STATUTORY INCORPORATION OF RIGHTS DERIVED FROM THE TREATY OF WAITANGI

by

Edward Murray Willis

A dissertation
submitted to Victoria University of Wellington
in partial fulfilment of the requirements for the degree of
Master of Laws

Victoria University of Wellington

2008

Ko te manu e kai ana i te miro, nōna te ngahere.
Ko te manu e kai ana i te mātauranga, nōna te ao.

TABLE OF CONTENTS

ABSTRACT

Systematic and principled Crown recognition of rights derived from the Treaty of Waitangi through legislation is necessary for the effective performance of the Crown's Treaty of Waitangi obligations to Māori. The Hohfeldian analytical distinction and inherent moral differences between rights and other interests has largely been overlooked in orthodox Treaty jurisprudence. The Waitangi Tribunal has, however, implicitly recognised the distinction in a number of its reports and a framework for the principled recognition of Treaty rights is emerging. This framework considers the Treaty to be the source of Treaty rights, and indicates that to be consistent with the principles of the Treaty, Treaty rights must have similar legal implications to other rights: Treaty rights act as a limit in principle on the exercise of sovereign authority, take priority over other legal interests, and require vindication if infringed. As this framework is consistent with both the principles of the Treaty and current legal recognition of rights, there are good grounds to suggest that the Tribunal's Treaty rights framework should be adopted as part of a principled response to Māori Treaty claims. There are three key ways in which legal effect is given to the Treaty of Waitangi: directly through statutory incorporation of the Treaty, and indirectly either as an extrinsic interpretation aid or as an implicit relevant consideration under administrative law. However, statutory incorporation of the Treaty is currently the only way that Treaty rights can be given legal effect. Broad statutory language that allows the courts to recognise and protect Treaty rights is therefore the most principled and effective method of giving legal effect to Treaty rights, and current approaches to Treaty provisions in legislation need to be reassessed.

Statement of word length:
The text of this paper (excluding the abstract, table of contents, footnotes and bibliography) comprises approximately 35,000 words.

Topics:
Treaty of Waitangi – Treaty provisions in legislation – Māori rights – Legislative incorporation

I INTRODUCTION

The Treaty of Waitangi (the "Treaty") is considered to be New Zealand's most important historical document,[1] perhaps because it has been "critical in the history of New Zealand and its constitutional development".[2] Over time, the Treaty has come to signify the relationship, or the set of relationships,[3] between the Māori population and the New Zealand government.[4] The Treaty has become a touchstone for a wide range of issues that affect Māori – from issues as diverse as the future development of New Zealand's constitutional arrangements,[5] to matters of social policy.[6] As such, the Treaty now forms a central part of numerous Māori claims against the New Zealand government.

Principled consideration of these Māori claims based on the Treaty will often invite a legal response. In response to Treaty claims the political branch of government[7]

The author would like to acknowledge and thank the following people who have commented on early drafts or otherwise influenced the development of this paper: Māmari Stephens, Bevan Marten, Tane Waetford, Claire Charters, Dean Knight, Bill Atkin and Jenna Raeburn.

---

1 Robin Cooke "Introduction" (1990) 14 NZULR 1, 1.

2 Sian Elias "The Treaty of Waitangi and the Separation of Powers in New Zealand" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 206, 213 ["Separation of Powers"].

3 Matthew Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207, 209.

4 In this paper, the term "Māori" is used as a generic term for the indigenous people of New Zealand. It should not be assumed, and this paper does not take the view, that Māori are homogeneous without diverse interests and points of view.

5 In the summary of the Building the Constitution Conference, the Treaty of Waitangi was described as "by far the most pervasive theme", and one unidentified participant is quoted as saying "A constitution and a future that is not founded in the Treaty is irrelevant": see Colin James (ed) *Building the Constitution* (Victoria University of Wellington Institute of Policy Studies, Wellington, 2000) 14.

6 The Terms of Reference to the *Report of the Royal Commission on Social Policy* directed the Royal Commission to consider the impact of the Treaty of Waitangi: see Royal Commission on Social Policy *Report of the Royal Commission on Social Policy: the April Report* (Royal Commission on Social Policy, Wellington, 1988) Volume 1, vi.

7 This paper adopts the definition of "political branch of government" used by Philip Joseph to refer to the merged legislative and executive functions that are characteristic of the Westminster system of government: see Philip Joseph "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 KCLJ 321, 321 ["The Collaborative Enterprise"].

has, for example, legislated for the protection of the principles of the Treaty,[8] for the creation of new legal rights,[9] and for the Treaty to be taken into account by administrative decision makers.[10] The courts have also been proactive in responding to Treaty claims: the New Zealand Court of Appeal has been instrumental in the development of a coherent body of legal Treaty principles.[11] As a result, the Treaty is now as much a part of the New Zealand legal system as it is "part of the fabric of New Zealand society".[12]

A key feature of the emerging jurisprudence that responds to the challenges presented by interaction between the Treaty and the legal system is the affirmation of rights derived from the Treaty. A Treaty right involves a claim that a particular Māori interest based on the Treaty should be recognised as having a special quality that other Treaty claims do not have. As a result of this special quality, a Treaty right imposes a substantive obligation on the Crown, as a responsible Treaty partner, to actively protect particular Māori interests. In recognition of this substantive duty the legal system may respond to a Treaty right in three ways: the legal system may recognise the Treaty as a principled limitation on the exercise of Crown sovereignty, it may prioritise Treaty claims over competing interests, and it may provide a substantive remedy for breach of the Treaty. Not all claims based on the Treaty can sustain these types of demands. Accordingly, Treaty rights are an important and distinct subset of a much broader category of Māori interests based on the Treaty. It appears, however, that a distinction between Treaty rights and other Treaty interests is not often observed in the current theory or practice of giving legal effect to the Treaty.

This paper seeks to develop two broad themes. The first is that systematic and principled Crown recognition of Treaty rights through legislation is necessary for the effective performance of the Crown's Treaty obligations to Māori. The second is that

---

8 See State-Owned Enterprises Act 1986, s 9.

9 See Māori Language Act 1987, s 4(1).

10 See Resource Management Act 1991, s 8.

11 See especially *New Zealand Māori Council v Attorney-General (Lands)* [1987] 1 NZLR 641 (CA).

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

principled legislative recognition of Treaty rights is only possible using broadly-phrased statutory references to the Treaty that permit a role for the courts to assess and protect Treaty rights. Following this introduction, these themes are developed through four substantive parts. Part II builds on Hohfeldian analysis of legal entitlements to elaborate on the distinction between legal rights and other legal interests, and argues that the distinction is useful for understanding and providing principled responses to particular Māori claims based on the Treaty. Part III sets out the approach of the Waitangi Tribunal (the "Tribunal") to Treaty rights as developed principally in the context of Māori claims to natural resources. The Tribunal has recognised the distinctive ways that the legal system responds to rights, and a useful framework for understanding Treaty rights is emerging from the Tribunal's jurisprudence. Importantly, the Tribunal recognises the Treaty as a source of rights, meaning that there is significant scope for further development of the Tribunal's Treaty rights framework within New Zealand's legal system. The Tribunal's Treaty rights framework is sound in principle when viewed from both legalistic and Treaty-based perspectives, and should be adopted as a robust framework for developing principled responses to Māori claims based on Treaty rights.

Part IV examines the principal three ways in which the Treaty can be given legal effect: directly through statutory incorporation of the Treaty, and indirectly as an extrinsic aid to statutory interpretation or as an implicit mandatory consideration under administrative law. This discussion highlights that at present only direct legal incorporation of the Treaty through express statutory recognition has the potential to give legal effect to Treaty rights, leaving the ultimate legal effect of Treaty rights largely in the hands of the political branch of government. Finally, Part V argues that despite the need for the political branch to take the lead on giving legal effect to Treaty rights, the judiciary has a principled role to play in protecting Treaty rights. The independence of the courts and their focus on principle when issues of rights are at stake mean that the courts can play a valuable role in giving legal effect to Treaty rights. Accordingly, statutory recognition of the Treaty needs to be couched in broad language to permit the courts to recognise and protect Treaty rights. The current theory and practice of incorporating Treaty provisions into legislation do not permit any more than the most

limited role for the courts to interpret those statutory provisions, and this approach must be reassessed.

The themes developed in this paper are done so on the basis of statutory Treaty provisions as ordinary legislation. While acknowledging the constitutional tensions that underpin many aspects of Treaty jurisprudence, and that any discussion of Treaty rights raises the spectre of constitutional limits on the exercise of public power in practice,[13] this paper argues that Treaty rights can be acknowledged and protected within the constraints of the New Zealand legal system's current framework, including the doctrine of Parliamentary sovereignty. This paper also proceeds on terms that are neutral as to questions of whether or not the Treaty supports collective or group rights in addition to individual rights. This paper consciously draws on liberal conceptions of individual rights in arguing that Treaty rights deserve legislative recognition, but this approach is not intended to exclude any collective rights of Māori as an indigenous minority.

13 See Kenneth Keith "The Roles of the Tribunal, the Courts and the Legislature" (1995) 25 VUWLR 129, 138.

II RIGHTS AND INTERESTS

Rights are not like other legal interests. In this paper, a right can be broadly defined as an entitlement with a corresponding legal or moral duty. To refer to an interest, on the other hand, is to use a more generic term that can refer to "any sort of legal advantage, whether claim, privilege, power, or immunity".[14] This means that rights and interests are not polar opposites; rights represent a subset of interests. This Part II seeks to identify the reasons that rights are distinct from other interests, and discusses the implications of the recognition of the distinction between rights and other interests for the legal system, and in particular the Treaty's legal effect.

The leading modern analysis of legal rights is Hohfeld's celebrated article which distinguishes between various fundamental legal conceptions.[15] Hohfeld's analysis indicates that rights form one distinct category of legal interests, and in particular Hohfeld urged a distinction between legal entitlements that are rights, which necessarily have a corresponding duty, and legal entitlements that are privileges (or liberties), which do not. In addition to Hohfeld's descriptive analysis, rights can be distinguished because they have an underlying moral element that other legal interests do not have. This moral element is an inherent part of the right-duty relationship even though the precise nature of this morality remains unsettled.

The necessary connection with a duty and the inherent moral element that are both characteristic of a right mean that rights manifest themselves in the legal system in three distinctive ways. A key legal manifestation of a right is as a substantive limit on the legitimate use of political power. A second manifestation is a degree of priority associated with rights that suggests a need for protection against erosion by competing interests. A third manifestation is that abrogation of a right requires a substantive

---

14 See Wesley Newcomb Hohfeld "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale LJ 710, 717.

15 Wesley Newcomb Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16 ["Fundamental Legal Conceptions"].

response that vindicates the infringed right. Interests that are not rights do not impact on the legal system in these ways. Consequently, issues involving rights suggest the need for a different legal response from issues that touch only on other interests.

The obligation on a responsive legal system to treat rights and other interests differently has the potential to clarify the detail of the Crown's Treaty obligations to Māori in particular circumstances. There can be little doubt that the Treaty is a document that is concerned with "fundamental rights" as well as other legal interests:[16] the text of the Treaty incorporates concepts that can be properly described as rights, particularly the property rights guaranteed in Article II and the rights of citizenship guaranteed by Article III.[17] However, neither the nature of those Treaty rights nor the way in which they should be applied in modern New Zealand society is completely clear. One reason for this lack of clarity is that rights jurisprudence in New Zealand generally,[18] and with reference to the Treaty in particular,[19] is still very much developing. The distinction between Treaty rights and other Treaty interests may assist in this development as identifying which of the Crown's Treaty obligations stem from claims based on Treaty rights identifies which Treaty obligations require a response that takes into account the unique ways in which rights impact on the legal system.

A The Distinction between Rights and Other Interests

Rights are fundamentally different from other interests in two key ways. The first way that rights are different is that where someone holds a right someone else necessarily has a corresponding duty in respect of that right. As Hohfeld demonstrated in his analysis of legal conceptions, other interests do not give rise to a corresponding legal duty. The second way that rights are different is that there is a moral component inherent

---

16 *Lands*, above n 11, 656 Cooke P.

17 See Margaret Bedggood "Constitutionalising Rights and Responsibilities in Aotearoa/New Zealand" (1998) 9 Otago LR 343, 347.

18 See generally Bedggood, above n 17.

19 President Cooke, as he then was, has described the Treaty as "an embryo rather than a fully developed and integrated set of ideas": see *Lands*, above n 11, 663.

in all rights. Understanding these fundamental differences between rights and other interests is important for understanding how the legal system answers various questions of policy and justice.[20]

1 Hohfeld's fundamental legal conceptions

Legal rights are notorious for escaping easy definition.[21] Hohfeld sought to clarify the nature of legal rights by identifying eight basic legal conceptions: rights, privileges, powers, immunities, no-rights, duties, disabilities and liabilities.[22] The first four of these are sometimes called "legal entitlements",[23] though Hohfeld seems to have termed them "legal interests".[24] Rights are legal claims in respect of another person that he or she be compelled to act in a certain way to the right-holder. Such claims may take the form of a positive duty such as the right to demand payment, or a negative claim such as the right to freely enjoy one's property without interference. A privilege is an ability to choose to act in a certain way (or to not act in that way) without compulsion. A privilege does not, however, entitle the privilege-holder to prevent interference with that privilege. A power is the ability to changes one's legal relations. An immunity is a protection from having one's legal relations changed by others.

Hohfeld's second four conceptions represent the opposites of his four legal interests. A no-right is the opposite of a right, and indicates the lack of ability to compel others to act in certain ways. A duty is the opposite of a privilege, and suggests a compulsion to act in a certain way, rather than the freedom to choose how to act. A disability is the lack of an ability to change one's legal relations. A liability is a lack of protection from having one's legal relations changed by others.

---

20 "Fundamental Legal Conceptions", above n 15, 59.

21 HLA Hart "Bentham on Legal Rights" in AWB Simpson (ed) *Oxford Essays in Jurisprudence (Second Series)* (Clarendon Press, Oxford, 1973) 171, 171. See also Jim Evans "What Does it Mean to Say that Someone has a Legal Right?" (1998) 9 Otago LR 301.

22 "Fundamental Legal Conceptions", above n 15, 30.

23 Joseph William Singer "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" [1982] Wis L Rev 975, 986.

24 See "Fundamental Legal Conceptions", above n 15, 23-24.

Hohfeld highlighted the relationships between his eight conceptions by constructing two tables: a table of jural opposites and a table of jural correlatives:[25]

Jural Opposites			
right	privilege	power	immunity
no-right	duty	disability	liability

Jural Correlatives			
right	privilege	power	immunity
duty	no-right	liability	disability

As the tables above indicate, a right is both the opposite of no-right and the correlative of a duty. The "jural opposite" relationship indicates that a person must necessarily have one or other of the corresponding opposite legal conceptions: a person either has a right or no-right. The "jural correlative" relationship indicates the consequence of a legal interest. A person cannot hold a right, for example, without someone else having a duty in respect of that right. Hohfeld argued that the converse is also true, so that "[i]f A has a duty toward B, then B has a right against A".[26] If a person holds a privilege, power or immunity, then there is no corresponding duty falling on anyone else in respect of that legal interest.

Hohfeld's sought to rebut the "express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties'",[27] and in particular to distinguish rights from legal privileges. Hohfeld's key device for distinguishing between a right and another legal interest was the identification of a corresponding legal duty.[28] According to

25 Ibid, 30.

26 Singer, above n 23, 987.

27 "Fundamental Legal Conceptions", above n 15, 28.

28 "Fundamental Legal Conceptions", above n 15, 31.

Hohfeld, a legal duty is the "invariable correlative" of a legal right:[29] where there is a legal right there will necessarily be a corresponding legal duty. This relationship between rights and duties is a fundamental aspect of the legal system because "rights can only be effectively protected within a web of reciprocal rights and duties".[30] The classic example of this relationship between rights and duties is that if X has a right to exclude others from his or her property, then Y has a duty to keep off that property.[31] Accordingly, legal rights are "logically dependent" on legal duties.[32] Other legal interests cannot be said to be logically dependent on legal duties in this way.

2 The moral component of a right

Hohfeld's descriptive analysis of rights tells only half the story: it identifies rights within the legal system, but does not elaborate on the "underlying ideas which turn legal phenomena into a right, duty, or whatever".[33] Rights and their corresponding duties each have an inherent moral component that indicates that the legal system should recognise a particular entitlement as a right. This underlying moral element is another factor that distinguishes rights from other legal interests.

The conferment of a right necessarily involves a normative assessment. A right inherently suggests something about right and wrong, and about what ought to be the case: [34]

> When we say that someone has a 'right' to do something, we imply that it would be *wrong* to interfere with his [or her] doing it, or at least that some special grounds are needed for justifying any interference.

---

29 Ibid.

30 Bedggood, above n 17, 349.

31 "Fundamental Legal Conceptions", above n 15, 32.

32 Though the reverse may not necessarily be true: see Evans, above n 21, 304.

33 Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 375 [*The Māori Magna Carta*].

34 Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1978) 188 [emphasis added] [*Taking Rights Seriously*].

A right is a matter of moral principle rather than a matter of political policy.[35] A right is, therefore, more than a legal entitlement connected to a legal duty; it is also a moral entitlement that ought to be recognised by the legal system.

The morality inherent in the language of rights has been highlighted by contrasting it with the language of needs.[36] To state that 'X has a right to food' is to imply that there is a moral obligation on someone to provide X with food.[37] Use of the word 'right' suggests not only a third-party duty, but moral culpability on that third party if that duty is not fulfilled. By contrast, the statement 'X needs food' suggests nothing about the moral elements involved.[38] To put it another way, to say that "X needs food" does not tell us whether X's interest in food is in the nature of a right, a privilege, a power, an immunity or any particular form of entitlement. The statement does not imply the moral obligation that is inherent in statements about rights.

The moral element implicit in the idea of a right means that the language of rights is also the language of empowerment.[39] As the holder of a right, an individual is empowered to make a claim against those who have a corresponding duty to see that his or her right is protected or given effect to. Further, if that corresponding duty is not fulfilled willingly, the right-holder is empowered to insist that the state use its coercive power to ensure that the duty is duly fulfilled. Only a sufficient degree of moral weight can justify such a significant claim on the resources of the state to 'empower' an individual to enforce his or her interest.

The basis for this underlying moral component of a right will invariably be a matter that attracts debate. Competing moral theories will each provide different moral

---

35 Ibid, 90.

36 See Claudia Geiringer and Matthew Palmer "Human Rights and Social Policy in New Zealand" (2007) 30 Social Policy JNZ 12, 15-16.

37 Ibid, 15.

38 Ibid.

39 Ibid.

justification for the recognition of a right. Rights may be premised on minimising "the extent to which individual freedom of action may legitimately be limited by collective coercion over the individual".[40] Alternatively, the moral justification for a right may be based on respect for the dignity and equality of individuals,[41] or something less vulnerable to precise definition. This ongoing debate over the moral justification for a right should not be confused with debate over whether or not there is a moral component inherent in all rights. Healthy disagreement about the moral nature of rights should not detract from the fact that rights do implicitly carry a moral element that distinguishes them from other legal interests.

While a degree of moral significance is inherent in all rights, the extent of that moral significance may differ.[42] In particular, rights that create obligations for the state, that is, rights where the state has a corresponding duty towards the right-holder, are likely to carry more moral weight than other rights. Such rights can be called 'political rights' because rather than limiting the freedom of other individuals, a political right limits the freedom on the political branch of government to pursue its political policy. A political right is therefore an individualised political claim on the state.[43] Issues of political policy are usually justified on utilitarian grounds – political policy aims to maximise the general welfare or the public good.[44] Individual freedoms require a strong moral justification if they are to be so important to the welfare of the individual as to limit state action that seeks to maximise the benefit to society as a whole. As such, political rights might also be called 'fundamental rights'.

As the discussion above illustrates, questions of rights are intimately bound up with questions of morality to the extent that to claim a right is as much a moral claim as a legal one. Rights are, therefore, more than simply legal entitlements with corresponding

---

40 Singer, above n 23, 980.

41 See *Taking Rights Seriously*, above n 34, 205.

42 Ibid, 26.

43 Ibid, 91.

44 Ibid.

legal duties. Rights also imply a principled claim on the legal system that a particular interest has sufficient moral gravitas to warrant conferment of a right.

B Rights in the legal system

The features that distinguish rights from other interests – a necessary connection with a corresponding duty and a high moral significance – mean that rights manifest themselves in the legal system in three distinct ways. First, a right suggests a principled limit on the exercise of state power, especially where that right is a political right. While a right may not always represent a substantive limit on state power, the state is likely to face strong moral criticism where a breach of a right cannot be demonstrated to be in the greater public interest. Second, a right has a degree of priority over other competing interests. Rights are not easily amenable to the weighing, balancing and horse-trading used to decide between competing interests, and should often be considered apart from such processes. Finally, a right requires the availability of an effective remedy to vindicate that right if it is breached. Other legal interests do not make these same demands on the legal system.

Rights may manifest in the legal system as a factor limiting the principled exercise of political power. This often occurs where the right is a political right, as the requirement to fulfil the corresponding duty will dictate the limits of principled action available to the state. Such limitations have a strong normative element – any state action that would breach the relevant right would be open to challenge on moral grounds, and the legal system will only permit this reluctantly. In *Zaoui v Attorney-General*,[45] for example, the Supreme Court found that the right to freedom from torture and the right not to be deprived of life, both fundamental human rights,[46] should be given effect so that a refugee with security risk status should not be deported even though an orthodox

45 *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC).

46 See New Zealand Bill of Rights Act 1990, ss 8 and 9.

interpretation of the statutory regime would have suggested a different conclusion.[47] Section 114K of the Immigration Act 1987, which requires the Minister of Immigration to make a decision to deport or otherwise based on confirmation of a security risk certificate in respect of a refugee, was effectively stripped of legal effect rather than risk breaching the two fundamental rights at stake.[48] This reading down of an Act of Parliament suggests that there are fundamental moral issues in play, and the normative, extra-legal force associated with fundamental rights protects such rights from abrogation at the hands of Parliament.[49] Only legal interests that are rights can limit the legitimate use of political power in this way.

The fundamental importance of certain normative standards has even led to speculation that certain Crown action may never be justified. Lord Cooke's famous pronouncement that some common law rights might be so fundamental to our system of law that the courts might refuse to give effect to legislation purporting to abrogate them is a prime example.[50] This suggests that Parliament should only legislate in accordance with fundamental norms if it is to legislate legitimately. Despite these principled arguments that fundamental rights represent normative limits on Crown action, however, interference with a fundamental right is not always an absolute limit on the exercise of political power in practice. The adherence of the New Zealand legal system to the doctrine of Parliamentary sovereignty, which deems Parliament's sovereign authority to be absolute, means it is difficult to argue that fundamental rights always act as a substantive limit on Crown authority in practice. Parliament's ability to legislate contrary to fundamental rights is expressly recognised in the New Zealand Bill of Rights Act 1990

---

47 Claudia Geiringer "Parsing Sir Kenneth Keith's Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 179, 182 ["Parsing Sir Kenneth Keith's Taxonomy of Human Rights"].

48 Ibid.

49 Philip Joseph "The Higher Judiciary and the Constitution: A View From Below" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (Lexis Nexis NZ, Wellington, 2006) 213, 228 ["The Higher Judiciary and the Constitution"].

50 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (CA) Cooke J. See also *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390 (CA) Cooke, McMullin and Onley JJ; *L v M* [1979] 2 NZLR 519, 527 (CA) Cooke J dissenting; Robin Cooke "Fundamentals" [1988] NZLJ 158.

("NZBORA"), the cornerstone of protection for fundamental rights in New Zealand.[51] That rights do not trump the legislative process is further highlighted throughout NZBORA where protected rights are subject to proportionality or reasonableness considerations, rather than being described in absolute terms.[52] While rights are recognised as being fundamentally important in New Zealand jurisprudence, such as the jurisprudence that has developed in respect of NZBORA, there is a strong preference for 'unentrenched' legal rights.[53]

The courts also acknowledge that rights do not trump the exercise of Crown authority in all circumstances. The Court of Appeal, for instance, has stressed that:[54]

> …rights are never absolute. Individual freedoms are necessarily limited by membership of society. Individuals are not isolates. They flourish in their relationship with others. All rights are constrained by duties to other individuals and to the community. Individual freedom and community responsibility are opposite sides of the same coin, not the antithesis of each other.

This is not a viewpoint that is unique to New Zealand, as even the most ardent supporters of liberal rights recognise that in the absence of Parliamentary sovereignty to claim a right against the state does not imply a need to "go so far as to say that the State is *never* justified in overriding that right".[55] Any interference with a fundamental right, however, must be justified on the basis of some "compelling reason" that is consistent with the underlying moral basis of the recognition of the abrogated right.[56] For example, the NZBORA suggests that fundamental rights are subject only to those reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[57] The courts have recognised this need for any limitation of rights to be justified, and have

---

51 New Zealand Bill of Rights Act 1990, s 4. See also the curious Supreme Court Act 2003, s 3(2).

52 See, for example, the section 21 right to be free of "unreasonable" search and seizure.

53 Ministry of Justice *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR A6.

54 *R v Jefferies* (1993) 10 CRNZ 210, 217 (CA). See also *R v B* [1995] 2 NZLR 172, 182 (CA) Richardson J; *Ministry of Transport v Noort* [1992] 3 NZLR 260, 282-283 (CA) Richardson J.

55 *Taking Rights Seriously*, above n 34, 191 [emphasis in the original].

56 Ibid, 200.

57 New Zealand Bill of Rights Act 1990, s 5.

shown a keen ability to distinguish between where such reasonableness is demonstrated and where rights should be given full effect.[58]

The legal system will also prefer to give legal effect to rights over other legitimate claims where those other claims are based on interests that are not rights. The competing interest may be those of other individuals, but the strength of the presumption in favour of rights is highlighted in cases where fundamental interests of the state have been required to give way to the rights of the individual. For example, arguments that certain practices are essential for effective government or are long standing do not always justify a breach of fundamental common law rights, such as the right to freedom from unreasonable search and seizure.[59] Even the most fundamental interests of the state that the courts will usually afford a high priority, such as national security,[60] have been found to give way to or be interpreted consistently with fundamental human rights.[61] In the Treaty context, recognised Māori rights have taken priority over the implementation of core economic policy.[62] The clearest general expression of this priority of rights over competing interests in New Zealand is NZBORA which, as noted above, prescribes that NZBORA rights may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society.[63] This priority is, however, a factor relevant to all rights, not just those rights affirmed by NZBORA.

Developments in administrative law in New Zealand that suggest a willingness of the courts to look to the substantive merits of administrative decision making add significantly to the priority of rights over other interests. The *ultra vires* doctrine, the theoretical basis of the courts' jurisdiction to assess the legitimacy of the exercise of

---

58 See "Parsing Sir Kenneth Keith's Taxonomy of Human Rights", above n 47.

59 See *Entick v Carrington* (1765) 19 St Tr 1029.

60 See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 402 (HL) Lord Fraser.

61 *Chandler v Director of Public Prosecutions* [1964] AC 763 (HL); *Zaoui*, above n 45.

62 See *Lands*, above n 11.

63 But see New Zealand Bill of Rights Act 1990, s 4.

administrative discretion, has come under increasing pressure in recent years.[64] In New Zealand, one manifestation of this pressure is the emerging support for 'hard look' review of administrative action that infringes fundamental rights.[65] Where administrative action touches only on interests that are not rights, the courts will usually be satisfied to leave the substantive merits of the decision to the decision maker. Where fundamental rights are at stake, however, the courts are more willing to take a 'hard look' at the merits of a decision to protect those rights if necessary.[66] This approach is required as a matter of principle:[67]

> The modern focus on fundamental human, civil and political rights ensures a close review – what might be said to be a hard look – at any decision affecting those rights. Clearly, the tolerance permitted a public authority in arriving at a decision affecting fundamental human and civil rights will be less than the latitude extended to the same or other authorities where such rights are not involved.

Another possible framework for understanding the developments towards substantive review is to recognise certain types of administrative law action as examples of 'constitutional review'. Joseph suggests that the willingness of the New Zealand courts to assess executive action against the constitutional standards of human rights, international law and the principles of the Treaty has created a novel category of substantive, value-driven judicial review.[68] Constitutional review suggests that when fundamental rights are affected a higher standard of care is warranted. It may only be a matter of time before the language of judicial review catches up with the substance of recent New Zealand decisions and the courts refer to the priority of interests based on

---

64 See PA Joseph "The Demise of *Ultra Vires* – Judicial Review in the New Zealand Courts" [2001] PL 354 ["The Demise of *Ultra Vires*"].

65 Sian Elias " "Hard Look" and the Judicial Function" (1996) 4(2) Waikato LR 1 [" "Hard Look" and the Judicial Function"].

66 *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58, 66 (CA) Blanchard J; *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619, 631 (CA) Hammond J for the Court.

67 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, 403 (CA) Thomas J dissenting.

68 Philip Joseph "Constitutional Review Now" [1998] 86 NZ Law Rev 85 ["Constitutional Review Now"].

fundamental norms when determining the legality of the exercise of executive discretion.[69]

The final aspect of a right-holder's legal entitlement is an entitlement to vindication of a right if that right has been abrogated. Where legal rights are abrogated a substantive remedy is required to vindicate the infringed rights.[70] By way of contrast, if relevant legitimate interests are not taken into account by an administrative decision-maker, then usual administrative law practice merely requires the decision-maker to exercise his or her discretion again taking all relevant interests into account. As a result of this reconsideration the decision-maker may reach a decision that favours those interests originally omitted from consideration, but equally the decision-maker may reaffirm the previous decision so that the outcome is not substantively different. Remedies of this type cannot be said to substantively protect legal rights, which is appropriate as the courts are not usually concerned with the substantive merits of administrative decision making. Rights, on the other hand, require a special kind of protection against the undue intrusion of the state, and violations of rights should have a substantive remedy to ensure that protection against state intrusion is effective.[71] Rights therefore require vindication in a manner that other interests do not.

