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Indigenous People: An American Perspective on the Case for Entrenchment of Maori Rights in New Zealand Law

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INDIGENOUS PEOPLE: AN AMERICAN PERSPECTIVE ON THE CASE FOR ENTRENCHMENT OF MAORI RIGHTS IN NEW ZEALAND LAW

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Abstract: The 1840 Treaty of Waitangi, signed by representatives of the British Crown and Maori Tribes, created a partnership that allowed colonization of New Zealand while protecting the Maori culture. The Treaty was declared a "nullity" in an 1877 court decision, and Maori rights under the Treaty have yet to be fully realized. Since the beginning of the 1970s, the New Zealand government has increasingly recognized the Maori culture. This Comment explores the history of the relationship between the Maori people and the New Zealand government. It analyzes current government policy on Maori issues. Finally, it advocates for legislative entrenchment of Treaty rights to ensure protection of the Maori culture and provide redress for past and future grievances between the Treaty partners.

I. INTRODUCTION

In the Maori language, "Waitangi" means "pool of tears."[1] Throughout the history of New Zealand, the signing of the Treaty of Waitangi has created a literal "pool of tears" for Maori people, washing them to the lowest levels of New Zealand society.[2] Many Maori have adopted the Treaty as their "bill of rights."[3] Yet when Queen Elizabeth visited Waitangi to celebrate the 150th anniversary of the Treaty, the New Zealand police had to take great pains to protect the Queen from a Maori salute, *whakapohane*, which involves the baring of ones' buttocks to communicate strong dissatisfaction.[4]

The precise legal position of the Treaty in New Zealand is unclear. The controversy over what the Treaty means is nearly as confusing as the controversy over what it ought to mean. Debate is ongoing among New Zealand legal scholars as to how the Treaty fits into New Zealand's

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[1] Peter Walker, *Pool of Tears in the Antipathies; Today the Queen is Attending a Strange Birthday Party in New Zealand*, THE INDEPENDENT, Feb. 6, 1990, at 17.

[2] *Ka Awatea: Report of the New Zealand Maori Commission, Part 3: The Position of Maori in Society* 12 (1989).

[3] "This hui is suspicious of the passing of a Bill of Rights because we believe we already have one, i.e. the Treaty of Waitangi." David V. Williams, *The Constitutional Status of the Treaty of Waitangi: An Historical Perspective*, 14 N.Z.U. L. REV. 9, 13 (1990) (quoting the resolutions of the Turangawaewae hui).

[4] *Protesters Toss Eggs, Score Direct Hit; Queen Not Laughing At Yolks*, L.A. TIMES, Feb. 24, 1986, pt. 1, at 2.

constitutional framework. Maori people strongly feel the implications of the debate, especially in an age when indigenous peoples' rights are receiving international attention. The problem is not likely to just go away. A demographer has predicted that if current birth rates continue, one fourth of New Zealand's people will be Maori within 30 years.[5]

This Comment looks at the ongoing argument from an American perspective. First, it looks at the Treaty from its origin and on through the changes in Treaty policy initiated by the Waitangi Tribunal in the 1980s. It then assesses the practical measures already implemented to address the problems of the Maori in New Zealand. Finally, it analyzes the problems arising from current government policy with respect to Treaty principles and looks at potential ways to address those problems. It is not the intent of this Comment to advocate constitutional reform in New Zealand, and especially not to urge New Zealanders to duplicate the United States system. Rather, it urges New Zealanders to explore the practical aspects of instituting reforms that better meet the needs of the Maori in the areas of Treaty promises, the policy statements of the New Zealand government, and international concepts of justice for indigenous peoples.

II. HISTORICAL PERSPECTIVES

Exploring the position of Maori people in their homeland from the signing of the Treaty through the history of its legal interpretation provides more questions than answers. Far from a simple document, the Treaty has a dual nature in both its substance and its philosophy. Two inconsistent versions exist, one in English and one in Maori. The Treaty of Waitangi is really two Treaties, making consistent legal interpretation nearly impossible. Although the Treaty's intent may have been to bring its partners together, this duality has polarized Maori and English interests. Maori claimants citing their plain language interpretation of Treaty concepts have been continually frustrated in New Zealand courts. Inconsistency has fueled the debate. Many people feel that Maori and non-Maori interests are irreconcilable.[6]

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[5] David Clark Scott, *New Zealand's 'Experiment' in Righting Racial Wrongs*, CHRISTIAN SCIENCE MONITOR, Mar. 24, 1988, at I-15.

[6] Charles P. Wallace, *Maoris Get Property and Fishing Rights, Sparking White Backlash; Land Dispute Highlights Racial Issue in New Zealand*, L.A. TIMES, Aug. 18, 1989, pt. 1, at 2.

A. The Treaty of Waitangi

The text of the Treaty of Waitangi consists of an English and a Maori language version. The legislature has acknowledged that the terms of the two versions are inconsistent.[7] Representatives of the Crown and a handful of Maori tribes ceremonially signed the Treaty at Waitangi in February of 1840.[8] Captain William Hobson, who negotiated the Treaty on behalf of the British Crown, proclaimed British sovereignty over New Zealand "by virtue of the Treaty's cession of all rights and powers of sovereignty absolutely and without reservation."[9] Following the Waitangi meeting, Hobson and his representatives carried copies of the Treaty to other sites in the North Island and South Island of New Zealand, eventually obtaining the signatures of over 500 Maori chiefs.[10]

1. Two Treaties, Two Meanings

The English version of the Treaty, which Parliament accepted in the Treaty of Waitangi Act of 1975, echoes the terms of Hobson's proclamation. The first article of the Treaty cedes sovereignty, without reservation, to the Crown. The second article guarantees full exclusive and undisturbed possession of lands and estates, forests, fisheries and other properties to the Maori. The third article extends the protection of the Crown to the natives, along with all rights and privileges as British subjects.

The Maori version of the Treaty, also incorporated into the 1975 Act, expresses a very different view of sovereignty. The first article grants *kawanatanga* to the Crown. The general translation of *kawanatanga* is "government, or governance."[11] The Maori concept of *kawanatanga* is not sovereignty, but rather a grant of police power over European settlers.[12]

The Maori retain *rangatiratanga*, or chieftainship,[13] under the second article of the Treaty. *Rangatiratanga* implies a partnership arrangement under which the Crown governs New Zealand, and the Maori govern them-

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7 "[W]hereas the text of the Treaty in the English language differs from the text of the Treaty in the Maori language . . . ." Treaty of Waitangi Act, N.Z. STAT. No. 114, at 825 (1976).

8 Williams, *supra* note 3, at 24.

9 *Id.*

10 CLAUDIA ORANGE, THE TREATY OF WAITANGI 60-91 (1987).

11 *Id.* at 268 (glossary).

12 Jane Kelsey, *Economic Libertarianism versus Maori Self-Determination: Aotearoa/New Zealand in Crisis*, 18 INT'L J. SOC. L. 239, 240 (1990) (defining *kawanatanga* as "a subordinate power aimed primarily at achieving law and order amongst Pakeha [European] settlers.").

13 ORANGE, *supra* note 10, at 268 (glossary).

selves. The division of sovereignty implied by *kawanatanga* and *rangatiratanga* is inconsistent, therefore, with the cession of sovereignty without reservation expressed in the English version. The second article also protects *taonga* (treasures)[14] of Maori people. Unlike the specific property and land use rights detailed in the English version, *taonga* to the Maori has intangible as well as tangible aspects.[15] In a legal system based on property and ownership, it is difficult for Maori claimants to allege losses of intangible aspects of culture.

The third article of the Maori text grants *te tiakitanga o te kuini o ingarani*, or her Majesty's royal protection,[16] to the tribes. Historical evidence indicates that the chiefs' main concern was protection from the English settlers, especially when it came to Maori lands and customs.[17]

2. *Legal Controversy Over the Two Treaty Versions:*

When New Zealand courts have recognized the Treaty, they usually quote the English language version. A strong argument exists, however, for considering the Maori language version "the Treaty" and the English "the translation."[18] During the time of signing the Treaty, the Maori version remained constant, while representatives of the Crown took at least five different English texts to the various signing sites.[19] The Waitangi Tribunal, created to interpret the Treaty, recommended that in the event of a conflict the Maori text should prevail.[20] This follows the Indian law rule in the United States and Canada that courts should interpret treaties as the tribes understood them at the time they were made.[21] Statutes that are ambiguous or conflicting with a treaty are to be interpreted in favor of the aboriginal people.[22] The suggestion of the Waitangi Tribunal is not binding, however, and in New Zealand courts have only such powers as are explicitly granted by

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14 *Id.*

15 *Id.* at 250 (defining *Taonga* as "valued customs and possessions").

