

## **“Shifting the goal posts”**

### The politics of the Treaty of Waitangi in New Zealand

Toon VAN MEIJL\*

Since the beginning of colonization in New Zealand it has often been asserted that the country's indigenous Maori people find themselves in a relatively better position than other Fourth World peoples: indigenous minorities which have been eclipsed by a foreign majority on their own lands and which now make up an underdeveloped enclave within nation-states, such as the settlement colonies of the USA, Canada, Australia and New Zealand (VAN MEIJL, 1991). Differences in welfare and socio-economic status between the New Zealand Maori and other indigenous peoples such as Australian Aborigines and North American Indians have often been attributed to the fact that Maori people were offered a treaty to protect their rights.

In 1840 a covenant was signed by representatives of the British Crown and Maori chiefs at Waitangi in the Bay of Islands of the North Island of New Zealand. In what came to be known as the Treaty of Waitangi the Maori chiefs ceded sovereignty to the Queen of the United Kingdom of Great Britain and Ireland in exchange for the guarantee of their proprietary and civic rights. However, the Treaty of Waitangi has never been ratified by the British Crown, let alone entrenched in the New Zealand constitution, while the colonial history of New Zealand is marked by countless violations of the Treaty. The history of the Treaty of Waitangi is not, then, substantially different from the history of treaties between other Fourth World peoples and the colonial powers which engulfed them (HOWARD, 1992). That the Maori were offered a treaty at an early stage in the process of

\* *Centre for Pacific Studies, University of Nijmegen, P.o. Box 9108, 6500 HK Nijmegen, The Netherlands.*

colonization, whereas several Native American groups had to wait until much later, while the Australian Aborigines are, of course, still waiting for their treaty, has not affected the position of the New Zealand Maori to such an extent that they may be singled out as a special case.

In this article I shall therefore argue that the Treaty of Waitangi cannot explain the arguable advantage of the Maori people over other Fourth World minorities, since it has not made a substantial difference for the treatment of Maori people as the subjects of colonization. Instead, I will show that the Maori people were offered a treaty because from the outset they were considered as distinct from other indigenous peoples, more advanced on the evolutionary scale, and therefore a people not to be ignored. Thus, the reasons for the comparatively higher status of the Maori within the New Zealand nation-state are of an endogenous rather than an exogenous nature. If the Maori enjoy a better standard of living than their Australian or North American counterparts, it is not the result of colonial benevolence in New Zealand, but of cultural and historic differences between the Maori and other aboriginal peoples.

The view that minor differences between Fourth World peoples prior to European settlement had some influence on ensuing relations between colonized and colonizer has far-reaching implications for the analysis of ethnic relationships in New Zealand and elsewhere. It creates the epistemological conditions necessary for dismantling the misrepresentation of ethnic relationships in New Zealand and the role of the Treaty of Waitangi. Until recently the Treaty figured prominently in representations of Maori-European relationships by European New Zealanders often priding themselves on excellent 'race relations' in contrast with colonizers of other countries, but in the course of the 1980s it has become increasingly accepted that such a portrayal is unfounded. Although the New Zealand Maori find themselves in a relatively better situation than other Fourth World peoples, this is not the consequence of a different colonial strategy.

I begin with an introduction to the history of the Treaty of Waitangi, with particular reference to the reasons why the Maori were offered a treaty. Subsequently, I provide a brief sketch of historical interpretations of the Treaty to show that the New Zealand government, as representative of the British Crown, has never been consistent about its promises in the Treaty. However, I will focus the analysis on the contemporary debate. Since the mid-1970s the Treaty has become the most contentious issue in the tug-of-war between Maori and Europeans, mainly because various Labour governments made the

'mistake' of awarding the Treaty some legal recognition. This opened up a long hidden reservoir of Maori land claims on the basis of the Treaty. I will document the legal changes in some detail, but the emphasis will be on opportunistic shifts in government policy: after the Labour government of David Lange created the possibility for Maori tribes to seek redress for breaches of the Treaty of Waitangi, the judicial system of New Zealand was bombarded with a vast number of Maori land claims. At the same time, however, following a rigorous monetary policy the New Zealand economy collapsed completely in the course of the 1980s and, as a result, it soon became abundantly clear that the country could never afford to settle even a minimum of Maori claims. Consequently, Lange declared he had to "shift the goal posts" of the political game of reinterpreting the ever controversial Treaty<sup>1</sup>.

## FIRST CONTACTS AND EUROPEAN REPRESENTATIONS

It is commonly accepted that the Dutch discoverer Abel Tasman was the first European to visit New Zealand in 1642. Tasman, however, never set foot ashore as he quickly took to his heels after a skirmish. Evidently no prolonged contact was established with the indigenous population of New Zealand until the British explorer James Cook disembarked in 1769. However, only after the establishment of a penal colony at Port Jackson (Sydney) in Australia in 1788, did Europeans set course for New Zealand on a regular basis.

The first contacts between Europeans and New Zealand 'natives' were characterised by barter. The Maori showed a particular interest in iron tools, blankets, soap and fish hooks, while they, in turn, provided food and craft goods to European visitors. The receptivity of the Maori for European goods contributed to the belief that they differed from other savages, a view which was further reinforced by Maori achievement in agriculture, their sedentary settlement patterns, their stratified social organisation and their art, all matched by a sturdy physique and copper skin colour. As a result, the Maori were placed on the border between savagery and barbarism; they were

<sup>1</sup> David Lange made this statement in a documentary entitled "Trick or Treaty" broadcast on the current affairs programme, *Four Corners*, of the Australian Broadcasting Corporation on March 5th, 1990. At the time Lange had resigned as Prime Minister and was the Attorney General of the New Zealand Labour government led by Geoffrey Palmer.

assumed to be capable of “graduating to civilization” (SORRENSON, 1975: 97)<sup>2</sup>.

