THE TREATY, THE 1840 REVOLUTION AND RESPONSIBLE GOVERNMENT

F M BROOKFIELD *

Professor of Law, University of Auckland

I. THE TREATY

Mr Philip Joseph's important book[1] launched yesterday fills a great gap for public lawyers, for law teachers and students and the profession alike. I am using it this afternoon as a launching base for a few remarks about the Treaty of Waitangi and its present day relevance, the revolutionary significance I give the events of 1840, and the impact of the development of responsible government in New Zealand on Treaty and related issues.

In Chapter 3, Mr Joseph draws attention to the great changes in the perceptions of the Treaty that have come about in recent years. It has been elevated by some to the status of founding document, an elevation which he ascribes to "anxiety from broken promises and the quest for national identity".[2] Mr Joseph quotes the remarks of Sir Robin Cooke in his Introduction to the special sesquicentennial issue of the *New Zealand Universities Law Review*, where Sir Robin writes of "constitutionalising the Treaty" and refers to it as a "foundation document" and "an approximation of a fundamental charter".[3] And judicially Sir Robin has been willing to go further than (so far) have other members of the Court of Appeal in tending to constitutionalise the Treaty, as *New Zealand Maori Council v Attorney-General* (1992)[4] shows, in relation to s 9 of the State Owned Enterprises Act 1986 (of which I will say a little more later). Then in the *Huakina* case[5] Chilwell J, in giving an enhanced role to the Treaty in statutory interpretation, referred to the Treaty, as "part of the fabric of New Zealand society" and as "perceivable, whether or not enforceable, in law".

The judicial tendency to constitutionalise the Treaty is reinforced by some academic writing, such as that of Professor Sir Kenneth Keith[6] of the Victoria University of Wellington and Dr Paul McHugh,[7] which rejects the views, long regarded as orthodox, of 19th century jurists such as Sir James Prendergast CJ who, in *Wi Parata v Bishop of Wellington*,[8] denied the capacity of indigenous tribes to cede sovereignty. The Treaty, Sir James said in that case, insofar as it purported to cede sovereignty, was a "simple nullity".[9]

Mr Joseph states a strong case against the revisionists.[10] I would not wish to contend with that case this afternoon; indeed in the end I might accept

* This article is the edited text of a guest lecture given at the University of Canterbury on 2 April 1993.

1 P A Joseph, *Constitutional and Administrative Law in New Zealand* (1993).
2 Ibid at 37.
3 Sir Robin Cooke, "Introduction" (1990) 14 NZULR 1, 1-8.
4 *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (Cooke P diss). See F M Brookfield [1992] NZRL Rev 233.
5 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 206, 210.
6 Sir Kenneth Keith, "The Treaty of Waitangi in the Courts" (1990) 14 NZULR 37; "International Law and New Zealand Municipal Law" in *A G Davis Essays in Law* (1965, ed Northey) 130, 137.
7 P G McHugh, *The Maori Magna Carta* (1991), 176-181.
8 (1872) 3 NZ Jur (NS) 72.
9 Ibid at 78.
10 Joseph, note 1 above, pp 44-46.

it anyway, though only to the extent, possibly, of agreeing that the Treaty has never been an international treaty. I would mention though that in very recently published work Professor Ian Brownlie suggests that it was subsequent doctrinal developments – developments coming after the Treaty – which had the effect of denying it status in international law.[11] But Professor Brownlie in effect points out that the Treaty (or, as I would suggest, the ultimately successful assertions of Imperial power that followed it) brought to an end the international personality of the signatory chiefs.[12] Hence, if it was an international treaty at the time of its execution, it has certainly ceased to be a treaty in force. Only one party to it still exists internationally.

I think there is more to be said about that particular matter but again it will not be possible to say it all this afternoon. To remind you very briefly of what you know already, by article 1 of the English version, the chiefs ceded "sovereignty" to the Crown though the cession was qualified, indeed, encumbered, by the Crown's promises in article 2 to protect the chiefs in the possession of their lands. But in the Maori version it was kawanatanga, governance, that was ceded by the first article; and tino rangatiratanga, "the highest chieftainship", was reserved to the chiefs by the second article. In short, the Maori version cedes less to the Crown and reserves much more to the chiefs, than does the English version. I have no doubt we should take the Maori version, adopting the *contra proferentem* principle that a document is to be construed against the party who drafted and put it forward, that is against the Crown. Certainly on that approach kawanatanga cannot have meant the equivalent of sovereignty; rangatiratanga, the highest chieftainship reserved to the chiefs by article 2, comes closer to that. What then did kawanatanga mean?

