CHALLENGING THE MISSION OF COLONIZATION: A MAORI VIEW OF THE TREATY OF WAITANGI AND THE CONSTITUTION

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Introduction

> The negation of indigenous views of history was a critical part of asserting colonial ideology, partly because such views were regarded as clearly 'primitive' and 'incorrect' and mostly because they challenged and resisted the mission of colonization".'

This paper is an attempt to present a Maori view of the history surrounding the signing of the Treaty of Waitangi on 6 February 1840. Doubtless there will be those among you who will dismiss my arguments as simply incorrect. I am hopeful, however, that some of you will understand that your discomfort with my approach owes more to your investment in the ongoing project of colonization than it does to any inherent flaw in the view that I am presenting. It is a view which consciously strives to free itself from the clutter of nearly one hundred and sixty years of Pakeha revisionism.

The fact is that while the volume of academic writing on the Treaty of Waitangi continues to grow at an astounding rate, very little of it steps outside of a Western viewpoint. In 1990 Jane Kelsey was highly critical of the ever-increasing number of her colleagues who were jumping on "the treaty bandwagon", and speaking from positions of "cultural ignorance . . . born not simply of a lack of exposure but also of an arrogance which defined the treaty as a legal issue to which Maori perspectives were irrelevant".' Nearly ten years later, it must be said that few heeded her criticism. Either that, or they simply failed to realise that she was talking about them! Many have continued instead to "make the mistake that lawyers trained in the English tradition have made", according to Joe Williams, which is "to reach a view as to the law and then fit the Treaty into it".[3]

This paper approaches the question the other way round, reaching a view as to the Treaty and then considering how the law of the colonizer might fit into it. After all, the Treaty came ahead of any colonial pretensions to impose British law in Aotearoa.

Maori Law

A necessary starting point is to remind ourselves that Maori law existed here in Aotearoa for many hundreds of years before 1840. This may seem too obvious a point to bear repeating. But the assumption that Maori had no "real" law before the British arrived here to provide it for us forms a powerful undercurrent to Western views of Treaty history. As Governor Gore-Browne wrote in a letter addressed to Maori in 1858:[4]

> I mua, i kapi tenei whenua i te kino, i te pouri, i te he; kahore he kai whakapuaki mo te pai, kahore he kai atiati mo te kino.
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> Before, this land was occupied by evil, darkness and wrongdoing; there were no upholders of good, no preventers of evil.

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[1] Smith, LT *Decolonizing Methodologies: Research and Indigenous Peoples* (1999), 29.
[2] Kelsey, J *A Question of Honour: Labour and the Treaty 1984-1989* (1990) 236.
[3] Williams, J "Not Ceded but Redistributed" in Renwick, W (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (199 1) 193.
[4] In Fenton, F *The Laws of England: Compiled and translated into the Maori language (I 858)* (i).

His letter was by way of introduction to a compilation of English laws which had been translated into Maori "with the view of placing in the hands of Her Majesty's Subjects of the Maori Race such information, with respect to the Laws and Institutions of the Nation into which they have been incorporated, as may be found practically useful in their present stage of civilization".[5] It is tempting, of course, to regard Governor Gore Browne's overt racism as merely reflective of the times and therefore as being of limited application to more modem views on the Treaty. However, we should not forget that as recently as 1979 Judge Blackwood in the famous "Haka Party Incident" judgment effectively labeled Maori law as being "a type of lynch law" and "the law of the jungle".[6]

A belief in the inferiority of Maori law (and the inherent superiority of British law) has fed Pakeha assumptions about the ultimate inevitability of British law being brought to bear in Aotearoa. In turn, those assumptions have led Pakeha to adopt particular views as to the Treaty of Waitangi's meaning and constitutional significance. Some of these views will be traversed later in this paper.

For now, it is sufficient to note that Maori law was based on the imperative to maintain balance within whanau, hapu and iwi, the importance of which stemmed from the interconnectedness or whanaungatanga of all living things through whakapapa (genealogy). Moana Jackson has written great deal about the basic tenets of Maori law, noting that it was based on "a religious and mystical weave which was codified into oral traditions and sacred beliefs".' The law was based on spiritual beliefs, ancestral precedent and a profound relationship with the natural environment, which could be traced back to Maori cosmogony, establishing as it did that Maori descended from the original female-male union of Papatuanuku (the earth mother) and Ranginui (the sky father). This law had prevailed in Aotearoa for a thousand years when the first British arrived here. Maori had no need of British law to regulate conduct among themselves in 1840.