16 P.G. McHugh, *The Role of Law in Maori Claims*, N.Z. L.J. 16, 18 (1990).

17 ORANGE, *supra* note 10, at 64-65.

18 *Id.* at 85.

19 David V. Williams, *Unique Relationship between the Crown and Tangata Whenua in* WAITANGI, MAORI AND PAKEHA PERSPECTIVES 76 (I.H. Kawharu ed., 1989) (in the Maori language, *Tangata Whenua* means literally "The People of the Land").

20 The tribunal relied on "rules of international law, the *contra preferentum* rule and Canadian and US precedents." R.P. Boast, *New Zealand Maori Council v. Attorney General: The Case of the Century?* N.Z. L.J. 240, 243 (Aug. 1987).

21 Ralph Johnson, *Fragile Gains: Two Centuries of Canadian and U.S. Policy Toward Indians*, 66 WASH. L. REV. 643, 657 (1991).

22 *Id.*

Parliament.[23] The Treaty is legally relevant only where a statute in question explicitly contains the provision that interpretation must be consistent with Treaty principles.[24] Even then, the court has broad discretion to interpret Treaty principles and interests.[25] No rule requires interpretation consistent with Maori understanding or the concepts expressed in the Maori language Treaty.

The major difference between the two versions of the Treaty is that the English version transfers sovereignty, while the Maori version indicates shared sovereignty.[26] This inconsistency has sparked controversy over whether the Treaty ceded absolute sovereignty to the Crown. The issue of cession, however, is a difficult point to press 150 years after the fact. The Crown has taken absolute sovereignty over New Zealand, regardless of whether or not it was ever granted.[27] It is unrealistic to expect the government to renegotiate sovereignty, but damages and reparation are available to some extent as a practical compromise.

Negotiated or court awarded monetary compensation has provided reparation for historic losses in the United States and Canada.[28] The New Zealand policy has begun to develop along similar lines. For example, the Ngati Whatua tribe and the Crown negotiated for more than three years before coming to an agreement on 80 acres of land at Bastion Point, near Auckland.[29]

A very few scholars continue, however, to raise the old argument that the Treaty is irrelevant because the Acts of Parliament that annexed New Zealand to New South Wales secured sovereignty.[30] Tracing sovereignty through a series of Acts, a New Zealand court recently found justification to dismiss a Maori challenge.[31] Another court, however, found that the Treaty has a significant position as a source of New Zealand law.[32] Without

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23 "The Treaty of Waitangi was in issue only because of the statutory references to it made in the State-Owned Enterprises Act itself." Boast, *supra* note 20, at 240.

24 *Id.*

25 Sir Kenneth Keith, *The Treaty of Waitangi in the Courts*, 14 N.Z.U. L. REV. 37, 58 (1990).

26 I.H. Kawharu, *Introduction in* WAITANGI, MAORI AND PAKEHA PERSPECTIVES, *supra* note 19, at xvii.

27 "The tribunal was by then talking of a cession of sovereignty and rights of Pakeha settlement 'which cannot now be denied'." Kelsey, *supra* note 12, at 250.

28 Johnson, *supra* note 21, at 679-80.

29 Charles P. Wallace, *Maoris Get Property and Fishing Rights, Sparking White Backlash; Land Dispute Highlights Racial Issue in New Zealand*, N.Y. TIMES, Aug. 18, 1989, at I-12.

30 David V. Williams, *The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi?*, 3 AUSTRALIAN J. L. & SOC. ANN. 41, 45 (1985).

31 Berkett v. Tauranga District Court, 3 N.Z.L.R. 206 (1992).

32 "[T]he Treaty of Waitangi is part of the fabric of New Zealand society and that it is proper to resort to the Treaty as extrinsic material called in aid to interpret the provisions of any legislation, whether

legislative guidance, inconsistent application of the Treaty in the courts is unavoidable. Historical reverence for the Treaty coupled with government responses to Treaty concerns, such as the establishment of the Waitangi Tribunal, prove that the Treaty is not irrelevant in the eyes of most New Zealanders. Maori people, arguably, have a special constitutional status because the Treaty marked the beginning of constitutional government in New Zealand.[33]

B. Assimilation of the Maori Culture

As conflicts arose between the two peoples in New Zealand, the government developed policies designed to assimilate the Maori culture into that of the European settlers. Hobson assured the Maori chiefs who signed the Treaty that lands unfairly taken would be returned, that the Crown would not forcibly take land, and that the Queen might purchase land from the Maori.[34] He established the official office of "Protector of the Aborigines" to ensure fair negotiation of these land sales. Captain George Grey abolished the office soon after he became Governor in 1846, however, establishing in its place a "Commissioner for the Extinguishment of Native Title."[35] The Colonial Secretary, Lord Nelson, admonished Grey to consider the Treaty valid and binding. The courts reinforced this view of the Treaty in the 1847 decision, *The Queen v. Symonds*.[36] Grey nevertheless ordered the invasion of the Waikato Maori settlement in 1863, beginning the Land Wars, which lasted until 1872 and led to the unlawful seizure of thousands of acres of land.[37] Maori who refused to move from confiscated lands were arrested and held without trial.[38] The Maori attempted to take recourse through legal channels, filing over one thousand petitions to the General Assembly in the 1880s for return of their lands.[39] The courts

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or not there are specific legislative references to the Treaty or to Maori values." D. V. Williams, *Maori Issues II*, N.Z. RECENT L. REV. 129, 131 (1990) (quoting Huakina Development Trust v. Waikato Valley Authority, 2 N.Z.L.R. 188 (1987)).

33 Pita Rikys, *Trick or Treaty? Validity of English Law in New Zealand and the Application of the Treaty of Waitangi*, N.Z. L.J. 370, 370 (Oct. 1991).

34 ORANGE, *supra* note 10, at 46-47, 65.

35 PAUL TEMM Q.C., THE WAITANGI TRIBUNAL: THE CONSCIENCE OF THE NATION 19 (1990).

36 *Id.* at 19.

37 *Id.* at 23.

38 *Id.* at 24.

39 ORANGE, *supra* note 10, at 186.

quashed these hopes by upholding an 1877 decision that declared the Treaty a legal nullity.[40]

Maori hopes continued to decline throughout most of the next century as the government's refusal to abide by Treaty promises ensured that Maori concerns ranked below those of the European settlers. Many Maori lost their cultural identity, becoming trapped at the lowest economic levels of colonial society.[41]

Even with such justifiable anger and despair, however, the Maori threat of a "twenty-one bum salute" to the Queen never materialized. On the 150th anniversary of the signing of the Treaty at Waitangi, an estimated one-fourth of the total Maori population took part in building or restoring twenty-one war canoes to commemorate the Maori discovery of New Zealand.[42] The ceremony became a demonstration of Maori pride, not Maori protest. Government reforms revived hope, beginning with the establishment of the Waitangi Tribunal in 1975.[43] Statutory recognition of the Treaty and of Maori concerns followed, indicating an increasingly effective Maori political movement in New Zealand.[44]

C. The Waitangi Tribunal

Established in 1975 by the Treaty of Waitangi Act,[45] the Waitangi Tribunal heard its first case in 1977. The claim was summarily dismissed, arousing suspicions in the Maori community.[46] The Tribunal's purpose was to interpret the Treaty and to apply Treaty principles in recommending resolution of Treaty claims.[47] Reconvened in 1980 with a Maori chairman, Judge Edward Taihakeirei Durie, the second Tribunal sat as a three member panel composed of Judge Durie, Sir Graham Latimer, and Paul Temm

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40 "The alleged treaty with the Bishop of New Zealand, if it ever existed, was a legal nullity, the right of extinguishing the native title being exclusively in the Crown." Wi Parata v. Bishop of Wellington, 3 N.Z. Jur. R. (NS) S.C. 72, 76 (1877).

41 Vernon Loeb, *Maoris of New Zealand at Last are Getting Their Due*, PHIL. INQUIRER, Apr. 27, 1990, at A19.

42 *Id.*

43 *See infra* notes 45-51 and accompanying text.

44 Frank Viviano, *Maoris Stake Claim to 'God's Country', Native Movement a Potent Force in State Affairs*, S.F. CHRON., May 11, 1988, at 2, Z1.

45 Treaty of Waitangi Act, N.Z. STAT. No. 114 (1975).

46 Maori feared the Tribunal was "another Pakeha [European] trick." TEMM, *supra* note 35, at 6.

47 The Act states the Tribunal's duties to "make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles." Treaty of Waitangi Act, *supra* note 45, at 825.

