of standing. All the essayists are leaders of legal thought about the Waitangi Treaty within New Zealand at the present day. They are not of course *all* the leaders. At the cost of seeming invidious a few other academic names should perhaps be specifically mentioned, such as Professor F. M. Brookfield of Auckland University, Mr R. P. Boast of Victoria University, and among the expatriates Dr Paul McHugh of Sidney Sussex College, Cambridge, and Mr Benedict Kingsbury of Exeter College, Oxford. Their influence is reflected by citations in the essays. Fortunately the specialist practitioners on both the Maori and the Crown sides are in the main so well-known that they will need no advertisement in the pages of this Review. One can safely refrain from the patronage of particulars.

The essay carrying most authority is probably that of Chief Judge Durie and Professor Gordon Orr, for here both the Chairperson of the Waitangi Tribunal and one of its Pakeha members give a first-hand account of the basic approach of the Tribunal to its statutory task, imposed in 1975 and enlarged to embrace the whole past in 1985, of inquiring into and making recommendations on claims that there has been prejudicial effect, on the Maori people or groups of them, from statutes or Crown action

inconsistent with the principles of the Treaty. The reference to *the principles* of the Treaty made in the preamble to the Act constituting the Tribunal in 1975 has been carried forward into other statutes (notably the State-Owned Enterprises Act 1986) and is a key element in all the jurisprudence. It serves to underline that the Treaty is a brief document—a preamble, three articles, a testimonium—standing for a set of embryonic and partly conflicting ideas, which by any normal process of verbal interpretation could not possibly be made to supply answers to the specific problems of the vastly different society existing 150 years later. The courts and the Tribunal alike, and Parliament itself in deciding to refer to principles, have placed in the forefront the need to get at the spirit and underlying ideas of the Treaty, to apply them as realistically and reasonably as possible in current circumstances. It was with astonishment that I heard an eminent historian apparently say in a lecture that the judges were adopting an over-literal approach.

Another view, not much less surprising but rather more widely expressed by persons who speak from a certain Maori or pro-Maori point of view, is that it is in fact wrong to look for the principles of the Treaty. Although this school of thought might well normally condemn legal positivism as shallow and literal interpretation as legalistic in an unfavourable sense, they urge a return to the bare text of the Treaty as if it were, in Blackstone's words, "the revealed or divine law . . . to be found only in the holy scriptures". A difficulty with this is that the meaning of the text as a whole, and the meanings in their context of individual phrases in it, are far from self-evident. Thus, while by the second article the Queen of England agreed to protect the chiefs and all others in te tino rangatiratanga (which is the expression on which this school tends to fasten and which is rendered in the official English version as "full exclusive and undisturbed possession" and by Sir Hugh Kawharu as "the unqualified exercise of their chieftainship") it is no less true that by the first article there is given to the Queen forever kawanatanga, a word said to have been coined by the missionaries and rendered in the official English version as "all the rights and powers of sovereignty" but by Sir Hugh as "the complete government over their land". These provisions have to be reconciled by a mode of interpretation which must give primary weight to the broad purpose of the pact. It might be thought that the important clue lies in the emphasis in the preamble on preventing lawlessness, and in the apparently clear intention of the third article that all the people of New Zealand will be British subjects.

Consistently with a marriage of all the provisions of the Treaty and their underlying ideas, Chief Judge Durie and Professor Orr see their Tribunal as promoting "the growth of a distinctive bi-cultural legal regime, and one in which the Treaty will increasingly be seen as a source of law". On a less abstract plane they describe Tribunal sittings on marae, inserting with

regard to the absence of an oath for witnesses the memorable shaft of humour, "It is not proper to suggest that a marae speaker is prone to dishonesty without providential goading".

