

The Status and Rights of Indigenous Peoples in New Zealand

Markus Ehrmann*

I. Introduction

New Zealand offers a special approach to the status and rights of indigenous people. The European colonisation of the territory of New Zealand was based on a treaty between the British Crown and the Maori, the Treaty of Waitangi, signed in 1840. The practice of treaties between a European power and indigenous people is not unknown in the history of colonisation, at least in the Pacific area.¹ However, the Treaty of Waitangi, named after the place where it was signed, is unique in the history of colonisation.² The text of the Treaty comprises only three Articles and a Preamble and thus seems rather inconspicuous. Yet it aims at the cession of sovereignty over the territory of New Zealand from the indigenous Maori to the British Crown. In return the Crown confirms and guarantees the Maori lands, estates, forests, fisheries and other properties.³

The Treaty of Waitangi is a living document and on-going covenant which forms the basis of the relationship and partnership of New Zealanders of European and of Maori descent in the present day.⁴ The importance of the Treaty for the constitutional life of New Zealand cannot be overestimated, even if its legal status is still a matter of dispute.⁵ The Treaty has been seen as the “founding document of the nation of New Zealand”⁶, “simply the most important document in

* *Ref. jur.*, Berlin.

¹ Between 1826 and 1910 France, Germany, the United Kingdom and the USA concluded at least 65 treaties with island “States” in the Pacific area, see Keith, *The Treaty of Waitangi in the Courts*, *New Zealand Universities Law Review* 14 (1990), 37, 38.

² See e.g. Chief Justice Fenton 1870 in the decision *Kauwaeranga* (reprinted in *Victoria University of Wellington Law Review* 14 [1984], 227, 242): “There is probably no case of a colony founded in precisely the same manner as New Zealand, i.e. by contract with a race of savages, the Crown of England obtaining the sovereignty of high domain, and confirming and guaranteeing to the aborigines the useful domain, or the use and possession of all lands.” (See for a detailed discussion of this decision *infra* note 51 and accompanying text.)

³ See the full text of the Treaty in Annex, IX., in this issue.

⁴ Compare the President of Court of Appeal of New Zealand, Cooke, in the decision *Maori Council v. Attorney General*, *Court of Appeal, New Zealand Law Reports (NZLR)* 1, 1987, 641, 663, line 55: “The Treaty has to be seen as an embryo rather than a fully devolved and integrated set of ideas.” (See for a detailed discussion of this decision *infra* note 115 et seq. and accompanying text.)

⁵ Compare only the Introduction of the former President of the Court of Appeal, The Right Honourable Sir Robin Cooke, to the special issue of the *New Zealand Universities Law Review* on the occasion of the 150th anniversary of the Treaty of Waitangi, *New Zealand Universities Law Review* 14 (1990), 1–8.

⁶ New Zealand Government Online, *The Treaty of Waitangi*, http://www.govnz/nz_info/treaty.shtml.

New Zealand's history"⁷ or the "Maori Magna Charta".⁸ The Treaty has further been the topic of legal research⁹ and – above all – the focus of lively political debates.¹⁰

A treaty between a European crown and indigenous people concerning the ceding of sovereignty raises interesting questions of international law. However, regarding the indisputable sovereignty of the British Crown over the territory of New Zealand today and the *de facto* "integration" of the Maori in the society of modern New Zealand, it seems to be more interesting to review the Treaty of Waitangi as a legal instrument for the protection of the Maori as a minority group in New Zealand's society.¹¹ This paper will focus first on the development from 1840 to the present day of the land rights, fisheries rights and other rights of the Maori, as they are guaranteed in the Treaty of Waitangi, and second on the legal status of the Treaty.

II. Historical Background

For a better understanding of the contents of the Treaty, this part shall give its historical background. It will provide an overview of the situation, which led to the signing of the Treaty, the history of the proceedings of the signature itself and a description of the direct consequences of the Treaty.¹²

⁷ Cooke (note 5), 1.

⁸ See the title of the book by McHugh, *The Maori Magna Charta – New Zealand Law and the Treaty of Waitangi* (1991); Cooke (note 5), 8. This wording is taken from a series of reports of the Waitangi Tribunal. (See for a detailed discussion of this institution *infra* notes 58–63 et seq. and accompanying text.)

⁹ The Treaty of Waitangi has been the subject of a number of special issues of New Zealand's leading law reviews: see e.g. *New Zealand Universities Law Review* 14 (1990), 1–96 and *Victoria University of Wellington Law Review* 25 (1995), 91–248.

¹⁰ See the speeches at the 1995 Symposium of the Victoria University of Wellington of Peters (then chair of the "New Zealand First" Party), *A Time for Leadership*, *Victoria University of Wellington Law Review* 25 (1995), 118–128; Graham, *Address by the Minister in Charge of Treaty of Waitangi Negotiations*, *ibid.*, 231–237; Caygill, *A Labour Party View*, *ibid.*, 238–240; Palmer, *Where to From Here*, *ibid.*, 241–244. Compare for a comprehensive overview of the sociological and philosophical debate of Maori matters Sharp, *Justice and the Maori* (1990).

¹¹ 16% of the population in New Zealand are Maori. In the census 1996 579.714 persons from a total number of 3.618.303 said that they have Maori ancestors (see the homepage of the Government of New Zealand at <http://www.stats.govt.nz/>).

¹² Compare for an overview: Airey, *New Zealand in Evolution*, in: Belshaw (Ed.), *New Zealand* (1947), 73, 79–80; Sutherland, *Maori and Pakeha*, in: *ibid.*, 49, 56–58; McLintock, *Crown Colony Government in New Zealand* (1958), 54–71; *id.*, *Treaty of Waitangi*, in: *Encyclopaedia of New Zealand* 3 (1966), 525–539; Wright, *New Zealand, 1769–1840 – Early Years of Western Contact* (1959), 187–201; Oliver, *The Story of New Zealand* (1960), 48–62; Cooke (Ed.), *Portrait of a Profession* (1969), 17–22; McIntyre, *Colonies into Commonwealth* (1966), 59–63; Sinclair, *A History of New Zealand* (1980), 70–73; Rice, *The Oxford History of New Zealand* (1992), 28–53.

1. The British Colonialisation of New Zealand

The Maori are not the original inhabitants of New Zealand. Starting from the eighth century, they came from the Polynesian area to the territory which they called "Aotearoa". It can be demonstrated that they settled there at least from the tenth century onwards. The first known white man to see "Aotearoa" was the Dutch sailor Abel Janszon Tasman, after whom the island Tasmania south of Australia is called. He saw parts of the islands of "Aotearoa" on 13 December 1642, but did not take possession of them. However, this incident was decisive for the name of the new territory: in the following years, it became known as "New Zealand", called after the Dutch province Zeeland. At the end of 1769 Captain James Cook took "possession" of the land in the name of King George III. It was Cook who explored the North Island and the South Island, which form the main parts of the territory of New Zealand. The British settlement then began at the end of the 18th century. It was a rather slow development: in 1838 only 2000 British subjects lived in New Zealand. The number of settlers began to grow only in the 1830s. At that time, the British Government still considered New Zealand as an independent state.¹³

Some 70 years passed after the exploration until the British Crown took over sovereignty in New Zealand. This might be surprising, considering the British colonial expansion in other parts of the world. However, it can be explained by the lack of natural resources in New Zealand. Additionally, no trade was possible with the Maori, who were fishermen and warriors. Finally, considering the geographical position of New Zealand, no strategic reasons urged the British Crown to take over sovereignty.

However, there had been a number of developments in the years before 1840, which led the British Crown to conclude the Treaty of Waitangi.

First, there were problems to ensure the public order among the British settlers. It is said that a good number of persons living at that time in New Zealand were fugitive prisoners from camps in Australia and mutineers from British ships. They lived there without any form of public order and in a state of lawlessness. The initial reaction of the British Crown was the dispatch of Sir James Busby as Permanent British Resident on 14 June 1832. However, without any authorities and military support, he was unable to restore public order.

On 28 October 1835, 35 Maori Chiefs of the North Island signed a "Declaration of Independence of New Zealand".¹⁴ They proclaimed themselves as the "United Tribes of New Zealand" and declared that they alone would have all rights and powers of sovereignty in this territory. At the same time they entreated

¹³ See the comments of King George IV, as they are quoted in the 1870 *Kauwaeranga* Decision of the Native Land Court, reprinted in Victoria University of Wellington Law Review 14 (1984), 227, 232.

¹⁴ "Declaration of Independence of New Zealand", reprinted in the *Kauwaeranga* Decision of the Native Land Court of 1870 (note 13), 227, 233. The Declaration can also be found on the homepage of the Government of New Zealand at <http://www.wcc.govt.nz/ponke/independ.txt>.

“that [His Majesty the King of England] will continue to be the parent of their infant State, and that he will become its Protector from all attempts upon its independence.”¹⁵ This proclamation was intended to ensure protection from European settlers, but also from hostile Maori tribes. The Declaration was officially handed over to Busby, who sent it to London on 2 November 1835. It was Busby himself who encouraged the Maori to this Declaration in order to forestall a French colonisation. He hoped to form a kind of Maori statehood, so that the British Crown was given the possibility to enter into negotiations with it in order to conclude a Treaty.

Second, it was foreseeable at that time that the number of settlers would massively increase. In 1838 the “New Zealand Company” was founded in England, which planned a systematic settlement policy in New Zealand. The British Government thus had concerns that – regarding the vast number of settlers – the settlement would develop in complete disorder. In addition the “New Zealand Company” aimed at a form of “self-government” for their settlements without any recognition of the British Crown. Moreover “land-sharers” from Sydney had bought vast areas of land at ridiculous prices. Disputes over land between Maori and settlers seemed to be inevitable. Finally, English missionaries urged the Crown to protect the Maori.

2. The signature of the Treaty

Given that situation, the British Government decided to act in 1838. It considered the “United Tribes of New Zealand” as an equal partner for negotiations. An official representative was to be dispatched to New Zealand for negotiations with the Maori about the ceding of the sovereignty and their protection.

William Hobson, Captain of the Royal Navy, was chosen for that mission, since he had previously visited New Zealand in 1837. He was appointed “Consul” and “Lieutenant Governor” at the same time: as “Consul”, he was to enter into negotiations with the Maori, as “Lieutenant Governor” he should exercise power in the newly acquired territories. The detailed instructions¹⁶ from the British Government for Hobson give information about the motives of the Crown for the negotiations. He should negotiate with the Tribal Chiefs as they would represent an independent government. The Crown would refrain from any kind of acquisition of New Zealand by exploration, occupation or conquest. Sovereignty should only be based on cessation, which the indigenous people have consented in free and informed consent following to their customs. Land should only be ceded to the Crown, not to its subjects. Nobody should hold any title to land than the Crown itself.

¹⁵ Ibid., para. 4.

¹⁶ “Instructions from the Secretary of State for War and Colonies, Lord Normanby, to Captain Hobson, recently appointed H.M. Consul at New Zealand, concerning his duty as Lieutenant Governor of New Zealand as a part of the colony of New South Wales, dated 14 August 1839”, partly reprinted in the *Kauwaeranga* Decision of the Native Land Court of 1870 (note 13), 227, 236–238.

Captain Hobson reached New Zealand on 29 January 1840 at the Bay of Islands. Following his instructions he proclaimed any title to land other than that of the Crown as void. Then he convened the Chiefs of the Northern Tribes to Waitangi.¹⁷ The Treaty had been drafted by Busby and translated by Reverend Henry Williams in the Maori language at 4 February 1840. The deliberations between the Maori Chiefs and Hobson, who was supported by Busby, Williams and other missionaries began on 5 February 1840. At the outset, Hobson and Busby explained the Treaty and its necessity. Both stressed that no land should be taken away from the Maori, rather the Treaty should ensure their protection. The majority of the Chiefs initially spoke against the Treaty. They had seen the occupation of New South Wales and Tasmania and the fate of the Aborigines there. It was only the speech of the influential Chief Tamati Whaka Nene that turned the debate in favour of the Treaty. He urged Hobson to protect the land and the customs of the Maori and to “remain for us a father, a judge, a peacemaker.”¹⁸ On the following day, 6 February 1840, the Treaty was signed by 45 Chiefs and by Hobson. Hobson is said to have ended the ceremony with the words “We are now one people”.

At that time, only Chiefs from parts of the North Island, where most of the Maori settled, had signed the Treaty. To extend the Crown’s authority Hobson and the missionaries travelled through the country to obtain further signatures for the Treaty. At the end of the day, about 500 Chiefs had signed the Treaty. However, not all Maori Chiefs signed the document, some could not be reached, some were against it.