Setting the Scene: Events Leading up to the Signing of the Treaty of Waitangi

By 1840 many Maori had come into contact with the British nationals who had been frequenting Aotearoa's shores at a gradually increasing rate since James Cook's six-month circumnavigation of the country in 1769. Salmond notes that the actual periods of contact between Cook and Maori were quite brief, with a total of fifty six days out of the six months being spent at anchor, and that during that time relations between them were often either 'thostile, or tentative and uneasy".' From the 1790s traders, sealers and whalers sailed the coastline and in 18 14 Samuel Marsden's arrival in the Bay of Islands signalled the beginning of the missionary era. By 1839 approximately 2000 British nationals were living here in Aotearoa, with many more transients passing through.'

Relations between Maori and Pakeha during early contact appear to have been generally good. Claudia Orange has noted that contact was mutually advantageous, Maori seeking trade goods that the Pakeha could provide and Pakeha needing Maori cooperation to obtain services and provisions and to extract the country's products." By the early 1830s it was common for Maori to compete to secure resident Pakeha in their midst because of the benefits they brought in the form of trade, skills and access to Western knowledge. Similarly, any trader or missionary realised that having the protection of a

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[5] Ibid, English Preface.

[6] *Police v Dalton* (unreported, Judge Blackwood, District Court, 16 July 1979) 42-43. The circumstances of the case are discussed by Ranginui Walker in *Ka Whawhai Tonu Matou: Struggle Without End* (1990) 222-225.

[7] Jackson, M *The Maori and the Criminal Justice System: He Whaipaanga Hou -A New Perspective* (1988) 39.

[8] Salmond, A *Two Worlds: First Meetings between Maori and Europeans 1642-l 772* (1993) 265.

[9] Orange, C *The Treaty of Waitangi* (1987) 6.

[10] Ibid, 7.

rangatira was essential. In Orange's words "it was an uneasy balance of interests not always free from violence, but generally it worked"."

Maori society changed quite substantially from the time of Cook's voyage to 1840, particularly those iwi who were coastal and who therefore had the most contact with Pakeha. They moved from being subsistence cultivators and food gatherers to become traders in food and resources. Many became literate, through contact with the missionaries, and many incorporated Christian beliefs into their own belief systems. Orange notes that while the changes were remarkable "in the long term it proved not so much a revolutionary overturning of old ways as selective development by a resilient, adaptable culture". [12]

Not all the changes were positive, however. Ian Pool has estimated that the Maori population dropped from approximately 100,000 in 1769 to between 70,000 and 90,000 by 1839. He attributes the decline mainly to introduced diseases.[13]

From 1831 various calls were made by some Maori to the King for him to protect them from foreign threat and from the misconduct of British subjects. One such call even resulted in a petition which was signed by some thirteen Northern rangatira who had gathered at Kerikeri.[14] In seeking the King's assistance, the petition acknowledged the special trade and missionary contacts with Britain. These calls were sparked by rumours that the French were about to annex New Zealand, and were encouraged by missionaries and other British nationals who were anxious that the Crown take action to protect their burgeoning interests in Aotearoa.[15] Alan Ward has suggested that the repeated Maori calls during the 1830s for the protection of the King "were impulsive attempts to invoke an ally who was understood to be both powerful and disposed to be friendly, and were intended essentially to preserve, not surrender, independence".[16]

In 1832 the increasing pressure on the Crown to signal a special relationship with Aotearoa resulted in the appointment of James Busby as British Resident. Busby arrived at the Bay of Islands on 5 May 1832 and was welcomed in a manner that has led Orange to comment that "the twenty two chiefs who gathered at the Paihea mission might well have seen the event as indicating British recognition of the Maori people as their equals".[17] The focus was on Busby having been sent by the King to honour Maori; to ensure their protection and to guarantee more effective control of British subjects. Orange claims that "there was more than a suggestion of ambassadorial representation to an independent country".'*

From a Maori perspective, Busby proved to be quite useful as a mediator of disputes, particularly disputes between Maori and settlers." In 1834 he responded to difficulties that had arisen out of the fact that vessels built in New Zealand were sailing without a flag by arranging a meeting of twenty five Northern rangatira at Waitangi to select a national flag. Orange has observed that the long-term significance of the flag "lay in Maori understanding of the event: the belief that the mana of New Zealand, closely associated with the mana of the chiefs, had been recognised by the British Crown".[20]

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11 Idem.
12 Idem.
13 Pool, i *Te Iwi Maori: A Population Past, Present and Future* (1991) 58.
14 Walker, supra note 6, 87-88.
15 Orange, supra note 9, 1 I-12.
16 Ward, A *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (1995) 24.
17 Orange, supra note 9, 13.
18 Idem.
19 Orange, Ibid, 16-17. Others, however, have suggested that Maori were unimpressed with Busby: see Ward, supra note 16, 25.
20 Ibid, 20-2 1.