NZBORA jurisprudence affirms the requirement for a breach of fundamental rights to be met with a substantive remedy. NZBORA itself does not contain provisions dealing with remedies for breaches of the fundamental rights and freedoms it affirms. Despite there being no express remedy provisions, the courts have consciously adopted a rights-centred approach to NZBORA that focuses on vindication of infringed rights.[72] In *Simpson v Attorney-General* the Court found that the Crown was primarily liable for breaches of NZBORA rights and awarded punitive damages against the Crown for those

---

69 "The Demise of *Ultra Vires*", above n 64, 374.

70 Evans, above n 21, 306-307.

71 See *R v Goodwin* [1993] 2 NZLR 153 (CA); *R v Te Kira* [1993] 3 NZLR 257 (CA).

72 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007) 1176-1178 [*Constitutional and Administrative Law*].

breaches.[73] This demonstrates a willingness on the part of the courts to respond to a breach of fundamental rights with a more substantive remedy that denotes a degree of moral culpability, rather than simply attempting to 'compensate' the victim for the guilty party's transgression. The courts will choose a remedy carefully and deliberately to ensure vindication of an abrogated right where appropriate.[74]

Clearly, rights place a number of unique requirement impact on the legal system. Rights may act as a principled limit on the exercise of state power, take priority over competing interests, and require substantive remedies that can vindicate any breach. Interests that are not rights do not impact on the legal system in these ways. Understanding the differences between the ways that rights and other interests manifest themselves in the legal system is therefore important as it can clarify the expectations on the legal system of particular claims and ensure a principled legal response to those particular claims.

C Treaty Rights and Treaty Interests

The distinction between rights and other interests may prove useful in understanding many areas of jurisprudence, but one particular area where the distinction has the potential to prove highly influential is the responsiveness of the legal system in addressing Māori claims based on the Treaty. The distinction between rights and other interests in the Treaty context suggests that claims based on Treaty rights, that is, claims based on rights derived from the Treaty, require a different legal response to claims based on other Treaty interests. The distinction between rights and interests is, therefore, a useful analytical tool for understanding the legal and political implications of the Crown's Treaty obligations.

---

73 *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667, 676 (CA) Cooke P. See also *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (CA); *McKean v Attorney-General* [2007] 3 NZLR 819 (HC).

74 See *Dunlea v Attorney-General* [2000] 3 NZLR 136, 161-162 (CA) Thomas J dissenting.

Where a Māori claim based on the Treaty can be properly described as a Treaty right, this represents a moral entitlement to legal or political protection of that right, and suggests a corresponding duty on the Crown, as a Treaty partner, to take positive steps to protect or vindicate that Treaty right. Other interests based on the Treaty may also necessitate legal or political engagement on the part of the Crown, but these other Treaty interests will not necessarily require the same recognition and protection afforded to Treaty rights. The difference between claims based on Treaty rights and other claims based on the Treaty can perhaps be summarised as the difference between an obligation on the Crown to recognise and consider Māori interests based on the Treaty (Treaty interests) and an obligation to actively protect those interests (Treaty rights).[75]

One example of where the application of the distinction between Treaty rights and other Treaty interests may prove useful lies in clarifying the constitutional significance of the Treaty. That the Treaty is of constitutional significance is now widely accepted: it represents the foundation of a new British colony,[76] and signifies the beginning of constitutional government in New Zealand. However, the precise nature of the Treaty's constitutional significance is still contested. Recognition that Treaty rights are a distinct category of Treaty interests may assist in clarifying the matter, as rights are legal constructs with constitutional implications. Rights carry both a high degree of moral and legal force,[77] and rights manifest themselves in the legal system in ways that might be described as 'constitutional' – limits on state power, priority over competing claims and substantive remedies in the event of a breach are all constitutional ideals. Treaty rights therefore have strong constitutional parallels with other fundamental rights, such as human rights.[78] As such, a claim based on a Treaty right has a constitutional element that

---

75 See Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim: WAI 8* (Government Printer, Wellington, 1985) 95.

76 Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Wellington, 1987) 55 citing William Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (1971 reprint, Caper, Wellington, 1890) 35.

77 "The Higher Judiciary and the Constitution", above n 49, 227.

78 This analogy has also been recognised by the Human Rights Commission: see generally Human Rights Commission *Human Rights and the Treaty of Waitangi: Te Mana i Waitangi* (Human Rights Commission, Wellington, 2003). See also Ivor Richardson "Rights Jurisprudence – Justice For All?" in Philip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 61, 75.

other Treaty claims may not have. Accordingly, other Treaty interests do not demand the same level of constitutional recognition from the legal system, and therefore will not require the same type of legal response.

Despite the important implications of the distinction between Treaty rights and other Treaty interests, it is a distinction that is not often observed.[79] This can mean that the rhetoric of Treaty rights is used in a way that disconnects it from the substance of such rights, resulting in confusion as to the intended effect of such rights in the legal system. A quintessential example is Matthew Palmer's analysis of Treaty provisions in legislation.[80] Palmer advocates that the political branch determine the content of legal Treaty obligations through political decision making, relying on the weighing and balancing of competing policy considerations to determine the Treaty's legal effect. In his analysis, Palmer refers to these Treaty obligations using the conglomerate phrase "rights and interests".[81] However, it is difficult to conceive of any room for Treaty rights in Palmer's approach. Palmer does not support a role for the Treaty that includes a limitation on the exercise of power by the political branch of government, and his argument that Treaty "rights and interests" should be weighed against competing policy considerations does not appear to afford any priority to Treaty rights. Palmer's approach cannot, therefore, be said to permit Treaty rights as part of the legal system's principled response to claims based on the Treaty. Rather, Palmer's talk of Treaty "rights and interests" in the same breath, whether or not intentional, collapses the distinction between the two concepts, and therefore downplays the importance of Treaty rights as a distinct category of Treaty interests.

---

79 The primary exception appears to be RP Boast *The Treaty of Waitangi: A Framework for Resource Management Law* (New Zealand Planning Council and Victoria University of Wellington, Wellington, 1989) [*Resource Management Law*]. Another possible exception is the work of Paul McHugh, but while McHugh recognises some of the unique jurisprudence associated with rights and applies this jurisprudence in the Treaty context, he does not directly draw a distinction between rights and other interests: See *The Māori Magna Carta*, above, n 33.

80 Palmer, above n 3.

81 Ibid, 210.

Rights are distinct from other interests, and it should be recognised that Treaty rights are distinct from other Treaty interests. If nothing else, the distinction between Treaty rights and other Treaty interests serves to underline that Māori claims based on the Treaty require something more sophisticated than a 'one size fits all' response from the Crown. Emphasising that the Crown needs to understand the differences between particular Treaty claims before it can offer a principled response to those claims is important, but the distinction can potentially achieve much more than this. Acknowledging that a Treaty claim is based on a Treaty right suggests the nature of a principled legal response to that claim: a response that recognises constitutional limits on the exercise of Crown authority, that prioritises Treaty rights over competing interests, and vindicates any breach of a Treaty right. The distinction between Treaty rights and other Treaty interests is therefore both fundamental in principle and useful in practice, and it is necessary that any attempt by the Crown to seriously address Māori claims based on the Treaty would include a conceptual framework that addresses the distinction between Treaty rights and other Treaty interests.

III TREATY RIGHTS IN THE TRIBUNAL

One institution that has recognised the need for the legal system to respond to claims based on Treaty rights as well as other Treaty interests is the Waitangi Tribunal. The Tribunal has, through a number of reports, identified specific instances of Māori rights based on the Treaty and recommended ways in which the legal system should respond to those rights. While the development of the Tribunal's Treaty rights jurisprudence has been incremental, it is now clear that a principled framework for understanding and applying Treaty rights is starting to emerge, and this framework offers significant guidance to the legal system on how it should respond to Māori claims based on Treaty rights.

In setting out the Tribunal's Treaty rights framework, this Part III draws principally on two Tribunal reports, both dealing with Māori claims to natural resources based on the Treaty: the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (the "*Muriwhenua Fishing Report*"),[82] which considered Māori claims to fishing resources, and *The Petroleum Report* (the "*Petroleum Report*"),[83] which considered Māori claims to oil and gas reserves. The Tribunal's Treaty rights framework recognises the distinct ways that the legal system responds to rights, and how those legal principles are best applied to claims of rights based on the Treaty. The Tribunal has determined that Treaty rights place a limit on the principled use of political power, take priority over competing interests and require a substantive remedy if breached. This approach is consistent with the recognition of rights in the legal system generally, but importantly the Tribunal has suggested that the Treaty itself governs the application of Treaty rights. The Tribunal has been careful to point out that it considers the Treaty to be the source of Treaty rights, and has distinguished between Treaty rights and Māori rights available at common law, including those rights available under the doctrine of aboriginal title. This

---

82 Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim: WAI 22* (Waitangi Tribunal, Wellington, 1988) [*Muriwhenua Fishing Report*].

83 Waitangi Tribunal *The Petroleum Report: WAI 796* (Legislation Direct, Wellington, 2003) [*The Petroleum Report*].

means that there is significant scope for the Tribunal's Treaty rights framework to influence the legal system in a broad range of areas that impact on the Treaty.

The Tribunal has a unique role within New Zealand's legal system, and this has consequences for the application of the Tribunal's Treaty rights framework. The Tribunal's jurisdiction is non-binding, meaning that its recommendations are not assimilated into the existing legal order as a matter of course. This Part III begins with an account of the role of the Tribunal to demonstrate that its jurisprudence is orthodox and based on sound legal principle. This general rule holds true for the Tribunal's articulation of Treaty rights, and this suggests that there are good grounds to justify the use of the Tribunal's Treaty rights framework to inform principled legal responses to Māori claims based on the Treaty. The Tribunal's Treaty rights framework does not have force of law in itself, however, and a degree of political will is required before the framework can be adopted by the legal system.

A The Role of the Tribunal

The Tribunal is a quasi-judicial institution with exclusive jurisdiction to inquire into "the meaning and effect of the Treaty of Waitangi".[84] This means that the Tribunal is uniquely placed within New Zealand's legal system to identify, and provide some impetus for responses to, Treaty-related issues. The Tribunal is empowered to scrutinise Crown acts or omissions for compliance with the "principles of the Treaty" wherever such an inquiry is relevant.[85] By contrast, the ordinary courts generally have no jurisdiction to consider the direct legal effect of the Treaty unless it receives legislative expression,[86] meaning that the courts have a much more limited role in interpreting and

84 Treaty of Waitangi Act 1975, s 5(2).

85 Treaty of Waitangi Act 1975, s 6.

86 *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308, 324 (PC) Viscount Simon LC for the Board.

applying the Treaty. The Tribunal has emphasised the distinction between its role and that of the courts:[87]

> The Tribunal is not a court required to determine an actionable wrong, quantify a particular loss, or award damages for property losses and injuries on legal lines. … Thus, the statutory direction to the Tribunal is in general terms. It may recommend that action be taken to compensate for or remove the prejudice, or to prevent other persons from being similarly affected in the future. This is not the language of the courts. 'Prejudice', in this context, would appear to embrace broad social and economic consequences.

The Tribunal's jurisdiction is, then, "quite separate from that exercised by the ordinary courts",[88] and the Tribunal's powers of inquiry in respect of the Treaty are quite broad.

The Tribunal's ability to enforce its determinations is more limited. In response to any well-founded claim, the Tribunal may recommend to the Crown that it take certain action to compensate for or remove any prejudice or to prevent other persons being similarly affected.[89] Any such recommendations may be specific or general.[90] Unlike the ordinary courts, however, the Tribunal generally cannot require that the Crown comply with its recommendations.[91] The Tribunal's jurisdiction is, therefore, non-binding.

The unique nature of its jurisdiction creates both opportunities and challenges for the Tribunal. Without conventional judicial restraints, the Tribunal is able to exercise considerable flexibility in determining the scope of its inquiries and in making recommendations. The Tribunal is, however, subject to significant informal restraints. The recommendatory status of the Tribunal's determinations means that it is important for the Tribunal to maintain a degree of mainstream acceptance if its recommendations

---

87 Waitangi Tribunal *Muriwhenua Land Report: WAI 45* (GP Publications, Wellington, 1997) 405-406.

88 Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report: WAI 953* (Legislation Direct, Wellington, 2002) 52.

89 Treaty of Waitangi Act 1975, s 6(3).

90 Treaty of Waitangi Act 1975, s 6(4).

91 For the limited exceptions to this general rule see Treaty of Waitangi Act 1975, s 8A(2).

are to be taken seriously by the political branch of government and the public.[92] This means that despite the Tribunal's quasi-judicial status its determinations are often principled and based on sound legal reasoning. This is borne out in the opinions of those who have been closely involved with the Tribunal's processes, with one commentator suggesting that the operations of the Tribunal are as "thorough and conscientious as anyone can reasonably expect".[93] Further, the courts have recognised that the Tribunal's jurisprudence is often based on robust legal principles by demonstrating a willingness to be influenced by that jurisprudence when deciding legal issues that touch on the Treaty.[94] Regardless of the robustness of the Tribunal's approach in making its recommendations, however, the non-binding status of the Tribunal's jurisdiction means that a degree of political will is required before those recommendations will be implemented and given legal effect.

The Tribunal's unique statutory jurisdiction roots its jurisprudence firmly in the orthodox school of Treaty jurisprudence. It is a little strange to bestow the title 'orthodox' on any jurisprudential framework relating to the Treaty of Waitangi,[95] as Māori claims to the legal recognition of their legitimate rights and interests, including those based on the Treaty, have always presented a challenge to "crusty legal methodology".[96] There are, however, a range of diverse views on the Treaty that can be fairly described as orthodox jurisprudence because those views acknowledge the place of the Treaty through the orthodox processes and institutions of New Zealand's common law system. A principal exponent of orthodox Treaty jurisprudence explains the process in these terms:[97]

---

92 E Taihakurei Durie and Gordon S Orr "The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence" (1990) 14 NZULR 62, 72.

93 Richard Boast "The Treaty of Waitangi and the Law" [1999] NZLJ 123, 123.

94 *Lands*, above n 11, 655 Cooke P.

95 The term appears to have been coined by PG McHugh: see "Legal Reasoning and the Treaty of Waitangi: Orthodox and Radical Approaches" in Graham Oddie and Roy W Perrett (eds) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 91, 91 ["Legal Reasoning and the Treaty of Waitangi"].

96 Ibid.

97 Ibid, above n 153, 99 [emphasis in the original].

> [There are] two fundamentally different processes of orthodox legal scholarship. These processes are (1) the *definition* of a Treaty claim or right and (2) the *translation* of that articulated Treaty right into the vocabulary of the legal paradigm. … The result of (2) can be accepted (happily or disgruntledly) or rejected. One way or another, it will certainly tell the claimant of the responsiveness of the legal system to his [or her] claim. In the context of Treaty claims the process of definition is clearly a task only Māori can perform, whilst lawyers must tackle the second step of translation.

The orthodox legal paradigm is therefore characterised by translating an entitlement claimed in respect of the Treaty, which may be expressed in any form, into the vocabulary of the existing legal system. The Treaty interest can then be recognised and assessed in accordance with the existing legal system. At its core, orthodox Treaty jurisprudence accepts that there is a place for the Treaty within the New Zealand legal system, but acknowledges a need to consider the application of other common law doctrines.[98] As it accepts the common law and its institutions as fundamental to the legal effect of the Treaty, there is an "essential Pākehā-ness" about the orthodox paradigm.[99]

The Tribunal's role is intimately tied to orthodox Treaty jurisprudence. As the primary institution charged with articulating and assessing Māori claims based on the Treaty, the Tribunal drives much of the translation of those claims into the rhetoric of New Zealand's legal system. Engaging in this process of translation involves much more than merely describing claims based on the Treaty in the language of the legal system; it entails a normative assessment of how the legal system *should* respond to Māori claims based on the Treaty. This is appropriate, as implicit in the recognition of a place for the Treaty in the common law system is acknowledgement that the common law is a dynamic force; it is subject to change and development and, it might be suggested, improvement. This is, of course, a fundamental quality of the common law generally, not just in respect of the Treaty.[100] But it does mean that the place of the Treaty, and the law that impacts

---

98 For a critical assessment of the orthodox legal paradigm see Paul Havemann "The "Pākehā Constitutional Revolution?" Five Perspectives on Māori Rights and Pākehā Duties" (1993) 1 Waikato LR 53, 71-76.

99 "Legal Reasoning and the Treaty of Waitangi", above n 95, 98.

100 Robin Cooke "Dynamics of the Common Law" in *Conference Papers: 9th Commonwealth Law Conference* (Commerce Clearing House New Zealand, Auckland, 1990) 1, 7.

on Māori rights and interests based on the Treaty, will continue to develop in step with the development of the common law. This is a crucial aspect of the orthodox Treaty jurisprudence:[101]

> Translation of a Treaty right is not definition of the right. There may be a wide gulf between the definition and translation of a particular Treaty right. Revelation of the gulf and the provision of strategies for narrowing it is one of the most valuable tasks performed by orthodox legal methodology.

The success of the Tribunal in fulfilling this role of encouraging the legal system to adapt to ever-evolving orthodox Treaty jurisprudence is evidenced by the Tribunal's jurisprudence appearing to have been largely assimilated by the orthodox legal paradigm.[102]

As an institution founded on orthodox Treaty jurisprudence, the Tribunal's work implicitly rejects the two principal alternative schools of Treaty jurisprudence:[103] the 'Prendergast paradigm',[104] so called because of an infamous statement of a former Chief Judge that the Treaty was a "simple nullity",[105] and which denies a place for the Treaty in New Zealand's contemporary legal system;[106] and critical Treaty paradigms, often

---

101 "Legal Reasoning and the Treaty of Waitangi", above n 95, 99.

102 See PG McHugh "The Constitutional Role of the Waitangi Tribunal" [1985] NZLJ 224.

103 This is not to deny that the Treaty can be analysed from a multiplicity of perspectives that include but extend beyond the three broad categories of jurisprudence noted in this paper. For discussion of some of the other options see Mark Bennett and Nicole Roughan "*Rebus Sic Stantibus* and the Treaty of Waitangi" (2006) 37 VUWLR 505.

104 Identified by Havemann, above n 98, 57-60.

105 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72, 78 (SC) Prendergast J for the Court. While Prendergast delivered the judgment and is the individual primarily associated with it, the judgment was a "cooperative effort" between Prendergast and Justice Christopher Richmond: Grant Morris "James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty During the Latter Half of the Nineteenth Century " (2004) 35 VUWLR 117, 121.

106 See Guy Chapman "The Treaty of Waitangi – Fertile Ground for Judicial (and Academic) Myth-Making" [1991] NZLJ 288; David Garrett "Resources: Treaty Rights and Private Property" in David Novitz and Bill Willmott (eds) *New Zealand in Crisis* (GP Publications Limited, Wellington, 1992) 101-107; Jeremy Pope "The Non-Treaty of Waitangi" [1971] NZLJ 193; David Round *Truth or Treaty? Commonsense Questions About the Treaty of Waitangi* (Canterbury University Press, Christchurch, 1998) [*Truth or Treaty?*].

involving critiques based on Marxist or traditional Māori legal principles,[107] which contend that New Zealand's Westminster system of government is incapable of providing principled legal recognition to the Treaty. That the Tribunal's work is inconsistent with the Prendergast paradigm is unsurprising given that it is impossible to separate the Treaty from the Tribunal's *raison d'être*, but also because of the Tribunal's conscious development and promotion of bicultural jurisprudence based on the Treaty, which is inconsistent with the "monocultural, Christianising and assimilationist" views inherent in the Prendergast paradigm. [108]

Paradigms rooted in critical Treaty jurisprudence offer a more serious challenge to the Tribunal's adherence to the orthodox Treaty paradigm. Critical Treaty jurisprudence directly questions the ability of New Zealand's common law legal system and its institutions, including the Tribunal, to provide adequate recognition of Māori rights based on the Treaty. The rangatiratanga paradigm emphasises rangatiratanga and traditional Māori philosophies as the source of Māori rights, rather than accepting the common law system's expression of such rights. On this view, the Treaty is not the source of Māori rights, but declaratory of rights that exist as a matter of ture Māori.[109] Marxist critiques focus on the tendency of the legal system to disempower Māori through the redefinition of claims made on the legal and political system. An example is the perceived redefinition of the Crown's Treaty obligations to Māori undertaken by various state institutions, including the Court of Appeal, so as not to burden the "economic, political and legal structures of the colonial state".[110] For an institution such as the Tribunal that seeks to recognise the Treaty within the confines of the existing legal order,

---

107 These divisions are articulated by Havemann, above n 98, 60-71. On the critical Treaty jurisprudence based on traditional Māori principles see especially Moana Jackson "The Treaty and the Word: The Colonization of Māori Philosophy" in Graham Oddie and Roy W Perrett (eds) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 1. On the critical Treaty jurisprudence based on Marxist ideals see especially Jane Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (Allen and Unwin, Wellington, 1990). For a critical assessment of the jurisprudential labels traditionally attached to scholars writing within critical Treaty paradigms see K Upston-Hooper "Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi" (1998) 28 VUWLR 683.

108 Havemann, above n 98, 60.

109 Moana Jackson "Commonwealth Law Conference" [1990] NZLJ 334, 334.

110 Jane Kelsey "Treaty Justice in the 1980s" in Paul Spoonley et al (eds) *Ngā Take: Ethnic Relations and Racism in Aotearoa/New Zealand* (The Dunmore Press, Palmerston North, 1991) 108, 110.

however, critical Treaty jurisprudence provides little guidance. Rather than being a jurisprudential framework for understanding the legal effect of the Treaty, critical Treaty jurisprudence more readily provides a Treaty-based framework for critiquing the legal system.

The Tribunal's emerging Treaty rights framework, which is discussed below, can be considered sound in principle partly because it fits within the two fundamental tenets of orthodox Treaty jurisprudence: recognition of a place for the Treaty in the modern legal system and respect of the strictures and institutions that form the backbone of that legal system. The Tribunal's recognition of Treaty interests that are rights is a straight-forward application of the process of definition and translation that is symptomatic of orthodox Treaty jurisprudence. It is also, of course, a required process under the Tribunal's statutory mandate. These unique aspects of the Tribunal's role mean that it is well placed to provide a principled and pragmatic account of rights based on the Treaty.

B Recognising Treaty Rights

From the beginning the Tribunal has recognised that claims based on the Treaty may involve issues of Treaty rights. In its first major report the Tribunal suggested that the Treaty might limit the Crown's "right to make laws", and characterised Māori interests as having a degree of priority over other interests.[111] From that starting point the Tribunal has developed particular jurisprudence in relation to Treaty rights, and a conceptual framework for understanding Treaty rights is starting to emerge. The first aspect of the Tribunal's emerging Treaty rights framework is recognition and application of Treaty rights as part of the legal system. This means that the legal system must be open to accepting Treaty rights as a limit on the legitimate use of political power, as taking priority over competing interests that are not rights, and as requiring a substantive remedy in the event of a breach.

---

111 Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim: WAI 6* (2 ed, Waitangi Tribunal, Wellington, 1989) 53 [*Motunui-Waitara Report*].

The *Muriwhenua Fishing Report* demonstrates the first two of these points. In the *Muriwhenua Fishing Report* the Tribunal determined that Treaty rights may limit the Crown's exercise of sovereign authority where that exercise of sovereignty is not consistent with the principles of the Treaty. The Tribunal also determined that Treaty rights should take priority over other competing interests so that Treaty rights are infringed to the minimum extent possible. In the *Petroleum Report* the Tribunal noted that a breach of a Treaty right places an obligation on the Crown, based on the principles of the Treaty, to provide a substantive remedy to vindicate the infringed right. Together, these two Tribunal reports provide significant guidance on the manifestation of Treaty rights in the legal system.

1 The Muriwhenua Fishing Report

The *Muriwhenua Fishing Report* is an early report of the Tribunal. It concerned a claim brought by iwi in the Muriwhenua region to fishing resources in that area,[112] but raised principles fundamental to Māori claims to natural resources nationwide. As a result, the *Muriwhenua Fishing Report* should be considered an expression of general principles as much as a specific claim to fisheries in the Muriwhenua region.

The impetus for the claim was a government policy to issue exclusive rights to commercial fishing in the form of transferable fishing quota as part of environmental efforts to mitigate the depletion of fishing stocks. As it was expected that large commercial fishing enterprises would receive most of the available quota, implementation of the policy would have significantly restricted Māori access to fisheries. The quota management policy therefore appeared to directly conflict with the principles of the Treaty, which expressly recognise and protect Māori fishing interests. The words of the English language version of the Treaty, for instance, explicitly

112 The Muriwhenua region is located in the north of New Zealand's North Island.

guarantee to Māori the ongoing use of fisheries.[113] The plain words of the Treaty did not indicate, however, the precise nature of those Māori fishing interests as guaranteed in the Treaty. Consequentially, the Treaty did not appear to offer any guidance to the Crown on how it should best respond to Māori claims to fisheries based on the Treaty.

The Tribunal sought to provide this guidance. The Tribunal's analysis began by examining the Crown's authority over fishing resources. The position that had largely prevailed prior to the *Muriwhenua Fishing Report* was complete Crown control. There is a possible justification for this complete Crown control in the Treaty, as it might be considered a consequence of the cession of "all the rights and powers of Sovereignty" to the Crown as expressed in Article I.[114] However, the Tribunal's analysis focused on the Crown's authority in terms of kawanatanga,[115] the basis for Crown authority under the Māori language version of the Treaty, and the relationship between kawanatanga and the Crown's obligation to respect rangatiratanga Māori. The Tribunal considered that, in accordance with the Crown's kawanatanga, it was not necessarily in breach of the principles of the Treaty for the Crown to regulate the use of fisheries.[116] Thus, the Tribunal explicitly recognised Crown authority over fishing resources as an important consideration in any discussion of Māori fishing interests based on the Treaty.

The Tribunal also recognised from the outset the modern reality that Māori interests in fishing form only one of a number of categories of interests in the exploitation of fishing resources, including non-Māori recreational and commercial fishing interests. The Tribunal determined that Māori interests in fishing resources that derive from the Treaty could not be considered in isolation from these competing, private interests in the same resource:[117]

---

113 Article II of the Treaty guarantees to Māori the "… full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties …": see Treaty of Waitangi Act 1975, 1st sch.

114 Treaty of Waitangi Act 1975, 1st sch.

115 'Kawanatanga' is the word used in the Māori language version of the Treaty to describe the political authority ceded by Māori to the Crown in Article I: see Treaty of Waitangi Act 1975, 1st sch.

116 *Muriwhenua Fishing Report*, above n 82, 227.

117 Ibid, 11.

> Rightly or wrongly, new circumstances now apply and a number of conflicting private interests, honestly obtained, must be weighed in the balance. It is out of keeping with the spirit of the Treaty … that the resolution of one injustice should not be seen to create another.

This passage illustrates the Tribunal's belief that the consideration of competing private interests is appropriate as a matter of principle. Rather than the existence of competing interests being recognised simply as a reality in modern New Zealand, the Tribunal's approach requires that the legitimate interests of all New Zealanders be taken into account before any articulation of Māori interests can be consistent with the principles of the Treaty. This approach is also consistent with recent common law developments, such as the process of 'rights integration' that recognises that indigenous rights necessarily exist within a much wider overlapping framework of rights and interests.[118] Accordingly, a principled framework for recognising Māori Treaty interests in fishing resources will also recognise other, competing interests.

Against this background of Crown control and a web of competing interests, the Tribunal explored the characteristics of Māori interests in fisheries derived from the Treaty. The Tribunal expressly characterised these interests as Treaty rights.[119] The Tribunal found some support for this characterisation in common law aboriginal title rights to fishing resources and a history of ersatz statutory recognition of Māori fishing rights,[120] but the basis for the Tribunal's characterisation of Māori fishing interests as Treaty rights appears to be the Article II guarantee by the Crown to Māori of rangatiratanga. Rangatiratanga "denotes the mana of Māori".[121] Recognition of mana Māori in respect of fishing resources in part entails recognition that mana Māori is of a

---

118 See PG McHugh "New Dawn to Cold Light: Courts and Common Law Aboriginal Rights" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (Lexis Nexis NZ, Wellington, 2006) 25, 60 ["New Dawn to Cold Light"].

119 *Muriwhenua Fishing Report*, above n 82, 238.

120 Ibid, 96.

121 Waitangi Tribunal *Ngawha Geothermal Resource Report: WAI 304* (Brooker and Friend, Wellington, 1993) 64.

different order to other interests in fishing.[122] Mana Māori in respect of natural resources generally implies that Māori not only have an interest in effective resource management, but an interest in effectively managing that resource.[123] Similar considerations apply in the specific instance of fishing resources. Rangatiratanga, as the expression of mana Māori in the Treaty, entails the protection of these uniquely Māori interests in fishing resources and informs the Crown's ability to legitimately exercise its sovereign authority over those resources:[124]

> To argue otherwise, to maintain that Māori have the same entitlements as everyone else, is another way of saying that the [T]reaty should be of no account, since the state should not discriminate whether or not a Treaty exists.

Respect for the Treaty therefore necessitates recognition of Treaty rights in certain contexts, including the management of fisheries.

In the *Muriwhenua Fishing Report* the Tribunal determined that effective recognition of Treaty rights to fishing resources manifests itself in two key ways. First, Treaty rights can act as a fetter on legitimate Crown action in certain circumstances, as the essence of kawanatanga is the exercise of Crown authority in a manner consistent with the Treaty.[125] As discussed above, kawanatanga affords the Crown general authority to make laws, but also obliges the Crown to take proper account of Māori rights, that is to take proper account of rangatiratanga. It follows that Māori Treaty rights, the content of rangatiratanga, may limit the legitimate exercise of Crown authority. Put bluntly, "[s]overeignty is limited by the rights reserved in [Article II]".[126] It may be overstating the case to suggest that "all discussion and analysis of the implications of the Treaty must begin from its starting-point as a constitutional

---

122 *Resource Management Law*, above n 79, 25-26.