The Waitangi Tribunal has well and faithfully performed the tasks allotted to it by successive Parliaments of differing political complexions. The country has been fortunate in the quality of the Tribunal's leadership. In my personal opinion the Chairperson (hardly an inspiring title) should be appointed a High Court Judge, as a recognition of the Treaty partnership of races. Although the Tribunal's functions are mainly recommendatory, they are not exclusively so. Since the 1988 statutory amendments concerning State Enterprises, the Tribunal has had power to make binding decisions in some cases. In any event, in undertaking major public enquiries on a continuing footing and making recommendations on claims submitted to it pursuant to statutory rights conferred on citizens, the Tribunal is in substance an important part of the national system of administration of justice. It is as appropriate that its head should be a High Court Judge as it is that a High Court Judge should be a member of the Law Commission.

Sir Kenneth Keith was allotted the subject of the courts and the Treaty, but to the benefit of the reader his encyclopaedic knowledge and impulses are not to be pent up; and the result is a wide-ranging survey of legal questions relating to the Treaty, with a judicious selection of references for further exploration. The essay would be a good starting-point for any lawyer coming to the Treaty for the first time. A review of the more recent judicial decisions is a rather ticklish task for an author who has been a constitutional adviser at a high government level during the period. In consequence discretion understandably prevails. Although Sir Kenneth commits himself to the opinion that it is "time to try to take a steady view of the whole" (in contrast with the unsteady and erratic views previously taken?), he is by and large content with posing a series of questions. These are certainly pertinent. As regards some he may hint at the answers which he would be disposed to give. For instance, the impression conveyed is of possible disapproval of Chilwell J.'s judgment in the 1987 *Huakina* case insofar as the judge held that the Treaty had to be taken into account in administering a planning Act containing no express reference to it. That judgment has not yet arisen for close consideration in the Court of Appeal; the caveat already entered applies; I go no further than saying extra-judicially, without prejudice and on a purely provisional basis, that at first sight it seems in harmony with the spirit and principles of the Treaty and with what has been said in the *New Zealand Maori Council* and other cases.

Sir Kenneth Keith's essay ends on a note sounded from time to time in this collection but not falling within the main themes of any of the writers. Nor is the present introduction the place to develop it. Yet the international obligations into which New Zealand has comparatively

recently entered will increasingly have to be reckoned with in considering Treaty-related issues. A profound mistake would be made by anyone who assumed that any branch of the New Zealand state—whether the legislature, the executive or the judiciary—will necessarily have the last word on such issues. A Geneva committee not previously much acquainted with this country may see it as a part of the world susceptible to new jurisprudence about indigenous and human rights.

The title of Mr Alex Frame's contribution very fairly gives notice of the standpoint from which it is written, that of Director of the Treaty of Waitangi Policy Unit in the Department of Justice. Subsequently he has relinquished that office with its administrative components, and has become free to undertake suitable assignments as special counsel. The first part of his contribution expands on a subject on which I have already touched, *kawanatanga* and *rangatiratanga*—words less than familiar to most New Zealand lawyers in the past, destined on current indications to become part of the vocabulary of every New Zealand lawyer in the future.

The third part has also been alluded to already, being an account of the origins and aims of the Maori Fisheries Act 1989, with some commentary on the litigation arising from Maori claims to sea fisheries. It may have been after the paper was written that most of the main issues in the litigation were effectively ended for the time being by the High Court through the grant (as I understand it) of an adjournment *sine die* of proceedings for judicial review of the validity of the quota system. That was a comparatively happy outcome. In encouraging something of the sort the Court of Appeal derived considerable help from the Canadian and United States experience of dealing with broadly similar claims step by step. The legal and factual backgrounds are far from identical, but there is enough analogy to enable us to see that problems in New Zealand are not altogether unique and to benefit from the wisdom of North American judges. Another quite heartening aspect of the story is that in performing their different tasks Parliament, the government and the courts in effect combined to produce a result giving Maori, not indeed all that was sought, nor even all that may have been available when the Joint Working Group on Maori Fisheries was searching for agreement, but at least substantial practical benefits in the form of fishing quotas and finance. The challenge is now there to make the most of this step forward.