The most significant action that Busby took in his role as British Resident was triggered by the suggestion that Frenchman Baron de Thierry was planning to establish an independent state in the far North. Busby called a meeting of thirty four Northern rangatira on 28 October 1835, at Waitangi, and persuaded them to sign a Declaration of Independence. The rangatiratanga (translated as independence) of the country was declared by the signatories under the designation of The United Tribes of New Zealand. The signatories declared that kingitanga and mana (translated as all sovereign power and authority) resided in them collectively. They agreed to meet in Congress annually at Waitangi for the purpose of passing laws, and they invited Southern iwi to join the Confederation of United Tribes. They also declared that they would not permit any legislative authority (translated as whakarite ture) to exist apart from themselves, nor would they permit any function of government (translated as kawanatanga) to be exercised by anyone other than persons to whom they delegated such a task.

Whatever Busby's motives may have been, it is apparent that the Maori signatories had no particular reason not to declare their independence or to signal an alliance with the British. The fourth article of the Declaration agreed that a copy of the document be sent to the King and that he be thanked for acknowledging their flag. In return for the Maori signatories' protection of British subjects in their land, they asked that King William IV continue to act as a parent to their infant state, so that its independence would not be interfered with.

The Declaration states that those responsible for the translation between English and Maori texts were missionaries who had resided in New Zealand for at least ten years. [21] Henry Williams and George Clarke, both of the Church Missionary Society, signed the document as witnesses, and it is recorded that Williams assisted Busby with the declaration.[22]

While Busby's plan for a Parliament House to be built at Waitangi for the annual Congress meetings never eventuated, he did call together committees of Confederation rangatira from time to time, and apparently some work was undertaken on the drawing up of a constitution.[23] Busby continued to gather signatures to the document, collecting a total of fifty two in all. The last person to sign was Te Wherowhero of Waikato, in July 1839.[24]

The Treaty of Waitangi

Barely seven months later, Busby convened another gathering at Waitangi to discuss the relationship between Maori and the Crown.[25] By now, William Hobson had arrived from England with instructions to secure sovereignty over such parts of the country as Maori were prepared to cede. As with the Declaration of Independence, Busby was instrumental in drafting the Treaty in English, and Henry Williams was a key figure in its translation into Maori.[26] Over half of the rangatira who signed the Treaty at Waitangi had signed the Declaration of Independence less than five years earlier.[27]

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[21] This analysis of the Declaration of Independence is based on the document as it has been reproduced in Appendix 1 of Orange, ibid, 255-256.

[22] Walker, supra note 6, 88'.

[23] Orange, supra note 9, 22.

[24] Kelsey, supra note 2, 7.

[25] Invitations to gather at Waitangi on 5 February were prepared by Busby and sent out under his name on 30 January 1840, Orange, supra note 9, 35..

[26] Walker, supra note 6, 90; Orange, supra note 9, 36-39.

[27] Orange records Hobson's calculation that twenty six of the the forty six Waitangi signatories were Confederation chiefs, supra note 9, 55. However, it should be noted that the number of Waitangi signatories cannot be calculated with precision: Orange says the number may be forty three, forty five or fifty two, ibid, 259.

The Waitangi signatories signed the Maori text of the Treaty, granting to the Crown kawanatanga pursuant to the first article and retaining for themselves te tino rangatiratanga under the second article. Both the 1835 and the 1840 meetings had taken place at Waitangi at the invitation of James Busby, he had drafted both documents in English and he relied upon Henry Williams in each case to translate them into Maori. Therefore, the Confederation chiefs would have had particularly good reason to expect that words used in the Maori text of the Declaration would have the same meaning in the Maori text of the Treaty. In other words, they could have confidently expected that they were reserving to themselves their independence (rangatiratanga) and that they were delegating to the Crown the function of government (kawanatanga). There would have been no suggestion in their minds that they were doing anything other than cementing their overriding authority in Aotearoa.

Of course, the Treaty was not just signed at Waitangi, but was taken around the country during the ensuing eight months, eventually gathering a total of over five hundred and thirty signatures. All signatories, other than thirty nine who signed at the Waikato Heads and Manukau,[29] signed the Maori text. According to Walker, the use of the words "kawanatanga" and "rangatiratanga" were key to the Maori understanding of the Treaty. He notes:[30]

> The chiefs are likely to have understood the second clause of the Treaty as a confirmation of their own sovereign rights in return for a limited concession of power in kawanatanga. . . . The Treaty of Waitangi they signed confirmed their own sovereignty while ceding the right to establish a governor in New Zealand to the Crown. A governor is in effect a satrap, who . . . is a holder of provincial governorship; he was a subordinate ruler, or a colonial governor. In New Zealand's case, he governed at the behest and on behalf of the chiefs. . . Hobson governed by the acquiescence of the chiefs. In effect, the chiefs were his sovereigns.