Before all signatures could be collected, Hobson proclaimed the sovereignty of the British Crown over the whole territory of New Zealand on 21 May 1840. He felt urged to that step by the news of the arrival of settlers of the “New Zealand Company”. To justify the sovereignty of the Crown, Hobson referred to the cessation of sovereignty in the Treaty of Waitangi regarding the Northern Island and to exploration and occupation concerning the Southern Island. The British Government approved the measures taken by Hobson in a Declaration dated 17 July 1840. The text of the Treaty of Waitangi and the declarations by Hobson of 21 May 1840 were published in the Official Bulletin in London on 2 October 1840. At this time at the latest, the sovereignty of the British Crown can be regarded as firmly founded. Thus the Treaty is only one of several steps taken to gain sovereignty over the territory of New Zealand.

In the history of the signature of the Treaty, the short time of its drafting and of the deliberations is remarkable. However, as a learned source later put it, “the Treaty was drawn up by amateurs on the one side and signed by those on the other side who understood little of its implications”.¹⁹

¹⁷ See for the history of the signature of the treaty: Miller, *New Zealand* (1950), 19–27; Reed, *The Story of New Zealand* (1955), 119–125.

¹⁸ The wording of the speech is reprinted in the Decision *Maori Council v. Attorney General* (note 4), 641, 714, line 22–40.

¹⁹ See the study “Kaupapa – Te Wahanga Tuatahi” of the New Zealand Maori Council as quoted in the Decision *Maori Council v. Attorney General* (note 4), 641, 672.

3. The direct consequences of the Treaty

The hope of the British Government, that the Treaty could serve as an instrument of peace and reconciliation between the settlers and the Maori, was not fulfilled in the follow-up. The “New Zealand Company” regarded the Treaty as “a praiseworthy device for amusing and pacifying savages for the moment”²⁰ and went on with the settlement without paying any respect to the concerns of the Maori. However, the British Government felt itself to be bound to its treaty obligations.

The signature of the Treaty was very timely. In the years after 1840, an explosive increase in the number of settlers was recorded. In the same time, the Maori lost more and more of their own customs and aligned to the European lifestyle. However, the model of the fathers of the Treaty of Waitangi of a bi-cultural nation was not achieved.

Nevertheless, the Treaty served as the starting point for colonial administration of the territory of New Zealand. It was originally administered by the Governor of New South Wales in Sydney. Only on 3 May 1841, New Zealand gained its own status as a Crown Colony, and Captain Hobson was appointed the first General Governor of New Zealand. In 1852 the “New Zealand Constitution Act”²¹ was adopted. Up to that time, all the legislative and executive power was in the hands of the General Governor. Following demands by the settlers for representation, a “General Assembly”, consisting of the General Governor, a “Legislative Council” and a “House of Representatives”²² was established by the Act. However, the authority concerning indigenous people remained solely in the hands of the General Governor.

III. The Contents of the Treaty and their Interpretation

For the interpretation of the text, it is important to note that there exists an English version as signed and a Maori version as signed. The contents of these two versions differ partly substantially, as has been recognised in various Acts²³ and judicial decisions²⁴ of the recent years. The reason for these differences can be

²⁰ See the quote in McLintock (note 12), 68.

²¹ 1852 “Constitution Act”, reprinted in: *The Public Acts of New Zealand (Reprint)*, Vol.1, 1908–1931, 997–1002.

²² Following the 1867 “Maori Representation Act”, four of the 70 seats in total in the General Assembly were held by Maori. Currently, the 120 seats in Parliament are made up of 60 from General electorates, 5 from Maori electorates and 55 MPs from party lists. In 1993, New Zealand changed its electoral system from a “First Past the Post”-model (FPP) to a “Mixed Member Proportional” (MMP) system. Therefore, the New Zealand Parliament consists of general and Maori electorates. Qualified electors who are New Zealand Maori or descendants of a New Zealand Maori can choose whether they want to vote for a General electorate or a Maori electorate.

²³ Compare the Preamble, Paragraph 2 and Paragraph 5 (2) of the 1975 Treaty of Waitangi Act (New Zealand Statutes 1975, Vol. 2, No. 114, 825, 827) and Art. 4 (3) of the Draft New Zealand Bill of Rights (reprinted in: Palmer/Chen, *Public Law in New Zealand* [1993], 450).

²⁴ See *Maori Council v. Attorney General* (note 4), 641, 662, line 28–31; 663, line 28–44; 671, line 41–43; 672, line 5–39; 690–691, *passim*; 712, line 47–55; *New Zealand Maori Council v. Attorney General*, Privy Council, 1994, Vol. 1, NZLR 1994, 513, 514, line 7.

seen in the fact that the Treaty was first drafted in English by representatives of the British Crown and only subsequently was translated into Maori. The translators faced the problem that some English terms could not be translated into Maori, since the concepts behind the terms were unknown in Maori language and there was no possibility for any understanding of Maori signatories of certain terms on the basis of experience or cultural precedent. Yet the same is true *vice versa*. Furthermore, the contents of some Maori terms cannot be precisely defined, since they represent rather descriptions of a certain state of affairs than a defined concept.²⁵ This problem of the interpretation of a treaty which has been authenticated in two or more languages is well known in international law.²⁶ But the different cultural background of its parties represents yet another problem for the interpretation of the Treaty. Thus, even for the same wording two different interpretations can be given.²⁷ These remarks should serve to set the ground for the following detailed presentation and interpretation of the Treaty.

According to the English version of the first Article, the Maori Chiefs cede all the rights and powers of "sovereignty" over their respective territories to the British Crown. The concept of "sovereignty" was completely unknown to the Maori signatories, consequently there had been no equivalent term in Maori language. It was only Reverend Williams during his translation work of the English text who coined the Maori term "kawanatanga". In modern English, this term has rather the meaning of "government" than of sovereignty.²⁸ It means the power as exercised by a British Governor over the land. It is without prejudice to the chieftainship, the traditional power of Maori Chiefs over their people. This would remain to the Maori. Thus, the two versions differ insofar as according to the Maori version, not the full sovereignty would be ceded to the British, but only part of it.²⁹ The Maori understanding of this ceding of power comes close to a "trusteeship" concerning the land, which the British will protect.

²⁵ This is the result of an expert meeting, which was quoted before Court in the Decision *Maori Council v. Attorney General* (note 4), 641, 672, line 5–22.

²⁶ Following Art. 33 of the 1969 Vienna Convention on the Law of Treaties the meaning which best reconciles the texts, having regard to the objects and purpose of the treaty shall be adopted, see Bernhardt, *Interpretation in International Law*, in: id. (Ed.), *Encyclopaedia of Public International Law* 7 (1984), 318, 324.

²⁷ See Brookfield, *Sovereignty: The Treaty, the Courts and the Tribunal*, *New Zealand Recent Law Review* 1989, 292–298.

²⁸ This and the following translations are taken from a translation of the original Maori text of the Treaty by Professor Sir Hugh Kawharu, see Kawharu (Ed.), *Waitangi – Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989), 313–315 and 319–321. Another explanation of the Maori view of the Treaty can be found at Wharepouri, *The Phenomenon of Agreement: A Maori View*, *Auckland University Law Review* 7 (1994), 603–617.

²⁹ This becomes clear in the famous quote of a Maori Chief during the ceremony of signatures: "The shadow of the land goes to the Queen, but the substance remains with us", cited in Miller (note 17), 122; Sinclair (note 12), 71; Sutherland (note 12), 49, 57; "Study on treaties, agreements and other constructive arrangements between States and indigenous populations", *First Progress Report of 25.08.1992*, in: E/CN.4/Sb.2/1992/32, para. 278.

The English version of the second Article speaks of an exclusive “Right of pre-emption” over the land, which the Chiefs will yield to the Crown. The use of this term lets one think that settlers may enter directly in negotiations with Maori in order to buy land and that the Crown may pre-empt in those contracts. But it rather intends that land will exclusively be sold to the Crown, so that any private title to land is void until it is derived from the Crown. The term “pre-emption” in this context is thus somewhat inappropriate.³⁰ Accordingly, the Maori text simply speaks of selling the land to the Queen.

However, the essence of the second Article is that – according to the English version – the Queen confirms and guarantees to the Maori the full and undisturbed possession of their lands and estates, forests, fisheries and other properties which they possess collectively or individually so long as they wish.

However, the idea of “possession” of land in the sense of holding a title to it is unknown to Maori. Any “relationship” to land is held collectively and not individually. The Maori version thus speaks in this context of “rangatiratanga”, which can be translated as “unqualified exercise of chieftainship”, meaning that the Maori would be given the complete control according to their customs over the above-mentioned goods. According to the Maori version, these goods are not only their land and villages, but also their “taonga”. This term might be translated as “treasures” or “all things valuable to Maori people”. It refers e.g. to a tribal group’s estate, material and non-material, heirlooms and sacred places.

Consequently, the interpretation of the first and second Article from the Maori view leads to the assertion that not all the power was ceded to the Crown, but that some form of self-government stays with the Maori.³¹

The essence of the Treaty is, however, that no land shall be taken away from the Maori, but certain rights of them should be protected. In return, they cede sovereignty to the Crown – at least according to the English version. This “quid pro quo” is the heart of the Treaty, but at the same time its difficulty.

The third Article is usually not as intensively discussed as the other Articles. It stipulates that Maori will become British subjects and that they will enjoy all the rights and privileges of that status. Since Maori could not have any understanding of the status of a British subject, the Maori version provides that the Queen will protect all the ordinary peoples of New Zealand and will give them the same rights and duties of citizenship as the people of England.

The extension of British citizenship to Maori may be considered as a logical consequence of the ceding of sovereignty to the Crown. However, the Maori

³⁰ This is held by the Privy Council in 1847 in its Decision *R. v. Symonds*, New Zealand Privy Council Cases (1840–1931), 387–398 (see for a detailed discussion of this decision *infra* note 35 and accompanying text).

³¹ This understanding can be seen in a speech by Henry Sewell, the first Prime Minister of New Zealand: “... it is true, that [the Maori] surrendered to the Queen the ‘Kawanatanga’ – the governorship – or sovereignty; but they did not understand that they thereby surrendered the right to self-government over their internal affairs, a right which we never claimed or exercised, and could in fact not exercise”, cited by McLintock (note 12), 70.

translation emphasizes the aspect of the protection of Maori. This runs parallel with the original plan of the Colonial Government, that Maori should not have the same rights and duties as British settlers but they should be given the opportunity to live according to their own customs in certain districts where they form the majority of the population.³² However, this plan was never realised.

IV. The Development of the Interpretation of Maori Land Rights, Fisheries and other Rights

In the history of New Zealand from 1840 until today the Treaty of Waitangi and the Maori rights experienced a diverse history. Over time the legal status of the Treaty was considered differently and the changing political attitude towards the rights of indigenous people had its influence on the fate of Maori in New Zealand.

One might distinguish two phases: Originally the Treaty was disregarded for more than 100 years. This position – which might be labelled as the “traditional approach” – was founded in a number of important judicial decisions and found its way into some Acts. The attitude towards the Treaty changed only recently in the middle of the 1980s. The Treaty played a decisive role in major judgements and Acts; this development will be presented as the “modern approach”.

1. Traditional approach

Judgements and Acts in the early phase mainly dealt with Maori land rights; there is only one concerning fisheries and none concerning other rights.

a. Land Rights

The starting point for a discussion of Maori land rights is not the Treaty itself, but the “aboriginal title” of the Common law. This legal concept stipulates that indigenous people hold a title to use their land and fisheries after a Colonial power has gained sovereignty over the respective territory by exploration, conquest or cession. However the sovereignty and the property belongs to the Crown, although the Crown only acts as a trustee. This corresponds to the colonial idea that the land is of no use to the indigenous people.³³ Thus the property of and the right to use the land belong to different persons. The native right to use the land expires

³² See Art. 71 of the 1852 “New Zealand Constitution Act” (note 21): “And whereas it may be expedient that the laws, customs and usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within such laws, customs, or usages should be so observed.”

³³ See e.g. the instructions to Captain Hobson (note 16): “To the Natives and their Chiefs much of the Land of the Country is of no actual use, and, in their hands, it possesses scarcely any exchangeable value. ... its value ... will be created, and then progressively increased, by the introduction of Capital and of Settlers from this Country.”

if the Crown sells the land to settlers or if Parliament declares the native title expired.³⁴

The background of this concept of a “native title” is – independently from the colonial situation – the Common law principle that any title to land must be derived from the Crown. This idea is based on the historical notion that all land belongs to the King and that it was he who gave titles to land during feudalism.