At the same time, however, the Maori people were not considered ‘noble savages’, a phrase that was used more often in reference to the Tahitians<sup>3</sup>. From earliest contacts the Maori had earned a reputation for being intelligent though fierce, cannibalistic barbarians, and this qualified European admiration — for this reason, too, the British penal colony was established in Australia instead of New Zealand.

The views of Samuel Marsden, who established the first missionary station at Rangihoua in the Bay of Islands in December 1814, illustrate the ambiguity in European representations of the Maori people. On the one hand, Marsden went to New Zealand to preach the gospel, because he thought that the Maori:

“[...] were cannibals — [...] a savage race, full of superstition, and wholly under the power and influence of the Prince of Darkness” (ELDER, 1932: 60).

On the other hand, however, Marsden held the natives of New Zealand in high regard. He had met some Maori chiefs in Sydney and was invariably impressed with their intelligence and industriousness. His impressions were reaffirmed during his first visit:

“From my first knowledge of these people, I have always considered them the finest and noblest race of heathens known to the civilized world...” (*ibid.*: 79).

Based on these beliefs and the assumption they were of Semitic origin (*ibid.*: 219), Marsden developed a strategy for the conversion of the Maori in which civilization preceded Christianization.

After the missionaries established their first stations, trade was intensified. The number of European visitors increased and so did Maori demand for European goods. From the mid-1830s, therefore, New Zealand Maori were no longer exposed to isolated goods and practices only, but to a whole new type of world, which was rapidly establishing itself on a permanent basis. The population of non-missionary settlers began to outnumber that of the missionaries. Most

<sup>2</sup> For a comparative study of the New Zealand Maori people and the Australian Aborigines, see HOWE (1977). See also KEESING (n. d.).

<sup>3</sup> SMITH (1989: 330-1) has described the conceptualisation of the Maori as ‘romantic’ instead of ‘noble savages’.

European settlers were from the colony of New South Wales, and intended to exploit the growing market economy in New Zealand, beginning in the Bay of Islands, but soon spreading out across the entire country.

## THE COLONIZATION OF NEW ZEALAND

The haphazard intensification of contact sparked off rumours that the French were about to take possession of New Zealand. Some chiefs of northern tribes requested British protection against the “tribe of Marion [du Fresne]” (ADAMS, 1977: 75-6). At the same time, the Governor of New South Wales suggested that a British Resident should be appointed to protect the Europeans and the Maori population from each other. James Busby was appointed to the position and he arrived in New Zealand in May 1833 (ORANGE, 1987: 12-3). Busby was received with respect by the Maori, but the English settlers characterized him as a “man of war without guns” (*ibid.*: 15). He did arrange for 34 chiefs to declare their independence under the designation of the “United Tribes of New Zealand”, but being the sole administrator he lacked the power to govern and could not maintain law and order on the British’ imperial frontier. By 1839 some 1300 British subjects had settled permanently on the North Island, and some 700 on the South Island, although many thousands had passed through (ADAMS, 1977: 26-8).

In the 1830s official British policy towards New Zealand was formulated in the Colonial Office. It was clearly reluctant to intervene, but was obliged by statute to support the legitimate pursuits of the British subjects who had migrated to New Zealand as well as to control their excesses. However, the British authorities also felt morally obliged to protect the Maori people from the potentially disastrous consequences of uncontrolled — British — settlement (*ibid.*: 13). The dramatic effects of colonization on indigenous peoples in other countries had become known in England and in 1837 they had given rise to the foundation of the Aborigines Protection Society, a humanitarian lobby which aspired to tempering unlimited expansion (WARD, 1973: 33). The awareness of a dual obligation of the British Crown proceeded, to some extent, from a difference in ideology between two factions in British society, one justifying, the other condemning the expansion of the British empire (OWENS, 1981: 53). In spite of the ideological conflict some form of British intervention was widely regarded as inevitable. Actions of the mastermind behind the New Zealand Association (later to become Company), Edward Gibbon Wakefield, who aimed at systematically establishing a New

Zealand colony by purchasing massive amounts of land, prompted the Colonial Office to take measures.

On the 29th of January 1840 the first Governor of New Zealand, William Hobson, landed at the Bay of Islands. He had been instructed to secure sovereignty for Britain, preferably by means of a treaty with the Maori people. In the name of Queen Victoria, Governor Hobson invited Maori chiefs to gather at Waitangi, where he presented them with a treaty which was signed by more than forty of them. After a tour around the North Island and even some parts of the South Island it was eventually signed by more than 530 chiefs of various tribes (ORANGE, 1987: 259-60). Referring to the signatories of what became known as the Treaty of Waitangi, Hobson proclaimed British sovereignty over the North Island on the 21th of May 1840 (*ibid.*: 60). The British Queen's sovereignty was proclaimed over the South Island in June of the same year (*ibid.*: 80).

The debate on the Treaty of Waitangi is voluminous and immensely complicated<sup>4</sup>. There are at least four different versions of the Treaty, with significant differences between English and Maori translations<sup>5</sup>. Most Maori chiefs signed a Maori version of the Treaty, although 39 Waikato chiefs signed an English version in April 1840. It seems certain that each of the two signing parties had different understandings of key aspects.

The Treaty is made up of three articles. In the First Article the English version states that the chiefs ceded "all the rights and powers of Sovereignty" over their respective territories, but the Maori version does not use the nearest equivalent to sovereignty, *i.e. mana*, but *kawanatanga*, a transliteration of 'governorship' improvised by the missionaries, which to the Maori might not have meant more than the coming of the first governor<sup>6</sup>.