Claudia Orange has also suggested that te tino rangatiratanga "was a better approximation to sovereignty than kawanatanga",[31] and refers to the use of the terms in the Bible (which was well-known to Maori by 1840) to reinforce the suggestion that kawanatanga was a lesser form of authority than rangatiratanga.[32] Mike Smith has likened the arrangement to a sub-contract:[33]

> The word 'governor' or 'kawana' implied someone to govern or exercise control over their people, so it was really a chief for the Pakeha. I think of kawanatanga as subcontractors, We have the main contract to look after this place and we subcontracted out some functions, some limited authority, to the kawanatanga to look after their own people and ensure that they lived peacefully within the realms of our society.

It is plain, then, from the words used in the Maori text of the Treaty, that Maori signatories understood it to mean that their ultimate authority (te tino rangatiratanga) was being affirmed but that they were delegating to the Crown a lesser form of authority (kawanatanga), to regulate the conduct of British nationals. Approximately five hundred signed the Maori text, scarcely surprising given that Maori was overwhelmingly the dominant language of Aotearoa at that time.

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28 Ibid, 260.
29 Ibid, 69-70.
30 Supra note 6, 93.
31 Supra note 9, 4 1.
32 Idem.
33 Melbourne, H (ed) *Maori Sovereignty: the Maori Perspective* (1995) 103.

In reaching such a conclusion as to the meaning of the Treaty, it is clear that the signatories were profoundly influenced by the realities of the time. Throughout seventy years of contact with the British, Maori authority in Aotearoa had never been questioned. In fact, the Crown had gone to considerable lengths to acknowledge that authority. In 1840 Maori outnumbered the permanent settler population by forty to one, Maori numbering between 70,000 and 90,000, Pakeha just 2,000.[34] The conduct of many of the British transient population was a matter of grave concern, so it made sense to delegate the necessary authority to the Crown to enable it to deal effectively with its own citizens. However, the suggestion that Maori would have felt the need to relinquish control over their own lives to a representative of the Crown when they were so clearly dominant is little short of ludicrous.

One point that is often mentioned in historical accounts surrounding the signing of the Treaty is the degree of Maori opposition that was expressed, both at Waitangi and at other venues where the Treaty was taken for signing. Some regard it as an indication that some Maori did understand the essence of the English text after all.[35] However, aside from the inescapable fact that it is nevertheless the Maori text that was signed by the overwhelming majority of signatories, the suggestion that Maori refusal to sign necessarily points to an understanding of the English translation is simplistic. Sir James Henare, for example, has explained that at a meeting of rangatira held on the night of 5 February it was agreed that they would sign the Treaty, but that certain nominated rangatira should nevertheless stand and offer token opposition.[36] Orange has described their opposition as "a shrewd debating tactic"[37] which highlighted Pakeha desire for land.

It is also plain that Maori reasons for not signing must have varied. The refusal of Te Wherowhero to sign, for instance, has been said to have been due to his belief that the Treaty "added little to the British recognition of rangatiratanga already contained within the Declaration of Independence".[38] Doubtless there were some who regarded the Treaty as simply unnecessary: after all, they already exercised ultimate authority within their own iwi and hapu spheres. The Treaty could not add anything to the power they already exercised. It is also highly likely that some were influenced in their decision not to sign by the fact that allies and relatives had not signed, or because traditional adversaries had done so. Maori politics of 1840, after all, are most unlikely to have been any less complex than they are today.

Similarly, the reasons for signing would have varied. Some would have signed out of a desire to cement trade relationships with the British, to reinforce bonds with the missionaries, or as a result of political alliances with other hapu or iwi. However, whatever factors contributed to peoples' decisions to sign, the words in the Maori text spoke loudly of an intention to sustain, not erode, Maori authority. What is more, the agreement came in the form of a carefully written and solemnly signed document. The significance of this was not lost on Maori who, after years of contact with Pakeha, understood the importance to them of such documents.[39]

Creating Confusion From Clarity

It is argued that careful consideration of a Maori view of history surrounding the signing of the Treaty reveals a clear Maori intention to create a space for the Crown to regulate the conduct of its own subjects, subject to the overriding authority of the rangatira. It is

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34 Pool, supra note 13, 58.
35 Eg Walker, R in Melbourne, supra note 33, 27-28.
36 Quoted in Kelsey, supra note 2, 8-9.
37 Supra note 9, 48.
38 Kelsey, supra note 2, 12.
39 Orange, supra note 9, 58.

apparent that the Treaty created rights, not for Maori, but for the Crown. The Maori position was not in any doubt:[40]

> Ko te putake o o tatou tikanga, tenei tonu i te rakau kauri. I whanau tonu i konei, i tipu ake tatou i konei, ko tatou te tangata whenua. E matau ana tatou, kei te mohiotia e te Tiriti o Waitangi, tenei kaupapa, hei kawenata mo aua tikanga.
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> The source of our rights is that, like the kauri, we are grounded here, we were nurtured here, we are the people of this land . . . and we know that the Treaty protected our place, covenanted our rights . . .