123 Ibid, 8-9.

124 Ibid, 16.

125 The balance between Crown governance and protection of Māori interests has been described as the "general overarching principle" of the Treaty: Waitangi Tribunal *Ngai Tahu Sea Fisheries Report: WAI 27* (Brooker and Friend, Wellington, 1992) 269.

126 *Muriwhenua Fishing Report*, above n 82, 232.

constraint",[127] but the point is nonetheless a fundamental one. Crown action may be considered *ultra vires* the Treaty, and therefore illegitimate, if it interferes with Treaty rights.

This Treaty-based 'constitutional fetter' on the legitimate exercise of Crown authority may be difficult for some to accept, not least because of New Zealand's historical adherence to the doctrine of Parliamentary sovereignty.[128] Any objection along these lines, however, would be to misunderstand the Tribunal's approach. For a start, the Tribunal's non-binding mandate means it is difficult to construe the Tribunal's analysis as a serious threat to the sovereignty of Parliament. In fact, the non-binding nature of the Tribunal's recommendations means that the political branch has been able to accept the Tribunal's guidance on the principled exercise of sovereign power in respect of Treaty issues without the perception that Parliamentary sovereignty has been infringed.[129] The Tribunal's finding that Treaty rights may fetter legitimate Crown action should therefore be seen as guidance to the political branch on the appropriate exercise of sovereign power, rather than an attempt to undermine the basis of that sovereign power.

The Tribunal was also careful to point out that Crown action that interferes with Treaty rights may be justified in certain circumstances because of the Crown's overriding responsibility to manage natural resources in the public interest.[130] This responsibility is an integral part of Crown kawanatanga. Accordingly, there may be a 'presumption' that the Crown should not legislate contrary to Māori interests guaranteed as Treaty rights, but this presumption can be displaced in particular situations.[131] However, any Crown action

---

127 *Resource Management Law*, above n 79, 6.

128 Though there are signs that the tide is going out on the doctrine: see especially Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148 ["Sovereignty in the 21st Century"].

129 See Petra Butler "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUWLR 341, 352. Compare Michael Cullen "Waitangi Tribunal Report Disappointing" (8 March 2004) <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=19091> (last accessed 26 September 2008).

130 *Muriwhenua Fishing Report*, above n 82, 227.

131 The "presumption" terminology is borrowed from Richard Boast: see *Resource Management Law*, above n 79, 6.

that abrogates Treaty rights must be undertaken in a manner consistent with the principles of the Treaty, that is, consistent with the balance between kawanatanga and rangatiratanga. Only where Crown action is consistent with the principles of the Treaty will the abrogation of Treaty rights be justifiable. In the Tribunal's view, a clear example of where this would be the case in the management of fisheries is the Crown's right to make laws in the public interest for the ongoing conservation of fishing resources.[132] If such laws were applied in a manner consistent with the Treaty, then the Crown's 'conservation priority' might legitimately override any conflicting Treaty rights.

There are two related reasons that the Crown's conservation priority is a justified limitation on the Treaty right of Māori to use fishing resources. The first is that the Crown's right to govern in the interests of all New Zealanders is explicitly recognised in Article I of the Treaty.[133] It is, therefore, consistent with the principles of the Treaty that the Crown should have some over-arching power to regulate the exercise of Treaty rights by Māori so that "Treaty rights do not necessarily prevail in all contexts".[134] The second reason that justifies the Crown's conservation priority is that any Māori rights derived from the Treaty must themselves be exercised consistently with the principles of the Treaty. Treaty rights have their foundation in rangatiratanga, and a Treaty right to use fishing resources does not include a right to deplete or destroy those fishing resources.[135] The Crown is justified to intervene, therefore, where the exercise of Treaty rights is inconsistent with kaitiakitanga, or responsible management, in respect of the fishing resource.

The Tribunal's conservation priority may be a specific example of a broader principle that the Crown's authority to govern under the Treaty should not be unreasonably restricted by the Crown's Treaty obligations. The Court of Appeal has addressed the issue of the limits of Treaty rights to dictate Crown action in broad terms,

---

132 *Muriwhenua Fishing Report*, above n 82, 227.

133 Ibid, 232.

134 *Resource Management Law*, above n 79, 16.

135 *Muriwhenua Fishing Report*, above n 82, 231.

suggesting that the Crown should not be required to go to unreasonable lengths to fulfil its Treaty obligations.[136] Again, this is consistent with the Crown's over-arching authority to govern in the interests of all New Zealanders, which is confirmed by Article I of the Treaty.

The *Muriwhenua Fishing Report* therefore provides significant guidance on when and how Treaty rights suggest a limit on the exercise of political power. In general, Crown action should be consistent with the principles of the Treaty, as the Treaty is one source of the authority for that action. Crown action that may infringe Treaty rights places additional pressure on the political branch to exercise restraint as this would interfere with rangatiratanga, and the protection of rangatiratanga is a condition of the Crown's sovereign kawanatanga authority. Treaty rights do not restrict the political branch in all circumstances, however, as the principles of the Treaty may require Crown kawanatanga to override Māori rights based on rangatiratanga.

The second way that the Tribunal determined Māori rights to fishing resources should be recognised in the *Muriwhenua Fishing Report* was by affording those Māori interests a degree of priority over other, private interests. While the Tribunal characterised Māori Treaty interests in fishing resources as rights, the Tribunal appears to have characterised non-Treaty interests in fishing as "mere privileges".[137] This characterisation reflects the Tribunal's view that such interests are held at the discretion of the Crown, and can be legitimately restricted or revoked in accordance with the usual practices of government. Interests that are privileges can be effectively weighed and balanced against other interests as part of the democratic decision-making process; the priority that is characteristic of Treaty rights implies that such rights should sit above political horse-trading.[138] Accordingly, where Treaty interests constitute genuine rights held by Māori, they have a degree of priority over competing interests as a matter of

---

136 *Taiaroa v Minister of Justice* [1995] 1 NZLR 411, 418 (CA) Cooke P for the Court.

137 James Armstrong Douglas *The Crown, Māori and the Control of Natural Resources: Rights and Priorities under the Treaty of Waitangi* (LLB (Hons) Research Paper, Victoria University of Wellington, Wellington, 1990) 15.

138 *Resource Management Law*, above n 79, 16.

principle on the basis that these rights represent a claim of a different nature to a claim based on other interests.[139] Private interests in fisheries do not amount to entitlements to such resources, or interests in managing those resources.

While there is not necessarily any inconsistency between Treaty rights and other interests being exercised simultaneously, prudent management of fishing resources may mean that not all interests in exploiting the resource can be satisfied. In such circumstances, private interests may be restricted or revoked, but the priority afforded to Treaty rights means that such rights cannot be legitimately restricted or revoked in the same way as other interests. In other words, if regulation is needed to closely manage fishing resources, then non-Treaty interests should be restricted or regulated first. If possible, Treaty rights should not be restricted at all, as infringing against a Treaty right should be considered a last resort. The Tribunal has characterised the priority of Treaty rights over non-Treaty interests in the following fashion:[140]

> Nothing in the Treaty restricts the free exercise of fishing rights … Unless absolutely necessary, the Crown should not restrict the [T]reaty right fishing of the tribes to counter overfishing … even if it is necessary to restrict the general public fishing, commercial or otherwise.

Private interests may therefore be required to give way so that Māori can continue to exercise their Treaty rights.

In the *Muriwhenua Fishing Report* the Tribunal was able to draw on indigenous rights jurisprudence from other jurisdictions to inform its application of Treaty rights. The courts in both the United States and Canada in particular have articulated indigenous rights in a manner very similar to the Tribunal's discussion in the *Muriwhenua Fishing Report*. Both jurisdictions have recognised indigenous rights as restraining the exercise of state power in some circumstances, and both draw a distinction between indigenous

---

139 Nicola White and Andrew Ladley "Claims to Treaty and Other Rights: Exploring the Terms of Crown-Māori Engagement" (2005) 1(1) Policy Quarterly 3, 6-7.

140 *Muriwhenua Fishing Report*, above n 82, 232.

rights and competing interests, with indigenous rights taking priority. The resulting similarity in the approach of the Tribunal and that taken in the North American jurisdictions certainly demonstrates the influence of the latter on the development of the former. The willingness of the Tribunal to maintain consistency with international jurisprudence on indigenous rights may have been intended to ensure that the application of Treaty rights in the *Muriwhenua Fishing Report* has a sound basis in legal principle.

In the United States, the major contemporary case the Tribunal felt able to draw on was *United States v State of Washington*.[141] The *State of Washington* case arose as the result of claims by the Indians indigenous to the State of Washington that proposed State regulation would unlawfully restrict their rights to exploit inshore fishing resources. The Indians resisted the regulation on the grounds that they had legal rights to the resource established by various treaties entered into by representatives of the tribes and the United States government in the mid-nineteenth century.

The Court in *State of Washington* upheld the treaty rights claimed by the Indians, and established a number of principles around the nature and extent of those rights that bear a close resemblance to the Tribunal's Treaty rights framework. The Court found that Indian treaty rights were of a different character to other competing interests, being of a higher order, but such rights to the fishing resources were not unlimited. Rather, the court ruled that there may be legitimate policy objectives of the State government that are entitled to priority over the established treaty rights.[142] In the case of fishing resources, the court found that conservation of the fishing stock was such a priority. The State government was therefore entitled to restrict fishing to "the extent reasonable and necessary for the … perpetuation of the fisheries species".[143]

---

141 *United States v State of Washington* (1974) 384 F Supp 312, affirmed (1975) 520 F 2d 679 (9th Cir).
142 Ibid, 333.
143 Ibid.

The Court also drew a clear distinction between the treaty rights of the Indians and the mere interests or privileges of other users of the resource.[144] While the State was entitled to regulate the use of the resource by those holding a mere privilege to it, the State could not legislate to limit the Indians' tribal fishing rights in the same way.[145] In weighing and balancing the competing interests in the resource, the Court found that the interests of the indigenous Indians should be given priority.

In Canada the courts faced a similar factual scenario in *R v Sparrow*.[146] The defendant in *Sparrow*, a member of an indigenous tribe, was prosecuted for breaching fishing restrictions as set out in his tribe's food fishing licence, and attempted to defend this charge by relying on his common law aboriginal rights to fish. This defence was upheld, and the Court articulated a number of principles similar to those relied on by the Tribunal in the *Muriwhenua Fishing Report*. The Court held that extinguishment or restriction of the common law aboriginal right to fish would be unconstitutional in the absence of a satisfactory justification, such as management and conservation of a natural resource.[147] However, the burden of managing the resource in this way should, where possible, fall only on non-indigenous users of the resource who did not have rights, giving indigenous users top priority.[148]

The parallels between the Tribunal's Treaty rights framework and the approach taken by the United States and Canadian courts are evident. Each jurisdiction has acknowledged the existence of indigenous rights to natural resources that provide a constitutional limitation on the exercise of state power in some circumstances. Each jurisdiction has also acknowledged that interference with indigenous rights may be justified if the interference is in the public interest and reasonable given the existence of a right. Conservation and other resource management concerns are given as examples of an appropriate justification in each case, suggesting that each jurisdiction is seeking to

---

144 Ibid, 332.

145 Ibid, 342.

146 *R v Sparrow* (1986) 36 DLR (4th) 247, affirmed [1990] 1 SCR 1075.

147 *R v Sparrow* [1990] 1 SCR 1075, 1113-1114 (SCC) Dickson CJ and La Forest J for the Court.

148 Ibid, 1115-1116.

address similar concerns. Finally, each jurisdiction has adopted a distinction between the rights or priorities of indigenous inhabitants and the interests or privileges of other resource users. Government regulation cannot run roughshod over indigenous rights, but must seek to regulate mere interests or privileges to that resource first. Together these similarities suggest that the Tribunal's Treaty rights framework is consistent with international approaches to indigenous rights.

It is, however, important to recognise potential differences as well as consistencies between the Tribunal's approach and those of the North American courts. One difference is that the Tribunal's analysis and the approach of the North American courts have been developed and articulated in different constitutional contexts and therefore must take into account different constitutional principles. In both the *State of Washington* and *Sparrow* decisions, the indigenous right relied on had a measure of constitutional protection that no doubt influenced the respective courts' decisions. In the United States, treaties with indigenous peoples are considered supreme law.[149] In Canada, common law aboriginal rights are protected by the Constitution Act 1982, which recognises and protects such rights.[150] There is no similar constitutional protection for indigenous rights in New Zealand, whether or not those rights are based on the Treaty.

This difference does not undermine the Tribunal's Treaty rights framework, but rather serves to highlight that its analysis is based on sound legal principle. To an extent, it is correct to suggest that it is the constitutional protection afforded to indigenous treaty rights in the United States and Canada that permits the courts in those jurisdictions to recognise that some indigenous claims should be recognised as rights.[151] However, as a "creature of Parliament's social conscience" on indigenous issues,[152] it is appropriate for the Tribunal to focus on the underlying values that suggest indigenous rights should be recognised and protected, rather than the differences in the formal constitutional

---

149 *State of Washington*, above n 141, 332.

150 Constitution Act 1982 (Canada), section 35(1).

151 See RP Boast "Treaty Rights or Aboriginal Rights?" [1990] NZLJ 31, 33 ["Treaty Rights or Aboriginal Rights?"].

152 PG McHugh "The Constitutional Role of the Waitangi Tribunal" [1985] NZLJ 224, 224.

arrangements of New Zealand and the North American jurisdictions. For example, the importance accorded to indigenous rights over competing interests in the United States where there is also the entrenched Fourteenth Amendment right to equality suggests an important lesson of principle in New Zealand. The position in the United States, which appears to be echoed by the Tribunal, is that such indigenous or Treaty rights are on a different plane to the generally accepted rights of equality and freedom from discrimination.[153] The Tribunal's analysis that certain Treaty interests should be treated as Treaty rights is sound in principle regardless of whether Treaty claims currently receive constitutional protection in New Zealand.

The Tribunal's Treaty rights analysis in the *Muriwhenua Fishing Report* expands on two key premises to provide the beginnings of a framework for understanding and applying Treaty rights. Those two key premises are that claims based on Treaty rights require the legal system to recognise limits on the principled exercise of Crown authority, and priority for Treaty rights over competing interests. The resulting framework stemming from these premises is that Crown authority is in part based on the Treaty, and should be exercised in a manner consistent with Treaty principles. Treaty rights will not restrict Crown action where such action is consistent with Treaty principles, but the principles of the Treaty require that Treaty rights are interfered with only where absolutely necessary and in accordance with Treaty principles. This means that non-Treaty interests may be required to give way to Treaty rights. The fundamentals of this model have been affirmed and developed in a number of subsequent Tribunal reports,[154] and can be summarised in the following terms:[155]

> There is a hierarchy of interests in natural resources based on the twin concepts of kawanatanga and rangatiratanga. First in the hierarchy comes the Crown's obligation or duty to control or manage those resources in the interest of conservation and in the wider

153 *Resource Management Law*, above n 79, 16.

154 In addition to the various Waitangi Tribunal reports already referred to, see Waitangi Tribunal *Report on the Allocation of Radio Frequencies: WAI 26 and WAI 150* (Brooker and Friend, Wellington, 1990) [*Radio Frequencies Report*]; Waitangi Tribunal *Turangi Township Report: WAI 84* (Brookers, Wellington, 1995); Waitangi Tribunal *The Whanganui River Report: WAI 167* (GP Publications, Wellington, 1999).

155 *Radio Frequencies Report*, above n 154, 42.

> public interest. Secondly comes the tribal interest in the resource. Then follows those who have commercial or recreational interests in the resource.

The Tribunal's framework therefore sets out a hierarchy of overlapping interests – private interests, Treaty rights, and the Crown's rights and obligations of responsible government – that express a balance between kawanatanga and rangatiratanga and thereby give effect to the principles of the Treaty within the legal system.

2 Vindicating Treaty rights – the "Treaty Interest"

A significant recent development in the Tribunal's Treaty rights framework is the articulation of the Treaty interest concept in the *Petroleum Report* (the "Treaty Interest"). The Treaty Interest supplements the Tribunal's framework by providing an effective remedy for breach of a Treaty right. In short, the Treaty Interest ensures that abrogated Treaty rights can be vindicated effectively.

The *Petroleum Report* involved Māori claims to petroleum resources specifically in the Taranaki basin.[156] However, the Tribunal addressed the issue of generic claims by Māori to any petroleum resources in New Zealand. Accordingly, much like its approach in the *Muriwhenua Fishing Report*, the Tribunal examined the relevant issues on a generic basis with the intention that the principles discussed would be of general application. The claim in the *Petroleum Report* arose in response to the proposed Crown sale of interests in the Kupe oil field. The Crown receives substantial royalties on oil and gas extracted from New Zealand petroleum reserves, an industry estimated to be worth in excess of $1 billion annually.[157] All non-Crown interests in New Zealand's petroleum resources were extinguished by statute in 1937,[158] though usual Crown practice was to compensate land owners financially for any expropriation of their property. Māori land

---

156 The principal claimants were Ngā Hapū ō Ngā Ruahine of Taranaki. A subsequent claim was also lodged by Ngati Kahungunu ki Wairarapa.

157 See Statistics New Zealand *Energy Monetary Stock Account 1987-2001* <http://www.stats.govt.nz/NR/rdonlyres/F20168F0-7DF3-4811-83C8-42EFBBCA66A3/0/EnergyMonetaryStockAccount.pdf> (last accessed 26 September 2008).

158 Petroleum Act 1937, s 3(1).

owners, however, suffered disproportionately from the expropriation of petroleum resources on two grounds. The first was that Māori land owners did not often receive the same compensation offered to other land owners. The second was that the extinguishment of Māori interests in petroleum appeared to be contrary to the guarantee of Māori property rights in Article II of the Treaty.[159] The claimants in the *Petroleum Report* sought recognition of and compensation for the loss of their property rights to naturally occurring petroleum resources, and saw the alienation of the Crown's interests in oil and gas reserves as frustrating any opportunity for recognition and compensation.

In determining that there had indeed been a breach of Māori property rights guaranteed by the Treaty, the Tribunal recommended a remedy with a novel element. The Tribunal suggested that the breach of Māori property rights created a Treaty Interest, which was said to arise:[160]

> … whenever legal rights are lost by means that are inconsistent with Treaty principles. [A Treaty Interest] carries with it a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right. Perhaps most importantly, the [Treaty Interest] creates an entitlement to a remedy for that loss additional to any other entitlement to redress.

The Tribunal has phrased the Treaty Interest in terms of a new "right to a remedy", but in substance the Treaty Interest is a mechanism to vindicate an existing Treaty right that has been breached. The implicit element of vindication is borne out by the strong moral language used by the Tribunal that suggests that the Treaty Interest is only applicable in cases where Treaty rights are breached: the reference to a *wrongful* loss suggests a normative assessment that is appropriate in cases of rights. The Treaty Interest therefore provides a mechanism to vindicate Treaty rights that have been breached.

---

159 Article II of the Treaty guarantees to Māori the "… full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties …": see Treaty of Waitangi Act 1975, 1st sch.

160 *The Petroleum Report*, above n 83, 65. For general discussion of the Waitangi Tribunal's Treaty Interest as articulated in the *Petroleum Report* see Huia Woods *The Treaty Interest: A New Concept in Indigenous Rights?* (Working Paper, University of Waikato, 2006).

The Tribunal has expressly stated that the Treaty Interest applies in addition to other available remedies. This suggests that the basis for the Treaty Interest can be found as much in the Treaty as in reliance on other legal principles. The Treaty Interest vindicates the infringement of a Treaty right even where other rights have been infringed and may require their own remedy, including other Treaty rights.[161] The Tribunal's reference to an obligation on the Crown to negotiate redress should not be seen as diminishing the requirement to provide vindication for a breach of a Treaty right on the basis that any remedy is optional for the Crown. Negotiation is an integral part of the process of vindicating Māori rights that are infringed by the Crown as the process of negotiation empowers Māori to ensure ongoing respect of Māori rights. The Crown cannot be "miserly" in its attempts to resolve Treaty claims through negotiation,[162] as only generous reparations can restore the honour of the Crown and repair the relationship with Māori.[163] Further, the language of negotiation is the language of the Treaty settlement process where the Crown and iwi negotiate redress for breaches of the Treaty,[164] and so should not be seen as an opportunity for the Crown to avoid engaging on issues of Treaty rights.

The Tribunal's 'Treaty Interest' terminology used in the *Petroleum Report* to describe the requirement to vindicate an infringed Treaty right should not detract from the distinction between Treaty rights and other Treaty interests advocated in this paper. The focus of the inquiry should be on the substance of the Tribunal's Treaty Interest, rather than its label. Far from being a Treaty interest that is not a Treaty right, the Treaty Interest builds on the Tribunal's Treaty rights framework. The Treaty Interest demonstrates that Treaty rights require a substantive remedy to vindicate Treaty rights if the Crown breaches those rights. Breach of a Treaty right is in itself a wrong that the

---

161 *The Petroleum Report*, above n 83, 68.

162 Ibid, 66. The Waitangi Tribunal also noted that Māori expectations of the negotiation process should not be extravagant.

163 Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi: WAI 143* (GP Publications, Wellington 1996) 314.

164 See Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana kit e Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2 ed, Office of Treaty Settlements, Wellington, 2002).

legal system must respond to independently of any financial or other loss associated with that breach.

Accordingly, the Tribunal's Treaty Interest complements the analysis in the *Muriwhenua Fishing Report* so that the Tribunal's Treaty rights framework accounts for all three ways that Treaty rights can expect to impact on the legal system. Treaty rights create a limit on the legitimate use of state power by requiring state action to be consistent with the principles of the Treaty, take priority over competing interests, and require vindication in the event of a breach. The Tribunal's framework further indicates that these three elements have a basis in the Treaty – it is implicit in the principles of the Treaty that the legal system should respond in these ways. As a result of the Tribunal's framework, the legal system must respond to Treaty rights on their own terms, that is be consistent with the principles of the Treaty, if it is to take full account of Treaty rights.

C The Source of Treaty Rights

The Tribunal's jurisprudence also considers the scope of Treaty rights. The Tribunal's analysis of the content and application of Treaty rights is premised on the Treaty itself being a direct source of Treaty rights. This view has both judicial and academic support, and fits neatly with the developing role of the Treaty within contemporary New Zealand society as a bicultural tool that can bring together the principles of both indigenous and common law legal traditions. This means that there is considerable scope for the ongoing development and application of Treaty rights, as those rights are not limited in the ways that common law aboriginal rights are limited. The issue is, in some respects, a contentious one, and confusion regarding the extent of the overlap between common law rights and Treaty rights is an issue that New Zealand law makers are currently struggling with. The most well-known example of this confusion is section 88(2) of the Fisheries Act 1983, which provides: "Nothing in this Act shall affect any Māori fishing rights". Neither the statutory provision itself nor subsequent judicial

interpretation in *Te Weehi v Regional Fisheries Officer*[165] clarify whether section 88(2) is intended to protect common law rights or Treaty rights, or indeed both.[166] The Tribunal's view that the Treaty is a source of rights goes some way to resolving this confusion.

The Tribunal's view that the Treaty is itself a source of Māori rights represents a departure from an influential view, particularly in some academic circles, that the Treaty is merely declaratory of existing common law rights. The extensive overlap between Treaty rights and aboriginal title rights is often cited as evidence that the two areas of law are coextensive. The Tribunal's view that the Treaty is a direct source of Māori rights does not, however, deny that the Treaty is, in part, premised on common law principles. If this were not the case then the Treaty would not be a legally coherent document, and the legal system would struggle to recognise Treaty rights at all. It is not surprising then that there is some overlap between Treaty rights and common law rights, and the application of each certainly informs the other. The Tribunal's view is simply that the Treaty rights can extend beyond existing common law rights, so that Treaty rights may apply where those common law rights do not. Viewing the Treaty as a source of rights is therefore an integral component of the Tribunal's Treaty rights framework as it signals that the scope for recognition of Treaty rights within the legal system is not limited by common law doctrines. Any limits on the scope of Treaty rights can only be those expressed or implied by the Treaty itself.

1 The Treaty as a source of rights

The Tribunal has consciously taken the view that the Treaty is itself a direct source of Māori rights. In doing so the Tribunal divorced Treaty rights from common law doctrines of indigenous rights, and in particular the doctrine of aboriginal or native

---

165 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

166 "Treaty Rights or Aboriginal Rights?", above n 151, 34. For contrasting views on the issue see *Huakina Development Trust*, above n 12, 49-51; FM Brookfield "Māori Fishing Rights and the Fisheries Act 1983: *Te Weehi's* case" [1987] Recent Law 63.

title. There is support for this distinction between Treaty rights and aboriginal title rights in both case law on the Treaty and in academic analysis. The scope of application of Treaty rights under the Tribunal's Treaty rights framework is therefore significant: Treaty rights are not limited in the ways that the aboriginal title doctrine is limited. As a result the Treaty can be seen as a symbol of New Zealand's commitment to biculturalism and can proactively respond to Māori claims based on rights in a way that a rigid common law doctrine cannot.

In the *Muriwhenua Fishing Report* the Tribunal was careful to draw a distinction between the doctrine of aboriginal title and rights derived from the Treaty. The Tribunal acknowledged that there is some overlap between Treaty rights and aboriginal title rights in some circumstances, but determined that the Treaty itself is a direct source of Māori rights:[167]

> While … there is some concurrence between the doctrine [of aboriginal title] and the Treaty principle of protecting Māori interests, the one is not determinative of the other, and both have an aura of their own. … It would be more correct to say, in our view, that the Treaty supplements the doctrine, while the doctrine upholds a right where the Treaty has no application.

The Tribunal has also clarified that it considers Treaty rights to be distinct from common law rights generally, as "[t]he Treaty [is] more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development".[168] On this approach, Treaty rights are something more than common law rights; Treaty rights have a distinct sphere of influence, even if there is some crossover. The Treaty is therefore an important source of, and not merely declaratory of, Māori rights.

The view that the Treaty itself is a source of rights has support on four grounds. There is long-standing judicial support for the view that the Treaty is a source of rights,

---

167 *Muriwhenua Fishing Report*, above n 82, 200.

168 *Motunui-Waitara Report*, above n 111, 52.

and increasing academic recognition that application of Treaty rights has extended beyond the scope of the aboriginal title doctrine. The Treaty also provides a bicultural basis for the assessment of Māori rights, which allows recognition of the subtleties of Māori interests in a way that a common law-based doctrine cannot. Finally, even if Treaty rights were considered to be coextensive with the aboriginal title doctrine, there is an inherent symbolism in the Treaty which gives greater impetus to Treaty rights.

There is a long history of case law supporting the view that the Treaty is itself a source of rights. One of the first appears to be the *Kauwaeranga* judgment, where the Treaty was described as containing "a clear and intelligible description of rights, which were to be reciprocally ceded, acknowledged, and confirmed".[169] Further, the Tribunal's distinction between Treaty rights and aboriginal title rights has since been explicitly endorsed in the Court of Appeal.[170] In light of this judicial support for the view that the Treaty is a source of Māori rights, recent judgments that align the Treaty with aboriginal title are perhaps better understood as suggesting that each area of the law informs the other, rather than the two being coextensive.[171]

Academic analysis of Treaty rights and aboriginal title rights also supports a clear distinction between the two. Treaty rights are increasingly being applied where aboriginal title rights are unavailable. Accordingly, there is a clear distinction between the two sets of rights because the doctrine of aboriginal title is limited in a number of ways that rights derived from the Treaty are not:[172]

> What exactly are the "aboriginal" rights [the doctrine] protects? The answer appears to be that it relates only to property which was in some sense "aboriginally" used. It is hard to conceive of an aboriginal title claim to oil and natural gas … , to non-traditionally used minerals, or to interests such as the preservation of the Māori language. Nor are Courts able to question the motives for Crown extinguishment…

---

169 Reprinted in A Frame "*Kauwaeranga* Judgment" (1984) 14 VUWLR 227, 244.

170 *Lands*, above n 11, 715 Bisson J.

171 See *Te Runanganui o te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 27 (CA) Cooke P for the Court.

172 "Treaty Rights or Aboriginal Rights", above n 151, 33.

The doctrine of aboriginal title is a rigid doctrine and only recognises a limited set of indigenous interests. The Treaty, by contrast, has been used to establish Māori claims in circumstances where the doctrine of aboriginal title does not apply: Treaty rights have, for example, been found to apply to petroleum resources,[173] and te reo Māori.[174]

The Treaty also provides recognition for dynamic and evolving indigenous interests that the aboriginal title doctrine does not. The rationale underlying the aboriginal title doctrine presupposes existing customary practices and traditions, and provides a mechanism for the common law to recognise these continuing practices and traditions. This restricts the application of the doctrine of aboriginal title to being a mechanism for maintaining the status quo. Treaty rights are not restricted in this way, and the Tribunal and the courts have continually emphasised that the Treaty is a basis for future development, not a tool for the maintenance of the status quo.[175] Further, the aboriginal title doctrine is a blunt instrument which may struggle to give effect to the nuances of indigenous interests. The Treaty, by contrast, provides an opportunity for the ongoing development of Māori rights and interests in a developing society. Treaty rights present an opportunity for Māori rights to be considered on their own terms, rather than being presented as a square peg to be forced into the round hole of rigid common law doctrines.

Another key difference between the aboriginal title doctrine and Treaty rights is the symbolic value of the Treaty as a source of rights. The aboriginal title doctrine is a construct of the common law, and does not necessarily provide a basis for Māori to engage effectively with the legal system. The Treaty, on the other hand, provides the opportunity for much more dialogue between the two legal approaches, that is the

---

173 See *The Petroleum Report*, above n 83.

174 See Waitangi Tribunal *Report of the Waitangi Tribunal on the Te Reo Māori Claim: WAI 11* (Waitangi Tribunal, Wellington, 1989).