Q.C.[48] Amendments to the Act in 1985 and 1988 increased the Tribunal membership to its current sixteen judges, with a quorum of four required to hear claims. The Tribunal can now conduct more than one hearing at a time.[49]

To encourage Maori faith in the Tribunal, Judge Durie and his panel devised procedures to incorporate Maori custom.[50] The original Tribunal met in a luxury hotel. The Tribunal now convenes at the tribal *marae* (village squares or meeting halls) and follows tribal customs. Tribal leaders ceremonially pass the *mana* (authority or prestige)[51] of the *marae* to the Tribunal before hearings. The Tribunal returns the *mana* to the tribe before adjournment. The Tribunal conducts proceedings in the Maori language, translated for the benefit of English-speaking judges and claimants. Durie's panel conceived of the Tribunal as accessible, informal, and familiar to Maori people.[52]

1. Tribunal Decisions that Shaped Policy

Four cornerstone decisions reached by the Tribunal from 1983 to 1987 laid the foundation for the legal benefits that the Maori have accrued to date. The *Motonui* decision of 1983 upheld the claim by the Te Atiawa tribe that discharging pollution near their traditional fishing grounds violated Treaty principles.[53] The Tribunal characterized the Treaty as placing an affirmative duty on the Crown, under contract theory, to protect Maori interests.[54] This characterization of a fiduciary relationship between the Crown and the Maori established a basis for enforcing Treaty promises under the common law.[55]

The Tribunal's *Kaituna* decision of 1984 explored the Treaty's relationship to the laws of Parliament.[56] The Tribunal declared that a proposal to discharge effluent into the Kaituna river near a sacred pool (*Te Wai-i-rangi*) of the Ngati Pikiao tribe constituted a violation of the Treaty.[57] The Tribunal gave the Treaty the status of a statutory instrument, suggesting

48 TEMM, *supra* note 35, at 6.
49 *Id.* at 13-14.
50 TEMM, *supra* note 35, at 7-12.
51 ORANGE, *supra* note 10, at 268 (glossary).
52 TEMM, *supra* note 35, at 7-12.
53 *Id.* at 40.
54 *Id.* (calling the Treaty "a foundation for a developing commercial contract . . .").
55 *See* discussion *infra* part III (A).
56 TEMM, *supra* note 35, at 46.
57 *Id.*

that courts should interpret legislation by using the Treaty as a guide.[58] Parliament adopted this recommendation in the State Owned Enterprises Act of 1987.[59] Justice Cooke interpreted the Act in *New Zealand Maori Council v. Attorney General*, 2 N.Z.L.R. 142 (1989), to require consideration of Maori claims before the Crown could transfer public land to private enterprise.[60]

The Manukau Harbor report in 1985 had little practical effect because at that time the Tribunal only had jurisdiction over claims of present harm.[61] Even so, the Manukau Harbour report detailed for the first time, in an official document, the injustices suffered by the Maori in the Land Wars.[62] The Tribunal found the acts of the British troops unjustified, and found that the seizure of Maori property violated the Treaty.[63] This finding may have gained significance with the extension of jurisdiction back to 1840,[64] if the Maori bring claims to redress these losses. The Appeals court also recently ruled that Tribunal reports are admissible even in actions where no statutory mandate requires that they be considered. Courts can now admit Tribunal reports under the hearsay exception for published books dealing with matters of public history, anthropology or sociology.[65] This opens the door to Tribunal reports as persuasive, though not binding, legal authority.

The Manukau Harbour report also discusses the relationship between *kawanatanga* (government) and *rangatiratanga* (chieftainship) in the Maori text of the Treaty. The Tribunal found that *rangatiratanga* implied the authority to control and manage.[66] The Tribunal reasoned that the partnership implications of this separation of sovereignty place the Crown under an obligation to recognize Maori interests arising under the Treaty and under an affirmative legal duty to protect those interests.[67]

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58 *Id.*

59 "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." State Owned Enterprises Act, N.Z. STAT. No. 124 § 9 (1986).

60 Boast, *supra* note 20, at 244.

61 E.T.J. Durie, *The Waitangi Tribunal: Its Relationship with the Judicial System*, N.Z. L.J. 235, 237 (July 1986) (jurisdiction was made retroactive to 1840 by later amendment to the Act).

62 "The Manukau Maori people were attacked without just cause by British troops, their homes and villages ransacked and burned, their horses and cattle stolen. They were then forced to leave their lands and treated as rebels, all their property being confiscated in punishment for a rebellion that never took place." TEMM, *supra* note 35, at 47 (quoting the Tribunal).

63 *Id.*

64 The Treaty of Waitangi Amendment Act, N.Z. STAT. No. 148 § 3 (1985).

65 Te Runanga o Muriwhenua Inc. v. Attorney General, 2 N.Z.L.R. 641 (1990) (reports admissible under Evidence Amendment Act of 1980).

66 Kenneth A. Palmer, *Law, Land and Maori Issues*, 3 CANTURBURY L. REV. 322, 345 n.106 (1988).

67 *Id.* at 343.

The fourth cornerstone decision, the Tribunal report on *Te Reo Maori* (1986), recommended that the government foster the Maori language as an official language of New Zealand.[68] The Tribunal urged Parliament to recognize the Maori right to use their native language in court proceedings and government business.[69] The report stressed the importance of Maori culture and its relationship to New Zealand's heritage.[70] Parliament largely adopted the Tribunal's findings in the Maori Language Act of 1987.[71]

2. *The Changing Role of the Tribunal*

The courts have further defined the principles of the Treaty of Waitangi and the role of the Waitangi Tribunal. A recent pair of decisions considered the role of the Waitangi Tribunal in the legal system. The first decision held that a government agency bound by statute to act consistently with Treaty principles must wait for the Tribunal's report before implementing policy.[72] This rule would benefit Maori claimants by postponing government acts that might affect the property or other interest in question until the Tribunal has considered the claim.

A second decision, arrived at a year later in the same action, eroded the potential benefit for Maori claimants. The court held that compliance with Treaty principles did not require immediate or substantial action, but that acts of the government must not diminish the present capacity to protect Treaty principles.[73] The claim arose when the government proposed to sell state-owned radio frequencies to private enterprise. The court agreed with the Tribunal that the Crown had committed itself to protect the Maori language under the Treaty.[74] The court found that a statutory reference to the Treaty applied.[75] It declared that broadcasting in the Maori language was essential to preserve the language.[76] The court nevertheless dismissed the appeal of the Maori council to prevent the transfer of broadcasting

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68 "The Maori culture is unique in the world. Its carvings are rich in symbolism. Its music is harmonious and appealing. Its dancing has captivated many hearts and its oral tradition is abundant in song and story. There is a great body of 'oral literature' that has survived for many generations, full of wisdom in its narrative and beauty in its poetry, and at the heart of it all is the Maori language . . . ." TEMM, *supra* note 35, at 54 (quoting the Tribunal report).

69 *Id.*

70 *Id.*

71 Maori Language Act, N.Z. STAT. No. 176 (1987).

72 Attorney General v. New Zealand Maori Council, 2 N.Z.L.R. 129 (1991).

73 New Zealand Maori Council v. Attorney General, 2 N.Z.L.R. 576 (1992).

74 *Id.*

75 *Id.*

76 *Id.*

facilities under the State Owned Enterprises Act.[77] The court held that it did not have the power to force the Crown to adopt policies simply because a claimant had proved that such policies were a more appropriate means to comply with Treaty obligations than other possible means.[78] As long as the government could find a substitute for the assets in question there was no reason to compel the Crown to comply with what the Waitangi Tribunal, or the Maori council, or even the court, deemed most appropriate.[79] Courts could interpret this decision to allow the government to postpone redress even for legally acknowledged breaches of the Treaty as long as there was some future capacity to effect reparation.

The work of the Waitangi Tribunal advanced the recognition of the Treaty in New Zealand, but at this point no consensus exists as to the legal effect of Tribunal decisions. As a means to redress Treaty injustices, the Tribunal has been effective.[80] No legal mandate, however, accompanies this ability to effect government policy. The government has complied voluntarily with the Tribunal's recommendations. The continued effectiveness of such a system is questionable, however, leaving the Maori vulnerable to the political changes of each election year.

The issue of Maori rights in New Zealand and the legal means to enforce those rights has its roots in the language of the Treaty, but has also been influenced by judicial interpretation and scholarly exploration of common law rights of indigenous peoples. The following section examines the implications of these views upon the Treaty and upon the Maori position in New Zealand law.