It is somewhat surprising, therefore, to find the Treaty being described in modem times as having an "aura of complexity and mystique",[41] and to be told that "[c]onfusion surrounded the Treaty from the first".[42] If there was confusion in 1840, it did not come from the Maori side. If there is confusion now, how has it come about?

In approaching this question, Orange provides a useful starting point:[43]

> A great deal of confusion over the treaty arises from the way it has been used to further what the different parties have each considered legitimate interests and to validate certain assumed rights. Europeans, in particular, have shifted their position on the treaty to suit their purposes.

Maori use of the Treaty will be considered shortly. However, it is the Pakeha use of the Treaty to validate assumed rights that should first be examined. Alongside an apparently unshakeable Pakeha belief in the inherent superiority of British law has been a blind assumption of the Crown's right to sovereignty. Consequently, the question of <u>whether</u> sovereignty was acquired by the Crown has never been asked. Nor has the question of <u>how</u>, precisely, the Crown came to acquire sovereignty ever been contemplated as leading to the possible answer that sovereignty was never legitimately acquired at all. The question of how sovereignty was acquired has been regarded as academically interesting, perhaps, but it could only be tackled within the comfort zone of assumed Crown sovereignty.

Pakeha thought on how the Crown acquired sovereignty has varied from pointing to the English text of the Treaty as establishing cession,[44] to a reliance on discovery and settlement and the denunciation of the Treaty as a simple nullity;[45] to an intermediate position which regards the Treaty as simply one ingredient among several, including Hobson's proclamations of sovereignty in May 1840 or the passage of time, which collectively brought about the transfer of sovereignty.[46]

There are problems with each of these approaches. Raising the prominence of the English text is little short of mischievous when one considers the entirely peripheral role

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[40] Te Ataria, 1886, cited in Jackson, M "The Crown, the Treaty, and the Usurpation of Maori Rights" *Proceedings of Aotearoa/New Zealand and Human Rights in the Pacific and Asia Region: A Policy Conference* 26-28 May 1989, Wellington.

[41] Kawharu, IH *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi (1989)* xvii.

[42] Orange, supra note 9, 1.

[43] Ibid, 2.

[44] Chief Judge Fenton in *The Kauwaeranga Judgment* (1870); reprinted in (1984) 14 VUWLR 227.

[45] Prendergast CJ in *Wi Parara v Bishop of Wellington* (1877) 3 Jur (N.S.) SC 72, 78.

[46] Eg Brookfield, FM "The New Zealand Constitution: The search for legitimacy" in Kawharu, supra note 41, 1; Chapman, G "The Treaty of Waitangi – fertile ground for judicial (and academic) myth-making" (199 1) NZLJ 228.

that it played in the signatories' decisions to sign in 1840.[47] While Williams and Busby were clearly aware of the differences between the two texts, it seems extraordinary that we should today reward their deceit[48] by paying the English text any attention whatsoever. To suggest that there was any confusion in Maori minds in 1840 as a result of the differences between the texts is to seek to create confusion where formerly there was none.

The characterisation of the Treaty as "a simple nullity", while popular with Pakeha for over a hundred years, has largely lost favour amongst those who "no longer marginalise . . . the document but rather elevate . . . it in the search for identity".[49] As Joseph notes, history has not dealt kindly with Prendergast CJ who was, after all "a judge of his time".[50] Be that as it may, the general view appears to have moved away from his entirely negative characterisation of the Treaty,[51] and in any case, the Maori view has never been in accordance with such an interpretation.

The insistence that the Treaty merely forms part of a chain of events which collectively brought about the transfer of sovereignty to the Crown is also problematic. Seeking legitimation of the Pakeha presence, and even of "thievish purchases"[52] in the mere passage of time is to clutch at straws. Reliance on Governor Hobson's proclamations of sovereignty is akin to accepting the word of the petulant toddler who stamps her or his foot and shouts "mine!" for all the world to hear. An insistence that Captain Cook "discovered" Aotearoa and that the English "settled" here is a source of amusement to Maori, having discovered and settled in these islands over a thousand years beforehand. And, as already discussed, attempts to source Crown sovereignty in cession are destined to fail due to the marginal role that the English text of the Treaty played in 1840.

Doubtless there will be some who will greet with astonishment my apparent lack of reverence for the modes of acquisition which were laid down as legitimate methods by which colonising powers could add new colonial spoils to their empires.[53] The colonising powers which dreamt these theories up in the first place so as to regulate conduct amongst themselves, and which benefited so handsomely as a result, may well feel a high degree of attachment to them. But it is simply too much to expect Maori, or indeed any indigenous peoples of the world who are in a position similar to our own, to take such theories seriously, even for a moment. They are not a part of our law, and we never agreed to make them so.