The first judgement to deal with the Treaty of Waitangi was the 1847 decision of the Supreme Court in the matter *The Queen v Symonds*.³⁵ The Court held that after the colonisation of New Zealand the body of British Common law is also applicable in this territory, including the concept of “aboriginal title”. It further held that “... it cannot too solemnly be asserted that the [aboriginal title of the Maori] is entitled to be respected ...”. At the same time “... in solemnly guaranteeing the native title ... the Treaty of Waitangi ... does not assert either in doctrine or in practice any thing new and unsettled.” Thus the Treaty of Waitangi is considered as only of declamatory nature.³⁶ Finally the Court held that the native title has to be consistent with the customs of the Maori.³⁷

This attitude, which confirms the land rights of the Maori as they are based on “aboriginal title” and the Treaty of Waitangi, would change substantially 30 years later. The reasons for this shift have to be found in the following events of New Zealand’s history in the middle of the 19th century.

Because of a growing number of settlers, the demand for land increased. This led to clashes between white settlers and Maori and finally to the so-called “Maori Wars” between 1862 and 1865.³⁸ These wars marked the turning point for Maori land rights. As a result of their defeat the Maori lost vast areas of their tribal land. In the same time the number of Maori population decreased.

³⁴ Compare for this concept: Joseph, *Constitutional and Administrative Law in New Zealand* (1993), 72–78; Boast, *Treaty Rights or Aboriginal Rights*, *New Zealand Law Journal* 1990, 32–36; McHugh, *The Constitutional and Legal Position of Maori Customary Land from 1840 to 1865*, in: id., *Maori Land Laws of New Zealand* (1983), 1–36; comprehensive: McHugh (note 8), 67–143.

³⁵ *R. v. Symonds* 1847 (note 30), 387–398; compare for a discussion of that decision: Williams, *The Queen v Symonds reconsidered*, *Victoria University of Wellington Law Review* 19 (1989), 385–402.

³⁶ The same was held in *Re Landon and Whitacker Claims*, *New Zealand Court of Appeals Report* 2 (1872), 41–59.

³⁷ See *supra* note 35, *R. v. Symonds*, 49: “The Crown is bound, both by the Common law of England and by its own solemn engagements, to a full recognition of Native proprietary rights. Whatever the extent of that right by established native customs appears to be, the Crown is bound to respect it. But the fullest measures to respect are consistent with the assertion of the technical doctrine, that all title to land by English tenure must be derived from the Crown, this is necessity importing that the fee-simple of the whole territory of New Zealand is vested and resides in the Crown, until it be parted with by grant from the Crown. In this large sense, all lands over which the Native title has not been extinguished are Crown lands.”

³⁸ See Litchfield, *Confiscation of Maori Land*, *Victoria University of Wellington Law Review* 1 (1985), 335–360. See for the details of military history: Belich, *The Victorian Interpretation of Racial Conflict* (1989).

As a consequence of the wars the 1862 “New Zealand Settlement Act”³⁹ and the 1865 “Native Land Act”⁴⁰ were adopted, that changed Maori land rights substantially. They authorised the General Governor to confiscate Maori land for British settlers as a means of retaliation for the rebellion of Maori against the Crown during the war. Furthermore, the right of pre-emption of the Crown was expired by the Acts, so that settlers could buy land directly from Maori. This led to an explosion in the number of private land sales. Finally, there was confiscation without any legal basis.

The main judgement in the following time was the *Wi Parata v The Bishop of Wellington* Case of the Supreme Court in 1877.⁴¹ The judgement became famous for the assumption of Chief Justice Sir James Prendergast that “so far as [the Treaty of Waitangi] purported to cede the sovereignty ... it must be regarded a simple nullity”. In the context of Maori land rights, he held that “the so-called Treaty merely affirms the rights and obligations which, *iure gentium*, vested in and developed upon the Crown under the circumstances of the case ...”. This obligation which is “not to be regarded as properly a treaty obligation, is yet in the nature of a treaty obligation”.⁴² The decision recognises the “aboriginal title”, but it denies the possibility of its legal enforcement. The Crown alone shall be authorised to decide about the expiration of this title.⁴³ This decision, as the relationship between the Crown and the Maori in general, can not be brought before court, since they represent an “act of state”.

Although this decision has been intensively criticised in recent time,⁴⁴ it laid the ground for the traditional approach towards Maori land rights: the “aboriginal title” has been recognised formally, but it was not enforceable before Court.

³⁹ The parts of interest in this context are reprinted in Palmer/Chen (note 23), 306–308.

⁴⁰ The parts of interest in this context are reprinted *ibid.*, 308.

⁴¹ *Wi Parata v. The Bishop of Wellington*, 1877, New Zealand Jurist New Series 3 (1877), 72.

⁴² This position was confirmed by the Decision in *Re the Bed of the Wanganui River* of 1962, NZLR 1962, 600, 623: “This obligation was akin to a treaty obligation ...”; and *Re the Ninety Mile Beach* of 1963, NZLR 1963, 461, 477: “This obligation was akin to a treaty obligation ...”.

⁴³ *Wi Parata* (note 41): “In the case of primitive barbarians, the supreme executive Government must acquit itself, as bet it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice”; see also *Re the Bed of the Wanganui River* (note 42), 623: “This obligation was akin to a treaty obligation, and was not right enforceable at the suit of any private persons as a matter of municipal law by virtue of the Treaty of Waitangi itself ...”; *Re the Ninety Mile Beach* (note 42), 477: “This obligation was akin to a treaty obligation and was not right enforceable at the suit of any private persons until carried into municipal law”. Compare for a discussion of this assumption: Boast, “In *Re Ninety Mile Beach*” Revisited: The Native Land Court and the Foreshore in New Zealand Legal History, Victoria University of Wellington Law Review 23 (1993), 145–170 and Haughey, Maori Claims to Lakes, River Beds and the Foreshore, New Zealand Universities Law Review 2 (1966), 29, 39–42.

⁴⁴ For example it can be contended that the relationship between Maori and the Crown could be an “act of state”, since Maori are British subjects according to Article three of the Treaty of Waitangi and the relationship between the Crown and its subjects can not be an “act of state”.

This line of arguments was clearly rejected by the Privy Council in the 1901 *Nireaha Tamaki v Baker* Case.⁴⁵ The Privy Council held that: "... it was said in the case of *Wi Parata v Bishop of Wellington* ... that there is no customary land of the Maori of which the Court can take cognisance. Their lordships think that its argument goes too far and that is rather late in the day for such an argument to be addressed of a New Zealand Court." In the opinion of the Privy Council "it is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by evidence". Later the Privy Council went one step further in the *Wallis v Solicitor General* Case of 1903⁴⁶ by stating: "As the law then stood under the treaty of Waitangi, the chiefs and tribes of New Zealand, and the respective families and individuals thereof, were guaranteed in the exclusive and undisturbed possession of their lands so long as they desired to possess them ...".⁴⁷

However, the Bench and the Bar of New Zealand protested sharply against this decision in an unprecedented move.⁴⁸ New Zealand's judges did expressly not follow the Privy Council in this question. Quite the reverse, the line of the *Wi Parata* Decision was codified. Paragraph 84 of the 1909 "Native Land Act"⁴⁹ and others⁵⁰ stipulate that the Native title is not enforceable before court.

Thus the Maori land rights, which can be based on "aboriginal title" and Article Two of the Treaty of Waitangi, represent only political and moral obligations for the Crown, which are not legally enforceable. In contradiction to the wording of the Treaty of Waitangi, Maori rights were hence not actually protected.

b. Fisheries rights

There is only one judgement in the early history of New Zealand dealing with native fishing rights, the *Kauwaeranga* Decision⁵¹ of the Native Land Court⁵² from 1870. It is the only decision of that time which stands in contradiction to the

⁴⁵ *Nireaha Tamaki v. Baker*, Privy Council, 1901, New Zealand Privy Council Cases (1840–1931), 371–386.

⁴⁶ *Wallis v. Solicitor General* of 1903, Privy Council, The Law Report Appeal Cases (1903), 173–189 (reprinted in: New Zealand Privy Council Cases [note 45], 23–36).

⁴⁷ *Ibid.*, 179.

⁴⁸ *Protest of Bench and Bar*, reprinted in: New Zealand Privy Council Cases (note 45), 730–760.

⁴⁹ Reprinted in: Palmer/Chen (note 23), 317 et seq.

⁵⁰ Paragraph 112 of the 1931 "Native Land Act" (reprinted in: The Public Acts of New Zealand [note 21], 103–354); Paragraph 155 and Paragraph 157 (1) of the 1953 "Maori Affairs Act", New Zealand Statutes 1953, Vol. 2, No. 94, 1067–1307.

⁵¹ *Kauwaeranga* (note 13), 229–245.

⁵² The "Native Land Court" was established by Art. V and VI of the 1865 "Native Land Act" (note 40). Later it was renamed "Maori Land Court" by the 1953 "Maori Affairs Act" (New Zealand Statutes 1953, Vol. 2, No. 94, 1067–1307; Part V, Para. 15 [1]). It shall decide about contentious land titles between Maori based on equity.

See for the historic role of that institution: Gilding, Engine of Destruction? An Introduction to the History of the Maori Land Court, Victoria University of Wellington Law Review 24 (1994), 115–139; Gilding, By whose Custom? The Operation of the Native Land Court in the Chatham Islands, Victoria University of Wellington Law Review 23 (1993), 45–58.

line of thinking as shown above. Remarkably enough, the original document was lost from sight for about a century and it was rediscovered only recently.⁵³

This decision is contrary to the prevailing attitude, both as far as the cession of sovereignty is concerned and as the Maori rights are concerned. Judge Fendon emphasised in his preliminary remarks the role of fishing in the life of Maori.⁵⁴ For a people of sailors, fish were the main food, thus fishing rights have a more prominent role than land rights. In regard to the Maori rights, the Court held that “especially remembering the very clear and almost stringent nature of the instructions given to Captain Hobson, that it was the intention of both parties to the compact to guarantee to the aborigines the continued exercise of whatever territorial rights they then exercised in a full and perfect manner, until they thought fit to dispose of them to the Crown.”

However, the *Kauwaeranga* Decision remained the only Judgement that has recognised the protection of Maori rights based on the Treaty of Waitangi. The basis for the official position concerning Maori rights was founded in the *Wi Parata* Decision and remained unchanged for almost a century.

2. Modern approach

It was only in the last quarter of this century, that the Treaty regained some importance. This could first be seen in the fact that February 6th, the day of the signature of the Treaty of Waitangi, was made an official national holiday by the 1960 “Waitangi Day Act”.⁵⁵ Yet the landmark was the adoption of the “Treaty of Waitangi Act” in 1975.⁵⁶

The core of this Act was the establishment of the “Waitangi Tribunal” to promote and confirm the principles of the Treaty of Waitangi.⁵⁷ According to the Act as amended⁵⁸ the Tribunal has mainly two functions. On the one hand, it shall

⁵³ The Decision was not reprinted in the official New Zealand Law Reports. Only recently, in 1984 it was reprinted in the Victoria University of Wellington Law Review, see the preliminary remarks by Frame with regard to the *Kauwaeranga* Decision (note 13), 227 et seq.

⁵⁴ *Ibid.*, 240: “It is very apparent that a place which afforded at all times, and with little labour and preparation, large and constant supply of almost the only animal food which they could obtain, was of the greatest possible value to them; indeed a very much greater value and importance to their existence than any equal portion of land on terra firma.”

⁵⁵ 1960 “Waitangi Day Act” (New Zealand Statutes 1960, Vol. 1, No. 46, 343–344), abolished by the 1973 “New Zealand Day Act” (New Zealand Statutes 1973, Vol. 1, No. 27, 383–387), abolished by the 1976 “Waitangi Day Act” (New Zealand Statutes 1976, Vol. 1, No. 33, 85–390).

⁵⁶ 1975 “Treaty of Waitangi Act”, New Zealand Statutes 1975, Vol. 2, No. 114, 825–833.

⁵⁷ See the official long title of the 1975 “Treaty of Waitangi Act” (note 56): “An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.”

⁵⁸ The sections concerning the Tribunal were amended by the 1985 “Treaty of Waitangi Amendment Act” (New Zealand Statutes 1985, Vol. 2, No. 148, 1335–1339), the 1988 “Treaty of Waitangi Amendment Act” (New Zealand Statutes 1988, Vol. 4, No. 233, 2989–2996) and the 1988 “Treaty of Waitangi (State Enterprises) Act” (New Zealand Statutes 1988, Vol. 2, No. 105, 881–902).

deal with Maori claims⁵⁹ if they feel that the government has acted against the promises of the Treaty since 1840.⁶⁰ After hearing a claim, the Tribunal may give recommendations how to settle the claim or to compensate for any breach of the Treaty.⁶¹ These recommendations are not legally binding for the Government, the Tribunal thus only has a fact-finding and consultative function in this regard. On the other hand, the Tribunal shall review the compliance with the Treaty of Waitangi of every Act submitted to it by Parliament.