In the Second Article the English version guaranteed the Maori "the full exclusive and undisturbed possession of their Lands and Estates

<sup>4</sup> ORANGE (1987) provides a comprehensive historical account, whereas the essays in KAWHARU (ed.) (1989) offer a scholarly insight into contemporary issues. A useful introduction to the political debate may be found in the report of the Royal Commission on Social Policy (1988).

<sup>5</sup> At least since the Treaty of Waitangi Act of 1975 came into law, the discussion about the translation of the Treaty of Waitangi has been restricted to two versions, one in Maori and one in English.

<sup>6</sup> ORANGE (1987: 42) argues that the translation of sovereignty by *mana* would not have made much difference, since in the second article they were confirmed in their *rangatiratanga*, which in some sense was equivalent to a chief's *mana*.

Forests Fisheries and other properties". The Maori version was less specific yet all-embracing as it confirmed to the Maori, according to KAWHARU's (ed., 1989: 319-20) translation<sup>7</sup>, "the unqualified exercise<sup>8</sup> of their chieftainship over their lands over their villages and over their treasures<sup>9</sup> all". There is further confusion in the Second Article as to whether the provision, in the Maori version, that chiefs "will give to the Queen the sale and purchase of those parts land is willing [to sell] the person owning the land" (KAWHARU ed., 1989: 320)<sup>10</sup> has the same implications as the phrase "yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate"<sup>11</sup>.

The Third Article, conferring "royal protection (to the Natives of New Zealand)" and imparting to them "all the Rights and Privileges of British Subjects", appears less contentious, but was politically compromised by the ultimate goal of British colonization, *i.e.* the amalgamation of the Maori people. Racial equality was only allowed to happen on British terms (ADAMS, 1977: 14-5). Thus the signing of the Treaty marks the formal notification of the first steps towards comprehensive European control of the Maori and New Zealand society.

Dissension among the Maori population about European settlement surfaced very clearly during the debate held at Waitangi and thereafter. Potatoes and guns symbolised irrevocable changes to some chiefs, particularly those from the coastal tribes in Northland. They valued the prospect of increased trade, and they signed the Treaty, among other things, because of their passion for material benefits and their desire for inter-tribal peace brought about by Christianity (ORANGE, 1987: 58). The Nga Puhi chief Tamati Waka Nene even asked Hobson

<sup>7</sup> ... *te tino rangatiratanga o o wenua o ratou kainga me o ratou taonga katoa...*

<sup>8</sup> KAWHARU (ed.) (1989: 319) adds a footnote to explain that the phrase 'unqualified exercise' "would emphasize to a chief the Queen's intention to give them complete control according to *their* customs", since in Maori the word *tino* has the connotation of 'quintessential'.

<sup>9</sup> KAWHARU (ed.) (1989: 320) adds that in the Maori language *taonga* referred to both material and non-material dimensions of a tribal group's estate. That the notion of *taonga* included physical possessions as well as social and cultural properties, was made clear in the Waitangi Tribunal's decision that, within the context of the Treaty of Waitangi, language is to be regarded as a treasure (*cf.* MATSON, 1991; see also SORRENSEN, 1987: 185-7 — a revised version of Sorrensen's paper was published in KAWHARU ed., 1989: 158-78).

<sup>10</sup> ... *ka tuku ki te Kuini te hokonga o eru wahi wenua e pai ai te tangata nona te Wenua...*

<sup>11</sup> For a more elaborate account of the different interpretations of this clause, see KAWHARU (1991).

to stay as a “father, a judge, a peacemaker” (*ibid.*: 50). Some of the great interior chiefs, on the other hand, such as Te Heuheu of Taupo and Te Wherowhero of Waikato, declined the Governor’s invitation to sign the Treaty. The reasons for their refusal can only be speculated about<sup>12</sup>. Perhaps they valued their own past more than an uncertain — European — future, as they argued they did not need foreign clothes and food when from time immemorial fern roots and flax mats had served their ancestors. Some also protested that too much land had already been sold to the missionaries and traders. Indeed, ownership of land would be the most contentious issue during the initial stage of colonization, degenerating into tense hostilities between Maori and Europeans, and ultimately leading to war.

## THE STRUGGLE FOR LAND

The year 1840, when the Treaty of Waitangi was signed and British sovereignty proclaimed, opens up a new period in New Zealand history. However, the ensuing transformation took place gradually. New Zealand historians have often argued that in 1840 Maori society “was shaken and even tottering” on its foundation (SINCLAIR, 1961: 17). Recently it has been contended that changes in the early contact history of New Zealand should not be exaggerated (BELICH, 1986: 20). I would argue, instead, that radical changes were taking place in Maori society, but that the effects of changes as a result of colonization were not as disastrous as often assumed, since Maori society was initially quite capable of dealing with changes within the framework of traditional tribal patterns. Maori tribes retained complete control of the political and economic situation throughout New Zealand for at least 15 years after the signing of the Treaty of Waitangi. While ‘legal’ or ‘nominal’ sovereignty had been transferred to the British Crown, ‘political’ or ‘substantive’<sup>13</sup> sovereignty remained in the hands of the Maori until the New Zealand Wars of the 1860s. The best illustration of this view is commercial agriculture.

<sup>12</sup> The Tainui people often argue that their chief Te Wherowhero had not signed the Treaty, because he had not seen the point in repeating what he had made clear with the signing of the Declaration of Independence in 1835, but ORANGE (1987: 22) implies that Te Wherowhero did not sign the 1835 declaration either. Moreover, in 1847 Te Wherowhero requested the Queen’s protection on the basis of the Treaty of Waitangi; see below (*cf.* footnote no. 16).

<sup>13</sup> The distinction between ‘legal’ and ‘political’ sovereignty, or ‘nominal’ and ‘substantive’ sovereignty is derived from MCHUGH (1989: 33-4) and BELICH (1986: 21) respectively.