The intermediate part of Mr Frame's paper is an apologia for the 1989 document entitled "Principles for Crown Action on the Treaty of Waitangi". Here we are in rather muddy semantic waters. In 1987 the Court of Appeal judges had found the analogy of partnership helpful in discovering the principles of the Treaty, because of the connotation of a continuing relationship between parties working together and owing each other duties of reasonable conduct and good faith. The analogy was of course not suggested to be perfect, but it was a natural one. It had been used often

enough by historians and others in the past. It has since then been used by Parliament in a 1988 Amendment to the Treaty of Waitangi Act 1975 whereby, in considering the suitability of persons for appointment to the Waitangi Tribunal, the Minister of Maori Affairs is directed to have regard to "the partnership between the two parties to the Treaty".

The judges did understand that the parties to the Treaty were not in fact embarking on a business in common with a view to profit. They also understood that shares in partnerships vary. After all, much legal practice in New Zealand is carried on by partnerships in which the shares are not equal. It seems, though, that the group of officials thought that the analogy suggested otherwise. Instead they formulated "the Principle of Co-operation" of which, it is said, "the outcome . . . will be partnership", and four other principles. Further, Mr Frame's paper analyses co-operation into seven characteristics or conditions, to be supplemented by the ancillary measures of "(A) Inter-party solicitude" and "(B) Various educational and cultural measures". I do not know that the vision of New Zealand as a co-op has any advantage in clarity over the idea of a partnership between races.

To comment on the "Historical Perspective" by Dr D. V. Williams last among the essays is not to imply that in any sense it is the least of them. Logically the editor has had it printed first. Written free of the constraints of official or quasi-official position, animated by an idealistic sympathy for the Maori cause, it will command interest especially for its touches of originality and practicality. His main thesis (in presenting which he acknowledges as one source Mr Atrill's Harvard dissertation) is that, whereas the Glorious Revolution might once have been seen as providing the ultimate premise or *grundnorm* of New Zealand law, that will no longer do for our independent South Pacific monarchy. The Maori perception has long been that the Treaty of Waitangi is a basic document: orthodox legal thought is now moving in the same direction. He classifies the New Zealand constitution as "uncontrolled" in the sense to be found in a 1920 Privy Council judgment delivered by Lord Birkenhead, Lord Chancellor. This seems to mean something like "susceptible to unlimited change".

Such a classification allows room for a document which in fact brought about the foundation of the state but may not hitherto have been accorded any special status in law, or indeed any status in law at all, to become elevated into an approximation of a fundamental charter. Only an approximation, presumably, for in the uncontrolled constitution further change or adjustment is never ruled out. While this theory and its implications are not easily formulated or grasped, they can be said to be no more difficult and no less logical than the theory that the New Zealand polity today depends essentially on events that occurred in England in 1688.

Dr Williams complements his theory by some empirical thoughts. He thinks that the composition of the High Court and the Court of Appeal

benches may well have an influence on how much further the judicial contribution to constitutionalising the Treaty will be taken. It is a possibility that, regrettably, can probably not now be ignored and one that lends strength to the argument for a Judicial Commission concerned at any rate with appointments. He predicts nevertheless that Maori pressure for upholding the Treaty will continue irrespective of changes in government or on the bench. He draws attention to a risk that without continual practical successes Maori litigants will lose faith in the court and tribunal system. Perhaps that thought expressed by him should be balanced by saying that I see not the slightest likelihood that the bench, however composed, would be blackmailed into decisions against the merits by any such consideration. It has not happened in Canada or the United States.

In her stimulating book review Annie Mikaere evidently approves of the concept of partnership but she shoots a flight of arrows at various contributors to Sir Hugh Kawharu's collection of essays, at the courts, the Waitangi Tribunal, and even at such academics as Dr McHugh—whom she charges with careful tailoring. Commonly it is thought appropriate for judgments to make reference to the arguments and evidence presented to the court, and the judges of the Court of Appeal did so in 1987 in relation to the terms of the Treaty. In the course of the judgments the Kawharu translation, differing from the official English version, was set out in full and attention was drawn to the opinions of previous authorities (including Chief Judge Durie) that there were ambiguities and unsettled questions. Non-judicial readers of this review may gain a sense of the pitfalls of judicial work if they consider one of Annie Mikaere's comments: "in rather similar fashion to many of the Pakeha contributors to this book, the judges bandied about terms such as *rangatiratanga*, almost as though they were qualified to decide what they meant". Still, she adds spice to the mixture.