All that endless academic discussion of such theories has achieved is the creation of confusion around an issue which was formerly clear, in Maori eyes at least. The Treaty of Waitangi has never been the source of Maori authority in Aotearoa: all it did was confirm that authority and create a place for Pakeha to live, regulated by the Crown, but ultimately subject to tino rangatiratanga. There is nothing confusing about that. It is just that such a position is in fundamental conflict with Pakeha assumptions about the superiority of their law and the necessity for Crown sovereignty. Unable to confront a view of history which does not support their assumptions, Pakeha have instead retreated into the safety of their own theories, and weaved elaborate but ultimately unconvincing versions of history which serve as grand distractions from the truth.

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[47] Thirty nine Maori signed the English text, at Waikato Heads and Manukau, but they did so only because that happened to be the only version sent to the missionary, Maunsell, who gathered their signatures while they were attending an important annual mission meeting, Orange, supra note 9, 69.

[48] Walker, R "The Treaty of Waitangi as the Focus of Maori Protest" in Kawharu (ed), supra note 41, *268.*

[49] Joseph, PA *Constitutional and Administrative Law in New Zealand* (1993) 37.

[50] Ibid, 36.

[51] Eg Brookfield states that "few today would accept Chief Justice Prendergast's description of it in 1877 as a 'nullity"', Kawharu, supra note 4 1, 10.

[52] Ibid, 5 and 14.

[53] Eg Joseph, supra note 49, 32-34.

A Maori View of Past. Present and Future

Despite the work of the academic spin doctors, Maori have held fast to our own history concerning the Treaty of Waitangi. This has often led to the accusation that we are determined to live in the past. However, given that Maori regard the past, present and future as being inextricably connected, it is hardly surprising that we look to the past in order to set right the present and to plan effectively for the future. Nor need we be apologetic for taking such an approach. Maori have shown an extraordinary degree of patience, goodwill and imagination as we have striven to make our vision of the Treaty a reality. When we have found the other party to our Treaty relationship reluctant to pursue positive change for Maori, we have seized the initiative and created the change ourselves.

Kohanga reo and kura kaupapa Maori are prime examples of the sort of change that Maori have brought about, despite an initial lack of enthusiasm on the part of the Crown. The first kohanga reo was established in 1982 and by July 1996 over 700 kohanga were providing total immersion early childhood programmes to over 14,000 children.[54] While kohanga now receive some government funding through the National Kohanga Reo Trust, they operated for many years completely independently of the state. They survived as a result of an enormous amount of hard work on the part of Maori whanau and were based largely on the unpaid work of Maori women. Kohanga reo represent a powerful practical expression- of tino rangatiratanga, one which Maori are unlikely to give up in return for the limited state funding which is now available:[55]

> A pedogogical objective of Kohanga is to be able to practice tino rangatiratanga . . . Tino rangatiratanga captures the essence of self-determination, the relative control that a group has over its operations and the decision-making process. . . Associated with this move towards tino rangatiratanga is a struggle to resist the power of veto that mainstream culture might gain over the existence and operation of Kohanga networks. This could happen if the state agencies that support their programmes . . . put in conditions that lead to the takeover of Kohanga.

In turn, kohanga reo forced further change, as the five year old kohanga graduates found that the education system was ill-prepared to meet their needs. Three independent kura kaupapa Maori were established during the 1980s, once again, self-funding and largely reliant on the voluntary efforts of Maori women. In 1990 the government was finally persuaded to fund six kura as a pilot scheme[56] and since that time the number of state-funded kura has risen to over thirty." However, as with kohanga reo, there remains the need for vigilance in the face of the threat of state co-option of kura philosophies and practices.[58] Maori have found it somewhat galling that the Crown, having ignored these initiatives for substantial periods of time, often now tries to claim credit for them. Worse still, it seeks to exert control over them through such agencies as the Education Review Office, thereby threatening to usurp the tino rangatiratanga which has been at the very heart of their success.