In the early 1840s Maori tribes were growing crops, particularly wheat, for the commercial market. Most wheat was ground in water mills which they constructed when steel handmills no longer sufficed for the quantities they were growing. Coasting vessels carried wheat, flour and other products to the capital city of Auckland and overseas, and returned with the much needed iron and steel tools, clothes and other European goods. Until the mid-1850s Maori tribes produced the bulk of the food crops supplied on the domestic market and half of those which were exported to Pōihakēna or Port Jackson, the contemporary name for Sydney, Australia (VAN MEIJL, 1990: 177-83).

At least until the late 1840s the British had a vested interest in Maori achievements, since they were entirely dependent on their food supply. However, dependency on Maori agriculture was not favoured by all settlers, most of whom had no place reserved for the Maori as competitor in their vision of the future on the imperial frontier. Most settlers in the 1840s were victims of the romance advertised by the New Zealand Company, that it was possible to make a quick fortune through the rise in the value of the land following colonization, and subsequently return to England (MILLER, 1958: 118-28). Many settlers, however, faced a lack of land that could be utilised productively.

Initially many Maori people had been willing to sell vast tracts of land to European settlers. There was plenty of land lying fallow and many Maori communities were eager for immigrant settlers to reside in their midst as they wished to procure the wealth they brought with them. However, due to the provision in the second article of the Treaty of Waitangi reserving the right of pre-emption to the Crown, the Maori were no longer allowed to sell land privately. The common import of pre-emption involves a first offer, but in New Zealand the Crown claimed a monopoly: only the Governor was entitled to purchase land in the name of the British Queen. This arrangement kept down the price of land which in open competition among the settlers had skyrocketed. More importantly, the Colonial Government often resold land purchased from the Maori to the increasing number of European settlers at high profits. This surreptitious transfer of capital to Auckland involving a loss of income for the Maori was compounded by the imposition of custom duties. As a result, Maori tribes became more reluctant to sell land.

Maori resistance to land deals was reinforced by a growing awareness that the sale of land involved parting with the land permanently. It is debatable whether before 1840 Maori people had an inkling that European settlers were buying land on the understanding they would

acquire permanent title, but after the signing of the Treaty of Waitangi they soon realised that European settlers believed they had obtained the land permanently. In the course of the 1840s, therefore, Maori interest in selling land was declining. Many Maori tribes were able to forgo profitable land deals because their success in commercial agriculture made them less dependent on European settlement.

The problem of Maori resistance to the sale of land became acute when there was a slump in the produce market in 1856. Maori communities then had to compete more often with European farmers. Moreover, the latter responded to the economic downturn by switching to pastoralism, which was more land extensive (SINCLAIR, 1952: 128; SORRENSON, 1981: 172). Economically it made up for the losses, but politically it compounded the problems caused by the recession, because it increased the pressure on the land. Thus, the competition between Maori and Europeans shifted from the produce of the land, to land as a scarce commodity.

In 1854 the government set up a Land Purchase Department to meet the increasing demand of settlers for land. At the same time more and more Maori protested against the sale of land, which caused various tribes to renounce inter-tribal rivalries and discuss their common interests. To protect themselves from European interference and to make a ban on land sales effective, a more coherent, political organisation was required. Maori tribes united into inter-tribal councils to map out a common strategy in order not to lose control. In the first instance the meetings of what became known as the movement of *kotahitanga* or 'oneness', were geared to put a *tapu* on land sales within certain boundaries, but soon the idea of a Maori king occurred. The motivation behind a king movement to unite Maori tribes throughout New Zealand, was intensified when the economic depression hit the country in 1856. The governmental Land Purchase Officers then spread the rumour that an anti-land-selling league had been formed by the Maori, but the term 'league' implies a greater degree of agreement and organisation than existed at the time<sup>14</sup>.

In 1858 the economic and social rivalry between European settlers and the Maori led to the establishment of the Maori King Movement. Chiefs from various tribes moved to elect a King and unite under his authority into a political confederation against the increasing pressure to sell land to British settlers. The crowning of the Waikato chief

<sup>14</sup> SINCLAIR (1950) has cogently argued that the notion of a Maori land league was a European construct justifying increased political pressure on the Maori to dispose of their land.

Potatau Te Wherowhero as first Maori King intensified the conflict since the desire of settlers to acquire the apparently fertile lands in the lush valleys of the Waikato River, from which the local tribes produced most of the country's food supply, conflicted with Potatau's aim of withholding land from the market. Potatau, thus, provided a focus for Maori discontent regarding the sale of land. The King Movement was, consequently, interpreted as an alliance to stop the progress of colonial settlement and the expansion of European society. As a result, war finally broke out in 1860. Following the wars one and a quarter million acres of land were confiscated.

## RE-INTERPRETING THE TREATY

Some twenty years after the Treaty had been signed, most Maori realised the ultimate consequences of the covenant with the British Crown. Irrespective of the Crown's pledges and promises, the Treaty had engendered an uncontrollable increase in the number of European settlers and a large-scale dispossession of Maori land. The signing of the Treaty of Waitangi had started off a rapid process through which the Maori had finally lost control of their society in all its dimensions.

Various tribes interpreted the role of the Treaty in their subordination to a majority of European immigrants in various ways. Maori strategies to retain control of the political and economic situation ranged from attempts to have the Treaty honoured to attempts to contest the validity of the Treaty because a particular tribe had refused to sign. To complicate the political spectrum: a tribe's view of the Treaty in 1865 did not necessarily concur with the tribe's initial stance when the Treaty was signed.