Thus the Tribunal does not act as a Court.⁶² It does not consider whether any Act of government constitutes a breach of the wording of the Treaty of Waitangi as a binding legal obligation, it can only consider whether it is inconsistent with the “principles” of the Treaty. Nor is it authorised to take any binding decision.

However, the influence of the work of the Waitangi Tribunal on Government policy in Maori affairs and on the jurisprudence of courts is of high importance.⁶³ A good number of Tribunal reports have led to the drafting of new Acts for the amelioration of the legal position of Maori. As the Court of Appeal held in a 1991

⁵⁹ The number of claims has increased drastically: In 1989 there were 102 claims pending (see Joseph [note 34], 64), in January 1995 451 (see Durie, Background Paper, Victoria University of Wellington Law Review 25 [1995], 97, 101) and in 1997 it were 676 claims (see the Journal of the Waitangi Tribunal “Te Manutukutuhu” No. 41, July 1997, that can be downloaded from <http://www.knowledge-basket.co.nz/waitangi/manu>).

⁶⁰ Paragraph 6 (1): “Where any Maori claims that he or any Group of Maoris of which he is a member is or is likely to be prejudicially affected –

(a) By any Act, regulations, or Order in Council, for the time being in force; or

(b) By any policy or practice adopted by or on behalf of the Crown and for the time being in force or by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(c) By any act which, after the commencement of this Act is done, omitted, or proposed to be done or omitted, by or on behalf of the Crown, – and that Act, regulations, or Order in Council, or the policy, practice, or act is inconsistent with the principles of the Treaty, he may submit that claim to the Tribunal under this section.”

⁶¹ The reports of the Tribunal can be downloaded from <http://www.knowledge-basket.co.nz/waitangi/>.

⁶² Considering the question, whether a report of the Tribunal constitutes *res judicata*, the Court of Appeal has pointed out in its 1990 decision in the matter *Te Runanga o Muriwhenua Inc v. Attorney-General* (NZLR 1990, Vol. 2, 641–657, 651, line 46 – 652, line 3): “The crucial point is that the Waitangi Tribunal is not a Court and has no jurisdiction to determine issues of law and fact conclusively. Under section 6 of the 1975 Act it may make findings and recommendations on claims, but these findings and recommendations are not binding on the Crown of their force. They may have the effect of contributing to the working out of the content of customary and Treaty rights; but if and when such rights are recognised by the law it is not because of the principle relating to the finality of litigation. Thus a Waitangi Tribunal finding might well be accepted by a Court as strong evidence of the extent of customary title; but unless accepted and acted on by a Court it has no effect in law. If accepted and acted on by the Court, it takes effect because the Court is determining the extent of legal rights in applying, for instance, the legal doctrine of customary title. The Court’s decision will operate as *res judicata*, but not the finding of the Tribunal.”

⁶³ See for the role of the Tribunal the comments of its Chief Judge Taihaurie Durie, in: *The Waitangi Tribunal – Its Relationship with the Judicial System*, New Zealand Law Journal 1986, 235–238; Durie/Orr, *The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence*, New Zealand Universities Law Review 14 (1990), 62–81; Background Paper, Victoria University of Wellington Law Review 25 (1995), 97–108; O’Keefe, *Waitangi Tribunal “Decision”*, New Zealand Law Journal 1983, 136.

decision, "... at the present day the Crown as a treaty partner, could not act in conformity with the Treaty or its principles without taking into account any relevant recommendations by the Waitangi Tribunal."⁶⁴ Thus the Waitangi Tribunal plays the central role in interpreting the Treaty and promoting its principles.

Starting from the middle of the 1980s, one can find a number of initiatives to promote the Maori rights and the principles of the Treaty of Waitangi by political programs,⁶⁵ judicial decisions, Acts and Bills and recently through direct negotiations and settlements between Maori Tribes and the Government.⁶⁶ This development runs parallel to the rethinking of the rights of indigenous people world-wide. Whereas at the international level there have been calls for a legal instrument to protect the rights of indigenous people,⁶⁷ in New Zealand Maori as well as "Pakeha", i.e. New Zealanders with European ancestors, recollected the Treaty of Waitangi. The Treaty was considered as a legal instrument for the protection of the Maori rights with mutual obligations between the Crown and the Maori as equal partners. This swing of opinion can e.g. be seen in the fact that Maori terms, especially those of the text of the Treaty itself, were used in judicial decisions and in Acts.⁶⁸

This modern approach deals less with land rights than the traditional approach did. It focuses more on fisheries and other rights, especially cultural values. The argument, that the Maori rights are not enforceable before court,⁶⁹ does not hold not true for those non-territorial rights.

a. Land rights

Although there was an intense discussion about land rights in literature⁷⁰, it was only in 1993 that a Court was given the opportunity to decide again in this question.

⁶⁴ *Attorney General v. New Zealand Maori Council General, No.1*, Court of Appeal, 1991, NZLR 1991, Vol. 2, 129, 135, line 45–48 (See for a detailed discussion of this decision *infra* note 113 and accompanying text.) See also Palmer, *Unbridled Power* (1989), 20.

⁶⁵ See e.g. the 1989 "Principles for Crown Action on the Treaty of Waitangi", reprinted in: Frame, *A State Servant Looks at the Treaty*, *New Zealand Universities Law Review* 14 (1990), 82, 87.

⁶⁶ See for an overview of the recent developments: Sutton, *The Treaty of Waitangi Today*, *Victoria University of Wellington Law Review* 11 (1981), 17–40; Berryman, *The Fourth World in the First World – the Maori in New Zealand*, *Sri Lanka Journal of International Law* 2 (1990), 37–58; Havemann, "What's in the Treaty": *Constitutionalizing Maori Rights in Aotearoa/New Zealand 1975–1993*, in: Hazlehurst (Ed.), *Legal Pluralism and the Colonial Legacy* (1995), 73–101; a comprehensive overview of the recent jurisprudence can be found at Kenderdine, *Legal Implications of Treaty Jurisprudence*, *Victoria University of Wellington Law Review* 19 (1989), 347–383.

⁶⁷ See *infra* note 165.

⁶⁸ See e.g. the 1990 "Runanga Iwi Act" of 31.08.1990 (*New Zealand Statutes 1990*, Vol. 3, No. 125, 1755–1781).

⁶⁹ See *supra* note 50 and accompanying text.

⁷⁰ See Holmes, *Fragmentation of Maori Land*, *Auckland University Law Review* 1 (1967), 1–19; Galvin, *Maori Land Development with Particular Reference to Land Development at Poutu, Northland*, *Auckland University Law Review* 3 (1976–1979), 291–305; McHugh, *The Fragmentation of Maori Land* (1980); *id.*, *The Contemporary Maori Land Laws of New Zealand*, in: *id.*, *Maori Land Laws of New Zealand* (1983), 39–79; *id.*, *The Role of Law in Maori Claims*, *New Zealand Law Journal* 1990, 16–20.

In the *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* Decision⁷¹ the Court of Appeal held that the “aboriginal title”, which is identical to the “Maori customary title”, is protected by the Treaty of Waitangi. Quoting the *Symonds*⁷² and *Nireaha Tamaki v Baker* Decisions⁷³, the Court came to the conclusion that this customary title corresponds to the rights as they are guaranteed in the Treaty.⁷⁴

b. Fisheries rights

Contrary to land rights, Maori fisheries rights have been neglected by jurisprudence for a long time.⁷⁵ However, the Fisheries Act, although amended, contained all the time a paragraph saying: “Nothing in this Act shall affect any Maori Fishing rights”.⁷⁶

This regulation was of crucial importance in the 1986 Decision of the High Court Christchurch in the matter *Te Weehi v Regional Fisheries Officer*.⁷⁷ The facts of this ground-breaking decision for the Maori fisheries rights were the following: Mister Te Weehi, a Maori, had been charged for fishing in a certain area in contradiction to the 1983 “Fisheries Act”. To defend himself, he referred to a traditional customary Maori fishing right for this area, stating that therefore he may not be charged because of the above-mentioned paragraph. The Court affirmed that position. It held that Te Weehi was in fact fishing on the basis of a customary right. This “aboriginal title” can only be expired by an Act of the Crown or Parliament, which was not the case here. The expiration of a title to the coastal land is without prejudice to the fishing right, since both exist independently.

As precedents, the Court quoted the 1870 *Kauwaeranga* Decision⁷⁸ and the 1847 *Symonds* Decision⁷⁹. As has been seen above, these were the only decisions in contradiction to the prevailing opinion. The Court did not neglect the *Wi Parata* Decision⁸⁰, nevertheless it considered that judgement of minor importance.

This change in jurisprudence regarding the recognition of the “aboriginal title” was confirmed by following decisions⁸¹ and applauded by comments by publi-

⁷¹ *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General*, Court of Appeal, 1993, NZLR 1994, Vol. 2, 20–27.

⁷² *Ibid.*, 24, line 6; compare to the *Symonds* Decision, *supra* note 35.

⁷³ *Ibid.*, 24, line 8; compare to the *Nireaha Tamaki v. Baker* Decision, *supra* note 45.

⁷⁴ *Ibid.*, 27, line 30–31.

⁷⁵ The only exception is the 1870 *Kauwaeranga* Decision of the Land Court, see *supra* note 13. See for the development of Fisheries Rights: Haughey (note 43), 29–42; Dewes, Fisheries – A Case Study of an Outcome, Victoria University of Wellington Law Review 25 (1995), 219–230.

⁷⁶ See e.g. Paragraph 88 (2) of the 1983 “Fisheries Act”, New Zealand Statutes 1983, Vol. 1, No. 14, 79–160.

⁷⁷ *Te Weehi v. Regional Fisheries Officer*, High Court Christchurch, NZLR 1986, Vol. 1, 682–693.

⁷⁸ *Ibid.*, 686, line 49 – 687, line 14, see for the *Kauwaeranga* Decision *supra* note 13.

⁷⁹ *Ibid.*, 687, line 15–30, see for the *Symonds* Decision *supra* note 30.

⁸⁰ *Ibid.*, 687, line 50, see for the *Wi Parata* Decision *supra* note 41.

⁸¹ See the 1990 Decision of the High Court Wanganui in the matter *Green v. Ministry of Agriculture and Fisheries* (NZLR 1989, Vol 1, 411–415) and the 1990 Decision of the Court of Appeal in the matter *Te Runaga o Muriwenua Inc v. Attorney-General* (note 62, 641, 655, line 32–44).

cists,⁸² who had previously influenced this new line of thinking.⁸³ However, it has to be noted that this change in position was only possible because of the above-mentioned paragraph, which mentioned the protection of Maori fishing rights *expressis verbis*.

Besides the fishing by individuals for their private use, which was the subject of the *Te Weehi* Decision, the modern fishing industry developed as a matter of contention between Maori and the Crown. In the historical situation, the Treaty of Waitangi was only speaking of the limited fishing by individuals, but the Maori now claimed in addition their share of the profits of the modern fishing industry. Jurisprudence and Parliament tried to cope with this problem for a number of years. It is now settled by a comprehensive agreement, according to which the Maori abstain from any further claims of their rights after being promised their share of the profits.⁸⁴

The starting point for this development were the regulations of the 1986 "Fisheries Amendment Act"⁸⁵, which provided for specific fishing quotas.⁸⁶ These quotas were criticised by the Maori, which led to negotiations between Maori and the Crown. In consequence the 1989 "Maori Fisheries Act"⁸⁷ was adopted. This Act aimed "at making better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi ...".⁸⁸ It provided for a 10 % quota of the fish or its profit, which shall be ceded to a "Maori Fisheries Commission", established by that Act.⁸⁹

In a number of claims before the Waitangi Tribunal, the High Court and the Court of Appeal,⁹⁰ Maori argued that this quota was inconsistent with the Treaty of Waitangi. This led to direct negotiations between Maori and the Crown to settle the participation of Maori in the context of commercial fishing and the status of Maori fishing rights comprehensively. After intense debate, the so-called "Sealord Deal" between the Government and Representatives of six Maori tribes was adopted on 23 September 1992⁹¹. This agreement provided *inter alia*, that the

⁸² McHugh, *Aboriginal Title Returns to New Zealand Courts*, *New Zealand Law Journal* 1987, 39–41, *id.* (note 8), 130–132.