175 See Waitangi Tribunal *The Fisheries Settlement Report: WAI 307* (Waitangi Tribunal, Wellington, 1992); *Ngai Tahu Māori Trust Board v Director-General* [1995] 3 NZLR 553, 560 (CA) Cooke P for the Court.

indigenous and Anglo-American traditions, and may result in more bicultural outcomes:[176]

> The Treaty of Waitangi, once recognised and given effect to, allows for a truly bicultural approach to the law to develop in a way that the aboriginal title rule – which is but a rule of common law itself – never could do. The Treaty has value as a symbol: we give meaning to it, and it can give meaning to us. The symbolic value of the aboriginal title rule, by contrast, is nil.

Even if aboriginal title rights and Treaty rights are coextensive, and the substance of any particular Treaty right can receive protection and recognition through the common law, the fact remains that New Zealand has taken a path that recognises the fundamental importance of the Treaty. Having taken that path, recognition of indigenous rights through the Treaty imbues those rights with a symbolic importance that reliance on common law aboriginal title cannot provide.[177] People live by symbols,[178] and the Treaty is a potent symbol of Māori rights in New Zealand in a way that aboriginal title rights cannot be.[179]

Viewing the Treaty as a source of Māori rights therefore makes up an important component of the Tribunal's Treaty rights framework. In addition to elaborating on the content of Treaty rights, the Tribunal's framework indicates that there is significant scope to develop and apply Treaty rights to emerging issues and challenges. Treaty rights are not limited in the ways that common law recognition of Māori rights is limited; rather, Treaty rights may potentially apply wherever the principles of the Treaty are relevant, and where claims based on those principles can properly be described as Treaty rights.

---

176 "Treaty Rights or Aboriginal Rights", above n 151, 36.

177 Hannah Northover *Legislative Reference to the Treaty of Waitangi* (LLB (Hons) Research Paper, Victoria University of Wellington, 2005) 19.

178 Oliver Wendell Holmes *Collected Legal Papers* (Harcourt, Brace & Co, New York, 1920) 270.

179 Interestingly, the Treaty was omitted from a recent discussion of important New Zealand symbols by a leading modern jurist, though Waitangi Day was mentioned briefly: see Geoffrey Palmer, Law Commission President "The Development and Significance of Dominion Status" (Dominion Status Symposium, Wellington, 26 September 2007) <http://www.mch.govt.nz/dominion/palmer.html> (last accessed 26 September 2008).

2 The declaratory view of Treaty rights

The Tribunal's position that the Treaty is a source of Māori rights is a move away from the view that the Treaty is merely declaratory of existing common law rights. Academically this declaratory view of the Treaty has been championed by Paul McHugh.[180] McHugh relies on the considerable overlap between Treaty rights and recent developments in common law aboriginal title rights to argue that the Treaty simply places a gloss on rights that would have been recognised by the common law in any case. There is also some historic case law suggesting that the Treaty did not create any new legal entitlements. Despite some overlap between Treaty rights and aboriginal title rights, the Tribunal's Treaty rights framework clearly extends Treaty rights beyond the scope of aboriginal title rights, and accordingly Treaty rights under the Tribunal's conceptual framework must be viewed on their own terms and separately of the common law doctrine of aboriginal title.

The idea that the Treaty is simply declaratory of Māori rights recognised as part of the common law appears to have influenced early legal attitudes to the Treaty in New Zealand. As early as 1847 the declaratory view of the Treaty was acknowledged by the New Zealand courts. In *R v Symonds*, in the context of affirming Māori property rights and the Crown's right of pre-emption as set out in the Treaty, the Court found that the Treaty did not assert any new legal rights.[181] Rather, the view taken was that any rights expressed in the Treaty were already recognised in the common law doctrine of aboriginal title:[182]

> Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives in this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it

180 See PG McHugh "The Legal Basis for Māori Claims Against the Crown" (1988) 18 VUWLR 1 ["The Legal Basis for Māori Claims Against the Crown"]; PG McHugh "What a Difference a Treaty Makes – The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law" (2004) 15 PLR 87 ["What a Difference a Treaty Makes"].

181 *R v Symonds* (1847) NZPCC 387, 390 (SC) Chapman J.

182 Ibid.

> cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi … does not assert either in doctrine or practice any thing new and unsettled.

Notwithstanding the age of this precedent it is often relied on as evidence for the proposition that the legal effect of the Treaty is largely coextensive with the common law doctrine of aboriginal title.[183]

It is worth noting that despite early judicial recognition the doctrine of aboriginal title, much like the Treaty, appears to have been largely ignored in New Zealand for most of the twentieth century. Some suggest *Te Weehi* is the first modern case to be decided on the basis of the doctrine,[184] but whether this is true or not aboriginal rights were not seriously acknowledged again in New Zealand courts until revived by the academic work of Paul McHugh in the 1980s.[185] As a result of this academic work the courts have again recognised the doctrine as an important part of the law in New Zealand.[186] The revival of aboriginal title rights in New Zealand occurred in the context of increasing recognition of the Treaty, and important developments in aboriginal rights jurisprudence overseas. The potential for Treaty jurisprudence and Māori rights at common law to influence and inform each other has been recognised in the Court of Appeal.[187] McHugh has relied on this potential for overlap between the Treaty and aboriginal title, and in particular a pronounced "parallelism" he has observed between the more recent development of Treaty principles with movements in aboriginal rights jurisprudence overseas, as evidence supporting that the Treaty is declaratory of, or perhaps simply a gloss on,

---

183 See "What a Difference a Treaty Makes", above n 180, 93.

184 "The Legal Basis for Māori Claims Against the Crown", above n 180, 2.

185 See especially PG McHugh "Aboriginal Title in New Zealand Courts" (1984) 2 Cant LR 235 ["Aboriginal Title in New Zealand Courts"]; PG McHugh "The Legal Status of Māori Fishing Rights in Tidal Waters" (1984) 14 VUWLR 247.

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

187 See *Te Runanganui o te Ika Whenua Inc Society*, above n 171.

aboriginal title rights.[188] Other jurists share similar views: Māori Land Court Chief Judge Joe Williams perhaps expressed the view most starkly when he suggested that the Treaty "did not create any rights, it simply recognised them".[189] The declaratory view of the Treaty therefore carries significant influence in academic circles.

Support for the declaratory view of the Treaty might also be found in the express terms of the Treaty, as the English language version of the Treaty clearly "assimilated existing common law doctrines or principles".[190] In particular, the Article II guarantee of exclusive possession of lands, forests and fisheries tracks aspects of aboriginal title property rights closely,[191] and the Article III promise to extend to tangata Māori all the rights and privileges of British subjects confirmed the entitlements that extended to all Māori as a result of the expansion of British sovereignty to New Zealand.[192] That the Treaty assimilated these aspects of the common law is important as the Treaty's consistency with common law principles gives it a "legal coherence" that is an important reason why the legal and political relevance of the Treaty continues today.[193] On the Tribunal's view, however, it would be incorrect to assume that the ways in which the Treaty is declaratory of existing legal doctrines is the full extent of its legal effect. At the very least the Treaty adds another dimension to existing legal rights by guaranteeing ongoing Crown recognition of such rights.[194] The Tribunal's view that the Treaty is itself a source of rights does not deny that the Treaty is declaratory of certain aspects of the common law, but the view taken by the Tribunal goes further as it sees the Treaty as a source of rights that can extend further than recognised common law doctrines.

This extended reach of Treaty rights over common law indigenous rights marks the true point of departure of the Tribunal's framework from the declaratory view of

---

188 "What a Difference a Treaty Makes", above n 180, 95.

189 Joe Williams "Chapman is Wrong" [1991] NZLJ 373, 373.

190 *Constitutional and Administrative Law*, above n 72, 52.

191 Ibid, 52-53.

192 Ibid, 53.

193 See PA Joseph "The Treaty of Waitangi: A Text for the Performance of a Nation" (2004) 4 OUCLJ 1.

194 "Separation of Powers", above n 2, 209.

Treaty rights. If Treaty rights are conceptualised as nothing more than aboriginal title rights, then strict common law limitations are placed on the ambit of those Treaty rights. Aboriginal rights are, by definition, limited to those customary rights that are recognised by the common law as continuing after the cession of sovereignty.[195] On the declaratory view, Treaty rights are similarly limited to recognised categories of aboriginal rights. Williams' view is that Treaty rights are constituted by two limited categories of rights: traditional property rights and rights of internal government.[196] McHugh has identified three separate categories of aboriginal rights, which he describes as jurisdictional, procedural and proprietary rights.[197] McHugh's jurisdictional and proprietary rights conform roughly with Williams' internal government and property rights respectively. The additional category of procedural rights relates to the rights of indigenous peoples to participate effectively in decision-making processes that affect their interests,[198] and seems to be recognised to a degree in New Zealand.[199] However these categories are defined, they are relatively narrow when compared with the open-ended scope attached to the Tribunal's Treaty rights framework. The Tribunal's framework is therefore quite distinct conceptually from common law doctrines of indigenous rights.

D An Emerging Conceptual Framework

Several themes emerge from the Tribunal's discussion of Treaty rights in the *Muriwhenua Fishing Report* and the *Petroleum Report*. The most pervasive theme is perhaps that there is room within the text and the principles of the Treaty for a coherent framework for understanding Treaty rights. Treaty rights stem directly from the Treaty, and the content and application of Treaty rights is therefore determined, at least in part, by the interpretation of Treaty principles. Consistency with the principles of the Treaty is therefore an integral aspect of the Tribunal's framework of Treaty rights.

---

195 "Aboriginal Title in New Zealand Courts", above n 185, 235.

196 Williams, above n 187, 373.

197 "New Dawn to Cold Light", above n 118, 39.

198 Ibid, 49.

199 See *Huakina Development Trust*, above n 12.

The Tribunal's framework is also consistent with New Zealand jurisprudence on the legal effect of fundamental rights. The Tribunal has carefully articulated the legal effect of Treaty rights as being similar to the effect of other legal rights. Accordingly, Treaty rights suggest a limit on the principled use of political power, take priority over competing interests that are not rights, and require a substantive remedy in the event of a breach. These consequences for the recognition of Treaty rights are therefore based as much on general legal principles as the principles of the Treaty. Hence, the Tribunal's articulation of Treaty rights fits neatly within the parameters of orthodox Treaty jurisprudence.

The Tribunal's Treaty rights framework also provides that the Treaty is itself a direct source of rights. This means that Treaty rights do not rely on the recognition of other rights, such as aboriginal title rights available at common law, to warrant consideration. As a result, Treaty rights potentially have very wide application. The Tribunal has suggested that Treaty rights can apply in areas as diverse as commercial interests, such as petroleum mining, and social policy concerns, such as the protection of te reo Māori. Whether the principles of the Treaty indicate that Treaty interests should be treated as rights by the legal system is, therefore, the primary determinant of the existence of such rights.

Together, these three themes indicate that a coherent framework for understanding Treaty rights is emerging from the Tribunal's jurisprudence. This Treaty rights framework incorporates both the principles of the Treaty and the recognition of legal rights in a coherent fashion, and has the potential to significantly influence a number of areas of the law as part of the Tribunal's orthodox Treaty jurisprudence. The Tribunal's Treaty rights framework demonstrates that there is a meaningful distinction to be drawn between Treaty rights and other Treaty interests. Treaty rights are a unique category of Treaty interests, and should be recognised as such. Any principled response to Māori claims against the Crown would therefore be expected to heavily draw on, if not adopt, the Tribunal's Treaty rights framework.

IV GIVING LEGAL EFFECT TO TREATY RIGHTS

Given the value of the Tribunal's Treaty rights framework for clarifying the Crown's Treaty obligations, the is a strong case for giving legal effect to that framework. This may not be easy, however, as the Tribunal's recommendations, including its Treaty rights framework, do not have legal status in their own right. Further, the Treaty itself only has limited legal effect. This Part IV examines possible methods for giving legal effect to the Tribunal's Treaty rights framework, and endorses statutory incorporation of the Treaty as a principled and effective method for giving legal effect to Treaty rights.

The Treaty does not have direct legal effect in its own right. At common law, the basic rule is that the Treaty requires statutory incorporation before it can be enforced in the courts. This leaves three ways that the Treaty can be given legal effect under the current legal orthodoxy: directly through statutory incorporation of the Treaty, or indirectly as an extrinsic interpretation aid or as an implicit mandatory consideration under administrative law.[200] Of these three options, only statutory incorporation of the Treaty can give effect to Treaty rights in a manner consistent with the Tribunal's framework. Statutory references to the Treaty have been relied on in the courts to give substantive protection to Māori rights derived from the Treaty, and the principles enunciated by the courts when providing this protection for Treaty rights are consistent with the principles articulated by the Tribunal in setting out its framework. The profound legal effect of Treaty rights resulting from statutory incorporation of the Treaty is exemplified by the *Lands* case. Criticism of the *Lands* case serves to highlight the tensions between the judicial and political branches of government in giving effect to Treaty rights, and addressing these criticisms demonstrates that statutory incorporation of Treaty rights is principled when assessed against orthodox legal principles. Not all

---

200 It is true that the Treaty may be given legal effect through other means that do recognise Treaty rights, such as full constitutionalisation of the Treaty by the courts. This would mean that all Crown action, including legislation, would need to be assessed against the standard of the Treaty. Such a move would, however, be unlikely in practice and would represent a revolutionary change to the existing legal order. It is therefore not consistent with the Waitangi Tribunal's Treaty rights framework, which is premised on consistency with the existing legal order.

statutory references to the Treaty offer substantive protection of Treaty rights, however, which suggests that the power to give legal effect to Treaty rights lies predominantly with the political branch of government.

The ways in which the Treaty has some indirect legal effect, as an extrinsic interpretation aid and as an implicit mandatory administrative law consideration, do not currently offer substantive protection for Treaty rights. The 'presumption of consistency' used by the courts to interpret ambiguous legislative provisions has not yet been used to 'read down' legislation that is inconsistent with Treaty rights. Administrative law review is moving towards 'constitutional review' of administrative action that may impact on fundamental rights, including Treaty rights. However, again these developments are yet to fully provide substantive protection to Treaty rights. While these aspects of the law are continuing to develop, in the current legal environment the Treaty's indirect legal effect does not recognise Treaty rights in the principled and practical way that legislative incorporation of the Treaty can.

A The Legal Effect of the Treaty at Common Law

Two common law rules significantly limit the legal effect of the Treaty. The first is that the Treaty is a treaty of cession, and accordingly has no direct legal effect unless it has received legislative recognition. The second is that the political branch of government is entitled to legislate contrary to the express terms and principles of the Treaty under the doctrine of Parliamentary sovereignty. The continued application of these rules is something of a matter of debate. However, these rules represent the current legal orthodoxy, and as a result the Treaty only has limited legal effect at common law.

At common law, the Treaty of Waitangi is a valid treaty of cession.[201] Usually, a treaty of cession will not bind the political branch of government and is not enforceable in the ordinary courts except to the extent that it has been incorporated into domestic

201 *Te Heuheu*, above n 86. See also Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: WAI 9* (Waitangi Tribunal, Wellington, 1987) 149.

law.[202] The leading decision on the legal status of the Treaty, *Hoani Te Heuheu Tukino v Aotea District Māori Land Board*, confirmed that this general rule applies to the Treaty:[203]

> Under [Article I of the English language version of the Treaty] there had been a complete cession of all the rights and powers of sovereignty of the chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law. … So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi and must refer the court to some statutory recognition of the right claimed by him.

This rule limits the legal effect of the Treaty markedly. On its face, it suggests that the Treaty has no legal effect unless and until it has received statutory recognition. While there is now a number of references to the Treaty in the statute books, nothing like an over-arching or constitutional reference to the Treaty with general application has been enacted. As a treaty of cession, the Treaty's legal effect appears to be quite narrow on the basis of *Te Heuheu*.

Part of the underlying rationale for the decision in *Te Heuheu* appears to be maintenance of the doctrine of Parliamentary sovereignty. On this matter, *Te Heuheu* confirmed the sovereign power of the political branch to enact legislative provisions contrary to the rights and interests guaranteed by the Treaty.[204] As a result, *Te Heuheu* is authority for the proposition that the Treaty is not a formal fetter on Parliament's legislative sovereignty. Regardless of the strength of any moral claims against the conscience of the Crown to adhere to the principles of the Treaty, at common law there is nothing to prevent the political branch legislating contrary to its Treaty obligations. This rule further confirms that the Treaty is, in itself, of only limited legal effect.

---

202 *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 IA 357, 360 (PC) Lord Dunedin for the Board.

203 *Te Heuheu*, above n 86, 324-325 Viscount Simon for the Board.

204 See "Aboriginal Title in New Zealand Courts", above n 185, 256.

Continuing adherence to the rule in *Te Heuheu* is being increasingly questioned, suggesting that it may be revisited by the courts. Legal and political developments have provided the Treaty with an increasing relevance, and the courts may be more willing to consider the Treaty as a direct source of law even where it has not received express statutory recognition. For instance, there are now numerous statutory references to the Treaty that impact on a wide range of policy areas, which suggests an acceptance of the place of the Treaty by the political branch.[205] The courts have relied on this development to significantly expand the legal application of the Treaty.[206] Further, the decisions of the Court of Appeal on the legal application of the Treaty and its principles, beginning with the *Lands* case in 1987, suggests a 'constitutionalisation' of the Treaty.[207] Appeals to the Privy Council have also been abolished and a local Supreme Court may be more willing to develop an indigenous jurisprudence involving the Treaty, not least because the Supreme Court's establishing legislation expressly contemplates resolution of Treaty issues.[208] These developments suggest that the *Te Heuheu* decision may be "no longer credible" as a matter of legal principle.[209]

The doctrine of Parliamentary sovereignty, which is an underlying premise of the *Te Heuheu* decision, is also being questioned more openly. Parliamentary sovereignty is seen by detractors as an historical anomaly not based on principle, legal or otherwise.[210] Others, particularly politicians, stoutly defend the continuing relevance of the doctrine in a modern democratic society.[211] However, increasing recognition that the rule of law is

---

205 See Conservation Act 1987, s 4; Education Act 1989, s 181; Crown Minerals Act 1991, s 4; Resource Management Act 1991, s 8; Crown Research Institutes Act 1992, s 10; New Zealand Public Health and Disability Act 2000, s 4; Local Government Act 2002, s 4; Land Transport Management Act 2003, s 4; Public Records Act 2005, s 7.

206 See *Huakina Development Trust*, above n 12.

207 See Catherine Callaghan " "Constitutionalisation" of Treaties by the Courts: The Treaty of Waitangi and the Treaty of Rome Compared" (1998) 18 NZULR 334. See also "Constitutional Review Now", above n 68.

208 The purpose of the Supreme Court Act includes "…to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions: see Supreme Court Act 2003, s 3(1)(a)(ii).

209 See "Separation of Powers", above n 2, 219.

210 Ibid, 213.

211 See Michael Cullen "Parliamentary Sovereignty and the Courts" [2004] NZLJ 243; Michael Cullen "Parliament: Supremacy over Fundamental Norms?" (2005) 3 NZJPIL 1.

fundamental to democracy means that talk of sovereignty or supremacy of any branch of government may have outlived its usefulness. This is especially true where Treaty issues are concerned, as the application of a theory based on a monocultural understanding of the distribution of political power should be approached with some skepticism.[212] There is weight behind the argument that any principled approach to the Treaty cannot rely on a waning doctrine of Parliamentary sovereignty to limit the Treaty's application.

Whether *Te Heuheu* should remain the law in the modern legal climate is clearly a matter of some debate.[213] *Te Heuheu* has, however, been reaffirmed by the courts, and the rule as to the legal effect of the Treaty at common law has been described as a "fundamental proposition".[214] As a result, the legal effect of the Treaty remains limited at common law.

B Statutory Incorporation of the Treaty

As a result of the *Te Heuheu* doctrine, statutory incorporation is the primary means of giving legal effect to the Treaty. There are now a number of statutes that contain express references to the Treaty, but there does not seem to be any consistent pattern or formula underlying the use of Treaty provisions in legislation.[215] This is an important point, as the words used in legislation to refer to the Treaty will have a significant impact on the Treaty's ultimate legal effect.[216] As a result, whether legal

---

212 "Separation of Powers", above n 2, 213.

213 It has been suggested that *Te Heuheu* may even have not been supported by authority at the time it was decided: see Alex Frame "Hoani Te Heuheu's Case in London 1940-41: An Explosive Story" (2006) 22 NZULR 148, 164-165.

214 *Ngati Apa ki te Waipounamu v Attorney-General* [2003] 1 NZLR 779, 804 (HC) France J. See also *New Zealand Māori Council v Attorney-General (Broadcasting Assets)* [1994] 1 NZLR 513, 524 (PC) Lord Woolf for the Board; *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140, 168 (CA) Richardson P, Gault, McKay, Henry, Keith, Blanchard JJ.

215 Bill Mansfield, Ministry of Justice Draft Discussion Paper "Considerations Relevant to the Use of Specific References to the Treaty of Waitangi in Legislation" (17 November 1999) (Obtained under the Official Information Act 1982, Request to the Public Law Group, Ministry of Justice) 3 ["The Treaty of Waitangi in Legislation"], citing Richard Boast and Deborah Edmunds *Treaty of Waitangi and Resource Management*.

216 Palmer, above n 3, 208.

effect is given to Treaty rights through statutory reference to the Treaty is largely in the hands of the political branch of government when developing policy and legislation that incorporates the Treaty.

The courts also have a role to play in giving legal effect to the Treaty through legislative incorporation. Some Treaty provisions confer broad discretion on the courts to interpret the Treaty's legal effect, and where this occurs the courts take a "broad, unquibbling and practical" approach to interpreting legislative Treaty provisions.[217] Perhaps the most striking illustration of the courts using a legislative Treaty reference to give legal effect to Treaty rights is the *Lands* case and the legal principles of the Treaty that stem from it. These Treaty principles incorporate concepts that are consistent with the Tribunal's Treaty rights framework, and accordingly the *Lands* case can be used as an example of how Treaty rights consistent with the Tribunal's framework can be incorporated into the legal system. The *Lands* case has been the subject of strong criticism, and it is worth addressing these criticisms to demonstrate that the *Lands* case involves nothing more than the straightforward application of orthodox legal principles. The Treaty principles that have developed as a result of the *Lands* case are therefore an appropriate means of integrating the Tribunal's Treaty rights framework into the legal system.

However, not all legislative references to the Treaty can be interpreted by the courts to substantively protect Treaty rights. Some provisions may deem the Treaty and its principles to be a relevant consideration to the exercise of administrative action, which cannot be said to substantively protect Treaty rights. Other Treaty provisions restrict the courts' ability to interpret the legal effect of the Treat to such an extent that the Treaty has no meaningful legal effect at all. These examples can serve as a reminder that while the courts have developed a number of Treaty principles that will protect Treaty rights, the ultimate legal effect of the Treaty is a matter for the political branch during the passage of legislation.

---

217 *Lands,* above n 11, 654 Cooke P.

1 The Lands *case*

While the case itself turned on a rather unremarkable issue of statutory interpretation, the *Lands* case is significant in that it was the first time the Court of Appeal had been called on to interpret a Treaty provision with substantive effect. As a result, the Court was able to enunciate the 'principles of the Treaty' in law for the first time, and the *Lands* case has set the foundation for the development of the principles of the Treaty in law ever since. Given the broad significance of Treaty principle in New Zealand's contemporary legal and political framework it is not an exaggeration to speculate on whether it is in fact the most significant New Zealand case of the twentieth century.[218]

The specific issue in the *Lands* case concerned the correct interpretation of certain provisions in the State-Owned Enterprises Act 1986 ("SOEA"). The impetus for the SOEA was the reorganisation, and in particular corporatisation, of certain public sector functions. The policy underlying the SOEA was the creation of a number of state enterprises that would operate as commercial entities. A critical part of the implementation of the government's policy involved the transfer of significant Crown assets to the ownership of those state enterprises, including millions of hectares of Crown land. There was a concern among many Māori, supported by the findings in an interim report of the Tribunal,[219] that the alienation of such land from direct Crown ownership would frustrate any claims to recover such lands as a part of the Treaty claims settlement process. In the words of the Tribunal:[220]

> The policy proposed in the State-Owned Enterprises Bill involves the transfer of Crown land to the Forestry Corporation, the Land Corporation and other Corporations. It would then cease to be Crown land. Although it appears Ministers will retain a power of discretion to the proposed Corporations, that power, it seems to us, is likely to be limited

---

218 See RP Boast "*New Zealand Māori Council v Attorney-General*: the Case of the Century?" [1987] NZLJ 240 ["Case of the Century?"].

219 Waitangi Tribunal *Interim Report to the Minister of Māori Affairs on the State-Owned Enterprises Bill: WAI 1177* (Waitangi Tribunal, Te Hapua, 1986).

220 Ibid.

> and insufficiently wide to enable the return of Crown land pursuant to a recommendation of this Tribunal …

In an attempt to allay these concerns a new legal mechanism, now set out in section 27 of the SOEA, was added to the State-Owned Enterprises Bill. This mechanism restricts the alienation of land that is subject to a Tribunal claim before the enactment of the SOEA,[221] and provides for the discretionary resumption of Crown ownership of land that the Tribunal recommends be returned to Māori.[222]

There were, however, continuing concerns that the proposed mechanism left gaps in relation to any land that might become subject to a Tribunal claim after the enactment of the SOEA. As a result of these concerns, and continuing political pressure, a second "last minute" amendment, the inclusion of what is now section 9 of the SOEA, was approved.[223] Section 9 provides: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi". The exact intention underlying section 9 has never been made clear. There is no evidence that the political branch ever considered what the detail attaching to the phrase 'the principles of the Treaty' might be. The Parliamentary debates recorded in Hansard on the third reading of the State-Owned Enterprises Bill, which the Court of Appeal referred to in the *Lands* case, did not discuss the relationship between section 9 and section 27.[224] It seems entirely plausible that that it was intended to be nothing more that ersatz recognition of the Treaty, having no legal effect whatsoever,[225] and the Solicitor-General argued as much in the *Lands* case by suggesting that section 9 was nothing more than an exhortation to the relevant Ministers.[226] It has also been suggested that the Minister of

---

221 State-Owned Enterprises Act 1987, s 27(1).

222 State-Owned Enterprises Act 1987, s 27(2).

223 Andrew Sharp "The Problem of Māori Affairs, 1984-1989" in Martin Holland and Jonathon Boston (eds) *The Fourth Labour Government: Politics and Policy in New Zealand* (2 ed, Oxford University Press, Auckland, 1990) 251, 260.

224 See (11 December 1986) 476 NZPD 6192-6201.

225 See David Round "Judicial Activism and the Treaty: the Pendulum Returns" (2000) 9 Otago LR 653, 654 ["The Pendulum Returns"].

226 See Janet McLean "Constitutional and Administrative Law: the Contribution of the Lord Cooke" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 221, 224.

Justice at the time considered section 9 a useful device to remove the Treaty from the political spotlight and into judicial forums that might provide "an atmosphere of calm deliberation".[227] Whatever the original intention, it appears in hindsight that section 9 achieved little more than transforming a controversial political issue into a controversial legal one, as once it was enacted the precise meaning of section 9 became a matter for the courts.

The applicants in the *Lands* case did not feel that the amendments to the SOEA fully addressed their concerns, and they applied for review of the proposed asset transfer on the basis that there was no evidence that the Crown had taken steps to ensure that the proposed land transfers were consistent with the principles of the Treaty of Waitangi as required by section 9. Given that the section 27 mechanism, which was designed to account for the Crown's Treaty obligations, was silent on the issue of Crown land subject to future Tribunal claims, there were good grounds to suspect that the principles of the Treaty had not been complied with. In the absence of clear, systematic steps taken by the political branch to ensure compliance with Treaty principles, the claimants contended that the proposed transfer of land would be inconsistent with section 9.

The Crown's response to the application was to argue in the Court of Appeal that section 27 amounted to a complete code in respect of the transfer of land to state enterprises. If that was the case then the proposed land transfers could clearly proceed, as section 27 would not be subject to the restriction set out in section 9. If that argument was accepted, it would mean that section 9 was intended to deal with matters other than Māori land rights. The *Lands* case itself, then, turned on a simple issue of statutory interpretation: was section 27 a complete code, or was it subject to the general requirement set out in section 9 that the Crown must act consistently with the principles of the Treaty?

The Court rejected the Crown's argument that section 27 was intended to be a complete code, and found that any transfer of Crown land would need to be conducted in

---

227 Sharp, above n 223, 260.

a manner consistent with the principles of the Treaty. The intentional broad, all-encompassing language of section 9 – "Nothing in this Act…" – clearly applied to section 27 as a result of the plain, unambiguous language used. Further, the Court felt that if section 9 did not apply to land, it was difficult to envisage its purpose:[228]

> [E]ven if any such rights [other than rights to land] could be affected by transfers of assets under the Act, they were certainly not in the forefront of parliamentary consideration. Certainly the Act extends to a range of assets other than Crown land, but patently the transfer of Crown land is a central subject dealt with by the Act. It would be strange if the uncompromising wording of [section 9] were read as meaning nothing except the provisions about Crown land.

The decision of the Court on this issue was hardly surprising and, with respect, must be the correct approach.[229] Despite the criticism that the *Lands* case has received since 1987,[230] on the statutory interpretation issue it is not a case of judicial activism: rather than the Court reading in its own values the *Lands* case represents an effort on the part of the Court to give some meaning to the enacted words.[231] But, in using ordinary principles of statutory interpretation to find that the broad words of section 9 qualified the more specific section 27, the Court of Appeal was left with a far more challenging question: what did the plain words of section 9 mean? What was Parliament's intention in referring to the principles of the Treaty? The answer the Court provided to these questions lies at the heart of the ongoing significance of the *Lands* case.

The 'principles of the Treaty' was not a wholly new legal concept in 1987. The first statutory use of the phrase is contained in the Treaty of Waitangi Act 1975.[232] In that context, however, the use of the phrase could not be considered a substantive Treaty reference in the sense that it did not create legally binding obligations in respect of the Treaty on the political branch of government. The Treaty of Waitangi Act established the

---

228 *Lands*, above n 11, 658, Cooke P.