First, something about the background to and the etymology of the word. In the Maori translations of the Bible kawana is the translation, indeed really transliteration, of governor. Kawanatanga, then, is governance. Maori educated by the missionaries knew something of the Roman governors in the New Testament, such as Pontius Pilate: figures not without power but not sovereign rulers. Some Maori knew too something of the Governor of New South Wales[13] whom one might describe similarly.

Kawanatanga, governance, being the authority of such a figure, was what was ceded by article 1. What was its extent? Here are three of the views (though there are others).

The distinguished Maori scholar Professor Sir Hugh Kawharu, recently retired Professor of Maori Studies at the University of Auckland, has been quoted by the Waitangi Tribunal as saying this:[14]

> ... [w]hat the chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death.

A more radically limited view is that of my Auckland colleague, Dr Jane Kelsey:[15]

11 I Brownlie (ed Brookfield), *Treaties and Indigenous Peoples* (1992), 8-9.
12 Ibid at 9.
13 See eg C Orange, *The Treaty of Waitangi* (1987), 41.
14 *Finding of the Waitangi Tribunal on the Kaituna Claim* (Wai 4; 1984), 14.
15 J Kelsey, "The Treaty of Waitangi and Maori Independence" (1990) 9th *Commonwealth Law Conference Papers* 249.

The Crown was granted the limited power of kawanatanga – in this context clearly seen by Maori as a subordinate power aimed primarily at achieving law and order amongst Pakeha settlers, thereby protecting Maori rangatiratanga.

Still more radical and definite is the view of Mr Moana Jackson, editor of Te Whakamarama, the Maori Law Bulletin:[16]

So what Maori people did, in Article One, was grant to the Crown the right of kawanatanga over the Crown's own people, over what Maori called 'nga tangata whai muri', that is, those who came to Aotearoa after the Treaty. The Crown could then exercise its kawanatanga over all European settlers, but the authority to control and exercise power over Maori stayed where it had always been, with the iwi.

And indeed Mr Jackson says that no chief had the power to transfer the mana of his tribe, which would necessarily have been included in a ceding of rangatiratanga or of sovereignty.[17]

Curiously, one may note some agreement between Mr Jackson and Prendergast CJ in *Wi Parata v Bishop of Wellington*. The Chief Justice, you will remember, said that the Treaty, insofar as it purported to cede sovereignty, was a "simple nullity" because he thought the chiefs lacked international capacity. For rather different reasons, Mr Jackson's conclusion is similar: the chiefs could not have ceded sovereignty because they had no power to do so.

One should note also how much at odds Mr Jackson is with Professor Kawharu. For the latter the chiefs did cede *part* of their mana and rangatiratanga: in particular the power of life and death. But it is that very power which in his most recent writing Mr Jackson claims as being within the rangatiratanga reserved by the second article and which he impliedly claims back for the tribes, the iwi, today.

Mr Joseph aptly quotes[18] the view of Chief Judge Durie of the Maori Land Court and of the Waitangi Tribunal, that the Treaty:

can mean different things to different people. It lacks the precision of a legal contract and is more in the nature of an agreement to seek arrangements along broad guidelines.

Which of course would leave the Treaty a very vague thing indeed.

II. The 1840 Revolution

Faced with so much confusion and uncertainty I must briefly state my own views; and here I come to my second theme this afternoon and one I have developed in some recent writing,[19] the Revolution of 1840. I see as revolutionary the Crown's assumption of sovereignty in New Zealand, notably in Lieutenant-Governor Hobson's Proclamations of 21 May 1840 and the first acts of effective government that he carried out under his commission. "Revolutionary" in the sense that the customary legal orders of the tribes began to be superseded by the legal order imposed by the Crown through its effective assertion of power. The proclamations were in part, but in part only, supported by the Treaty. Here I am tentatively accepting the revisionist view of the Treaty as at the time a valid treaty in international law; tentatively because I must look at the whole matter again

16 M Jackson, "Maori Law, Pakeha Law and the Treaty of Waitangi" in *Mana Tiriti: The Art of Protest and Partnership* (1991), 14, 19.
17 M Jackson in *Justice, Ethics and New Zealand Society* (1992 ed Oddie and Perrett), 1, 7.
18 Joseph, note 1 above, p 42.
19 F M Brookfield, "Kelsen, the Constitution and the Treaty" (1992) 15 NZULR 163, in which (at 166-167) there are further references.

in the light of Mr Joseph's criticisms of the revisionist view. But whether or not one assumes that the Treaty was a valid one, the British Crown took more than the kawanatanga that was purportedly ceded to it, on any reasonable understanding of that word. It took full sovereignty, unencumbered by any legally enforceable duty, even in terms of the English version of article 2, to protect Maori in the possession of their lands; let alone a legally enforceable duty to protect the chieftainship reserved in the Maori version of that article.