III. MAORI RIGHTS

Waitangi Tribunal Judge Durie wrote in 1987 that to restore minimum justice to the Maori would require reparation, tribal self-government, independent economy, preservation of tribal culture, and state funding.[81] These imperatives parallel the relationship between Maori and the Crown envisioned in the Maori language Treaty. Reparation would begin to heal the losses of tangible *taonga* (treasures) such as tribal land. Self-government embodies the concept of *rangatiratanga* (chieftainship). Independent economy would restore *mana* (authority, prestige) and assure continued *rangati-*

77 *Id.*
78 *Id.* at 588, 602.
79 *Id.*
80 *See infra* notes 53-60 and accompanying text.
81 J. Durie, *Protection of Minorities*, N.Z. L.J. 260, 260-61 (Aug. 1987).

ratanga. The preservation of tribal culture incorporates the intangible aspects of *taonga* such as rituals and customs. State funding is necessary to restore justice to the Maori, especially since the state has failed to keep the Crown's original promises. Current government policy, however, falls short of even these "minimum" standards.

A. *The Courts*

Legal concepts supporting the restoration of justice to the Maori arise from both the common law and the statutory recognition of the Treaty. Maori rights under the Treaty are enforceable where Acts of Parliament include a reference to the Treaty. Since the State Owned Enterprises Act,[82] numerous other laws have incorporated references to Treaty principles.[83] Court decisions under these statutes make reference to fiduciary duties implied by the Treaty, although courts have explicitly linked their rulings to the enabling statute.[84] However, under the common law doctrine of aboriginal fiduciary obligation, a duty on the part of the government exists even without a statutory reference to the Treaty.[85] One court even recognized the possibility that unextinguished aboriginal title may survive over lands held by the Crown.[86] No other court has gone so far, however, and government policy continues to ignore even the existence of such an argument.[87] Whether any claim based on these precedents could survive in a New Zealand court absent Parliamentary recognition of the Treaty remains untested.

Under British law, treaties do not bind the courts unless Parliament incorporates them into legislation as a part of domestic law.[88] Treaties of cession, however, differ in that they bind the executive directly, without requiring legislation.[89] Because New Zealand's highest court, the Privy

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82 *See supra* note 59.

83 McHugh, *supra* note 16, at 16.

84 Boast, *supra* note 20, at 244.

85 McHugh, *supra* note 16, at 18.

86 Te Weehi v. Regional Fisheries Officer, 1 N.Z.L.R. 680 (1986).

87 "How many New Zealanders are aware of the Te Weehi case which recognizes that an unextinguished non-territorial aboriginal title may survive over Crown land? Or do we keep these tidbits hidden amongst all the other little secrets underneath our gowns?" Nick Gerritsen, *The Treaty of Waitangi: "do I dare disturb the universe?"*, N.Z. L.J. 138, 139 (Apr. 1991).

88 W.K. Hastings, *New Zealand Treaty Practice with Particular Reference to the Treaty of Waitangi*, 38 INT'L & COMP. L.Q. 668, 668 (July 1989).

89 Treaties of cession "bind the Crown in its executive (as opposed to Parliamentary) capacity." McHugh, *supra* note 16, at 17.

Council,[90] has termed the Treaty of Waitangi a treaty of cession, the common law provides a basis for enforcing breaches of the Treaty.[91] Suits against the Crown are therefore an appropriate means for enforcing Treaty promises.

The *Kauweranga Judgment*, which found "rights in the nature of contract flowing from the Treaty,"[92] shows that there is judicial support for this type of common law reparation. New Zealand courts have recognized common law rights which could prevail over the doctrine of parliamentary supremacy.[93] Justice Cooke, one of the authors of the State Owned Enterprises Act decision,[94] characterizes the judiciary as "ready to do what we reasonably can to allow fairness to have decisive weight in New Zealand jurisprudence."[95] His dictum in another opinion is persuasive in this point: "some common law rights presumably lie so deep that even Parliament could not override them."[96]

The support given by other judges to the doctrine of Parliamentary supremacy tends to indicate, however, that common law arguments might not be well-received or even heard. The court in *Berkett v. Tauranga District Court*, 3 N.Z.L.R. 206 (1992) recently cited a 1974 British House of Lords decision, holding that courts only have the power to interpret statutes; the courts may not refuse to enforce them.[97] According to such reasoning, the Maori must seek their remedies from Parliament rather than the courts, a difficult task because Maori interests have little representation in Parliament.[98]

The final problem in advancing common law arguments is that they enforce Maori rights through collateral means, avoiding the question of where the Treaty fits in New Zealand law.[99] Successful common law

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90 Hastings, *supra* note 88, at 676.

91 McHugh, *supra* note 16, at 17.

92 *Kauweranga Judgment*, republished at 14 V. U. OF WELLINGTON L. REV. 227 (1984).

93 See *supra* notes 85, 86 and accompanying text.

94 *Attorney General v. New Zealand Maori Council*, *supra* note 72.

95 Robin Cooke, *Fairness (Treaty of Waitangi)*, 19 V. U. OF WELLINGTON L. REV. 421, 433 (Nov. 1989).

96 Taylor v. New Zealand Poultry Board, 1 N.Z.L.R. 394, 398 (1992).

97 "When an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the statute book at all." *Berkett* at 214 (citing Picklin v. British Railways Board, 1 ALL ER 609, 619 (1974)).

98 R.J. O'Connor, *The Future of Maori Representation in Parliament*, N.Z. L.J. 175, 176 (May 1991).

99 "No one pretends that the language of 'partnership' and 'fiduciary obligation' was exchanged on the seaside promontory at Waitangi in 1840. The courts have stressed their construction of what amounts

actions are better than a complete failure to enforce Maori rights, but will not provide the stability and legal predictability that recognition of the actual language of the Treaty would bring to the Maori. Before the enactment of the Constitution Act, New Zealand scholars strongly advocated entrenched constitutional recognition of the Treaty.[100] The argument continued through the remainder of the 1980s as Parliament debated over the Bill of Rights Act.[101] The question of whether or not the Treaty can or should be entrenched in New Zealand law revolves around the issue of constitutional function in New Zealand.

B. The Constitution

Even if Parliament acknowledged the Treaty as a document of constitutional importance in New Zealand, its legal status would still be uncertain.[102] Unlike the United States Constitution, New Zealand's constitution does not operate as supreme law, and courts do not apply its provisions to override inconsistent laws. For example, the New Zealand Constitution Act of 1852 provided in Section 71 for the continuation of Maori customary law. The Act provided that the government would set districts apart for the purpose of preserving Maori customs.[103] This delegation of power to the Maori never happened, and there was apparently no way to force the government to enact the provisions of its own law.[104]

In 1986, the Constitution Act of 1987 was introduced and Parliament was urged to consider incorporating the Treaty of Waitangi into the Act, and to provide implementation for Section 71.[105] Parliament did not follow these suggestions. Instead, it repealed the customary law provision, excluded the Treaty, and enacted the constitution itself only as statutory law.[106]

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to a contemporary mythology of the Treaty." P.G. McHugh, *Constitutional Myths and the Treaty of Waitangi*, N.Z. L.J. 316, 319 (Sept. 1991).

100 David V. Williams, *The Constitutional Status of the Treaty of Waitangi: An Historical Perspective*, 14 N.Z.U. L. REV. 9 (June 1990).

101 *See* JEROME B. ELKIND AND ANTONY SHAW, A STANDARD FOR JUSTICE: A CRITICAL COMMENTARY ON THE PROPOSED BILL OF RIGHTS FOR NEW ZEALAND (1986).

102 "The nature of the uncontrolled constitution, however, means that there is no simple definitive answer to questions about the present constitutional status of the Treaty." Williams, *supra* note 30, at 29.

103 Customs were limited to those "not repugnant to the general purposes of humanity . . ." Alex Frame, *Colonising Attitudes toward Maori Custom*, N.Z. L.J. 105, 106-07 (Mar. 1981).

104 Williams, *supra* note 100, at 22.

105 *Id.* at 23.