Of particular relevance to the issue of making our Treaty vision a reality is the increasing Maori interest in constitutional reform. While some Maori have long been thinking about how the Treaty relationship might better be reflected in our constitutional arrangements, the question was brought to a head in 1995 by the Crown's proposed fiscal envelope policy. The proposal sought to settle all historical Treaty grievances for a

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54 Education Review Office *What Counts as Quality in Kohanga Reo* (1997) 1.
55 Coxon, E et al *The Politics of Learning and Teaching in Aotearoa – New Zealand* (1994) 167-8.
56 Pursuant to the Education Amendment Act 1989.
57 Durie, M *Te Mana Te Kawanatanga: The Politics of Maori Self-Determination* (1998) 65.
58 Coxon et al, supra note 55, 173.

maximum total of one billion dollars, and within a time span of ten years.[59] While some iwi eventually did settle their claims within the fiscal envelope framework,[60] Maori opposition to the proposals was immediate and widespread.[61] A series of national hui at Hirangi were called by Sir Hepi Te Heuheu, at which it became apparent that the time was ripe for a discussion on constitutional reform. At the third hui, held in April 1996, a workshop was held on constitutional change, during which a range of political options leading to Maori government were discussed. These varied from creating separate geographical Maori and non-Maori areas in the country, to simply having parallel governing structures without geographical separation, to establishing some kind of Maori assembly which would be advisory to the Crown.

The most surprising characteristic of many Maori proposals for constitutional reform, is their continued willingness to negotiate and to share. For example, one model that has been mooted for longer than most is based on the establishment of a three-house parliamentary structure. The tikanga Pakeha house would consist of seventy five members, would control seventy five to eighty percent of the budget and would prepare legislation of interest to non-Maori. The tikanga Maori house would consist of- twenty five to thirty members, would control fifteen to twenty percent of the budget and would prepare legislation relevant to Maori. All legislation would be sent to a third house, the Treaty of Waitangi house, or Senate, which would consist of equal numbers of Maori and Pakeha members and would vet all legislation with reference to the Treaty of Waitangi.[62]

While the Crown has not shown any interest in this (or indeed any) Maori proposal, it has certainly gained ground amongst Maori and some Pakeha as well.[63] For those who blindly adhere to racist assumptions about the inherent superiority of British law and the inevitability of Crown sovereignty, such a model probably seems extraordinary. In fact, the most extraordinary aspect of this proposal, when measured against the reaffirmation of Maori authority in the Treaty and also against the sad trail of Treaty breaches that Maori have suffered at the hands of the Crown, is its remarkable generosity of spirit.

Conclusion

The view of history presented in this paper has attempted to strip away a great deal of the carefully concocted confusion surrounding the Treaty of Waitangi to reveal a simple if, to many Pakeha, unpalatable truth. The Treaty of Waitangi did no more for Maori than the Declaration of Independence had done five years earlier. It simply reaffirmed the authority that we had exercised in Aotearoa for a thousand years and that we continued to exercise, as a matter of fact, in 1835 and in 1840. On the other hand, the Treaty did create new rights for the Crown, rights to regulate the conduct of British nationals in Aotearoa, subject to the overriding authority of the rangatira.

The important question to ask next is what can be done to give life to the true intentions of the Treaty nearly one hundred and sixty years later. A common response is that, one way or another, the Crown managed to wrest control from Maori and that it is pointless now to discuss the true nature of our Treaty relationship. I disagree. A stable state cannot be built upon an unstable foundation. So long as Pakeha refuse to confront their deep-rooted insecurities about the illegitimacy of the state that they have created, their sense of nationhood will remain shallow and meaningless. The Pakeha need to resolve these issues is palpable.

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[59] Office of Treaty Settlements *Crown Proposals@ the Settlement of Treaty of Waitangi Claims: Detailed Proposals (* 1994)

[60] Eg Tainui and Ngai Tahu have each settled historical claims for a total of $170 million.

[61] Gardiner, W *Return to Sender: What really happened at the fiscal envelope hui (1996).*

[62] This model has been proposed by Professor Whatarangi Winiata of Te Wananga o Raukawa.

[63] Eg Paterson, J in Archie, C (ed) *Maori Sovereignty: The Pakeha Perspective (1995) 23.*

Confronting the truth about the Treaty will not necessarily require that all non-Maori leave the country. Our ancestors have proven themselves to be exceptionally accommodating hosts, and there is no reason to assume that the magnanimity that has for so long characterised Maori conduct towards our visitors will come to an end. What confronting the truth will require, as a minimum, is that the Crown sit down with Maori, as equals, and agree to a process whereby constitutional change can be negotiated. This is not to suggest that such a process will be easy, but that it is necessary, and achievable.

I have been told that to expect such an outcome is unrealistic, because Maori are now a minority. This obsession with numbers fascinates me, for a number of reasons. Firstly, it assumes that only Maori are interested in constitutional change that will result in some kind of genuine power-sharing arrangement. This presupposes that all Pakeha are too one-eyed, too self-centred to acknowledge the justice of the Maori claim to a share of political power. Yet clearly this is not the case. There are Pakeha who are willing to contemplate constitutional reform,[64] and their numbers can only grow as public awareness of the Maori position increases.