229 See "The Case of the Century?", above n 218, 242.

230 See Chapman, above n 106, 234-235; "The Pendulum Returns", above n 225, 654-658.

231 McLean, above n 226, 223.

232 Treaty of Waitangi Act 1975, s 6.

Tribunal to inquire into alleged breaches of the Treaty, and as a result these statutory references to the Treaty did not provide the principles of the Treaty with direct legal effect. Any Tribunal findings that the Crown had acted inconsistently with Treaty principles are subject to non-binding recommendations only.[233] The *Lands* case represented the first opportunity for the courts to examine a substantive statutory reference to Treaty principles.

The Crown argued that the transfer of land to Crown-owned state enterprises was not inconsistent with the principles of the Treaty, and that the transfer of Crown land to those state enterprises should proceed as anticipated. The Court criticised this argument as taking "far too narrow a view of the Treaty".[234] The Court instead took a wider view of how the principles of the Treaty should be interpreted, stating that the Treaty "should not be approached with the austerity of tabulated legalism",[235] but rather that its "history, its form and its place in our social order clearly require a broad interpretation".[236] The applicants contended that the relationship between the Treaty partners meant that the Crown had obligations analogous to fiduciary duties to actively protect Māori interests in land. This submission was largely accepted by the Court of Appeal.[237]

In answer to an interrogatory inquiring whether steps had been taken to ascertain whether the transfer of any Crown assets the SOEA would breach the principles of the Treaty, the Solicitor-General stated simply that they had not. On the basis of this evidence, it was difficult for the Court to conclude otherwise than that the Crown was not acting reasonably nor in good faith in respect of its Treaty obligations, and without a systematic inquiry into potential Tribunal claims there was a real risk that the Crown's transfer of land would be in breach of the principles of the Treaty.

---

233 It is clear, however, that the Court of Appeal in the *Lands* case found it valuable to draw on the findings of the Waitangi Tribunal in respect of the content of the principles of the Treaty: see *Lands*, above n 11, 661 Cooke P.

234 *Lands*, above n 11, 680 Richardson J.

235 Ibid, 655 Cooke P.

236 Ibid, 673 Richardson J.

237 Ibid, 664 Cooke P.

Each of the five Court of Appeal Judges discussed the content of the principles of the Treaty in some depth. There is some divergence in the detail of the different judgments on the precise content of the principles of the Treaty, but a common theme in each judgment is that the principles of the Treaty entail that the Crown and Māori act reasonably towards each other and exercise the utmost good faith in their mutual dealings.[238] The Court ordered that the Crown prepare a "scheme of safeguards" to protect Māori claims to assets being transferred to state enterprises for agreement by the New Zealand Māori Council and to be lodged with the Court of Appeal to ensure that the scheme gave effect to the Court's interpretation of the principles of the Treaty.[239] The Government later enacted the Treaty of Waitangi (State Enterprises) Act 1988, which gave effect to the agreement reached between the parties. Thus, the principles of the Treaty, and their statutory incorporation via section 9 of the SOEA, had a profound legal influence on the policy and scope of action of the political branch of government.

2 The Lands *case and Treaty rights*

The content of the principles of the Treaty in law has been further developed in later cases, and they now constitute a fairly recognisable list. One of the most comprehensive reviews of the principles of the Treaty as articulated by the courts lists seven principles:[240]

- The acquisition of sovereignty in exchange for the protection of rangatiratanga;
- The partnership established by the Treaty, and the duty on the partners to act reasonably and in good faith;
- The freedom of the Crown to govern;
- The Crown's duty of active protection;
- The Crown's duty to remedy past breaches of the Treaty;

---

238 Ibid, 667 Cooke P.

239 Ibid, 666 Cooke P.

240 See Janine Haywood "Appendix: The Principles of the Treaty of Waitangi" in Alan Ward *National Overview: Waitangi Tribunal Rangahaua Whānui Series* (Volume II, GP Publications, Wellington, 1997) 475, 477-479.

- The Māori right to retain rangatiratanga over their resources and taonga and to have all the rights and privileges of citizenship; and
- The Crown duty (in some circumstances) to consult with Māori.

There is obviously some room for overlap between these principles. For example, the Crown's duty of active protection of Māori interests is likely to entail an obligation to consult with Māori, otherwise the Crown has no way to ensure that it is discharging its duty fully and properly. It has been suggested that the real value in the assessment of the principles of the Treaty as undertaken in the *Lands* case and subsequent cases is the acknowledgement of the special relationship of good faith and reasonableness between Māori and the Crown.[241] In the *Lands* case, this special relationship was described as the "one overarching principle",[242] and clearly ties together the distinct principles listed above. This principle of good faith and reasonableness has been described elsewhere as "an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other".[243] This characterisation of the Treaty as the basis for a special relationship between Māori and the Crown highlights the pervasive nature of the Treaty and the Crown's Treaty obligations.

These principles share many characteristics with Treaty rights. The right of the Crown to govern is listed above as a central Treaty principle, for example, and has been explicitly incorporated into the Tribunal's Treaty rights framework. Further, this right is always to be balanced with Māori rangatiratanga under the Tribunal's Treaty rights framework, and Māori rangatiratanga receives explicit recognition and protection under the Court of Appeal's Treaty principles. The Crown's duty to actively protect Māori interests and express acknowledgement of the partnership-style relationship between Māori and the Crown provides a basis for Māori rights based on rangatiratanga and priority of these rights over mere privileges. The need to offer a remedy for a breach of a

241 See Northover, above n 177, 14.

242 *Lands*, above n 11, 673 Richardson J.

243 *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301, 304 (CA) Cooke P for the Court.

Treaty right under the Tribunal's framework is also mirrored in Court's principle that the Crown should remedy past breaches of the Treaty. The ways in which Treaty rights would be expected to impact on the legal system under the Tribunal's Treaty rights framework are recognised in the Court of Appeal's Treaty principles.

The principles of the Treaty developed by the *Lands* case and subsequent cases also suggest that the Treaty itself is the source of Treaty principles. This means that the aspects of the principles of the Treaty which give effect to Treaty rights stem directly from the Treaty. This is a crucial part of the Tribunal's Treaty rights framework, and again demonstrates the consistency between the Tribunal's framework and the principles of the Treaty as developed by the courts.

The statutory phrase "…the principles of the Treaty…" gives legislative recognition to the relationship of good faith and reasonableness between the Crown and Māori and in turn entails legal recognition of Treaty rights. It confers a broad discretion on the courts to recognise and apply Treaty principles in appropriate circumstances. The courts have done this is a way that is consistent with the Tribunal's Treaty rights framework. As a result, appropriately-worded legislative incorporation of the principles of the Treaty is a principled means of giving legal effect to Treaty rights.

3 Criticisms of the Lands *case*

The application of the principles of the Treaty as established in the *Lands* case has drawn criticism on two grounds, one focusing on the appropriate role of the judiciary and the other on the role of the political branch of government. It is worthwhile addressing these criticisms in order to demonstrate that the protection offered to Treaty rights by statutory incorporation of the principles of the Treaty is premised entirely on orthodox legal principles, as required by the Tribunal's Treaty rights framework. The first criticism is that, whatever Parliament's intention in enacting section 9, the Court of Appeal clearly went beyond that intention with its development of Treaty principles.

This criticism invokes the spectre of judicial activism: the suggestion is that the Court of Appeal went beyond its statutory mandate in developing Treaty principles that may be applied to restrain the actions of the political branch of government.

The claim that the Court of Appeal acted contrary to the doctrine of Parliamentary sovereignty is, however, difficult to sustain. In its application of Treaty principles in the *Lands* case the Court was careful to demonstrate that it was not endorsing any legal principles that could be considered radical or unusual. For example, the concept of partnership was articulated in a manner entirely consistent with Parliamentary sovereignty, as "…if the Crown, acting reasonably and in good faith satisfies itself that known or foreseeable Māori claims do not require the retention of certain land, no principle of the Treaty will prevent a transfer".[244] There is nothing controversial in this statement; rather, the concepts of reasonableness and good faith relied on to bring meaning to the idea of partnership come from established ideas found in equity and administrative law.[245] These ideas cannot be controversial in themselves, and their application in the Treaty context seems perfectly natural once the context of the particular case – Crown interference with Māori property rights – is understood.

The charge of judicial activism, however, cuts much deeper. Wherever issues involving questions of policy or politics fall for judicial determination, especially where there is considered room for more than one valid viewpoint, it seems that judges will be criticised for overstepping their bounds.[246] The reason for these criticisms is that such issues are often considered to be more appropriately determined by political institutions.[247] Treaty matters, especially those in issue in the *Lands* case, are often used as quintessential examples of the courts interfering with the concerns of the political branch of government.[248] However, this complaint is also unwarranted, at least as far as

---

244 *Lands*, above n 11, 664 Cooke P.

245 McLean, above n 226, 225.

246 See "The Pendulum Returns", above n 225, 653.

247 Palmer, above n 3, 209.

248 "The Pendulum Returns", above n 225, 653; DF Dugdale "Frame Statutes in an Age of Judicial Supremacism" (2000) 9 Otago LR 603, 609.

the *Lands* case is concerned. The orders of the Court in the *Lands* case did not dictate to the political branch the action to be taken to ensure compliance with the principles of the Treaty. Quite by contrast, the substantive detail of the principles of the Treaty and their application to the case were both left to be determined in further negotiations between the parties to the litigation, albeit under Court supervised negotiations. In this respect it is difficult to see the Court as imposing its will on the political branch in a way that determined the Crown's substantive Treaty obligations. Rather, the Court was supervising the processes undertaken by the political branch in its attempts to reach a substantive outcome. Again, this is consistent with the ordinary administrative law jurisdiction of the courts.

Claims of judicial activism in respect of the application of the "principles of the Treaty", then, are greatly overstated: the Court of Appeal in the *Lands* case merely drew on existing legal concepts to flesh out an undefined phrase that the political branch had left for it to interpret. The then President of the Court of Appeal was careful to note this fact in his judgment when he noted that "[i]f the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity".[249] This recognition that the Court was simply discharging its traditional role of interpreting legislation is, however, the basis for a second criticism of the application of Treaty principles in the *Lands* case: that the political branch of government should not have given statutory effect to the principles of the Treaty without providing a clear indication of what those principles might be.

This second criticism that Parliament should not use indefinite provisions to refer to the Treaty in legislation is stronger than criticisms of the approach of the Court of Appeal. As noted above, the anecdotal evidence suggests that the politicians and officials responsible for the inclusion of section 9 of the SOEA did not have a clear purpose in mind when they gave legislative force to the Treaty's principles. There is undoubtedly a case for ensuring that the hard policy work involved with Treaty issues is undertaken

---

249 *Lands*, above n 11, 668 Cooke P.

before the enactment of Treaty provisions require that task to be performed by the courts.[250]

The hard policy work underlying the drafting of legislation does not in itself rule out the possibility of legislation that confers discretion on the courts. Legislation conferring judicial discretion can be a useful device, especially where the application of rigid legal rules will not do justice or may even cause harm.[251] This is often the case when dealing with issues of rights, and it is recognised that a degree of vagueness or ambiguity is desirable so that parties with differing views on rights can both rely on similar rhetoric to express their respective arguments.[252] This use of open language also means that the courts can decide rights issues on the basis of justice and fairness, and the value placed on certainty in the law may be overstated in respect of rights, including Treaty rights.[253] Some judicial discretion could, therefore, be justified in the case of the Treaty given the complex legal-political relationships it entails and the potentially wide application of Treaty rights.

Even where there is a need for some certainty in Treaty legislation, statutory references to the principles of the Treaty can be useful in a number of ways. The difficulty of reconciling the English and Māori language versions of the Treaty so as to give a precise and consistent legal meaning has been described as the "futility of textual interpretation".[254] There is, simply, no single correct version of the Treaty.[255] The concept of Treaty principles acknowledges this, and provides a mechanism to apply the Treaty to new and changing situations. Statutory reference to Treaty principles therefore

---

250 See Palmer, above n 3, 210.

251 JF Burrows *Statute Law in New Zealand* (3 ed, LexisNexis, Wellington, 2003) 354-355.

252 Mark Tushnet "An Essay on Rights" (1984) 62 Tex L Rev 1363, 1371.

253 Nothover, above n 177, 27.

254 Ibid, 208. For a detailed, language-oriented discussion of the texts of the Treaty see Bruce Biggs "Humpty-Dumpty and the Treaty of Waitangi" in IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 300.

255 Northover, above n 177, 10.

enables "the Treaty to be applied in light of its contextual significance, rather than on the basis of its literal words".[256]

Such an approach may be consistent with a Māori approach to interpreting and understanding the Treaty. The Tribunal has noted:[257]

> A Māori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place.

A heavy focus on the text of the Treaty is therefore unlikely to be appropriate where the goal is a bicultural or inclusive interpretation of the Treaty. Any such textual approach is likely to be the product of a black-letter legalism that does not recognise other perspectives, such as those provided by tikanga Māori.[258]

Statutory reference to Treaty principles also provides a degree of flexibility that other types of statutory incorporation of the Treaty may not. An attempt to remove any perceived vagueness or ambiguity by preparing a definitive list of Treaty principles or other Treaty obligations for general application would undermine the flexibility of a more open-textured Treaty reference. Accordingly, the real value in statutory incorporation of the principles of the Treaty lies in the adaptability of the legal effect of the Treaty to diverse and changing circumstances. Such flexibility does not necessarily mean that the application of Treaty principles is "vague" or "divisive".[259] While there is scope for the interpretation of the principles of the Treaty to evolve over time, those principles are by no means indeterminate.[260] Even ardent critics of Treaty principles have been able to point to a well-formed, clearly articulated list of Treaty principles and corresponding

---

256 Ibid.

257 *Motunui-Waitara Report*, above n 111, 43.

258 Bennett and Roughan, above n 103, 529.

259 See *Truth or Treaty?*, above n 106, 122.

260 Northover, above n 177, 13.

Crown obligations.[261] Further, there are common themes underlying many of the Treaty principles such as partnership, fairness and good faith, which means that it is simply inaccurate to characterise Treaty principles as indeterminate.[262]

4 Other examples of statutory incorporation

While the *Lands* case demonstrates that statutory incorporation of the Treaty can give legal effect to Treaty, not all statutory references to the Treaty operate in this way. Some statutes incorporate the principles of the Treaty as a relevant consideration in administrative decision making rather than as a substantive restriction on Crown action. Other statutory references to the Treaty appear to have no legal effect at all. This lack of protection of Treaty rights in some circumstances indicates that if legal effect is to be given to Treaty rights through statutory incorporation of the Treaty, then a reference similar to section 9 of the SOEA should be preferred.

While the Court of Appeal in the *Lands* case was able to rely on a statutory reference to the principles of the Treaty to give effect to substantive Treaty rights, not all statutory reference to the principles of the Treaty will have this effect. Many statutory references to the principles of the Treaty incorporate those principles as considerations in administrative decision making: statutes require administrative actors to "have regard to" or "take into account" the principles of the Treaty.[263] Such references cannot be said to give legal effect to substantive Treaty rights,[264] as decision makers are free to reach decisions that are inconsistently with Treaty rights. Statutory incorporation of the principles of the Treaty is therefore not enough by itself to protect substantive Treaty rights: reference to the principles of the Treaty needs to be coupled with a substantive

---

261 See "The Pendulum Returns", above n 225, 655-656.

262 Northover, above n 177, 12.

263 See Crown Minerals Act 1991, s 4 and Resource Management Act 1991, s 8 respectively.

264 Kenneth Keith "The Treaty of Waitangi in Courts" (1990) 14 NZULR 37, 56.

obligation to not act inconsistent,[265] or to positively give effect to,[266] those principles in order to give legal effect to Treaty rights.

Some legislative references to the Treaty do not have any legal effect whatsoever. The New Zealand Public Health and Disability Act 2000 ("NZPHDA"), for example, contains the following provision:

> **Section 4 – Treaty of Waitangi**
>
> In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Māori, Part 3 provides for mechanisms to enable Māori to contribute to decision-making on, and to participate in the delivery of, health and disability services.

Part 3 of the NZPHDA sets out: how Māori interests are to be taken into account in establishing the objectives and functions of District Health Boards ("DHBs");[267] how Māori interests will be represented on DHBs;[268] training for DHB members on Māori health and Treaty of Waitangi issues;[269] and general provisions on how the relationships between DHBs and constituents, including Māori, are to be managed.[270] Nowhere, however, are concepts similar to Treaty rights as recognised in the Tribunal's Treaty rights framework or the *Lands* case incorporated into the NZPHDA. As a result, section 4 of the NZPHDA appears to pay little more than lip service to the principles of the Treaty, rather than providing for the Treaty to have any substantive legal effect. Similar provision can be found in the Local Government Act 2002 and the Public Records Act 2005. While statutory incorporation of the Treaty can give legal effect to Treaty rights, this is not necessarily the case. Treaty rights will only receive legal protection where the political branch has enacted a Treaty provision that requires consistency with the principles of the Treaty.

---

265 See State-Owned Enterprises Act 1986, s 9.

266 See Conservation Act 1987, s 4.

267 New Zealand Public Health and Disability Act 2000, ss 22 and 23.

268 New Zealand Public Health and Disability Act 2000, ss 29 and 34-36.

269 New Zealand Public Health and Disability Act 2000, sch 3.

270 New Zealand Public Health and Disability Act 2000, ss 24 and 25.

C The Treaty's Indirect Legal Effect

In addition to direct legal incorporation through legislation the Treaty can also have some indirect legal effect in at least two ways. The first of these is as an extrinsic aid to the interpretation of statutes. The courts will prefer an interpretation of a statute that is consistent with the Treaty. The second is as an implicit mandatory consideration to be taken into account as part of administrative decision making. The pervasive influence of the Treaty means it is relevant to a range of decision-making powers. Together, these two methods of providing the Treaty with indirect legal effect mean that the Treaty can have a significant influence on the legal system even where it has not received statutory recognition.

However, as these methods of giving indirect legal effect to the Treaty are currently used, neither judicial use of extrinsic interpretation aids nor administrative law doctrine can be relied on to beyond procedural protection of Māori interests and give legal effect to Treaty rights in the way that statutory incorporation of the Treaty can. This is despite both judicial devices representing developing areas of the law where the courts are increasingly willing to adjudicate on substantive, as opposed to merely procedural, issues. Relying on the Treaty as an extrinsic interpretation aid is a specific application of a general common law presumption of consistency with fundamental norms. The courts have demonstrated a willingness to apply this presumption to substantively protect fundamental rights even where there are strong indicators of a Parliamentary intention to the contrary. However, such strong use of the presumption is yet to be applied in the Treaty context. Administrative law in New Zealand is also generally moving towards review of administrative action based on fundamental values, and the Treaty is considered a driver of this move towards 'constitutional review'. However, again these developments have not yet been applied in the Treaty context to substantively protect Treaty rights. Consequently, neither use of a strong-form presumption of consistency with the Treaty nor the emergence of constitutional-style review of executive action can protect Treaty rights in the current legal environment. Given the need to recognise Treaty rights as a matter of principle, however, the pressure

to utilise the Treaty's indirect legal effect to substantively protect Treaty rights may continue to grow in the absence of statutory recognition of such rights.

1 The Treaty as an extrinsic aid to statutory interpretation

The courts will sometimes draw on material outside of the four corners of a particular statute to assist in ascertaining the meaning of vague or ambiguous legislative provisions.[271] These extrinsic aids can come from a multitude of sources,[272] and provide contextual information that informs the correct or most appropriate interpretation of legislation. The Treaty can be used as an extrinsic aid to statutory interpretation in this way, especially where a particular statute relates to issues that impact on Māori.[273] In the absence of an express Parliamentary intention to the contrary, the courts will prefer an interpretation that is consistent with the principles of the Treaty. The courts have not yet, however, been willing to insist on a Treaty-consistent interpretation in responsive to all but the most unambiguous legislative intention to the contrary, which would be expected if Treaty rights were to be effectively protected.

The use of the Treaty as an extrinsic aid has been described as a "presumption of consistency",[274] meaning that where legislation is silent on the matter it is presumed that Parliament intended to legislate consistently with the principles of the Treaty. Similar presumptions apply in respect of consistency with NZBORA[275] and consistency with New Zealand's obligations at international law.[276] An approach that includes a presumption of consistency with the Treaty has been endorsed in the Court of Appeal when "interpreting ambiguous legislation or working out the import of an express

---

271 Burrows, above n 251, 168.

272 See James Allan "Statutory Interpretation and the Courts" (1999) 18 NZULR 439.

273 Morag McDowell and Duncan Webb *The New Zealand Legal System* (2 ed, Butterworths, Wellington, 1998) 323.

274 Northover, above n 177, 15.

275 New Zealand Bill of Rights Act 1990, s 6.

276 See *Rajan v Minister of Immigration* [1996] 3 NZLR 531, 551 (CA) Henry and Keith JJ; *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

reference to the principles of the Treaty".[277] Indeed, the proposition seems to be inevitable given the constitutional and social importance of the Treaty.[278]

An alternative view is that where the political branch has failed to include a Treaty reference in a particular enactment, it should be taken to have considered the implications of the Treaty and deliberately remained silent on the matter. This view argues that as the political branch is deemed to have considered the Treaty, legislative silence should be considered an indication that the Treaty is of no moment in respect of a particular enactment. This position is not necessarily inconsistent with a presumption of consistency with the Treaty, as legislative silence might be seen as allowing the presumption of consistency to take effect, that is, allowing the courts to search for a consistent interpretation without guidance from an express statutory reference. More commonly, however, this view is advanced as part of an argument that legislative silence indicates that the Treaty has no effect, and at least one public sector agency appears to have taken this view.[279] This view, however, appears to be out of step with majority opinion, which supports the presumption of consistency with the principles of the Treaty.[280]

Common law presumptions of consistency can be of varying strengths. At one end of the spectrum is a presumption that applies to the interpretation of vague or ambiguous legislation.[281] This appears to be the presumption that President Cooke (as he then was) was referring to when articulating the approach of the courts to the interpretation of Treaty provisions in the *Lands* case. A moderate-strength presumption may apply where there is no indication to the contrary,[282] and can be relied on to read

---

277 *Lands*, above n 11, 656 Cooke P.

278 "Separation of Powers", above n 2, 219.

279 See State Services Commission *The Public Service and the Treaty of Waitangi* (State Services Commission, Wellington, 1995) 9.

280 In addition to the sources cited above see Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Ministry of Justice, Wellington, 2001) 76-77; Te Puni Kōkiri *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Te Puni Kōkiri, Wellington, 2001) 17.

281 See *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 (HL).

282 See *Drew v Attorney-General* [2002] 2 NZLR 58 (CA).

down the scope of statutory provisions.[283] The strongest form of the presumption requires consistency with fundamental norms even in the face of strong indications of a contrary Parliamentary intent.[284] This form of the presumption may even go so far as to restrict the otherwise clear purpose of a statute.[285] This final, strong-form presumption has been labeled "assertive" use of the presumption of consistency in recognition of the role of the courts in reading in fundamental values as part of the interpretation of legislation.[286] The potential for assertive use of the presumption of consistency to protect Treaty rights is evident from its use to protect other fundamental values.[287] To date, however, the courts have been slow to move beyond weak or moderate application of the presumption in response to claims based on the Treaty.

The current application of the presumption of consistency in the Treaty sphere was demonstrated in *Huakina Development Trust v Waikato Valley Authority*.[288] That case concerned an appeal from a decision of the Planning Tribunal to grant an application for water rights pursuant to section 21 of the Water and Soil Conservation Act 1967 to the owners of a dairy farm that discharged effluent into a tributary of the Waikato River. The appellant trust objected to the application because the mixing of the discharged material with the waters of the tributary was contrary to Māori spiritual values. The trust contended that these spiritual values were required to be taken into account by the Planning Tribunal in making its decision under Article II of the Treaty. The Planning Tribunal ruled that it could not take these matters into account as the Water and Soil Conservation Act did not expressly specify Māori spiritual concerns as a relevant consideration. Further, the Water and Soil Conservation Act contained no explicit reference to the Treaty or its principles.

---

283 Claudia Geiringer "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66, 75 ["*Tavita* and All That"].

284 See *Zaoui*, above n 45.

285 Burrows, above n 251, 226.

286 Hanna Wilberg "Judicial Remedies for the Original Breach" [2007] NZ Law Review 713, 720-721.

287 *Zaoui*, above n 45; *Sellers*, above n 276.

288 *Huakina Development Trust*, above n 12.

The Trust successfully appealed the decision of the Planning Tribunal to the High Court. Despite the lack of an express Treaty reference, the Court found that the Treaty is:[289]

> …part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges on its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

Māori spiritual values were, therefore, an aspect that the Planning Tribunal was required to take into account in deciding whether to grant the application.

Notwithstanding the sweeping language of the judgment, *Huakina Development Trust* is closely reasoned. The Court was persuaded by the arguments submitted on behalf of the appellant Trust that the increasing number of statutory references to the Treaty, and a long history of Treaty case law,[290] provided that there was ample evidence that the Treaty was part of New Zealand's legal landscape, even if the Treaty "is not part of the municipal law of New Zealand in the sense that it gives rights enforceable in the Courts by virtue of the Treaty itself".[291] This provided a basis for the Treaty to be used as an extrinsic aid to interpret statutes "when it is proper".[292] Justice Chilwell then drew on the Town and Country Planning Act 1977, which incorporated a requirement to have regard to the principles and objectives of the Water and Soil Conservation Act in certain circumstances,[293] and contained "a significant degree of statutory material to preserve Māori values".[294] The two statutes were held to comprise a "comprehensive statutory scheme",[295] and the Water and Soil Conservation Act was to be interpreted with

---

289 Ibid, 210 Chilwell J.

290 A number of judgments were cited spanning from *R v Symonds*, above n 181, to *Te Weehi*, above n 165.

291 *Huakina Development Trust*, above n 12, 210 Chilwell J.

292 Ibid.

293 Town and Country Planning Act 1977, s 4.

294 *Huakina Development Trust*, above n 12, 211 Chilwell J.

295 Ibid.

reference to the public policy underlying that scheme.[296] Consideration of both the Treaty's pervasive influence and the general policy of considering Māori values when exercising discretion under the statutory scheme led Justice Chilwell to the conclusion that Māori spiritual values and beliefs should have been considered by the Planning Tribunal in making its decision.

While drawing analogies with statutory recognition of the Treaty may encourage the courts to provide a Treaty-consistent interpretation, it is not essential. In *Barton-Prescott v Director-General of Social Welfare*, a case that concerned the proposed adoption of a Māori child, the High Court found the Treaty to be a document of general application, colouring "all matters to which it has relevance, whether public or private".[297] The issue in *Barton-Prescott* was that the child's relatives objected to the fact that the prospective adoptive parents, while Māori, did not affiliate with the same iwi as the child. Despite the mother having consented to the adoption taking place, a member of the mother's family applied for custody and additional guardianship of the child under the Guardianship Act 1968.

The Family Court declined the application, and an appeal was brought to the High Court. The appellant contended that the decision of the Family Court was wrong in law because the Guardianship Act had not been interpreted in a manner consistent with the principles of the Treaty of Waitangi. The appellant contended that the Treaty applied directly, despite there being no explicit reference to the Treaty or its principles in the relevant legislation. The appellant relied on a series of Court of Appeal decisions on the principles of the Treaty to support the contention that the Treaty gave formal recognition to the rights of Māori to manage their affairs with minimum interference from the

296 Precedent for this approach was found in *Rotorua District Council v Bay of Plenty Catchment Commission* [1979] 2 NZLR 97 (CA) and *R v Menzies* [1982] 1 NZLR 40 (CA).

297 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179, 184 (HC) Gallen and Goddard JJ.

Crown.[298] It was further contended that these rights of Māori implicitly extended to issues of whānaungatanga.

The High Court agreed with the appellant, and ruled that the Treaty was relevant to the interpretation of the Guardian Act.[299] In a joint judgment the two presiding Judges found that the Treaty contemplated the preservation of Māori family units. In reaching this decision the Court relied on evidence provided by Hirini Moko Mead on the place of tamariki within whānau Māori. This "helpful and detailed" evidence emphasised:[300]

> … the obligations of the whānau to ensure that the child has not only the protection and care of the whānau in growing up, but has available to [him or her] that accumulated knowledge of the child's inheritance, physical and spiritual, as part of a family extending back through whakapapa to remote ancestors.

As a result, the Court was of the view that all statutes dealing with family matters, including the Guardianship Act, should be interpreted, if possible, in a manner that is consistent with the principles of the Treaty.[301]

Huakina Development Trust and *Barton-Prescott* demonstrate the importance of the Treaty as an extrinsic interpretation aid. However, neither are examples of assertive use of the presumption of consistency. Rather, each case does little more than build in the Treaty as an implicit element of the process of interpretation of vague or ambiguous legislation, which is consistent only with the weak-form presumption of consistency. Accordingly, neither case can be said to recognise and give legal effect to Treaty rights. The closest that the courts have come to strengthening the presumption of consistency in the Treaty context is *Ngai Tahu Māori Trust Board v Director-General of Conservation*.[302] In that case, representative of the iwi Ngai Tahu claimed that when

---

298 *Lands*, above n 11; *Te Runanga o Wharekauri Rekoku Inc*, above n 243; *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (CA).

299 Though the appellant's claim to halt the adoption process ultimately failed.

300 *Barton-Prescott*, above n 296, 183.

301 Ibid, 184. For discussion see Wilberg, above n 286, 730-734.

302 *Ngai Tahu*, above n 175.

issuing permits for commercial whale-watching ventures under the Marine Mammals Protection Act 1978, the Department of Conservation was required to consider Ngai Tahu's interests under the Treaty as mandatory relevant considerations even though the Act did not have an express Treaty reference.