106 New Zealand Constitution Act, N.Z. STAT. No. 114 (1987).

New Zealand's constitution consists of more, however, than the provisions of the Constitution Act. Because the constitution is unentrenched, or not supreme law, it operates on both written procedural and unwritten common law levels.[107] The unentrenched constitution is equal, in a legal sense, to any other act of Parliament.[108] On the common law level, however, courts use the constitution as a tool for statutory interpretation and it may also influence the courts in other, unacknowledged ways. Through the interpretation of statutes that refer to the Treaty and the common law effect of the Treaty on court decisions, the Treaty has become "constitutionalized."[109] Both the constitution and the Treaty operate in New Zealand law in a similar fashion: the courts consider their principles yet have no preemptive power to enforce them. The result is a system that is slow to evolve and unresponsive to the concerns of its constituents.[110] After 150 years the Maori are frustrated with waiting for movement on Treaty issues.

Following the enactment of the Constitution Act of 1987, the proposal for a Bill of Rights Act revived debate over entrenchment of the Treaty.[111] Scholars argued that without the Treaty there was no legitimate basis for the constitution.[112] The Bill of Rights could reconcile the conflicting concepts of sovereignty in the two versions of the Treaty, creating a consistent legal structure in New Zealand.[113] Again the argument for entrenchment failed, however, and the Bill of Rights was enacted as an ordinary statute without including the provisions of the Treaty.

Because Parliament has entrenched neither the constitution nor the New Zealand Bill of Rights as supreme law, the failure to entrench the Treaty of Waitangi does not obviously discriminate against Maori interests. In fact, with increasing recognition through the 1970s and 1980s, the Treaty

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107 P.A. Joseph, *The Apparent Futility of Constitutional Entrenchment in New Zealand*, 10 N.Z.U. L. REV. 27, 30 (June 1982).

108 *Id.*

109 Williams, *supra* note 30, at 23-29.

110 "Here judicial theory of the constitution serves two masters. On the one hand it seeks to account for the constitutional system as it operates in fact, and on the other it substitutes for a written constitution in seeking to reinforce the existing institutions legitimized in the course of events. Drawn by these incongruous aims, English constitutional theory struggles to be contemporary and sensitive, yet tends to be inertial and constraining." Joseph, *supra* note 107, at 36.

111 ELKIND AND SHAW, *supra* note 101, at 41.

112 *See* F.M. Brookfield, *The New Zealand Constitution; The Search for Legitimacy*, *supra* note 19, at 1.

113 "The legitimacy of the Constitution rests to a large extent on reconciling the authority of the New Zealand Crown and Parliament, developed from the *kawanatanga* ceded in the first article of the Treaty . . . with the *rangatiratanga* and *mana* of the Maori which should have been preserved under the second article." *Id.* at 17.

may occupy a position superior to these ordinary Acts. Without entrenchment, however, these gains are the result of voluntary action by the government, and there is no guarantee that the outlook for the Maori in New Zealand will continue to improve.

C. *Maori Sovereignty*

Maori interests have made the least progress regarding the Treaty promise of *rangatiratanga* (chieftainship). In the United States, the jurisdiction of tribal courts recognizes aboriginal sovereignty. Although the system has many flaws and Native Americans continue to fight against government incursions into areas of sovereignty, tribal sovereignty is crucial to Indian rights and culture. The Maori have never been able to carve out an area free from the Crown's influence in New Zealand, despite Treaty promises and enactments such as Section 71. The Crown continues to claim absolute sovereignty, a condition that leaves little residual sovereignty for aboriginal people.

If the legal sovereignty of the Crown is considered separately from common law "popular or political sovereignty," which is vested in the people, then there is room for an independent Maori government.[114] Under such an independent government, tribal leaders would operate free from government constraints in areas concerning only Maori, such as management of tribal resources and tribal law on Maori land. A structure for such Maori political sovereignty may be emerging under the policies of the Runanga Iwi Act,[115] conceived to assist the process of devolution of Maori social programs to *iwi* (tribal) agencies. The Runanga Iwi Act established the Iwi Transition Agency to implement the transfer to individual tribes of some of the administrative functions formerly the province of the Department of Maori Affairs.[116] This is a significant step toward Maori self-determination and recognition as a Treaty partner.[117] The Iwi Transition Agency, however, is only a beginning. Although the Act provides that it should be interpreted consistently with the principles of the

114 "[T]he traditional vocabulary of British constitutional theory provides the equipment to clarify the relationship of rangatiratanga to our system of government." P.G. McHugh, *Constitutional Theory and Maori Claims*, *supra* note 19, at 25, 47.

115 Runanga Iwi Act, N.Z. STAT. No. 125 (1990).

116 *Id.*

117 Tom O'Reilly and David Wood, *Biculturalism and the Public Sector in* RESHAPING THE STATE: NEW ZEALAND'S BUREAUCRATIC REVOLUTION 320, 340 (1990).

Treaty of Waitangi, many of its provisions cannot be reconciled with the principle of Maori chieftainship.[118]

The most criticized section of the Act provides that the government, rather than the tribal authorities, holds all power to define tribal agencies and to determine the procedures they must follow.[119] The government also controls the process of settling conflicts within and between tribes.[120] Although there are few gains for the Maori under the Act, the Crown benefits in several ways. The government has power to limit, to monitor and to define the tribal authorities. The government reduces costs by delivering resources to tribal agencies to administer rather than administering them through government funded agencies. Although the Runanga Iwi Act may provide a starting point for recognition of the *rangatiratanga* (chieftainship) Treaty principle, at present it is only a framework for the fulfillment of the Crown's promise.

The New Zealand government, despite all the progress in the last twenty years, continues to totter on the brink of recognizing the provisions of the Treaty. Enactments such as the Runanga Iwi Act refer to principles, rather than provisions. Reparation for some past injustices has been significant, but the majority of Maori have not benefited. Finally, the Maori still have no guaranteed legal means to redress past wrongs or to prevent future erosion of the rights that have been acknowledged.

IV. ANALYSIS

A. *Reparation*

The acts of the New Zealand government in the last twenty years show an increasing sense of commitment toward healing the breach between the two peoples that occupy its soil. There has been a significant change in policy from assimilation to celebration of the Maori culture. The acts of the government have made it impossible to go back to the policy of ignoring the Treaty. Many issues remain unsettled, however, and the problem will grow as the Maori population grows. The prediction that half of New Zealand's people will one day be Maori is significant. If the government postpones

118 "The Bill, and indeed, the entire government policy of devolution in its current form are in breach of the Treaty, in particular the guarantee of *tino rangatiratanga* in Part 2. It is clear that *iwi* will continue to be subservient to the Crown in this new scheme." A.L. Mikaere, *Maori Issues I*, N.Z. RECENT L. REV. 122 (1992).

119 *Id.*

120 *Id.*

reparation, discontent on such a large scale could be catastrophic. Rifts of over a hundred years' duration are not easily filled, and run deeper than they first appear. The first healing must be in the area of trust.

1. *"If you would restore the honour of the Pakeha . . ."*[121]

William Hobson and the Crown had honorable intentions when they made a pact with the Maori to acquire New Zealand.[122] From an American perspective, this is enviable, because the transactions of the U.S. government with indigenous people had no such auspicious beginning.[123] The Crown seems to have intended to keep its treaty promises. The early establishment of a "Protector of Aborigines" indicates an intent to prevent the government and the European settlers from taking advantage of the Maori in land transactions. Section 71 of the original Constitution Act shows an intent to keep Maori customs alive and to establish districts of Maori influence that may even have satisfied the Treaty concept of Maori self-government. The relationship of the Maori and the Crown was consistent with these good intentions until the time of the Land Wars.

Legislation from the Treaty of Waitangi Act to the present proves that those good intentions have been revived. The government of New Zealand has shown its intention to acknowledge the Treaty, to redress past injustices and to transfer power to tribal authority. These intentions cannot be fulfilled, however, without defining what will be done, how it will be accomplished and when it will begin. There is an air of Maori expectancy felt in the debate over the legal position of the Treaty of Waitangi in New Zealand, but the hope that progress will continue is tainted by the shadow of doubt: what will prevent the government from passing new laws that put the Maori back where they were? Parliament created the Waitangi Tribunal, and what the Crown gives it can also take away. Government promises to the Maori are met with justifiable mistrust.

2. *"you must first restore the mana of the Maori."*[124]

At the time of the Treaty and the early years following its signing, the Maori were a strong and numerous people. They had their own language, laws, social customs and religious beliefs. They cultivated land, developed

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121 TEMM, *supra* note 35, at 32.

122 *See supra* note 34 and accompanying text.

123 *See generally,* FRANCIS PAUL PRUCHA, THE GREAT FATHER (1986).

124 TEMM, *supra* note 35, at 32.

advanced fishing techniques and engaged in commerce. They had cultural identities distinct from tribe to tribe, and celebrated their differences in art, music and storytelling. All of these "treasures," taken together, form the *mana* of the Maori.