If the Treaty is taken as applicable to the whole of New Zealand, the Treaty should have given rise not to the establishment of a Crown colony on the general model – which is what it did – but to a territory under British rule or protection but with a written constitution under which, alike, the rights reserved to Maori and the rights of Pakeha settlers were delineated and safeguarded in a system of limited government. Of course this is going well beyond the constitutional thinking of the time, as shown generally in the United Kingdom's founding of its Australasian colonies. New Zealand was to be given, by the New Zealand Constitution Act 1852, the same kind of representative government as New South Wales, Victoria and the other Australian colonies where there was of course no Treaty with the indigenous people at all. There was one provision in the 1852 Act which could have protected (at least to some extent) the Maori position. Section 71 could have been used by the Crown to establish partly autonomous regions where modified systems of Maori customary law would exist within the imperial-colonial order. But that was as far as the 1852 Act went in providing for the constitutionally dual New Zealand that, in its Maori version, the Treaty appears to have contemplated. And section 71 was never in fact used.

I qualified what I have said with the words "if the Treaty is taken as applicable to the whole of New Zealand". And of course, at the foundation of the colony, that was a big "if". In his proclamations of May 1840 Hobson declared the Crown's sovereignty over the North Island on the ground of cession and over the South Island and Stewart Island on the ground of discovery. But not all North Island chiefs signed the Treaty – there were notable absentees – and some South Island chiefs did sign it. Notwithstanding all such difficulties as these, Somers J was clearly right in *New Zealand Maori Council v Attorney-General*[20] when he dealt with them thus:

> We were referred to a number of valuable commentaries on this part of the Treaty and to the several determinations of the Waitangi Tribunal. They provide grounds for thinking that there were important differences between the understanding of the signatories as to the true intent and meaning of article 1 of the Treaty. But notwithstanding that feature I am of opinion that the question of sovereignty in New Zealand is not in doubt. On 21 May 1840 Captain Hobson proclaimed the "full sovereignty of the Queen over the whole of the North Island" by virtue of the rights and powers ceded to the Crown by the Treaty of Waitangi, and over the South Island and Stewart Island on the grounds of discovery. These proclamations were approved in London and published in the London Gazette of 2 October 1840. The sovereignty of the Crown was then beyond dispute and the subsequent legislative history of New Zealand clearly evidences that. Sovereignty in New Zealand resides in Parliament.

If he is so clearly right, it is because the British revolution was in the end so completely successful. The Crown took more than the kawanatanga ceded by article 1, a great deal more if Mr Moana Jackson's understanding

20 [1987] 1 NZLR 641, 690.

of the matter is correct; and what it took it took also from tribes whose chiefs had not signed the Treaty. As the historian James Belich has recently shown, areas of de facto Maori autonomy long survived, especially the King Country in the North Island;[21] but the result of the New Zealand wars was in the end the secure establishment of the revolutionary imperial-colonial legal order throughout the country. And before the courts today, whether Maori plead the Treaty as a direct source of rights as in *Kaihau v Inland Revenue Department*[22] or plead exemption from the general criminal law because they belong to iwi not party to it, as in *Kohu v Police*[23] and *Berkett v Tauranga District Court*,[24] the result is the same. Both kinds of plea are rejected because the courts enforce a legal order based on the Crown's assumption of sovereignty in 1840 and not on the Treaty itself. (I leave aside, as irrelevant to the present discussion, the possibility that the basis of the Constitution was changed by a quiet revolution accomplished by the Constitution Act 1986.[25])

Does it help thus to explain the Crown's assumption of sovereignty as revolutionary? I think it does because such an explanation both accords with the political reality of what has happened over the last 153 years and gives the customary Maori legal orders that competed with the imperial-colonial one, and which were superseded by it, a recognition that is historically due to them. I add that the approach has the support of one Australian court, the Queensland Court of Criminal Appeal in *R v Walker*[26] which I would commend to you.

Further, as that case shows, to base the legitimacy of a legal order, if we claim legitimacy for it, simply on the effectiveness of the legal order – on the success of the revolution which established it – may not be enough: legitimacy implies more than effectiveness. Which is why the Treaty and its proper observance by the Crown, notwithstanding all the difficulties, has its present day relevance.