The judgment of the Court of Appeal went beyond treating the Treaty interests as relevant considerations, and stated that Ngai Tahu were entitled, on the basis of the Treaty, to a "reasonable degree of preference".[303] This has been interpreted by some as requiring some substantive protection of Treaty interests,[304] suggesting that meaningful protection of Treaty rights may have been contemplated by the Court. This extends the procedural protection offered by a mandatory relevant consideration.[305] It is worth noting that while *Ngai Tahu* may move the presumption of consistency in respect of Treaty issues to the moderate-strength version, it still falls short of assertive use of the presumption.[306] Rather than providing a Treaty-consistent interpretation that rejected indications to the contrary, there were strong indicators suggesting a Treaty-consistent approach was actually intended. Primary among these was a requirement in the Conservation Act 1987 to give effect to the principles of the Treaty.[307] The Conservation Act provided for the Department of Conservation to administer certain other statutes, including the Marine Mammals Protection Act. Accordingly, there was a statutory imperative for the Department of Conservation to administer the Marine Mammals Protection Act consistently with the principles of the Treaty, which can be contrasted with the analogy approach in *Huakina Development Trust*. For this reason, at least to the extent that it protects legal Treaty rights *Ngai Tahu* is more properly understood as an example of statutory incorporation of the Treaty, rather than developing the use of the presumption of consistency.[308]

---

303 Ibid, 562 Cooke P for the Court.

304 Wilberg, above n 286, 730.

305 See below Part IV D 2 The Treaty and Administrative Law Standards.

306 Wilberg, above n 286, 733.

307 Conservation Act 1987, s 4.

308 See *Constitutional and Administrative Law*, above n 72, 74.

2 The Treaty and administrative law standards

The Treaty can also have indirect legal effect where it is used as an administrative law standard to assess the lawfulness or reasonableness of executive decisions made by the political branch of government. Administrative law is centrally concerned with protecting individuals from the abuse of state power,[309] and administrative law doctrine seeks to offer this protection by ensuring that public bodies comply with the law.[310] The Treaty and administrative law are similar in that both are concerned with "the interactions between policies, standards, principles, and rules",[311] and the development of administrative law in New Zealand has included the assimilation of the Treaty and its principles to inform the application of policies, standards, principles and rules to be taken into account when a decision is undertaken, whether or not the Treaty explicitly forms part of the relevant statutory scheme. While administrative law in New Zealand is moving towards value-based review where fundamental norms are at issue, these developments have not yet been applied in the Treaty context. As a result, administrative law doctrine cannot protect Treaty rights in the absence of express statutory incorporation of the Treaty.

There are clear parallels between the principles of the Treaty as described by the courts and general principles of administrative law. This may be no coincidence, as it appears to be part of a wider attempt to utilise common law principles and ideas to flesh out the concept of Treaty principles in law. McLean highlights then President Cooke's discussion of the Treaty concept of partnership in the *Lands* case, and continues:[312]

> My point is not whether one agrees with these principles of the Treaty but to notice where these ideas come from: fair dealing, good faith, and loyalty, from fiduciary principals in equity, and reasonableness, with or without the *Wednesbury* epithet, from administrative law.

---

309 HWR Wade and CF Forsyth *Administrative Law* (9 ed, Oxford University Press, Oxford, 2004) 5.

310 *Peters v Davidson* [1999] 2 NZLR 164, 192 (CA) Richardson P, Henry and Keith JJ.

311 McLean, above n 226, 221.

312 McLean, above n 226, 225.

Administrative law concepts are, therefore, intimately linked with the application of Treaty principles.

In *Ngati Apa ki Waipounamu Trust v Attorney-General* the relationship between the Treaty and administrative law standards was directly in issue.[313] The case concerned a decision of the Māori Appellant Court, on a case stated by the Tribunal, that the iwi Ngai Tahu had sole interests in certain land that was the subject of a Tribunal claim brought by Te Runanga o Ngai Tahu. The applicants, being representatives of various iwi who believed that their own Tribunal claims might be prejudicially affected by the Māori Appellant Court's decision, sought a declaration that the Court had acted procedurally unfairly and in breach of natural justice requirements.

In addition to these standard administrative law grounds for review, each of the applicants advanced arguments that the principles of the Treaty themselves imposed certain procedural duties on the Māori Appellant Court. In rejecting this argument, Justice France opined that the principles of the Treaty did not add anything to the concurrent administrative law duties of procedural propriety, natural justice and the duty to act fairly.[314] Any relevant Treaty obligations were considered to be "very similar, if not identical" to obligations arising out of natural justice.[315] The principles of the Treaty and administrative law standards are therefore so closely related that their content will sometimes be identical.

The real significance of the principles of the Treaty in the application of administrative law lies in the potential for Treaty principles to be read into statutes as relevant considerations, where the statute in question is silent on the issue of the Treaty. *Attorney-General v New Zealand Māori Council (Radio Frequencies)*[316] leaves the door

313 *Ngati Apa ki Waipounamu Trust*, above n 214.

314 Ibid, 806 France J. See also *Taiaroa v Minister of Justice* [1995] 1 NZLR 411, 415 (CA) Cooke P for the Court.

315 Ibid.

316 *Attorney-General v New Zealand Māori Council (Radio Frequencies)* [1991] 2 NZLR 129 (CA).

ajar to this possibility.[317] That case concerned the government's policy of licensing rights to use radio spectra pursuant to the Radiocommunications Act 1989. Certain AM and FM radio frequencies were set aside for use by Māori, but none of the available FM frequencies covered the Auckland and Wellington regions where there were significant Māori populations. The applicant contended that FM frequencies were needed in these areas to encourage young Māori to listen to Māori radio. The principal issue before the Court was whether, in allocating rights to radio frequencies, the Crown was required to wait for and take into account a forthcoming Tribunal report on the issue.[318] The applicant argued that the Crown was required to take the forthcoming report into account as part of the decision-making process, despite the fact that the Radiocommunications Act 1989 did not include the Treaty as a relevant consideration.

In argument before the Court, the Solicitor-General conceded that an earlier Tribunal report that focused on the protection of the Māori language was a relevant consideration in the decision-making process.[319] The Court used this concession as evidence that the Crown considered that Tribunal reports dealing with the subject matter of the decision were relevant considerations. Accordingly the forthcoming Tribunal report should have been taken into account as part of the decision-making process. The Solicitor-General's concession therefore allowed the Court to find that the Crown was bound by earlier commitments to consider the Crown's Treaty obligation regardless of whether those obligations had received explicit statutory recognition.

The principle that the Crown is bound by its earlier commitments is not the only justification for finding that the Treaty is to be taken into account as a matter of administrative law. McLean has identified other potential justifications:[320]

---

317 McLean, above n 226, 228.

318 Waitangi Tribunal *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies: WAI 26* (Government Printer, Wellington, 1986).

319 Waitangi Tribunal *Report of the Waitangi Tribunal on the Te Reo Māori Claim: WAI 11* (Government Printer, Wellington, 1986).

320 McLean, above n 226, 229.

> For example, what, if anything, is to be imputed from the government's refraining from repealing the by now controversial [section 9 of the SOEA]? Does the act of restraint have a constitutionalising effect? What of the Cabinet Circular which requires all legislation to be assessed for consistency with Treaty principles? Which way does that point – to acceptance of the Treaty principles as a constitutional norm or to deference to the executive's assessment of consistency?

Further, the Court in the *Radio Frequencies* case could have relied on analogies with the scheme and policy implications of statutes dealing with similar subject matter, as was done in *Huakina Development Trust*. Relevant statutes in this context might include the Māori Language Act 1987 and the Broadcasting Act 1989.[321] Each statute touches on similar subject matter, and each explicitly make reference to Māori interests in language and broadcasting respectively. The underlying policy of these statutes would certainly inform the application of the Radiocommnications Act 1989. There were several avenues, then, that the Court could have used in the *Radio Frequencies* case can be used to tie the Treaty to decision-making processes under administrative law.

Relying on the Treaty as an administrative law standard provides another key mechanism for giving the Treaty indirect legal effect. Again, the Treaty's informal constitutional status suggests that this is appropriate. While jurisprudence is still developing in this area, it is clear that administrative law is not only consistent with the principles of the Treaty, but also that the former gives some indirect legal effect to the latter. However, if the Treaty adds nothing to existing administrative law principles, as the cases suggest, then it is difficult to see scope for the protection of substantive Treaty rights on the basis of an implicit mandatory consideration.

3 Treaty rights and the Treaty's indirect legal effect

It will be noted from the above discussion that neither of the ways in which the Treaty has indirect legal effect can be said to give legal effect to Treaty rights. Where the

---

321 Ibid.

Treaty has been used as an extrinsic interpretation aid, the weak-form presumption of consistency has primarily been employed. This limits the effect of the Treaty to vague or ambiguous legislation, and does not protect Treaty rights in the face of the slightest express Parliamentary intent to the contrary. Where the Treaty has been considered in an administrative law context, the Treaty has been found to add nothing to the existing procedural protection offered by the standards of natural justice and reasonableness. These procedural protections do operate to ensure Treaty interests are considered by administrative decision-makers, but do not offer the substantive protection that would be expected where Treaty rights are in issue. In contrast to the substantive protection afforded Treaty rights in the *Lands* case, the ways in which the Treaty has indirect legal effect have not yet been used to give legal effect to Treaty rights. As a result, neither method is currently used to give legal effect to the Tribunal's Treaty rights framework.

It is worth noting, however, that developments in the application of assertive use of the presumption of consistency and administrative law review based on substantive grounds may soon catch up with Treaty jurisprudence. Assertive use of the presumption of consistency in the Treaty context is closely analogous to its use in the context of unincorporated international obligations, as neither have direct legal effect in the absence of statutory incorporation but are considered to be important sources rights nonetheless.[322] Once it is recognised that Treaty rights are fundamental, as the Tribunal has done with its Treaty rights framework, then analogies can more readily be drawn with fundamental common law and statutory rights. The Tribunal's Treaty rights framework is, for example, premised on consistency with New Zealand's approach to fundamental NZBORA rights in New Zealand.[323] Principled application of the presumption of consistency would therefore suggest that assertive use in the Treaty context is required at least where Treaty rights are in issue. On this basis, *Huakina Development Trust* and *Barton-Prescott* have been considered cases where Treaty rights were not actually in play,[324] but it is perhaps more accurate to characterise these cases as instances where

322 Wilberg, above n 286, 735.

323 See above Part III B Recognising Treaty rights.

324 See Wilberg, above n 286, 729. While Wilberg does not expressly account for the distinction between Treaty rights and other Treaty interests, she suggests that failure to apply assertive use of the

orthodox legal principles limit the courts to taking Treaty interests, rather than substantive Treaty rights, into account. The limited application of assertive use of the presumption of consistency may be the result of confusion between that approach and an approach which considers fundamental rights to be mandatory relevant considerations.[325] As the courts move to clarify the principles underpinning these two approaches, it can be expected that assertive use of the presumption of consistency will be found to apply as a matter of principle in cases where Treaty rights are at stake.

Administrative law doctrine in New Zealand generally is also moving towards review based on substantive merits, and it appears to be only a matter of time before the courts will require administrative action to be substantively consistent with the principles of the Treaty. Administrative law in New Zealand is moving towards a new kind of public law litigation that seeks vindication of fundamental norms.[326] The waning doctrine of *ultra vires* is one manifestation of these developments.[327] Whether conceptualised as 'hard look' or 'constitutional review',[328] the courts have indicated a willingness to assess the substantive merits of administrative decisions. Recognising that claims based on the Treaty may include Treaty rights again suggests that, as a matter of principle, consistency with Treaty rights should be assessed on substantive grounds along with other fundamental rights. As yet, however, the case law in respect of the Treaty and administrative law does not appear to go this far.

At least one commentator has suggested that substantive review based on the Treaty has already arrived. Philip Joseph has argued that the Treaty, in addition to fundamental human rights and international obligations, form the basis for 'constitutional review' of administrative action.[329] Joseph's constitutional review is substantive and

---

presumption in *Barton-Prescott* is the result of the "limits of the underlying Treaty obligation". See also "*Tavita* and All That", above n 283, 83-85.

325 See "*Tavita* and All That", above n 283.

326 Michael Taggart "Reinventing Administrative Law" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Portland, 2003) 311, 330.

327 See "The Demise of *Ultra Vires*", above n 64.

328 See above Part II B Rights in the legal system.

329 See especially PA Joseph "Constitutional Review Now", above n 68.

value-driven, and may be considered a move towards the recognition that certain legal interests are rights and should take priority.[330] Joseph relies on a wide range of cases dealing with the Treaty to suggest that constitutional review includes a substantive review assessed against Treaty principles.

On orthodox analysis, however, Joseph's claims of constitutional review in respect of the Treaty are difficult to sustain. Substantive assessment of administrative action against the principles of the Treaty, as required by constitutional review, has only occurred to date where statutory provisions expressly require such assessment. The *Lands* case, in reliance on section 9 of the SOEA, and *Ngai Tahu*, in reliance on section 4 of the Conservation Act, are quintessential examples. Cases that give indirect legal effect to the Treaty, such as the *Radio Frequencies* case and *Huakina Development Trust*, may be considered part of the context of a wider movement towards Treaty-based constitutional review of the exercise of Crown authority,[331] but because they do not provide direct legal effect to Treaty rights, they cannot provide a principled limit on the exercise of political power.[332] As a result, constitutional review as it currently stands does not move the indirect legal effect of the Treaty any closer towards substantive recognition of Treaty rights.

The distinction between legal processes that give the Treaty direct or indirect legal effect is not one that is always easy to apply. The *Lands* case, for instance, is based on direct statutory incorporation of the Treaty and its principles, but is strictly a judicial review case. *Ngai Tahu* contains elements of the Treaty as an extrinsic aid and as an implicit mandatory relevant consideration, but is best understood as an example of statutory incorporation of the Treaty. There is, however, an important distinction to be made between cases such as *Lands* and *Ngai Tahu* where express statutory references to the Treaty allow the courts to examine issues of substantive Treaty rights, and cases like

---

330 See "The Demise of *Ultra Vires*", above n 64, 374.

331 "Constitutional Review Now", above n 68, 97-101.

332 It may be a failure to recognise the distinction between Treaty rights and other Treaty interests that leads Joseph to the conclusion that cases concerning the indirect legal effect of the Treaty are direct examples of his constitutional review.

Radio Frequencies and *Huakina Development Trust* where the Treaty interests are only considered by the courts as part of assessing the Crown's procedural obligations. In *Lands* and *Ngai Tahu*, the courts had each had the opportunity to investigate the substantive merits of the Crown actions against the standard set by the principles of the Treaty. As the law currently stands, it is only through direct incorporation of the Treaty via statutory recognition that the Crown's substantive Treaty obligations can be legally enforced, and meaningful legal effect be given to Treaty rights. Appropriately worded statutory references to the principles of the Treaty are therefore required to give legal effect to the Tribunal's Treaty rights framework.

V IMPLICATIONS FOR TREATY PROVISIONS IN LEGISLATION

As the above discussion demonstrates, an appropriately-worded statutory reference to the principles of the Treaty is the only way to give effective recognition to Treaty rights in a manner that is consistent with the Tribunal's Treaty rights framework. Accordingly, where Treaty rights are in issue, it can be expected that a principled response from the political branch of government would be to enact legislative provisions that require consistency with,[333] or least prohibit inconsistency with,[334] the principles of the Treaty. Enacting such provisions has important implications, one of which is that, once these provisions are enacted the legal effect of the Treaty, and therefore of Treaty rights, is largely in the hands of the judiciary. Specific criticism of the *Lands* case in terms of the role of the courts in developing the legal principles of the Treaty has already been addressed. This Part V begins by going a step further and arguing that leaving a role for the judiciary in determining the content of Treaty rights is necessary as a matter of principle, and that a responsible political branch of government will seek to leave determination of the legal effect of Treaty rights to the courts in appropriate circumstances.

There are a number of reasons that the courts should play a role in recognising and protecting Treaty rights. The two most important are that the courts provide a degree of independence that legitimises judicial decision making in respect of rights generally and Treaty rights in particular, and that the political branch has demonstrated that it cannot protect minority rights such as Treaty rights where this would be in conflict with the political pressure brought to bear by a popular majority. Taking these two factors into account, principled exercise of the legislative prerogative by the political branch would allow for the recognition and protection of Treaty rights through appropriately broad references to the principles of the Treaty.

---

333 See Conservation Act 1987, s 4.

334 See State-Owned Enterprises Act 1986, s 9.

The current approach to statutory incorporation of the Treaty does not, however, provide scope for legal protection of Treaty rights where such protection would be expected. The current approach of the political branch is to incorporate an 'architecture' of provisions into a statutory scheme with the intention of minimising the legal effect of the Treaty.[335] While this architecture approach may support the ways in which the Treaty has indirect legal effect, it cannot provide legal effect to Treaty rights because it does not provide a role for the courts to recognise and protect them. There is some merit in the architecture approach in that it is intended to promote a clear understanding and expression of the legal effect intended by the political branch in referring to the Treaty. A desire for the political branch to take its Treaty obligations seriously should not, however, be used to frustrate principled legal recognition of Treaty rights.

A A Role for the Courts in Recognising and Protecting Treaty Rights

To ensure principled and effective resolution of issues involving Treaty rights the New Zealand courts need to play a role. The courts offer an independence when dealing with Treaty issues and issues of rights that the political branch cannot, and this means that the decisions of the courts on these issues can be legitimised in a way that political decision making cannot. There are three reasons for this: the judiciary is independent of the political branch, which Treaty rights are held against; that the courts provide a forum where individuals and minorities can bring claims based on rights as individuals and minorities in their own right, rather than as part of the wider citizenry in reliance on majority support; and the courts have a history and some experience of adjudicating rights issues.

Judicial protection of Treaty rights is necessary because New Zealand's political branch of government, and in particular its Parliamentary processes and institutions, do not adequately protect minority rights as a matter of practice. In relation to issues of

---

335 Office of the Minister of Health Memorandum to Cabinet "Legislative Provisions for Treaty of Waitangi" <http://executive.govt.nz/minister/king/cabinet00-08/docs/wording-treaty-clause.pdf> (last accessed 26 September 2008) 1.

Treaty rights in particular the political branch has demonstrated that it will infringe minority rights without justification where this is politically expedient. While this is not of itself an argument for judicial involvement in issues of Treaty rights, the involvement of an independent institution such as the judiciary would be one way to provide Treaty rights with an appropriate degree of protection. The argument is, therefore, not an argument for strong-form judicial review of Treaty issues; rather, the position advocated is one of political maturity and deference on certain Treaty issues so that such issues can be considered by the courts in a principled fashion.

1 The role of the judiciary in determining issues of rights

Where rights are at stake it is vital that those rights issues are determined with the involvement of an independent institution. This is the principal reason that the judiciary needs to have a role in determining issues of Treaty rights. The courts, being historically separate from the political branch of government and free of the populist pressures that political institutions face, provide the necessary independence. It is a basic rule of fair process and natural justice generally under New Zealand law that decision makers are independent when important issues are determined.[336] This rule stems from the maxim that justice must not just be done, but be seen to be done.[337] As an independent institution the courts are well-suited to dealing with weighty issues of rights:[338]

> The courts are the independent branch of government and the legislative and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violations of human rights is a legal principle.

---

336 *Constitutional and Administrative Law*, above n 72, 989.

337 *R v Sussex Justices; Ex p McCarthy* [1924] 1 KB 256, 259 (CA) Lord Hewart.

338 *R (Prolife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, 240 (HL) Lord Hoffmann.

In cases involving minority rights such as Treaty rights, independence of decision makers is particularly important. This is because "decisions about rights against the minority are not issues that in fairness ought to be left to the majority",[339] or majoritarian institutions. A populist decision-making procedure cannot separate itself from the views of a popular majority that may wish to frustrate recognition of minority rights. An independent institution is therefore required to fairly, and legitimately, determine issues of rights.

In the context of the Treaty rights the need for independence from the political branch is more subtle than a simple majoritarian threat to recognition of minority rights. Treaty rights are political rights by definition, meaning that Treaty rights entail corresponding Treaty obligations on the political branch of government. There is an inherent 'perception risk' that where the political branch solely determines the limits of its own responsibilities on Treaty issues it will not be seen to be acting fairly. The requirement that the political branch not be a judge in its own cause therefore has additional strength when Treaty rights are involved.

One ardent proponent of Parliamentary determination of rights argues that independence on issues of rights is illusionary, and therefore should not be a reason for preferring the courts over the political branch when rights issues are decided. Jeremy Waldron, who has been described as the world's leading rights scholar,[340] takes something of an ambivalent view on whether someone should act as a judge in his or her own cause, as he believes that decisions about rights will always be made by people who have their own rights affected by the decision.[341] This criticism, Waldron believes, applies equally to judges as it does to members of the political branch. As a consequence, any decision-making process will leave someone to be the judge in their own cause, and there is no reason to prefer judicial decision making on rights issues on the basis of independence.

---

339 *Taking Rights Seriously*, above n 34, 142.

340 James Allan and Andrew Geddis "Waldron and Opposing Judicial Review – Except, Sort of, in New Zealand" [2006] NZLJ 94, 94.

341 Jeremy Waldron *Law and Disagreement* (Clarendon Press, Oxford, 1999) 297.

Waldron's argument on this point fails to acknowledge that it is the electing public, in addition to the individuals that constitute the legislative institution itself, who will be interested in a decision about individual or minority rights.[342] The general public's own interests may, for example, oppose the recognition of the right in question. This creates a risk, or at least the perception of a risk, that the political branch will face pressures from constituents that the courts will not.[343] The judiciary therefore has a perception of independence that suggests it has a principled basis to determine rights issues.

Further, even if Waldron's argument that judges are not independent is accepted for rights issues generally, it may not hold in the specific case of Treaty rights. Waldron argues that the individuals involved in decisions on rights will be interested in decisions about rights whether or not those individuals form part of judicial or political institutions. However, where rights are held against the political branch, as with Treaty rights, there is the additional concern that the Crown will act in its own interests through its political institutions. Waldron fails to address the point that political institutions, rather than individuals that make up those political institutions, may act in their own interests on issues of fundamental political rights. The political branch may, for instance, seek to limit the scope of certain rights in order to maintain its own political power. As an institution independent of the right-duty relationship in the Treaty context, the courts can, at least, avoid this additional risk.

In addition to their independence, two further reasons suggest that the courts have a principled role to play in protecting Treaty rights. The first is that the courts provide a forum for examining rights issues on the initiation of the individual or the minority group that feels that their rights have been abrogated.[344] Individuals and minorities will simply not be able to ensure that their views will be taken into account in a political forum unless

---

342 Ronald Dworkin *A Matter of Principle* (Harvard University Press, Cambridge, 1985) 24 [*A Matter of Principle*].

343 Ibid, 25.

344 Ibid, 11. See also " "Hard Look" and the Judicial Function", above n 65.

they can make themselves "strategically viable",[345] and individuals and minorities may often find this difficult. It is central to a liberal conception of the rule of law that citizens can, as individuals or minority groups, demand assessment of their rights.[346] Māori, as individuals and as a minority group, need to be able to petition effectively for recognition of Treaty rights, and to leave the issue of rights recognition solely to political processes requires political will that may or may not exist.

The courts are also better placed to deal with rights issues because they have a history of dealing with such issues. Traditionally, it has been the courts that have defended rights that would otherwise have been curtailed. There are numerous examples in the law reports of New Zealand and England: three are *Entick v Carrington*,[347] *Fitzgerald v Muldoon*,[348] and *Simpson v Attorney-General*.[349] In the Treaty rights context one need look no further than the *Lands* case and *Attorney-General v Ngati Apa*.[350] Judicial protection of rights is therefore well established, and it should be disturbed only reluctantly.[351]

There is, then, good reason to believe that the courts should play a role in recognising and protecting rights, and in particular Treaty rights. This is primarily because of the independence that the courts provide, but also because the courts can be accessed directly by right-holders and have a history of protecting fundamental rights.

2 Waldron's defence of legislatures

Waldron also advances a strong argument that the political branch should in principle be the final arbiter on issues of rights and that a role for the courts is

---

345 Lawrence G Sager "Constitutional Justice" (2002) 6 NYU J Legis & Pub Pol'y 11, 17.

346 *A Matter of Principle*, above n 342, 12-13.

347 *Entick v Carrington* (1795) 19 St Tr 1029.

348 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (CA).

349 *Baigent's case*, above n 73.

350 *Ngati Apa*, above n 186.

351 See "The Pendulum Returns", above n 225, 363.

unnecessary. Waldron argues persuasively that legislative decision making has its own underlying principle – the principle of consent. Consent "carries moral force",[352] and it is a key factor in distinguishing democratic processes from majority rule. Without a similar basis in consent, the courts do not have the same claim to determine substantive issues of rights.

Consent provides a moral basis for political decision making because it demonstrates respect for individual views, and this legitimises legislation as the product of such decision-making. Implicit in Waldron's principle of consent is that the greatest possible weight is given to all individual views.[353] Consent also veers consenting parties towards compromise.[354] Where a crude majority-based decision-making process would roughly dismiss any dissenting views, the moral ideal of consent ensures that all views are given due consideration. This ensures that differences of opinion about conceptions of rights are respected, even if the are not ultimately given effect to.[355] There will always be disagreement on important issues such as rights, and in the face of this disagreement, Waldron argues, only a decision-making process premised on consent and inclusion can finally and legitimately determine issues of rights.

An initial response to Waldron's argument based on the principle of consent is that, unlike the principle of independence, it does not operate to protect minority rights against majoritarian pressures. Waldron specifically addresses the issue of a lack of respect for minority rights as part of a majoritarian decision-making process. Waldron is skeptical of an objective approach to issues of rights, and actually believes that disagreement about rights is a good thing. Legislatures are open forums for disagreement, and specialise in resolving those disagreements through the equal participation of interested parties through democratic processes.[356] On Waldron's view,

---

352 Jeremy Waldron *The Dignity of Legislation* (Cambridge University Press, Cambridge, 1999) 136.

353 Ibid, 148.

354 Ibid, 142.

355 Ibid, 158.

356 See Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346, 1388 ["The Case Against Judicial Review"].

minority rights are respected by truly democratic processes because any decision on rights will be consistent with the conception of rights held by the majority.[357] Waldron argues that individuals vote based on their conception of justice rather than their own self-interest,[358] which removes any risk of minority rights being arbitrarily. This means that minority rights are respected, even though the minority's own view on those rights will not necessarily be accepted.

Waldron's argument may have some force in the Treaty rights context, as in New Zealand there are several checks and balances in place to ensure that the Treaty and the different issues it raises must be engaged with seriously by the majority as part of the policy and legislative processes and cannot simply be ignored. There is a Cabinet Minute that requires Ministers to report on the Treaty implications for every Cabinet paper that proposes new legislation.[359] The number of Māori members of Parliament has increased significantly since the advent of MMP, and they come from an increasingly diverse range of political parties,[360] meaning that Treaty issues can be effectively identified and debated in the House. The Attorney-General is required to vet new legislation for consistency with NZBORA,[361] and these rights overlap with Treaty rights in some circumstances. In addition, the state service also seems well aware of its obligations to consider the Treaty.[362] The informal constitutional rhetoric surrounding the Treaty also gives it some protection from being ignored by the political branch.

---

357 Claire Charters "Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament Does Not Protect Rights in Hard Cases" [2006] NZLR 621, 626.

358 The Case Against Judicial Review, above n 356, 1401.

359 Although some have questioned whether the requirements of this Cabinet Minute are adhered to strictly: see Northover, above n 177, 15-16.

360 See Fionnuala McKeever *MMP and the New Zealand Constitution: How the Advent of a Proportional Representation Electoral System has Altered the Relationship between the Legislative and Executive Branch of Government* (LLB (Hons) Research Paper, Victoria University of Wellington, Wellington, 2005) 10-11. See also The Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3, 50-51.

361 New Zealand Bill of Rights Act 1990, s 7.

362 See generally State Services Commission, above n 278; Office of the Controller and Auditor-General *The Treasury: Capability to Recognise and Respond to Issues for Māori* (Office of the Controller and Auditor-General, Wellington, 2006); Office of the Controller and Auditor-General *The State Services Commission: Capability to Recognise and Respond to Issues for Māori* (Office of the Controller and Auditor-General, Wellington, 2004).

However, Waldron's argument fails to take into account one fundamental characteristic of rights: rights should be enforced or vindicated even if to do so would run against the interests of the majority. This is in essence what sets rights apart from other legitimate interests that fall to be decided by the political branch of government,[363] and is the basis of the distinction between Treaty rights and other Treaty interests observed by the Tribunal and discussed in Part III of the this paper. In denying the relevance of this fundamental characteristic Waldron does not so much argue in favour of political determination of rights, but denies of the existence of rights as traditionally understood in liberal jurisprudence. It is not clear why a modern society founded on the twin pillars of democracy and the rule of law should embrace a view that removes special consideration for fundamental rights. New Zealand has clearly adopted a legal and political framework that recognises the unique characteristics of rights issues and that they must be resolved differently from other legal and political issues.[364] Further, the fundamental importance of the Treaty in the legal system means that Treaty rights also require special consideration.

Waldron's argument simply fails to resolve the issue that Māori are in the minority in New Zealand and if there is no majority support for Māori Treaty rights the political branch may fail to recognise and protect those rights. Rejecting Waldron's argument for political determination of rights issues on the basis that issues of rights do deserve additional protection and should not simply be resolved by majoritarian decision making sets up a strong case that the judiciary, as an independent institution, should be permitted a role in the identification and protection of Treaty rights.

---

363 *Taking Rights Seriously*, above n 22, 139.

364 See generally KJ Keith "A Bill of Rights for New Zealand? Judicial Review Versus Democracy" (1985) 11 NZULR 307.

3 Parliament's failure to protect minority rights

Waldron's argument that consent legitimises political determination of rights issues is also open to challenge on its own terms, as it is contingent on a number of conditions. Waldron acknowledges this fact and has qualified his argument significantly by suggesting that political decision making based on consent is a principled method of decision making only if certain societal conditions are in place. These conditions are:[365]

> … a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights … among the members of the society who are committed to the idea of rights.

On the terms of Waldron's own argument, then, his principled defence of legislatures as the appropriate institution to determine rights issues will not apply if political institutions do not operate within a framework where all of his conditions apply. If Waldron's analysis is to provide support for the claim that the political branch of government should deal with issues of Treaty rights, then it needs to be demonstrated that all four of Waldron's conditions hold in the case of New Zealand society.