The chiefs who signed the Treaty of Waitangi thought it would protect the *mana* of their people. They made their marks beneath promises, written by the English in the Maori language, that their land would be protected, that they would retain the power to regulate their own lives, and that their "treasures" would not be taken away. The promises of the Treaty became a part of their *mana*. The Treaty was itself a treasure that the tribes possessed. Even after the Crown dishonored the Treaty and broke its promises, the Maori did not cease to value it.

The New Zealand government has returned some part of Maori treasures. It has returned some lands and protected others. It has acknowledged the Maori language and created a tribunal that follows Maori customs in its procedure and provides a forum to air the grievances that New Zealand courts do not recognize. These are all treasures, but they fall short of *mana*. What is missing is a very important treasure: a sphere of power in which each tribe can act independently in matters that do not affect outsiders, and a sphere of influence in which each tribe can demand justice when acts of outsiders adversely affect them.

The argument seems always to return to the Treaty. "The principles of the Treaty of Waitangi" is a phrase that has become common in New Zealand legislation. Obviously, in the interpretation of the New Zealand government, this provision means something less than the literal terms of the Treaty or the expectations of those who signed it. The Prime Minister has even gone so far as to announce five major principles that form the basis for these legislative references.[125] The extent to which these five principles correspond with the Treaty itself, and the extent to which current and future legislation reflects rights arising under these principles is the final focus of this analysis. If the New Zealand government would restore honor to the Crown, it must restore the *mana* of the Maori. The question is whether the principles as stated have the potential to create an acceptable level of reparation, honor the Treaty, and heal Maori trust.

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125 Alex Frame, *A State Servant Looks at The Treaty*, 14 N.Z. L. REV. 82, 86 (June 1990).

B. The Crown's Policy Statement of Treaty Principles

The government policy statement of Treaty principles creates a frame of reference for issues affecting the Maori. The principles address five areas of concern. The first principle, *Government*, considers the question of sovereignty. The second, *Self-Management*, addresses the need for a sphere of independent Maori influence in areas affecting the tribes. The third and fourth principles, *Equality* and *Cooperation*, look at the relationship of two peoples in one land. The final principle, *Redress*, brings up the issue of reconciling past and future conflict.

1. The Kawanatanga Principle / The Principle of Government

> The first Article of the Treaty gives expression of the right to the Crown to make laws and its obligation to govern in accordance with constitutional process. This sovereignty is qualified by the promise to accord the Maori interest specified in the second Article an appropriate priority.[126]

On its face, the first principle backs away from the statement of absolute sovereignty seen in the English version of the Treaty, and therefore encourages the Maori. It takes into consideration the meaning of the Maori treaty terms, acknowledges the Treaty promise of Maori self-government, and makes two further promises: that Parliament will give this interest "an appropriate priority" in making laws, and that the Crown will govern "in accordance with constitutional process."

In light of the history of past promises, those concerned with Maori interests should ask for further clarification of three major points. First, the means of enforcing these obligations is not stated. Second, the Maori definition of "appropriate" may differ from that of the Crown. Finally, the term "constitutional process" is unclear. The courts and the legislature cannot apply the principle consistently or in a practical manner unless these issues are clarified. As stated, any number of interpretations are possible. In light of the past relationship between the Maori and government, the implications in these areas are not encouraging.

Promises by the government have not been scarce throughout the history of the relationship between the Maori and the Crown. The Maori continue to lack an adequate means to ensure that the government keeps its

126 *Id.* at 87 (quoting the text of the five principles).

promises. The *Kawanatanga* principle continues to speak of obligation and promise but never provides that means. As previous case law suggests, if the Maori take these promises and obligations to court, the courts will probably find that the remedy lies only in Parliament. The fact that Maori constitute about ten percent of the current population signifies the amount of influence they may reasonably be expected to exert upon the legislature. Postponing the resolution of Treaty issues because the Maori population may increase is irresponsible in both moral and fiscal implications.

Going to Parliament by way of the Waitangi Tribunal has been the most effective means for Maori concerns to be acknowledged, because the Tribunal has the advisory power to interpret Treaty principles. The fact that the government has now made an official statement of Treaty principles is ominous. Political pressure may influence the Waitangi Tribunal to concur with the government's interpretation rather than to refer to the Treaty. Parliament may also choose the government interpretation over that of the Tribunal in drafting legislation. Thus, not only does the government fail to provide a legal means to enforce promises to the Maori, its statement of principles may even weaken the persuasive effect of the Tribunal that is currently the Maori's sole protection.

These concerns also point out that what Parliament or the Crown considers to be appropriate is not necessarily going to be matched by the Tribunal's views or by a majority of Maori people. Again, case law is significant. In the radio frequencies case[127] the court found that it was outside the court's proper function to question whether or not the government's action was appropriate.[128] If the courts do not have the power to mediate between the Crown and the Maori in determining what acts are appropriate, the Crown's judgment will prevail.

The promise to act in accordance with constitutional process is not as reassuring as the Prime Minister may have intended. It is not settled in New Zealand law whether the Treaty or its principles are a part of the constitution, so there is no guarantee that constitutional process will include Treaty concepts, or any other representation of Maori interests as a minority people.[129]

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127 *See supra* notes 73-74 and accompanying text.

128 *Id.* at 602.

129 This issue was also present at the time the United States Constitution was being formed. There was much debate over the representation of minority interests in a democratic process primarily based on majority rule. One of the main reasons that the U.S. Constitution was necessary was to prevent excessive control of government by a "superior force of an interested and overbearing majority." *The Federalist No. 10,* 8 (James Madison) (reprinted in STONE, SEIDMAN, SUNSTEIN AND TUSHNET, CONSTITUTIONAL LAW (2ed. Little, Brown and Co. 1991).

Although New Zealand is not governed solely under democratic theory, the popularly elected Parliament primarily reflects the interests of the majority of voters and the views of the majority party in control at a given time. As a constitutional monarchy, the executive protects minority interests. The Maori have no power to compel the Crown to protect their interests unless the Crown violates a basic, internationally recognized human right sufficient to carry a claim to the Human Rights Committee of the United Nations.[130] The Maori cannot rely upon the unenforceable promise of government. They must rely on the honor of the Crown, a prospect so tarnished by history that it is no guarantee at all.

2. *The Rangatiratanga Principle / The Principle of Self Management*

> The second article of the Treaty guarantees to *iwi* Maori the control and enjoyment of those resources and *taonga* which it is their wish to retain. The preservation of a resource base, restoration of *iwi* self management, and the active protection of taonga, both material and cultural, are necessary elements of the Crown's policy of recognizing *rangatiratanga.*[131]

The Self-Management principle appears to be a leap forward for Maori interests. Finally, there is official recognition that the concept of *rangatiratanga* forms a part of the Treaty. Upon closer analysis, however, this principle appears to be a preemptive strike. The government defines the Treaty terms according to the concessions that the government is willing to make. Three issues remain problematic. First, the government definition of *rangatiratanga* is unacceptable. Second, this principle gives the Maori nothing more than they already had. Finally, this statement falls short of a "guarantee" to the Maori.

The source of the government's definition resides in motivational rather than linguistic analysis. Defining the Maori term *rangatiratanga* as "self management" significantly reduces the impact of the generally accepted translation: chieftainship.[132] Businesses, property owners and private individuals already have the right to manage themselves. The principle gives the Maori nothing more. The principle tailors its words to fit

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130 Antony Shaw and Andrew S. Butler, *The New Zealand Bill of Rights Comes Alive*, N.Z. L.J. 400, 410 (Nov. 1991).

131 Frame, *supra* note 125, at 87.

132 *See* ORANGE, *supra* note 10, at 268 (glossary); *see also* 14 N.Z.U. L. REV. 102 (Dec. 1990) (glossary) ("chieftainship, authority"); SHAW AND ELKIND, *supra* note 101, at 37 ("high chieftainship").

the provisions of the Runanga Iwi Act, defining the Treaty concepts so narrowly that the Act meets these concerns without requiring further effort. According to its own principle, the government need do no more than hand its programs to the tribes to administer, complete with government-determined rules, regulations and procedures.

The principle further dilutes the language of even the English Treaty. The "control and enjoyment of those resources and *taonga* which it is their wish to retain" gives less than the English language in the Treaty: "[F]ull exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess . . . ."[133] "Material" possessions are only those resources actually owned or legally recognized, because the principle limits non-tangible resources to cultural aspects. The principle does not address customary uses of land, protection of sacred sites or hunting and fishing rights. It does not make a commitment to restore lost resources or to provide an economic base for tribal self-sufficiency. The principle promises active protection of material and cultural resources, but again, how the Maori can enforce these promises is not made clear in the principles and has not been clarified in subsequent law.