* * *

This introduction is written in Oxford, within the hospitable walls of All Souls, the College of Blackstone, Dicey, Anson and Simon, all of whom expressed opinions having a distinct (and in Viscount Simon's case direct) bearing on the Treaty of Waitangi and the law. In introducing his *Commentaries*, Blackstone wrote, on the one hand, instancing the crime of murder:

Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

Yet, on the other hand, referring to all forms of government, he wrote:

However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside.

One day, as I sat at a reading desk admiring the matchless vista of the Codrington Library, the shade of Blackstone seemed to come down from his statue. "I must own", he said, "that I did not presume to enter upon the business of reconciling these truths. Pray remember that my lectures were composed for gentlemen, such as should understand that it may be neither becoming nor wise to enter far into the most profound of questions. And if the parliament and the judges are forever mindful of the restraint on the part of either which is fitting to preserve equilibrium in society, those questions may safely remain unagitated. I do not doubt but that your Treaty of Waitangi has become in some sense a grand constitutional compact akin to our Magna Charta".

"Would you add anything, Spirit?" I ventured. "Only", he replied before vanishing, "something concerning that American professor, connected in some manner with a place Chicago, who wrote in introducing a facsimile of the first edition of my *Commentaries* that I was undoubtedly a dull man and an undistinguished and uninteresting judge. Be it known that my lectures were not for such as he".

THE CONSTITUTIONAL STATUS OF THE TREATY OF WAITANGI: AN HISTORICAL PERSPECTIVE

BY DAVID V. WILLIAMS*

I. 1688 AND ALL THAT

Having therefore an intire confidence that his said Highnesse the Prince of Orange will perfect the deliverance soe farr advanced by him and will still preserve them from the violation of their rights which they have here asserted and from all other attempts upon their religion rights and liberties. The said lords spirituall and temporall and commons assembled at Westminster doe resolve that William and Mary Prince and Princesse of Orange be and be declared King and Queene of England France and Ireland and the dominions thereunto belonging to hold the crowne and royall dignity of the said kingdomes and dominions to them the said prince and princesse . . .

Bill of Rights (1688).

The above quoted resolution from the Bill of Rights (1688) was probably the most important step in the process whereby the de facto authority exercised by the Prince of Orange, after the flight of King James II, was transmuted into an assertion that King William and Queen Mary were the lawful sovereigns of England. There is an argument, convincing to many legal positivists, that the ultimate constitutional norm for what is now known as the United Kingdom may be traced to the events of the "Glorious Revolution" and the actions of the Convention Parliament which met in January and February 1688.¹ As Macaulay put it:²

It was plain that the Convention was the fountainhead from which the authority of all future parliaments must be derived, and that on the validity of the votes of the Convention must depend the validity of every future statute.

If one adopts Kelsen's analysis of the formal structure of law as a hierarchical system of norms, then one may trace the validity of the constitutional structures of present-day New Zealand back to England in 1688 without any breaks in the links of the norm structures.³ Thus the legislative powers of parliament set out in the Constitution Act 1986 depend for their validity upon earlier New Zealand enactments such as the New Zealand Constitution Amendment Act 1973 and the Statute of Westminster Adoption Act 1947. They also depend upon imperial enactments such as the New Zealand Constitution (Amendment) Act 1947, the Statute of Westminster 1931, the New Zealand Constitution Act 1852 and the New

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¹ Until the Calendar (New Style) Act 1750 the year legally commenced on 25 March. It is incorrect to date the Bill of Rights as 1689.

² Quoted in *Lloyd's Introduction to Jurisprudence* (5th ed. 1985) 333, n. 67.

³ *Pace* doubts expressed as to whether Queen Elizabeth II was, being female, the sole heir to King George VI: Farran, "The Law of the Accession" (1953) 16 M.L.R. 140.