As early as 1842 some tribes endeavoured to achieve an exceptional status in the process of colonization because they had refrained from signing the Treaty. These tribes argued that the rules of the Colonial Government were not binding upon them because the Crown had never obtained their consent to declaring sovereignty. They confronted the Attorney General Swainson with an interesting problem: since not all tribes had signed the Treaty, did this imply that the Crown's sovereignty was incomplete and did not concern those tribes who had not signed? Did the lack of many chiefs' signatures, indeed, mean that some, if not most, tribes remained subject to customary law? This argument, however, was invalidated promptly as the Colonial Office stated that the sovereignty it had declared was 'exhaustive and

indivisible' (Paul McHugh, personal communication)<sup>15</sup>. If the argument of divisive sovereignty ever lingered after this inexorable statement, it was definitely defeated with the confiscations following the wars of the 1860s.

Contrary to those tribes endeavouring to abate the Treaty, other tribes tried to have the Treaty recognised by the Crown. These included tribes who had not signed the Treaty, but who realised that the sovereignty which the Crown had proclaimed was irrevocable. Thus, the paramount chief of the Waikato tribe, Potatau Te Whero-where, the future Maori King who had never signed the Treaty, argued for justice on the basis of the Treaty from as early as 1847. Together with four other major Waikato chiefs, Potatau presented Governor Grey with a letter to the Queen expressing their anxiety about the rumours that "Queens's ministers are talking of taking away the land of the native without cause"<sup>16</sup>. The Queen wrote back and assured the chiefs that the Treaty would always "be most scrupulously and religiously observed"<sup>17</sup>. The monarchal Maori tribes would soon find out, however, that the Crown considered the interests of the increasing number of settlers more important than its pledges to the Maori in the Treaty.

Conflicts about the interpretation of the Treaty and its consequences became most tense when several Maori leaders moved to establish inter-tribal unity in the form of a pan-tribal Maori kingdom. The governor was instructed to persuade the Maori chiefs to give up their determination to elect a King since the Colonial Office could not accept a semi-autonomous Maori movement because all Maori were considered to have ceded sovereignty by signing the Treaty of Waitangi. The real objection to the Maori King Movement, however, was that it compounded the government's problems to create access to Maori land since Potatau had been granted the authority to withhold land from the market and the right to forbid sales. As a result, the increasing number of European colonists advocating for tribal bastions to be thrown open for settlement, gained the sympathy of the government, which ultimately decided to wage war against the Maori in order to establish 'substantive' sovereignty by force.

<sup>15</sup> Cf. MCHUGH (1989: 41) and ORANGE (1987: 110-2).

<sup>16</sup> Great Britain Parliament, *British Parliamentary Papers*, 1847-48 (1002) XLIII, 9-17, 8-11-1847, p. 16.

<sup>17</sup> Great Britain Parliament, *British Parliamentary Papers*, 1847-48 (1002) XLIII, 17-30, 3-5-1848, p. 144.

## THE TREATY AS A 'NULLITY'

After the wars the government consolidated its position on the confiscated lands. Military settlements were established to deter further Maori hostilities and an ambitious Immigration Scheme was launched to recruit immigrants for permanent settlement (STOKES, 1972). Outside the confiscated areas the sale of land was facilitated by the setting up of the Native Land Court in 1865. Its aim was, firstly, to determine traditional land titles on a sub-tribal basis, and, secondly, to individualise the titles by allotting individual shares to a maximum of ten owners per block of land (KAWHARU, 1977; SMITH, 1960). As a result, many Maori people could not be offered a share and were dispossessed of their tribal lands<sup>18</sup>.

It goes without saying that the New Zealand Wars and their aftermath were in violation of the Treaty which guaranteed Maori proprietary rights. In order to settle their grievances over breaches of the Treaty, therefore, Maori people massively had recourse to the law in the 1870s. Their experiences in court, however, demonstrated that the Treaty offered them no protection. A leading case in 1877 involved Wi Parata, the Western Maori Representative in Parliament, who in the Supreme Court requested that land issued to Bishop Selwyn of Wellington be returned to his tribe Ngati Toa. In his judgement Chief Judge James Prendergast discussed "the pact known as the 'Treaty of Waitangi'", which he regarded "as a simple nullity" for:

"(n)o body politic existed capable of making cession of sovereignty, nor could the thing itself exist. [...] The title of the Crown to the country was acquired, *jure gentium*, by discovery and priority of occupation, as a territory inhabited only by savages<sup>19</sup>."

This ruling dismissed all Maori rights recognized by the Treaty and set a precedent for all legal cases with which Maori attempted to secure redress through the courts until 1987. For 110 years the Treaty of Waitangi was consistently ignored by the British Crown and its legal representative, the New Zealand government, in spite of an unceasing Maori quest for acknowledgement of the Treaty.

<sup>18</sup> The ones who objected to the proceedings of the Court were even further off, since they often had to sell their land in order to pay legal expenses and ended up empty handed (SORRENSON, 1956).

<sup>19</sup> *Wi Parata v. The Bishop of Wellington and the Attorney General* (1877) 3 N.Z. Jur (N.S.) SC 72.

Two major attempts were undertaken to have the Treaty recognised. In 1884 the second Maori King, Taawhiao, led a deputation to England with a petition to the British Queen, because he believed she had an obligation under the terms of the Treaty of Waitangi<sup>20</sup>. He asked the Queen to return all the confiscated lands and to approve an independent Maori government, although he qualified the latter request by explaining its purpose:

“I am called a king, not for the purpose of separation, but in order that the natives might be united under one race, ever acknowledging the supremacy of the Queen, and claiming her protection” (quoted in JONES, 1968: 137-8).

The petitioners, however, did not even get to see the Queen, since, with the granting of governmental responsibility to the colony, all Maori matters were to be dealt with by the New Zealand administration. The regal Maori delegation was referred to the New Zealand Government to redress their grievances, but Taawhiao realised he was returning empty-handed<sup>21</sup>.