⁸³ McHugh, *Aboriginal Title in New Zealand Courts*, *Canterbury Law Review* 2 (1984), 235–265; *id.*, *The Legal Status of Maori Fishing Rights in Tidal Waters*, *Victoria University of Wellington Law Review* 14 (1984), 247–274; *id.*, *Maori Fishing Rights and the North American Indian*, *Otago Law Review* 6 (1985), 62–94. This influence has been recognised by the Court itself: note 77, 691, line 49–92, line 4.

⁸⁴ See for an overview of this development Frame (note 65), 82, 92–96; Mikaree, *Maori Issues I*, *New Zealand Recent Law Review* 1993, 308, 309–313; *id.*, *Maori Issues*, *New Zealand Recent Law Review* 1994, 162, 171–173; Robinson, *The Sealord Fishing Settlement: An International Perspective*, *Auckland University Law Review* 7 (1994), 557–577; Munro, *The Treaty of Waitangi and the Sealord Deal*, *Victoria University of Wellington Law Review* 24 (1994), 389–430.

⁸⁵ 1986 "Fisheries Amendment Act", *New Zealand Statutes* 1986, Vol. 2, No. 34, 465–528.

⁸⁶ *Ibid.*, Paragraphs 28B – 28ZC.

⁸⁷ 1989 "Maori Fisheries Act", *New Zealand Statutes* 1989, Vol. 4, No. 159, 2648–2701.

⁸⁸ See the official long title of this Act, *ibid.*, 2649.

⁸⁹ *Ibid.*, Paragraphs 8–11.

⁹⁰ *Te Runanga o Muriwhenua Inc v. Attorney-General* (note 62), 641–657.

⁹¹ The "Memorandum of Understanding" is reprinted in NZLR 1993, Vol. 2, 301, 309–322.

Government shall put NZ \$ 150 million⁹² at the disposal of the Maori to assist them in a joint venture to purchase “Sealord Products Limited”, the largest company in the fishing industry of New Zealand. In addition, the Crown shall give Maori 20 percent of new species quota, in addition to the 10 percent of previous quota. In return, the Maori who signed agreed that all fishing rights are extinguished⁹³ and all current and future claims thereto shall be satisfied. They agreed to discontinue their current court actions relating to fisheries and to take no more proceedings. Furthermore, the Waitangi Tribunal shall have no further say on commercial fishing matters. Finally, they agreed to abolishing the above mentioned Paragraph 88 (2) of the 1983 “Fisheries Act”, which provides for the protection of Maori fishing rights.⁹⁴

The transformation of this agreement into an Act was seriously criticised by some Maori tribes. They argued that the agreement was negotiated only by parts of the Maori population, which had no mandate to represent all Maori. Furthermore, they criticised that current as well as future claims in respect to commercial fishing shall be satisfied and that the regulation is prejudicial to future claimants.

However, these objections were not successful. The Court of Appeal refused in its 1992 Decision in the matter *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*⁹⁵ to intervene in an ongoing parliamentary process. Likewise the Waitangi Tribunal had no substantial doubts that the agreement is contrary to the Treaty of Waitangi.⁹⁶ It only recommended that the possibility for judicial review should not be restricted to the extent as planned.

The settlement was transformed into law by the 1992 “Treaty of Waitangi Fisheries Claims Settlement Act”⁹⁷. Besides the extinction of Maori fishing rights as noted above, this Act provided for a reconstruction of the “Maori Fisheries Commission”⁹⁸ into the “Treaty of Waitangi Fisheries Commission”. This institution is responsible for the allocation of the commercial fishing profits.

This agreement and its transformation into an Act seemed to have settled the dispute between the Crown and the Maori. However, it gave rise to contentions between the Maori tribes themselves concerning the allocation of the profits. First,

⁹² 1,447 NZ Dollar are equivalent to one US Dollar (see the homepage of the Government of New Zealand at <http://www.stats.govt.nz/>).

⁹³ Note 91, Paragraph 5.1: “Maori agree that his Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute Common law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights or interests have been subject of recommendation or adjudication by the Courts or the Waitangi Tribunal.”

⁹⁴ *Supra* note 76.

⁹⁵ *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General*, Court of Appeal, 1993, NZLR 1993, Vol. 2, 301–322.

⁹⁶ Fisheries Settlement Report of 4.11.1992 (Wai 307) (compare note 61).

⁹⁷ 1992 “Treaty of Waitangi (Fisheries Claims) Settlement Act”, New Zealand Statutes 1992, Vol. 3, No. 121, 1881–1901.

⁹⁸ *Supra* note 89.

the scheme of the allocation, i.e. the division of benefits amongst the various Maori groups entitled became a matter of dispute. The background for this contention was the question which descent groups may represent the holders of customary fishing rights in a district. The commission planned to prefer the tribes who live in a coastal area. Second there was a set of questions concerning representation, e.g. which tribe can speak for an area or what body can speak for Maori at the national level. Finally, the allocation to Maori who live in the cities without any close relationship to a tribe became a problem. Following some claims before the Waitangi Tribunal and the High Court, the matter was brought before the Court of Appeal in 1996.⁹⁹ The Court held that the profits may not only be allocated to the Chiefs but to the entire Tribes. However, the Court refrained from regulating the details of the modalities of the allocation. It held that “it is the responsibility of Maori and a test of Maori to rise to the challenge of working out a solution for Maori of this difficult but surely not insuperable problem.”¹⁰⁰

The “Sealord”-Agreement represents a highly remarkable development and a historic event. It follows an innovative and pragmatic approach. It was the first time that Maori representatives and the Crown entered into direct negotiations at the national level. This implied the recognition of the Maori as equal partners and of Maori rights. However, the agreement involves a number of difficult questions. The discussions between Maori tribes in the aftermath of the agreement showed that the Maori population does not represent a uniform bloc. The most difficult question, however, might be whether it represents a promising way that Maori discharge their ongoing legal positions and thus in some kind end the obligations of the Treaty of Waitangi in return for a share in commercial profit. One might comment that Maori have sold their rights. It remains doubtful whether such values can be traded.

Despite those doubts the “Sealord” Agreement served as a precedent for other settlements to satisfy and compensate Maori claims.

On 8 December 1994 the Government announced it would provide NZ \$ 1 billion¹⁰¹ for a “full and final settlement” of all claims based on the Treaty of Waitangi.¹⁰² This sum should serve for the resolution of all historical grievances and past losses of Maori. The proposal raised an intense political debate.¹⁰³ Maori themselves rather rejected it;¹⁰⁴ for example, they argued that there is no clear for-

⁹⁹ *Te Runanga o Muriwhenua and Others v. Te Runanganui o Te Upoko o Te Ika Association Inc and Others/Jackson and Others v. Treaty of Waitangi Fisheries Commission and Others/Te Runanga o Muriwhenua and Others v. Treaty of Waitangi Fisheries Commission and Others*, NZLR 1996, Vol. 3, 10–23.

¹⁰⁰ *Ibid.*, 20, line 12–27, especially line 25–27.

¹⁰¹ For a comparison: The gross national product in 1995 was NZ \$ 81,822 millions (see the homepage of the Government of New Zealand at <http://www.stats.govt.nz/>).

¹⁰² “Government’s Proposals For the Settlement of Treaty of Waitangi Claims”(“Fiscal envelope”).

¹⁰³ See *supra* note 10.

¹⁰⁴ Durie, Proceedings of a Hui held at Hirnagi Marae, Turangi, Victoria University of Wellington Law Review 25 (1995), 109–117; Mikaere, Maori Issues, New Zealand Recent Law Review 1995, 137, 153–155; Harris, Full and Final Settlement of Treaty Grievance: The Crown’s Constitutional Agenda, Auckland University Law Review 8 (1996), 205–208.

mal definition of the term “Maori”.¹⁰⁵ It remained unclear whether Maori who lost their traditional way of living were in a position to receive compensation. Yet the main objection was that the settlement should be “final”. Instead of interpreting the principles of the Treaty according to the circumstances of a given situation for the future, all claims should be settled for the past. The further development of this proposal remains to be seen.

The most recent development in this context was the adoption of the “Ngai Tahu Act” on 25 September 1997 which transforms the “Ngai Tahu deed of settlement” of 14 June 1996 between Ngai Tahu, the Maori tribe living on the South Island, and the Government.¹⁰⁶ Negotiations were recommended by the Waitangi Tribunal in 1991. The agreement should serve to settle claims of the Ngai Tahu against the Crown dating back from 1847. It consists mainly of three elements.¹⁰⁷ First, the Crown apologises formally and will apologise publicly to Ngai Tahu as it acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngai Tahu. Second, it will pay the settlement amount of NZ \$ 117 million as compensation. Third, it will transfer back certain assets like farmlands and forestry. The most prominent part of that agreement is the vesting back of Mount Cook – the highest mountain of New Zealand – to the Maori under its Maori name “Aoraki”. This mountain is of special significance to the Maori since it represents one of the most important cultural treasures of the Maori. In return, the Maori tribe makes the mountain a gift to the Crown, on behalf of the people of New Zealand, in order that Aoraki/Mount Cook will remain and continue to be part of the corresponding National Park.

¹⁰⁵ McGuire, Reflections on the Formal Definitions of Maori, *New Zealand Law Journal* 1995, 168–172; id., The Concept of “tangata whenua” and Collective Interests, *New Zealand Law Journal* 1996, 28–34; id., A Theory for a More Coherent Approach to Eliciting the Meaning of the Principles of the Treaty of Waitangi, *New Zealand Law Journal* 1996, 116–120.

¹⁰⁶ The very detailed text of the Act is available at <http://www.executive.govt.nz/minister/gramham/ngai-tahu/content/index.html>, see also O’Regan, A Ngai Tahu Perspective on Some Treaty Questions, *Victoria University of Wellington Law Review* 25 (1995), 178–194.

¹⁰⁷ *Ibid.*, Paragraph 2.1:

(1) “The Crown acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngai Tahu and purchases of Ngai Tahu land. ...

(2) The Crown acknowledges that, in breach of Article Two of the Treaty, it failed to preserve and protect Ngai Tahu’s use and ownership of the land and valued possessions as they wished to retain.

(3) The Crown recognises that it has failed to act towards Ngai Tahu reasonably and with the utmost faith in a manner consistent with the honour of the Crown.

(4) ...

(5) The Crown expresses its profound regret and apologises unreservedly to all members of Ngai Tahu or the suffering a hardship caused to Ngai Tahu ...

(6) The Crown apologises to Ngai Tahu for its past failures to acknowledge Ngai Tahu rangatiratanga and mana over the South Island lands within its boundaries, and, in fulfilment of its Treaty obligations, the Crown recognises Ngai Tahu as the tangata whenua of, and as holding rangatiratanga within, the Takiwa of Ngai Tahu Whanui.

(7) ...”.

c. Other rights

Besides the land and fisheries rights discussed above, the debate currently focuses on the “other rights” guaranteed in the Treaty of Waitangi. The English version of Article Two speaks of “other properties”, whereas the Maori version speaks of “taonga”, which can be translated as “treasures”.¹⁰⁸ But “taonga” can also include non-material values like the cultural identity of Maori and intellectual property. According to a decision of the High Court Wellington, even the spiritual relationship of Maori to a specific river represents “taonga”, when Maori consider that river as the symbol of their tribe and the source of life.¹⁰⁹

Of special importance for the recognition of a minority is the recognition of their language.¹¹⁰ The Maori language was recognised as an official language of New Zealand by the 1987 “Maori Language Act”. Following a recommendation from the Waitangi Tribunal¹¹¹ the Act recognises that the Maori language is part of their cultural heritage and thus represents “taonga”, so that the Treaty of Waitangi obliges the Crown to recognise and protect it. This requires affirmative action for the promotion of the Maori language. The Act provides that any person who wishes to do so may use the Maori language in all courts and in any dealings with government departments, local authorities and other public bodies. However, Maori is not recognised as an official language for education. Finally, a national commission for the Maori language shall be established.

The recognition of Maori as an official language also had consequences for the public broadcasting policy. In a 1986 report the Waitangi Tribunal emphasised the importance of broadcasting in Maori for the promotion of that language and consequently for the Maori culture. Therefore, the minister of broadcasting is obliged to consider appropriately that aspect in the allocation of radio frequencies.¹¹² In 1991 the Court of Appeal confirmed that the minister in charge is obliged to duly consider that recommendation of the Waitangi Tribunal.¹¹³

¹⁰⁸ See *supra* note 28.

¹⁰⁹ See the 1987 Decision of the High Court Wellington in the matter *Huakina Development Trust v. Waikato Valley Authority*, NZLR 1987, Vol. 2, 188, 194, line 18–27 (see for a detailed discussion of this decision *infra* note 157 and accompanying text).