To develop that a little. In *Walker's* case the appellant, an aboriginal of the Nunukel people of Stradbroke Island (off the Queensland coast), argued in an appeal against his conviction for minor property damage that Queensland law did not apply to Stradbroke Island, the British Crown not having lawfully obtained sovereignty over it because the assent of the Nunukel people was not obtained. In rejecting the plea, McPherson J, for the Queensland Court of Criminal Appeal, refers not only to the *efficacy* of the legal system based on the Crown's revolutionary assumption of power but to the *durability* of the system, which has imparted a sufficient legitimacy to it. Compare that case with *Berkett v Tauranga District Court* (mentioned above), involving a like argument over another island, Tuhua-Mayor Island. There Fisher J rejects a very similar plea, which had been based on the defendant's membership of an iwi not party to the Treaty of Waitangi. He does so without McPherson J's valuable jurisprudential explanation in *Walker*. If one were to adapt that explanation to New Zealand, one would invoke durability as well as efficacy (in the way McPherson J does), to impart a sufficient legitimacy (sufficient, that is, for its present functioning) to the New Zealand legal system based on the

21 J Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (1986), 306.
22 [1990] 3 NZLR 344.
23 (1989) 5 CRNZ 194.
24 [1991] 3 NZLR 206.
25 See Brookfield, note 19 above.
26 [1989] 2 Qd R 79. For fuller treatment of what follows, see Brookfield, note 19 above.

revolution begun in 1840. But one would also urge the Treaty as contributing to that legitimacy and, if and when appropriately constitutionalised, as completing it.[27]

III. Impact of Responsible Government

Before I say more about that, however, I turn to the third theme – the impact of responsible government on the issues we are considering. Maori made the Treaty with Queen Victoria whose political capacity was exercised for her by Ministers of her Imperial government. When responsible government was instituted in New Zealand in 1856, responsibility for Maori matters was retained by the Governor personally but it was released finally to local ministers in 1864. To put the matter more exactly, the convention that the Governor must act upon the advice of the colonial ministers commanding a majority in the House of Representatives now extended to Maori affairs. In effect the revolutionary imperial-colonial government changed its nature: it became a colonial government only. This of course fulfilled the aspirations of the colonists; but for Maori it meant that all dealings with the Crown over the Treaty and related issues were now to be conducted with Wellington ministers, not with the Governor acting on behalf of the Crown. Hence the melancholy tale of the Maori deputations to Queen Victoria in 1882 and 1884 and to George V in 1914 and 1924 (the constitutional significance of which I have referred to in some recent writing[28]). In each case, the substantial result was the same: the Maori was referred back to the Crown's government in Wellington. There are some constitutional intricacies here that I do not propose to examine in detail but in essence what happened was this: the British granting first of representative government by the Act of 1852 and, secondly, of responsible government that extended to Maori affairs, meant that the revolution to which Maori were subjected came to be directed by a government in Wellington, instead of by a government in London through its local agent, the Governor of New Zealand.

In relation to the Treaty, the identity of one of the parties was beginning to change: the Crown as an Imperial unity with whom Maori had made the Treaty was to become the Crown in right of New Zealand, as a separate entity. And as a 1982 decision of the English Court of Appeal, *R v Secretary of State, ex parte Indian Association of Alberta*,[29] has shown in the similar Canadian context, the division has come about as a matter of law. When lawyers speak today of the honour of the Crown in Treaty matters, they necessarily mean the Crown in right of New Zealand; not the Crown as an imperial unity with which the Treaty was made but which has now disappeared, or at least reduced to the Crown in right of the United Kingdom, in the dismemberment of the British Empire. One cannot quarrel with that end result; but one can I think say that the Crown, when it was still a powerful Imperial unity in the 1860s, was over-eager to abandon to the colonial government its obligations in Maori matters, including its

27 The New Zealand and Australian cases agree in the established doctrine that the *legal validity* of the acts of state by which sovereignty is acquired cannot be examined by the courts. See *Walker, Berkett* and (now) *Mabo v Queensland* [No 2] (1992) 175 CLR 1. But the issue of legitimacy is in my view not foreclosed by the doctrine.

28 F M Brookfield, "The Monarchy and the Constitution Today: a New Zealand Perspective" [1992] NZLJ 438.

29 [1982] QB 892.

obligations under the Treaty, whatever the nature of those obligations, legal or moral, and whatever their extent.