In 1912 the fourth Maori King, Te Rata, also decided to visit the British monarch, then King George V, with a petition about the confiscations being in violation of the Treaty of Waitangi. Te Rata was the first Maori King to be granted an audience with a reigning British monarch. He presented cloaks and Maori weapons to King George and Queen Mary to convey his submission and to pledge his loyalty to the British Crown, but no breakthrough was reached (KING, 1977: 75). The royal Maori delegation was again referred to the New Zealand Government, which invariably appealed to the 1877 judgement of Prendergast who had declared the Treaty a ‘nullity’. Thus, the petitions of the Maori monarchy to the British Crown merely constitute a footnote to the colonial history of New Zealand, in which the Treaty of Waitangi hardly played a role of significance. Not until the late 1960s did Maori movements for the recognition of the Treaty achieve some success.

## TOWARDS RECOGNITION OF THE TREATY

In 1960 the New Zealand government passed the Waitangi Day Act to declare the 6th of February a “national day of thanksgiving in

<sup>20</sup> About Taawhiao’s appeal to England, see ORANGE (1987: 211-6).

<sup>21</sup> Oral tradition has it that in his reply to the question about what he had achieved, he punned on the original meaning of *maori* as ‘usual’, ‘ordinary’ or ‘normal’: *I haere Maaori atu, i hoki Maaori mai*; “I went as a Maori, and I came back as a Maori”.

commemoration of the signing” of the Treaty of Waitangi (ORANGE, 1987: 240). While this symbolic gesture pleased the Maori it did not meet their long-standing demand for the historic covenant to be entrenched in the constitution. As a result of the increasing politicization of Maori people in the 1960s their continuing dissatisfaction eventually led to protest activities in the early 1970s. An action group called Ngaa Tamatoa sought more than symbolic acknowledgement of the Treaty, and claimed that either the Treaty should be ratified, or that the annual Waitangi celebrations should be declared a ‘day of mourning’ (WALKER, 1990: 211). The government noted the rising tide of Maori anger and sought advice from the New Zealand Maori Council.

In response to a request from the Maori Council the government moved to make Waitangi Day a public holiday in 1973. At the same time, however, it was patriotically renamed New Zealand Day. Three years later, however, the Waitangi Day Act reinstated the old name in a gesture honouring the traditional significance of the Treaty of Waitangi for the Maori people (ORANGE, 1987: 246).

In 1975 the government also responded with the Treaty of Waitangi Act which established the Waitangi Tribunal<sup>22</sup>. Section 6 of the act allowed any Maori to submit a claim to the Tribunal on grounds of being “prejudicially affected” by any policy or practice of the Crown which was “inconsistent with the principles of the Treaty”. The Waitangi Tribunal was:

“to make recommendations on claims relating to the practical application of the principles of the Treaty and... to determine... whether certain matters are inconsistent with those principles.”

In the preamble of the act it was recognized for the first time in New Zealand history that the English and Maori versions of the Treaty differ from one another. The Tribunal was to take both English and Maori texts into consideration. The most important limitation of the act was that “anything done or omitted before the commencement of (the) Act” was excluded from the Tribunal’s jurisdiction. Nor had the Tribunal itself any power to redress grievances. It was only authorized to make recommendations to the government “to compensate for or remove the prejudice”.

<sup>22</sup> For an introduction to the Waitangi Tribunal and a review of some of the cases it has dealt with so far, see TEMM (1990) and also WALKER (1991).

From the moment the Bill was introduced it was criticized as having no teeth, but in 1983 it was able to vindicate Maori faith in the moral force of the Treaty. In response to a claim by the Te Ati Awa tribe against the discharge of sewage and industrial waste from the proposed Motunui Syngas plant into their traditional fishing areas and reefs, the Tribunal recommended that the Treaty of Waitangi obliged the Crown to protect the Maori people from the consequences of the settlement and development of the land (see LEVINE, 1987: 429-33 and SORRENSEN, 1987: 177-9; 1989: 161-4).

In 1984 various Tainui sub-tribes living on the shores of Manukau Harbour, Te Puaha ki Manuka, lodged a claim with the Waitangi Tribunal about the despoliation of Manukau Harbour and the loss of certain surrounding lands. The immediate cause for the claim was the proposal by New Zealand Steel to take water from the Waikato River for a slurry pipeline and to discharge the effluent into the Manukau, but underlying the claim were the long-standing grievances ensuing from the confiscations of the tribe's lands in 1864.

In its report on the Manukau claim, the Tribunal mentioned that it was the most wide-ranging claim it had so far considered (WAITANGI TRIBUNAL, 1985: 9). For the first time the Tribunal even decided to examine events which had occurred before the Treaty of Waitangi Act had passed into law, but which it considered essential in order to comprehend the historical background to the claim. Strictly speaking the investigation of the history of the claim before 1975 was beyond the brief of the Waitangi Tribunal, but it regarded the land confiscations of 1863 as the main origin of the grievances behind the claim of the Manukau tribes. The Waitangi Tribunal concluded that it had no longer to be proved that "the Tainui people of the Waikato... were attacked by British troops in direct violation of Article II of the Treaty of Waitangi" (*ibid.*: 29). The Waitangi Tribunal strongly recommended that the government stop denying the consequences of the confiscations.

In the meantime Maori protest activity during the annual celebrations at Waitangi increased. During the days leading up to the 6th of February 1984 more than 3,000 Maori, young and old, representing tribes from across the country, marched in protest to Waitangi in what was called Te Hīkoi ("The March"). They demanded that the Treaty celebrations be discontinued until such time as the obligations placed on the Crown by the Treaty were fulfilled (TE MARU, 1984).