¹¹⁰ 4,2% of New Zealand’s population speak Maori. At the 1996 census out of the total population a number of 3.618.303 persons 140.886 persons answered that they speak Maori besides English. 12.783 persons answered that they speak Maori, but do not speak English (see the homepage of the Government of New Zealand at <http://www.stats.govt.nz/>). See for the Maori language: Williams, Maori Issues II, *New Zealand Recent Law Review* 1990, 129, 136–138; Thomas, *The Maori Language – The Chiefly Language of Aotearoa – The Long Struggle*, in: Bird/Martin/Nielsen (Eds.), *Majah – Indigenous People and the Law* (1996), 152–189.

¹¹¹ See the 1986 Report of the Waitangi Tribunal on the Te Reo Maori Claim (Wai. 11) (compare note 61); compare further in this context the 1996 Decision of the Court of Appeal in the matter *New Zealand Maori Council v. Attorney General* (NZLR 1996, Vol. 3, 140, 146, line 7–46).

¹¹² See Report of the Waitangi Tribunal on Claims Concerning Allocation of Radio Frequencies (Wai. 26 & 150), 1990 (compare 61).

¹¹³ See *Attorney General v. New Zealand Maori Council General, No.1* (note 64), 129–146; *Attorney General v. New Zealand Maori Council General, No. 2*, NZLR 1991, Vol. 2, 147–149.

The principles of the Treaty were finally important for the decision of the Court of Appeal concerning the privatisation of the public broadcasting company.¹¹⁴ Maori claimed that the Crown is prevented from selling the public broadcasting company by its obligation derived from the Treaty to protect and promote the Maori language. Otherwise it would lose its influence on the broadcasting policy. However, the Court held that the protection of Maori culture is not an absolute objective for Government policy, but may be weighted with other obligations and policies of the Government. Among these aspects are fiscal considerations. The Court found that the Government was under fiscal constraints at that time. Still it had fulfilled its Treaty obligations to protect the Maori language by other programs. Thus the Court felt not in a position to stop the privatisation of the public broadcasting company.

V. "Principle of Partnership" as the Core of the Treaty of Waitangi

This policy of privatisation of state-owned enterprises in the 1980s led the Court of Appeal to develop comprehensive principles for the relationship of New Zealanders of Maori and of European descent in its 1987 leading case *Maori Council v Attorney General*.¹¹⁵ This case has been considered by the Court itself¹¹⁶ "perhaps as important for the future of our country as any that has come before a New Zealand Court" and as a "century case" by learned comments.¹¹⁷

The Court had to consider quite a minor question of interpretation of the 1986 "State Owned Enterprise Act".¹¹⁸ This Act was one of the main instruments of the New Zealand's Labour Government policy of a comprehensive privatisation of state owned enterprises, assets, properties and forests. This policy has been a complete turn-about in New Zealand's economic policy, which favoured the welfare state for decades. Maori claimed that the Crown would hence lose its influence in virtually every policy area and thus its possibility to protect Maori interests according to the Treaty of Waitangi.

Thus Paragraphs 9 and 27 were inserted in the State Owned Enterprise Act, which now represent the subject of the dispute. Paragraph 9 stipulated: "Nothing in this Act shall permit the Crown to act in a manner which is inconsistent with the principles of the Treaty of Waitangi". Paragraph 27 provided for a very detailed procedure how properties could be sold after hearing the Waitangi Tribunal. However, the "New Zealand Maori Council" was of the opinion that this procedure did not meet the requirements of Paragraph 9. It thus put the matter before

¹¹⁴ See *New Zealand Maori Council v. Attorney General*, 1992, NZLR 1992, Vol. 2, 576-603; *New Zealand Maori Council v. Attorney General* (note 110), 140-189 referring to *New Zealand Maori Council v. Attorney General* 1994 (note 24), 513-526.

¹¹⁵ *Maori Council v. Attorney General* (note 24), 641-719.

¹¹⁶ See President Cooke, in: *ibid.*, 651, line 11 et seq.

¹¹⁷ Boast, *Maori Council v. Attorney General: A Case for the Century?*, *New Zealand Law Journal* 1987, 240-245.

¹¹⁸ 1986 "State Owned Enterprises Act", *New Zealand Statutes* 1986, Vol. 3, No. 124, 1306-1379.

Court for clarification and judicial review. The Court held that paragraph 27 was indeed insufficient to protect the principles of the Treaty of Waitangi. In consequence the Government negotiated a new procedure, which was laid down in the 1988 "Treaty of Waitangi (State Enterprises) Act"¹¹⁹.

In their unanimous decision the Judges developed the principle of partnership between New Zealanders of Maori and of European descent as the fundamental principle of the Treaty of Waitangi.¹²⁰

The starting point for their argument was that "the English and the Maori texts ... are not translations the one of the other and do not necessarily convey precisely the same meaning."¹²¹ However, "the differences between the texts and the shades of meaning do not matter for the purposes of this act. What matters is the spirit." Thus "the principles of the Treaty are to be applied, not the literal words".¹²² Of these principles, the principle of partnership represents the most important one. This principle provides that the New Zealanders of European and Maori descent have to act towards each other appropriately and reasonably in good faith. The relationship of the two entities can be compared with the mutual obligations of the parties of a civil law contract. Thus, both parties are committed to cooperation. However, the Court did not recognise an obligation to consultation, since the content of that obligation was considered as not clear enough and it remained a matter of doubt, which institution is authorised to represent Maori at the national level.¹²³ The partnership points to a responsibility of the Crown for Maori which corresponds to a fiduciary duty. The Court held that this is not a passive obligation but one which requires the Crown to take active steps for the protection of Maori. The obligation to consider Maori interests is based in the concept of the honour of the Crown.

This principle of partnership was confirmed by later decisions, which dealt with similar questions of privatisation¹²⁴ and had to decide about the interpretation of the 1988 "Treaty of Waitangi (State Enterprises) Act"¹²⁵ and others¹²⁶. To some extent these decisions went further as the original leading case by calling for "reparation [that] has to be made to the Maori people for the past and continuing

¹¹⁹ 1988 "Treaty of Waitangi (State Enterprises) Act", New Zealand Statutes 1988, Vol. 2, No. 105, 881–902, paragraphs 27, 27 A-D.

¹²⁰ Note 115, 664, line 1. This term was first used by the Waitangi Tribunal.

¹²¹ *Ibid.*, 663, line 45–46.

¹²² See *ibid.*, 671, line 41–43; 672, line 5–39; 690–691, *passim*; 712, line 47–55.

¹²³ Two years later, in 1989, the Court of Appeal recognised the obligation to consultations based on the principle of partnership, see *Maori Council v. Attorney General*, NZLR 1989, Vol. 2, 142, 152, line 29–33.

¹²⁴ See *ibid.*, 142–153 (concerning state forests), especially 152, line 40; *Tainui Maori Trust Board v. Attorney General*, 1989, Court of Appeal, NZLR 1989, Vol. 2, 513–546 (concerning state coal mines), especially 527, line 27–30 and line 53; *New Zealand Maori Council v. Attorney General* 1996 (note 110), 140–189 (concerning public broadcasting), especially 169, line 5–10.

¹²⁵ See note 119.

¹²⁶ *Attorney General v. New Zealand Maori Council General, No.1* (note 64), 129, 135, line 30; *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General* (note 95), 301, 304, line 43–55; 306, line 27–41; *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General* (note 71), 20, 24, line 11.

breaches of the Treaty”¹²⁷ and “... to take affirmative action to redress past breach”.¹²⁸

The 1987 leading decision was the starting point for an intense debate about Maori affairs in New Zealand’s society. The principle of partnership, even if it may be regarded as not very helpful for a concrete interpretation of the Treaty, was laid down in a number of Acts.¹²⁹ Finally, it was included as the “principle of cooperation” in official Government guidelines for its policy regarding the Treaty of Waitangi.¹³⁰

VI. Legal Status of the Treaty

The previous discussion of the development of the rights of the Treaty of Waitangi has not yet considered the legal status of the Treaty. In the 160 years since its signature, New Zealand’s jurisprudence has considered the legal status of the Treaty very differently. No clear line of thinking is discernible regarding the enforceability of the Treaty rights of Maori.¹³¹

1. Is the Treaty legally binding by virtue of itself?

The Treaty could be considered as directly legally binding if it constitutes an agreement under international law. A prerequisite for this would be that both treaty parties possess the legal capacity to conclude treaties under international law.

Fundamental for the New Zealand discussion of the legal status of the Treaty is still the 1877 decision of the Supreme Court in the matter *Wi Parata v The Bishop of Wellington*.¹³² In this judgement Chief Justice Sir James Prendergast held that “so far as [the Treaty of Waitangi] purported to cede the sovereignty ... it must be regarded a simple nullity”.¹³³ He argued that upon arrival the British delegation did not find any form of government or system of law amongst the indigenous people. Therefore there existed no authority to cede sovereignty and to conclude

¹²⁷ See President Cooke in *Tainui Maori Trust Board v. Attorney General* (note 124), 513, 530, line 8–11.

¹²⁸ *New Zealand Maori Council v. Attorney General* (note 111), 140, 169, line 17.

¹²⁹ See e.g. in Paragraph 2 (2A) (a) of the 1988 “Treaty of Waitangi Amendment Act” (note 58).

¹³⁰ See “Principles for Crown Action on the Treaty of Waitangi” of 22.5.1989; reprinted in *Frame* (note 65), 82, 87. This gave rise to a dispute between representatives of the Government and the Court of Appeal, whether the term “partnership” or “cooperation” is more helpful for implementing the Treaty of Waitangi (see *Frame*, *ibid.*, 88–92; Cooke [note 5], 6). However, the importance of this dispute seems minor since the Government holds that: “The outcome of a reasonable cooperation will be partnership”.

¹³¹ See for an overview to the discussion of the legal status of the Treaty: Keith (note 1), 37–61; *id.*, *The Roles of the Tribunal, the Courts and the Legislature*, Victoria University of Wellington Law Review 25 (1995), 129–143.

¹³² *Wi Parata v. The Bishop of Wellington* (note 41), 72.

¹³³ *Ibid.*, 78.

treaties under international law. In modern terms, the Maori tribes were not a subject of international law. This understanding was confirmed by later decisions.¹³⁴ Thus the “Treaty” has been considered merely as an declamatory affirmation of the Maori Chiefs to the British colonisation. According to that – leading¹³⁵ – opinion, the “Treaty” simply represents a “legal fiction”: the Crown gained sovereignty by occupation and settlement and not by cession.

One might rebut that the very fact that the British Crown had entered into negotiations with the Maori Tribes shows that it regarded them as equal partners. The Crown considered New Zealand as an independent state before the signing of the Treaty.¹³⁶ Even if the Maori Tribes were not a subject of international law at the time of signature, it can be stated that the British Crown, which was without doubt a subject of international law, conferred the capacity to conclude treaties under International Law to the Maori for this unique occasion.

However, this cannot be the place to give a final answer to this question.¹³⁷ Regarding that the jurisprudence of New Zealand is firmly denying a direct legal validity of the Treaty, from a pragmatic approach it seems more worthwhile to explore whether there exists another legal basis for its validity.¹³⁸

¹³⁴ See Judge Richmond in the 1884 Decision in the matter *Hunt v. Gordon*, New Zealand Law Reports 1884, Vol. 2, 160, 186: “... the so-called Treaty of Waitangi ... was not a treaty in the proper sense, and ... the sovereignty of these islands was not acquired by virtue thereof, but by occupation”; and the Court of Appeal 1913 in *Tamihana Korokai v. Solicitor General*, NZLR 1913, 321, 354.

In this context one might note two other famous decisions, which are not considered in the New Zealand discussion. The opinion, that indigenous people are not a subject under International Law is also held by Judge Huber in the 1928 *Island of Palmas*-Arbitration: “As regards contracts between a state ... and native princes or chiefs or peoples not recognised as members of the community of nations, they are not, in international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties”, Reports of International Arbitral Awards (R.I.A.A.) 2 (1928), 840, 858.

In its Advisory Opinion of October, 16th 1975 (ICJ Reports 1975, 12, 39) concerning the Western Sahara, the International Court of Justice held that “according to the State practice of that period, territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*: in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers. The information furnished to the Court shows (a) that at the time of colonisation Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them; ...”. However, the Court finds “that neither the internal nor the international acts relied upon by Morocco indicate the existence at the relevant period of either the existence or the international recognition of legal ties of territorial sovereignty between Western Sahara and the Moroccan State”.

¹³⁵ See the former President of the Court of Appeal The Right Honourable Sir Robin Cooke, in Cooke (Ed.), *Portrait of a Profession* (1969), 21.