IV. The Treaty Today and in Light of the Above

To refer to those obligations and the problem of their nature and extent is to take us back to where this lecture began, to develop my first theme, that of the Treaty itself. Even if one accepts the revisionist views of the Treaty that Mr Joseph disputes and regards it as in its time valid in international law, there is still the difficulty I have discussed: that the Crown by revolutionary action took more then the kawanatanga or governance that was purportedly ceded to it. And if that is not accepted and the Treaty is regarded as a valid cession of sovereignty, there is still the problem, one that exists in any event that, in accordance with the orthodox view laid down by the Privy Council in *Te Heu Heu Tukino's* case,[30] the Treaty's provisions are only part of New Zealand law so far as given effect in statute. My own view is that a constitutionalising approach to the Treaty which has been that of Sir Robin Cooke and, in the *Huakina* case, that of Chilwell J, is not only possible but is the one the courts should take. Can I argue for that when I may seem this afternoon to have been showing the Treaty, whatever its legal nature, as superseded by an Imperial – or imperialist – revolution which began in 1840 and of which the devolving of power in Treaty matters on the colonial government was part? I think I can so argue but must leave a fully detailed argument for another time. This afternoon I do no more than state briefly and in part the lines on which I think the matter should be considered.

First, it is the uniqueness of the Treaty that must be stressed – uniqueness admittedly not given to it by the Privy Council in *Te Heu Heu Tukino's* case. The Privy Council in effect regarded the Treaty as valid but applied to it the orthodox rule applicable to any other Treaty. As Cooke P remarked in *New Zealand Maori Council v Attorney-General* (1987):[31] "That judgment represented wholly orthodox legal thinking, at any rate from a 1941 standpoint ...". With respect, I think his Honour was right to hint that a different standpoint today might be justified. The legal status of New Zealand as a separate monarchy, now in effect endorsed by the English Court of Appeal in the *Indian Association of Alberta* case has, I think, come about since 1941. At any rate, it was clearly perceived then. Now that that status is certain, and established in law, the way is clear to see the Treaty as a founding document of what has become the New Zealand nation state. Plainly no other Treaty, whether entered into by the undivided Imperial Crown or the Crown in right of New Zealand, has such a position.

Secondly, there are admittedly certain things against it. That its status in international law may have been doubtful even when it was made; that not all chiefs signed it; and that the Imperial Parliament and, by devolution of revolutionary authority, the New Zealand Parliament, have successfully claimed more than the Treaty purported to cede. But those considerations nevertheless leave the Treaty as a significant expression of indigenous assent to some measure of Crown rule. The honour of the Crown, now the New Zealand Crown, is engaged by it and such a provision as s 9 of the

30 *Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] NZLR 590.

31 [1987] 1 NZLR 641, 667. Joseph, note 1 above, at p 72 aptly refers to this remark as "tantalisingly open".

State Owned Enterprises Act 1986 is no more than a recognition of that. Consider the wording of s 9:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

That implies quite clearly that the Crown *is* in some sense bound by the Treaty. Just in what sense may not be clear but the honour of the Crown is engaged, even though the supremacy of the New Zealand Parliament, which is the result of the revolution begun in 1840, must as things now stand prevail in law over the Treaty.

I think there is a basis here, subject to fuller argument, for giving effect to the Treaty now in some substantial measure as a founding document, to constitutionalise it at least to the extent that its principles (as established by the courts) are to be taken generously into account in the interpretation of all legislation that touches on Treaty matters, and perhaps to extend to the giving of general effect to the Crown's fiduciary duties in such matters.[32]

But, finally, I have to admit that at the moment judicial opinion in the majority views of the Court of Appeal, notably in *Attorney-General v New Zealand Maori Council (No 2)*[33] and *New Zealand Maori Council v Attorney-General*,[34] tends against the constitutionalising approach that has found support in the views of the President of the Court of Appeal and of Chilwell J.

Things may change. We may yet see the problem solved, not by the courts to the limited extent that they can solve it within the overriding supremacy of Parliament, but by the establishing of a written Constitution which, like the Canadian Constitution as patriated in 1982, would entrench the rights of the indigenous people.

In the meantime I think the courts have a proper if limited role in constitutionalising the Treaty which I hope they will resume. And there I must leave the matter for your own thoughts and consideration.

32 Cf Joseph, ibid, p 72.
33 [1991] 2 NZLR 147, 149 (Casey and Hardie Boys JJ).
34 [1992] 2 NZLR 576 (Cooke P dissenting).