However, there are grounds to question whether Waldron's conditions can ever realistically apply to any society when issues of minority rights that run counter to the majority interest are at stake. For the purposes of this paper it is enough to question Waldron's first condition: that the society in question has reasonably effective democratic institutions. A key reason to question the applicability of this condition is that political representatives often seem more concerned with politicking than producing a quality legislative product. Geoffrey Palmer, for instance, has complained that "[m]uch of the [Parliamentary] debate is vapid nonsense" and that "[p]olitics swallows up the rest of

365 "The Case Against Judicial Review", above n 356, 1360.

what goes on in Parliament".[366] Others have suggested that modern democratic institutions may not necessarily be effective as there is nothing to rule out the possibility that representatives simply disagree with their constituents about issues of rights, meaning that representatives may act on their own initiative rather than as a conduit of others' views (albeit with good intentions).[367] Waldron's assumption of a reasonably sound democratic institution therefore needs to at least be approached with an open mind.

Claire Charters has directly challenged the applicability of Waldron's first condition in New Zealand by examining an example of where New Zealand's political institutions have failed to protect minority rights. Charters uses the example of the Foreshore and Seabed Act 2004 (the "FSA"), the political branch's response to a Court of Appeal decision that traditional Māori property rights in New Zealand's foreshore and seabed territory had not been extinguished,[368] to highlight political failings to deal appropriately with issues of Māori rights. The FSA frustrated Māori property rights that were found to otherwise exist by the Court of Appeal, and Charters contends that this is a result of fundamental failings by the political branch of government where minority rights may run against the interests of the popular majority.

Charters' argument that the political branch fails to protect minority rights focuses on overlap between the executive and the legislature in New Zealand's political branch of government. First, Charters contends that Cabinet can effectively control the content of legislation that is enacted by determining the content of legislation presented to the House of Representatives for consideration.[369] This creates issues for effective representation and electoral accountability because Cabinet decisions are made in secret, without room for public dissent,[370] by members of governing parties that may not

---

366 Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming Our Political System* (McIndoe, Dunedin, 1992) 110.

367 Charters, above n 357, 660.

368 *Ngati Apa*, above n 186.

369 Charters, above n 357, 635.

370 As required by the constitutional convention of collective responsibility: see *Constitutional and Administrative Law*, above n 72, 747.

represent a majority of New Zealanders.[371] Charters argues that the MMP environment has not improved the situation as support for executive proposals are secured in secret and do not utilise a "transparent and inclusive process".[372] In the case of the FSA two government Members of Parliament voted against the Foreshore and Seabed Bill on its first reading causing a significant public display of dissent. Charters notes that this public dissent, while resulting in increased discussion on the relevant issues, was ironically considered to be some kind of systemic failing.[373] The heavy influence of the executive means, therefore, that legislative proposals are not usually discussed openly in a way that enables all relevant issues to be highlighted.

Charters argues further that legislative processes themselves are not sufficiently robust to withstand executive pressure.[374] For instance, the select committee process is designed to enable a multipartisan committee of Members of Parliament to examine legislative proposals in some detail. This is deemed to be one of the democratic highlights in New Zealand's system of government.[375] However, the executive does exercise significant influence over the select committee process. For example, the executive can determine which committee is to consider a particular bill, which may significantly influence the outcome of any select committee recommendations. The executive can also call for legislative proposals to be considered by Parliament under urgency, meaning that all three readings of a bill may be debated in immediate succession, thus limiting the time available for legislative deliberation. Both these examples came into play with the passage of the FSA: the Bill was referred to the Fisheries Committee when the Māori Affairs Committee seemed a more natural choice,[376] and urgency was accorded in respect of the Foreshore and Seabed Bill immediately following the beginning of the second reading.[377]

---

371 Charters, above n 357, 635-636.

372 Ibid, 636.

373 Ibid, 638.

374 Ibid, 639.

375 Jeremy Waldron "Compared to What? Judicial Activism and New Zealand's Parliament" [2005] NZLJ 441, 443 ["Compared to What?"].

376 Charters, above n 357, 640.

377 (16 November 2004) 621 NZPD 16929-16930.

This attack on the applicability of Waldron's first condition in the New Zealand context is quite compelling. Charters' assessment provides a practical example of the political branch failing to protect Māori rights because the legislative process cannot free itself from the influence of political pressures. There are, of course, other examples. The political branch is responsible for New Zealand being one of only four nations that voted against the United Nations Declaration on the Rights of Indigenous Peoples. More recently, the imposition of a deadline for the lodging of historical claims with the Waitangi Tribunal appears to be a matter of political expediency rather than a move concerned with principle or justice.[378] The most compelling support for Charters' assessment is that Waldron actually appears to be largely in agreement with Charters' views on these issues of executive domination of the legislature in the New Zealand context.[379] Waldron has been, in fact, quite scathing of New Zealand's brand of democracy for not living up to the ideals set out in his societal conditions, and in arguing her thesis Charters explicitly draws on Waldron's existing work.[380] Charters adds to Waldron's existing criticisms of New Zealand's democratic arrangements, highlighting that the development and passage of the FSA was driven by the Department of Prime Minister and Cabinet rather than an appropriate ministry, consultation on the legislation and significant protests were ignored, and a Tribunal report relating to the legislation was heavily and erroneously criticised.[381] Charters also questions the impartiality of the Attorney-General's responsibility to vet legislation for consistency with NZBORA,[382] a key component of New Zealand's protection of fundamental rights,[383] and suggests that it may provide the political branch of government with an opportunity to ignore other rights-based criticisms of legislative proposals.[384] These criticisms suggest a compelling case against the political branch as a forum for addressing rights issues, and there seems

---

378 See Treaty of Waitangi Act 1975, s 6AA.

379 See "Compared to What?", above n 375.

380 Charters, above n 357, 632.

381 Ibid, 645-649.

382 See New Zealand Bill of Rights Act 1990, s 7.

383 Charters, above n 357, 649-650.

384 Ibid, 651.

to be ample evidence that New Zealand's constitutional arrangements do not meet Waldron's first condition, and therefore that Parliament cannot operate to protect minority rights in practice.

4 A way forward – dialogue between the political and judicial branches

The principled role of an independent judiciary and the institutional failings of the political branch of government suggest that the courts should have a role in determining issues of Treaty rights. This conclusion does not, however, deny a principled role for the political branch on rights issues, as the nature of New Zealand's constitution with its emphasis on Parliamentary sovereignty requires political input on rights issues as a matter of practice. A dialogue between the courts, which in principle have a stronger claim to rights issues, and the political branch, which exercises sovereign authority under New Zealand's constitutional arrangements, is therefore perhaps the best way to address these problems in a principled fashion.[385] In order to achieve this dialogue, the political branch is required to enact appropriate legislative provisions that allow the courts to play a principled role. In respect of the Tribunal's Treaty rights framework, this requires an appropriately worded reference to the principles of the Treaty. Without the political branch taking this first step, a meaningful dialogue between the judicial and political branches of government cannot eventuate, and Treaty rights cannot be effectively protected.

The need for some kind of constitutional dialogue or collaboration is in part based on the legitimacy that accompanies political recognition of rights. While options that involve the courts taking the initiative on Treaty rights issues have been discussed as possibilities as Treaty jurisprudence evolves, it is worth emphasising that the political branch of government can play a vital role in ensuring that rights issues are considered seriously. NZBORA is a classic example of this. While NZBORA codified many

---

385 For an argument in support of judicial/political dialogue on rights issues see Peter W Hogg and Alison A Bushell "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall LJ 75. See also "The Collaborative Enterprise", above n 7.

fundamental common law rights, statutory recognition of those rights has provided a renewed emphasis on civil and political rights and their importance in New Zealand society.[386] Legislating for recognition of fundamental rights may also pave the way for the courts to follow in some circumstances, as the enactment of the Civil Union Act 2004 demonstrates.[387] In the Treaty context it is also worth remembering that collaboration with the political branch of government is necessary as a practical matter as while the courts have a principled role to play in applying and protecting rights, the political branch will often determine the extent to which the courts are free to do so through the legislative provisions it enacts. Principled recognition and protection of Treaty rights therefore requires a two-step process – enactment of statutory provisions that require consistency with the principles of the Treaty by the political branch, and the interpretation and application of those provisions to particular claims based on the Treaty by the judiciary.

B Reassessing the 'Architecture' Approach

While the Tribunal's Treaty rights framework suggests that legislative recognition of the Treaty should incorporate a requirement of consistency with the principles of the Treaty where Treaty rights are in issue, the current 'architecture' approach to Treaty provisions in legislation is not consistent with this principled recognition of Treaty rights. The architecture approach is so named because this approach incorporates an 'architecture' of Treaty provisions throughout the scheme of a particular statute. Often this entails a general reference to the Treaty in the purpose provision of the statute, and detailed operative clauses throughout the body of the statute to give specific legal effect for the stated purpose. Recent examples of this approach include the NZPHDA, the Local Government Act 2002, and the Public Records Act 2005.

---

386 See " "Hard Look" and the Judicial Function", above n 65, 1.

387 Compare *Quilter v Attorney-General* [1998] 1 NZLR 523. I am grateful to Bill Atkin for drawing my attention to this example.

The architecture approach has been used in circumstances where protection of Māori rights based on the Treaty would be expected to apply. A prime example is that NZPHDA, which incorporates both a broad reference to the principles of the Treaty that appears to have no actual legal effect and a range of instrumental provisions that ensure Māori interests are taken into account. These detailed instrumental provisions do not, however, provide for Māori rights to healthcare based on the Treaty, which would be expected if the political branch of government was taking its Treaty obligations seriously. This approach has been endorsed as a principled approach to Treaty provisions in legislation from both legal and public policy viewpoints on the grounds that toothless statutory reference to the Treaty and narrowly-phrased instrumental provisions mean that the courts cannot play a creative role in giving the Treaty unexpected legal application. As the criticisms of the *Lands* case indicate, there is some value in the underlying policy intention of instrumental Treaty provision being clarified, support for the architecture approach fails to acknowledge the principled distinction between Treaty rights and other Treaty interests, and as such the global use of the architecture approach when enacting Treaty provisions needs to be reassessed if the Tribunal's Treaty rights framework is to be afforded principled and effective legal recognition.

1 The architecture approach in action – the NZPHDA

The NZPHDA is a quintessential example of the architecture approach to Treaty provisions in legislation. As enacted, the NZPHDA contains the following provisions:

> **Section 3 – Purpose**
>
> (1) The purpose of this Act is to provide for the public funding and provision of personal health services, public health services, and disability support services, and establish new publicly-owned health and disability organisations in order to pursue the following objectives –
>
> …
>
> (b) to reduce health disparities by improving the health outcomes of Māori and other population groups:
>
> …

(2) The objectives stated in subsection (1) are to be pursued to the extent that they are reasonably achievable within the funding provided.

(3) To avoid any doubt, nothing in this Act –

(a) entitles a person to preferential access to services on the basis of race; or

(b) limits section 73 of the Human Rights Act 1993.

Section 4 – Treaty of Waitangi

In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Māori, Part 3 provides for mechanisms to enable Māori to contribute to decision-making on, and to participate in the delivery of, health and disability services.

Detailed provisions in Part 3 of the NZPHDA require Māori and Treaty interests to be taken into account as part of a range of functions to be performed under the NZPHDA. None of these detailed provisions require consistency with the principles of the Treaty, or otherwise attempt to protect Māori rights by providing the courts with appropriate scope to recognise and protect such rights.

The need for legislative recognition of Treaty rights in the NZPHDA becomes clear when the wider context of the Crown's Treaty obligations are considered. In fact, early Cabinet papers appear to recognise the need to consider Māori rights to healthcare in the lead up to the passage of the NZPHDA, where it was assumed that principled health legislation would recognise additional health entitlements for Māori.[388] While not directly invoking the rhetoric of rights to health care provision, the language of 'entitlement' suggests a position that is consistent with recognition of Treaty rights to adequate healthcare. Cabinet appears to have backed away from this position on the basis of a Crown Law Office letter of advice warning that such a position would perhaps be inconsistent with the usual approach taken to social policy issues in legislation.[389] However, there are strong principled reasons for legally recognising the rights of Māori

388 Office of the Ministry of Health Memorandum to Cabinet "Treaty of Waitangi in Health Legislation" <http://executive.govt.nz/minister/king/cabinet00-08/docs/treaty-of-waitangi-in-legislation.pdf> (last accessed 26 September 2008) 2.

389 Michael Doogan, Crown Counsel, to Grant Adam, Ministry of Health (9 May 2000) Letter, para 10 (Obtained under Official Information Act 1982, Request to the Ministry of Health).

to healthcare in spite of this usual practice. The political branch of government is required as a matter of international law to take a rights-based approach to issues of social policy, including healthcare.[390] A rights-based approach requires special provision to be made for disadvantaged groups,[391] and there is no reason that these additional entitlements should not be given statutory recognition. Māori certainly fall within the category of a disadvantaged group: Māori consistently rate behind other cultural groups in New Zealand on a range of socio-economic indicators. While there is apparent popular support for the crude 'needs-based provision; not raced-based provision' rhetoric in respect of social policy issues, this ignores the fact that Māori ethnicity is a prime driver of the negative results in socio-economic statistics.[392] Other reasons to recognise Māori rights to healthcare include increasing international recognition for indigenous rights, such as the United Nations Declaration on the Rights of Indigenous Peoples which recognises the rights of indigenous peoples to the improvement of their economic and social conditions.[393] The NZPHDA as enacted departs from this principled position as it does not recognise Treaty rights in respect of Māori healthcare.

In some ways, the architecture approach as employed in the NZPHDA is a step forward for legislative recognition of the Treaty. A key criticism of the enactment of section 9 of the SOEA is that the obligations it imposes are indeterminate, and it may have been used as a means of avoiding the hard policy work of determining the proper effect of the Treaty. The approach taken with the NZPHDA addresses these concerns, as it carefully spells out the intended effect of the reference to the Treaty. Accordingly, the architecture approach may, as far as policy considerations are concerned, represent the political branch of government taking its Treaty obligations seriously.

---

390 Geiringer and Palmer, above n 36, 13.

391 Ibid, 28-29.

392 See Mason Durie "Race and Ethnicity in Public Policy: Does it Work?" (2005) 24 Social Policy JNZ 1, 7 citing Arohia Durie *Te Rērenga o te Rā Autonomy and Identity: Māori Educational Aspirations* (PhD Thesis, Massey University, Palmerston North, 2002).

393 United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) 61/295, art 21.

Detailed Treaty policy provisions should not, however, be used in place of legislative recognition of Treaty rights. The NZPHDA does not recognise Treaty rights, and this may be a consequence of the desire to carefully articulate the Treaty's legal effect. There is no reason that detailed policy provisions designed to articulate the legal effect of Treaty interests cannot coexist with legislative recognition of Treaty rights. This is an approach utilised in other areas of the law.[394] The fact that Treaty rights have not been legislated for suggests a failure to appreciate the distinction between Treaty rights and other Treaty interests. Rather, the implicit assumption appears to be that all Treaty interests can be considered matters of political policy that should be accounted for with detailed legislative provisions that exclude any role for the courts. This approach is *prima facie* inconsistent with the Tribunal's Treaty rights framework, and needs to be reassessed if the political branch of government wishes to take its Treaty obligations to Māori seriously.

2 Support for the architecture approach

Support for the architecture approach comes from adherents to the view that the political branch rather than the judiciary should determine the content of the Crown's Treaty obligations. This involves completing the difficult policy work associated with the Treaty and transforming that policy into meaningful and effective legislation. This approach has some merit, as it appears to be the first systematic approach to Treaty provisions in legislation,[395] and promotes understanding by politicians and officials of the effect of legislative Treaty provisions. What is notable is that support for the architecture approach is not premised on political determination of issues of rights, as Waldron

---

394 Compare the specific rights to education in the Education Act 1989, ss 3 and 8(1) and the more detailed policy provisions of that statute under consideration in *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA). See also Grant Illingworth "Social Policy Legislation in New Zealand: The *Daniels* Case and Special Needs Children" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (Lexis Nexis, Wellington, 2006) 161.

395 Prior to this approach being adopted the form of any particular Treaty reference appears to have been governed by "the changes in the political climate or mood of the day, including reactions to court decisions based on earlier references, and to the political compromises associated with the drafting of legislation": "The Treaty of Waitangi in Legislation", above n 215, 3 citing Richard Boast and Deborah Edmunds *Treaty of Waitangi and Resource Management*.

argues.[396] Rather, it is premised on conflating Treaty rights with other Treaty interests so that all Treaty interests are considered to be matters of political policy able to be resolved by political processes. This analysis in support of the architecture approach highlights that the approach is fundamentally incompatible with legal recognition of the Tribunal's Treaty rights framework, and accordingly must be reassessed if the political branch wishes to offer principled responses to claims based on the Treaty.

A principal advocate of the architecture approach is Matthew Palmer, and the following discussion is largely a critique of his analysis.[397] Palmer argues that broadly-phrased Treaty references should only be used where it is intended that the Treaty not have legal effect, but where some symbolic value is called for.[398] This has been likened to a "legislative mihi",[399] or acknowledgment of the Treaty. While it is important to acknowledge the symbolism inherent in the Treaty, use of symbolic legislation divorced from any legal effect needs to be considered with a degree of skepticism. Support for symbolic legislation may stem from a belief that Treaty issues touch on a range of complex and controversial ideals and values that cannot ever be resolved through competing political and legal claims. Given the inherent controversy in any detailed claim based on the Treaty, adopting a legislative reference that provides only symbolic gratification for Treaty claims may provide both positive reinforcement for Treaty claims and the legitimation of the role of the political branch of government in dealing with those claims.[400] Further, this legitimation can be achieved without tying the political branch down with legislation that contains specific obligations or restrictions. It needs to be acknowledged, however, that symbolic references to the Treaty still leave open questions of how the Treaty is to apply in practice to various government agencies and the public, as does not actually seek to resolve the application of controversial issues such

---

396 See above Part V A 2 Waldron's defence of legislatures.

397 Palmer, above, n 3. Palmer may have since reconsidered this position, however: see Palmer, Matthew (Te Papa Tongarewa Treaty Debate Series 2008, Wellington, 31 January 2008) <http://www.tepapa.govt.nz/TePapa/English/WhatsOn/Events/AnnualEvents/TreatyDebate2008/> (last accessed 26 September 2008).

398 Ibid, 209.

399 Ibid.

400 See James Q Wilson "The Politics of Regulation" in James W McKie (ed) *Social Responsibility and the Business Predicament* (Brookings Institute, Washington, 1974) 135, 166.

as the Treaty.[401] Symbolic Treaty references do nothing to resolve Treaty issues, and may even confuse the bureaucracy and the courts when controversial Treaty issues fall before them for interpretation.

Symbolic Treaty references without any legal effect also seem to be out of step with orthodox Treaty jurisprudence. Palmer, for instance, suggests that an appropriately-placed symbolic reference to the Treaty could confer a degree of legitimacy on the New Zealand state,[402] something that seems at odds with the orthodox legal view he otherwise adopts.[403] The 'legislative mihi' concept is also a clear signal of departure from orthodox principles of statutory interpretation. Hannah Northover contends that the use of the term "mihi" in this context is a "slightly uncomfortable adoption of a word with more than symbolic meaning".[404] Northover goes on to suggest that it would be a clear perversion of the term if used to circumvent any instrumental effect the Treaty might otherwise have.[405] The current author echoes those sentiments.

The architecture approach to Treaty provisions with some intended instrumental legal effect involves careful policy development and implementation of that policy through detailed, narrowly-worded provisions. This roughly conforms to a four step process: identification of the relationships between Māori and the Crown and where necessary consultation with identified Māori individuals and groups; deconstruction of the relevant legislative proposal into decision-making elements; identification of the affected Māori Treaty interests; and incorporation of mechanisms for safeguarding the identified Māori Treaty interests into the proposed legislation.[406] This process is not, by

---

401 John P Dwyer "The Pathology of Symbolic Legislation" (1990) 17 Ecology LQ 233, 250. This comment is made in the context of applying legislation with some instrumental effect, but equally applies to purely symbolic legislation.

402 Palmer, above n 3, 209.

403 Palmer makes his stance within orthodox Treaty jurisprudence explicit by acknowledging the influence of Paul McHugh and Ken Coates on his work: Palmer, above n 3, 209.

404 Northover, above n 177, 38.

405 Ibid, 38.

406 Bill Mansfield, Ministry of Justice Draft Discussion Paper "The Identification of Māori Treaty Interests that may be Affected by Legislative Proposals and the Consideration of Mechanisms for the Safeguarding of those Interests: A Guide to Process" (undated) (Obtained under the Official

itself, inconsistent with principled recognition of Treaty rights. Treaty rights may well form one category of Treaty interests that are identified and safeguarded under this policy framework. However, the development of this framework appears to be motivated to a large extent by skepticism towards the role of the courts in dealing with Treaty issues. The author of the four step policy process, Bill Mansfield, notes that in the Treaty context:[407]

> … the courts have used the legislative [Treaty] references as a means of intervening in situations where it has appeared to them that the relevant interests of Māori were not being accorded appropriate attention by the Crown or the relevant decision maker. In fact it seems reasonably clear that where they deem it necessary the courts will make use of any of the forms of statutory reference to the Treaty to enable them to intervene to ensure that Māori interests are not ignored, overlooked, or transgressed by the Crown.

Accordingly, it is incumbent, in Mansfield's view, for the political branch to formulate legislative references to the Treaty carefully. Appropriately worded Treaty provisions formulated on the basis of his four step policy process can, Mansfield believes, limit the potential for the judicial intervention into issues of Treaty policy.[408]

Support for the narrowly-phrased instrumental Treaty provisions utilised as part of the architecture approach also appears to be premised on a denial of a role for the courts in determining issues involving Treaty interests. Palmer notes that when legislation is intended to give the Treaty some legal effect, the words used to refer to the Treaty will impact on exactly what the final legal effect of the Treaty will be.[409] Palmer suggests that narrowly-worded Treaty provisions that clearly enunciate Parliament's underlying intention in referring to the Treaty are the most appropriate method for giving

---

Information Act 1982, Request to the Public Law Group, Ministry of Justice) 3-5 ["The Identification of Māori Treaty Interests"].

407 Bill Mansfield, Ministry of Justice Draft Discussion Paper "Considerations Relevant to the Use of Specific References to the Treaty of Waitangi in Legislation" (17 November 1999) (Obtained under the Official Information Act 1982, Request to the Public Law Group, Ministry of Justice) 3.

408 "The Identification of Māori Treaty Interests", above n 406, 1.

409 Palmer, above n 3, 208.

the Treaty direct legal effect.[410] In other words, the specific policy objectives of the political branch need to be clearly set out in the words used in the enacted Treaty legislation. Palmer even suggests that such provisions need not actually refer to the Treaty as the relevant rights, interests and obligations may be readily identified and defined in a level of detail that makes an explicit Treaty reference superfluous.[411]

Palmer refers to the Treaty clauses in the NZPHDA as a positive example of the application of his approach to legislative references to the Treaty.[412] As introduced to the House, the Treaty clause in the New Zealand Public Health and Disability Bill read: "This Act is to be interpreted in a manner consistent with the principles of the Treaty of Waitangi". This wording would, of course, have allowed the courts to apply the Tribunal's Treaty rights framework through application of the principles of the Treaty as appropriate to individual circumstances. By the time the NZPHDA was passed, the more symbolic Treaty reference and narrowly-phrased policy proposals had replaced the originally proposed Treaty provision. Palmer argues that the key change evident in these provisions is a "shift from the general to the specific".[413] Rather than an indefinite reference to the Treaty as included in the initial version of the Bill, the enacted legislation clearly sets out what the intention of the political branch of government is and adequately deals with "the detail of policy analysis and its translation into legislation".[414]

Palmer openly acknowledges that using narrowly-phrased Treaty provisions in legislation has the effect of moving decisions concerning the legal effect of the Treaty away from the judiciary and towards the political branch of government. Palmer argues that this is appropriate because the political branch is better suited than the judiciary for this task in the context of New Zealand's political and legal framework. The Treaty, Palmer suggests, is primarily concerned with issues of politics and policy, and:[415]

---

410 Ibid, 212.
411 Ibid, 210.
412 Ibid, 211.
413 Ibid.
414 Ibid, 210.
415 Ibid, 209.

> [b]alancing these factors is primarily the job of elected representatives – also known as politicians. Lawyers and [j]udges should certainly be only a secondary resort. Lawyers are not trained to think laterally about ill-framed and changing issues, or to identify and analyse the policy effect of a wide variety of options for dealing with an issue, or to make tradeoffs between loudly competing political interests. Politicians, on the basis of sound professional advice, are better placed for these challenges.

Palmer continues:[416]

> The Treaty of Waitangi is expressed too generally to have a clear implication for most detailed legislative clauses. Simple reference to it leaves the legal and policy implications unclear on the face of the statute and leaves the discretion to fill in their meaning to lawyers' arguments and Judges' decisions. As the Courts themselves have consistently stressed, resolving the policy questions raised by the Treaty of Waitangi requires political engagement first and foremost. Lawyers and Judges may be able to offer assessments of those resolutions but are poorly placed to forge them.

Palmer, like Mansfield, is primarily motivated by skepticism that the judiciary is able to deal with Treaty issues. Treaty issues can best be resolved through detailed policy analysis, including consultation with affected groups, the identification of Treaty interests and mechanisms for protecting those interests, and clear translation of those policy outcomes into law.[417] This can only be done effectively, according to adherents to the architecture approach, by the political branch.

It is also notable that neither Palmer nor Mansfield contemplate a place for principled legal recognition of Treaty rights in their respective assessments of Treaty provisions in legislation. Rather, both approaches appear to conflate all Treaty issues with matter of policy, and thus ignore issues of Treaty rights. Considering all Treaty issues as matters of policy excludes a role for the courts in determining such issues, which is necessarily inconsistent with principled recognition of Treaty rights. Interestingly, Palmer at least purports to recognise Treaty rights, as the rhetoric of Treaty

---

416 Ibid, 210.

417 Ibid.

rights creeps into his discussion. Any consideration of Treaty interests on Palmer's account is, however, fundamentally disconnected from his suggested treatment of the Treaty in legislation. The architecture approach leaves no room for recognition of Treaty interests that restrict Crown action, take priority over other interests, or require substantive remedies for breach. In fact, Palmer seems reluctant to acknowledge any connection between the Treaty and recognised rights. In a 2007 article providing an otherwise comprehensive account of the implications of rights recognition for social policy in New Zealand that Palmer co-authored, the Treaty of Waitangi merits less than six full lines of discussion.[418] It seems, therefore, that Palmer does not envisage a place for such rights in the legal system, despite employing the phrase 'Treaty rights' in his work.

This conceptual error of conflating all Treaty interests with matters of policy is symptomatic of the architecture approach to Treaty provisions in legislation. Detailed, narrowly-phrased Treaty provisions are effective for implementing political policy, but Treaty issues extend beyond issues of political policy and encompass issues of Treaty rights. A role for the courts is required in determining such issues fairly – something that is at odds with the architecture approach. Given the need for principled responses to Māori claims based on the Treaty to include consideration of the Tribunal's Treaty rights framework, the architecture approach needs to be reassessed as a 'one-stop shop' for legislative proposal that purport to discharge the Crown's Treaty obligations.

---

418 See Geiringer and Palmer, above n 36, 20-21. I am grateful to Māmari Stephens for this example.

VI CONCLUSION

Treaty rights matter. Rights derived from the Treaty of Waitangi form an important part of a principled and pragmatic response to Māori claims based on the Treaty. This paper has endorsed the Tribunal's Treaty rights framework as a principled and coherent way of conceptualising and understanding Treaty rights. Given that Treaty rights make up an important component of the Crown's obligations to Māori, it is incumbent on the Crown to recognise and give legal effect to Treaty rights in a principled way. Achieving this legal recognition of Treaty rights requires statutory incorporation of the Treaty in a manner that allows the courts to determine the application and effect of Treaty rights, thereby protecting and vindicating those rights in appropriate circumstances.

This in turn requires a considered assessment of the need to legally recognise and protect Treaty rights on the part of the political branch of government. Where Treaty rights do require legislative recognition, the most appropriate method of achieving this recognition will be broadly-phrased statutory incorporation of the principles of the Treaty. In the end, effective recognition and protection of Treaty rights is simply not possible without the cooperation of both the political and judicial branches of government. Accordingly, the political branch needs to begin to legislate with maturity and recognise the principled role of the courts in determining issues of rights in particular cases. Only when this occurs can we be sure that the Crown is attempting to take its Treaty obligations seriously.

VII BIBLIOGRAPHY

A New Zealand Statutes

Conservation Act 1987.

Crown Minerals Act 1991.

Crown Research Institutes Act 1992.

Education Act 1989.

Environment Act 1989.

Fisheries Act 1983.

Land Transport Management Act 2003.

Local Government Act 2002.

Māori Language Act 1987.

New Zealand Bill of Rights Act 1990.

New Zealand Public Health and Disability Act 2000.

Petroleum Act 1937.

Public Records Act 2005.

Resource Management Act 1991.

State-Owned Enterprises Act 1986.

Supreme Court Act 2003.

Treaty of Waitangi Act 1975.

B Overseas Statutes

Constitution Act 1982 (Canada).

C New Zealand Cases

Attorney-General v Daniels [2003] 2 NZLR 742 (CA).

Attorney-General v New Zealand Māori Council (Radio Frequencies) [1991] 2 NZLR 129 (CA).

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

Auckland Unemployed Workers' Rights Centre Inc v Attorney-General [1994] 3 NZLR 720 (CA).

Barton-Prescott v Director-General of Social Welfare [1997] 3 NZLR 179 (HC).

Discount Brands Ltd v Northcote Mainstreet Inc [2004] 3 NZLR 619 (CA).

Drew v Attorney-General [2002] 1 NZLR 58 (CA).

Dunlea v Attorney-General [2000] 3 NZLR 136 (CA).