Following the peaceful march to Waitangi a national gathering was organised in September of the same year. The purpose of the gathering was to bring together collective opinions from Maori people



about the Treaty of Waitangi (BLANK *et al.* eds, 1985). One of the resolutions of the conference induced a radical change in the policy of the newly elected Labour government. It recommended giving the Waitangi Tribunal the retrospective jurisdiction to hear and examine Maori grievances which had occurred from the date when the Treaty was signed in 1840.

To show its willingness to improve Maori-European relations in New Zealand, the newly elected Labour government led by the charismatic David Lange amended the Treaty of Waitangi Act in 1985. It expanded the Tribunal from three to seven members, at least four of whom must be Maori, giving them a built-in majority. The most important clause of the amendment, however, provided for the extension of the Tribunal's jurisdiction back from 1975 to 6 February 1840 when the Treaty was signed. It goes without saying that this clause opened up an important avenue for Maori people to seek redress for past grievances, although the Tribunal can still do no more than make recommendations to the Crown, which remains the only authority to make compensation for or to redress grievances.

## THE FIRST LEGAL VICTORY

At the moment there are approximately 180 claims before the Waitangi Tribunal (*New Zealand Herald* 14-3-1989). Most claims in their present form were sparked off by the government's move to transfer lands held in Crown ownership to semi-private State Owned Enterprises<sup>23</sup>. Clause 9 of the State Owned Enterprises Act 1986 prohibited the Crown from acting "in a manner that is inconsistent with the principles of the Treaty of Waitangi", but several tribal groups expressed their concern that the Act itself could prejudice their possibilities of resolving long-standing grievances such as confiscations. After all, Maori tribes could hope to re-acquire ownership of only those assets which were still held by the Crown.

In March 1987 the New Zealand Maori Council filed an injunction to stop the State Owned Enterprises Act from coming into effect as of 1 April 1987. On condition that the injunction was withdrawn, in order to allow the corporatisation policy to proceed, the Attorney General gave an undertaking not to transfer any assets to State

<sup>23</sup> Although full voting rights for private shareholders were deliberately shunned, the State Owned Enterprises Act provided for private ownership of non-voting equity bonds.

Owned Enterprises until Maori tribes had had sufficient notice of the proposed transfers to enable them to file proceedings in the High Court. Court proceedings eventually resulted in a judgement by the Court of Appeal which on June 29th, 1987, ruled that the transfer of assets to State Owned Enterprises would be unlawful without establishing any system to consider whether the transfer of particular assets would be inconsistent with the principles of the Treaty of Waitangi. It was the first time in New Zealand history that the legality of the Treaty was recognized.

This historic judgement aroused high expectations among the Maori, who were led to believe that after nearly 150 years justice would finally triumph. The New Zealand administration, on the other hand, was most unhappy with the decision of the Court of Appeal, which forced the government to reach a compromise. To meet its legal obligations the government reluctantly passed the Treaty of Waitangi (State Enterprises) Act 1988 which empowered the Waitangi Tribunal to make binding recommendations for the return to Maori ownership of any land transferred to State Enterprises under the State Owned Enterprises Act 1986. At the same time, however, the government argued that, given the severe economic recession, the country could never afford to meet even a minimum of Maori expectations. In the position of Attorney General of the New Zealand government, David Lange later admitted the government had to "shift the goal posts" in the search for a solution to Maori claims.

While losing many legal disputes in the courts<sup>24</sup>, the government initiated a review of its policy concerning Maori claims and promulgated that the power of deciding how to address Treaty of Waitangi issues lies with the Crown rather than the courts. Accordingly, the government established a Crown Task Force made up of Cabinet Ministers, which was responsible for developing the Crown's position in respect of Waitangi Tribunal hearings and all court proceedings relating to Maori issues in general, as well as for preparing direct negotiations with tribes for settlement of grievances (*New Zealand Herald* 15-12-1989). This was a radical reversion in the government's position; previously it had consistently argued that the final rulings were for the courts to decide. Maori tribal groups had been conscious all along that any legal victory would have to be endorsed politically by the government.

<sup>24</sup> For a detailed account of most conflicts in which the Labour Government was involved between 1984 and 1989, see KELSEY (1990).

Obviously, the New Zealand government did not know how to deal with the issue of Maori grievances. For that reason, too, it remained reluctant to incite the Crown Task Force to action and enter into direct negotiations with tribes seeking a settlement. The main reason for the government's tardiness on the issue was clearly that it had not envisaged the radical potential of Maori claims when it granted the Waitangi Tribunal the jurisdiction to investigate grievances dating back to 1840.

## RECENT DEVELOPMENTS<sup>25</sup>

In the meantime, in October 1990 elections were held in New Zealand<sup>26</sup>. The Labour Party was decisively defeated by the National Party, partly because of the European backlash triggered off by Labour's handling of Maori issues, which had resulted in a flood of Maori claims. In the 1980s, therefore, New Zealand's popular myth of racial harmony was abruptly dismantled. Due to legal changes introduced by the first Labour Government of David Lange, the largely European population of New Zealand was obliged to face the facts of colonial history and the consistent violation of the Treaty of Waitangi.

Unlike the Labour Party, the National Party attempted to perpetuate colonial sentiments by arguing that all was still roses on the ethnic front in New Zealand. It had never shown any sympathy towards the Maori cause and over the past decade it has continued to ignore Maori grievances. In effect, the electoral victory of the National Party has set Maori tribal claims back to square one.

At present most Maori tribes are still waiting for the new National Party Government to formulate its policies in respect to Maori claims, but they are beginning to realise that their case will no longer be dealt with in direct negotiations with the government. Most cases will probably have to be heard by the Waitangi Tribunal. Given the number of claims before the Waitangi Tribunal, however, this may not occur for a number of years.