Moreover, one cannot help but greet the argument that democracy is an unassailable good with a degree of cynicism, given the selective way in which the numbers game has been played in this country. One only has to consider the creation of the four Maori electorates in 1 867,[65] at a time when the Maori population should have entitled us to a total of twenty seats,[66] to understand that Pakeha have relied on numbers only when it has suited their interests to do so.

Furthermore, an insistence upon numbers to justify an adherence to the status quo indicates a certain short-sightedness on the part of its proponents. It may have seemed a watertight argument towards the end of last century, when the Maori population dropped to a mere 42,000[67] and when various commentators confidently anticipated that we would die out altogether.[68] But we should remind ourselves that the Maori population now stands at over half a million,[69] and it is predicted that it will "over the foreseeable future . . . make a very significant contribution to national population growth".[70] We have seen in kohanga reo and kura kaupapa what Maori can achieve when united behind a cause. I think it unwise to underestimate the potential power that the Maori population might wield when we come to future discussions about constitutional reform.

Nor is it realistic to hope that Maori expectations will dissipate. This view, expressed by Ranginui Walker just four years ago, encapsulates nicely the enduring nature of the Maori position:"

> Maori sovereignty is being talked about. It's bubbling along under the surface. It will never go away. Jin Bolger can shout for all he likes 'There can only be one sovereign state and we are not going to share power.' But one thing is for sure - sooner or later the government will have to face the issue and sit down at the table and talk, because governments come and go. Bolger will be history but Maori will still be there with their agenda of tino rangatiratanga.

The question of what is realistic is often raised in an attempt to deny the validity of Maori claims to a Treaty-based share of political power. I have found the work of Richard Falk to be particularly useful in this regard. In an interesting discussion of what

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[64] Eg several Pakeha state their commitment to change of this kind in Archie, ibid.
[65] Pursuant to the Maori Representation Act 1867.
[66] Walker, supra note 6, 144.
[67] Pool, supra note 13, 76.
[68] For a selection of quotations on this subject see Pool, ibid, 28.
[69] Durie, supra note 57, 85.
[70] Pool, supra note 13, 231.
[71] Walker, in Melbourne, supra note 33, 3 1.

he calls "the plight of entrapped nations"[72] he explores the need to be politically realistic in the strategies that we employ for the safeguarding of indigenous nations and peoples. However, he also demonstrates, with reference to a number of specific examples, that:[73]

> an apparent relation of forces can be dramatically reversed over a very short period of time, so that the definition of what is realistic in any given situation has to be looked at much more carefully than most people imbued with liberal, moderate, and empirical traditions of thought and politics tend to do. These prevailing reformist traditions tend to be imprisoned intellectually within unduly confining definitions of what is feasible.

The growth in the Maori population, and the trend towards greater public awareness of Maori views of Treaty history are exactly the kinds of factors that could bring about the dramatic reversal in the apparent relation of forces of which Falk writes. Maori will not be trapped forever within the intellectual imprisonment of what our colonisers deem to be feasible. We are capable of aiming much higher. It is my belief that Pakeha are capable of aiming higher too.

In conclusion, I note that the price of challenging the intellectual dishonesty that is implicit in much of what passes for Treaty jurisprudence can be high. In 1990, a special volume of the New Zealand Universities Law Review, dedicated to the Treaty of Waitangi, was issued My contribution to the volume was a review of *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, edited by Professor Kawharu. What I have said today sits comfortably with what I said in the review. In his introduction to the volume, the Right Hon. Sir Robin Cooke (as he then was) expressed some bemusement at my critique of various chapters in the book, adding "[s]till, she adds spice to the mixture".[74] The comment sent a powerful message to this young Maori woman as to the weight (or lack thereof) which might be attached to my views. Spice, after all, is usually brown, faintly exotic and definitely an optional extra, something which may be added simply to heighten interest. I thought the cooking symbolism to be rather telling as well. Perhaps I ought to have stayed in the kitchen and tended to my baking instead of venturing out into the predominantly white man's world of Treaty jurisprudence (all the other contributors to the volume were men; only one of them was Maori and his piece had been co-written with a Pakeha colleague).

It is little wonder that when I was asked to participate in this forum, I was reluctant to do so. How could I be sure that I was not being set up to be marginalised, yet again? I am still not sure. I wonder whether the world of Treaty jurisprudence has matured sufficiently in the last nine years to take seriously the views that I have presented. It needs to do so. For, as Ranginui Walker has indicated, Maori claims to tino rangatiratanga will be here for as long as Maori are here.

E kore e ngaro, he kakano i ruia mai i Rangiatea
We shall never be lost, the seed from Rangiatea

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[72] Falk, R T "The Struggle of Indigenous peoples and the Promise of Natural Political Communities", in Thompson, R *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (1987)59, 60 (which he defines as nations that are entrapped within the structure and framework of the sovereign state)

[73] Ibid, 65

[74] (1990) 14 *NZULR 7.*