Fitzgerald v Muldoon [1976] 2 NZLR 615 (CA).

Hoani Te Heuheu Tukino v Aotea District Maori Trust Board [1941] AC 308 (PC).

Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188 (HC).

Kauwaeranga reprinted in A Frame "*Kauwaeranga* Judgment" (1984) 14 VUWLR 227.

L v M [1979] 2 NZLR 519 (CA).

Lange v Atkinson and Australian Consolidated Press NZ Ltd [1997] 2 NZLR 22 (HC).

Management Agency Ltd v Roussel Uclaf Australia Pty Ltd [1998] NZAR 58 (CA).

McKean v Attorney-General [2007] 3 NZLR 819 (HC).

Ministry of Transport v Noort [1992] 3 NZLR 260 (CA).

New Zealand Drivers' Association v New Zealand Road Carriers [1982] 1 NZLR 374 (CA).

New Zealand Māori Council v Attorney-General (Lands) [1987] 1 NZLR 641 (CA).

New Zealand Māori Council v Attorney-General (Broadcasting Assets) [1994] 1 NZLR 513 (PC).

New Zealand Māori Council v Attorney-General [1996] 3 NZLR 140 (CA).

Ngati Apa ki Waipounamu v Attorney-General [2003] 1 NZLR 779 (HC).

Ngai Tahu Māori Trust Board v Director-General of Conservation [1995] 3 NZLR 553 (CA).

Nireaha Tamaki v Baker [1901] AC 561 (PC).

Peters v Davidson [1999] 2 NZLR 164 (CA).

Quilter v Attorney-General [1998] 1 NZLR 523 (CA).

R v B [1995] 2 NZLR 172 (CA).

R v Goodwin [1993] 2 NZLR 153 (CA).

R v Jefferies (1993) 10 CRNZ 210 (CA).

R v Menzies [1982] 1 NZLR 40 (CA).

R v Symonds (1847) NZPCC 387 (SC).

R v Te Kira [1993] 3 NZLR 257 (CA).

Rajan v Minister of Immigration [1996] 3 NZLR 531 (CA).

Rotorua District Council v Bay of Plenty Catchment Commission [1979] 2 NZLR 97 (CA).

Sellers v Maritime Safety Inspector [1999] 2 NZLR 44 (CA).

Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667 (CA).

Taiaroa v Minister of Justice [1995] 1 NZLR 411 (CA).

Taylor v New Zealand Poultry Board [1984] 1 NZLR 394 (CA).

Te Runanganui o te Ika Whenua Inc Society v Attorney-General [1994] 2 NZLR 20 (CA).

Te Runanga o Wharekauri Rekohu v Attorney-General [1993] 2 NZLR 301 (CA).

Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680 (HC).

Waitakere City Council v Lovelock [1997] 2 NZLR 385 (CA).

Wī Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) 72 (SC).

Zaoui v Attorney-General (No. 2) [2006] 1 NZLR 289 (SC).

D Overseas Cases

Brind v Secretary of State for the Home Department [1991] 1 All ER 720 (HL).

Chandler v Director of Public Prosecutions [1964] AC 763 (HL).

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL).

Entick v Carrington (1795) 19 St Tr 1029.

R (Prolife Alliance) v British Broadcasting Corporation [2004] 1 AC 185 (HL).

R v Sparrow (1986) 36 DLR (4th) 247.

R v Sparrow [1990] 1 SCR 1075 (SCC).

R v Sussex Justices; Ex p McCarthy [1924] 1 KB 256 (CA).

United States v State of Washington (1974) 384 F Supp 312.

Vajesingji Joravarsingji v Secretary of State for India (1924) LR 51 IA 357 (PC).

E International Instruments

United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) 61/295.

F Waitangi Tribunal Reports

Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim: WAI 8* (Government Printer, Wellington, 1985).

Waitangi Tribunal *Interim Report to the Minister of Māori Affairs on the State-Owned Enterprises Bill: WAI 1177* (Waitangi Tribunal, Te Hapua, 1986).

Waitangi Tribunal *Report of the Waitangi Tribunal on the Te Reo Māori Claim: WAI 11* (Government Printer, Wellington, 1986).

Waitangi Tribunal *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies: WAI 26* (Government Printer, Wellington, 1986).

Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: WAI 9* (Waitangi Tribunal, Wellington, 1987).

Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim: WAI 22* (Waitangi Tribunal, Wellington, 1988).

Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim: WAI 6* (2 ed, Waitangi Tribunal, Wellington, 1989).

Waitangi Tribunal *Report of the Waitangi Tribunal on the Te Reo Māori Claim: WAI 11* (Waitangi Tribunal, Wellington, 1989).

Waitangi Tribunal *Report on the Allocation of Radio Frequencies: WAI 26 and WAI 150* (Brooker and Friend, Wellington, 1990).

Waitangi Tribunal *The Fisheries Settlement Report: WAI 307* (Waitangi Tribunal, Wellington, 1992).

Waitangi Tribunal *Ngai Tahu Sea Fisheries Report: WAI 27* (Brooker and Friend, Wellington, 1992).

Waitangi Tribunal *Ngawha Geothermal Resource Report: WAI 304* (Brooker and Friend, Wellington, 1993).

Waitangi Tribunal *Turangi Township Report: WAI 84* (Brooker's, Wellington, 1995).

Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi: WAI 143* (GP Publications, Wellington 1996)

Waitangi Tribunal *Muriwhenua Land Report: WAI 45* (GP Publications, Wellington, 1997).

Waitangi Tribunal *The Whanganui River Report: WAI 167* (GP Publications, Wellington, 1999).

Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report: WAI 953* (Legislation Direct, Wellington, 2002).

Waitangi Tribunal *The Petroleum Report: WAI 796* (Legislation Direct, Wellington, 2003).

G New Zealand Government Publications

Cabinet Office *Cabinet Manual 2001* (Department of Prime Minister and Cabinet, Wellington, 2001).

Human Rights Commission *Human Rights and the Treaty of Waitangi: Te Mana i Waitangi* (Human Rights Commission, Wellington, 2003).

Justice and Law Reform Committee *Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* (Government Printer, Wellington, 1988).

Legislation Advisory Committee *Legislation Advisory Committee Guidelines on Process and Content of Legislation* (Ministry of Justice, Wellington, 2001).

Ministry of Justice *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR A6.

Office of the Controller and Auditor-General *The Treasury: Capability to Recognise and Respond to Issues for Māori* (Office of the Controller and Auditor-General, Wellington, 2006).

Office of the Controller and Auditor-General *The State Services Commission: Capability to Recognise and Respond to Issues for Māori* (Office of the Controller and Auditor-General, Wellington, 2004).

Office of the Ministry of Health Memorandum to Cabinet "Legislative Provisions for Treaty of Waitangi" <http://executive.govt.nz/minister/king/cabinet00-08/docs/wording-treaty-clause.pdf> (last accessed 26 September 2008).

Office of the Ministry of Health Memorandum to Cabinet "Treaty of Waitangi in Health Legislation" <http://executive.govt.nz/minister/king/cabinet00-08/docs/treaty-of-waitangi-in-legislation.pdf> (last accessed 26 September 2008).

Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana kit e Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2 ed, Office of Treaty Settlements, Wellington, 2002)

Royal Commission on Social Policy *Report of the Royal Commission on Social Policy: the April Report* (Royal Commission on Social Policy, Wellington, 1988).

State Services Commission *The Public Service and the Treaty of Waitangi* (State Services Commission, Wellington, 1995).

Statistics New Zealand *Energy Monetary Stock Account 1987-2001* <http://www.stats.govt.nz/NR/rdonlyres/F20168F0-7DF3-4811-83C8-42EFBBCA66A3/0/EnergyMonetaryStockAccount.pdf> (last accessed 26 September 2008).

Te Puni Kōkiri *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty as Expressed by the Courts and the Waitangi Tribunal* (Te Puni Kōkiri, Wellington, 2001).

H Texts

Bentham, Jeremy *Theory of Legislation* (translated by R Hildreth) (5 ed, Trübner & Co, London, 1887).

Brookfield, FM (Jock) *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999).

Burrows, JF *Statute Law in New Zealand* (3 ed, LexisNexis, Wellington, 2003).

Dworkin, Ronald *Taking Rights Seriously* (Duckworth, London, 1978).

Dworkin, Ronald *A Matter of Principle* (Havard University Press, Cambridge, 1985).

Ely, John Hart *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, 1980).

Hart, HLA *The Concept of Law* (2ed, Clarendon Press, Oxford, 1994).

Holmes, Oliver Wendell *Collected Legal Papers* (Harcourt, Brace & Co, New York, 1920).

James, Colin (ed) *Building the Constitution* (Victoria University of Wellington Institute of Policy Studies, Wellington, 2000).

Joseph, Philip A *Constitutional and Administrative Law in New Zealand* (3 ed, Thomson Brookers, Wellington, 2007).

Kelsey, Jane *A Question of Honour? Labour and the Treaty 1984-1989* (Allen and Unwin, Wellington, 1990).

Kelsey, Jane *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books, Wellington, 1990).

McDowell, Morag and Duncan Webb *The New Zealand Legal System* (2 ed, Butterworths, Wellington, 1998).

McHugh, PG *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).

McHugh, PG *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, New York, 2004).

Orange, Claudia *The Treaty of Waitangi* (Bridget Williams Books, Wellington, 1987).

Palmer, Geoffrey *New Zealand's Constitution in Crisis: Reforming Our Political System* (McIndoe, Dunedin, 1992).

Round, David *Truth or Treaty? Commonsense Questions about the Treaty of Waitangi* (Canterbury University Press, Christchurch, 1998).

Wade, HWR and CF Forsyth *Administrative Law* (9 ed, Oxford University Press, Oxford, 2004).

Waldron, Jeremy *The Dignity of Legislation* (Cambridge University Press, Cambridge, 1999).

Waldron, Jeremy *Law and Disagreement* (Clarendon Press, Oxford, 1999).

I Chapters

Biggs, Bruce "Humpty-Dumpty and the Treaty of Waitangi" in IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 300.

Boast, Richard "The Treaty and Local Government: Emerging Jurisprudence" in Janine Haywood (ed) *Local Government and the Treaty of Waitangi* (Oxford University Press, Melbourne, 2003) 157.

Brookfield, FM "Parliament, the Treaty, and Freedom – Millennial Hopes and Speculations" in Philip A Joseph *Essays on the Constitution* (Brookers, Wellington, 1995) 41.

Cooke, Robin "Dynamics of the Common Law" in *Conference Papers: 9th Commonwealth Law Conference* (Commerce Clearing House New Zealand, Auckland, 1990) 1.

Dyzenhaus, David "The Rule of Law as the Rule of Liberal Principle" in Arthur Ripstein (ed) *Ronald Dworkin* (Cambridge University Press, Cambridge, 2007) 56.

Elias, Sian "The Treaty of Waitangi and the Separation of Powers in New Zealand" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brooker's, Wellington, 1995) 206.

Garrett, David "Resources: Treaty Rights and Private Property" in David Novitz and Bill Willmott (eds) *New Zealand in Crisis* (GP Publications Limited, Wellington, 1992) 101.

Geiringer, Claudia "Parsing Sir Kenneth Keith's Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 179.

Harris, BV "The Law-Making Power of the Judiciary" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 265.

Hart, HLA "Bentham on Legal Rights" in AWB Simpson (ed) *Oxford Essays in Jurisprudence (Second Series)* (Clarendon Press, Oxford, 1973) 171.

Haywood, Janine "Appendix: The Principles of the Treaty of Waitangi" in Alan Ward *National Overview: Waitangi Tribunal Rangahaua Whānui Series* (Volume II, GP Publications, Wellington, 1997) 475.

Henare, Denese "Appendix A Millennial Thoughts on Māori Development" in New Zealand Law Commission *Annual Report on the Law Commission* (New Zealand Law Commission, Wellington, 2000) 53.

Illingworth, Grant "Social Policy Litigation in New Zealand: The *Daniels* Case and Special Needs Children" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 161.

Jackson, Moana "The Treaty and the Word: The Colonization of Māori Philosophy" in Graham Oddie and Roy W Perrett (eds) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 1.

Joseph, Philip "The Higher Judiciary and the Constitution: A View from Below" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 213.

Kelsey, Jane "Treaty Justice in the 1980s" in Paul Spoonley et al (eds) *Ngā Take: Ethnic Relations and Racism in Aotearoa/New Zealand* (The Dunmore Press, Palmerston North, 1991) 108.

Kingsbury, Benedict "The Treaty of Waitangi: Some International Law Aspects" in Hugh Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives* (Oxford University Press, Auckland, 1989) 121.

Love, Morris Te Whiti "Resource Management, Local Government, and the Treaty of Waitangi" in Janine Haywood (ed) *Local Government and the Treaty of Waitangi* (Oxford University Press, Melbourne, 2003) 21.

MacCormick, DN "Rights in Legislation" in PMS Hacker and J Raz (eds) *Law, Morality, and Society: Essays in Honour of HLA Hart* (Clarendon Press, Oxford, 1977).

McGee, David "The Legislative Process and the Courts" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 84.

McHugh, PG "Legal Reasoning and the Treaty of Waitangi: Orthodox and Radical Approaches" in Graham Oddie and Roy W Perrett *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 91.

McHugh, PG "A History of Crown Sovereignty in New Zealand" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss* (Bridget Williams Books, Wellington, 2001) 189.

McHugh, PG "New Dawn to Cold Light: Courts and Common Law Aboriginal Rights" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 25.

McLean, Janet "Constitutional and Administrative Law: the Contribution of the Lord Cooke" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 221.

Richardson, Ivor "Rights Jurisprudence – Justice For All?" in Philip Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) 61.

Sharp, Andrew "The Problem of Māori Affairs, 1984-1989" in Martin Holland and Jonathon Boston (eds) *The Fourth Labour Government: Politics and Policy in New Zealand* (2 ed, Oxford University Press, Auckland, 1990) 251.

Smillie, John "Who Wants Juristocracy" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 235.

Taggart, Michael "Reinventing Administrative Law" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Portland, 2003) 311.

Williams, Joe V "Māori in New Zealand at the End of the Cooke Era – Where have We Got To?" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 165.

Wilson, James Q "The Politics of Regulation" in James W McKie (ed) *Social Responsibility and the Business Predicament* (Brookings Institute, Washington, 1974) 135.

J Articles

Arnold, Terrance "Parliament and the Courts: Arm Wrestle or Handshake?" (2005) 3 NZJPIL 45.

Allan, James "Statutory Interpretation and the Courts" (1999) 18 NZULR 439.

Allan, James and Andrew Geddis "Waldron and Opposing Judicial Review – Except, Sort of, in New Zealand" [2006] NZLJ 94.

Bargh, Maria "Tiers of Confusion and Blurring Boundaries: Māori, the Local Government Act 2002 and the General Agreement on Trade in Services (GATS)" (2004) 56 *Political Science* 65.

Bedggood, Margaret "Constitutionalising Rights and Responsibilities in Aotearoa/New Zealand" (1998) 9 Otago LR 343.

Bennett, Mark and Nicole Roughan "*Rebus Sic Stantibus* and the Treaty of Waitangi" (2006) 37 VUWLR 505.

Boast, RP "*New Zealand Māori Council v Attorney-General*: the Case of the Century?" [1987] NZLJ 240.

Boast, RP "Treaty Rights or Aboriginal Rights?" [1990] NZLJ 32.

Boast, Richard "The Treaty of Waitangi and the Law" [1999] NZLJ 123.

Brookfield, FM "Māori Fishing Rights and the Fisheries Act 1983: *Te Weehi's* Case" [1987] Recent Law 63.

Butler, Andrew S "Limiting Rights" (2002) 33 VUWLR 113.

Butler, Petra "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUWLR 341.

Callaghan, Catherine " "Constitutionalisation" of Treaties by the Courts: the Treaty of Waitangi and the Treaty of Rome Compared" (1998) 18 NZULR 334.

Carter, Betty "The Incorporation of the Treaty of Waitangi into Municipal Law" (1980) 4 AULR 1.

Chapman, Guy "The Treaty of Waitangi – Fertile Ground for Judicial (and Academic) Myth-Making" [1991] NZLJ 288.

Charters, Claire "Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament does not Protect Rights in Hard Cases" [2006] NZ Law Rev 621.

Cooke, Robin "Fundamentals" [1988] NZLJ 158.

Cooke, Robin "Introduction" (1990) 14 NZULR 1.

Cooke, Robin "The Challenge of Treaty of Waitangi Jurisprudence" (1994) 2 Waikato LR 1.

Cullen, Michael "Parliamentary Sovereignty and the Courts" [2004] NZLJ 243.

Cullen, Michael "Parliament: Supremacy over Fundamental Norms?" (2005) 3 NZJPIL 1.

Davis, Dennis "Socio-Economic Rights in South Africa: The Record After Ten Years" (2004) 2 NZJPIL 47.

Dugdale, DF "Statutory Conferment of Judicial Discretion" [1972] NZLJ 556.

Dugdale, DF "Framimg Statutes in an Age of Judicial Supremacism" (2000) 9 Otago LR 603.

Durie, E Taihakurei and Gordon S Orr "The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence" (1990) 14 NZULR 62.

Durire, ET "The Rule of Law, Biculturalism and Multiculturalism" (2005) 13 Waikato LR 41.

Durie, Mason "Race and Ethnicity in Public Policy: Does it Work?" (2005) 24 Social Policy JNZ 1.

Dwyer, John P "The Pathology of Symbolic Legislation" (1990) 17 Ecology LQ 233.

Ekins, Richard "The Authority of Parliament: A Reply to Professor Joseph" (2005) 16 KCLJ 51.

Elias, Sian " "Hard Look" and the Judicial Function" (1996) 4(2) Waikato LR 1.

Elias, Sian "Māori and the New Zealand Legal System" (2002) 76 Australian LJ 620.

Elias, Sian "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148.

Elias, Sian "Equality Under Law" (2005) 13 Waikato LR 1.

Engle, George " "Bills are Made to Pass as Razors are Made to Sell": Practical Constraints on the Preparation of Legislation" [1983] Statute LR 7.

Evans, Jim "What Does it Mean to Say that Someone has a Legal Right?" (1998) 9 Otago LR 301.

Fallon, Richard H "The Core of an Uneasy Case for Judicial Review" (2008) 121 Harv L Rev 1693.

Frame, Alex "A State Servant Looks at the Treaty" (1990) 14 NZULR 82.

Garrett, Elisabeth "Commercial Whale-Watching" [1996] NZLJ 43.

Geiringer, Claudia "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.

Geiringer, Claudia and Matthew Palmer "Human Rights and Social Policy in New Zealand" (2007) 30 Social Policy JNZ 12.

Gerritsen, Nick "The Treaty of Waitangi: "Do I Dare Disturb the Universe?" " [1991] NZLJ 138.

Gobbi, Mark "Drafting Techniques for Implementing Treaties in New Zealand" (2000) 21 Statute LR 71.

Goldsworthy, Jeffrey "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIL 7.

Harris, BV "The Treaty of Waitangi and the Constitutional Future of New Zealand" (2005) 2 NZ Law Rev 189.

Haughey, EJ "The Treaty of Waitangi – Its Legal Status" [1984] NZLJ 392.

Haughey, EJ "A Vindication of Sir James Prendergast" [1990] NZLJ 230.

Havemann, Paul "The "Pākehā Constitutional Revolution?" Five Perspectives on Māori Rights and Pākehā Duties" (1993) 1 Waikato LR 53.

Hogg, Peter W and Alison A Bushell "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall LJ 75.

Hohfeld, Wesley Newcomb "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16.

Hohfeld, Wesley Newcomb "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale LJ 710.

Hunt, Paul "Reclaiming Economic, Social and Cultural Rights" (1993) 1 Waikato LR 141.

Iles, Walter "Legislative Drafting in New Zealand" (1991) 12 Statute LR 16.

Iles, Walter "New Zealand Experience of Parliamentary Scrutiny of Legislation" (1991) 12 Statute LR 165.

Iles, Walter "The Responsibilities of the New Zealand Legislation Advisory Committee" (1992) 13 Statute LR 11.

Jackson, Moana "Commonwealth Law Conference" [1990] NZLJ 334.

Jamieson, NJ "The New Look Legislation" [1991] NZLJ 24.

Joseph, Philip A and Gordon R Walker "A Theory of Constitutional Change" (1987) 7 Oxford Journal of Legal Studies 155.

Joseph, Philip "Constitutional Review Now" [1998] 86 NZ Law Rev 85.

Joseph, PA "The Demise of *Ultra Vires* – Judicial Review in the New Zealand Courts" [2001] PL 354.

Joseph, Philip "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 KCLJ 321.

Joseph, Philip "The Treaty of Waitangi: A Text for the Performance of a Nation" (2004) 4 OUCLJ 1.

Keith, KJ "A Bill of Rights for New Zealand? Judicial Review Versus Democracy" (1985) 11 NZULR 307.

Keith, KJ "The Courts and the Constitution" (1985) 15 VUWLR 29.

Keith, Kenneth "The Roles of the Tribunal, the Courts and the Legislature" (1995) 25 VUWLR 129.

Keith, Kenneth "The Treaty of Waitangi in Courts" (1990) 14 NZULR 37.

Kenderdine, Shonagh "Legal Implications of Treaty Jurisprudence" [about 1989/90] VUWLR 347.

Keyes, John Mark "Incorporation by Reference in Legislation" (2004) 25 Statute LR 180.

Kirby, Michael "Deep Lying Rights – A Constitutional Conversation Continues" (2005) 3 NZJPIL 195.

Ladley, Andrew "The Treaty and Democratic Government" (2005) 1 Policy Quarterly 21.

McGee, DG "Extrinsic Aids to Statutory Interpretation" [1989] NZLJ 341.

McGee, DG "The Influence of Parliamentary Procedure on the Form of Legislation in New Zealand" 12 (1991) Statute LR 135.

McGuire, Jeremy "Reflections on the Formal Definitions of Māori" [1995] NZLJ 168.

McGuire, Jeremy "The Concept of "Tangata Whenua" and Collective Interests" [1996] NZLJ 28.

McGuire, Jeremy "A Theory for a More Coherent Approach to Eliciting the Meaning of the Principles of the Treaty of Waitangi" [1996] NZLJ 116.

McHugh, PG "Aboriginal Title in New Zealand Courts" (1984) 2 Cant LR 235.

McHugh, PG "The Legal Status of Māori Fishing Rights in Tidal Waters" (1984) 14 VUWLR 247.

McHugh, PG "The Constitutional Role of the Waitangi Tribunal" [1985] NZLJ 224.

McHugh, PG "The Legal Basis for Māori Claims Against the Crown" (1988) 18 VUWLR 1.

McHugh, PG "Constitutional Myths and the Treaty of Waitangi" [1991] NZLJ 316.

McHugh, PG "What a Difference a Treaty Makes: The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law" (2004) 15 PLR 87.

McHugh, PG "Aboriginal Title in New Zealand: A Retrospect and Prospect" (2004) 2 NZJPIL 1.

Morris, Grant "James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty During the Latter Half of the Nineteenth Century" (2004) 35 VUWLR 117.

Murphy, Gavin "Political Control Over Policy Development" (2003) 24 Statute LR 157.

Palmer, Geoffrey "The New Zealand Legislative Machine" (1987) 17 VUWLR 285.

Palmer, Geoffrey "The Treaty of Waitangi – Principles for Crown Action" (1989) 19 VUWLR 335.

Palmer, Matthew "The Treaty of Waitangi in Legislation" [2001] NZLJ 207.

Pocock, JGA "Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi" (1998) 43 McGill LJ 481.

Pope, Jeremy "The Non-Treaty of Waitangi" [1971] NZLJ 193.

Quentin-Baxter, RQ "Themes of Constitutional Development: The Need for a Favourable Climate of Discussion" (1985) 15 VUWLR 12.

Richardson, ILM "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46.

Roughan, Nicole "Te Tiriti and the Constitution: Rethinking Citizenship, Justice, Equality and Democracy" (2005) 2 NZLPIL 285.

Round, David "Judicial Activism and the Treaty: the Pendulum Returns" (2000) 9 Otago LR 653.

Ruru, Jacinta "Treaty of Waitangi Principles 20 Years On" [2007] NZLJ 87.

Russell, Peter H "A Democratic Approach to Civil Liberties" (1969) 19 U Toronto LJ 109.

Sager, Lawrence G "Constitutional Justice" (2002) 6 NYU J Legis & Pub Pol'y 11.

Singer, Joseph William "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" [1982] Wis L Rev 975.

Stockley, Andrew P "Parliament, Crown and Treaty: Inextricably Linked?" (1996) 17 NZULR 193.

Thomas, EW "The Relationship Between Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5.

Tokeley, Kate "Trends in Statutory Interpretation and the Judicial Process" (2002) 33 VUWLR 965.

Tushnet, Mark "An Essay on Rights" (1984) 62 Tex L Rev 1363, 1371.

Tushnet, Mark "Weak-Form Judicial Review: Its Implications for Legislatures" (2004) 2 NZJPIL 7.

Upston-Hopper, K "Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi" (1998) 28 VUWLR 683.

Waldron, Jeremy "A Rights-Based Critique of Constitutional Rights" (1993) 13 Oxford Journal of Legal Studies 18.

Waldron, Jeremy "Indigeneity? First Peoples and Last Occupancy" (2003) 1 NZJPIL 55.

Waldron, Jeremy "Compared to What? Judicial Activism and New Zealand's Parliament" [2005] NZLJ 441.

Waldron, Jeremy "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346.

Webber, Jeremy "The Jurisprudence of Regret: The Search fir Standards of Justice in *Mabo*" (1995) 17 Sydney LR 5.

White, Nicola and Andrew Ladley "Claims to Treaty and Other Rights: Exploring the Terms of Crown-Māori Engagement" (2005) 1(1) Policy Quarterly 3.

Wilberg, Hanna "Facing Up to the Original Breach of the Treaty" [2007] NZ Law Review 527.

Wilberg, Hanna "Judicial Remedies for the Original Breach" [2007] NZ Law Review 713.

Williams, David V "The Constitutional Status of the Treaty of Waitangi: An Historical Perspective" (1990) 14 NZULR 9.

Williams, George "The Constitutional Role of the Courts: A Perspective from a Nation without a Bill of Rights" (2004) 2 NZJPIL 25.

Williams, Joe "Chapman is Wrong" [1991] NZLJ 373.

K Other Sources

Attrill, Wayne J *Aspects of the Treaty of Waitangi in the Law and Constitution in New Zealand* (LLM Research Paper, Harvard Law School, Cambridge, 1989).

Boast, Richard *The Treaty of Waitangi: a Framework for Resource Management Law* (Monograph, New Zealand Planning Council and Victoria University of Wellington, Wellington, 1989).

Cullen, Michael "Waitangi Tribunal Report Disappointing" (8 March 2004) <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=19091> (last accessed 26 September 2008).

Doogan, Michael, Crown Counsel, to Grant Adam, Ministry of Health (9 May 2000) Letter (Obtained under Official Information Act 1982, Request to the Ministry of Health)

Douglas, James Armstrong *The Crown, Māori and the Control of Natural Resources: Rights and Priorities under the Treaty of Waitangi* (LLB Hons Research Paper, Victoria University of Wellington, 1990).

Flaus, Virginia Rae *The Role of the Treaty of Waitangi in Contemporary Public Law: Does the Treaty have to be Incorporated into Municipal Law to be of Effect?* (LLM Research Paper, Victoria University of Wellington, 1989).

Frater, Charlotte *The Māori Seats in Paliament: Continuing Justification for Guaranteed Representation* (LLB (Hons) Research Paper, Victoria University of Wellington, 2003).

Keith, Benjamin James Roy *Why Honour the Treaty? The Implications of Treaty of Waitangi Policy for the Economic Analysis of Public Decisionmaking* (LLB (Hons) Research Paper, Victoria University of Wellington, Wellington, 1995).

McKeever, Fionnuala *MMP and the New Zealand Constitution: How the Advent of a Proportional Representation Electoral System has Altered the Relationship between the Legislative and Executive Branch of Government* (LLB (Hons) Research Paper, Victoria University of Wellington, Wellington, 2005).

Mansfield, Bill, Ministry of Justice Draft Discussion Paper "The Identification of Māori Treaty Interests that may be Affected by Legislative Proposals and the Consideration of Mechanisms for the Safeguarding of those Interests: A Guide to Process" (undated) (Obtained under the Official Information Act 1982, Request to the Public Law Group, Ministry of Justice).

Mansfield, Bill, Ministry of Justice Draft Discussion Paper "Considerations Relevant to the Use of Specific References to the Treaty of Waitangi in Legislation" (17 November 1999) (Obtained under the Official Information Act 1982, Request to the Public Law Group, Ministry of Justice).

Northover, Hannah *Legislative Reference to the Treaty of Waitangi* (LLB (Hons) Research Paper, Victoria University of Wellington, Wellington, 2005).

Palmer, Geoffrey, Law Commission President "The Development and significance of Dominion Status" (Dominion Status Symposium, Wellington, 26 September 2007) <http://www.mch.govt.nz/dominion/palmer.html> (last accessed 26 September 2008).

Palmer, Matthew (Te Papa Tongarewa Treaty Debate Series 2008, Wellington, 31 January 2008) <http://www.tepapa.govt.nz/TePapa/English/WhatsOn/Events/AnnualEvents/TreatyDebate2008/> (last accessed 26 September 2008).

Roff, Rachel Laura *Ruminations on Improving the Parliamentary Scrutiny Process* (LLB (Hons) Research Paper, Victoria University of Wellington, 2004).

Wainwright, Carolyn Mary *Leverage Through Litigation: The New Māori Politics* (LLM Research Paper, Victoria University of Wellington, Wellington, 1991).

Woods, David William Stewart *Māori Affairs Select Committee: What Role Does it Play?* (LLM Research Paper, Victoria University of Wellington, Wellington, 1990).

Woods, Huia *The Treaty Interest: A New Concept in Indigenous Rights?* (Working Paper, University of Waikato, 2006).