<sup>25</sup> For a useful, concise overview of developments regarding the Treaty of Waitangi since 1975, see also WARD (1991).

<sup>26</sup> The National Party of New Zealand was re-elected into the office of government in November 1993.

The Waitangi Tribunal has put out a number of significant reports<sup>27</sup>, but it has yet to finalise the first major claim. Since 1988 the Waitangi Tribunal has been dealing with the claim by the Ngai Tahu tribe covering large parts of the South Island. The Tribunal has been expected to release its report on this case for some time. It will be interesting to see how it will deal with this claim, because it is widely expected to set a precedent for other claims. However, even if the Tribunal finds the claim is justified, it is unrealistic to expect that the Tribunal will recommend the return of all land to Ngai Tahu ownership. Not only because of the severe downturn in the New Zealand economy: the country could not possibly afford to compensate for all the losses Maori tribes have accumulated over time.

## CONCLUDING REMARKS

In spite of the controversy surrounding the Treaty of Waitangi, the historic covenant between Maori chiefs and the British Crown, presently represented by the New Zealand government, is widely considered the founding charter, if not the Magna Charta, of modern New Zealand society. Consequently, the 150th anniversary of the signing of the Treaty of Waitangi was celebrated as the country's sesquicentenary in 1990. When taking stock at the end of the year, however, the Maori community expressed its mixed feelings with respect to the Treaty. On the one hand, it felt liberated, and relieved, that the impact of the Treaty was now stronger than ever before. On the other hand, Maori people were intensely frustrated that their expectations, which had reached a high in 1987, would probably never be met.

Maori ambivalence results directly from a contradiction in the policy of the Labour Party which held the office of government from 1984 until 1990. In 1984 the newly elected Labour Government opened up the avenue for Maori people to seek redress of violations of the Treaty, while at the same time it introduced a rigorous monetary

<sup>27</sup> In 1987 the Waitangi Tribunal (Wai-9) released its finding on the claim by the Ngaati Whatua to the Orakei Block on Bastion Point in Auckland, and in 1988 the government accepted all of the Tribunal's recommendations with a few minor qualifications. In 1988 the Waitangi Tribunal (Wai-22) released its report on the fisheries claim of the Muriwhenua tribes in the northern tip of the North Island, but it refrained from making any recommendations since a joint Maori and Crown working party had been set up to resolve a complicated dispute about coastal and inland fisheries. However, the Working Party on Maori Fisheries was unable to reach agreement and the conflict is still far from decided.

policy to bring the country's finances into order and check rampant inflation. The latter policy was implemented at breathtaking speed and led the country almost to bankruptcy. It made it impossible for the New Zealand state to deliver its promises to the Maori population. As a result, it can be argued that the government's and the Maori's perspective on the Treaty of Waitangi have moved in opposite directions.

In the early 1980s many Maori people still claimed the Treaty was a 'fraud'. With the exception of some northern tribes, who had all signed the Treaty and, consequently, never lost their faith in its political and moral force, most Maori tribes, particularly the ones who had never signed the Treaty, saw it as a 'nullity' and argued for a new constitution to protect their proprietary and civic rights. Towards the end of the 1980s, however, there was widespread agreement among the Maori, including the tribes who had never signed the Treaty, that the historic covenant ought to be recognised as according to the victories in the courts. The Maori community now almost unanimously demanded the legal judgements to be acted upon.

This shift in Maori public opinion as a result of several trailblazing court cases is directly opposed to a shift in government views. Whereas in 1984 the Labour Government pledged to recognise the Treaty, it recoiled from its commitment to the Treaty towards the end of the 1980s. As New Zealand could not possibly afford to settle all Maori grievances which had re-emerged following the backdating of the jurisdiction of the Waitangi Tribunal, the government "shifted the goal posts" in the game of interpreting the Treaty.

In conclusion, it can be noted that changing interpretations of the Treaty of Waitangi vary according to cyclical movements of the New Zealand economy. It can be argued that the Maori were initially offered a Treaty because of British dependence on the Maori economy. After the imperial frontier had been extended by means of the Treaty, however, the increasing number of British settlers arriving in New Zealand saw their colonial dreams frustrated by the Maori population which was thriving on the growing economy. Their problems were compounded by a recession in the mid-1850s, after which they increased the pressure on the Colonial Government to embark on a Pax New Zealandia. In the New Zealand Wars between 1860 and 1863 the government, then, acquired control of the economic situation in the New Zealand colony. After the British immigrants had transformed legal sovereignty into political sovereignty by force, the Treaty would soon be declared a 'nullity'.

Over the past decade legal and political changes have equally varied with the state of the New Zealand economy. When Labour was elected it was deemed necessary to reorganize New Zealand's finances. However, the dramatic impact of a firm monetary policy on the political feasibility of a lasting solution to Maori grievances had not been foreseen. The Maori are paying a disproportionately high prize for the collapse of the New Zealand economy. A high proportion of Maori people is unemployed, and the social dislocation of Maori society, associated as it is with a historic loss of cultural identity, is consequently greater<sup>28</sup>. In addition, the crisis of Maori society is aggravated by the shifting of the goal posts in the political game of interpreting the Treaty of Waitangi. At least in the foreseeable future, it is inconceivable that the legal victories of the 1980s will be converted into a political triumph. And yet argument will continue that Maori people are relatively better off than other indigenous peoples, but this is simply an uncritical perpetuation of New Zealand's popular myth of racial harmony.

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<sup>28</sup> Research into the socio-economic position of the Maori has consistently revealed that they are locked into a vicious circle of underdevelopment: low educational achievement, lower skilled jobs, high unemployment rates, low income, deprived status, low self-esteem, poor health and high crime rates (Dept. of MAORI AFFAIRS 1989).

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