¹³⁶ See *supra* note 16.

¹³⁷ The opinion that the Treaty of Waitangi is an agreement under International Law is only held by McGinty, *New Zealand’s Forgotten Promises: The Treaty of Waitangi*, *Vanderbilt Journal of Transnational Law* 25 (1992), 681, 697–722 and Carter, *The Incorporation of the Treaty of Waitangi in Municipal Law*, *Auckland University Law Review* 4 (1980), 1–18.

¹³⁸ Likewise recent jurisprudence led the question whether the Treaty of Waitangi constitutes an agreement under International Law consciously unanswered, see the leading case *Maori Council v. Attorney General* 1987 (note 24), 641, 655, line 31–37.

2. Is the Treaty legally binding by incorporation into municipal law?

It is firmly settled in Common law that any treaty concluded by the Crown becomes legally binding only if it is incorporated in municipal law by an act of Parliament. This is rooted in the concept of "Sovereignty of Parliament": any treaty obligation entered into by the Crown can only be enforced by court if it has been incorporated by Parliament as the supreme legislative authority.¹³⁹

This concept was first applied in the context of the Treaty of Waitangi by the Court of Appeal in 1913 in its decision in the matter *Tamihana Korokai v Solicitor General*.¹⁴⁰ The Court held that the Treaty "only becomes enforceable as part of the municipal law if and when it is made so by the legislative authority. That has not been done".¹⁴¹ However, the fundamental decision for the concept of incorporation can be found in the decision in the matter *Hoani Te Huhē Tukino v Aotea District Maori Land Board*¹⁴² of the Privy Council in 1941. The Council held that "it is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except so far as they have been incorporated in the municipal law."¹⁴³ This has been confirmed in a number of subsequent decisions.¹⁴⁴ Since there has not been any act of incorporation, it is traditionally submitted, that the Treaty is of no legal value.¹⁴⁵

Nevertheless, recently a number of Acts have referred to the Treaty, the most prominent example is the 1975 "Treaty of Waitangi Act"¹⁴⁶. However, these Acts only refer to the principles of the Treaty, not the wording of the Treaty itself.¹⁴⁷ Furthermore, although these Acts cite the wording of the Treaty of Waitangi

¹³⁹ See for an overview of the application of this notion in the context of the Treaty of Waitangi: Carter (note 137), 1–18; Haughey, *The Treaty of Waitangi – Its Legal Status*, *New Zealand Law Journal* 1984, 392; Williams, *The Constitutional Status of the Treaty of Waitangi: A Historical Perspective*, *New Zealand Universities Law Review* 14 (1990), 9–36.

¹⁴⁰ *Tamihana Korokai v. Solicitor General* (note 134), 321–360.

¹⁴¹ *Ibid.*, 354f.

¹⁴² *Hoani Te Huhē Tukino v. Aotea District Maori Land Board*, Privy Council, 1941, NZLR 1941, 590–599.

¹⁴³ *Ibid.*, 596 et seq.

¹⁴⁴ See *Re the Bed of the Wanganui River* (note 42), 623: "This obligation was akin to a treaty obligation, and was not right enforceable at the suit of any private persons as a matter of municipal law by virtue of the Treaty of Waitangi itself ..."; *Re the Ninety Mile Beach* (note 42), 477: "This obligation was akin to a treaty obligation and was not right enforceable at the suit of any private persons until carried into municipal law".

¹⁴⁵ Mollooy, *The Non-Treaty of Waitangi*, *New Zealand Law Journal* 1971, 193, 196, has pointed out "... considering only whether [the Treaty] is a binding legal document, and ignoring any 'spiritual' or emotional value it might have, it is submitted that the Treaty of Waitangi is worthless and of no effect. It is a non-treaty".

¹⁴⁶ See *supra* note 56.

¹⁴⁷ See e.g. Paragraph 6 of the 1975 "Treaty of Waitangi Act" (note 56) and Paragraph 9 of the 1986 "State owned Enterprises Act" (note 118).

in an annex,¹⁴⁸ they do so only for information purposes, so that fact cannot be considered as an incorporation of the Treaty. One might thus conclude that these Acts constitute a declamatory affirmation of the Treaty, but not an incorporation. This conclusion is confirmed by recent judicial authority,¹⁴⁹ e.g. the High Court Wellington held in its 1987 Decision in the matter *Huakina Development Trust v Waikato Valley Authority* that "... the Treaty is not part of the municipal law of New Zealand in the sense it gives rights enforceable in the Courts by virtue of the Treaty itself."¹⁵⁰

3. The Treaty of Waitangi as supreme law?

General comments refer to the Treaty of Waitangi as the "founding document of the nation of New Zealand" or the "Maori Magna Charta".¹⁵¹ This raises the question whether the Treaty might be qualified as a constitutional document, that has priority over Acts and Statutes by Parliament.

But this question was unambiguously answered by the Court of Appeal in its 1987 leading decision: it held that the Treaty of Waitangi is neither a constitutional document nor a "Bill of Rights".¹⁵²

However, one has to note the project to incorporate the Treaty of Waitangi in the 1990 "New Zealand Bill of Rights"¹⁵³. In a 1985 Draft the former Labour Government took the position that a fundamental document like a Bill of Rights should include a recognition and affirmation of Maori rights.¹⁵⁴ However, after an

¹⁴⁸ See 1931 "Native Land Act" (note 50), 101 et seq.; 1960 "Waitangi Day Act" (note 55), 345–346; 1975 "Treaty of Waitangi Act" (note 56), 825, 830–832; 1973 "New Zealand Day Act" (note 55), 383, 386–387; 1976 "Waitangi Day Act" (note 55), 385, 388–390.

¹⁴⁹ See comprehensively the Court of Appeal in its 1987 leading case *Maori Council v. Attorney General* (note 24), 641, 655, line 50–55; 667, line 50; 672, line 40–52; 691, line 23; 692, line 19; 715, line 37–42. The Court of Appeal explicitly refers to the 1941 Decision of the Privy Council in the matter *Hoani Te Huhu Tukino v. Aotea District Maori Land Board* (see note 142). See further *Tainui Maori Trust Board v. Attorney General* 1989 (note 124), 513–546; *New Zealand Maori Council v. Attorney General*, Court of Appeal, 1992, NZLR 1992, Vol. 2, 576, 603, line 22–24: "... Treaty rights cannot be enforced in the Courts except insofar as they have been given recognition by statute."

¹⁵⁰ See *supra* note 109, 188, 210, line 23.

¹⁵¹ See *supra* note 6–8.

¹⁵² *Maori Council v. Attorney General* (note 24), 641; 655, line 48; 642, line 6.

¹⁵³ 1990 "New Zealand Bill of Rights", New Zealand Statutes 1990, Vol. 3, No. 109, 1687–1693.

¹⁵⁴ Draft New Zealand Bill of Rights (reprinted in: Kelsey, *Decolonization in the First World – Indigenous Peoples' Struggles for Justice and Self-determination*, The Windsor Yearbook of Justice 5 [1985], 102, 129):

Preamble:

"Whereas ... (3) The Maori People as tangata whenua o Aotearoa, and the Crown entered in 1840 into a solemn compact, known as Te Tiriti o Waitangi or the Treaty of Waitangi, and it is desirable to recognise and affirm the Treaty as part of the supreme law of New Zealand;" ...

Art. 4:

(1) "The Rights of Maori people under the Treaty of Waitangi are hereby recognised and affirmed.
(2) The Treaty of Waitangi shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent.

(3) The Treaty of Waitangi means the Treaty as set out in English and Maori in the Schedule to this Bill of Rights."

intense legal and political debate,¹⁵⁵ this proposal was not realised. From a legal point of view it was argued that this incorporation is contrary to the character of a Bill of Rights. It should serve to guarantee individual rights and freedoms of the citizens whereas the Treaty of Waitangi contains a group right, which derives from a mutual treaty.

4. The Treaty of Waitangi as criterion for the interpretation of acts

In a number of Acts, especially concerning environmental protection and planning, one can find paragraphs providing that its regulations shall be interpreted in a manner consistent with the principles of the Treaty of Waitangi.¹⁵⁶

Above that, the administration has to take into account the principles of the Treaty of Waitangi in a planning decision even if the corresponding Act does not refer to the Treaty of Waitangi. This was held by the High Court Wellington in its 1987 Decision in the matter *Huakina Development Trust v Waikato Valley Authority*.¹⁵⁷ A group of Maori had successfully filed a claim against a decision which allowed the disposal of waste and waste water in the Huakina River. They argued that this constitutes not only a physical danger, but also a denial of the traditional spiritual relationship of that tribe to the river. Since the river represents a symbol of the cultural identity of the tribe, they asserted that it is protected by Article Two of the Treaty. At that time the planning act did not include a reference to the Treaty of Waitangi. However the Court argued that "... there has been considerable direct and indirect recognition by statute of the obligations of the Crown to the Maori people. ... There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statute interpretation, to give resort to extrinsic material".¹⁵⁸

¹⁵⁵ See Kelsey (note 154), 102, 129–135; Joseph, *The Challenge of a Bill of Rights: A Commentary*, *New Zealand Law Journal* 1986, 416, 422; Elkind, *Response*, *New Zealand Law Journal* 1986, 422, 423; Tamihere, *The Treaty of Waitangi and the Bill of Rights: A Plea for Recognition*, *New Zealand Law Journal* 1987, 151–153; Brookfield, *The New Zealand Constitution: The Search for Legitimacy*, in: Kawharu (Ed.), *Waitangi – Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989), 1–24; id., *Parliament, the Treaty and Freedom: Millennium Hopes and Speculations*, *New Zealand Law Journal* 1994, 462–468; Mikaere, *Maori Issues I*, *New Zealand Recent Law Review* 1990, 122, 126.

¹⁵⁶ See Paragraph 8 of the 1991 "Resource Management Act" (New Zealand Statutes 1991, Vol. 2, No. 69, 595–976): "In achieving the purpose of this Act all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)"; Paragraph 4 of the 1990 "Runanga Iwi Act" (note 68): "This Act shall be interpreted in a manner consistent with the principles of the Treaty of Waitangi" and Paragraph 9 of the 1986 "State owned Enterprises Act" (note 118): "Nothing in this Act shall permit the Crown to act in a manner which is inconsistent with the principles of the Treaty of Waitangi".

¹⁵⁷ See *supra* note 109.

¹⁵⁸ *Ibid.*, 210, line 35–42.

Similarly the Court of Appeal held in its 1987 leading decision that it "... will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach to the interpretation of ambiguous legislation or working out the import of an express reference to the principles of the Treaty."¹⁵⁹

5. The Treaty of Waitangi as a political guideline

Finally, the Treaty of Waitangi is of influence for legislative and political programs. Cabinet members are urged to substantiate that draft acts are in compliance with the principles of the Treaty of Waitangi.¹⁶⁰ The Ministry for Maori Affairs¹⁶¹ has the task to monitor the fulfilment of that requirement. Thus there is no legally enforceable obligation to comply with the Treaty of Waitangi. However, the Court of Appeal held in 1991¹⁶² that Ministers are bound to the principles of the Treaty of Waitangi as interpreted by the Waitangi Tribunal in their political decisions, even if there is no explicit reference to the Treaty of Waitangi in the corresponding Act¹⁶³.

6. Conclusion

Summarising these various approaches of New Zealand's jurisprudence and legislation, only a "quasi-legal" status can be ascribed to the Treaty of Waitangi. It has no direct legal value nor an indirect legal validity since an act of incorporation of the Treaty in municipal law is wanting. However, a good number of Acts recognise and affirm the principles of the Treaty. They have to be considered for the interpretation of Acts, even if the corresponding Act does not explicitly refer to them. Thus the Treaty of Waitangi represents not a legal, but a firm political and moral obligation to the Crown.

VII. International Comparison

Trying to evaluate the Treaty of Waitangi, it might be helpful to compare the situation in New Zealand with the rights of Indigenous Peoples on the international level and in other former British Dominions like Australia and Canada.¹⁶⁴

¹⁵⁹ President COOKE in *Maori Council v. Attorney General* (note 24), 656, line 3–6.

¹⁶⁰ See the Guideline of the "Legislation Advisory Committee" No. 38 of June, 23rd 1986, reprinted in: KEITH (note 1), 37, 48.

¹⁶¹ See for information about the "Ministry for Maori Affairs/Te Puni Kokiri", which has been restructured in 1992, the homepage of the Government of New Zealand at <http://www.tpk.govt.nz/intro/index.html>.

¹⁶² See *supra* note 113.