The principle lists the preservation of a resource base as a concern, but it does not say whether this protects the Maori interest or that of the Crown. Recent legislation regarding the fisheries resource indicates that the Maori will share the economic burdens of resource conservation. The Maori Fisheries Act of 1989[134] grants a significant quota of the total fishery to the Maori, subject to conservation concerns of the government. The Act provides for tribal control over some smaller specific areas. The Maori Fisheries Commission must consult with tribal representatives and consider Maori custom in granting fish quotas.[135] However, traditional Maori fishing practices have no priority under the Act. The Act goes no further and possibly falls short of previous case law, which found that the Treaty protected customary and traditional rights for the Maori, superior to those of the general public.[136]

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133 Treaty of Waitangi Act, N.Z. STAT. No. 114 (1975).

134 Maori Fisheries Act, N.Z. STAT. No. 159 (1989).

135 Frame, *supra* note 125, at 93.

136 "If there is any feeling that it is somehow unjust that the Maori people should by their custom and tradition have the right to take *toheroa* [a protected species] when others are absolutely prohibited from doing so, then we need to remind ourselves that the Crown covenanted by the Treaty of Waitangi, on behalf of the European settlers, that in return for the acceptance by the Maori people of the sovereignty of the Crown their fishing rights . . . should be protected and preserved to them." D. V. Williams, *Maori*

The Maori Fisheries Act acknowledges Maori rights to an extremely valuable resource, but remains a long step away from the Treaty principle of chieftainship. Legislation passed after the release of the "principles" may even erode Maori gains under the common law. If the Self-Management principle is any indication, the government will not implement policies to advance Maori independence in tribal law or tribal government.

The final issue under the second principle is the practical value to the Maori of the Prime Minister's guarantee. Much of what the principle guarantees the Maori already had, due either to previous legal gains or as a general right in common with all citizens. If the principle offers anything new, the Maori cannot ensure that they actually get it. This "guarantee" is only a statement of policy, and has no legal enforceability. No further legislation has provided concrete assurance. The government must be willing to remove itself from power in the areas granted to the Maori for self-government to keep the *rangatiratanga* promise. Specific legislation is the only real guarantee.

3. *The Principle of Equality*

> The third Article of the Treaty constitutes a guarantee of legal equality between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality although human rights accepted under international law are incorporated also.
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> The third Article also has an important social significance in the implicit assurance that social rights would be enjoyed equally by Maori with all New Zealand citizens of whatever origin. Special measures to attain that equal enjoyment of social benefits are allowed by international law.[137]

The Equality principle begins with the Treaty grant of royal protection and all rights and privileges as British citizens to the Maori, but it adds several new layers. The assertion that the Treaty selects the common

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Issues II, N.Z. RECENT L. REV. 129, 132 (quoting *Inglis, Q.C., Ministry of Agriculture and Fisheries v. Hakaria*, D.C.R. 289 (1989)).

137 Frame, *supra* note 125, at 87.

law system has no apparent roots in the actual language of the third article, but it does not appear objectionable. "Social rights" is more confusing, but the clue in the subsequent statement allows a guess. The principle may intend to protect future legislation designed to enhance the status of minorities (i.e., affirmative action in the United States) from the equality objection.

Such programs are special measures to attain equal enjoyment of social benefits. They would allow the government to restore the losses in status that have economically disadvantaged the Maori as a group. If one can extract from this principle a commitment to undertake such measures, it is an encouraging response to the persuasive argument about the need for evolutionary change in New Zealand's constitution. It also shows support for international concepts of human rights for indigenous peoples.[138] Such a characterization of the principle may be too optimistic, however, because the principle does not state an express commitment that such special measures will occur, or even that they should. The government may have declared the Maori equal in order to preempt the courts from finding that they are entitled to distinct group rights.

The Treaty of Waitangi may entitle the Maori to a special constitutional status in New Zealand. The decision of the district court in *Hakaria*,[139] which recognized fishing rights for the Maori that were superior to those of the general public, provides one concrete example of this status. If the principle equalizes Maori rights in these areas with those of the population at large, special rights already won would be eliminated. It would also preclude any future recognition of the unique position that the Maori, as aboriginal people, occupy. The equality principle could jeopardize the attempt to establish areas of tribal influence in which Maori customary laws can be given effect under the *rangatiratanga* principle.

Dampening the ability of the Maori to seek special recognition of their laws and customs has cultural costs for all New Zealanders. The existence of a separate system of customs and laws can allow a government to evolve more easily, and make it more responsive.[140] An independent

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138 "The theory and practice of the modern international law of human rights can reinforce our resolution to do whatever may be needed to reduce, and finally to eliminate, margins of disadvantage suffered by the Maori and islands peoples . . . ." R.Q. Quentin-Baxter, *Themes of Constitutional Development: The Need for a Favorable Climate of Discussion*, N.Z. L.J. 203, 207 (June 1984).

139 *See supra* note 136.

140 "It is this possibility of creative interaction between Maori customary concepts and Pakeha law—a possibility unique in New Zealand—which is lost when, in accordance with an ill-conceived model for "law", one system is exalted into unshakeable dominance and the other defined into darkness. If one of the central problems of modern law systems is the gap between state law and the life of ordinary people . . .

Maori system could address individual problems according to the practices of tribal culture, while keeping the larger system informed. To the extent that the principle of equality encourages cultural uniformity, it does not benefit New Zealand. Equality destroys the possibility of independent Maori customary law under the *rangatiratanga* principle.

Although the Government principle proposes to protect the Maori culture, special recognition of Maori customary law helps define Maori culture. Assimilation nearly destroyed the Maori culture. Because of cultural differences, it is difficult to frame Maori concerns and issues in terms of mainstream legal concepts.[141] The principle must not equalize the Maori to the extent that they lose special forums for Maori concerns, such as the Waitangi Tribunal. Independent Maori control in areas that affect tribal interests and a legal system that has the power to protect these interests are crucial for the protection of Maori culture.

4. The Principle of Cooperation

> The Treaty is regarded by the Crown as establishing a fair basis for two peoples in one country. Duality and unity are both significant. Duality implies distinctive cultural development and unity implies common purpose and community. The relationship between community and distinctive development is governed by the requirement of cooperation which is an obligation placed on both parties to the Treaty.
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> Reasonable cooperation can only take place if there is consultation on major issues of common concern and if good faith, balance, and common sense are shown on both sides. The outcome of reasonable cooperation will be partnership.[142]

The fourth principle, Cooperation, recognizes the concept of partnership implied in the Maori version of the Treaty, but places contingencies upon the full recognition of the Maori as Treaty partners. The Maori must

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then the existence in a culture of a system of customary law should be seen as a national asset, not as a 'problem' to be defined away." Alex Frame, *Colonising Attitudes toward Maori Custom*, N.Z. L.J. 105, 110 (Mar. 1981).

141 "[P]olicy makers and planners have consciously and unconsciously strived for cultural uniformity in this country and in so doing have relegated things Maori into non-issues . . . ." John Tamihere, *Te Take Maori: A Maori Perspective of Legislation and its Interpretation with an Emphasis on Planning Law*, Vol. 5, No. 2 AUCKLAND U. L. REV. 137, 138 (1985).

142 Frame, *supra* note 125, at 87.

cooperate with the larger community, and the principle implies compromise between the two interests. The principle contemplates the development of a separate cultural identity for the Maori. The vision, however, has the Maori cultural identity developing inside a unified community, becoming one voice among many. The principle sees Maori and non-Maori as two cultures, but not as separate influences in society. There is to be a common purpose and single community.

There is an agreement of consultation, and a duty of good faith, balance and common sense placed on both parties. This indicates that where the government seeks Maori views, it will take those views into account, balancing them against other interests and considerations of practicality. Balancing interests and moving toward practical common purposes appears reasonable at first. Flaws in this reasoning appear, however, in light of the fact that the Maori comprise a minority of about ten percent of New Zealand's population.

Maori and non-Maori, with their cultural differences and past inequality, will seldom share common political purposes. The principles have enough leeway to allow the breach of Treaty rights so long as there is enough weight on the other side of the scale to justify such acts as benefiting the larger community. When conflict arises the weight of the majority interest will usually prevail. Outnumbered nine to one in the population, the Maori will be more wary of "balancing" their interests against the greater good than would have been the case at the time of the Treaty, when the ratios were reversed. The terms of this principle are dangerously close to the former policy of assimilation.

The cooperation principle echoes the message given to the Maori by the courts. The promises of the Treaty and the injustices that resulted from breaching those promises occurred in the past, but courts must find the remedy in today's world. Claims based on Maori concepts of the Treaty have been termed unfair and extravagant.[143] The principle of Cooperation does not focus on the Treaty, Maori rights, or concepts of justice for indigenous peoples. It focuses on practicality, avoiding government burdens, and fairness for the population in general. Such a focus makes it difficult to correct the margins of disadvantage that the Maori have suffered and continue to suffer. Before cooperation can be effective, the advantages must

143 "Maori must recognise that . . . both the history and the economy of the nation rule out extravagant claims in the democracy now shared. Both partners should know that a narrow focus on the past is useless. The principles of the Treaty have to be applied to give fair results in today's world." Tainui Trust Board v. Attorney-General, 2 N.Z.L.R. 513, 530 (1989).

counteract the past inequity and reestablish economic and social influence for the Maori.

The government statement of the Cooperation principle keeps the Crown's obligations vague. The government never acknowledges the obligation to make reparation, a crucial point in the same decision that urged the Maori to let go of their extravagant claims.[144] The *Tainui* court's message to the Crown, that an obligation must be seen in order to be honored, points out the greatest inadequacy in these principles and in New Zealand law. There is no binding declaration of the Crown's present and future obligations.

The Treaty of Waitangi is not embodied in the law. Legislation refers only to the principles of the Treaty, and the government statement of those principles will become a reference for the courts as well as the legislature. The Waitangi Tribunal currently has the greatest responsibility for answering Maori Treaty concerns, but it is not a legal body. Without a commitment in these areas, the Crown's principles amount to little more than the "lip service" criticized by the *Tainui* court. As long as the government acts with honor, the Maori position will continue to improve. Without guaranteed legal rights, the means to enforce those rights, and protection from government interference, the Maori depend solely upon that honor.

5. *The Principle of Redress*

> The Crown accepts a responsibility to provide a process for the resolution of grievances arising from the Treaty. This process may involve courts, the Waitangi Tribunal, or direct negotiation. The provision of redress, where entitlement is established, must take account of its practical impact and of the need to avoid the creation of fresh injustice. If the Crown demonstrates commitment to this process of redress then it will expect reconciliation to result.[145]

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144 "It is obvious that . . . non-Maori have to adjust to an understanding that does not come easily to all: reparation has to be made to the Maori people for past and continuing breaches of the Treaty by which they agreed to yield government. Lip service disclaimers of racial prejudice and token acknowledgments that the Treaty has not been honoured cannot be enough. An obligation has to be seen to be honoured." *Id.* at 530.

145 Frame, *supra* note 125, at 87-88.

The final principle, Redress, is perhaps the most hopeful. It recognizes that rights are meaningless without the means to enforce them, and that legitimate grievances exist. The *Tainui* court suggested negotiation as a more appropriate means than legal action for restoring Maori lands.[146] The legislature has taken the recommendations of the Waitangi Tribunal into account even though there was no mandate to do so. This strongly indicates that the legislature will continue to act in good faith in considering the Tribunal's advice. Tribunal recommendations may become a negotiating tool for the Maori who chose to take their claims to the government rather than the courts.

The obvious question, however, is what effect "accepting responsibility to provide a process" will have in enforcing the guarantees of the other principles, the rights under the Treaty currently recognized, and unrecognized interests such as independent tribal government. Since the principle lists direct negotiation as an acceptable process, the willingness to negotiate may, without more, be sufficient to satisfy this responsibility.

Negotiation is a voluntary exchange, and without recognized legal rights and remedies, the Maori have little bargaining power. The Waitangi Tribunal has no binding legal influence. The courts must provide a legal remedy only where the legislature has granted them jurisdiction. The *Berkett* decision demonstrates that a court can dismiss general claims under the Treaty.[147] The argument, like the Maori claimant, comes full circle, always winding up back where it started: the lack of a remedy.

Under the current system, the Maori have no codified rights as an indigenous people. As a minority people, they have no influence where the majority rules. The areas over which they can exert control are only those voluntarily ceded to them by the legislature.[148] The measures of improvement that have occurred without a legal mandate affirm the honor and fairness of the Crown, Parliament and the people of New Zealand. Passing legislation to guarantee Maori rights would show that the Crown is committed to continuing that honor and fairness.

In order to permanently restore the *mana* of the Maori, there must be more than material gains. Instituting social programs to benefit the Maori,

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146 *See supra* notes 143-144.

147 *See supra* notes 31, 97 and accompanying text.

148 "We are committed to government by the consent of the governed; and that consent is based upon reason and habit. To satisfy reason, we have to provide better means for the people to evaluate the actions and processes of government and we have to be able to show that these actions and processes embody a sense of fairness. To satisfy habit, we must ensure that change is evolutionary—that our institutions are true to their own spirit, even while they are changing." Quentin-Baxter, *supra* note 138, at 207.

or awarding money or property in restitution, returns only a part of what the Maori lost. *Mana* encompasses the concepts of pride, independence and control. These treasures cannot be restored if the Maori must beg at the government's table, regardless of how many millions of dollars worth of scraps are distributed. The Maori are justified in viewing the government's commitment to fairness with skepticism unless and until they have both guaranteed rights and the means to enforce them.

V. CONCLUSION

Canada has codified aboriginal rights as a part of its constitution, entrenched as supreme law and subject to judicial review.[149] The lack of similar protections in New Zealand, therefore, is not a function of the British legal system. Placing the Constitution, Bill of Rights, or Treaty of Waitangi beyond the ability of Parliament to tamper with them as ordinary Acts must go against the grain for the independent-thinking New Zealander. Even the progressive government of the 1980s stopped on the brink of this action.

A major reason that New Zealand has not codified Maori rights is the Treaty of Waitangi itself. Both the Constitution and Bill of Rights Acts proposed incorporating the text of the Treaty as the declaration of rights for the Maori. The possible difficulty of interpreting and enforcing the Treaty as a legal instrument became a persuasive argument for holding back.[150] Even if it is conceded, however, that the Treaty would be unwieldy as a piece of legislation, it does not follow that Maori rights under the Treaty cannot or should not be entrenched. Parliament can draft legislation to restore the rights and powers that the Maori intended to reserve under the Treaty, and to limit government interference in the future. Judge Durie's minimum justice factors[151] can offer guidance in drafting such legislation, as can the government principles, and the Treaty itself.

The problems outlined above have not been solved by the half-measures undertaken to date. It is difficult for the Maori to trust a government that seems so unsure of its own position. Parliament continues to draft the term "the principles of the Treaty of Waitangi" into legislation. The

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149 Johnson, *supra* note 21, at 682-83.

150 "The Treaty [quite apart from the fact that its Maori and English versions may not entirely coincide] is by its very nature vague and uncertain. Whether the Treaty is capable of legal application is open to grave doubt. That is not to depreciate its symbolic value or great importance in New Zealand history. The mistake is suddenly to accord it a legal status for which it was never intended and for which it is plainly unfitted." Guy Brougham Chapman, *A Bill of Wrongs: The Argument Against the Proposed Bill of Rights*, N.Z. L.J. 226, 230 (July 1985).

151 *See generally* Durie, *supra* note 81.

government statement of those principles, however, is a vague and uncertain place to hang the hat of Maori trust. The government's principles back away from the fulfillment of the original Treaty promises, and from the new hopes that arose from the hard won gains of the last decade.

To demonstrate its commitment toward fulfilling the Treaty to the greatest practical extent, Parliament must be willing to return to the Maori the rights and powers that the signing chiefs intended to reserve. Practicality can limit the initial rights and powers granted, to expand and evolve as conditions change. To meet the standards of minimum justice, however, there must be some areas of power controlled solely by the Maori. Perhaps such powers will eventually evolve from the Runanga Iwi Act, or as a function of the Waitangi Tribunal. If the government negotiates the form and limits of Maori rights and powers openly, all concerned parties can have sufficient influence to ensure a practical system. It does not make sense for a government to exert control over areas that concern only the indigenous populace unless its intent is to keep that populace subservient.

Without legislation, the government of New Zealand does not bind itself to its own promises, and mistrust results. The common law concepts discussed above are one means of redress available to the Maori until legislation is passed, but they are by no means certain. Time will also make the Maori voice stronger, if the prediction of growth in the Maori population is accurate. It may be optimistic, but there is evidence to suggest that the New Zealand government will not wait until it is forced to act.