¹⁶³ 1989 "Radio Communications Act", New Zealand Statutes 1989, Vol. 4, No. 148, 2297.

¹⁶⁴ See for an overview of the situation of indigenous people in other states the reports of Special Rapporteur Miquel Alfonso Martinez of the "Sub-Commission on Prevention of Discrimination and

1. International level

On the international level one has to note the ongoing work in the United Nations on the "Draft Declaration on the Rights of Indigenous Peoples"¹⁶⁵. This Draft Declaration contains a number of rights proclaimed similar to those confirmed in New Zealand by the Treaty of Waitangi or developed by jurisprudence in the way of interpretation as discussed above.

For example, Draft Article 14 provides that Indigenous Peoples have the right to revitalise, use, develop and transmit to future generations their language. States shall also ensure that they can understand and be understood in political, legal and administrative proceedings. In this context, Article 17 provides that Indigenous Peoples have the right to establish their own media in their own language. They also have the right to equal access to all forms of non-indigenous media. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. Furthermore Articles 25–30 proclaim comprehensive land rights. According to the Draft Declaration Indigenous Peoples do not only have the right to maintain and strengthen their distinctive material but also their spiritual relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used. Indigenous Peoples are moreover entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. Finally, they have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation.

Apparently the core of the Draft Declaration is the right of self-determination of Indigenous Peoples, which at the same time represents its most difficult problem. As a specific form of exercising their right to self-determination, they are supposed to have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, media, health, land and resources management, environment and others.

Protection of Minorities" of the Human Rights Commission: "Study on treaties, agreements and other constructive arrangements between States and indigenous populations", First Progress Report of 25.8.1992 in E/CN.4/Sb.2/1992/32, Second Progress report of 31.7.1995 in E/CN.4/sub.2/1995/27; Third Progress Report of 15.8.1996, E/CN.4/Sub.2/1996/23. Wickliffe, Issues for Indigenous Claims Settlement Policies Arising in Other Jurisdictions, *Victoria University of Wellington Law Review* 25 (1995), 204–218; McHugh, Aboriginal Rights and Sovereignty: Commonwealth Developments, *New Zealand Law Journal* 1986, 57–63.

¹⁶⁵ United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft United Nations Declaration on the Rights of Indigenous Peoples, 34 ILM 541 (1995). Compare also Annex, II., in this issue. See for further details Wolfgram in this issue, 369–382.

Self-determination represents a problem under the Treaty of Waitangi as well.¹⁶⁶ According to Article Two of the English version the Crown guarantees to Maori the full and undisturbed possession of certain assets. The Maori version speaks of “rangatiratanga”, i.e. the unqualified exercise of their chieftainship over their lands, villages and all treasures.¹⁶⁷ Since this wording focuses on the power of the Chiefs as exercised according to their customs, it might be interpreted as the right of self-determination at least concerning land and resources management. Yet the discussion whether there could be any form of government according to Maori customs, e.g. a tribal authority or a separate Maori criminal justice system, is only at its origins in New Zealand.¹⁶⁸

Obviously the inherent problem of self-determination of Maori is the restriction of the sovereignty of the Crown, of the powers of Parliament and of the rights of others. Hence the 1989 “Principles for Crown Action on the Treaty of Waitangi” emphasise that according to Article One of the Treaty the Crown has the “right ... to make laws and its obligation to govern ...”, whereas according to Article Two the Maori have the right of “self-management” of their resources.¹⁶⁹ It has to be noted that the term “self-determination” is not used. The problem of self-determination is too far-reaching to be discussed here in detail.¹⁷⁰ It should be sufficient to point to one interesting regulation of New Zealand in this context, which should be noted when examining the problem of a possible contradiction between the right of self-determination and individual rights: By Maori customs, women are not allowed to speak in the traditional assemblies (“hui”). Consequently paragraph 7 (9) of the 1988 “Treaty of Waitangi Amendment Act”¹⁷¹ especially stipulates that whereas the Tribunal may regulate its procedure as appropriate, it “shall not deny any person the right to speak during proceedings of the Tribunal on the ground of that person’s sex.”

2. Australia and Canada

Because of the geographical neighbourhood of Australia and New Zealand, one might first search there for possible parallels regarding the situation of indigenous

¹⁶⁶ See comprehensively Brownlie, *The Framework: Group Rights and Self-Determination*, in: *Treaties and Indigenous Peoples*, in: Brookfield (Ed.), *The Robb Lectures 1991* (1991), 29–54; Brownlie, *Indigenous Peoples: A Relevant Concept?*, in: *ibid.*, 55–75.

¹⁶⁷ See *supra* note 28.

¹⁶⁸ See Jackson, *Justice and Political Power: Reasserting Maori Legal Processes*, in: Hazlehurst (Ed.), *Legal Pluralism and the Colonial Legacy – Indigenous Experiences of Justice in Canada, Australia and New Zealand* (1995), 244–263.

¹⁶⁹ 1989 “Principles for Crown Action on the Treaty of Waitangi” (note 65), 82, 87; see for a discussion of these guidelines: Palmer, *The Treaty of Waitangi – Principles for Crown Action*, *Victoria University of Wellington Law Review* 19 (1989), 335–345.

¹⁷⁰ See for details Wolfrum in this issue, 369–382.

¹⁷¹ *Supra* note 58.

people.¹⁷² However, the striking difference between these two countries is the kind of acquisition of territory during colonisation: the Australian thinking was based on the legal fiction that the Australian continent represented “terra nullius” when it was discovered in 1788. Thus any “native title” of Aborigines was extinguished by occupation and settlement. The turning point was marked only in 1992 by the leading *Mabo* Decision of the Australian High Court.¹⁷³ The Court held that Australian Common law recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants in accordance with their laws or customs. This was confirmed by another leading case of the High Court in 1996 in the matter *Wik Peoples v State of Queensland and Others*.¹⁷⁴ The Court held that native title can only be extinguished by a written law or an act of the Government which shows a clear and plain intention to extinguish native title.

Similarly in Canada¹⁷⁵ the Supreme Court confirmed in 1984 in its decision in the matter *Guerrin v the Queen*¹⁷⁶ the “aboriginal title”. Further to this concept of Common law, there exists a number of treaties between French or English settlers and Indian Tribes in Canada.¹⁷⁷ However – unlike the Treaty of Waitangi – they do not provide for a cession of territory, but only for the ceding of hunting and fishing rights in return for peace and friendly relations. Finally the existing aboriginal and treaty rights of aboriginal peoples of Canada are recognised and confirmed by Article 35 of the 1982 “Constitution Act”.¹⁷⁸ This constitutional protection can neither be found in Australia nor in New Zealand.

Article 35 was interpreted by the Canadian Supreme Court in 1990 in the matter *R v Sparrow*.¹⁷⁹ The facts of the case are very similar to the *Te Weehi* Decision in New Zealand.¹⁸⁰ The appellant was charged with fishing in contradiction to the Fisheries Act. He admitted that the facts alleged constitute the offence, but defended himself on the basis that he was exercising an existing aboriginal right to fish and that restriction by the Fisheries Act was invalid in that it was inconsistent with Article 35(1) of the 1982 Constitution Act. The Court confirmed that fishing according to an aboriginal right was protected by Article 35. It further held that

¹⁷² See for details Schillhorn in this issue, 443–462. See for the influence of the New Zealand thinking: Hookey, *Milirrpum and the Maoris: The Significance of the Maori Lands Cases outside New Zealand*, *Otago Law Review* 3 (1973), 63–75; Nettheim, *Developing Aboriginal Rights*, *Victoria University of Wellington Law Review* 19 (1989), 403–419.

¹⁷³ *Mabo v. Queensland* (No. 2), High Court, *Australian Law Reports* 107 (1992), 1–170 (see also the previous *Mabo v. Queensland* (No. 1), High Court, *Commonwealth Law Reports* 166 (1988), 186).

¹⁷⁴ *Australian Law Reports* 141 (1997), 129–296.

¹⁷⁵ For details see Benedict in this issue, 405–442.

¹⁷⁶ *Guerrin v. the Queen*, *Supreme Court Reports* 1984, Vol. 2, 335.

¹⁷⁷ Compare e.g. Stokes, *The Land Claims of First Nations in British Columbia*, *Victoria University of Wellington Law Review* 23 (1993), 171–190.

¹⁷⁸ “Constitution Act 1982”, reprinted in: Hook, *Constitutional Law of Canada* (1992), Appendix III; 1335–1368. Compare also Annex, VIII., in this issue.

¹⁷⁹ *R. v. Sparrow*, *Supreme Court Reports* 1, 1990, 1075.

¹⁸⁰ See *supra* note 77.

any government regulation that infringes upon or denies aboriginal rights – like the Fishing Act – demands justification. The constitutional recognition afforded by the provision, therefore, gives a strong measure of control over government conduct and a strong check on legislative power. Article 35 does not promise immunity from government regulation in contemporary society, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under section 35 (1).¹⁸¹

Taking together the leading cases of Australia, Canada and New Zealand, they all refer to the same concept of relationship between the indigenous people and the Government.¹⁸² It can now be held that there is a substantial body of Commonwealth case law pointing to a fiduciary duty or a trust obligation of the Crown in its dealing with indigenous people and to the principle of partnership. All the decisions quoted emphasise that the fiduciary duty is upheld in the honour of the Crown and in keeping with the unique contemporary relationship, grounded in the history and policy between the Crown and the indigenous people.

VIII. Concluding Remarks

The Treaty of Waitangi is thus on the one hand part of a widespread international recognition of the rights of indigenous peoples. On the other hand, it is unique, as the comparison with Australia and Canada has shown. The approach of a comprehensive treaty between an indigenous people and a European Power is without precedent in the history of colonisation. It shows the intent that the new territory should not be acquired by occupation, but by cession in free and informed consent by the indigenous people. The Treaty contains a number of rights, which have just recently been developed in other States and on the international level.

Still the legal position of the Treaty remains unclear in the discussion in New Zealand¹⁸³ and on the international level.¹⁸⁴ Whereas the early history of New

¹⁸¹ See note 179, 410, para. (d).

¹⁸² New Zealand's Courts also have been influenced by the earlier Australian and Canadian Decisions, see the comments in *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General* (note 71), 20–27; *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General* (note 95), 301–322.

¹⁸³ See the debate between Chapman, *The Treaty of Waitangi – Fertile Ground for Judicial (and Academic) Myth-making*, *New Zealand Law Journal* 1991, 228–236, on the one hand, and on the other hand: McHugh, *Constitutional Myth and the Treaty of Waitangi*, *New Zealand Law Journal* 1991, 316–319; Williams, *Chapman is Wrong*, *New Zealand Law Journal* 1991, 373–375. See further Brownlie, *Waitangi: More a Problem than a Solution?*, in: *Treaties and Indigenous Peoples*, in: Brookfield (Ed.) (note 166), 77–100; Brookfield, *Maori Rights and Two Radical Writers: Review and Response*, *New Zealand Law Journal* 1990, 406–420.

¹⁸⁴ See “Study on treaties, agreements and other constructive arrangements between States and indigenous populations”, Second Progress Report of 31.7.1995 in E/CN.4/sub.2/1995/27, para. 176–201.

Zealand has a bad record of adherence to the Treaty, especially in the last ten years, one could witness a serious concern about Maori questions. Essential for this process has been the interplay of government, legislation and jurisprudence.

However, the legal status of the Treaty remains a matter of dispute. Today it can be neither regarded as a "simple nullity", nor as a constitutional document, nor has it been incorporated in municipal law. Nevertheless, there is a trend in recent jurisprudence that it serves as a yardstick for the interpretation of Acts. Thus the Treaty can be considered as a "quasi-judicial" instrument. A mirror for this "quasi-judicial" role are the functions of the main body for the promotion of the Treaty, the Waitangi Tribunal.

In outlook, a constitutional affirmation of the Treaty seems to be desirable. Thus it is regrettable that the chance to incorporate the Treaty in the 1990 Bill of Rights was not used. That way the importance of the Treaty of Waitangi for the interpretation of Acts would have been confirmed, since Article 6 of the Bill of Rights stipulates: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." The structure of the Canadian Constitutional Act might serve as a model for the incorporation of Maori rights in the New Zealand Bill of Rights. A constitutional affirmation of Maori rights finally seems to be necessary considering the possible development of New Zealand from a monarchy to a republic,¹⁸⁵ so that the Crown as a treaty partner would lose its influence.

¹⁸⁵ See Brookfield, *Republican New Zealand: Legal Aspects and Consequences*, *New Zealand Law Review* 1995, 310–327; *id.*, *Revolutions, Referendums and the Treaty*, *New Zealand Law Journal* 1997, 328–322.